

Mahr as Contract: internal pluralism and external perspectives

KATHERINE SPENCER*

Abstract

This paper examines the Islamic legal doctrine of *mahr* - an inherent component to the marriage contract. In the first part the principal aspects of the marriage contract are analysed and the pluralism between Islamic schools and geo-political regimes are acknowledged. In the second part the "*mahr*" itself is specifically considered, noting the difficulties for Western scholars in conceptualising and categorising a provision that has no equivalent in Judeo-Christian marriage. The third part looks at the ways in which US and UK courts have categorised the *mahr* as a contract, or a term within a contract and yet have reached different conclusions on its enforceability. This produces inconsistent and sometimes unfair results and begs the question whether the recognition of Islamic family law by "Western" courts is inherently problematic. In the final section I attempt to answer some of those larger questions and conclude with the view that giving effect to *mahr* agreements as enforceable personal rights is judicially feasible - with the proviso however that in circumstances of profound unfairness and where contrary to public policy courts maintain the discretion to render such contracts unenforceable.

Key words

Mahr; Marriage Contract; Enforceability

* LLB Hons (Edinburgh), LLM (Harvard), kspencer@post.harvard.edu

Table of contents

| | |
|--|----|
| 1. Introduction..... | 3 |
| 2. The Marriage Contract in Islam..... | 3 |
| 2.1. A civil contract..... | 3 |
| 2.2. Liberal vs. Islamic Feminists..... | 4 |
| 2.3. Internal Pluralism..... | 5 |
| 3. The Mahr..... | 6 |
| 3.1. A Problematic Definition..... | 6 |
| 3.2. Feminist Division..... | 7 |
| 3.3. Internal Pluralism..... | 8 |
| 3.4. Consequences of mahr – mahr as a bargaining tool..... | 9 |
| 4. Mahr as a contract..... | 10 |
| 4.1. Mahr as a right ex contractu..... | 10 |
| 4.1.1. In English courts..... | 10 |
| 4.1.2. In US Courts..... | 13 |
| 4.2. Mahr as a prenuptial contract..... | 13 |
| 4.2.1. In US courts..... | 13 |
| 4.3. Mahr as an unenforceable contract..... | 14 |
| 5. Mahr in the wider context of legal pluralism and social assimilation..... | 16 |
| 6. Conclusion..... | 18 |
| 7. References..... | 19 |

1. Introduction

At the heart of Islamic marriage is the contract. Although marriage is largely a matter of civil contract, one must be careful to place it in the context of the cultural and legal norms of the Islamic world. Contracts provide from the outset a neutral framework with the potential for equality between the contracting parties. As with all contracts, the outcomes for the parties are at least partially dependent on their respective bargaining powers, their socio-economic status and the prevailing cultural norms. Since Islamic social and legal orders are often deeply inegalitarian in terms of gender, the prospects for neutrality and equality are much reduced.

Mahr is an essential provision within the marriage contract. Issues surrounding the *mahr* are usually raised on the termination of the marriage by divorce. The consequences of divorce on *mahr* very much depend on the form the divorce takes. My intention is to examine, primarily through UK and US case law, how Western secular courts determine legal claims to *mahr* and to what extent the Islamic marriage contract is interpreted as a civil contract or a prenuptial agreement. In the course of this paper I will firstly discuss the Islam marriage contract itself – its characteristics and consequences, moving on to outline the feminist debate surrounding marriage and the internal pluralism within Islam regarding marriage. I will then turn to the *mahr* itself: its problematic conceptual transposition into Western jurisprudence, the feminist division as to the nature and purpose of the *mahr*, the internal pluralism within Islam and the consequences that the negotiation of the *mahr* can have for the wife – *mahr* as a bargaining tool. Following this, I will critically examine some of the key judgements on Islamic divorce and *mahr* and compare the reasoning used by the various courts. I will examine cases that have viewed the *mahr* as contract, *mahr* as a prenuptial agreement and *mahr* as unenforceable. I will conclude with a discussion of *mahr* in the wider context of legal pluralism and social assimilation.

2. The Marriage Contract in Islam

2.1. A civil contract

Marriage in Islam, as I have already mentioned, is a civil contract established by mutual agreement between the parties.¹ However, marriage as an institution is deeply embedded in the religion of Islam, and describing the contract as “civil” does not correlate to “secular”. The marriage contract itself often invokes the sanctity of marriage; a guide to the Muslim marriage published by The Muslim Institute in the UK states: “fulfilling the terms of this contract is a religious obligation and duty rewarded in this world and hereafter. Violation of these agreed terms constitutes a sin”.² Moreover, Islamic law and custom dictates that contracts must be adhered to.³ Apart from constituting a formal contractual obligation, marriage is also a relationship between two human beings; the marriage contract is seen in Islam as giving rise to religious as well as legal obligations. Although there is contractual freedom between the parties, in order for contract terms to be valid they cannot be

¹ Note this does not necessarily imply female consent, for a discussion of consent see Tucker, J.E. 2008 *Women, Family and Gender in Islamic Law*. Cambridge: Cambridge University Press.

² Muslim Marriage Contract as endorsed by Imams & Mosques Council (UK), The Muslim Law (Shariah) Council UK, Utrujj Foundation, Muslim Council of Britain, The Muslim Parliament of Great Britain, The City Circle, Muslim Women’s Network-UK, Fatima Network, Muslim Community Helpline (Ex-MWH) Published by: The Muslim Institute 109 Fulham Palace Road, London W6 8JA.

³ Qur’an, *Al- Baqarah* 2:177 as translated by Yusuf Ali as: “It is not righteousness that ye turn your faces towards east or West; but it is righteousness- to believe in God and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice.

regular charity; to fulfil the contracts which ye have made; and to be firm and patient, in pain (or suffering) and in adversity, and throughout all periods of panic. Such are the people of truth, the Godfearing.”.

in violation of the *Shari'a*. Therefore, although this Muslim Institute guide recognises that "marriage is a social contract entered into willingly" and thus subject to "social norms, etiquettes and local customs (implicit or explicit), including the law of the land", this recognition only extends as far as they do not directly contradict the *Shari'a*.

Marriage or *nikah* has a number of purposes in Islam: legitimising sexual intercourse and automatically conferring paternity to the husband to any children born. It creates rights in inheritance for both parties and corresponding rights and obligations on both parties. For example, the wife has rights to the *mahr*, maintenance including lodging, food, clothing and an equal share of the husband's time if the marriage is polygynous (Ali 2009, p. 12). The husband's rights include the sexual availability of his wife; he has the right to take her with him when he travels and may forbid her from leaving his home (Ali 2009, p. 12). Often the personal codes of Islamic countries suggest that the wife has a de facto obligation of obedience – failure to show deference to her husband may give rise to a right on his part to discipline her (Abu-Odeh 2004, p. 1105). Despite the potential for flexibility within the contract, this is not extended to the above "basic rights" of the spouses. However, there is difference between the schools as to the essentiality of these provisions.

As in any contract, offer and acceptance must be made. There are standards and customs as to the sequence and exact phraseology of this process (Ali 2009, p. 13). Other essentials for the validity of the contract are witnesses, the guardian and the stipulation of the *mahr*. The bride and groom need not necessarily contract the marriage; the concept of using agents to represent parties in a legal capacity ("agency") exists in Islamic family law and an agent may be appointed to contract on behalf of either party. The guardian (*wali*) often has a crucial role in the contracting and negotiation of the marriage. Usually the guardian represents the bride. Of the four schools,⁴ only the Hanafi school does not require that a woman be married off by a guardian and even that school *recommends* that women of majority have a guardian (women who have not reached majority age *must* have a *wali*) (Tucker 2008, p. 42-3).

