Gender, Religion, and Family Law

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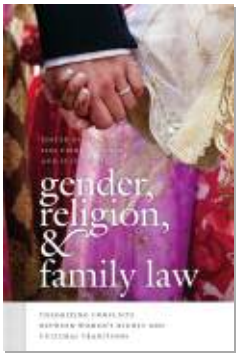

Published by Brandeis University Press

PASCALE FOURNIER

Chapter Five Flirting with God in Western Secular Courts *Mahr* in the West

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 — 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. This analysis welcomes such contradictions, as they operate in the specific context of the politics of recognition invoked by Muslim groups in Canada, the United States, 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 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 gray zones? What is it that we can't see? This chapter 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."[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 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.[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.

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.[8] 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 I focus on the locus of the state, on adjudication, and on case law is that courts present themselves as invested in the technical enterprise of applying the law in a non-ideological manner. In the table on pages 140 and 141, 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 contradiction": as the legal doctrine adopted by the court projects the mandate to recognize or the mandate 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, relationally, in related but somewhat different terms. The aim of this section is to complexify and attempt to transcend the ruling binaries that have organized the disciplinary fields in which *mahr* is projected and produced.

THE DOCTRINE-OUTCOME CONTRADICTION

The doctrine-outcome[9] contradiction may well be the effect of the deeply contradictory nature of law in general and adjudication in particular.[10] This

Summary of Forms of Adjudication

	LEGAL PLURALISM	FORMAL EQUALITY	SUBSTANTIVE EQUALITY
Mahr as . . .	Western state views *mahr* under the umbrella of Islamic family law The Western judge welcomes the imam as an expert witness: multiculturalist understanding of *mahr* *Mahr* is the expression of religious identity	Western state views *mahr* under the umbrella of Western contract law The Western judge pictures the legal system as devoid of representative role for the minorities: secular understanding of *mahr* *Mahr* is a contract irrespective of race, gender, or religion	Western state views *mahr* under the umbrella of Western family law The Western judge engages in sexual identity politics: gendered understanding of *mahr* *Mahr* is a religious custom that has an effect on substantive equality
Mahr is . . .	*Mahr* is enforceable as an Islamic custom. It is srecognized on the basis of: • Manifestation of identity (Canada) • Islamic custom (France and Germany) • Related to a *khul* divorce (Québec 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 (Québec) OR *Mahr* is not enforceable because it violates gender equality: the equal division of community property upon dissolution of the spouses' marriage is applied. It is not recognized on the basis of: • Equity (Québec) • Unjust enrichment (Germany) • Substantial justice (Canada) • Public policy (France and U.S.)

	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, Fam RZ 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)

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 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. 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.

IPRax (1983) is a German case that enforced *mahr* as an Islamic custom by showing an ideological commitment to legal pluralism. In 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* ("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."[11] 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 national legal order (Germany), and more specifically the local legal regime (Hamburg). He awarded 10,000 euros as *mahr al-mithl the German way*, divided into monthly payments of 1000 euros, based on what a similarly situated German woman living in Hamburg should receive. For the Muslim woman, the distributive consequences of such shift of rules lower her claim dramatically. Could those specific material stakes have motivated the "spin" of legal doctrine and hence the outcome that flowed 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 s. 52(1) of Ontario's Family Law Act[12] 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.[13] Justice Rutherford compared *mahr* to Christian marital commitments "to love, honour and cherish and to remain faithful"[14] and refused to enforce it on the basis that it constitutes a "religious" obligation, not a civil one.

The first contradiction, which has revealed the effect of judges' ideology on the "broken" relationship between doctrine and outcome, 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 behavior 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.

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* — that is, 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's 'Bad Man' and 'Bad Woman,'" will emphasize 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.

Mahr as a Culturally Transformed Legal Transplant?

The legal pluralist cases have all attempted to legally transplant *mahr* — that is, to re-create 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 Québec and the United States — yet along the way of its transportation, Western courts transformed *mahr*.

Nathoo[15] and *M. (N.M.)*[16] exemplify the ends/means perversity contradiction. In both cases, courts advanced an image of religion as an organized, 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 reapportionment 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 particularized 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"[17] 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"[18] conceived by classical Islamic jurists as a "powerful limitation"[19] on the possibly capricious exercise of *talaq* divorce by the husband as well as a form of "compensation"[20] 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?

