

FLIRTING WITH GOD IN WESTERN SECULAR COURTS: MAHR IN THE WEST

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ABSTRACT

Through the journey of one symbolic legal institution – *mahr* (a form of dowry) – the article follows the ways in which Islamic marriage travels to Canada, the USA, France, and Germany, offering a panoply of conflicting images, contradictions, and distributive endowments in the transit from Islamic family law to Western adjudication. 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. The article constitutes an important methodological contribution to the debates over the role of identity politics and the (im)possibility of legal transplants in comparative law. My argument is that *mahr* cannot travel to Western liberal courts without carrying a very complex interaction among several parties whose interests are often opposed as to its recognition. A legal realist and distributive analysis of Islamic marriage is crucial, I argue, because *mahr* is often used by the parties as a tool of relative bargaining power in the negotiation of contractual obligations related to the family. Moreover, Islamic law travels with a multiplicity of voices, and it is this complex hybridity that will be mediated through Western law upon adjudication.

An earlier version of this article was selected for presentation at the Harvard–Stanford International Junior Faculty Forum, which was held at Stanford Law School in October 2008. I thank the organisers, William Alford and Lawrence M. Friedman; my commentators, Stewart Macaulay and Mavis Maclean; and all participants in the forum for their invaluable critique and input. I am particularly grateful to Janet Halley for her unique intellectual presence in my work. I also thank Duncan Kennedy, Richard Ford, Frank Michelman, Abdullahi A. An-Na'im, Margot Badran, Frank Vogel, Libby Adler, Robert Leckey, Nathalie DesRosiers, Adelle Blackett, Benjamin Berger, Jonah Goldstein, Mario I. Aguilar, Mohammad Fadel, Moria Paz, Philomila Tsoukala, Hengameh Saberi, and Mark Toufayan for their helpful comments on earlier drafts. The article benefited greatly from comments by participants in the 2009 Wissenschaftskolleg zu Berlin workshop on Pluralism in Family Law, the 2009 Washington College of Law Workshop on Comparative Family Law, the 2009 Trudeau Foundation Summer Institute, and the 2009 conference on The Politics of Community and Identity, and the 2009 International Conference on Feminist Constitutionalism. I owe special thanks to Erica See for excellent research skills. I owe extra thanks to Xavier M. Milton for personal encouragement and to Charles L. Fournier-Milton for constant inspiration. Errors are mine alone.

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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. Moreover, 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 – ie 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 favour. 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. This analysis welcomes such contradictions, as they operate in the specific context of the 'politics of recognition' invoked by Muslim groups in Canada, the USA, France, and Germany.

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. 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 a mere expression of religious recognition by the judiciary. Moreover, the distributional impact is far from homogeneous and predictable. At times, the *mahr* that is being institutionally transferred by Western courts unfolds as an exceptional penalty imposed 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 at 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).

To represent this distributive framework, I will introduce several short scripts in which a fictional Leila embarks in a bargaining tactic

with her husband Samir upon divorce and uses *mahr* as its central object. In offering the many conflicting faces of *mahr* as bonus and penalty, I will 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*. What does it mean, concretely and legally, to be flirting with God in Western secular courts? Can the current public policy debate, assembled around the perfect dichotomies of the secular–religious, the Us–Them, the public–private, the Western–Islamic, grasp any of the grey zones? What is it that we cannot see? This article will implicitly address 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 will claim that the stakes are the constitution of a romantic subject in the former (the husband offers a gift to the wife upon 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 will argue, because *mahr* is encountered by actual parties and often used by them as a tool of relative bargaining power in the negotiation of contractual obligations related to the family. Moreover, Islamic law travels with a multiplicity of voices, and it is this complex hybridity that will be mediated through Western law upon adjudication.

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’ (Esposito and DeLong-Bas, 2001: 23). *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 upon 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 (Fournier, 2006). *Talaq* (repudiation) is a unilateral act that dissolves the marriage contract through the declaration of the husband only (Alami and Hinchcliffe, 1996: 22). 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 (Coulson, 1964: 207; Esposito and DeLong-Bas, 2001: 36; Fyzee, 1974: 133; Schacht, 1982: 167; Tucker, 1985: 54). In this regulatory regime, there is no short cut 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 (Zahra, 1955: 140–1). Otherwise, she may apply to the courts either for a *khul* or *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* (Abdal-Rahim, 1996: 105; Alami and Hinchcliffe, 1996: 27–8; Tucker, 1985: 54). 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 (Alami and Hinchcliffe, 1996: 29), in which case she will be entitled to *mahr*. This description of classical Islamic family law, however, is expressed differently in contemporary jurisprudence.

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 characterised this Islamic institution in three different ways: the legal pluralist approach, the formal equality approach, and the substantive equality approach.¹ I decided to 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 autonomy and liberty of the individual. 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. The reason why I focus 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. In Table 1, I briefly introduce the three forms of adjudication.

A LEGAL REALIST SHIFT: MAHR AS CONTRADICTIONS

In this section, I perform a legal realist shift to expose the contradictory nature of the adjudicative process. Through a case law analysis, I reveal the existence of two contradictions that have accompanied much of *mahr*'s journey to Western liberal courts. The first is the 'doctrine–outcome

Table 1. Summary of Forms of Adjudication

	Legal pluralism	Formal equality	Substantive equality
<i>Mahr</i> as . . .	<p>Western state views <i>mahr</i> under the umbrella of Islamic family law</p> <p>The Western judge welcomes the Imam as an expert witness: multiculturalist understanding of <i>mahr</i></p> <p><i>Mahr</i> is the expression of religious identity</p> <p><i>Mahr</i> is enforceable as an Islamic custom. It is recognised on the basis of:</p>	<p>Western state views <i>mahr</i> under the umbrella of Western contract law</p> <p>The Western judge pictures the legal system as devoid of representative role for the minorities: secular understanding of <i>mahr</i></p> <p><i>Mahr</i> is a contract irrespective of race, gender, or religion</p> <p><i>Mahr</i> is enforceable as a contract. It is recognised on the basis of:</p>	<p>Western state views <i>mahr</i> under the umbrella of Western family law</p> <p>The Western judge engages in sexual identity politics: gendered understanding of <i>mahr</i></p> <p><i>Mahr</i> is a religious custom that has an effect on substantive equality</p> <p><i>Mahr</i> is enforceable, but its amount must respect Western family law rules of equity. It is recognised on the basis of:</p> <p>Readjusted alimony (Germany)</p> <p>Being due even though the wife initiated the divorce (Quebec)</p> <p>Or</p> <p><i>Mahr</i> is not enforceable because it violates gender equality: the equal division of community property upon dissolution of the spouses' marriage is applied. It is not recognised on the basis of:</p> <p>Equity (Quebec)</p>
<i>Mahr</i> is . . .		<p>Marriage agreement (Canada)</p> <p>Antenuptial agreement (USA)</p> <p>Legal debt (Germany)</p>	