Muslim women theoretically have a broad capacity to add stipulations to their marriage contract, to gain greater equality or protection, however as Kecia Ali points out, such attempts have "varying degrees of success" (2009, p. 21). She notes that the success of the stipulation being upheld is dependent on the stipulation itself, the view taken by the relevant legal school and the court practice (2009, p. 21). Usually a breach of contract will give rise to a right for the woman to claim a judicial divorce (*faskh*); however, social custom may prevent this from being a feasible solution for a married woman. Further, judicial divorces are notoriously difficult to obtain; in classical Hanafi law, the woman can only obtain such a divorce by proving the husband's inability to consummate the marriage (Pearl and Menski 1998, p. 285; Abu-Odeh 2004, p. 1106). Other schools may provide further grounds for dissolution, yet Islamic divorce remains primarily "a matter of extra-judicial arrangement between the spouses and their families, with minimal involvement of official agents and generally no need for a court...to play a legal role..." (Pearl and Menski 1998, p. 286).

2.2. Liberal vs. Islamic Feminists

Debate is rife regarding the nature of marriage in Islam, principally among feminist scholars. "Liberal feminists" focus on the hierarchal structure which discriminates against women in Islam (marginalising and secluding them) while on the other hand, some "Islamic feminists" argue that in fact the Qur'an provides a strong basis for equality between the spouses – stating that: "wives' rights correspond to those

⁴ Hanafi, Hanbali, Maliki and Shafi'i.

that their husbands have, in equitable reciprocity".⁵ The Islamic feminist claim is that not only does Islam provide a liberating worldview for women but also that the Qur'an's epistemology is inherently antipatriarchal (Barlas 2002). Pearl and Menski also note the role of religious law in improving the situation of women in the pre-Islamic world: "the second major reform of the Qur'an is found in family law generally, changing the status of women in particular...much of the material in the Qur'anic verses concerns the very real attempt to enhance the legal position of women." (Pearl and Menski 1998, p. 4).

In pre-Islamic customary law women were treated like objects; they could be purchased and sold, a woman could be fully exploited by her father and she could be sold in marriage to the highest bidder. At that time *sadaq* was the husband's gift to the wife and *mahr* was the payment made to the bride's father (Esposito and DeLong-Bas 2002, p. 23). The Qur'an introduced greater rights for women. One of these provisions was the *mahr*. It gave the woman more security in terms of providing a deterrent for divorce; providing financial security in case of divorce and made the woman a contracting party in her own right. "This principle was the result of a *Qur'anic* reform (4:7) that gave the woman the right to own and manage property and to keep possession of this property even after her marriage" (Esposito and DeLong-Bas 2002, p. 23).

Yet the fundamentals of classical Islamic jurisprudence, particularly pertaining to family law, remain inherently patriarchal. Problems arise for Muslims contracting outside of Islamic states; should Western law respect and recognise the religious obligations prescribed by *shari'a* law, or should gender equality take primacy? Should cultural rights be taken into consideration? How should a balance be struck between these contradictory obligations? What if the woman herself wishes to conform to Islam, even when it is detrimental to her interests? This debate has produced a multitude of literature, authors such as Moller Okin (1999) condemning the tendency for liberal democratic states to apply multiculturalism through group recognition, often at the expense of the individual.⁶ A tense juxtaposition exists between the obligations of religious and cultural recognition and the principle of gender equality central to Western liberal democracies. Add to this the complication posed by the heterogeneity of "Islamic law"; if Western courts do choose to recognise and apply Islamic law, it must examine each case in relation to the Islamic school which is followed in the applicable country and whether religious law has been changed or modified by statute.

2.3. Internal Pluralism

As I have previously stated it is problematic to generalise the uniformity of Islamic marriage. Diversity in Islam⁷ is extreme – between schools, cultures and countries. The degree of pluralism within the *Shari'a*, the schools and even the social and legal orders of Islamic countries is significant. The schools differ on a number of stipulations regarding marriage: in relation to the *wali*, the *mahr*, witnesses and the requirement for female consent (Ali 2009). Further, the schools do not necessarily precisely correlate to the legal codes of the Islamic states; many provide that no

⁵ (2:229) Further examples of the egalitarian provisions in the Qur'an: -Eve was not created from Adam's rib in the Qur'an; they are both made from "one soul" (*nafs*) (39:6). Both Eve and Adam are fooled by the devil; Satan approaches both, not Eve alone. There is even a passage that singles out Adam (but not Eve) for blame: "But Satan whispered evil to him: he said, 'O Adam! shall I lead thee to the Tree of Eternity and to a kingdom that never decays?'" (20:120).

"I suffer not the good deeds of any to go to waste, be he a man or a woman: The one of you is of the other" (3:195).

⁶ Moller Okin argues that there is a tension between feminism and multiculturalism and the two are not necessarily reconcilable; in essence that multiculturalist accommodation can be disadvantageous and oppressive to women.

⁷ I refer to the four legal schools of Sunni Islam. Shi'a Islam is different again, but will not be discussed here, primarily because there is less literature on it and because the bulk of the case law is concerning Muslims from predominantly Sunni jurisdictions.

law shall be applied that contravenes the *Shari'a* but because of the diversity in interpretations of the "*Shari'a*" (between schools and within schools) this does not imply homogeneity.

Various Islamic countries have reformed their personal codes – providing a more gender-equal conception of marriage, with greater rights to divorce for women and greater equality in terms of the division of financial responsibility in the marriage. The prime example of this is Tunisia, perhaps one of the most progressive Islamic countries in terms of gender equality. Its personal status code provides a more egalitarian approach in issues of marriage and divorce that departs from the classical interpretation of Islam. The Tunisian model prohibits polygamy, abolishes the requirement for obedience, removes the paternal power to "marry off" minors and removes the requirement for parental consent for the marriage of daughters of majority age (Abu-Odeh 2004, p. 1122-3). There is no specific provision for *khul'* divorce; Article 31 of the Tunisian "Majallah" allows divorce for "both spouses, either through mutual consent, if either can prove harm or upon the *husband's desire or wife's request*". The Code appears to provide for female entitlement to deferred *mahr*, without being conditional on a male-initiated divorce. Contrast this with the provisions under the Egyptian and Jordanian codes; in Egypt a woman has only been able to apply for a *khul'* divorce since 2000, prior to this the granting of a *khul'* divorce was contingent upon the husband's consent (El-Azhary Sonbol, 2009). The grounds on which a wife can petition for a judicial divorce in both Egypt and Jordan are based on classical Hanafi doctrine (Abu-Odeh 2004, p. 1106-7; Tucker 2008, p. 121).

My point here is to illustrate that within Islam there are diverse rules pertaining to marriage and divorce. Some countries provide greater rights for women than others. Background legal orders greatly affect cultural and religious practices; in Tunisia, there is little need to include a monogamy clause in the marriage contract, since polygamy is legally prohibited. However, this clause remains an important protection for women in Islamic countries where polygamy is legally and socially permitted. Another example is the tendency for Tunisian couples to contract for a low *mahr*; women can work and divorce easily and are therefore less reliant on the *mahr* for financial security. This point is significant because, as I will go on to discuss, often the *mahr* is interpreted as a uniform and static Islamic doctrine, without considering the plurality of law that exists within the Islamic world.