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 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* (e.g., 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*]?), 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?"[21] asks *Odatalla*. "Its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony,"[22] responds *Aziz*. After all, suggests *Akileh*, the *mahr* "agreement was an antenuptial contract."[23] 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 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,"[24] a sign of "honour to the bride,"[25] a "free gift by the husband,"[26] "a manifestation of his love for the wife,"[27] and a symbol of the

"prestige of the marriage contract."[28] 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"[29] are met and respected. These cases illustrate the perverse relationship between ends and means: the contradiction seems irresolvable. 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.

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

In Holmes's "The Path of the Law,"[30] 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. Emphasizing the existence of battles between individuals or/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.[31]

Holmes's 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 recognize and the mandate not to recognize. 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's "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 analyzed in this essay, 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.)*,[32] *Kaddoura*,[33] *Aziz*,[34] and *Odatalla*.[35] 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's "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 authority[36] — but, on the same account, requested "alimony and equitable distribution of certain jewelry, furniture, wedding gifts and marital debt,"[37] demands that he could *not* have made under Islamic family law. Mr. Odatalla's adjudicative strategy is that of Holmes's "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's 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 recognize 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 recognize 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, that is, the mandate to recognize/not to recognize: 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 maximization of outcomes.

In *Amlani*,[38] the "bad man" strategy served as a focus of inquiry in a context of rules re-created 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."[39] Thus removed and repositioned in British Columbia, *mahr* is named by the husband himself as a different and surprising institution compared to 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 *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 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."[40]

The court rejected this sudden redesign, regarded as profoundly lacking in good faith.[41] Not only did Mr. Amlani virtually change his reading of the original contract for his personal, economic benefit, but he 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 crystallize 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."[42]

Until now, only instances where the Muslim husband has performed Holmes's "bad man" have been analyzed. 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.)*,[43] *Kaddoura*,[44] *Aziz*,[45] and *Odatalla*.[46] At times, however, in response to the Islamic argument that she should waive *mahr* because she is the one asking for divorce (*khul* divorce),[47] 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*,[48] *Dajani*,[49] *M.H.D. v. E.A.*,[50] *Arrêt de la Cour d'appel de Douai*,[51] and *Vladi*[52] 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."[53] She testified she was unaware of any other instance where deferred *mahr* would be forfeited. Moreover, the wife's father also testified that deferred *mahr* was "an absolute right of a wife to request from the husband whenever she wished and especially in the event of divorce."[54] 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."[55]

In *M.H.D. v. E.A.*, a Québec 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 ef-

fect 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"),[56] 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 Québec Civil Code."[57] *Mahr* should therefore be viewed as a contractual donation.[58]

The same "public order" logic was successfully used by the Muslim wife in a 1976 French Court of Appeal decision[59], 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."[60]

In *M.H.D. v. E.A*, the route to the material maximization 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 equalization payment of $246,500.[61]

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 mahr* as 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 re-created 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 can't know? Do we consider the possibility, as she insists on the big M (her as a Muslim; us as multiculturalists), that she only pretends to be devoted to Allah in order to get a devastating public revenge (e.g., 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)?

The ends/means perversity contradiction has produced the "impossibility of legal transplants"[62] 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,[63] feminist manifestos,[64] best-selling books,[65] and so on. In so doing, I meant to show that my 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.

THE ENFORCEMENT OF *MAHR*

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

Leila[66] 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 neighbours more hesitantly than do 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."[67] In their work, they both address the everyday violence of arranged marriages as well as the oppressive and sexist behavior 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 led 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 jeopardized. Leila opted for the former. She left Samir, her sons, her home — with perfect irresponsibility.[68]

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, five years later, Fatima was still heavily indebted to her ex-husband. She worked twelve 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 wasn't 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 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* were her predictions! Leila soon realized 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?

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 Leila[69] 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."[70] Leila married Samir at the age of eighteen years old, and he repudiated her three 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."[71] Leila has infinite gratitude toward Canadian society, where one can become a lesbian and even marry, write radical and provocative essays against Islam,[72] and choose an alternative path of life against the wishes of one's parents.

