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On God, Promises, and Money

Islamic Divorce at the Crossroads of Gender and the Law

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I. INTRODUCTION

If liberalism is committed to the individual and individual choice, it is also conventionally taken to be committed to freedom and equality. Giving effects to such principles often creates tensions: the "free" acts of individuals will sometimes produce inequality; and state enforcement of equality will likely reduce individual freedom. Beyond that, despite statutory – even constitutional – guarantees of equality, systemic slants lead to gendered inequalities that almost invariably subjugate or disempower women, either individually or collectively. When faced with the claims of subordinated groups, liberalism is asked to make concessions in which these collisions intensify and multiply. In fact, if the mandate to address the rights or interests of groups is not perfectly consistent with liberalism's commitment to individuals, such group accommodation may, however, be necessary if individuals in those groups are to be treated liberally – that is, accorded liberty or equality. And the mandate to address the subordination of groups generates new collisions between liberty and equality: de facto freedom for subordinated groups may require their specific regulation, while equality of their members may require active distributions in their favor. The "politics of recognition" invoked by subordinated groups within liberalism is thus an inherently contradictory project, exposing in practice the ideals of liberty and equality as fundamentally paradoxical.

Through the journey of one symbolic legal institution – *Mahr* (a form of dowry) – I will follow the ways in which Islamic marriage travels, offering a panoply of conflicting images, contradictions, and distributive endowments in the transit from Islamic family law to Western adjudication in Canada, the United States, Germany, and France. I insist on the importance that distributive consequences rather than recognition occupy central place in the assessment of the legal options available to Muslim women in Western courts. In family law matters, the enforcement of *Mahr* by Western courts carries considerable distributive power, although *Mahr* is often treated as mere religious recognition by the judiciary. Moreover, the distributional impact is far from homogeneous and predictable. At times, *Mahr* that is

institutionally transferred by Western courts imposes an exceptional penalty on the Muslim husband (courts add the amount of *Mahr* to the division of family assets and to spousal support), whereas sometimes it becomes an exceptional penalty for the Muslim wife (through conflict of laws, *Mahr* replaces alimony and equitable division of property). Still other times, the unenforceability of *Mahr* for an economically dependent wife leads to an exceptional bonus (through conflict of laws, *Mahr* is rejected as against "public order" and Western equity standards are applied instead). The plurality of receptions and interpretations *Mahr* receives in Western courts parallels the distinct ways *Mahr* is conceived in its place of residence, here represented by Egypt, Tunisia, and Malaysia, three countries that incorporated Islamic law into their national legal frameworks. Identifying variations in *Mahr*'s point of departure serves to illustrate that it is both internally plural as well as externally plural – at its point of arrival in Western courts, illustrated by an analysis of representative case law from Canada, the United States, France, and Germany.

To represent this distributive framework, I introduce four short scripts in which a fictional Leila embarks in a bargaining tactic with her husband Samir on divorce and uses *Mahr* as its central object. In offering the many conflicting faces of *Mahr* as bonus and penalty, I assess the interaction between Islamic law and Western law, as well as the subjective gains and losses predicted by Leila in relation to the enforceability of *Mahr*. This chapter implicitly addresses the stakes of conceiving *Mahr* as an autonomous legal institution, rather than as a dynamic part in a larger marital web of rights and duties. Ultimately, I claim that the stakes are the constitution of a romantic subject in the former (the husband offers a gift to the wife on marriage to express his love for her and his respect for God; this gift must travel as a legal transplant to Western states), and a calculating subject in the latter (*Mahr*, inherently plural, is used by the parties to gain something from the other; this institution is always-already resisting claims of "true" and "authentic" Islamic law). A distributional analysis of *Mahr* is crucial, I argue, because *Mahr* is encountered by actual parties and often used by them as a tool of relative – and gendered – bargaining power in the negotiation of contractual obligations related to the family. Despite the seeming (and often genuine) difference in bargaining power between the husband and the wife in the negotiation of the marriage contract, case law shows that Muslim wives are not content merely to let their *Mahr* slip away. On the contrary, some of them argue fiercely – although not always successfully – in Western courts to hold on to what they believe is theirs. Moreover, Islamic law travels with a multiplicity of voices, and it is this complex hybridity that will be mediated through Western law upon adjudication.

II. THE PLACE OF DEPARTURE: MAHR'S INTERNAL PLURALISM

Mahr, meaning "reward" (*ajr*) or "nuptial gift" (also designated as *sadaqa* or *faridah*), is the expression used in Islamic family law to describe the "payment that the wife

is entitled to receive from the husband in consideration of the marriage."[1] *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*).

Three forms of Islamic divorce (*Talaq*, *Khul*, and *Faskh*) can be used by the parties involved in a marital relationship. Islamic family law determines the degree to which the husband and wife may or may not initiate divorce and the different costs associated with each form of divorce.[2] *Talaq* (repudiation) is a unilateral act that dissolves the marriage contract through the declaration of the husband only.[3] 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.[4] In this regulatory regime, there is no shortcut for a wife who wants to obtain a divorce but who cannot obtain the consent of her husband. A wife may unilaterally terminate her marriage without cause only when such power has been explicitly delegated to her by her husband in the marriage contract.[5] 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 court (*qadi*) must grant it, and divorce by this method dissolves the husband's duty to pay the deferred *Mahr*.[6] In the case of a *Faskh* divorce, a fault-based divorce initiated by the wife, she must demonstrate to the court that her case meets the limited grounds under which divorce can be granted,[7] in which case she will be entitled to *Mahr*.

This description of classical Islamic family law, however, is expressed differently in contemporary jurisprudence. To demonstrate the internal plurality of *Mahr*, I develop the Islamic legal framework within which *Mahr* is conceived in three different countries – Egypt, Tunisia, and Malaysia. It is not, as the proponents of

[1] John L. Esposito & Natana J. DeLong-Bas, Women in Muslim Family Law 23 (2d ed., Syracuse University Press 2001).

[2] Pascale Fournier, *In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment*, 44 Osgoode Hall L. J. 649–77 (2006).

