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COMPARATIVE LAW AT THE INTERSECTION OF RELIGION  
AND GENDER

Pascale Fournier



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
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*Comparative Law at the Intersection of Religion and Gender*

**PASCALE FOURNIER**

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## **Abstract**

The articles seeks to understand the politics of transnational Islamic family law in Canada, the United States, France and Germany, through the migration of one particular legal institution: Mahr, “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 wife.” The issue of Mahr typically presents itself in a crisis-like fashion: married Muslim women, engaged in religiously structured marriages, and living in Western liberal states, reach out to the secular court upon the dissolution of their marriage to claim the enforcement of Mahr, presumably because their husbands have previously refused to give them the amount of deferred Mahr. Through an analysis of the case law, I will explore the ways in which legal pluralism, formal equality and substantive equality are being used by courts to accept or root out Islamic law from the family of institutions that are deemed appropriate in Western countries. How do the diverse and contradictory conceptual themes around Islamic law and Islamic theory get received 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 it as rules move across borders? Does the way Mahr travels affect subjectivity, in both productive and reactive terms?

## **Keywords**

Comparative law; Islamic family law; Mahr; Legal Transplants; Gender





## Table of Contents

### 1. Introduction

### 2. Definition of Mahr Under Classical Islamic Law

#### 2.1 Mahr

#### 2.2 The Qur'an

#### 2.3 The Sunnah

#### 2.4 QIYĀS

#### 2.5 IJMĀ

#### 2.6 The Internal Feminist Divide

### 3. Comparing Legal Regimes in Canada, the US, France and Germany

### 4. Treatment of Mahr in Western Liberal Legal Systems

#### 4.1 Legal Pluralism: The Multiculturalist Understanding of Mahr

##### 4.1.1 The Many Different Routes to Mahr as Cultural Recognition

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

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

c) *The waiver of Mahr as related to Khul divorce: Québec and the U.S.*

##### 4.1.2 Mahr as Utterly Foreign, therefore not Recognized and not Enforced: Canada

##### 4.1.3 Concluding Remarks

#### 4.2 Formal Equality: The Secular Understanding of Mahr

##### 4.2.1 Mahr-as-Enforceable-Contract

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

b) *The enforcement of Mahr as an antenuptial agreement: the U.S.*

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

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

##### 4.2.2 Mahr-as-Unenforceable-Contract

a) *The unenforceability of Mahr on grounds of vagueness: the U.S.*

b) *The unenforceability of Mahr due to lack of consent and consideration: the U.S.*

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

##### 4.2.3 Concluding Remarks

#### 4.3 Substantive Equality: The Gendered Understanding of Mahr

##### 4.3.1 The Enforcement of Mahr according to gender equity standards

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

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

##### 4.3.2 The Unenforceability of Mahr according to fairness principles

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

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

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

d) *The unenforceability of Mahr on grounds of public policy: France and the U.S.*

##### 4.3.3 Concluding Remarks

### 5. Conclusion



## 1. Introduction\*

Comparative law traditionally defines itself as a discipline capable of “comparing” national legal regimes as distinct and coherent bodies of knowledge. This paper 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.”<sup>1</sup> 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. While liberalism is one possible way of framing emancipatory claims by minorities in Western societies, I argue it 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 it as a mere secular contract; and the Substantive Equality Approach<sup>2</sup> projects feminist principles into its regulation. 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 do the diverse and contradictory conceptual themes around Islamic law and Islamic theory get received 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 it 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 as it leaves Islamic family law and 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 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, I suggest, because judges choose among a wide pool of conflicting considerations to perform and justify their judicial role.

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<sup>1</sup> *The Encyclopaedia of Islam*, New edition, ed. Bosworth, Donzel, Lewis, and Pellat, Vol. 6 (Leiden E.J. Brill: 1991).

<sup>2</sup> I have explored the Substantive Equality Approach in greater details in Pascale Fournier, "Adjudicating Islamic Marriage Transnationally: Substantive Equality, Gender, and the Indeterminacy of Legal Doctrine", forthcoming in *Constituting Equality: Gender Equality and Comparative Constitutional Rights*, Susan H. Williams (eds.), (New York: Cambridge University Press, 2008).

## 2. Definition of Mahr under Classical Islamic Law

As Mahr is 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 presented 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.

### 2.1 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.”<sup>3</sup> *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, Doctor 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 secondly by the auxiliary sources of the Sunnah, Qiyās, and Ijmā. These sources combined provide the most complete definition of Mahr.

### 2.2 The Qur’an

As the very words of God for Muslims, the Qur’an forms the primary source of Islamic law and it contains general as well as specific legal principles.<sup>4</sup> While 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 the believers, slave or not, or People of the book, but only on condition of paying her Mahr.<sup>5</sup> The only exception to the obligatory nature of Mahr is the marriage of a Muslim man to an atheist, a “non-believer”.<sup>6</sup> While Mahr is viewed as a “right granted to the woman as a result of *Quranic* prescription”<sup>7</sup>, it can be waived by the woman<sup>8</sup> or its amount can be adjusted by both parties<sup>9</sup>, but the husband can never take Mahr back unilaterally once it has been given to the wife.<sup>10</sup> In cases where the wife is divorced before the consummation of marriage, the *Quran* provides that she is entitled to one-half of Mahr<sup>11</sup>, and in cases where Mahr has been agreed upon, an “equitable compensation” is due to her.<sup>12</sup>

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<sup>3</sup> John L. Esposito with Natana J. DeLong-Bas., *Women in Muslim family law*, 2nd ed. Syracuse, (N. Y.: Syracuse University Press, 2001), at 23. (“Esposito & DeLong-Bas 2001”)

<sup>4</sup> See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 29-31 (1991) at 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.”)

<sup>5</sup> The Qur’an, Verse 24:32; Surah 4:24, 4:25 and 5:5.

<sup>6</sup> *Ibid* Verse 60.10.

<sup>7</sup> Esposito & DeLong-Bas 2001, *supra* note 3 at 23.

<sup>8</sup> The Qur’an, Verse 4:4.

<sup>9</sup> *Ibid*, Verse 4:24.

<sup>10</sup> The Qur’an, Surah 4:19, 4:20 and 4:21.

<sup>11</sup> *Ibid*, Surah 2:237.

<sup>12</sup> *Ibid* Qur’an, Surah 2:236.

### 2.3 The Sunnah

The Sunnah refers to the normative model behavior of the Prophet Muhammed, and it 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<sup>13</sup>, the amount of Mahr when it has not been agreed upon<sup>14</sup>, the subject matter of Mahr (addressing issues such as Mahr in the form of teaching the Qur'an<sup>15</sup> or offering to the woman a pair of shoes<sup>16</sup>) Mahr and *Khul* Divorce<sup>17</sup>, and Mahr and Li'an<sup>18</sup>.

### 2.4 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."<sup>19</sup> 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 "ijtihād", 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.<sup>20</sup> 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.

### 2.5 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.<sup>21</sup> It derives its authority from the famous hadith of the Prophet Mohammed who was deemed to have said: "My community will never agree on an error."<sup>22</sup> While the Qur'an and Sunna are generally thought to be preeminent over ijma, many Islamic scholars contend

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<sup>13</sup> David S. Powers, *Studies in Qur'an and Hadith: the formation of the Islamic law of inheritance*, (Berkeley: University of California Press, 1986), at 81.

<sup>14</sup> 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*, (London, United Kingdom: Ta Ha Publishers, c1984), at p. 160 ("Rahmān 1984"); see Abu Daud, ch. 12, Hadith 31.

<sup>15</sup> While the Qur'an was extremely vague as to the content or minimal amount of Mahr, the hadith literature gives concrete precisions 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, *ibid* 163.

<sup>16</sup> A pair of shoes as Mahr was considered sufficient only in so far as the Muslim woman consents to the gift, *ibid* 163; narrated by Ahmad, Ibn Majah and Thirmidhi.