3. The Mahr

3.1. A Problematic Definition

Turning now to the meaning of *mahr* – Western scholars have found the translation problematic. Various texts describe it: "marital gift"; "dower"; "bride-price"⁸ (Pearl and Menski 1998, p. 179); "reward"; "marital compensation". However, none of these descriptions quite captures the nature of *mahr*. There is and has been no equivalent in Christian marriage, *mahr* is a unique provision, quite distinct from a "dowry" as we know it in the Western/Christian conception. *Mahr* operates to secure a woman's economic position after marriage, either on the death of her husband or the dissolution of the marriage by the husband. Because of the imbalanced division of property between males and females in Islamic inheritance, the *mahr* adds to the inheritance of the wife, which may otherwise be minimal. The husband gifts the *mahr* directly to the wife, she owns it and it may be inherited from her. *Mahr* is usually divided into two parts: prompt *mahr* paid at the beginning of the marriage and deferred *mahr*, paid on its dissolution. The prompt *mahr* is often a smaller (somewhat symbolic) sum, the deferred *mahr* is usually more substantial. No notion of communal property exists in Islamic law; each spouse

⁸ This is quite evidently incorrect given that the *mahr* is the property of the wife alone and cannot be paid to her guardian or relatives instead.

retains his or her own separate property and the *mahr* remains the woman's property during the entire marriage. The deferred *mahr* is also technically hers, although not in her possession. This distinction between "upfront" and "postponed" *mahr* is important and may have important practical and legal consequences (Pearl 1979, p. 60-1).

Although *mahr* is an essential part of the marriage contract and has been described in terms that imply it is a symbol of respect and affection between husband and wife, it is intrinsically associated with divorce. In fact, the *mahr* provides one of the main ways a woman married under Islamic law can divorce her husband. It affords a means for a woman to "buy her way out" from her marriage, through the surrender of the deferred *mahr* that she has been contractually promised. *Mahr* in this sense must be seen as a practical measure, as well as a romantic gesture between the parties. The extent to which it is viewed as one or the other will likely depend on the legal order and the social context, as I will discuss below.

3.2. Feminist Division

Just as the nature of the *mahr* is contested between Islamic scholars, so feminists debate whether *mahr* represents equality for, or oppression of, women. Since one of the duties of the Muslim wife is sexual availability, *mahr* has been interpreted as the consideration in a contract of sale for a woman's sexuality or virginity (Fournier, 2007, p. 35). It has been argued that the *mahr* itself is a tool for perpetuating the patriarchal structure of Islamic law and ensuring inequality between sexes (Siddiqi 1996, p. 49, 54), and confirms the gender roles of the spouses; the husband gaining entitlement to the sexual use of his wife, the wife gaining pecuniary benefits in return.

It is undeniable that *mahr* has the potential to provide a minimum standard of protection; if part of the *mahr* is "prompt" then a woman may refuse cohabitation with her husband until she receives her dowry or her guardian may refuse her to the husband (Schleifer 1985, p. 204-5, Esposito and DeLong-Bas 2002, p. 25). At the same time, if the *mahr* is entirely deferred the woman has no grounds to refuse cohabitation (Schleifer 1985, p. 204-5; Esposito and DeLong-Bas 2002, p. 25). Therefore a prompt *mahr*, even if nominal, does provide a measure of security for the wife, should the husband turn out not to have the money or gift that he promised. Even later in the marriage, the deferred *mahr* acts to discourage the husband from divorcing his wife, making the divorce potentially expensive for him.

However, negating some of these beneficial effects - "if no *mahr* has been agreed or expressly stipulated by the parties, the contract of the marriage is still valid" (Pearl and Menski 1998, p. 180). If the marriage has not yet been consummated and the husband initiates divorce then no *mahr* will be due, if the husband dies before consummation then only half the *mahr* is owed (Pearl and Menski 1998, p. 180). There are also circumstances whereby a husband can avoid paying *mahr* in divorce - *khul'* divorce ("divorce for compensation"), which is initiated by the wife, requires the relinquishment of the *mahr*. The woman in effect relinquishes her *mahr*, financially compensating her husband, in order to get a divorce. This would support the liberal feminist approach of conceptualizing *mahr* as a payment, a form of transaction for the sexual availability of the wife. There is also the potential for the *mahr* to be set at such a nominal amount that there is no deterrent-effect on the husband initiating divorce. The power balance between the parties is something I will come to in more detail later.

The *mahr* is an essential part of the marriage contract and any "prenuptial agreement releasing the husband from his obligation to provide the wife with a dowry...is a void contract in Muslim law" (Pearl and Menski 1998, p. 181). However, corresponding with the fact that the *mahr* is wholly "owned" by the woman, she has the capacity to contract out of the obligation to have it paid to her - she can "forgive" the debt. This possibility is problematic, since once married and under the

control and influence of their husbands, wives may come under pressure to relinquish their claim to the *mahr*. In general, the *mahr* may be seen as a positive legal instrument that has the potential to provide some financial (and matrimonial) security for Muslim women. This is especially the case when legal reform has supported the intended objectives of *mahr*, either by setting minimum amounts or by making the *mahr* index linked, as in Iran. Such measures ensure that women who are being divorced after a lengthy marriage are not left with a *mahr* that in real terms is financially worthless (Rostami Povey 2001, p. 54).

3.3. Internal Pluralism

There is internal division within the schools as to when and in what form the *mahr* must be paid. For example, Hanafi and Maliki schools prescribe the *mahr* to be monetary, they prohibit the postponement of the *mahr* in its entirety, and usually at least half of it must be prompt. Islamic scholars debate as to the exact nature of the *mahr*; is it a condition for the validity of the marriage, or a legal effect of it? Again, there is diversity within the Islamic schools regarding this; the Maliki school, for example views *mahr* as a condition of marriage, while the other schools mainly see it as an effect of the marriage contract. This means for Hanafi, Shafi'i and Hanbali followers, in a contract that stipulates that no *mahr* is owed, the marriage remains valid – the wife will be owed the *mahr* only in the event of consummation (Pearl 1979, p. 102, 105). For Malikis, the *mahr* is due but the marriage must be dissolved (Ali 2009, p. 20).

It is also necessary to consider the pluralism between various Islamic legal codes on the issue of *mahr*. I have already mentioned Tunisia's progressive personal status code and the Iranian provisions for index-linked divorce. The position of the woman in relation to the *mahr* is not only governed by her (more accurately, her family's) socio-economic position, but also the legal order of her country of origin. Most significant within that legal order is the provision relating to divorce. Some countries have much more liberal divorce policies than others and again, this is in part dependent on the school of law that applies.

Christina Jones-Pauly identifies the importance of these background rules (both legal and customary) by comparing the position of *mahr* in Tunisia and Egypt. In Tunisia the reform in family law provisions that made women equally responsible for, and entitled to, the finances of the family (Jones-Pauly 1998; Abu-Odeh 2004, p. 1105) resulted in *mahr* becoming merely symbolic in value. The woman is not in dire financial need of the *mahr*, her options for divorce are not limited to bargaining for *khul'*, she is able (and may be expected) to work and contribute to the household. Further, as Jones-Pauly articulates, the Tunisian woman can rely on a liberal interpretation of Islamic law by the judiciary, she is therefore more inclined to go to court to affirm her rights and she will not be socially ostracized for doing so. Compare this to Egyptian women where *mahr* is much more likely to be of significant value. If comprising gifts and objects as opposed to a sum of money, Jones-Pauly (1998) uses the description "trousseau". Because gold jewellery (which is a common *mahr* in Egypt) is valuable and easy to trade, Egyptian women are often forced to remit their *mahr* to their husbands. In legal terms, this is a unilateral gift; it cannot be reclaimed (Jones-Pauly 1998). Tunisian *mahr* has a different nature and purpose than that of Egyptian *mahr*, which differs again from Iranian or Saudi Arabian *mahr*.