Leila gets furious with proponents of multiculturalism who romanticize 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."[73] 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."[74] 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,"[75] knowing "full well that provision for Maher was a condition of so doing,"[76] the court chooses to enforce *mahr.* Leila is happy. But something new and quite surprising will make Leila even happier: not only is *mahr* culturally recognized 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.

THE NON-ENFORCEMENT OF *MAHR*

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

On September 25, 2001, Leila[77] 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 Koran and in writing letters to Samir, her soul mate. 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."[78] 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 $1700. 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."[79] 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 penalized Leila.

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[80] who is attempting to break her marriage in order to escape a hostile domestic environment. At age nineteen, 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, 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." 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 organization Ni Putes Ni Soumises (Neither Whores Nor Slaves),[81] a French feminist movement founded in 2002, which had 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 mobilize), she became with time an active member and an engaged activist. She organized 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* represents. Undoubtedly, these foreign institutions should be declared contrary to *l'ordre public français* (French public order)! Leila won her case with pride.[82] 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.

Conclusion

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: (1) they portray judges as "independent" actors, denying strategic behavior in achieving outcomes; (2) they deny ideology so as to present legal doctrine as a coherent, logical, and consistent body of knowledge; and (3) they pretend that the legal doctrine chosen to adjudicate *mahr* generates predictable outcomes. However, as this essay has demonstrated, liberal ideologies hide behind judicial lawmaking, yet *inconsistently* generate the enforcement or non-enforcement of *mahr* — subverting the very rule of law behind which they operate.

In this chapter, 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 analyzed *mahr* as "adjudication" and "reception" by the Western liberal court, without inquiring into its subjective significance for the Muslim woman involved. I have also 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 as well as 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 essay, 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, broken down into several subcategories, such as the "secular Muslim woman," the "religious feminist Muslim woman," the

"rich professional Muslim woman," and "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

This chapter was selected as the 2009 best law review article by the Québec Bar Foundation's legal contest prize. It was previously published in the *International Journal of Law, Policy and the Family* (2010) 24(1): 67–94 (©2010 Oxford University Press) and is reprinted here by permission of the publisher.

1. J. L. Esposito, with N. J. DeLong-Bas, *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 2001), 23.

2. Pascale Fournier, "In the (Canadian) Shadow of Islamic Law: Translating *Mahr* as a Bargaining Endowment," *Osgoode Hall Law Journal* 44, no.4 (2006): 649–77.

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

4. A. A. A. Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 1974), 133; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 167; N. J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964), 207; Esposito and DeLong-Bas, *Women in Muslim Family Law*, 36.

5. Muhammad Abu Zahra, "Family Law," in *Law in the Middle East*, ed. M. Khadduri and H. J. Liebesny (Washington, D.C.: The Middle East Institute, 1955), 140–41.

6. Judith Tucker, *Women in Nineteenth-Century Egypt* (Cambridge: Cambridge University Press, 1985), 54.

7. El Alami and Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World*, 29.

8. 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," *Journal of Comparative Law* 4, no.1 (2009): 1–38.

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

10. See Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, Mass.: Harvard University Press, 1997).

11. David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet and Maxwell, 998), 180.

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

13. Kaddoura v. Hammoud, [1998] O.J. No. 5054, 44 R.F.L. (4th) 228, 168 D.L.R. (4th) 503, 1998 Carswell Ont 4747, 83 O.T.C. 30 (Ont. Gen. Div.) at para. 26.

14. *Kaddoura*, above n. 13, at para. 25.

15. Nathoo v. Nathoo, [1996] B.C.J. No. 2720 (S.C.) (British Columbia Supreme Court).

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

17. *M.(N.M.)*, above n. 16, at para. 31.

18. Fyzee, *Outlines of Muhammadan Law*, 133.

19. Schacht, *An Introduction to Islamic Law*, 167.

20. Esposito and DeLong-Bas, *Women in Muslim Family Law*, 35.

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

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

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

24. Pearl and Menski, *Muslim Family Law*, 179.

25. M. A. Wani, *The Islamic Law on Maintenance of Women, Children, Parents and Other Relative: Classical Principles and Modern Legislations in India and Muslim Countries* (Noonamy, Kashmir: Upright Study Home, 1995), 193.

26. Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* (London: Ta Ha Publishers, 1984), 159.