[3] Dawoud Sudqi El Alami & Doreen Hinchcliffe, Islamic Marriage and Divorce Laws of the Arab World 22 (Kluwer Law International 1996).

[4] Asaf A. A. Fyzee, Outlines of Muhammadan Law 133 (4th ed. Oxford University Press 1974); Joseph Schacht, Introduction to Islamic Law 167 (Clarendon Press 1982); Noel J. Coulson, A History of Islamic Law 207 (Edinburgh University Press 1964); Judith E. Tucker, Women in Nineteenth-century Egypt 54 (Cambridge University Press 1985); Esposito & DeLong-Bas, *supra* note 1, at 36.

[5] Zahra, M. A., *Family Law*, *in* Law in the Middle East 140–41 (Majid Khadduri & Herbert J. Liebesny eds., Middle East Institute 1955).

[6] El Alami & Hinchcliffe *supra* note 3, at 27–28; Abdal-Rahim, A. R., *The Family and Gender Laws in Egypt during the Ottoman Period*, *in* Women, the Family, and Divorce Laws in Islamic History 105 (Amira El Azhary Sonbol ed., Syracuse University Press 1996); Tucker, *supra* note 4, at 54.

[7] El Alami & Hinchcliffe *supra* note 3, at 29.

the formalist school would argue,[8] a static institution derived solely from God and spiritually detached from society.

A. Mahr *in Egypt*

Egypt typifies the dichotomy of dual legal systems through its retention of both Western-inspired national law and Islamic personal law.[9] During the nineteenth century, Islamic law was progressively replaced by European legal systems. Eventually, only family law remained within the direct application of Islamic law,[10] and, in 1956, the Islamic courts were integrated into the national court system.[11] Islamic law has, nonetheless, remained very influential and is considered the principle source of law,[12] especially in family law matters.[13] Despite rising divorce rates in Egypt since the 1970s,[14] it has proven difficult for Egyptian women to obtain a divorce. For example, under Egyptian Law No. 100 (1985), a wife could only obtain a *Faskh* divorce on the following grounds: her husband habitually failed his duty to provide her maintenance, he suffered from a serious disease, he was absent for a lengthy period, he was imprisoned for a long-term sentence, or she suffered "harm" as inflicted by her husband.[15] In response to lobbying by women's rights activists, the Egyptian legislature adopted Egyptian Law No. 1 of 2000,[16] which now allows women to apply

[8] In all of the English and French literature on Islamic family law that I have studied, *Mahr* is described as a single, separate, autonomous, and historically static institution. Afzal Wani, a well-known Islamic scholar and specialist on the legal institution of *Mahr*, presents *Mahr* as if it were a European code: "The law of *mahr* as it exists today is well developed like the law relating to other Muslim law institutions. It covers all the relevant matters like: subject matter of *mahr*, amount of *mahr*, mode of its payment, when it becomes due, widowed and divorced women's claims to *mahr* and so on." *See* M. Afzal Wani, The Islamic Institution of Mahr: a Study of its Philosophy, Working and Related Legislations in the Contemporary World 27 (1996).

[9] The Egyptian legal system developed from a mix of Roman, French, Ottoman, and Islamic law, as well as ancient, medieval, and customary Egyptian law. *See* Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 Am. U. L. Rev. 1950, 1984 (1995); Brenda Oppermann, *Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 Hastings Women's L. J. 65, 68 (2006).

[10] Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 Vand. J. Transnat'l L. 1043, 1045–46 (2004).

[11] Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 Law & Soc. Inquiry 1, 24 (2004).

[12] Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 Colum. J. Transnat'l L. 81, 86 (1998–1999).

[13] Abu-Odeh, *supra* note 10, at 1051, 1097, 1100; Oppermann, *supra* note 9.

[14] Abdullahi A. An-Na'im, Islamic Family Law in a Changing World 159 (2002).

[15] Abu-Odeh, *supra* note 10, at 1106.

[16] Law No. 1 of 2000 regulating certain litigation procedures in personal status, *Al-Jarida Al-Rasmiyya*, 22 Jan. 2000, No. 4 (Egypt) [hereinafter Law No. 1/2000]. The law was controversial and subject to considerable debate. *See* Amira Mashhour, *Islamic Law and Gender Equality – Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation*

for a somewhat modified version of the classical *Khul* divorce.[17] In fact, a wife can nowadays obtain a divorce without the husband's consent and without any specific ground except stating that the continuation of the marriage may cause her to violate God's law.[18] Whereas classical jurists have interpreted *Khul* divorce as requiring the return of the deferred *Mahr* only,[19] a wife who is seeking *Khul* divorce under the Egyptian Law No. 1 of 2000 must not only repay any prompt *Mahr*, but also renounce *all* of her postmarriage financial rights under Islamic law, which include the unpaid portions of deferred *Mahr* and maintenance.[20]

By March 2000, the Personal Status Court in Cairo alone had received more than three thousand applications for a *Khul* divorce.[21] Given the considerable length of time and difficulty of proving harm to obtain a *Faskh* divorce, studies show that only women of means are requesting such divorces.[22] In fact, the return of paid prompt *Mahr* and any payments made on a deferred *Mahr* may act as a deterrent against divorce for poorer women.[23]

B. Mahr *in Tunisia*

The Tunisian legal system is based on French civil law and Islamic law. Although the Constitution states that the country is Muslim, this provision does not require all laws to conform with Islamic law.[24] Habib Bourguiba, the first president who administered the country from 1956 to 1987, was very influential in the development of women's rights as part of his efforts toward modernization and development.[25] In 1956, the Personal Status Code created major reforms in the legal system based on

in Tunisia and Egypt, 27 Hum. Rts. Q. 562, 583 (2005); Mulki Al-Sharmani, Recent Reforms in Personal Status Laws and Women's Empowerment: Family Courts in Egypt 9–10 (2007).

17 Law No. 1/2000, *supra* note 16, art. 20: "The two spouses may agree between themselves upon khul', but if they do not agree mutually and the wife files a claim requesting it [khul'], and ransoms herself and releases herself by khul' (khala'at zawjaha) by forfeiting all of her lawful financial rights, and restores to him [her husband] the dower he gave to her [upon marriage], then the court is to divorce her from him."