In each country, the background legal and social order determine the tools the woman has at her disposal to protect herself in the event of divorce; *mahr* is not necessarily her best option. For example, it is common for Egyptian women to marry within their family, to cousins or other kin – it is viewed as the best way to ensure financial security in case of death or divorce. Also because of the reluctance among Egyptian women to use the judicial system, an intra-familial marriage may also provide the best option for protection against violence or abuse (Jones-Pauly

1998). Even in countries where *mahr* is the woman's principal (and possibly only) avenue for financial security or bargaining out of an unhappy or abusive marriage, depending on how the law is applied and what custom dictates, it may not be much use at all. In Iran for example, it is noted in the *Encyclopedia on Women and Islamic Culture* that despite legal reform attempting to make judicial divorce more accessible for women, the expense and hostility they are met with mean that most still revert to "buying" their freedom through *khul'* divorce, which requires the relinquishing of the *mahr*. In order to prevent the divorce, the Encyclopedia notes that husbands are "increasingly demanding much more than the *mahr*, assuming they do not refuse the divorce outright" (Joseph and Najmabadi 2005, p. 106).

3.4. Consequences of mahr – mahr as a bargaining tool

Aligned with the formal purpose of providing the wife with financial security in the case of *talaq* divorce or death of her husband, the *mahr* is an essential component in the *khul'* divorce. Theoretically *khul'* divorce is the entitlement of the wife, granted on the proviso that the *mahr* is renounced. Although the amount and form of *mahr* may be prescribed according to school or jurisdiction, there is potential to use the *mahr* as a bargaining tool: in order to more easily gain a divorce; in order to prevent the divorce; in order to gain child custody. If a deferred *mahr* is set beyond the means of the husband, this will often provide a deterrence for divorce – since pronouncement of *talaq* will require the payment of the deferred *mahr*. Similarly, a high *mahr* may prevent the husband from taking a second wife, since he will have no means to provide another *mahr*. Conversely, although a significant prompt mahr may provide initial financial independence, it can prohibit the wife from seeking divorce, since she will have to repay her *mahr* in compensation.

To an extent, the above points are purely academic given that the *mahr* and indeed the entire marriage contract, is unlikely to be negotiated by the wife herself. Indeed, the consent of the wife to the contractual terms, or the marriage itself is often unnecessary⁹ (Pearl 1979, p. 44; Abu-Odeh 2004, p. 1102-3; Tucker 2008, p. 42-3). The groom, his family and the bride's guardian are the principal parties involved in the Islamic marriage negotiation (Blenkhorn 2002, p. 197), including the provisions relating to the *mahr*. Again, although technically the bride is permitted to add stipulations to her marriage contract through the *wali* (though Esposito and DeLong-Bas (2002 p. 23) note that the Hanafi school does not allow the wife to add further stipulations to the marriage contract), such stipulations may be contrary to law, social norms or may be frustrated by the inability of the woman to make her voice heard during the negotiations (Blenkhorn 2002, p. 198).

Once again, the background legal rules are of prime importance here, as are the social and cultural norms of the community; these will likely dictate the operation and function of the *mahr*. Such norms are not static. In Lisa Wynn's examination of "*Marriage Contracts and Women's Rights in Saudi Arabia*" she cites an anthropological study of elite families which identified trends in the *mahr* (Wynn 2009, p. 203-4). Initially it often consisted of furniture and household goods that would be brought to the conjugal house. By the early 1980s this changed; the groom would pay a minimal *mahr* but bear the cost of furnishing the house. More recently the *mahr* among Saudi elites reached huge figures, paid directly into the bank account of the wife. Wynn also notes that in Saudi "there is no tradition of a deferred dower... as seen in other parts of the Arab world" (2009, p. 205) and that even within Saudi Arabia "the amount of the *mahr* and the bride's access to it varies, particularly between urban and rural areas" (2009, p. 207).

⁹ These references describe the Hanafi Doctrine as permitting the contracting of a marriage of a minor daughter by the father, even by force. In Egypt this rule is the default legal position and in Jordan the guardian's consent is required in all cases, unless the woman is of majority age and has already been married.

My point here is not only to illustrate the diversity that exists in the written and applied law and custom within the Islamic world, but also to raise the observation that the purpose and nature of the *mahr* is highly variable; between legal codes, legal schools, social-status, economic class, even between urban and rural areas of the same country. As Pascale Fournier has argued: "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" (2007, p. 24).

Given this, what approach should Western courts take when the *mahr* is raised as a legal claim in a non-Islamic legal system? In my discussion of the case law, a number of cases show that the husband may claim that in his religion, culture, or to his knowledge, the *mahr* is merely symbolic and it is therefore not due. If the couple are Tunisian, *mahr* may well be symbolic; the Court may wish to look at the relevant Tunisian provisions and determine what the parties would be entitled to had they been residing and divorcing in Tunisia. However, if the couple are Saudi Arabian, *mahr* is unlikely to be merely symbolic and to say so is a manipulation of the judge's ignorance of Islamic law.

Yet, as I have outlined, it is not only the laws of the country of origin that are relevant when considering the *mahr*. Should Western courts be expected to examine the social and cultural norms? My purpose here is merely to raise the observation of the impossibility for Western Courts to apply foreign law in the precise way that it would be applied in that foreign country (complete with the social/cultural and other considerations that may well be made by the foreign court). I now turn to the diverse approaches Western courts have taken in resolving claims regarding *mahr*. I question whether reasoning that attempts to transplant foreign law or foreign social norms is any more or less beneficial for the Muslim wife than treating *mahr* as a right *ex contractu*, *mahr* as a prenuptial agreement, or *mahr* as unenforceable. I examine why each of these approaches can be problematic and finally make some normative proposals in answer to the question "how should Western secular courts navigate religious institutions such as *mahr*?"

4. Mahr as a contract

4.1. *Mahr as a right ex contractu*

4.1.1. In English courts

Some early examples of *mahr* being regarded in strictly contractual terms are seen in English case law courts from the first wave of immigrants from South Asia. The first case, *Shahnaz v Rizwan* (1965), involved a couple who had married in India, under Islamic law but were residing in England. The husband filed for divorce and the wife claimed £1,400 in deferred *mahr*. The husband argued that the *mahr* was a matrimonial right, which the English court had no precedent of recognising and therefore should refuse to do so in this case. An added complication arose from the fact that the English system at this time refused to recognise "potentially polygamous unions". Perhaps in order to bypass this obstacle, the judge was careful to qualify the *mahr*, not as a matrimonial right but as a "right *ex contractu*" – which while "entered into in contemplation ... of a marriage", was nonetheless a right in contract and therefore enforceable. Pearl and Menski note the consideration of public policy in the Court's reasoning: "...there being so many Mohammedans resident in this country, it is better that the court should recognise in favour of the women who have come here...than that they should be bereft of those rights and receive no assistance from the English courts" (1998, p. 233). Thus the fate of these women, otherwise vulnerable to financial destitution, is an important consideration in the Court's decision and offers some elucidation as to the attempt to depart from previous reasoning and find the *mahr* due. The question has been raised whether the Court would have applied the same reasoning if the *mahr* had not been specified and it has been surmised that the Court would find this a

problematic step further into the uniquely religious Islamic marriage contract. David Pearl has argued that there is no reason why this should be the case. If the court treats *mahr* as a contract, there is no reason why they should not assess the quantity of *mahr*, since the Courts regularly encounter (and resolve) other contractual matters without specified sums (1998, p. 234).

This approach to *mahr* as a purely contractual right was supported in the later case of *Qureshi v Qureshi* (1971), a case involving a Pakistani husband and Indian wife who married in England. They underwent an English civil marriage and an additional Muslim ceremony conducted in conformity with Islamic law. After the parties separated the wife was able to obtain maintenance. The husband divorced the wife by *talaq* and this was pronounced as absolute by the Pakistani High Commissioner in accordance with Pakistani law. The wife's principal claim in Court was that the marriage still existed and that the husband had to continue to provide maintenance. If the Court found the marriage had been validly dissolved the wife alternatively claimed her *mahr* of £78,833, plus the maintenance of £5 per week.