27. Wani, *The Islamic Law on Maintenance*, 193.

28. Jamal J. Nasir, *The Status of Women under Islamic Law and Under Modern Islamic Legislation* (London: Graham & Trotman, 1994), 43.

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

30. Oliver Wendel Holmes, "The Path of the Law" (1897), in *American Legal Realism*, ed. William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed (New York: Oxford University Press, 1993).

31. Ibid., 17.

32. *M.(N.M.)*, above n. 16.

33. *Kaddoura*, above n. 13.

34. *Aziz*, above n. 22

35. *Odatalla*, above n. 21.

36. *Odatalla*, above n. 21, at 95.

37. *Odatalla*, above n. 21, at 94.

38. Amlani v. Hirani, 2000 CarswellBC 2663.

39. *Amlani*, above n. 27, at para. 30 (the emphasis is mine).

40. *Amlani*, above n. 27, at para. 28.

41. *Amlani*, above n. 27, at para. 30.

42. *Amlani*, above n. 27, at para. 31.

43. *M.(N.M.)*, above n. 16.

44. *Kaddoura*, above n. 13.

45. *Aziz*, above n. 22.

46. *Odatalla*, above n. 21.

47. *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.

48. *Akileh*, above n. 23.

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

50. M.H.D. v. E.A, Droit de la famille — 1466, Québec Court of Appeal, 23 Septembre 1991, No 500–09–001296–896.

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

52. 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.

53. *Akileh*, above n. 23.

54. *Akileh*, above n. 23.

55. In re Marriage of Dajani, above n. 48.

56. *M.H.D.*, above n. 32, at para. 49.

57. *M.H.D.*, above n. 32, at para. 49 (translation by author).

58. 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.

59. *Douai*, above n. 51.

60. *Vladi*, above n. 52, at paras. 30 and 11.

61. *Vladi,* above n. 52, at paras. 46 and 70.

62. I borrow this expression from Pierre Legrand. Although I am sympathetic to the "law and society" perspective adopted by Legrand, my approach rejects the idea of an external, coherent, and real "culture," "society," or "religion" that exists in corresponding features to law. Pierre Legrand, "The Impossibility of Legal Transplants," *Maastricht Journal of European and Comparative Law* 4 (1997): 111.

63. See below, "Leila, the Canadian-Pakistani Journalist Writing as a Lesbian Refusenik."

64. See below, "Leila, the French Member of Ni Putes Ni Soumises."

65. See below, "Leila, the German-Egyptian 'Foreign Bride.'"

66. This script is partly based on *OLG Bremen*, FamRZ 1980, 606, a 1980 German decision from the Higher Regional Court of Bremen, and Necla Kelek, *Die fremde Braut: Ein Bericht aus dem Inneren des türkischen Lebens in Deutschland* (The Foreign Bride: A Report from the Inside of Turkish life in Germany) (Cologne: Kiepenheuer & Witsch, 2005).

67. 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.

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

69. This script is partly based on Irshad Manji's autobiographical book *The Trouble with Islam: A Muslim's Call for Reform in her Faith* (New York: St. Martin's Press, 2003), an international best seller, which has been published in numerous 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 refuseniks." I have also incorporated the outcome of two Canadian cases, namely *Nathoo*, above n. 15, and *M.(N.M.)*, above n. 16.

70. Manji, *The Trouble with Islam*, 19.

71. Ibid., 21.

72. Ibid., 35.

73. Ibid., 1.

74. Ibid., 3.

75. *Nathoo*, above n. 15, at para. 24.

76. *Nathoo*, above n. 15, at para. 24.

77. This script is partly based on In re Marriage of Dajani, above n. 48, an American appellate decision from California.

78. Wani, *The Islamic Law on Maintenance.*

79. In re Marriage of Dajani, above n. 49.

80. This script is partly based on the following French and Canadian decisions: *Douai*, above n. 51; and *Vladi,* above n. 52.

81. The French organization Ni Putes Ni Soumises has become a nationwide force in France. The movement expresses its anger at the "tolerance" of French society toward violence and stigmatization suffered by Muslim women in the name of Islamic tradition in the neglected French suburbs (http://www.niputesnisoumises.com).

82. I refer specifically here to *Douai*, above n. 51.