<sup>17</sup> M. Afzal Wani, *The Islamic institution of mahr: a study of its philosophy, working & related legislations in the contemporary world*, 1st ed. Noonamy, Kashmir: Upright Study Home, (New Delhi : Marketed by Qazi Publishers and Distributors, 1996), at 45.

<sup>18</sup> *Ibid*, at 45.

<sup>19</sup> Daniel Brown, *A New Introduction to Islam* (Malden, MA; Oxford: Blackwell Publishing, 2004) at 124.

<sup>20</sup> Esposito & DeLong-Bas 2001, *supra* note 3 at 7.

<sup>21</sup> Keith Hodkinson, *Muslim Family Law: A Source Book*, (Croom Helm, London: Canberra, 1984), at 4. ("Hodkinson 1984")

<sup>22</sup> Esposito & DeLong-Bas 2001, *supra* note 3 at 7.

that only those interpretations of the Qur'an and Sunna that have passed the test of ijma are authoritative.<sup>23</sup>

## 2.6 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 the one hand stand the vivid 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.<sup>24</sup> Mahr is thus conceptualized in this literature as marking the shift from the “wife as an object of sale”<sup>25</sup> under the pre-Islamic era to the “wife as a contracting party in her own right”<sup>26</sup> under Islam. In fact, one of the greatest empowerments given to women by Islam lies in her right to property.<sup>27</sup> This independent legal entity in the eyes of the law<sup>28</sup> and deserving of dignity, love, and respect in the eyes of men is “symbolized by making Mahr obligatory for her and binding upon men.”<sup>29</sup> Expressions such as “mark of respect for the wife”<sup>30</sup>,

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<sup>23</sup> See Hodkinson 1984, *supra* note 21, 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* 19 (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.

<sup>24</sup> 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 antipatriarchal”. Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an*, 1st ed. (Austin: University of Texas Press, 2002), at 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.

<sup>25</sup> Zainab Chaudhry, “What is Our Share? A Look at Women’s Inheritance in Islamic Law”, *Azizah Atlanta*, Vol. 3, Iss. 3, (August 2004), at 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.”

<sup>26</sup> See David Pearl and Werner Menski, *Muslim family law*, 3rd ed., (London: Sweet & Maxwell, 1998), at 4 (“Pearl & Menski 1998”): “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.”

<sup>27</sup> Sabaq al-Sayyid, *Fiqh al-sunnah*, (Beirut, Dār al-Kitāb al-Arabī:1969), at 155 (“al-Sayyid 1969”): “One of the best honours that has been conferred upon woman and the best veneration that has been given to them by Islam is that she was vested with the property rights. During the period of Jahiliyah she could not even own her person. Interdiction was to the extent that even the guardian would snatch her property rendering no possibility or chance for her to own something or to possess anything.

<sup>28</sup> M. Afzal Wani, *The Islamic law on maintenance of women, children, parents & other relatives: classical principles and modern legislations in India and Muslim countries*, 1st ed., (Noonamy, Kashmir: Upright Study Home; New Delhi: Marketed by Qazi Publisher & Distributors, 1995), at 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.”

<sup>29</sup> al-Sayyid 1969, *supra* note 27 at 155.

<sup>30</sup> See Pearl & Menski 1998, *supra* note 26 at 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*, P.L.D Publishers, Lahore, Pakistan (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 (...).”

“honour to the bride”<sup>31</sup>, “free gift by the husband”<sup>32</sup> or symbol of the “prestige of the marriage contract”<sup>33</sup> are indistinctly 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”<sup>34</sup> who condemn Mahr as the expression, at the time of marriage, of the sale of the Muslim woman’s vagina.<sup>35</sup> The main thrust of the “liberal secular feminists” consists of understanding “revelation as both text and context”<sup>36</sup>, i.e. as “an interpretation of the spirit and broad intention behind the specific language of the texts”.<sup>37</sup> The liberal secular conception of Mahr is accompanied by images of the 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.<sup>38</sup> Here, marriage is often portrayed as a “fundamentally unequal social institution”.<sup>39</sup> This feminist literature further suggests that Mahr, in valuing the existence of virginity, perpetuates “patriarchal domination remained most entrenched in the family”.<sup>40</sup> In fact, “it was usual that the dowry of a virgin be higher than that of a divorced woman.”<sup>41</sup> 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.”<sup>42</sup> Hence, Mahr is not, as claimed by

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<sup>31</sup> Wani 1995, *supra* note 28 at 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.”

<sup>32</sup> Rahmān 1984, *supra* note 14 at p. 159 Mahr’s character as a “free gift by the husband to the wife, at the time of contracting the marriage.”

<sup>33</sup> Jamal J. Nasir, *The Islamic Law of Personal Status*, 3d ed. (New York: Kluwer Law International, 2002), at 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”.

<sup>34</sup> 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) 263.

<sup>35</sup> Ironically enough, classical jurists have often employed a 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*, (London: Luzac, 1916). Mu’uqqiq 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 Mu’uqqiq al-Hilli 1985. Sharayi’ al-Islam, vol. 2, Persian translation by A. A. Yazdi, compiled by Muhammad Taqi Danish-Pazhuh, (Tehran: Tehran University Press, 1985), at 428.

<sup>36</sup> Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh*, (Cambridge University Press, 1997), at 231.

<sup>37</sup> *Ibid.*

<sup>38</sup> See generally Yvonne Yazbeck Haddad, “Islam and Gender: Dilemmas in the Changing Arab World”, *Islam, Gender and Social Change*, ed. Yvonne Yazbeck Haddad, and John Esposito, (Oxford: Oxford University Press, 1988).

<sup>39</sup> Homa Hoodfar, “Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities”, (121–42), in Homa Hoodfar, ed., *Shifting boundaries in marriage and divorce in Muslim communities*, Women Living Under Muslim Laws, Special dossier no. 1 (1996), at 124.

<sup>40</sup> Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt*, (Princeton University Press: Princeton, 1995), at p. 124.

<sup>41</sup> Abdal-Rehim Abdal-Rahman Abdal-Rahim, “The Family and Gender Laws in Egypt during the Ottoman period,” in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse University Press, 1996), at 103. (“A.R. Abdal-Rehim 1996”)

<sup>42</sup> Esposito & DeLong-Bas 2001, *supra* note 3 at 24.

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.”<sup>43</sup>

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 represent 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.

### 3. Comparing Legal Regimes in Canada, the US, France and Germany

The background legal rules differ considerably in Canada, the US, France and Germany. The Supreme Court of Canada has on numerous occasions stressed the importance of freedom of religion<sup>44</sup>, a freedom that, with the adoption of the *Canadian Charter of Rights and Freedoms*<sup>45</sup>, “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.”<sup>46</sup> Religious freedom is thus closely allied with the Canadian Charter’s commitments to religious equality in section 15<sup>47</sup> and to the preservation

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<sup>43</sup> See Pearl & Menski 1998, *supra* note 26 at 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.” See also Hodgkinson 1984, *supra* note 21: “In assessing the value of the proper mahr, the law lays down a number of criteria. These are basically: the status of the bride’s family; the bride’s personal characteristics, i.e. her age, beauty, wealth, learning and conduct; and the amount agreed in the case of other female members of her family. Some attention may also be paid to the position of the husband, but this is very much a subordinate criterion.”

<sup>44</sup> It was explained in *Syndicat Northcrest c. Amselem*, 2004 SCC 47, at Par. 46 (“*Amselem*”), that freedom of religion consists “. . . of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.” See also *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 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.”

<sup>45</sup> *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*”)

<sup>46</sup> *Big M Drug Mart*, *supra* note 44 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*”, (1991) 40 U.N.B. L.J. 87 at 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.”