18 Lynn Welchman, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy 115 (2007).

19 Mashhour, *supra* note 16, at 584.

20 Additional rights given up include the right to postdivorce maintenance (*nafaqat il idda*) and any postdivorce compensation (*mu'ta*). *See id.* at 583–84; Welchman, *supra* note 18, at 112; Azizah Al-Hibri, *The Nature of Islamic Marriage: Sacramental, Covenantal, or Contractual?*, *in* Covenant Marriage in Comparative Perspective 201 (J. Witte Jr. & E. Ellison eds., 2005).

21 An-Na'im, *supra* note 14, at 159.

22 Al-Sharmani, *supra* note 16, at 8.

23 Welchman, supra note 18, at 115; Abu-Odeh, *supra* note 10, at 1102.

24 *See* Mounira M. Charrad, States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco 222 (2001); Laurie A. Brand, Women, the State and Political Liberalization: Middle Eastern and North African Experiences 202 (1998).

25 Brand, *supra* note 24, at 177.

Qur'anic reasoning,[26] including the criminalization of polygamy.[27] Tunisian family laws make divorce proceedings more equitable for women, providing them with the same access as men under Islamic law.[28] Only courts can grant a divorce, so *Talaq* outside the court is not considered a legal divorce.[29] Moreover, the traditional *Faskh* divorce is not applied.[30] Divorce may be obtained by mutual consent, at the request of one of the parties without specific grounds,[31] or because of abuse.[32]

Mahr remains an integral component of a valid marriage.[33] Without paying prompt *Mahr*, a husband cannot legitimately consummate the marriage.[34] Deferred *Mahr* is payable immediately on divorce or death, and is considered an unsecured debt against a husband's estate if unpaid.[35] Unlike many other Muslim countries, a wife does not need to remit her *Mahr* in seeking divorce.[36] In practice, however, *Mahr* amounts are quite low and there is no obligatory minimum.[37] Bourguiba used the occasion of his own marriage in 1962 to break with tradition by giving his wife a singular "symbolic dinar" as *Mahr* instead of a substantial amount.[38] The 1993 Amendments to the 1956 Personal Status Code further cemented the trend by removing the requirement that *Mahr* not be "trifling."[39]

[26] As one Tunisian scholar commented, "The CSP [Personal Status Code] is a more powerful symbol of Tunisia than the Constitution," CHARRAD, *supra* note 24, at 309.

[27] For this reform to be implemented, it was reasoned that the Quran favors monogamy and, as with slavery, polygamy no longer constitutes a necessary or acceptable practice. Moreover, the government adopted Muslim scholarly arguments stating that it was impossible to treat multiple wives equally and that polygamy was historically justified only because of the decrease in the male population following the particular context of war, Venkatraman, *supra* note 9, at 1980–81; Quran Sura 4 (129) and Sura 4 (Verse 3); Mashhour, *supra* note 16, at 585; Andrea Barron, *Tunisia as an Arab Women's Rights Leader*, THE GLOBALIST, July 11, 2007, *available at* www.theglobalist.com/StoryId.aspx?StoryId=6306 (last visited Mar. 12, 2009). Those who defy this law are subject to a fine and/or imprisonment: BRAND, *supra* note 24, at 208.

[28] Adrian Morse Jr. & Leila Sayeh, *Tunisia: Marriage, Divorce, and Foreign Recognition*, 29 FAM. L. Q. 701, 719 (1995).

[29] Mashhour, *supra* note 16, at 585–86; Morse & Sayeh, *supra* note 28, at 712; BRAND, *supra* note 24, at 178.

[30] WELCHMAN, *supra* note 18, at 128; Mashhour, *supra* note 16, at 586.

[31] WELCHMAN, *supra* note 18, at 128; Mashhour, *supra* note 16, at 585–86; AN-NA'IM, *supra* note 14, at 159; Morse & Sayeh, *supra* note 28, at 714; Abu-Odeh, *supra* note 10, at 1107–09.

[32] Code du Statut Personnel, Art. 31, Jurisite, *available at* http://jurisitetunisie.com/tunisie/codes/csp/Menu.html [herein after CSP]; BRAND, *supra* note 24, at 208; Morse & Sayeh, *supra* note 28, at 713–14.

[33] Order No. 13/1956 on the promulgation of the Code of Personal Status, Al-Jarida Al-Rasmiyya, 17 Aug. 1956, No. 66, Art. 32 (Egypt) [hereinafter Order No. 13/1956]; AN-NA'IM, *supra* note 14, at 158–59.

[34] Morse & Sayeh, *supra* note 28, at 709.

[35] *Id*. at 713; Abu-Odeh, *supra* note 10, at 1107–1109.

[36] Rubya Mehdi, *Facing the Enigma: Talaq-e-tafweez a Need of Muslim Women in Nordic Perspective* 33 INT'L J. SOC. L. 133, 140 (2005).

[37] Lilia Labidi, *From Sexual Submission to Voluntary Commitment: The Transformation of Family Ties in Contemporary Tunisia, in The New Arab Family, in* CAIRO PAPERS IN SOCIAL SCIENCE 24, 122 (Nicholas S. Hopkins ed., 2003).

[38] *Id*. at 121–22.

[39] WELCHMAN, *supra* note 18, at 91–92.