Table 1. Continued

	Legal pluralism	Formal equality	Substantive equality
	<p>Manifestation of identity (Canada)</p> <p>Islamic custom (France and Germany)</p> <p>Related to a <i>khul</i> divorce (Quebec and USA)</p> <p>Or</p> <p><i>Mahr</i> is not enforceable because it is too 'foreign' to be adjudicated by a Western (non-Muslim) judge. It is not recognised on the basis of:</p> <p>Being utterly foreign (Canada)</p> <p>Canada: <i>M.(N.M.) v. M.(N.S.)</i> (2004); <i>Nathoo v. Nathoo</i> (1996); <i>M.H.D. v. E.A.</i> (1991); <i>Kaddoura v. Hammoud</i> (1998); <i>I.(S.) v. E.(E.)</i> (2005);</p> <p>France: Cour de Cassation, 1978-000137 (1978);</p> <p>Germany: OLG Bremen, FamRZ 1980, 606; Kammergericht (Berlin), Fam RZ (1988, 296); OLG Koeln IPRAx (1983, 73); USA: <i>Akileh v. Elchahal</i> (1996); Dajani (1988)</p>	<p>Contractual condition of marriage (France)</p> <p>Or</p> <p><i>Mahr</i> is not enforceable because it speaks to contractual exceptions. It is not recognised on the basis of:</p> <p>Vagueness (USA)</p> <p>Lack of consent (USA)</p> <p>Abstractness (Germany)</p> <p>Canada: <i>Amlani v. Hmani</i> (2000); USA: <i>Odatalla v. Odatalla</i> (2002); <i>Akileh v. Elchahal</i> (1996); <i>Aziz v. Aziz</i> (1985); <i>Habibi-Fahrnich v. Fahrnich</i> (1995); <i>Shaban v. Shaban</i> (2001);</p> <p>Germany: Hamm FamRz (1988, 516); Amtsgericht Buende, 7 F 555/03 (2004); IPRAx 1988, 109-113, BGH (1987); France: Cour de Cassation, December 2, 1997 (Pourvoi)</p>	<p>Unjust enrichment (Germany)</p> <p>Substantial justice (Canada)</p> <p>Public policy (France and USA)</p> <p>Germany: IPRAx, OLG Koeln (1983, 73); OLG Cell, FamRZ (1998, 374); Canada: <i>M.H.D. v. E.A.</i> (1991); M.F. c. M.A. A. (2002); <i>Vladi v. Vladi</i> (1987); France: Arrêt de la Cour d'appel de Douai, January 8, 1976; N. 76-11-613; USA: Dajani (1988)</p>
Case law			

contradiction’: as the legal doctrine adopted by the court projects the mandate to recognise or the mandate not to recognise, 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 globalised context of rules, produce the anticipated result. Moreover, the parties involved in the dispute over the enforcement of *mahr* act out this contradiction, individually, relationally, in related but somewhat different terms. The aim of this section is to complexify and attempt to transcend the ruling binaries that have organised the disciplinary fields in which *mahr* is projected and produced.

1. THE DOCTRINE–OUTCOME CONTRADICTION

The doctrine–outcome² contradiction may well be the effect of the deeply contradictory nature of law in general and adjudication in particular (see Kennedy, 1997). This section tests the doctrine–outcome contradiction by using concrete cases. It will address 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 is chosen to exemplify this contradiction because 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. In order 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: this is so because legal materials presented to judges show the existence of numerous ‘gaps, conflicts, and ambiguities’ (see Kennedy, 1986, 2005; Tushnet, 1996). Therefore, when confronting a legal question in a particular case, the adjudicator may perform her legal work by interpreting ‘legal doctrine’ in such a way as to produce, strategically, the ‘holding of the case’. This section identifies this strategic field by exploring the ways in which the CLS indeterminacy thesis presents itself in the legal pluralist cases: while the Islamic legal doctrine applicable to judges should have driven us in a certain direction, other doctrines came into play to get an opposite ruling.

The first example is *IPRax* 1983, a German case that enforced *mahr* as an Islamic custom by way of showing an ideological commitment to legal pluralism. In this case, the legal reasoning used by the court to enforce *mahr* borrowed deeply from an *identitarian* politics of recognition towards Muslim identity. The German choice of law rule is pluralist in its aim to recognise and legalise cultural/religious differences: German courts will rely, in family law matters, on ‘the law of the state of origin’

(Rohe, 2003). Both parties were Iranian citizens, married in Iran, and the court therefore applied the law of citizenship to resolve the issue, according to international private law rules that directly incorporate Islamic family law. Faced with the absence of any written or oral contract, the judge accepted the religious expert evidence arguing for the existence of an Islamic *mahr al-mithl*. *Mahr al-mithl* is as a form of 'proper *mahr*', properly determined by comparing 'the *mahr* paid to other female members of the wife's family, for instance sisters, paternal aunts and female cousins' (Pearl and Menski, 1998: 180). The mandate to recognise *mahr* that was underlying much of the legal doctrine even led the German court to consult, to study, and to evaluate the Iranian family code. The wife argued that, given her privileged socio-economic status, the application of the Islamic legal doctrine should produce the following holding: 75,000 Euros plus 4% interest as *mahr al-mithl* the Islamic way.

However, in order to work properly in its new environment, *mahr al-mithl* was rewritten by the judge against the backdrop of the national legal order (Germany) and, more specifically, the local legal regime (Hamburg). Consequently, the outcome – the determination of *mahr al-mithl* according to the similarly situated German woman living in Hamburg – was converted into an amount of 10,000 Euros as *mahr al-mithl* the German way, divided into monthly payments of 1,000 Euros. Here, the contradictory relationship between doctrine and outcome is expressed this way: given the indeterminacy of legal doctrine(s), other (German) doctrines have intervened between the (Islamic) doctrine and the ruling of the case to produce a holding that is very different from what we could have expected from the (Islamic) Iranian doctrine alone. In this instance, the economic interests that lie behind the legal decision are apparent. For the Muslim woman involved, the distributive consequences of such shift of rules by the court brings her claim of 75,000 Euros plus 4% interest as *mahr al-mithl* the Islamic way down to an award of 10,000 Euros as *mahr al-mithl* the German way. Could those specific material stakes have motivated the spin of legal doctrine and hence the outcome that flew from it?

The second example, the *Kaddoura* decision, exemplifies judges' choice of interpretation through policy analysis rather than through deduction in legal reasoning. In *Kaddoura*, the Canadian court concluded that all the elements related to the definition and enforcement of a 'domestic agreement' pursuant to s. 52(1) of Ontario's Family Law Act³ were met: both Sam and Manira had acknowledged the agreement as to *mahr*; the parties entered freely and willingly into the agreement; and no evidence showed that the provision requiring the payment of \$30,000 as deferred *mahr* was vague or that the agreement was signed under circumstances suggestive of inequality, improvidence, or duress.⁴

We could have predicted, with a certain degree of certainty, that *mahr* be enforced as a simple 'domestic agreement' similar to those that are

routinely dealt with in family law. 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.⁵

By first identifying and applying this set of specific policy arguments, Justice Rutherford compared *mahr* with Christian marital commitments ‘to love, honour and cherish and to remain faithful’⁶ and refused to enforce it on the basis that it constitutes a ‘religious’ obligation, not a civil one. The legal doctrine first invoked could not have predicted such an outcome: case law under s. 52(1) of Ontario’s Family Law Act does not provide for this religious exception and the court does not cite any precedent, except for this vague reference to the American separation of church and state doctrine. It only seems fair to ask: how did the situation get framed in this way? In *Kaddoura*, not only did the indeterminacy of doctrine(s) generate an unexpected holding, *mahr* as jurisdictionally unenforceable, but also the policy analysis exempted the court from the elementary duty to apply a clear norm.