<sup>47</sup> 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



and enhancement of Canada's multicultural heritage in s.27<sup>48</sup>. "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."<sup>49</sup> 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.<sup>50</sup> 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"<sup>51</sup> or "a free society built upon a foundation of diversity of views (...) that seeks to accommodate this diversity to the greatest extent possible"<sup>52</sup>, 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"<sup>53</sup> while the federal level has jurisdiction over "marriage and divorce".<sup>54</sup> The federal *Divorce Act*<sup>55</sup> 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*<sup>56</sup> and the *Establishment*<sup>57</sup> *Clauses* compels the State "to pursue a course of 'neutrality' toward religion".<sup>58</sup> The First Amendment provides

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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, *supra* note 45.

<sup>48</sup> Section 27 reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Ibid*.

<sup>49</sup> *Amselem*, *supra* note 44, 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."

<sup>50</sup> See Bruce Ryder, "Equal Religious Citizenship in Canada", forthcoming in *Religion and Citizenship in Canada*, (UBC Press, 2008).

<sup>51</sup> *Amselem*, *supra* note 44, at para. 87.

<sup>52</sup> *Ross v. New Brunswick School District No. 15*, (1996) 1 S.C.R. 825

<sup>53</sup> *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.

<sup>54</sup> 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 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*.

<sup>55</sup> *The Divorce Act*, L.R.C. 1985, c. 3 (2<sup>e</sup> suppl.).

<sup>56</sup> 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.

dual protections: it guarantees government neutrality towards religion and provides for the individual's liberty in choosing and practicing a religion.<sup>59</sup> Though the Court has narrowed the opportunity to obtain religious exemptions from generally applicable laws, it has not totally closed this door.<sup>60</sup> 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 "prescribe what shall be orthodox in politics, nationalism (or) religion."<sup>61</sup> The judicial involvement 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".<sup>62</sup> American family law falls primarily under state jurisdiction.<sup>63</sup> 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 both 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

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<sup>57</sup> 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"); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating two statutes that provided financial aid to church-related schools); *Board of Education v. Mergens* 496 U.S. 226 (1990) (No Establishment Clause violation where a high school included a Christian club in its thirty recognized student groups); *Lee v. Weisman* 505 U.S. 577 (1992), (Establishment Clause violation where public school officials invite members of the clergy to offer invocation and benediction prayers at a high school graduation); *Santa Fe Independent School District v. Doe* 530 U.S. 290 (2000), (Establishment Clause violation where a school district authorizes a student election to determine whether to have a student deliver "brief invocation and/or message [at] varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition").

<sup>58</sup> 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)

<sup>59</sup> *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", 80 Nw. U. L. Rev. 204, 215 (1985).

<sup>60</sup> 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).

<sup>61</sup> *Zummo v. Zummo*, 574 A.2d 1130, 1134-1135 (explaining that enforcement of antenuptial religious-upbringing agreements would be contrary to the Establishment and Free Exercise Clauses of the First Amendment).

<sup>62</sup> *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).

<sup>63</sup> 27A C.J.S. Divorce § 11.

and Germany due to the application of those countries' international private law rules<sup>64</sup> and bilateral accords.<sup>65</sup> 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 order.<sup>66</sup> French and German courts seem to have reached similar conclusions when clarifying the limits of French or German "public order": 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.<sup>67</sup> Although the legal systems mentioned above and how they incorporate Islamic law differ considerably, this appears to have little effect on the unpredictable nature of legal pluralism and formal equality as interpretative approaches to Mahr in all four of the countries in question.

#### 4. 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 U.S., France, and Germany.<sup>68</sup> Working through examples, it will be demonstrated that objective legal rules and norms very often mask an exercise of choice involving ideological predispositions.<sup>69</sup> This section uncovers the road to ideology and brings

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<sup>64</sup> 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.

<sup>65</sup> 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, *BGBI. 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 du 1er 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).

<sup>66</sup> For a general study of the exception of "public order" 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* (Paris : Dalloz, 1996), p. 65ff. See also Edwige Rude-Antoine, *L'Immigration Face Aux Lois de la République*. (Paris: Editions Karthala, 1992); Jean Deprez, « Droit international privé et conflit de civilisations. Aspects méthodologiques. Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel », *Recueil des Cours de l'Académie de droit international de La Haye*, t. 211 (1988. IV), at 1. In Germany, the legal principle of public order 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)).

<sup>67</sup> For a more detailed analysis of the interaction between private international law and Islamic family law in France and Germany, see Pascale Fournier, «The Reception of Muslim Family Laws in Western Liberal States », *Women Living Under Muslim Laws*, Dossier 27 (2005), 65-79.

<sup>68</sup> In order to obtain the cases that have adjudicated Mahr, I have conducted research in the available Anglophone, francophone and German databases, using key words such as Mahr, Sadaq, la dot, dower, Maher, etc. I have also included trial court decisions that have been overruled on appeal. I have done so because there are few cases directly adjudicating Mahr and the trial court decisions would often present an interesting alternative approach among the spectrum of ideology.

<sup>69</sup> See Duncan Kennedy, "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form", 100 *Columbia L. Rev.* 94 (2000), at 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,

back into focus the numerous and often competing considerations that have colored the underlying legal regime upon which adjudication took place.<sup>70</sup> 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 antenuptial 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.

#### **4.1 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, etc. For the legal pluralist, law is not defined as rules imposed top-down, but rather as rules emerging from the accommodations of human interaction. To 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.<sup>71</sup> 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<sup>72</sup>, the public institution<sup>73</sup>, the neighborhood<sup>74</sup>, the law school<sup>75</sup>, the workplace, etc.

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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.”

<sup>70</sup> See generally Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, 1997).

<sup>71</sup> See M. Reisman, *Law in Brief Encounters*, (New Haven: Yale University Press, 1999) and Daniel Jutras, “The Legal Dimensions of Everyday Life” *Canadian Journal of Law and Society* 2001, 16(1), at p. 47. For a review and analysis of the literature on legal pluralism see S. E. Merry, “Legal Pluralism: A Literature Review” (1988) 22 *L. Soc. Rev.* 869; J. Griffiths, “What is Legal Pluralism?” 24 *Journal of Legal Pluralism and Unofficial Law* 1 (1986); M.-M. Kleinmans & R.A. Macdonald, “What is a critical legal pluralism?” (1996) 12 *Can.J.Law.Soc.* 43. For a critique of the foundation of legal pluralism, see B. Tamahana, “A Non-Essentialist Version of Legal Pluralism”, (2000) 27 *J. L. & Soc’y* 296 and Franz von Benda-Beckmann, “Who’s Afraid of Legal Pluralism?”, 47 *J. Legal Pluralism* 37 (2002).

<sup>72</sup> For a legal pluralist understanding and use of the concept of “space” more generally, see H. Lefebvre, *The production of space*, (trans. by Donald Nicholson-Smith), (Oxford: Blackwell, 1991); Juhani Pallesmaa, *The Eyes of the Skin* (London: Academy Editions, 1996); M. Taussig, *Mimesis and Alterity* (New York: Routledge, 1993); S.M. Low, et al., eds., *The Anthropology of Space and Place* (Oxford: Blackwell, 2003). For a legal pluralist approach to the analysis of “religious space”, see Shauna Van Praagh, “Law as a Means of Exclusion: The Chutzpah of Chasidism”, 11-Fall *Can. J.L. & Soc’y* 193 (1996); Gregory A. Kalscheur, “John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism”, 1 *J. Cath Soc. Thought* 231 (2004); Steven D. Smith, “The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom”, 10 *Legal Theory* 51 (2004); Perry Dane, “Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities”, 90 *Yale L.J.* 350, 365-76 (1980).

<sup>73</sup> 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” (1986) XVII *Sociol. Soc.* 37; R.A. Macdonald, “Les vieilles gardes” in J.G. Belley, ed., *Le droit soluble* (Paris: L.G.D.J., 1996) 233; R.A. Macdonald, “The Acoustics of Accountability” in A. Sajo., ed., *Judicial Integrity* (Leiden: Nijhoff Publishers, 2004) 141.