C. Mahr *in Malaysia*

The Malaysian legal system is derived from three sources: English common law, Islamic law, and *Adat*, the latter being defined as Malay customary law preexisting Islam. *Adat* has had a significant influence on Islam, mostly in ensuring greater freedom, rights, and public participation for Muslim women in Malaysia.[40] The official legal system incorporates common law and Islamic law, with civil courts responsible for most areas of the law and *Adat* influencing certain areas of law.[41] The Islamic court system governs family law, charitable endowments, bequests, inheritance, and various offenses including those against Islam.[42]

A Malaysian woman is provided with a number of legal options for divorce. First, she can request a *Faskh* divorce if her husband has disappeared for more than one year, if he failed to maintain her for three months, or if she did not consent to marriage.[43] Second, she can negotiate a *Khul* divorce with the consent of her husband;[44] in so doing, she must give up her claim to any outstanding *Mahr* and return whatever portion was given to her on the solemnization of the marriage, or must pay an agreed-upon amount. If the parties cannot agree, Syarian Court judges may determine the amount "in accordance with *Hukum Syarak*, the amount, having regard to the status and the means of the parties."[45] Through the process of *hakam*,[46] a woman can also ask the court to declare a *Talaq* divorce.[47]

In Malaysia, *Mahr* is known as *Mas Kahwin*, which literally means "marriage gold."[48] At the time of marriage, it can be given as money actually paid or as something that can be valued, or acknowledged as a debt.[49] Amounts are traditionally

[40] Rebecca Foley, *Muslim Women's Challenges to Islamic Law: The Case of Malaysia*, 6 Int'l Feminist Journal of Politics 53, 56 (2004); Noraida Endut, *Malaysia's Plural Legal System and Its Impact on Women*, *in* Muslim Women and Access to Justice 20 (Maznah Mohamad ed., 2000).

[41] In Malaysia, non-Muslim family law is regulated by federal law that allows for some level of consistency across states, whereas Islamic family law falls under state jurisdiction. However, the federal government has developed model laws such as The Islamic Family Law (Federal Territories) Act 1984 (Act 303), Malaysia Act 303.50a [hereinafter Act 303] that states can choose to adopt either entirely or with modifications, Endut, *supra* note 40, at 37.

[42] In these matters, no intervention of the civil courts is allowed. Nik Noriani Nik Badli Shah, *Legislative Provisions and Judicial Mechanisms for the Enforcement and Termination of the Islamic Marriage Contract in Malaysia*, *in* The Islamic Marriage Contract (A. Quraishi & F. E. Vogel eds., 2009).

[43] Muslim Feminism and Feminist Movement: South-East Asia 52 (Abida Samiuddin & R. Khanam eds., 2002); Endut, *supra* note 40, at 44, 65; An-Na'im, *supra* note 14, at 271.

[44] Act 303, *supra* note 40, §49(1); An-Na'im, *supra* note 14, at 255.

[45] Act 303, *supra* note 40, §49(3); Noor Aziah Mohd Awal, *Malaysia: Family Laws in Malaysia: Past, Present, and the Future*, *in* The International Survey of Family Law 189 (Bill Atkin ed., 2007).

[46] Under Islamic law, the first step is generally a form of counseling; if this is unsuccessful, arbitration by *hakam* based on the Quran takes place and, as a final option, the Islamic court presides, Endut, *supra* note 40, at 45–46.

[47] Act 303, *supra* note 40, §§49(3), 47(2) & (11).

[48] M. G. Peletz, Islamic Modern: Religious Courts and Cultural Politics in Malaysia 305 (2002).

[49] The standard definition is "the obligatory marriage payment due under *Hukum Syarak* [Islamic Law according to any recognized Mazhab] by the husband to the wife at the time the marriage is

quite low, and maximum rates are set by law[50] depending on region and a woman's status (i.e., an unmarried woman or a divorcée).[51]

III. THE PLACE OF ARRIVAL: MAHR'S EXTERNAL PLURALISM

My analysis of how the law captures claims based on identity within the liberal framework suggests that in adjudicating *Mahr*, courts have characterized this Islamic institution in three different ways: the Legal Pluralist Approach, the Formal Equality Approach, and the Substantive Equality Approach.[52] I classify these three disciplinary discourses within the wider expression of liberalism because they all share, in both their normative and descriptive dimensions, the same commitment to individuals' autonomy and liberty. Along this spectrum of ideology, *Mahr* has been the subject of competing aesthetic and political representations, from a form of religious family affiliation under legal pluralism, to a space of mere secular contract under formal equality, and finally to the projection of a gendered symbol under substantive equality. I focus on adjudication and case law because courts present themselves as invested in the technical enterprise of applying the law in a nonideological manner. In Table 23.1, I briefly introduce the three forms of adjudication.

IV. A LEGAL REALIST SHIFT: MAHR AS CONTRADICTIONS

A legal realist shift exposes the contradictory nature of the adjudicative process. Case law analysis reveals two contradictions that have accompanied *Mahr*'s journey to Western liberal courts. The first is the "Doctrine–Outcome Contradiction": as the legal doctrine adopted by the court projects the mandate to recognize or not to recognize, the resulting outcome from that recognition does not follow the doctrine as would logically be expected; instead, it often reverses it. The second is the "Ends–Means Perversity Contradiction": the probability that the legal means available to judges to achieve a given end cannot, in a globalized context of rules, produce the anticipated result. Moreover, the parties involved in the dispute over the enforcement of *Mahr* act out this contradiction, individually and relationally, in related but somewhat different terms. The aim of this section is to acknowledge, yet eventually attempt to transcend, the complexities of the binaries that organize the disciplinary fields in which *Mahr* is projected and produced.

solemnized, whether in the form of money actually paid or acknowledged as a debt with or without security, or in the form of something that, according to *Hukum Syarak*, is capable of being valued in terms of money." Act 303, *supra* note 40, §2(1).

[50] There is considerable variance in the permissible maximum amounts set, likely because of the economic capacity in each region, Jamila Hussain, Islam: Its Law and Society 82 (2004).

[51] *Id.*

[52] For a detailed analysis of how legal pluralism, formal equality, and substantive equality play out in the enforcement of *Mahr*, see Pascale Fournier, *Transit and Translation: Islamic Legal Transplants in North America and Western Europe*, 4 J. Comp. L. 1 (2009).

TABLE 23.1. *Three Forms of Adjudication*

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

(continued)

TABLE 23.1 *(continued)*

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

A. *The Doctrine–Outcome Contradiction*

The Doctrine–Outcome[53] Contradiction may well be the effect of the deeply contradictory nature of law in general and adjudication in particular.[54] This section tests the Doctrine–Outcome Contradiction by using concrete cases. It addresses the indeterminacy between the legal doctrine used by the judge, on the one hand, and the outcome of particular legal pluralist decisions as represented by the holding of the case, on the other. The legal pluralist camp exemplifies this contradiction as it frequently adopts the doctrine of Islamic law to interpret *Mahr*, and yet other doctrines and policies held by judges block the causal relationship between doctrine and outcome. To study the Doctrine–Outcome Contradiction, the Critical Legal Studies (CLS) indeterminacy thesis is invoked to capture the "spin" that the holding receives in relation to the doctrine. This thesis posits that the interpretation of legal doctrine by judges may, in a given case, support opposing outcomes.