The President of the Family Division awarded the wife her *mahr*, on the grounds that her divorce had been valid. The Court had discretion to refuse to recognise this form of divorce using the public order principle; however, it viewed that since the marriage was going to be dissolved in any event, the wife would be better off if her divorce were recognised in order that she could recover her *mahr*. She was not awarded maintenance on the grounds that she was no longer married. Again the fate of the wife was a persuasive factor in the Court's decision: "Whatever the judgement of this court, the husband will not return to the wife....she is really better off with a judgement for a considerable sum of money, which is likely to be more easily enforceable....than with the largely meaningless right to be recognised locally as his wife".

Pearl and Menski question the lack of subsequent case law in England on this issue (1998, p. 233). It could be that these cases serve as precedent for unreported judgements, or conversely that Islamic women are being pressured into not using the civil courts to determine *mahr* (Pearl and Menski 1998, p. 233). It is important to note that since both cases the English Family Law Act of 1986 has refused legal recognition to Muslim divorces in the UK and to informal divorces made abroad. This in part explains the prevalence of the so-called "Shari'a Courts" in the UK. These are arbitration tribunals that work in the same way as any other alternative dispute resolution body, in settling disputes among Muslims. Such "courts" are in fact largely informal tribunals which would require a civil enforcement order to make the agreement binding. However, the Muslim Arbitration Tribunal established in 2007 under the Arbitration Act 1996 can provide dispute resolution that is legally binding under the civil law and conforms to *Shari'a* law,¹⁰ offering Muslims a viable alternative to civil courts and informal tribunals.

Yet *mahr* has not disappeared from the English courts. Notably prior to the establishment of the Muslim Arbitration Tribunal, Werner Menski (2002) discusses the unreported case of *Ali v Ali* (2000), a decision he calls "the case of the missing pound". In this case (in which Prof. Menski gave expert testimony on behalf of the wife), a Bangladeshi couple residing in London had married civilly and religiously,¹¹ according to secular law and the tenets of their faith. *Mahr* was furiously bargained between the bridegroom and the bride's family and was eventually set at £30,001. A few months later Mr Ali sought to divorce his wife civilly and Mrs Ali sought the *mahr*. Mr Ali made the argument (that arises frequently in these cases on the *mahr*) that his obligations were a matter of Islam, should be treated as "custom" and not law and that the Court should therefore refuse to enforce them. If solely civil law was applied the wife would be entitled to nothing, it being such a short

¹⁰ For further information see <http://www.matribunal.com/index.html>.

¹¹ What Prof. Menski terms "*angrezi shariat*" – British Muslim law, where the couple make sure that they follow English law as well as the customary norms of their respective Muslim societies.

marriage and she being a professional woman capable of earning her own income (Menski 2002). Menski gave expert evidence to the Court as to the nature of the marriage and divorce in this case; explaining that in effect two separate marriages and divorces were in existence here, with different obligations under both. Mr Ali further tried to argue another point that crops up continually in litigation over *mahr* – that such a high *mahr* was promised for reasons of status, yet there was no genuine intention to pay such a sum. The judge, considering that to refuse the *mahr* would leave the wife no option but to have her case adjudicated before an Islamic court, awarded the wife £30,000 exactly – the *mahr* less £1.

Because the case is unreported and I am relying on Menski's commentary (Menski being an expert witness in the case) for my interpretation, it is difficult to ascertain the precise reasoning of the judge. However, we can assume since the sum enforced was not exactly that specified in the contractual agreement the right was not purely *ex contractu* as seen in *Shahnaz v Rizwan*. Instead it seems that the decision was particularly influenced by public policy considerations, the judge keen to avoid sending Mrs Ali for resolution in a "Shari'a court", yet asserting the supremacy of civil law over "religious law" by not awarding the exact agreed sum (Zaman 2008). Saminaz Zaman sees this as evidence that the court "actively engages in the 'forum shopping' contest created by British Muslims" (2008, p. 194).

The recent Court of Appeal case of *Uddin v Choudhury* (2009) sheds further light on the approach favoured by English judges. In this case an arranged marriage was dissolved by the issuance of decree of divorce by the Islamic Shari'a Council, on application by the bride. Uddin, father of the groom, raised an action claiming £25,000 for items of jewellery taken by the bride during the marriage. The bride counterclaimed for the amount of the mahr - £15,000. The appeal court judge relied on the trial court judge's assessment of parties' evidence and that of an expert witness. Relying principally on the opinions of the expert witness, the trial judge held that the items taken by the wife were legally hers since they had been given as outright gifts and did not constitute part of the mahr. In addition, he determined that on the basis of expert evidence in relation to the marriage contract, there was a valid mahr, enforceable by the court.

On appeal Mr Uddin made the claim that the expert evidence given had been ignored or misunderstood by the trial court and also that the invalidity of the marriage affected the bride's right to the mahr. He further stated that it was "custom that gifts made in relation to the forthcoming marriage ought to be deducted from the mehar". The Court of Appeal however, rejected these submissions and endorsed the findings of the trial court judge. In the penultimate paragraph of the judgement it suggests that Mr Uddin was of the view "that the bride did not really intend to remain married to his son, but had someone else in mind, and that it was relevant to look at these reasons for the failure of the marriage in the context of the money that he had invested in it".

In a commentary on the case, Roger Ballard (2010) notes the significance of the court's recognition of the enforceability of the *nikah* but laments the failure of the court to identify the importance of determining the basis on which the *nikah* was terminated. Ballard queries the expertise of the expert, given that he failed to draw the judge's attention to the Islamic rule that where the marriage is dissolved before consummation, by husband or wife, the wife may lose the mahr (2010, p. 4). He also voices concern both in relation to the reliance the trial judge had on the expert evidence and the failure to ask pertinent questions about the facts and circumstances surrounding the marriage and its dissolution. Was the jewellery specified in the *nikah*? What provisions were made by the Islamic Council upon dissolution in relation to the jewellery and the mahr? Was the divorce female instigated *khul* (as seems to be suggested by the fact that the "bride" made the application) or consensual *mubaraat*? As we know this would greatly impact the distribution of the mahr. This case neatly encapsulates the dangers inherent in

domestic courts adjudicating on the private religious ordering of families who subscribe to religious and cultural norms wholly unfamiliar to these domestic judges. The result is an over-reliance on the testimony of the expert witness, which, when misunderstood, misapplied or downright erroneous can have dismaying consequences for fair and accurate dispute settlement.

4.1.2. In US Courts

A significant difference exists between the US and English family law systems - the recognition of prenuptial agreements in the US. These agreements are only of persuasive authority in England: "[In the US] a couple may add any additional provisions to the marriage contract so long as this does not violate public policy. Most states, with Illinois as a notable exception, recognise and enforce these contracts" (Zaman 2008, p. 192). Another difference is obviously the existence of the federal system in the US, family laws are not uniform among the states. In contrast to what Saminaz Zaman (2008, p. 186) views as "angrezi shariat" ("the much-contested, largely private and unofficial application of Islamic law by British Muslims in the shadow of official state law"), Muslims in the US "must contend with the fact that in the US legal system, law varies from state to state, so that a couple that marries in California would expect a different definition, for example, of marital property from a couple in Massachusetts. The US Muslim law thus appears internally plural in a different manner than unofficial Muslim law in Britain." (Zaman 2008, p. 187).¹²

Despite the legal enforceability of "prenups" in the US, some Courts have preferred to treat the mahr as an "enforceable secular contract" (Fournier 2007, p. 192). In *Odatalla v Odatalla*, a New Jersey Court considered the case of a Muslim wife who raised an action for divorce and who sought equitable division of property and her mahr of \$10,000. Mr Odatalla argued that mahr was unenforceable on two grounds: that recognition was incompatible with the First Amendment principle of church and state and second, that the contract was not valid under New Jersey law. Relying principally on a videotape of the wedding which depicted the families negotiating the mahr, signing the license and presenting the bride with the prompt mahr of one golden coin, the judge held that this constituted a valid contract that satisfied the "neutral principles of law" and was not contrary to public policy. Crucially, in this case the mahr agreement (which is somewhat of a false term, since it constitutes part of the marriage contract) was not treated as a prenuptial agreement - it was decided separately from the equitable division of property (Edwards 2002). It was considered a contractual agreement giving rise to rights in personam in much the same way as the earlier English cases of *Shahnaz* and *Qureshi*. Mrs Odatalla received her mahr on top of an equitable division of matrimonial property, despite having initiated the divorce - she benefited from the combination of civil law and Islamic law in a way that she would not have done had her divorce been decided in an Islamic country.