<sup>74</sup> See Shauna Van Praagh, “View from the Sukkah – Mapping the Mixité of Montreal”, forthcoming in *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).

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.<sup>76</sup> 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?”<sup>77</sup> 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?

#### 4.1.1 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 the 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 rather 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*<sup>78</sup> and *M.(N.M.) v. M.(N.S.)*,<sup>79</sup> 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 the 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.

In *Nathoo*, the trial court concluded that “the statutory equality of division would be unfair”<sup>80</sup> under the Family Relations Act<sup>81</sup> and awarded Mrs. Nathoo \$37,747.17 upon reapportionment of family assets.<sup>82</sup> Instead of considering the enforcement of Mahr as part of family assets, the Court begins the

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<sup>75</sup> See S. Van Praagh, “Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education” (1992) 2:1 Columbia Journal of Gender & Law 111.

<sup>76</sup> See Charles Taylor, “The Politics of Recognition”, in *Multiculturalism: Examining the Politics of Recognition* 25 (Amy Gutman ed., 1994). (“Taylor 1994”) For the study of law as a manifestation of culture, see P. Kahn, *The Cultural Study of Law* (Chicago: University of Chicago Press, 1999). For Pierre Legrand, law is itself a cultural phenomenon like society. See also Pierre Legrand, *Fragments on Law as Culture* (Tjeenk Willink, Deventer, 1999).

<sup>77</sup> See Roderick A. Macdonald, “Pluralistic Human Rights; Universal Human Wrongs”, November 1, 2006 (on file with author), at p. 11. (“R. Macdonald 2006”)

<sup>78</sup> *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (S.C.). (“*Nathoo v. Nathoo*”)

<sup>79</sup> *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.)*”)

<sup>80</sup> *Nathoo v. Nathoo*, *supra* note 78 at Par. 18.

<sup>81</sup> *Family Relations Act*, R.S.B.C. 1979, c. 121.

<sup>82</sup> 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

analysis of Mahr as a “marriage agreement” under s.48.<sup>83</sup> Expressing a clear commitment to legal pluralism and multiculturalism, Justice Dorgan introduces his interpretation of s.48 of the Act as one that “acknowledges cultural diversity”<sup>84</sup> and which is “respectful of traditions which define various groups who live in a multi-cultural community.”<sup>85</sup> The court explores 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”<sup>86</sup>, 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.”<sup>87</sup> 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.”<sup>88</sup> 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 November 6, 1994, the day of their marriage.”<sup>89</sup>

Having thus redefined the issue of Mahr as a unique and autonomous domain guided by sacred religious principles, Justice Dorgan concludes that it would *not* “be unfair to uphold the provisions”<sup>90</sup> of the agreement, given that “the parties chose to marry within the Ismaili tradition”<sup>91</sup>, knowing “full well that provision for Maher was a condition of so doing.”<sup>92</sup> The British Columbia Supreme Court,

(Contd.)

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. Given that the matrimonial home was clear title, the monthly expenses of the household were substantially less than in cases where mortgage payments are required. Ms. Mawani paid her own personal expenses and contributed to the joint expenses of the household as she was able, given her limited income. As well, she continued to meet her monthly obligations in respect of a line of credit, the balance of which was approximately \$30,000. This debt was primarily a consolidation of student loans taken during the course of her post-secondary education.” *Nathoo v. Nathoo*, supra note 78 at Par. 19.

<sup>83</sup> reproduce section 48, because the definition of “marriage agreements” under the *Family Relations Act* differed at the time of *Nathoo*. The previous section explored the notion of “marriage agreements” under s. 61 of the *Act*. 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.

<sup>84</sup> *Nathoo v. Nathoo*, supra note 78, at Par. 25.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* Par. 8.

<sup>87</sup> *Ibid* Par. 5.

<sup>88</sup> See s. 48(2) of the *Family Relations Act*, R.S.B.C. 1979, c. 121.

<sup>89</sup> *Nathoo v. Nathoo*, supra note 78, at Par. 8.

<sup>90</sup> *Ibid* Par. 25.

<sup>91</sup> *Ibid* Par. 24.

<sup>92</sup> *Ibid.*

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*”.<sup>93</sup>

It seems obvious from the case law<sup>94</sup> 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.<sup>95</sup> 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.”<sup>96</sup> 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 indicates 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”<sup>97</sup>, 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.”<sup>98</sup> The wife’s father, whose evidence was not challenged in cross-examination, argued that the Mahr document was presented and explained by an Islamic religious authority and that “the parties read the printed form”<sup>99</sup> and agreed to it prior to the marriage ceremony.

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<sup>93</sup> 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*.”

<sup>94</sup> 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 CarswellBC 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.” See also *Stark v. Stark* (1990), 26 R.F.L. (3d) 425 [47 B.C.L.R. (2d) 99 (leave to appeal to S.C.C. refused (March 14, 1991) [53 B.C.L.R. (2d) xxxi]); *Walker v. Walker* (1989), 23 R.F.L. (3d) 113 (B.C.C.A.); *Gwynn (Forsythe) v. Forsythe* (1985), 45 R.F.L. (2d) 86 (B.C.C.A.). In *Clarke v. Clarke*, the British Columbia Court of Appeal showed that, under s. 51 of the *Act*, fairness depends on how the agreement is likely to provide for the parties’ futures based on the facts at the time and the probable future developments. Hence, the “parties who negotiate settlements of family matters on an adversarial basis must accept the risk that the court will exercise its jurisdiction to review the results of these negotiations objectively as of the date of settlement.” *Clarke v. Clarke* (1991), 31 R.F.L. (3d) 383 [55 B.C.L.R. (2d) - 273] (B.C.C.A.) (leave to appeal to S.C.C. refused 83 D.L.R. (4th) vii [60 B.C.L.R. (2d) xxxv, at Par. 23.

<sup>95</sup> Par 21 reads, in *Nathoo v. Nathoo*, *supra* note 78: “Mr. Nathoo argues that, considering both the division of assets and the effect of the Mahr, 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 Mahr of \$20,000.”

<sup>96</sup> *Nathoo v. Nathoo*, *supra* note 78, at Par.27.

<sup>97</sup> *M.(N.M.) v. M.(N.S.)*, *supra* note79 at Par. 26.

<sup>98</sup> *Ibid* Par. 26.

<sup>99</sup> *Ibid* Par. 27. It should be mentioned that M.N.M. relies extensively on *Nathoo*.

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"<sup>100</sup> 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 Mahr."<sup>101</sup>

*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 in 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.<sup>102</sup> 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 order. Two years later, in 1980, the German Higher Regional Court of Bremen in *OLG Bremen*<sup>103</sup> 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"<sup>104</sup>, 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*<sup>105</sup>, 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.<sup>106</sup> The 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*)."<sup>107</sup>

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*<sup>108</sup>, 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

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<sup>100</sup> *Ibid* Par. 7.

<sup>101</sup> *Ibid* Par. 28.

<sup>102</sup> 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.

<sup>103</sup> OLG Bremen, FamRZ 1980, 606.

<sup>104</sup> 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*, (Cambridge: Harvard University Press, 2008) at p. 9. ("Jones-Pauly 2008")

<sup>105</sup> Kammergericht (Berlin), FamRZ 1988, 296.

<sup>106</sup> 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.

<sup>107</sup> Jones-Pauly 2008, *supra* note 104 at p. 9.

<sup>108</sup> See IPRax 1983 (Praxis des Internationalen Privat- und Verfahrensrechts), 74-7 and 64-65.



symbolic Mahr consisting of a Qur'an and a piece of sugar cane candy symbolizing the sweetness of married life."<sup>109</sup> 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."<sup>110</sup> 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."<sup>111</sup>

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."<sup>112</sup> *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"<sup>113</sup> 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."<sup>114</sup> 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 might present itself to be as a political vision, such 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.

c) *The waiver of Mahr as related to Khul divorce: Québec and the U.S.*

A *Khul* divorce dissolves the husband's duty to pay the deferred *Mahr*.<sup>115</sup> 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

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<sup>109</sup> Jones-Pauly 2008, *supra* note 104 at p. 11.