IPRax (1983) is a German case that enforced *Mahr* as an Islamic custom by showing an ideological commitment to legal pluralism.[55] In the absence of any written or oral contract, the judge accepted the religious expert evidence arguing for the existence of

[53] In this section, I use the term *outcome* to refer to the case ruling in a given decision.
[54] Duncan Kennedy, A Critique of Adjudication: Fin de Siècle (Harvard University Press 1997).
[55] *IPRax* 1983 (Praxis des Internationalen Pivat – und Verfahrensrechts, 74–7 and 64–65).

an Islamic *Mahr al-mithl* (proper *Mahr*), to be determined by comparing "the *mahr* paid to other female members of the wife's family, for instance sisters, paternal aunts, and female cousins."[56] The wife argued that, given her privileged socioeconomic status, she should be awarded 75,000 Euros plus 4 percent interest as *Mahr al-mithl the Islamic way*. However, the judge recast *Mahr al-mithl* against the backdrop of the German national legal order, and more specifically that of the local Hamburg legal regime. He awarded 10,000 Euros as *Mahr al-mithl the German way*, divided into monthly payments of 1,000 Euros, based on what a similarly situated *German* woman living in Hamburg should receive. For the Muslim woman, the distributive consequences of such a shift of rules lowered her claim dramatically. Could those specific material stakes have motivated the "spin" of legal doctrine and hence the outcome that flew from it?

The second example, *Kaddoura*, exemplifies judges' choice of interpretation through policy analysis rather than through deductive legal reasoning. The Canadian court concluded that all the elements related to the definition and enforcement of a "domestic agreement" pursuant to Section 52(1) of Ontario's Family Law Act[57] were met; thus, *Mahr* could predictably have been enforced as a simple "domestic agreement." Yet, somehow, the chain of causality between the legal doctrine and the holding was broken down by the introduction of another legal doctrine: the (American!) principle of the separation of church and state.[58] Justice Rutherford compared *Mahr* to Christian marital commitments "to love, honour and cherish and to remain faithful"[59] and refused to enforce it on the basis that it constitutes a "religious" obligation, not a civil one.

B. *The Ends–Means Perversity Contradiction*

i. *Mahr* as a Culturally Transformed Legal Transplant?

The legal pluralist cases have all attempted to legally transplant *Mahr* – that is, to recreate it through many different routes of cultural recognition: as "a manifestation of identity" in Canada; as "an Islamic custom" in France and Germany; as "related to a *Khul* divorce" in Quebec and the United States. Along the way, however, Western courts transformed *Mahr*.

M.(N.M.)[60] exemplifies the Ends–Means Perversity Contradiction in that the court advanced an image of religion as an organized, comprehensive, and organic entity: Muslim subjects *chose* to be Muslims, and one consequence of Muslim

[56] David Pearl & Werner Menski, Muslim Family Law 180 (3d ed. Sweet & Maxwell 1998).
[57] Family Law Act, R.S.O. 1990, c.F.3 (ca.), pt. 1, s. 52(1) (Can.).
[58] *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, ¶ 26 (Can. Ont. Gen. Div.).
[59] *Id.* ¶ 25.
[60] M.(N.M.) v. M.(N.S.), 2004 BCSC 346, 26 B.C.L.R. (4th) 80 (Can. B.C. Sup. Ct.).

identity is the enforcement of *Mahr* by the court. Ironically, the *Mahr* that was institutionally transferred unfolded as an exceptional penalty imposed on the husband, a result that cannot be explained or legitimated from the point of view of the original Islamic milieu of departure. The court held that Muslim marriage agreements should not be governed by the same contractual principles that governed other secular contracts; thus the *Mahr* agreement in question would be valid. The British Columbia court added the "amount of $51,250 on account of the Maher"[61] to the $101,911 due by the husband on the division of family assets *and* to an additional $2,000 monthly in spousal support.

ii. *Mahr* as Projecting a "Religious" Contractual Intention?

The Ends–Means Perversity Contradiction also affects the formal equality cases. In following a mandate *not* to culturally recognize *Mahr*, the judicial narratives embracing formal equality have attempted to secularize *Mahr*, and merely to give effect to "the intention of the parties." Yet the contract law doctrinal analysis, as applied to the specific context of *Mahr* (were the parties capable of contracting *Mahr*? Was there a "meeting of the minds" between the two parties regarding prompt and deferred *Mahr*? Was there consideration, even in cases where no amount was specified [*Mahr al-mithl*]?, etc.), has carried a religious intention into the law and, in effect, although pretending not to, courts have opened the door to the existence of this "contractual/religious" intention of the parties.

Aziz, *Odatalla*, and *Akileh* have all denied this perverse relationship between means and ends. In fact, the three American decisions all insist on the fact that the religious character of *Mahr* is irrelevant: "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?"[62] asks *Odatalla*. "Its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony,"[63] responds *Aziz*. After all, suggests *Akileh*, the *Mahr* "agreement was an antenuptial contract."[64] Under the Formal Equality Approach, secular *Mahr* becomes an antenuptial agreement immediately enforceable as long as the conditions of contract law doctrine are met. The irony lies in the fact that, in interpreting *Mahr*, the *secular-promise-to-pay-money-in-the-form-of-an-antenuptial-agreement* can only be understood, contractually, contextually, by referring to the religious intentions of the Muslim parties. By a priori rejecting the pertinence of the Islamic shadow behind which husband and wife negotiate, bargain, and determine *Mahr* and its amount, courts have paradoxically refused an appreciation of contract law that would account for the parties' particular, peculiar private ordering regime,

[61] *Id.* ¶ 31.
[62] *Odatalla v. Odatalla*, 810 A.2d 93, 309 (N.J. Super. Ct. Ch. Div. 2002).
[63] *Aziz v. Aziz*, 127 Misc.2d 1013, 1013, 488 N.Y.S.2d 123 (Sup. Ct. 1985).
[64] *Akileh v. Elchahal*, 666 So.2d 246, 248 (Fla. Ct. App. 1996).