The first contradiction, which has revealed the effect of judges’ ideology on the ‘broken’ relationship between doctrine and outcome,⁷ is intimately related to the second one, the ends/means perversity contradiction. This next section further explores the ways in which ideology manifests itself concretely in the framing of a legal problem. It will specifically address the limits and frustrations of not achieving the outcome that strategic behaviour was expecting to produce in the process of ideological interpretation, due to the perverse relationship between ends and means in the adjudication of *mahr* in Western liberal courts.

2. THE ENDS/MEANS PERVERSITY CONTRADICTION

The frustration of the ends by means can be explained as follows: for any end that a court aims at achieving, ideologically, discursively, the available (Western) means to reach that end cannot achieve it. As a result, *mahr* cannot travel either through recognition or through non-recognition. For instance, if the end is to enforce *mahr* as a form of classical Islamic family law – as if it were situated in Egypt, let us imagine – the means of the Western court cannot be used to achieve it. In fact, the legal tools available to judges cannot reproduce Egyptian *mahr* – ie the enforcement of *mahr* incorporating the background Islamic legal regime of *talaq*, *khul*, and *faskh* divorce. In this section, three parts of the contradiction are presented. The first one, ‘*Mahr* as a Culturally Transformed Legal Transplant?’, will present the perverse relationship between ends and means as it operates against the backdrop of the legal pluralist approach and ultimately fails to reproduce *mahr* as a legal transplant. The second one, ‘*Mahr* as Projecting a “Religious” Contractual Intention?’, will highlight the mysterious dimensions of

‘religion’ and ‘Islamic intentions’ as they permeate the relationship between means (contract law as acknowledging contractual intentions) and ends (*mahr* as merely secular). The third one, ‘The Performance of the Contradiction by the Parties Themselves: Holmes’ “Bad Man” and “Bad Woman”’, will emphasise the puzzling role of parties involved in the adjudication of *mahr* as they strategically behave, from opposite ends of the spectrum, in relation to means and ends.

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

The legal pluralist cases have all attempted to legally transplant *mahr* – ie 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, and as ‘related to a *khul* divorce’ in Quebec and the USA – yet, along the way of its transplantation, Western courts transformed *mahr*.

*Nathoo*⁸ and *M.(N.M.)*⁹ exemplify the ends/means perversity contradiction. In both cases, courts advanced an image of religion as an organised, comprehensive, and organic entity: Muslim subjects chose to be Muslims, and one consequence of performing Muslim 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. In *Nathoo*, the court required the Muslim husband to pay \$37,747.17 to his former wife upon reappportionment of family assets and enforced *mahr* as an additional and separate amount of \$20,000. This holding is extremely bizarre. In fact, had only Canadian family law applied, a ‘marriage agreement’ would have supplanted the marital equitable regime; had Islamic family law only applied, Mrs Nathoo would have obtained only *mahr* besides maintenance during the *iddah* period. To get to such an unusual outcome in *Nathoo* – the enforcement of *mahr* plus the unequal division of property under the statutory regime – the court had to frame the issue as a minority rights one: religion is an exceptional field, it generates its own conception of the good life, and fairness is only an extension of this particularised vision. Under the disciplinary effects of the legal pluralist approach, the court held that the same contractual principles that governed other secular contracts were not to govern Muslim marriage agreements and that under such exceptional treatment the *mahr* agreement in question would be valid. Such a holding is explained by the ends/means perversity contradiction: the (Western) means available to legally transplant *mahr* cannot and, in fact, did not achieve that end.

Similarly in *M.(N.M.)*, the British Columbia court added the ‘amount of \$51,250 on account of the Maher’¹⁰ to an amount of \$101,911 due by the husband upon the division of family assets and to an additional

\$2,000 monthly in spousal support. Confronted with the particularities of the Canadian legal culture, *mahr* faces resistance as it moves from an Islamic regime of ‘you get *mahr* and only *mahr* in cases of *talaq* and *faskh* divorce’ to a family law system applying doctrines of equitable division in British Columbia.

Muslim parties have to accept multiculturalism’s insistence on viewing them in absolute and homogeneous terms in order to function properly in the legal pluralist paradigm. The complex, contradictory, and shifting *mahr*, which exists as a bargaining endowment ‘in the shadow of the law’, does not easily travel. *Mahr*, once a ‘provision for a rainy day’ (Fyze, 1974: 133) conceived by classical Islamic jurists as a ‘powerful limitation’ (Schacht, 1982: 167) on the possibly capricious exercise of *talaq* divorce by the husband as well as a form of ‘compensation’ (Esposito and DeLong-Bas, 2001: 35) to the wife once the marriage has been dissolved, becomes under the legal pluralist approach a multiculturalist feature that supposedly reflects Muslim identity yet in fact distorts it. Can the formal equality cases, which attempt to formally reject notions of ‘religious identity’ and ‘recognition’, achieve such a desired end through the means of contract law doctrine?

B. 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 recognise *mahr*, the judicial narratives embracing formal equality have attempted to secularise *mahr*, and to correctly and merely 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?’¹¹, asks *Odatalla*. ‘Its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony’,¹² responds *Aziz*. After all, suggests *Akileh*, the *mahr* ‘agreement was an antenuptial contract’.¹³ 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. What is blocked from view by the ends/means perversity contradiction in these cases?

In this apparent refusal by the courts to explore the religious role of contracts in the social order, the formal equality gaze in *Aziz*, *Odatalla*, and *Akileh* projected ‘*mahr* as contract’ but could not observe ‘*mahr* as status’: the complexity of ‘the will of the parties’ under Islamic law. The fact that *mahr* was possibly understood by Mr Aziz or Ms Odatalla as being enforceable under a *talaq* or *faskh* divorce, but not so under a *khul* divorce, has been buried from the discourse of secular *mahr*. *Mahr* is portrayed under Islamic family law as a ‘mark of respect for the wife’ (Pearl and Menski, 1998: 179), a sign of ‘honour to the bride’ (Wani, 1995: 193), a ‘free gift by the husband’ (Doi, 1984: 159), ‘a manifestation of his love for the wife’ (Wani, 1995: 193), and a symbol of the ‘prestige of the marriage contract’ (Nasir, 1994: 43). But the primary effect of a deferred *mahr* during marriage is to delineate a bargaining structure that exists in the shadow of the law, one that hides and preserves a capital in the event of some forms of divorce or of death. The formal equality approach rather projects and imposes a liberal ‘consent’ to a contractual obligation that did not necessarily originate in the intention of the (Muslim) parties themselves: in *Aziz*, *Odatalla*, and *Akileh*, *mahr* is dissociated from the Islamic social and legal meaning to which it was once attached and becomes enforceable in all cases (*talaq/khul/faskh*), so long as ‘the neutral principles of law’¹⁴ are met and respected. These cases illustrate the perverse relationship between ends and means: the contradiction seems unresolvable. The next section investigates whether the Muslim parties involved in the interpretation and adjudication of *mahr* perform, in strategic and opposing terms, the ends/means perversity contradiction.

C. The Performance of the Contradiction by the Parties Themselves: Holmes’ ‘Bad Man’ and ‘Bad Woman’

In Holmes’ ‘The Path of the Law’ (Holmes, 1993), the legal system is depicted as ‘an instrument . . . of business’ whose ‘prophecies’ the lawyer attempts to rigorously 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. Emphasising the existence of battles between

individuals and 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 (Holmes, 1993: 17).