<sup>110</sup> Pearl & Menski 1998, *supra* note 26.

<sup>111</sup> Jones-Pauly 2008, *supra* note 104 at p. 11

<sup>112</sup> *Ibid* p. 12.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*.

<sup>115</sup> For an analysis of this form of Islamic divorce, see Pascale Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment", 44:4 *Osgoode Hall L.J.* (2006) 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 & Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* 3 (1996), at 27-28 ("El Alami & Hinchcliffe 1996"); A.R. A.R. Abdal-Rehim 1996, *supra* note 41 at 105: "A large portion of the cases that wives brought before the qadi, however, involved husbands who were unwilling to divorce and who had not broken any of the conditions in the marriage contract. In such cases, the wife demanded *khul* (repudiation), by which the qadi allowed for a legal separation, but on the condition that the wife ... pay back all or part of the dowry paid to her by her husband at the time of marriage."; "Freedom" is reflected in the old Persian saying: "I release you from my mahr to free my life. (mahram halal janam azad)," quoted in Ziba Mir-Hosseini, *Marriage on trial: Islamic family law in Iran and Morocco*, (Rev. ed. London; New York: I.B. Tauris; New York: St. Martin's Press, 2000), at 82; Judith E. Tucker, *Women in Nineteenth-century Egypt* (Cambridge: Cambridge University Press, 1985), at 54.

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.*<sup>116</sup>, a 1991 Canadian Court of Appeal decision from Québec, the wife filed for divorce in Montreal and claimed the enforcement of deferred Mahr.<sup>117</sup> In applying Syrian law<sup>118</sup> to the marriage contract according to private international law rules<sup>119</sup>, 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*.<sup>120</sup>

Fifteen years later in Québec, the same basic reasoning and outcome was used in *I. (S.) v. E. (E.)*<sup>121</sup>, 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<sup>122</sup>, as well as on grounds of “physical cruelty” toward the wife only, for the harm she suffered during “the parties’ 21 years of life together”<sup>123</sup>. The court concludes that, given the peculiar and traumatic circumstances of the case, this is an exceptional situation “where injustice would result if there were to be equal shares”<sup>124</sup> in the division of the family patrimony. After having decided in the wife’s favor on the partition of the family patrimony<sup>125</sup>, 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.<sup>126</sup> Agreeing to grant Ms. I. the religious divorce immediately, before the court, “as a sign of good faith”<sup>127</sup>, Mr. E pronounced “talaq”

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<sup>116</sup> *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.*”)

<sup>117</sup> 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.

<sup>118</sup> Syrian law is derived in part from Islamic law.

<sup>119</sup> 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.*, *supra* note 116, at Par. 7 and 8.

<sup>120</sup> *M.H.D. v. E.A.*, *supra* note 116 at Par 33.

<sup>121</sup> *I. (S.) v. E. (E.)*, Cour supérieure du Québec, 2005 CarswellQue 8765. (“*I. (S.) v. E. (E.)*”)

<sup>122</sup> *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. ...”

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid* Par. 100. See also Par. 101 & 102 : “The evidence is clear and ample as to Mr. E.'s conduct vis-à-vis Ms. I.: as soon as she arrived in Canada as his wife, he treated her as a sexual convenience, beat her regularly and took her personal documents, i.e. passport, immigration and identity papers, to control her so that she could not leave him; he took advantage of her financially,...; he deprived her of food while she was pregnant; even though they were co-owners of the coffee shop business, she did most of the work but he controlled the cash; Ms. I. was the one who established the good relationships with the customers and the other tenants in the shopping mall, while Mr. E. would, at best, keep to himself or at worst, be insulting to third parties; he took no part in bringing up their children and left it all to her; on the contrary, he would also beat them; not only was he not generous -- Ms. I.'s testimony as to the very few presents he gave her over the years is particularly clear -- , he was miserly: the furniture, in the Laval residence, or lack thereof, is an ample illustration of that fact. In summary, Mr. E. did little, took undue and unfair advantage of his wife, was physically and verbally violent, and kept all the money for himself while depriving his family of the necessities of life.”

<sup>125</sup> Ms. I. had requested unequal shares, whereas Mr. E. had asked for equal shares.

<sup>126</sup> *I. (S.) v. E. (E.)*, *supra* note 121 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 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.”

<sup>127</sup> *I. (S.) v. E. (E.)*, *supra* note 121 Par. 66.

three times “in front of two Muslim witnesses, i.e. Ms. I. and her lawyer, Mtre Elmaraghi”<sup>128</sup>, 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.<sup>129</sup> Instead, the court acknowledges 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.<sup>130</sup> Although the court uses 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*<sup>131</sup>, an American 1996 trial court decision from Florida, and in *In re Marriage of Dajani*<sup>132</sup>, 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.”<sup>133</sup> In the final judgment of dissolution of marriage, the trial court further denied the “Wife’s claim for rehabilitative alimony”<sup>134</sup> and “permanent alimony”<sup>135</sup>, 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 was caused by the genital warts and that she is unable to work because of the cancer.”<sup>136</sup> 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

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<sup>128</sup> *I. (S.) v. E. (E.)*, *supra* note 121 Par. 66.

<sup>129</sup> 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.<sup>129</sup> Otherwise, she may apply to the courts either for a *khul* or a *faskh* divorce. *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*. 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 *faskh* divorce, the wife is entitled to *mahr*. See El Alami & Hinchcliffe 1996, *supra* note 115 at 22; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982) at 167; Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, 4th ed. (Delhi: Oxford University Press, 1974), at 133.

<sup>130</sup> *I. (S.) v. E. (E.)*, *supra* note 121 Par. 117.

<sup>131</sup> *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. (“*Akileh v. Elchahal* 13<sup>th</sup> Ct.”)

<sup>132</sup> *In re Marriage of Dajani*, Superior Court of Orange County, No. D-246250, James J. Alfano, Sr., Judge.

<sup>133</sup> *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996) at 248. (“*Akileh v. Elchahal* Fla. Dist. Ct. App.”)

<sup>134</sup> *Akileh v. Elchahal* 13<sup>th</sup> Ct., *supra* note 131.

<sup>135</sup> *Ibid* p. 3., Par. B.

<sup>136</sup> *Akileh v. Elchahal* 13<sup>th</sup> Ct., *supra* note 131 at 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 August 24, 1993.

property at the dissolution of marriage, but the court rather proceeds to identify which items consist of marital property<sup>137</sup> and divides them according to the rule of “equal share of the marital funds”<sup>138</sup>.

*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.”<sup>139</sup>

#### 4.1.2 Mahr as Utterly Foreign, therefore not Recognized and not Enforced: Canada

By contrast, and at the opposite extreme of the Legal Pluralist spectrum, *Kaddoura v. Hammoud*<sup>140</sup>, a 1998 Ontario decision, refuses to culturally recognize Mahr on the basis of the authenticity and purity of Islamic law. Consequently, the court fails 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 both 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.<sup>141</sup> 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 reveals that it is the religious dimension of the Mahr that rendered the agreement unenforceable.<sup>142</sup> In fact, 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,

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<sup>137</sup> *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. Bot vehicules are of equal value. All but the 1992 Honda were taken by Husband.”

<sup>138</sup> *Ibid* Par. G.

<sup>139</sup> 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. (“*In re Marriage of Dajani* Cal. App. 3d.”) 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.

<sup>140</sup> *Kaddoura v. Hammoud*, (1998) O.J. No. 5054, 44 R.F.L. (4th) 228, 168 D.L.R. (4th) 503, 1998 CarswellOnt 4747, 83 O.T.C. 30 (Ont. Gen. Div.). (“*Kaddoura v. Hammoud*”)

<sup>141</sup> 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*, *supra* note 140 at Par. 13.