one that depends on their religious, gendered roles as much as it does on their contractual, "marketplace" roles.

iii. The Performance of the Contradiction by the Parties Themselves: Holmes' "Bad Man" and "Bad Woman"

In Holmes' The Path of the Law,[65] the legal system is depicted as "an instrument . . . of business" whose "prophecies" the lawyer attempts rigorously to predict and master. If adjudication is about judges' "duty of weighing considerations of social advantage," parties must know not only the adequate rules and precedents but also "the relative worth and importance of competing considerations" that are likely to affect judges. Emphasizing the existence of battles between individuals and/or groups, Holmes develops the famous "bad man" theory of the law, the individual who cares only about the material (and not the ethical) consequences of his act.[66]

Holmes' predictive theory of law and his advocacy of the bad-man perspective constitute powerful strategies undermining the misleading picture of law. In this section, I add another internal dimension to the Ends–Means Perversity Contradiction: the agency and active role of the Muslim parties themselves in relation to each other, as well as in relation to the Western court. Because of their individual motives, each spouse advocates or opposes the judicial enforcement of *Mahr* depending on how his or her interests would be affected. Is it possible that the *Muslim-husband-arguing-for-the-nonenforcement-of-Mahr-mainly-on-religious-grounds* is the equivalent of Holmes' "bad man," and the *Muslim-wife-arguing-for-the-enforcement-of-Mahr-mainly-on-secular-grounds* personifies a Holmesian "bad woman"?

a. The Muslim (Religious/Secular) Husband as the "Bad Man"?

In most of the matrimonial disputes analyzed in this chapter, Muslim parties made contradictory claims about Islam and the role of religion in a secular, Western state more generally. The Muslim husband typically argued that the obligations imposed by *Mahr* arose solely from religious/Islamic law and can therefore be interpreted only by reference to religious dogma.[67] In *Odatalla*, for example, Mr. Odatalla asked the court to *not* enforce *Mahr* – alleging that, according to his religious faith, *Mahr* could only be decided by an Islamic authority[68] – but, on the same account, requested "alimony and equitable distribution of certain jewelry, furniture, wedding

[65] Oliver Wendell Holmes, *The Path of the Law* (1897), *in* American Legal Realism 15–24 (William W. Fisher III et al. eds., Oxford University Press 1993).

[66] *Id.* at 17.

[67] *See M.(N.M.)*, 2004 BCSC 346; *Kaddoura*, [1998] O.J. No. 5054; *Aziz*, 127 Misc.2d; and *Odatalla*, 810 A.2d.

[68] *Odatalla*, 810 A.2d. at 95.

gifts, and marital debt,"[69] demands that he could *not* have made under Islamic family law. Mr. Odatalla's adjudicative strategy is that of Holmes' "bad man" in that he uses law as a strategy to gain the most advantageous economic outcomes and material consequences while undermining the importance of religious law (Holmes' morality).

Can we imagine the Muslim wife behaving in the same fashion, alternatively drawing on and occasionally transcending the secular/religious performance – and bending perceived traditional gender roles in so doing? Can the Muslim wife, in asking for the enforcement of *Mahr* in Western courts, constitute a Holmesian "bad woman"?

b. The Muslim (Secular/Religious) Wife as the "Bad Woman"?

In most of the matrimonial disputes studied in this chapter, the Muslim wife claimed that nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of *Mahr*. After all, *Mahr* is a contractual matter.[70] At times, however, in response to the Islamic argument that she should waive *Mahr* because she is the one asking for divorce (*Khul* divorce),[71] the Muslim wife donned the religious hat and presented a profoundly surprising description and analysis of Islamic law. The key to understanding the performance of the "bad woman" is to measure the *predicted* economic gains and losses of advocating the enforcement or nonenforcement of *Mahr* in a given situation, in relation to both Islamic family law *and* Western law. In response to the "waiver rule" of *Khul Mahr*, the "bad 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). Either one of these options allows her to wield *Mahr* promises as weapons in order to emerge from the dissolution of her marriage with more than she would otherwise get.

A Quebec trial decision illustrates the point. In *M.H.D. v. E.A.*,[72] the Muslim wife embarked on a "secular" argumentation and convinced the court that Syrian Islamic law could not apply in Canada because its application would create a negative effect on Muslim wives availing themselves of the *Divorce Act*. The Muslim wife argued *Khul Mahr* as a legal institution violates substantive equality, in that it requires the Western state to punish a wife because *she* is the one initiating the divorce proceedings, an outcome that would not similarly apply to the husband. In the name of gender equality, such discriminatory Islamic traditions should be formally

[69] *Id*. at 94.

[70] *See M.(N.M.)*, 2004 BCSC 346; *Kaddoura*, [1998] O.J. No. 5054; *Aziz*, 127 Misc.2d; and *Odatalla*, 810 A.2d.

[71] *Mahr* is attached to a wider regime of Islamic family law dictating in which cases it will be enforced: under a *Talaq* or *Faskh* divorce, but not so under a *Khul* divorce.

[72] *M.H.D. v. E.A.*, Droit de la famille – 1466, Sept. 23, 1991, No. 500–09-001296–896, (Can. Que. C.A.).

and rigidly *rejected* by the host legal system, despite rules of international private law incorporating Syrian Islamic law: "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*.."[73]

V. MAHR AS BONUS AND PENALTY

In this section, I perform a distributive shift to argue that in the social life of Islamic marriages, *Mahr* is not unitary and autonomous but rather a functional institution that produces a series of inconsistent characteristics we can study. Through this distributive reading of *Mahr*, my hope is to offer a narrative concerned primarily with the social effects created by the judiciary as it claims to merely *translate Mahr* according to ideological preferences when in fact it *produces Mahr* as bonus or penalty. In an attempt to underline the complexity of *Mahr* as it moves from ideology to contradictions, I have deconstructed the *Muslim-woman-reacting-to-Mahr* into many conflicting players, situated in a continuum spectrum along the bonus/penalty lines. In every subsection, I present Leila in relation to her specific background rules and norms and situate how *Mahr* could be employed and deployed by her in strategic terms given that location. Although these perspectives are fictional, each Leila also reflects, directly or indirectly, the legal reasoning or outcome of real cases I have encountered and studied in my research.