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 will 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, the husband and wife are continually speaking both the mandate to recognise and the mandate not to recognise. They advocate or oppose the judicial enforcement of *mahr* depending on how their interests would be affected by its recognition. In the following two subsections, I will inquire into whether the ‘Muslim-husband-arguing-for-the-non-enforcement-of-*mahr*-mainly-on-religious-grounds’ is the equivalent of Holmes’ ‘bad man’ and, incidentally, whether the ‘Muslim-wife-arguing-for-the-enforcement-of-*Mahr*-mainly-on-secular-grounds’ personifies a Holmesian ‘bad woman’.

The Muslim (Religious/Secular) Husband as the Bad Man? In most of the matrimonial disputes analysed in this article, 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* arise solely from religious/Islamic law and can therefore be interpreted only by reference to religious dogma. Consequently, *mahr* is a matter touching upon purely religious doctrine that can be enforced only by religious authorities – its enforcement by a civil court would violate the principle of the separation of church and state, laïcité, etc. It is, quite ironically, in the name of religion that the Muslim husband argued for the non-enforcement of *mahr* – an outcome that would coercively disengage his financial responsibility. Such was the argumentation of the husband in *M. (N.M.)*,¹⁵ *Kaddoura*,¹⁶ *Aziz*,¹⁷ and *Odatalla*.¹⁸ At times, however, the prediction of economic sanctions will dictate to the Muslim husband to borrow from the secular rhetoric. How, if at all, did the cases on the adjudication of *mahr* speak to issues that interested Holmes?

Holmes’ bad man theory offers interesting analytical insights into *Odatalla*, our 2002 New Jersey decision. With an apparent cynicism, Mr Odatalla asked the court not to enforce *mahr* – alleging that, according to his religious faith, *mahr* could only be decided by an Islamic authority¹⁹ – but, on the same account, requested ‘alimony and equitable distribution of certain jewelry, furniture, wedding gifts and marital debt’,²⁰ 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).

In caring only about what the law might *do* to him, not what it *is* abstractly for him, Mr Odatalla presented his argument to the court in such a way that he would be compelled to pay *the least* and consequently gain *the most*. Let us imagine his strategy assessment in this situation. Mr Odatalla considered the possible predictable sanctions that the law might impose on him. The recognition/non-recognition of Islam as a religion, of him as a believer, and of *mahr* as an Islamic institution was crucial in his calculation. Will the mandate to recognise pay off, he asked himself? Surely not – *mahr* might be declared unenforceable on the basis of the separation of church and state, but he might also be prevented from enjoying the equitable dissolution of family assets. Will the mandate not to recognise pay off, he may have further inquired? Surely not – he might be ordered to pay the sum of \$10,000 as *mahr* on the basis of contractual antenuptial agreement doctrine on top of the division of family property. Considering these complex and highly material predictions, Mr Odatalla assumed an efficient hybrid position, one in which he would concurrently wear the religious/secular hat, ie the mandate to recognise/not to recognise: the non-enforcement of *mahr*, for religious reasons; and 'alimony and equitable distribution of certain jewelry, furniture, wedding gifts and marital debt', on secular grounds. This represents, he probably thought, the maximisation of outcomes.

In *Amlani*,²¹ the bad man strategy served as a focus of inquiry in a context of rules recreated by the parties themselves prior to the adjudication of *mahr*. In 2000, Mr Amlani asked the British Columbia Supreme Court for a declaration acknowledging that the marriage contract made during the religious wedding ceremony did not constitute a 'marriage agreement' under s.61 of the Family Relations Act. Consequently, *mahr* should not be enforced. The marriage contract however specified that Mr Amlani would 'pay the agreed sum of money by way of Maher to my said wife. It shall be *in addition and without prejudice* to and not in substitution of all of my obligations provided for by the laws of the land'.²² Thus, removed and repositioned in British Columbia, *mahr* is named by the husband himself as a different and surprising institution compared with what it is under Islamic family law, its native place of departure. In anticipation of (Western) adjudication, *mahr* is no longer attached to a regime of *talaq/khul/faskh* divorce. The transfer has already occurred across jurisdictions: *mahr* embraces the complexity and perversity of flirting with the 'laws of the land'. It adds itself to a well-established family law regime, one of no-fault divorce and equitable division of family assets. It accepts to define itself as an exceptional penalty for the husband: in this particular case, *mahr* becomes a debt of \$51,000.00 added to the equitable division of family property. Along the road to Western liberal states, *mahr* lost its coherence in relation to the law of origin, Islamic family law.

Ironically, against this background of previous legal transplanting, Mr Amlani presented himself to court as a religious man, claiming the existence of a purely religious *mahr*. The relationship between ‘Islamic law’ – you will get *mahr* and only *mahr* if I divorce you – and ‘Canadian law’ – you can divorce me and get *mahr* and benefit from the division of property – clearly delineates to the bad man the least profitable ‘path of the law’. Indeed, Mr Amlani chose the path that paid off the most for him: Islamic law *divorced* from the laws of the land. Such a regime, in the specific circumstances of the case, would have meant that Mr Amlani was required to pay *zero*. This is so because his wife embarked on what Islamic law classifies as a *khul* divorce and she should therefore waive \$51,000.00 and not claim alimony or division of property. Mr Amlani thus argued that ‘the Mehr amount is a traditional custom of Muslim law that was intended to provide financial compensation for a wife and children in the event of a marriage break-up. Muslim religious law did not allow a wife to pursue support for herself and any children, nor any rights to property’.²³

The court rejected this sudden redesign, regarded as profoundly lacking in good faith.²⁴ Not only did Mr. Amlani virtually change his reading of the original contract for his personal economic benefit but he also asked the court to judge his case on the rule that none of the ‘laws of the land’ applied. Could the court reproduce the practical consciousness of Islamic *mahr*? Could it crystallise the cultural codes of conduct that surround Islamic *mahr*? Could it do so despite the marriage contract, as if it were somehow expressing false consciousness? In the eyes of the court, such an interpretation cannot be sustained: ‘Ms. Hirani has civil remedies available to her. 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’.²⁵

Until now, only instances where the Muslim husband has performed Holmes’ bad man have been analysed. Can we imagine the Muslim wife behaving in the same fashion, alternatively drawing upon and occasionally transcending the secular/religious performance? Can the Muslim wife, in asking for the enforcement of *mahr* in Western courts, constitute a Holmesian bad woman?

The Muslim (Secular/Religious) Wife as the Bad Woman? In most of the matrimonial disputes studied in this essay, 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. It should be enforced and distributed to her. This was the argumentation put before the court in *M.(N.M.)*,²⁶ *Kaddoura*,²⁷ *Aziz*,²⁸ and *Odatalla*.²⁹ At times, however, in response to the Islamic argument that she should waive *mahr* because she is the one asking for divorce

(*khul* divorce),³⁰ the Muslim wife borrowed the religious hat and presented a profoundly surprising description and analysis of Islamic law. To illustrate this point, the examples of *Akileh*,³¹ *Dajani*,³² *M.H.D. v. E.A.*,³³ Arrêt de la Cour d'appel de Douai,³⁴ and *Vladr*³⁵ are examined.

The key to understanding the performance of the 'bad woman' is to measure the predicted economic gains and losses of advocating the enforcement or the non-enforcement 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). I will address these options in order.