<sup>142</sup> *Ibid* Par. 25: “The Mahr and the extent to which it obligates a husband to make payment to his wife is 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.”

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."<sup>143</sup> Such a conclusion is, ironically, faithful to the legal pluralist vision: religion is law's other, and Mahr belongs to this non-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."<sup>144</sup> 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.

#### 4.1.3 Concluding Remarks

The cases discussed in this section emphasized both 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 as 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 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."<sup>145</sup> 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".

#### 4.2 Formal Equality: the Secular Understanding of Mahr

The Formal Equality Approach supposes that law exists as an identifiable and autonomous entity detached from society and morality.<sup>146</sup> 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

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<sup>143</sup> *Ibid* 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.

<sup>144</sup> *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 CarswellOnt 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)

<sup>145</sup> 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." R. Macdonald 2006, *supra* note 77

<sup>146</sup> See H.L.A. Hart, "Positivism and the Separation of Law & Morals" (1958) 71 Harvard Law Review 593-629 and Lon Fuller, "Positivism and Fidelity to Law" (1958) 71 Harvard Law Review 630-672.

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, etc. 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.<sup>147</sup> 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. Such approach is prepared to devote special attention to equal opportunities, not to equal outcomes. Accordingly, in contract law matters, it views contracts 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.<sup>148</sup> 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.<sup>149</sup>

#### 4.2.1 Mahr-as-Enforceable-Contract

In this section, I will introduce seven cases—one from Canada, three from the US, 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, I will simultaneously explore the politics of contract law as a secular domain and argue that there are political stakes in treating contract law as merely the convergence of the will of the parties<sup>150</sup>, and (religious) Mahr as yet just another (secular) contract.

##### *a) The enforcement of Mahr as a marriage agreement: Canada*

In a 2000 Canadian case, *Amlani v. Hirani*<sup>151</sup>, the British Columbia Supreme Court dissociated itself from *Nathoo*<sup>152</sup> in 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<sup>153</sup>, the court responds 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”<sup>154</sup>, he cannot now ask the court to ignore his contractual obligations in the name of religion.<sup>155</sup>

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<sup>147</sup> 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 & Felix S. Cohen, *Readings in Jurisprudence and Legal Philosophy*, Boston, Little, Brown and Company, 1951 and Felix Cohen, “Transcendental Nonsense and the Functional Approach”, 35 *Colum. L. Rev.* 809 (1935).

<sup>148</sup> See generally Roscoe Pound, “The Role of the Will in Law”, 68 *Harv. L. Rev.* 1 (1954).

<sup>149</sup> See Lon L. Fuller & William R. Perdue, Jr., “The Reliance Interest in Contract Damages”, 2, 46 *Yale L.J.* 373 (1936).

<sup>150</sup> See Duncan Kennedy, « The political Stakes in « Merely Technical » Issues of Contract Law », *European Review of Private Law*, 1.

<sup>151</sup> *Amlani v. Hirani*, 2000 CarswellBC 2663. (“*Amlani v. Hirani*”)

<sup>152</sup> *Nathoo v. Nathoo*, *supra* note 78.

<sup>153</sup> This is what Mr. Amlani claimed in his Examination for Discovery. See *Amlani v. Hirani*, *supra* note 151, at Par. 29 and 31.

<sup>154</sup> *Ibid* Par. 30.

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*.<sup>156</sup>

*b) The enforcement of Mahr as an antenuptial agreement: the U.S.*

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 short 1985 decision from the New York Superior Court<sup>157</sup>, 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”<sup>158</sup>, and concludes 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.”<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup>

(Contd.) \_\_\_\_\_

<sup>155</sup> *Ibid* 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.”

<sup>156</sup> 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*.

<sup>157</sup> *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.

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid*.

<sup>160</sup> 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*”, 73 Geo. L.J. 193 (1984); Warmflash, “Enforcing Religious Marriage Contracts”, 50 Brooklyn L.R. 229 (1984).

<sup>161</sup> *Aziz v. Aziz*, *supra* note 157 at 1014.

In *Odatalla v Odatalla*<sup>162</sup>, 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”<sup>163</sup>, 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?”<sup>164</sup> Furthermore, the court affirms that the validity of Mahr as a contract does not involve a “doctrinal issue”<sup>165</sup> related to religious policy or theories; consequently, there is “no constitutional infringement” at stake in enforcing Mahr.<sup>166</sup> Not only is the enforcement “not void simply because it was entered into during an Islamic ceremony of marriage”<sup>167</sup>, but to embrace “the secular parts of a written agreement is consistent with the constitutional mandate for a “free exercise” of religious beliefs.”<sup>168</sup> In *Odatalla*, the judge claimed to merely *acknowledge* a previous, pre-existing secular agreement, “though religious in appearance”<sup>169</sup>, 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’”<sup>170</sup> and (2) if “the agreement in question meets the state’s standards for those ‘neutral principles of law.’”<sup>171</sup> In applying the neutral principles of contract law, Justice Selser reviews the definition of contract<sup>172</sup> and applies it to the Mahr agreement. The videotape in evidence demonstrates an offer of \$10,000 on the part of Zuhair Odatalla<sup>173</sup> and an acceptance from Houida Odatalla in the form of a signature.<sup>174</sup> Insisting on the fact that each party “read the entire license and Mahr Agreement”<sup>175</sup>, “signed the same freely and voluntarily”<sup>176</sup>, “(t)he signatures were witnessed”<sup>177</sup> and “the Imam continued performing the remaining parts of the Islamic ceremony of marriage”<sup>178</sup>, the Superior Court of New Jersey finds that “all of the essential elements of a contract [were] present”<sup>179</sup>. Further, Justice Selser reviews the constitutive exceptions to the enforcement of contracts and rejects the positions that the Mahr

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<sup>162</sup> *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002). (“*Odatalla v. Odatalla*”)

<sup>163</sup> *Ibid* p. 95.

<sup>164</sup> *Ibid*.

<sup>165</sup> *Ibid* p. 96.

<sup>166</sup> *Ibid*.

<sup>167</sup> *Ibid*.

<sup>168</sup> *Ibid* p. 97.

<sup>169</sup> *Ibid*.

<sup>170</sup> 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).

<sup>171</sup> *Odatalla v. Odatalla*, *supra* note 162, at p. 98.

<sup>172</sup> *Ibid* p. 97.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid* p. 95.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid*.

<sup>179</sup> *Ibid* p. 98.



Agreement “is too vague to comply with contract law”<sup>180</sup>, that it constitutes a gift<sup>181</sup> or that it “is unenforceable and void as being against public policy.”<sup>182</sup> Rather, he describes Mahr as indicating a relationship of property between two contracting parties, “nothing more and nothing less than a simple contract between two consenting adults”<sup>183</sup>; hence, Zuhair “owes to the plaintiff the sum of \$10,000.”<sup>184</sup>

In *Akileh v. Elchahal*,<sup>185</sup> 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.<sup>186</sup> The parties contracted their marriage in Florida and agreed upon one dollar in prompt Mahr and \$50,000 in deferred Mahr.<sup>187</sup> The trial court held that Mahr was unenforceable for lack of consideration and because there was no meeting of the minds.<sup>188</sup> 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.”<sup>189</sup> 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.”<sup>190</sup> 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.<sup>191</sup> 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<sup>192</sup>, 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 a 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*<sup>193</sup>, 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

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<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Akileh v. Elchahal* Fla. Dist. Ct. App., *supra* note 133.

<sup>186</sup> *Ibid* p. 247.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid* p. 248.

<sup>189</sup> *Ibid* p. 247.

<sup>190</sup> *Ibid* p. 248.

<sup>191</sup> *Ibid* pp. 248-249.