4.2. Mahr as a prenuptial contract

4.2.1. In US courts

Blenkhorn, in her article on Islamic marriage contracts in American Courts, argues convincingly why *mahr* agreements and prenuptial (or "ante-nuptial") agreements are non-comparable and should not be treated as analogous by courts (Blenkhorn 2002, p. 203). *Mahr* may be viewed as a compensatory tool for the inequities in Islamic marital/divorce law; Muslim women face the prospect of being unilaterally divorced or of having to bargain - using the *mahr* - in order to initiate divorce. The

¹² I am compelled to note here that Zaman ignores the distinct legal system of Scots law (which includes family law) in his description of Britain. It would be more accurate to use "England". Although some of the differences in Scots and English family law are nominal, others are significant - for example the greater legal recognition given to prenuptial agreements in Scotland as compared to England.

very purpose of a prenup is not to compensate a spouse, but to protect assets from them (Blenkhorn 2002, p. 203). The *mahr* is by its very nature gender-specific. It is only applicable to Muslim women, who are subject to discriminatory inheritance laws and separate property regimes which likely disadvantage them. In contrast, p. renuptial agreements are gender-neutral and can be used by either spouse. Finally, the prenuptial agreement protects assets from being included in what would otherwise potentially be "community property", the concept of which does not exist in Islam. For these reasons, Blenkhorn maintains the importance of distinguishing between *mahr* agreements and prenuptial agreements.¹³

A number of US cases have held that the *mahr* agreement constitutes a prenup and should thus preclude equitable division of property. In an early example from New Jersey, *Chaudry v Chaudry*, the Court held that the *mahr* was a valid prenuptial agreement and the wife was awarded \$1,500, considerably less than she would have received if matrimonial property had been judicially divided.¹⁴ In *Akileh v Elchahal* (1996), it was first held that a deferred *mahr* of \$50,000 was unenforceable, since there was "no consideration" and "no meeting of the minds". The wife had filed for divorce, having contracted a venereal disease from her husband. He claimed that since his wife initiated divorce no *mahr* was due, which appears an accurate understanding of the principle of *khul'* divorce. On appeal this reasoning was reversed and the court held that the upcoming marriage represented sufficient consideration to constitute a prenuptial agreement and there was satisfactory "meeting of the minds" on the essential terms. Unlike in *Chaudry*, the wife in *Akileh*, benefited from this construction of *mahr* as a prenup – her \$50,000 *mahr* was worth more than half of her husband's assets (Blenkhorn 2002, p. 208).

The effect that interpreting *mahr* as a prenup has on the fortune of the wife is greatly dependent on the amount of *mahr* that the wife (or her family) have been able to negotiate prior to the wedding. As already mentioned, this varies considerably in relation to the family's social standing, the personal characteristics of the bride (beauty, virginity etc.), the wealth and social standing of the bridegroom and the legal, cultural and social norms imported from the country of origin. This raises issues in a number of hypothetical situations. For example, one can envisage the family of a young woman from Pakistan betrothed to an American man of Pakistani origin, accepting a lower *mahr*, given that the bride will be able to come to America and will perhaps benefit from a higher standard of living. If she is then divorced by her husband and the court enforces her *mahr* as a prenup she may well be left with a meagre sum. Alternatively, an extremely high dower may be agreed upon, principally to deter the husband from divorcing his wife. What if, after an extremely short marriage, the wife meets someone else, instigates a civil divorce and the court grants her *mahr* on the basis that it constitutes a prenup. The purpose of the *mahr* under Islamic law is entirely frustrated and although some may argue this is a beneficial outcome for the wife, it neither satisfies the concept of "fairness" nor satisfies the parties' obligations under Islamic law.

4.3. *Mahr as an unenforceable contract*

A number of American, Canadian and European cases¹⁵ indicate a propensity for courts to find *mahr* unenforceable and avoid it entirely. Unenforceability may be justified for a number of reasons: contractual vagueness, fundamental discordance with public policy, "too religious", "too foreign", "too unfair", no "meeting of the

¹³ Blenkhorn cites *In re Marriage of Shaban* (105 Cal. Rptr. 2d 863, 2001) as an example of a court getting this right. I will come back to this case below under the heading "Mahr as unenforceable".

¹⁴ Mr Chaudry was a doctor and presumably one can assume Mrs Chaudry would have been entitled to considerably more had the *mahr* not been interpreted as a prenuptial agreement.

¹⁵ I will not detail these cases but instead see Fournier, P. 2007 *Islamic Marriage in Western Liberal Courts: Beyond "Recognition", "Equality" and "Fairness"* Dissertation (SJD) Harvard Law School and Jones-Pauly, C., 1998 (June 14th). *The Status of Woman in Islamic Law*. Lecture in Göttingen, Germany see <http://www.islamfortoday.com/womeninlaw.htm>.

minds". By rendering *mahr* unenforceable it is argued that the Court restructures this quasi-religious institution into something secular: "deprived of its Islamic flavour, *mahr* becomes a (Western) contract enforceable (or not) irrespective of race, gender, or religion....the liberal system as devoid of [a] representative role for the "Muslimness" of the parties" (Fournier 2007, p. 212).

Mahr as "too religious" is exemplified by the Canadian case of *Kaddoura v Hammoud*. The husband in this case initiated divorce. He argued the all-too-familiar "*mahr* as a religious agreement" and thus unenforceable by civil, secular courts. In his testimony he conceded that he had agreed to the \$30,000 *mahr*, but had understood that he would never be compelled to pay it. Despite hearing expert evidence on Islamic law and culture, the Canadian judge skirted the issue altogether by declaring that *mahr* was not appropriate for adjudication in civil courts, "the religious thicket....is a place that the courts cannot safely and should not go".

American cases have tended to view unenforceability as arising from vagueness, or contrary to American law. *In re Marriage of Shaban* a Californian appellate court overrode a *mahr* agreement on the grounds that it did not constitute a valid prenuptial agreement, being too vague in its terms to constitute a valid prenuptial agreement. Here the couple had married in Egypt, some thirty years before and sought divorce in California, where they were now resident. The marriage contract stipulated a *mahr* equivalent to approximately \$30. The husband was a doctor with assets worth upwards of \$3 million. The marriage contract stated that it was to be governed by Islamic law, which the husband argued implied separation of property. The court was unconvinced by this argument and found the invocation of a religious legal order to be too uncertain to constitute a prenuptial agreement. "Islamic law" in the context of this case could refer to the Egyptian law on marriage from thirty years ago, or the current Egyptian law – complete with a reformed personal code, or alternatively classical Hanafi law (Blenkhorn 2002, p. 213). Further, Muslims can change legal schools if they find the doctrine of another to suit them better under the circumstances (Pearl 1979, p. 102, 105). For an American judge to make such an investigation into the intention of each party, given all these variables as to which legal order they contracted to apply and then deal with the intricacies of applying a foreign, quasi-religious law, is unduly onerous.