In *Akileh* and *Dajani*, the Muslim wife offered a unique and fascinating dimension of the legal transplantation of *mahr*, one that entirely disregards Islamic theory. In *Akileh*, the wife testified that a Muslim woman's right to receive the postponed portion of *mahr* was 'absolute and not affected by the cause of a divorce', and suggested 'the exception was that a wife would forfeit the dowry if she cheated on her husband'.³⁶ She testified she was unaware of any other instance where deferred *mahr* would be forfeited. Moreover, the wife's father also testified deferred *mahr* was 'an absolute right of a wife to request from the husband whenever she wished and especially in the event of divorce'.³⁷ Similarly in *Dajani*, the Muslim wife claimed she was entitled to *mahr* upon her husband's death or dissolution of the marriage – notwithstanding the form of divorce. Her expert on the subject was 'an attorney admitted to practice in California and Egypt who testified the dowry provided for a cash payment to the wife in the event of death or dissolution of the marriage. In the latter case, the sum was due no matter which party initiated the dissolution proceedings'.³⁸

In *M.H.D. v. E.A.*, a Quebec trial court decision, 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, which the conflict of laws held at the heart of the principle of *l'ordre public* (public order),³⁹ 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: '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*.⁴⁰ *Mahr* should therefore be viewed as a contractual donation.⁴¹

The same public order logic was successfully used by the Muslim wife in a 1976 French Court of Appeal decision,⁴² as well as in *Vladi v. Vladi*, a 1987 decision from Nova Scotia (Canada) in which the court refused to enforce *mahr* on the basis of ‘substantial justice’. In *Vladi*, the court held: ‘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. (. . .) 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’.⁴³

In *M.H.D. v. E.A.*, the route to the material maximisation of outcomes implied the following claim on the part of the Muslim wife: the rejection of *khul mahr* (which amounts to zero), on the one hand, and the adoption of the equitable division of family patrimony *plus* the enforcement of *mahr* as a contractual donation, on the other. In Arrêt de la Cour d’appel de Douai and *Vladi*, the wives’ strategies precisely produced this highly sympathetic economic result: conflict of laws rejected *khul mahr* (which amounts to zero), on the one hand, and adopted the equitable division of family patrimony, which in the case of *Vladi* meant a generous equalisation payment of \$246,500.⁴⁴

Such an unusual view of Islamic family law in Western liberal courts (the non-enforcement of *khul mahr* attached only to circumstances of adultery; the enforcement of *mahr* as an absolute right, thus denying the existence of ‘the waiver rule’; the rejection of *khul mahras* inherently contrary to gender equality) certainly underlines the perverse relationship between means and ends. In what appears as the perfect equivalent of an attempt to materially obtain the most out of the interplay between Islamic law and Western law (desired end), the Muslim wife subversively recreated the scope of this comparative law encounter to her economic advantage (means).

The distributive character of adjudication as applied to this specific example of *mahr* allows us to ask certain questions: Would the Muslim wife have performed the bad woman script had no money been connected to the postponed portion of *mahr*? Does the shift in where the enforcement should take place tell us something about how religious the woman is? Does it matter to us that she might be *strategically* shaping her religiosity to match a maximal outcome? Do we care whether she is really a believer and that we know that we cannot know? Do we consider the possibility, as she insists on the big M (her as a Muslim and us as Multiculturalists), that she only pretends

to be devoted to Allah in order to get a devastating public revenge (make her husband pay, for instance, because he left her for her best friend; humiliating him in obtaining a secular *mahr* to which they had never agreed, etc)?

The ends/means perversity contradiction has produced the ‘impossibility of legal transplants’⁴⁵ in relation to the legal pluralist cases, the unavoidability of a ‘religious/contractual’ intention in relation to the formal equality cases, and the strategic postures of the ‘bad’ (religious/secular) Muslim husband as well as the ‘bad’ (secular/religious) Muslim wife in relation to legal pluralism and formal equality.

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 that 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 will 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. These perspectives are fictional, although I drew partly upon existing characters from autobiographical books,⁴⁶ feminist manifestos,⁴⁷ religious advocacy groups,⁴⁸ best-sellers books,⁴⁹ etc. In so doing, I meant to show that my six Leilas are in some ways connected to real people out there in the world. All of these scripts also reflect, directly or indirectly, the legal reasoning or outcome of real cases I have encountered and studied in my research.

I. THE ENFORCEMENT OF MAHR

A. *Mahr as Penalty for Wife and Bonus for Husband*

Leila, the Feminist-President-of-the-Canadian-Council-of-Muslim-Women

Leila⁵⁰ is a Canadian citizen of Tunisian origin who founded in 1982 the Canadian Council for Muslim Women,⁵¹ an organisation that views Islam as ‘a religion of peace, compassion, social justice and equality’ (Canadian Council of Muslim Women, unpublished data), while acknowledging that ‘many of the interpretations and practices of Muslim

law do not always reflect these principles' (Canadian Council of Muslim Women, unpublished data). Leila and her husband, Samir, met in Toronto where they were both working for the same company. After a brief courtship, they decided to get married in Tunis, where both of their families lived. Samir paid Leila 100 Tunisian dinar in prompt *mahr* on their wedding day, in accordance with Tunisian law. Although Leila and Samir were happy together for the first few years of their marriage, their relationship slowly deteriorated and Leila decided to seek a divorce.

Leila sees herself as a strong feminist – she is fascinated by the many progressive and intelligent women who exercised a positive influence on the life and teachings of Prophet Mohammed. She especially draws inspiration from the prophet's first wife, Khadija, who 'had her own business, traded, dealt with society at large, employed the Prophet Mohammed when he was a young boy, and subsequently, herself sent a proposal (of marriage) to the Prophet' (Bhutto, 1998: 110). For Leila, this is a direct and convincing example that women should have the ability to propose and end a marriage unilaterally and ask for deferred *mahr* whenever they so wish, without any relation to *talaq*, *khul*, or *faskh* divorce. If the Prophet Mohammed himself accepted this initial bargaining structure, why should not women follow the model that he established for future generations? Leila is committed to the revival of Khadija!

Although the trend in her native Tunisia was for the payment of only a nominal amount of *mahr*, Leila viewed *mahr* as a personal guarantee against financial ruin in the case of divorce. So, Leila insisted on a \$10,000 deferred *mahr* in her marriage contract. Her belief in the legacy of Khadija also motivated her to include numerous feminist stipulations in her marriage contract:

- the right to request *mahr* whenever she wishes and for whatever reasons;
- the right to divorce for both spouses, either through mutual consent or upon the husband's desire or the wife's request;
- the right to maintenance for herself and the children;
- the right to treat each other well and avoid inflicting harm on each other (absence of obedience); and
- the right to be paid for breastfeeding.