<sup>192</sup> *Akileh v. Elchahal* Fla. Dist. Ct. App., *supra* note 133 at p. 249.

<sup>193</sup> In *Hamm FamRZ*, 1988, 516

the parties had clearly distinguished in the marriage contract between “Mahr and maintenance”<sup>194</sup>, on the one hand, and “community property”<sup>195</sup>, 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*<sup>196</sup> 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.”<sup>197</sup> After six 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.”<sup>198</sup> 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<sup>199</sup>, 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”<sup>200</sup>. Upon divorce, Ms. Kubicka claimed that she did not consent to the family law regime described in the marriage contract, due to the fact that she did not speak nor understand Arabic and was not aware of the mandatory regime applicable to married couples in Lebanon.<sup>201</sup> 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”. In fact, it concluded that the trial court correctly inferred, from the “legal formulation of a reciprocal offer and acceptance”<sup>202</sup>, the “existence of an express will of the spouses regarding the determination of their matrimonial regime”<sup>203</sup>.

#### 4.2.2 Mahr-as-Unenforceable-Contract

The Formal Equality Approach found in “Mahr-as-Enforceable-Contract” can just as easily lead to an opposite outcome, as was the case in several decisions in the U.S. and Germany where Mahr was

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<sup>194</sup> Christina 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 2008, *supra* note 104 at p. 19

<sup>195</sup> As suggested by Christina 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)”. *Ibid* p. 10.

<sup>196</sup> *Amtsgericht Buende*, 25 March 2004, 7 F 555/03, unreported.

<sup>197</sup> Jones-Pauly 2008, *supra* note 104 at p. 18.

<sup>198</sup> *Ibid*.

<sup>199</sup> Cour de Cassation, Chambre civile, December 2, 1997, (Pourvoi)

<sup>200</sup> 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.

<sup>201</sup> *Ibid* p. 2.

<sup>202</sup> I translate from the French expression used in the decision, i.e. “les formules légales d’acceptation et de consentement réciproques”. *Ibid*.

<sup>203</sup> I translate from the French expression used in the decision, i.e. “l’existence d’une volonté expresse des époux quant à la détermination de leur régime matrimonial”. *Ibid*.

deemed unenforceable according to the contractual exceptions of vagueness, lack of consent and consideration, and abstractness.

a) *The unenforceability of Mahr on grounds of vagueness: the U.S.*

In *Habibi-Fahnrich v. Fahnrich*<sup>204</sup>, 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.<sup>205</sup> However, the enforceability of Mahr in this case turned on whether the requirements for a contract under the *General Obligations Law* were met.<sup>206</sup> 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”<sup>207</sup>, 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.<sup>208</sup>

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”.<sup>209</sup> 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”.<sup>210</sup> 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*<sup>211</sup>, a 2001 court of appeal decision from California, similarly concluded on the unenforceability of Mahr based on 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.”<sup>212</sup>

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<sup>204</sup> *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at 1 (N.Y. Sup. Ct. July 10, 1995).

<sup>205</sup> *Ibid* p. 1.

<sup>206</sup> *Ibid* 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.

<sup>207</sup> *Ibid* p. 1.

<sup>208</sup> *Ibid* 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.”

<sup>209</sup> The Mahr document read “a ring advanced and half of husband’s possessions postponed”. *Ibid* p. 1.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Shaban v Shaban*, Court of Appeal, Fourth District, California (2001), 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863. (“*Shaban v Shaban*”)

<sup>212</sup> *Ibid* 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.

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)<sup>213</sup>, whereas the husband introduced the Islamic marriage contract into evidence and sought to prove through parol evidence that by accepting Mahr, Mrs. Shaban also consented to their marriage being dissolved according to Islamic law's separate property presumption.<sup>214</sup> In practical effect, that would mean that "there would be no community interest in Ahmad's medical practice or retirement accounts."<sup>215</sup>

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.<sup>216</sup> Refusing to allow the expert to testify<sup>217</sup> and concluding that there was no prenuptial agreement<sup>218</sup>, 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: the U.S.*

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 on the unenforceability of Mahr. In fact, the "trial court held that the sadaq was unenforceable for lack of consideration and because there was no meeting of the minds."<sup>219</sup> 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."<sup>220</sup>

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

In *IPRax 1988*<sup>221</sup>, the German Federal High Court examined Mahr as a legal contractual debt under the *German Civil Code*<sup>222</sup> and concluded that it did not meet the contract law requirements. A debt under

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<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid* 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."

<sup>215</sup> *Ibid* p. 404.

<sup>216</sup> *Ibid* p. 406: "Given the need for reasonable certainty of terms and conditions, it is evident that the phrases "in Accordance with his Almighty God's Holy Book and the Rules of his Prophet" and "two parties [having] taken cognizance of the legal implications," no matter how much they might indirectly indicate a desire to be governed by the rules of the Islamic religion, simply bear too attenuated a relationship to any actual terms or conditions of a prenuptial agreement to satisfy the statute of frauds."

<sup>217</sup> *Ibid* 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."

<sup>218</sup> The court found the document to be a marriage "certificate", not a premarital agreement. *Ibid* p. 404.

<sup>219</sup> *Akileh v. Elchahal* Fla. Dist. Ct. App., *supra* note 133 at p. 248.

<sup>220</sup> *Akileh v. Elchahal* 13<sup>th</sup> Ct., *supra* note 131, at p. 3.

<sup>221</sup> BGH, 28 Jan 1987 (Bundesgerichtshof (federal supreme court), IPRax 1988, 109-113 (Praxis des Internationalen Privat- und Verfahrensrechts).

<sup>222</sup> BGB §780.

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 the contract of the motive for the performance.”<sup>223</sup> 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.”<sup>224</sup> It is on the basis of this exception to contract law that Mahr was not enforced.

#### 4.2.3 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—US), as a “legal debt” (rule—Germany) or as a “contractual condition of marriage” (rule—France) / or Mahr is rendered unenforceable because of “vagueness” (exception—US), due to lack of consent and consideration (exception—US) and “abstractness” (exception—Germany).

#### 4.3 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,<sup>225</sup> proponents of formal equality fail to take power into account in projecting a 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

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<sup>223</sup> Jones-Pauly 2008, *supra* note 104 at p. 25.

<sup>224</sup> *Ibid.*

<sup>225</sup> 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. Susan Moller Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard, and Martha C. Nussbaum eds. *Is Multiculturalism Bad for Women?* (Princeton, N.J., 1999). See also Doriane Lambelet Coleman, “Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma”, 96 *Colum. L. Rev.* 1093 (1996); Martha Minow, *About Women, About Culture: About Them*, *Daedalus* Vol. 129, No. 4 (Fall 2000); Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press 1999).

existing doctrines, practices and structures through the lens of subordination theory.<sup>226</sup> 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, the United-States, France and Germany?

#### 4.3.1 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 Québécois 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*<sup>227</sup> 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*<sup>228</sup>, 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]). Christina 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.”<sup>229</sup> The wife asked 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 *Family Law Chamber*. Mahr was thus translated as alimony and its amount fluctuated to adapt to fairness considerations.<sup>230</sup>

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<sup>226</sup> Feminist theory is diverse, with liberal, radical, Marxist, and socialist strands. See generally Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism*, (Princeton University Press, 2006).

<sup>227</sup> Khul divorce can be initiated by the wife with the husband's prior consent; however, divorce by this method dissolves the husband's duty to pay the deferred *Mahr*. As pointed out by Judith E. Tucker, Khul divorce is *the exchange of mahr* for “freedom,” a form of divorce that has “often proved very costly indeed.” Judith E. Tucker, *Women in Nineteenth-century Egypt* (Cambridge: Cambridge University Press, 1985), at 54. See El Alami & Hinchcliffe 1996, *supra* note 115 at 27-28. See also A.R. Abdal-Rehim 1996, *supra* note 41 at 105.