A. *The Enforcement of* Mahr

i. *Mahr* as Penalty for Wife and Bonus for Husband: Leila, the German-Egyptian-"Foreign Bride"

Leila[74] has been married to Samir for fifteen years. Although of Egyptian origin and citizenship, she lives in Kreuzberg, the Turkish Muslim suburb of Berlin. She rarely goes out and makes contact with her German neighbors more hesitantly than her sons and her husband. However, in recent years, Leila has been exposed to the new wave of feminist critiques coming from German women of Muslim background, such as those of Necla Kelek's in *The Foreign Bride*.[75] In this work, Kelek addresses both the everyday violence of arranged marriages as well as the oppressive and sexist

[73] *Id.* ¶ 27 (translated from the original French by the author).

[74] This script is partly based on Oberlandesgericht [OLG] [Higher Regional Court] Bremen 1980, FamRZ 606, a 1980 German decision from the Higher Regional Court of Bremen, and Necla Kelek, Die fremde Braut [The Foreign Bride] (2005).

[75] In her book, Kelek strongly criticizes both the so-called fundamentalist Muslim society for perpetuating a culture of female slavery, and the liberal German society, which in her opinion has adopted a hands-off approach based on tolerance. Kelek, *id.*

behavior of Muslim men in Germany. This book represented an ultimatum for Leila: she would either embrace women's rights (and other Western, German conceptions of freedom) or remain forever "a foreign bride" whose equality is constantly being jeopardized. Leila left Samir, her sons, her home – with perfect irresponsibility.[76]

Despite her sister Fatima's painful divorce experience in Egypt that left her heavily indebted to her ex-husband, Leila wasn't worried about suffering the same fate; German divorce law, she had been told, was much more favorable toward women. Faced with the impossibility of surviving with very limited economic resources, Leila reached the courthouse, confident that state alimony and division-of-property laws in Germany would guarantee her generous benefits. How wrong she was! Leila soon realized that, as a non-German citizen, Egyptian Islamic law would apply to her case! Because she had no claim under Egyptian law at the time to postdivorce alimony or to her share of the profits accruing to the marital property, the court held that *Mahr* constituted a substitute for postdivorce maintenance and division of the surplus of marital profits! Furthermore, because Leila was the one seeking the divorce, the court held that she had given up her right to deferred *Mahr* and was obligated to pay back the prompt *Mahr* she had been given at her wedding.

ii. *Mahr* as Penalty for Husband and Bonus for Wife: Leila, the Canadian-Pakistani-Journalist-Writing-as-a-Lesbian-Refusenik

Leila,[77] asserting herself as a Lesbian Refusenik living in British Columbia, Canada, acknowledges the freedom made possible by her surroundings: "The good news is I knew I lived in a part of the world that permitted me to explore. Thanks to the freedom afforded me in the West – to think, search, speak, exchange, discuss, challenge, be challenged, and rethink – I was poised to judge my religion in a light that I couldn't have possibly conceived in the parochial Muslim microcosm of the madressa."[78] Leila married Samir at the age of eighteen; he repudiated her three years later, as soon as she made her sexual preferences known to him. Leila is infinitely grateful to Canadian society, where one can become a lesbian and even

[76] I borrow this expression from Ralph Ellison, Invisible Man (1952), in which he argued that irresponsibility is, for subordinated groups, a consequence of their invisibility.

[77] This script is partly based on Irshad Manji's autobiographical book, Irshad Manji, The Trouble with Islam: A Muslim's Call for Reform in her Faith (2003), an international best seller that has been published in twenty-six countries (*see* www.muslim-refusenik.com). However, many of the facts that I have included in this story are purely fictional, including a first marriage with a man, and should not be interpreted as reflecting Manji's life. I chose this perspective because I believe it captures some of the anger of some Muslims who consider themselves as "Muslim Refusenik." I have also incorporated the outcome of two Canadian cases, namely *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (Can. B.C. Sup. Ct.), and *M.(N.M.)*, 2004 BCSC 346.

[78] Irshad Manji, The Trouble with Islam: A Muslim's Call for Reform in her Faith 19 (St. Martin's Press 2004).

marry, write radical and provocative essays against Islam,[79] and choose an alternative path of life against the wishes of one's parents.

Leila is infuriated by proponents of multiculturalism who romanticize Islam and excuse brutality as a "cultural feature." Leila is angry, embarrassed at the fact that she was once "in the closet," married to Samir, sleeping next to Samir, faking with Samir, because one cannot be "a Muslim and a Lesbian": "You may wonder who I am to talk to you this way. I am a Muslim Refusenik. That doesn't mean that I refuse to be a Muslim; it simply means I refuse to join an army of automatons in the name of Allah."[80] Leila decides to ask the secular court for the enforcement of *Mahr*, in the amount of $50,000, as a calculated revenge. Given that "the parties chose to marry within the Muslim tradition,"[81] knowing "full well that provision for Maher was a condition of so doing,"[82] the court chose to enforce *Mahr* in addition to the $37,747.17 owed by Samir to Leila as a result of the division of family assets.