By turning her back to the religious conservative voices of her Muslim community, including well-known and well-respected Imams in Toronto, Leila entered the courthouse almost demystified, asking for the enforcement of *mahr* upon divorce from a religious feminist perspective. She was hoping to introduce a new terminology – the non-existence of *khul mahr* on religious grounds. In an act of liberation and subversion, Leila presented the existence of Khadija as 'the very image of somebody

who is independent, assertive, and does not conform to the passive description of women in Muslim societies that we have grown accustomed to hearing about' (Bhutto, 1998: 110). She further gave the example of Khadija's marriage proposal to Prophet Mohammed as a matriarchal approach to Islam. But her original take on Islamic law was not accepted by the court because of the lack of 'expertise' and 'legitimacy'. The non-Tunisian Imam who testified at court soon came to deliver the truth: Leila should waive *mahr* because she is divorcing and that the different feminist stipulations of the marriage contract were ludicrous! The court respected the sacred testimony and refused to order the husband to pay the wife the deferred *mahr* on the basis that she was 'the one that chose to pursue the divorce',⁵² even though Leila would have likely been entitled to *mahr* had she divorced in Tunisia. There were risks to Leila's strategy of invoking the life of Khadija to support her case. Leila miscalculated and paid a high price. She left the courthouse in shock, hurt, and enraged. And with no money.

Leila, the German-Egyptian-Foreign Bride' Leila⁵³ has been married to Samir for 15 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 neighbours more hesitantly than her sons and her husband. At home, men often gather to talk politics, the war in Afghanistan, the disastrous state of Iraq, the integration of Turkey into the European Union, while women cook, assist, clean – a mute shadow, outsiders. In recent years, Leila has been exposed to the new wave of feminist critiques coming from German women of Muslim background, such as Seyran Ateş' 'Great Journey Into Fire' and Necla Kelek's 'The Foreign Bride'.⁵⁴ In their work, they both address the everyday violence of arranged marriages as well as the oppressive and sexist behaviour of Muslim men in Germany. Leila was powerfully seduced by their critique and the promising and assertive voice they developed. She saw herself in the eyes of the 'foreign bride', this young Muslim woman imported to Germany as a bride, who lead a fully insular and subservient life as a wife and a mother. 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 jeopardised. Leila opted for the former. She left Samir, her sons, her home – with perfect irresponsibility.⁵⁵

While contemplating divorce, Leila was obsessed by the memory of her sister in Egypt, Fatima, who had been left financially destitute after obtaining a *khul* divorce. Fatima's husband had been emotionally abusive to her but, not having the financial resources to prove the abuse in a *faskh* divorce, Fatima had opted for the quicker, less expensive *khul*

divorce. The court ruled that Fatima lost the right to seek any maintenance or deferred *mahr* from her husband and she had to repay the prompt *mahr* she had received. Even now 5 years later, Fatima was still heavily indebted to her ex-husband. She worked 12 hours a day as a cleaner, just to make payments on the debt and to maintain a small apartment for herself and her daughter in Cairo.

Despite Fatima's painful experience, Leila was not worried about suffering the same fate as her sister because she was seeking a divorce in Germany where divorce law, she had been told, was much more favourable towards 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 were her predictions! Leila soon realised that, as a non-German citizen, Egyptian Islamic law would apply to her case! Since she had no claim under Egyptian law at the time to post-divorce alimony or to her share of the profits accruing to the marital property, the court held that *mahr* constituted a substitute for post-divorce 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.

Leila felt trapped in a complex and seemingly incomprehensible reality. Was Leila fooled into thinking that she, too, could embrace German conceptions of freedom, as the book so delightfully suggested? Is Leila forever condemned, by virtue of the application of private international law rules in Germany, of representing this tragic 'foreign bride' that she so hoped to escape?

B. Mahr as Penalty for Husband and Bonus for Wife

Leila, the Canadian-Pakistani-Journalist-Writing-as-a-Lesbian-Refusenik This subsection presents a reading of Leila⁵⁶ asserting herself as a lesbian Refusenik living in British Columbia, Canada: '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' (Manji, 2004: 19). Leila married Samir at the age of 18, and he repudiated her 3 years later, as soon as she made her sexual preferences known to him: 'I'm openly lesbian. I choose to be "out" because, having matured in a miserable household under a father who despised joy, I'm not about to sabotage the consensual love that offers me joy as an adult. I met my first girlfriend in my twenties and, weeks afterwards, told my mother about the relationship' (Manji, 2004: 21). Leila has infinite gratitude

towards Canadian society, where one can become a lesbian and even marry!, write radical and provocative essays against Islam (Manji, 2004: 35), and choose an alternative path of life against the wishes of one's parents.

Leila gets furious with proponents of multiculturalism who romanticise Islam and excuse brutality as a 'cultural feature': 'I have to be honest with you. Islam is on very thin ice with me. I'm hanging on by my fingernails, in anxiety over what's coming next from the self-appointed ambassadors of Allah. (. . .) When I speak publicly about our failings, the very Muslims who detect stereotyping at every turn label me as a sell-out. A sellout to what? To moral clarity? To common decency? To civilization? Yes, I'm blunt. You're just going to have to get used to it' (Manji, 2004: 1). 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' (Manji, 2004: 3). Leila is very angry. She 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',⁵⁷ knowing 'full well that provision for *Maher* was a condition of so doing',⁵⁸ the court chose to enforce *mahr*. Leila is happy. But something new and quite surprising will make Leila even happier: not only is *mahr* culturally recognised and financially due to her but it is added to an amount of \$37,747.17 owed by Samir to Leila as a result of the division of family assets. Leila will thus receive \$87,747.17 on that very special day, an exceptional and costly penalty for Samir.

2. THE NON-ENFORCEMENT OF MAHR

A. *Mahr as Penalty for Wife and Bonus for Husband*

Leila, the American-Terrorist-Convicted-Under-the-Patriot-Act On 25 September 2001, Leila⁵⁹ was arrested and detained on the basis of allegations that she constituted a threat to the security of the USA, 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 Koran and in writing letters to Samir, her soul mate. For her, *mahr* symbolises 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' (Wani, 1995). Leila is 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 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'.⁶⁰ Leila is perplexed. How can *mahr* provide her to profit from divorce? And how can it clearly do so? It is Samir who religiously divorced her! The least she can ask for is the enforcement of deferred *mahr*, a condition of issuing *talaq* in the first place! By distorting *mahr*'s function, the court penalised Leila.

Leila, the German-Secular-Young-Professional-Rising-Star Leila is a German young professional, considered by her peers as a rising star doctor in Germany.⁶¹ She was born in Iran and arrived in Cologne soon after the Islamic revolution. Her family was very well off and too closely related to the Shaw to remain safely in Tehran upon Khomeini's arrival. She never obtained German citizenship. Leila considers herself as a secular woman, although she was religiously married to Samir, who has occasionally been working as a taxi driver. Their notarised marital contract specified 21,000 Euros as deferred *mahr*. Leila 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. She reached the courthouse with a clear notion of her privileged position: she 'legally' argued for the enforcement of *mahr*, although she never really conceived *mahr* as a form of identity, as a religious affiliation to the Prophet Mohammed, or as a sign of gender (in)equality. Moreover, *mahr* was not meant to 'economically protect' her in the case of a *talaq* divorce because not only was she the main breadwinner but the existence of a religious *talaq* divorce in Germany would not have been recognised by the state. Aware of the different angles of the bargaining power structure existing between her and Samir, she attempted to use *mahr* subversively.

She wanted to test her power. Indirectly and ambiguously, *mahr* produced all kinds of incentives for her. Were her interests erotic? Aesthetic? Both? Leila admittedly desired the court's gaze: to watch her, uncover her, make her publicly bad. The court pierced her veil: it held that the enforcement of *mahr* would create an unjust enrichment towards the Muslim husband so as to violate German public order. It thus refused to enforce *mahr*.