<sup>228</sup> OLG Koeln IPRax 1983, 73 (Cologne). (“OLG Koeln”)

<sup>229</sup> See Jones-Pauly 2008, *supra* note 104, at p 10.

<sup>230</sup> It is worth noting that this analogy with alimony does not stand up to any 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.

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

In *M.H.D. v. E.A.*<sup>231</sup>, 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.<sup>232</sup> 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<sup>233</sup> 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<sup>234</sup> considered this outcome contrary to the *Canadian Charter*<sup>235</sup>:

“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. In cases of conflict between spouses, each has the right to the equal protection and equal benefit of the law (s. 7 and 15(1)). Also, to deny the wife her right to equality by asking her to give back her wedding presents or gifts received or agreed upon in the marriage contract on the basis that she exercised rights recognized by the law, constitutes a form of discrimination.”<sup>236</sup>

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 order” 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 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 order”). 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. In her written factum (p.21): “How can one claim that we are not confronted by questions of public order, as much Quebecois as Canadian and international, when faced with a regime where the husband may marry more than one wife and the wife cannot have a number of husbands at once, where the wife is obliged to

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<sup>231</sup> *M.H.D. v. E.A.*, *supra* note 116.

<sup>232</sup> *Ibid* Par. 6.

<sup>233</sup> 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. *Ibid* at Par. 7 et 8.

<sup>234</sup> 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.

<sup>235</sup> Charter of Rights and Freedoms, *supra* note 45. 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.”

<sup>236</sup> *M.H.D. v. E.A.*, *supra* note 116. This is an excerpt from the court of appeal, quoting the trial court decision.

request a divorce to be remarried whereas that is not the case for the husband, where all donations, whether foreseen in the marriage contract or not, are revoked for the sole reason that the husband does not accept the motive for divorce of the wife even if the Court concludes that the reason is well founded? 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. How can one claim not to be confronted by questions of public order when the respondent asks for a divorce in Canada, on the basis of the Canadian *Divorce Act*, and finds herself stripped of all her rights due to the application of a foreign matrimonial regime which is, in and of itself, clearly discriminatory in all its aspects. We leave it to the Court to appreciate this question.”<sup>237</sup>

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*.”<sup>238</sup> 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 *inexecution* of *Mahr*, as much in Quebec, Canada and the United States as in France.

#### 4.3.2 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. I will review cases from the U.S., Canada, France and Québec that have all 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.*<sup>239</sup>, 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”<sup>240</sup>. The marriage lasted a little less than three years and during these years Mrs. Ajabi stayed at home to raise her son.<sup>241</sup> The court refused to enforce *Mahr*<sup>242</sup>, an amount that would have been worth 15,960\$.<sup>243</sup> Justice Hurtubise concluded:

It is true that Imam Salek Sebouweh wrote a letter dated January 7, 2002, to this Court, but he did not testify despite the efforts of defence counsel. Since, as a consequence, it was impossible to cross-examine him, we disregard his opinion.

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<sup>237</sup> *Ibid* Par. 34, extract from the judgment at first instance (translated from the original French).

<sup>238</sup> *Ibid* Par. 27. (translated from the original French).

<sup>239</sup> *M. F. c. MA. A.*, Cour supérieure, 11 mars 2002, N° 500-12-254264-009.

<sup>240</sup> *Ibid* par. 7.

<sup>241</sup> *Ibid* par. 23.

<sup>242</sup> *Ibid* p. 8.

<sup>243</sup> *Ibid* par. 32.



The only proof regarding the interpretation to be given to Islamic Mahr is cited above (a particular type of dowry according to the expert witness) consists of the transcript of an examination of Mr. Nabil Abbas, a Muslim minister of worship who also holds a PhD. The examination took place and was completed on January 25, 2002.

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.<sup>244</sup>

In applying the family law rules of the *Quebec Civil code*, Justice Hurtubise divided the family patrimony equally<sup>245</sup> (which resulted in the wife taking 27,304.85\$) and determined alimony for the wife would be 150\$/week<sup>246</sup>. In *M. F. c. MA. A.*, the court focuses 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 approaches Mahr through the lens 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, I have decided to address these cases separately because they explicitly refer to the legal concept of “unjust enrichment”. In *OLG Koeln*<sup>247</sup>, 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]).<sup>248</sup> As mentioned earlier, the wife asked 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 order 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*,<sup>249</sup> 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.

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

In *Vladi v. Vladi*<sup>250</sup>, 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*<sup>251</sup> of Nova Scotia, made by Mrs. Vladi subsequent to

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<sup>244</sup> *Ibid* (translated from the original French).

<sup>245</sup> *Ibid* p. 7.

<sup>246</sup> *Ibid*.

<sup>247</sup> OLG Koeln, *supra* note 228.

<sup>248</sup> *Ibid* 73.

<sup>249</sup> OLG Cell, FamRZ 1998, 374

<sup>250</sup> *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. (“*Vladi v. Vladi*”)

<sup>251</sup> *Matrimonial Property Act*, R.S.N.S. 1989, c. 275.

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*<sup>252</sup>, 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."<sup>253</sup> 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."<sup>254</sup> 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.<sup>255</sup>

d) *The unenforceability of Mahr on grounds of public policy: France and the U.S.*

In 1976, a French Court of Appeal<sup>256</sup> refused to enforce Mahr in conformity with French public order 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 order because they reduce marriage to a financial "purchase". Mahr itself is therefore contrary to "public order and French morals"<sup>257</sup>. Public policy was similarly used in *In re Marriage of Dajani*<sup>258</sup>, 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.<sup>259</sup> 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."<sup>260</sup> 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.

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<sup>252</sup> 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*.

<sup>253</sup> *Vladi v. Vladi*, *supra* note 250, Par. 11.

<sup>254</sup> *Ibid* par. 30.

<sup>255</sup> *Ibid* par. 46.

<sup>256</sup> *Arrêt de la Cour d'appel de Douai*, January 8, 1976: N. 76-11-613.

<sup>257</sup> *Ibid* p. 110.

<sup>258</sup> *In re Marriage of Dajani* Cal. App. 3d., *supra* note 139.

<sup>259</sup> *In re Marriage of Dajani* Cal. App. 3d., *supra* note 139, at p. 1389.

<sup>260</sup> *Ibid* p. 1388.

The contract clearly provided for the wife to profit by divorce, and it cannot be enforced by a California court.”<sup>261</sup>

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”.<sup>262</sup> 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.”<sup>263</sup>

#### 4.3.3 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.

## 5. 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), I have 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:

1. 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.
2. Canada, the United States, France and Germany, although differing in their relationship 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.

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<sup>261</sup> *Ibid* p. 1390.

<sup>262</sup> “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)

<sup>263</sup> *In re Marriage of Dajani* Cal. App. 3d., *supra* note 139, at p. 1389.

3. “Comparative law”, as it is 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 to paradoxical outcomes when we study Mahr’s journey in Western liberal courts.

The reason why I focused 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. I demonstrated in this article that Western courts respond to issues of faith and culture in ways that can be classified ideologically. Another reason why I insisted on the “public” dimension of the law 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. While Charles Taylor proposed that the liberal state affirms cultural differences in the public sphere as a remedy,<sup>264</sup> 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 denigration.<sup>265</sup> Hence, she concludes “...justice today requires *both* redistribution *and* recognition”.<sup>266</sup> Although the article did not engage this debate directly, it did 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 very complex interaction amongst several parties whose interests are often opposed as to its recognition.

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<sup>264</sup> Taylor 1994, *supra* note 76. 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* (Oxford: Oxford University Press, 1995).

<sup>265</sup> Nancy Fraser, “From Redistribution to Recognition: Dilemmas of Justice in a ‘Postcolonial’ Age”, in Nancy Fraser, ed., *Justice Interrupts: Critical Reflections on the ‘Postcolonial’ Condition* (London, Routledge, 1997).

<sup>266</sup> *Ibid* p. 68.

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