A similar holding was given in *Habibi-Fahnrich*, where a *mahr* provision in the marriage contract was found not to be a contract in itself and that it was unenforceable in any case, the material terms "half of the husband's possessions deferred" being too vague. What is clear from these cases on enforceability is the importance of specificity of contractual terms if the parties seek to have their agreement upheld in a Western civil court. This was also seen in the English cases; those cases were unlikely to have been decided in the same way had the *mahr* been not a specified amount and, I would add, had there not been strong considerations of fairness involved in granting the women their *mahr*.

In the case of *Obaidi v Qayoum*, the Washington State Court of Appeals held that, where a *mahr* agreement was signed by a groom who did not read or speak the language in which it was written and where its terms had not been explained to him before signing, it was unenforceable on the grounds that there had been no meeting of the minds. At trial the court found the facts and law supportive of Ms Obaidi's entitlement to the \$20,000. One wonders whether the fact that after less than a year of marriage Ms Obaidi was asked by her husband to go to Afghanistan for a number of months and upon her return was asked to leave their family home had any influence on the trial court's conclusions. However, on appeal the court decided that this case must be resolved by application of "neutral principles of law, not religious beliefs or policies" and held that the trial court erred in its consideration of Islamic law and fault – consequently the contract was unenforceable and no *mahr* payable.

A pragmatic solution would appear to be a duality of contracts (Foblets 2007). Islamic couples could retain their Islamic marriage contracts, complete with *mahr* provision, yet also draw up a civil, legally binding prenuptial agreement that stipulates the division of property along the lines of Islamic legal principles. The increasing number of Western-trained, Muslim lawyers should aid in facilitating this (Pearl and Menski 1998). However this solution ignores, firstly, those countries that do not recognise prenuptial agreements, such as England. Second, it leaves unanswered the wider questions surrounding the accommodation of Islamic legal practices into a Western civil (secular) legal order, and the further question – should there be any accommodation? And if so, how much? Where do *Shari'a Councils* factor in? Should they be encouraged or discouraged? It is impossible to dissociate the recognition of Islamic family law in Western courts, through whatever guise, whether contractual, prenuptial or religious exceptionalism, from politics. I attempt to face some of these questions in the concluding section below.

5. Mahr in the wider context of legal pluralism and social assimilation

There are a number of issues at play when issues of *mahr* are brought for determination before Western civil courts. One is, how much recognition should be given to the peculiarities of the Islamic legal regime. What about when recognition clashes with the fundamental principle of gender equality? These questions are inevitably interrelated with the “type” of multiculturalism (and the extent of secularism) in operation in a state. This is by no means uniform across the “Western world”. However, at this point a more comprehensive examination of these concepts is, at present, beyond the scope of this paper. Suffice to say that how a state defines “secularism”, “reasonable accommodation” and “legal pluralism” will strongly influence the treatment of minority legal orders within its borders.

It is also important to bear in mind that however much we frame *mahr* as contract, it remains in the realm of family law, which is itself an expression of the tradition, ideology and culture of a nation and thus intrinsic to its sovereignty. Therefore a call for recognition of unfamiliar family forms, property regimes, marital regulation will inevitably invite controversy. The approach of religious exceptionalism, as seen in a number of Canadian cases, where the court essentially takes the approach that *mahr* is the religious and cultural expression of a minority group and must therefore be upheld on this basis, is one I would reject. This move towards a strong system of legal pluralism is problematic in that it contradicts what is seen by some as the very nature and purpose of law (in its equal application to all and distinct from the religious sphere) and, aside from the danger of inciting widespread public opposition, risks the further marginalisation and exclusion of religious communities precisely by viewing them as “exceptional” and “separate”.

It is also problematic in practical terms. The application of law dependent on one’s religion necessitates the judge being capable of applying those legal-religious principles accurately. He would need expert evidence in order to do this. Given the heterogeneity of Islamic law, is expert evidence remotely viable? As seen in the Canadian cases that applied “religious exceptionalism”, the parties were both able to find experts on Islamic law to support their competing claims. The decision the judge reaches may well be influenced by the persuasiveness of the witnesses or the parties, as is natural in all judicial decision-making. Yet it would be mistaken to claim that what he is deciding accurately reflects the tenets of a religion or custom with which he is unfamiliar.

Some may argue that framing the *mahr* as a prenuptial agreement is even more problematic than treating it as an exceptional and religious institution, or enforcing it as a right *ex contractu*. For the reasons given above, *mahr* is quite distinct from a prenuptial agreement. The reasoning employed by various courts has failed to recognise that 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" (Fournier 2008). The application of *mahr* as a prenup, regardless of whether the wife initiates divorce (as in *Akileh*), inherently contradicts its purpose in Islamic law. It illustrates the court's lack of understanding (and perhaps intention to purposefully not understand) regarding the nature of *mahr* as an Islamic religious institution.

Perhaps *mahr* may be more accurately recognised as an independent right arising from contract (despite its fundamental inseparability from the Islamic marriage contract). The court then has the discretion to interpret those rights as only arising in circumstances where *mahr* is intended to apply, i.e. on the unilateral repudiation of the wife by the husband. This is a difficult point to argue; entrenched as we are in gender-equality norms (fortunately), it seems absurd to propose that Western courts should more faithfully recognise the nature and purpose of the *mahr*, especially if this acts to the detriment of Muslim women. However, it is necessary to consider the all-encompassing nature of Islam or indeed any religion followed devoutly: "religion is not merely a matter of belief; it is a way of life; it is action" (Freeman 1958). The failure of the courts to properly recognise Islam may have the precise effect of what the court in *Ali* was trying to avoid – driving Muslim litigants out of the civil courts and into informal Islamic arbitration tribunals. In this sense civil law must be conscious of the background presence of Islamic arbitration.

A further problem with the Western courts attempting to apply Islamic law is that often the specific "version" of Islamic law in question is a form manipulated by the parties in order to present their case in the most persuasive way. Husbands claim that they only ever considered the *mahr* as symbolic and not binding, wives claim that the *mahr* is due despite their having initiated the divorce. The stringent application of what is often classical Islamic law ignores the fact that many Islamic jurisdictions have reformed their personal status codes with a more liberal interpretation of Islamic religious doctrine. Ironically Muslim couples may encounter a more liberal application of the *shari'a* in their country of origin. It is imperative to avoid a situation whereby British or American Muslims must return to their country of origin in order to conduct their personal legal affairs.

As Pearl and Menski note, the aspects of Islamic law that Western jurisdictions find contrary to public policy do not just disappear because they receive no recognition in the civil law system and cite cases involving under-age Muslim spouses as an example. These "have become virtually invisible to the law for several reasons"; ethnic minority communities in Britain have "learnt" the law and found ways to bypass it. The problem of arranged marriages of minors "has been virtually exported from Britain by members of a transnational community who can use several legal systems for their family arrangements" (Pearl and Menski 1998, p. 174).