B. Mahr as Penalty for Husband and Bonus for Wife

Leila, the French-Member-of-Ni-Putes-Ni-Soumises To envision the unenforceability of *mahr* as a penalty for the husband and a bonus for the wife, imagine Leila,⁶² who is attempting to break her marriage in order to escape a hostile domestic environment. At age 19, Leila could have never guessed where life would take her when she married in Malaysia Samir, a family friend. 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, and 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 7 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 organisation. 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'. Samir would also make persistent comments, especially in the presence of her immediate and extended family, about the fact that she has been 'brainwashed' by the French corrupted secular society.

He was particularly incensed that Leila had been introduced by a colleague to the organisation *Ni Putes Ni Soumises* (Neither Whores Nor Slaves),⁶³ a French feminist movement founded in 2002, which has already secured the recognition of the French press and parliament. With ambivalence at first (the slogan used by the movement is meant both to shock and mobilise), she became with time an active member and an engaged activist. She organised several conferences and publicly shared her experience of suffering with other Muslim women, especially those from her native Malaysia. In the home and out in the streets, she was no longer afraid. 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 simply walked away and never came back. She decided to reach the French court system, though, to claim the unenforceability of *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. Undoubtedly, these foreign institutions should be declared contrary to *l'ordre public français* (French public order)! Leila won her case with pride.⁶⁴ Considering the *mas kahwin* and *pemberian* payments together, the court relied on conflict of laws principles to reject the application of *mahr* as against public order, on the one hand, and apply Western equity standards, on the other, which meant a generous amount of \$253,000 for Leila instead of \$0 under Islamic family law.

CONCLUSIONS

While 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. Liberalism, in its encounter with *mahr*, has offered the following spectrum of positions: the legal pluralist approach, the formal equality approach, and the substantive equality approach. These approaches all share some problematic underpinning assumptions: (i) they portray judges as ‘independent’ actors, denying strategic behaviour in achieving outcomes; (ii) they deny ideology so as to present legal doctrine as a coherent, logical, and consistent body of knowledge; and (iii) they pretend that the legal doctrine chosen to adjudicate *mahr* generates predictable outcomes. However, as this article demonstrated, liberal ideologies hide behind judicial law making yet inconsistently generate the enforcement or non-enforcement of *mahr* – subverting the very rule of law behind which they operate.

In ‘The Place of Departure: *Mahr*’s Internal Pluralism’ and ‘The Place of Arrival: *Mahr*’s External Pluralism’, I have explored *mahr*’s internal and external pluralism from its place of departure under Islamic family law to its place of arrival under Western secular law. I have analysed *mahr* as ‘adjudication’ and ‘reception’ by the Western liberal court, without inquiring into its subjective significance for the Muslim woman involved. In ‘A Legal Realist Shift: *Mahr* as Contradictions’ and ‘The Enforcement of *Mahr*’, I have performed a legal realist and distributive shift to 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 a fictional style that borrowed from concrete decisions, I have argued that *mahr* is disciplinary in that it incorporates norms and rules regarding the family, both in relation to the Islamic law regime and in relation to the Western legal system. Those function as the rules of the game in the conflict between the Muslim husband and the Muslim wife – before, during, and after the concrete adjudication of *mahr*.

In this article, 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 six Leilas, broken down into several subcategories such as the ‘secular Muslim woman’, the ‘religious feminist Muslim woman’, the ‘rich professional Muslim woman’, ‘the poor head of household Muslim woman’, have served to demonstrate that the legal enforcement of *mahr* as a legal rule can be deemed to have asymmetric economic effects among different groups of women. For one Leila, the enforcement of *mahr* is a bonus; for the other, it is a penalty. For a third one, the unenforceability of *mahr* is a penalty; for

another one, it is a bonus. Every short script has put Leila's dilemma and negotiating strategies into 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 flirting with God in Western secular courts. Can the structural nature of the law register this complexity; reproduce it?

NOTES

¹For a detailed analysis of how legal pluralism, formal equality, and substantive equality play out in the enforcement of *mahr*, see P. Fournier (2009), 'Transit and translation: Islamic legal transplants in North America and Western Europe', *Journal of Comparative Law*, 4.

²In this section, I use the term 'outcome' to refer to the case ruling in a given decision.

³Family Law Act, R.S.O. 1990, c.F.3 (ca.), part I, s. 52(1).

⁴*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.), paras 16 and 20.

⁵*Ibid.*, at para. 26.

⁶*Ibid.*, at para. 25.

⁷For future research, it would be interesting to explore the doctrine–outcome contradiction from within the formal equality camp and attempt to measure whether the contract law doctrine used to interpret *mahr* (law in books) corresponds to a secular understanding of the outcome by the parties themselves (law in action). In fact, as the legal doctrine de-recognises and individualises *mahr*, the outcome may well be treated as recognition of the group by the Muslim woman herself. In other words, although the (secular) court insists on the fact that the Muslim woman is merely a contractual party, the enforcement of *mahr* may subjectively be understood by her as an identity politics victory. An empirical research would be needed to test this hypothesis.

⁸*Nathoo v. Nathoo* (1996) B.C.J. No. 2720 (S.C.) (British Columbia Supreme Court).

⁹*M.(N.M.) v. M.(N.S.)*, 2004 CarswellBC 688; 2004 BCSC 346, 26 B.C.L.R. (4th) 80 (British Columbia Supreme Court).

¹⁰*Ibid.*, at para. 31.

¹¹*Odatalla v. Odatalla*, 810 A.2d 93, 309 (N.J. Super. Ct. Ch. Div. 2002).

¹²*Aziz v. Aziz*, 127 Misc.2d 1013, 1013, 488 N.Y.S.2d 123 (Sup. Ct. 1985).

¹³*Akileh v. Elchahal*, 666 So.2d 246, 248 (Fla. Ct. App. 1996).

¹⁴See also *Schwartz v. Schwartz*, 153 Misc.2d 789, 583 N.Y.S.2d 716, 718 (Sup. Ct. 1992).

¹⁵*M.(N.M.)*, at n. 9.

¹⁶*Kaddoura*, at n. 4.

¹⁷*Aziz*, at n. 12.

¹⁸*Odatalla*, at n. 11.

¹⁹*Odatalla*, at n. 11, at 95.

²⁰*Odatalla*, at n. 11, at 94.

²¹*Amlani v. Hirani*, 2000 CarswellBC 2663.

²²*Ibid.*, at para. 30 (the emphasis is mine).

²³*Ibid.*, at para. 28.

²⁴*Ibid.*, at para. 30.

²⁵*Ibid.*, at para. 31.

²⁶*M.(N.M.)*, at n. 9.

²⁷*Kaddoura*, at n. 4.

²⁸*Aziz*, at n. 12.

²⁹*Odatalla*, at n. 11.

³⁰*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.

³¹*Akileh*, at n. 13.

³²*In re Marriage of Dajani*, 204 Cal.App.3d 1387 (1988).

³³*M.H.D. v. E.A.*, Droit de la famille – 1466, Québec Court of Appeal, 23 septembre 1991, No 500-09-001296-896. In this section I analyze the reasoning of the trial court decision (unpublished) as quoted in the court of appeal decision.

³⁴ Arrêt de la Cour d'appel de Douai, January 8, 1976: N. 76-11-613.

³⁵ *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.

³⁶ *Akileh*, at n. 13.

³⁷ *Akileh*, at n. 13.