B. *The Nonenforcement of* Mahr

i. *Mahr* as Penalty for Wife and Bonus for Husband: Leila, the *American-"Terrorist"-Convicted-under-the-Patriot-Act*

On September 25, 2001, Leila[83] was arrested and detained on the basis of allegations that she constituted a threat to the security of the United States, by reason of her involvement in terrorist activities linked to Al-Qaeda. She was convicted soon after under the Patriot Act. Having recently married Samir, whom she had met a few months before being arrested, Leila remains in detention. In response to these unfounded suspicions linking her to terrorist groups, Leila finds peace in reading the Qu'ran and in writing letters to Samir, her soulmate. For her, *Mahr* symbolizes the beauty and purity of Samir's love, like "a bone in the upper part of the breast, or gristles of the ribs; or something presentable as a gift like a pearl."[84] Leila was a romantic. Last week, she received a letter informing her that Samir wishes to divorce her religiously, with no further explanation. Samir came on Sunday for his weekly visit and irrevocably pronounced the three *Talaq*. Leila was repudiated. Heartbroken, she asked a Californian lawyer to represent her in a claim for the enforcement of deferred *Mahr*, a symbolic amount of $1,700. She was informed that the court could not enforce *Mahr*. It held that the marriage contract must be considered as one designed to facilitate divorce, because with the exception of

[79] *Id.* at 35.
[80] *Id.* at 3.
[81] *Nathoo*, [1996] B.C.J. No. 2720, ¶ 24.
[82] *Id.*
[83] This script is partly based on *In re* Marriage of Dajani, 204 Cal. App. 3d 1387 (1988).
[84] M. Afzal Wani, The Islamic Law on Maintenance of Women, Children, Parents and Other Relatives: Classical Principles and Modern Legislations from India and Muslim Countries (Upright Study Home 1995).

prompt *Mahr* "the wife was not entitled to receive any of the agreed upon sum unless the marriage was dissolved or husband died. The contract clearly provided for wife to profit by divorce, and it cannot be enforced by a California court."[85] Leila was perplexed. How did *Mahr* provide *her* to profit from divorce? And how did it *clearly* do so? It was Samir who *religiously* divorced her! The least she could ask for is the enforcement of deferred *Mahr*, a condition of issuing *Talaq* in the first place! By distorting *Mahr*'s function, the court penalized Leila.

ii. *Mahr* as Penalty for Husband and Bonus for Wife: Leila, the *French-Member-of-Ni-Putes-Ni-Soumises*

Leila[86] is attempting to break her marriage to escape a hostile domestic environment. At nineteen, Leila would have never guessed where life would take her when she married Samir, a family friend, in Malaysia. At the time of the wedding, Leila was proud that she had garnered both a fairly high amount of *Mas Kahwin* (*Mahr*) as a young, unmarried woman, as well as an additional substantial amount of promised *Pemberian* (a customary form of dowry). The very idea of divorce seemed unthinkable at the time.

Leila and Samir moved to France seven years later so that Samir could pursue an advanced engineering degree. Bored with her life as a housewife, Leila decided to take night courses to become a secretary. She excelled in her course and blossomed in her new job working for a women's organization. Samir became more and more jealous and possessive after Leila started working. His physical abuse escalated and he started to make degrading remarks on how she became a "Western slut." He was particularly incensed that Leila had been introduced by a colleague to the organization *Ni Putes Ni Soumises* (Neither Whores Nor Slaves),[87] a French feminist movement founded in 2002 that has already secured the recognition of the French press and parliament. She eventually organized several conferences and publicly shared her experience of suffering with other Muslim women, especially those from her native Malaysia. Leila knew too well that Samir would never pronounce the three *Talaq* and she did not even attempt to negotiate a *Khul* divorce. One day, she

[85] *Id.*

[86] This script is partly based on the following French and Canadian decisions: Arrêt de la Cour d'appel de Douai, Jan. 8, 1976, No. 76–11-613 (Que.); and *Vladi v. Vladi*, 1987 Carswell NS 71, 7 R.F.L. (3d) 337, 79 N.S.R. (2d) 356; 196 A.P. R. 356, 39 D.L.R. (4th) 563 (N.S. Sup. Ct. Trial Div.).

[87] The French organization "Ni Putes Ni Soumises" [Neither Whores Nor Slaves] has become a nationwide force, in France, of Muslim women refusing violence and submission. "Neither Whores Nor Slaves" is an expression that is meant to reflect the tragedy of Sohane Benziane, a nineteen-year-old girl who was set on fire and killed by a boy she knew in a run-down apartment estate in the outskirts of Paris in October 2002. The movement expresses its anger at the "tolerance" of French society toward the violence and stigmatization suffered by Muslim women in the name of Islamic tradition in the neglected French suburbs. The political platform of the organization can be found at www.niputesnisoumises.com.

simply walked away and never came back. She decided to reach the French court system though, to claim *Mahr*. She argued that, precisely because she is "neither a whore nor a slave," she should never have been submitted to the unequal and degrading treatment that the promise of *Mas Kahwin* and *Pemberian* represent: these foreign institutions should be declared contrary to *l'ordre public français* (French public order). The court agreed.[88] Thanks to the court's application of Western equity standards, Leila was awarded $253,000 instead of $0 under Islamic family law.

CONCLUSION

Whereas liberalism is one possible way of framing emancipatory claims made by minorities in Western societies, it has become, I have argued, the dominant approach underlying the way the legal system in Western liberal states deals with claims made by Muslims in general and Muslim women in particular. I have explored *Mahr*'s internal and external pluralism from its place of departure under Islamic family law – illustrating that even there *Mahr* is not a static and monolithic religious institution – to its place of arrival under Western secular law, and analyzed *Mahr* as "adjudication" and "reception" by the Western liberal court, without inquiring into its subjective significance for the Muslim woman involved. A legal realist and distributive shift follow the way *Mahr* operates in the distribution of power and desire between the Muslim husband and the Muslim wife, as well as in the constitution of their respective identities through law.

In this chapter, I attempted to bring back into focus what has been hidden by the adjudicative discourse of *Mahr* as "recognition," as "equality," and as "fairness." My four Leilas demonstrate that the legal enforcement of *Mahr* as a legal rule has *asymmetric* economic effects *among* different groups of women. For one Leila, the enforcement of *Mahr* can be a bonus; for another, it is a penalty. For a third one, the unenforceability of *Mahr* is a penalty; for another one, it is a bonus. Leila's dilemma and negotiating strategies occupy different contexts, ranging from subversive uses of *Mahr* as a moral victory, a personal revenge, or an act of liberation. Such complex itinerary travels along with *Mahr* and reminds us too well that real women with real lives develop their own ways of bending gender roles to empower themselves as much as they can, despite the unpredictability of *Mahr*'s reception in Western courts.

[88] I refer specifically here to Arrêt de la Cour d'appel de Douai, Jan. 8, 1976: No. 76–11-613.