³⁸ In re Marriage of Dajani, at n. 32.

³⁹ *M.H.D.*, at n. 33, at para. 34.

⁴⁰ *M.H.D.*, at n. 33, at para. 27 (translation by author).

⁴¹ In *M.H.D.*, the court ruled that gender equity principles should govern. Thus, the court enforced *mahr* as a simple donation despite the *khul* divorce.

⁴² Douai, at n. 34.

⁴³ *Vladi*, at n. 35, at paras 30 and 11.

⁴⁴ *Vladi*, at n. 35, at paras 46 and 70.

⁴⁵ I borrow this expression from Legrand (1997). Although I am sympathetic to the 'law and society' perspective adopted by Pierre Legrand, my approach rejects the idea of an external, coherent, and real 'culture', 'society', or 'religion' that exist in corresponding features to law.

⁴⁶ See 'Leila, the Canadian-Pakistani-Journalist-Writing-as-a-Lesbian-Refusenik'.

⁴⁷ See 'Leila, the-French-Member-of-Ni-Putes-Ni-Soumises'.

⁴⁸ See 'Leila, the-Feminist-President-of-the-Canadian-Council-of-Muslim-Women'.

⁴⁹ See 'Leila, the-German-Egyptian-“Foreign Bride”'.

⁵⁰ This script is not based on the life of the president of the Canadian Council of Muslim Women, although I have used some of the insights I have collected, throughout the years, from my work with several female members of the council. This script borrows from the following decisions, which have all adopted the internal logic of the Islamic law regime in applying the waiver of *mahr*: *M.H.D.*, at n. 33; *I.(S.) v. E.(E.)*, Cour supérieure du Québec, 2005 CarswellQue 8765; *Akileh*, at n. 13; In re Marriage of Dajani, at n. 32. Hence, *mahr* is unenforceable because the wife is the one asking for divorce.

⁵¹ See Canadian Council for Muslim Women, <http://www.ccmv.com>.

⁵² *Akileh*, at n. 13, at 248.

⁵³ This script is partly based on OLG Bremen, FamRZ 1980, 606, a 1980 German decision from the Higher Regional Court of Bremen, and Kelek (2005).

⁵⁴ 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.

⁵⁵ I borrow this expression from Ralph Ellison's *Invisible Man* (1952), in which he argued that irresponsibility is, for subordinated groups, a consequence of their invisibility.

⁵⁶ This script is partly based on Irshad Manji's autobiographical book, *The Trouble With Islam: A Muslim's Call for Reform in Her Faith*, an international best-seller that has been published in 26 countries (see <http://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 the life of Irshad Manji. I chose this perspective because I believe it does capture 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*, at n. 8, and *M.(N.M.)*, at n. 9.

⁵⁷ *Nathoo*, at n. 8, at para. 24.

⁵⁸ *Nathoo*, at n. 8, at para. 24.

⁵⁹ This script is partly based on In re Marriage of Dajani, at n. 32, an American appellate decision from California.

⁶⁰ In re Marriage of Dajani, at n. 32.

⁶¹ This script is partly based on the following German cases: OLG Koeln IPRax 1983, 73 (Cologne) and OLG Cell, FamRZ 1998, 374.

⁶² This script is partly based on the following French and Canadian decisions: Douai, at n. 34; and *Vladi*, at n. 35.

⁶³ The French organisation 'Ni Putes Ni Soumises' 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 19-year-old girl who was set on fire and killed by a boy she knew in a run-down apartment estate in the Paris outskirts in October 2002. The movement expresses its anger at the 'tolerance' of French society towards violence and stigmatisation suffered by Muslim women in the name of Islamic tradition in the neglected French suburbs. The political platform of the organisation can be found at: <http://www.niputesnisoumises.com>.

⁶⁴ I refer specifically here to Douai, at n. 34.

REFERENCES

- Abdal-Rahim, A-R (1996) 'The family and gender laws in Egypt during the Ottoman period' in A.E.A. Sonbol (ed), *Women, the Family, and Divorce Laws in Islamic History*, Syracuse: Syracuse University Press.
- Alami, D. S. E. and Hinchcliffe, D. (1996) *Islamic Marriage and Divorce Laws of the Arab World*, London: Kluwer Law International.
- Bhutto, B. (1998) 'Politics and the Muslim woman' in C. Kurzman (ed), *Liberal Islam: A Sourcebook*, New York: Oxford University Press.
- Coulson, N. J. (1964) *A History of Islamic Law*, Edinburgh: University Press.
- Doi, A. R. I. (1984) *Shari'ah: the Islamic Law*, London: Ta Ha Publishers.
- Ellison, R. (1952) *Invisible Man*, New York: Random House.
- Esposito, J. L. and DeLong-Bas, N. J. (2001) *Women in Muslim Family Law*, Syracuse: Syracuse University Press.
- Fournier, P. (2006) 'In the (Canadian) shadow of Islamic law: Translating Mahr as a bargaining endowment', *Osgoode Hall Law Journal* 44(4), 649–77.
- Fyzee, A. A. A. (1974) *Outlines of Muhammadan Law*, Delhi: Oxford University Press.
- Holmes, O. W. (1993) 'The path of the law (1897)' in W.W. Fisher in M. J. Horwitz and T. A. Reed (eds), *American Legal Realism*, New York: Oxford University Press.
- Kelek, N. (2005) *Die fremde Braut: ein Bericht aus dem Inneren des türkischen Lebens in Deutschland*, Köln: Kiepenheuer and Witsch.
- Kennedy, D. (1997) *A Critique of Adjudication: fin de siècle*, Cambridge: Harvard University Press.
- Kennedy, D. (1986) 'Freedom and constraint in private law adjudication: A critical phenomenology', *Journal of Legal Education* 36, 518–62.
- Kennedy, D. (2005) 'A left-phenomenological critique of the Hart/Kelsen theory of legal interpretation' in E. Cáceres Nieto, I. B. Flores and E. Saldana (eds), *Problemas contemporaneos de la filosofía del derecho*, Mexico: Instituto de Investigaciones Jurídicas de las UNAM.
- Legrand, P. (1997) 'The impossibility of legal transplants', *Maastricht Journal of European and Comparative Law* 4, 111–24.
- Manji, I. (2004) *The Trouble With Islam: A Muslim's Call for Reform in Her Faith*, New York: St Martin's Press.
- Nasir, J. J. (1994) *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*, London: Graham & Trotman.
- Pearl, D. and Menski, W. (1998) *Muslim Family Law*, London: Sweet & Maxwell.
- Rohe, M. (2003) 'Islamic law in German courts', *Hawwa* 1, 47–59.
- Schacht, J. (1982) *An Introduction to Islamic Law*, Oxford: Clarendon Press.
- Tucker, J. E. (1985) *Women in Nineteenth-Century Egypt*, Cambridge: Cambridge University Press.
- Tushnet, M. (1996) 'Defending the indeterminacy thesis', *Quinnipiac Law Review* 16, 339–56.
- Wani, M. A. (1995) , *The Islamic Law on Maintenance of Women, Children, Parents and Other Relatives: Classical Principles and Modern Legislations in India and Muslim Countries*, Noonamy, Kashmir: Upright Study Home
- Zahra, M. A. (1955) 'Family law, in origin and development of Islamic law' in M. Khadduri and H. J. Liebesny (eds), *Law in the Middle East*, Washington: The Middle East Institute.