Turning the above argument on its head; one could argue that the very option of Islamic tribunals which apply *shari'a* law further necessitates civil courts applying *only* secular civil law. Influenced by a Rawlsian notion of government and society (Rawls 1993) the legal scholar An-Na'im (2008) is an ardent proponent of the view that the secular state enables real freedom within Islam. An-Na'im proposes a "liberal modernist" understanding of Islam that is consistent with international human rights requirements. He understands the *Shari'a* to be a dynamic instrument that is continually adapting – codification extinguishes this quality. In his view enforcement through state institutions forces a choice between competing interpretations, factor in judicial discretion and the system becomes wholly arbitrary and unstable (2008, p. 323). Feminists would agree with An-Na'im, and emphasize the importance of the civil courts providing an alternative to Muslim women whose rights are limited under an Islamic regime. John Bowen raised the potential for "forum shopping" in England; a Muslim women would first seek a divorce through an informal *Shari'a* arbitration and if she didn't like the outcome,

would go to the civil courts to assert her property rights there (Bowen, personal communication at Harvard Law School on 1st December 2009) and for many this is unproblematic. In fact this occurs continually, and not only in relation to minority groups; many couples seek to use mediation or arbitration first, using the civil courts as a last resort (with most avoiding them entirely).

However, as the lack of case law from England concerning Muslim women illustrates, it seems that examples of Muslim women using the civil court system are uncommon (Bano 2007). Samia Bano (2007) outlines the reasons for the unwillingness of British Muslim women to utilise the civil system in family cases. She suggests that: *"Firstly, under Muslim tradition, family issues are purposively left to "extra judicial" regulation and diasporic communities continue this traditional and resolve matrimonial disputes within this sphere. Secondly, Muslims do not recognise the authority and legitimacy of Western secular law on a par with Muslim law. Thirdly, the notions of honour and shame prevent familial disputes from being discussed in the public sphere and consequently religious laws are given greater potency and legitimacy within communities. And finally, the failure of the state to recognise plural legal order has led to the development of these "alternative" dispute resolution processes"*.

6. Conclusion

I have focused on contract, because this is broadly the way in which *mahr* has been framed in judicial decisions and in many ways a contract in its strictest sense is exactly what the Muslim marriage contract purports to be. Containing explicit clauses as to the regulation of the marriage and with the flexibility to include stipulations from either party, this is a contract that is negotiated and bartered between families. The conclusion is a legal document that under Islamic law, legally binds the parties. Where the contract sits uneasily with the Western legal conception of "contract" is in its invocation of the Islamic religion and in the blatant inequalities between the parties, solely on the basis of gender. These inequalities are present, not only as result of the contract terms, but also in the background legal order that regulates the negotiation of the terms.

In many ways, recognising *mahr* agreements as contractual clauses giving rise to rights in personam is judicially feasible. As I have already stated, there are a number of reasons why *mahr* is closer to a contractual right than a right arising from a prenuptial agreement. Viewing *mahr* as a contractual provision holds the husband to his obligations and respects the parties' autonomy to regulate their familial affairs in accordance to religious or cultural norms. It also leaves the court discretion to find the *mahr* provision unenforceable in the case of vagueness, or where there is evidence of duress or undue influence. In order to avoid vagueness, parties should create a civil contract in addition to their Islamic marriage contract that stipulates the payment of the *mahr* under certain conditions. However, if one of these conditions was that *mahr* is only payable in the event of a male initiated divorce, courts would have strong justification, on the grounds of public policy, to render this unenforceable. My concerns with the *mahr*-as-contract option arise from the inequality of bargaining power between parties. As I have described, although Islamic marriages vary enormously, women in Islam rarely have equality of bargaining power. The role of the potential bride in the negotiation of the Islamic marriage contract is minimal, her male guardian acts on her behalf, including in the negotiation of the *mahr*. Therefore to what extent should courts affirm *mahr* as a contract entered into freely by two parties?

Islamic family law continues to retain primacy for Muslims residing in "secular" countries and the *mahr* is a central component of the Islamic marriage contract. Refusing recognition to such a fundamental aspect of Islamic law and culture risks alienating Muslim minorities to the extent that civil courts are avoided and all personal affairs of Muslim minorities are dealt with through arbitration tribunals.

This gives rise to a clear multiplicity of legal systems (however informal), which begs the question: are we willing to move towards a more "plurality-focused future" (Menski 2002, p. 18)?

7. References

- Abu-Odeh, L., 2004. Modernizing Muslim Family Law: The Case of Egypt. *Vanderbilt Journal of Transnational Law*, 37 (4), 1043-1146.
- Akileh v. Elchahal*, 666 So.2d 246 (Fla. Ct. App. 1996).
- Ali, K., 2009. Marriage in Classical Islamic Jurisprudence. In: Vogel, F.E. and Quraishi, A., eds. *The Islamic Marriage Contract: Case Studies in Islamic Family Law*. Cambridge: Harvard University Press 11-45..
- An-Na'im, 2008. Shari'a in the Secular State: A Paradox of Separation and Conflation. In: Bearman, P., Heinrichs, W., and Weiss, B.G., eds. *The Law Applied: contextualizing the Islamic Shari'a*. London: I. B. Tauris, 321-341.
- Ballard, R., 12 Jan 2010. *One step forward, two steps back* [online]. Centre for Applied South Asian Studies (CASAS). Available from: <http://www.casas.org.uk/papers/pdfpapers/2stepsback.pdf> [Accessed 11 Sep 2011].
- Bano S., 2007. Muslim Family Justice and Human Rights: The Experience of British Muslim Women. *Journal of Comparative Law*. 2 (2), 38-66.
- Barlas, A., 2002. *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an*. Austin: University of Texas Press.
- Blenkhorn, L., 2002. Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreement as Prenuptials and Their Effect on Muslim Women. *Southern California Law Review* [online], 76 (1), 189-234. Available from: http://lawweb.usc.edu/why/students/orgs/lawreview/documents/Blenkhorn_Li ndsey_76_1.pdf [Accessed 19 Sep 2011].
- Chaudry v Chaudry* 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).
- Edwards, J., 2002. Islamic Marriage Contract Upheld. *New Jersey Law Journal*, [online]. Available from: http://www.zawaj.com/articles/contract_upheld.html [Accessed 21 Sep 2011].
- El-Azhary Sonbol, A., 2009. A History of Marriage Contracts in Egypt. In: Vogel, F.E. and Quraishi, A., eds. *The Islamic Marriage Contract: Case Studies in Islamic Family Law*. Cambridge: Harvard University Press, 87-122.
- Esposito, J.L., DeLong-Bas, N.J., 2002. *Women in Muslim Family Law (Contemporary Issues in the Middle East)*. Syracuse: Syracuse University Press, 2nd ed.
- Foblets, M.C., 2007. Moroccan Women in Europe: Bargaining for Autonomy'. *Washington and Lee Law Review*, 64 (4), 1385-1415.
- Fournier, P., 2008. Paper selected for the Harvard-Stanford International Junior Faculty Forum 2008 *Flirting with God in Western Secular Courts* . Available from: <http://www.callacbd.ca/conferences/2009/FournierPaper.pdf> [Accessed 11 Sep 2011].
- 2007. Islamic Marriage in Western Liberal Courts: Beyond "Recognition", "Equality" and "Fairness". Dissertation (SJD). Harvard Law School at 35.
- Freeman, H.A., 1958. A Remonstrance for Conscience. *University of Pennsylvania Law Review*, 106, 806-830.
- Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at 1 (N.Y. Sup. Ct. July 10, 1995).

- In re Marriage of Obaidi v. Qayoum* No. 27616-3-III (Wash. Ct. App. Feb. 23, 2010).
- In re Marriage of Shaban* 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001).
- Jones-Pauly, C., 1998 (June 14th). The Status of Woman in Islamic Law [online]. Lecture in Göttingen, Germany. Available from: <http://www.islamfortoday.com/womeninlaw.htm> [Accessed 11 Sep 2011].
- Joseph, S. and Najmabadi, A., 2005. *Encyclopedia of Women & Islamic Cultures: family, law, and politics*. Vol 2. Leiden ; Boston: Brill Academic Pub.
- 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.).
- Menski, W., 2002. *Immigration and Multiculturalism in Britain: New Issues in Research and Policy* [online]. Lecture delivered at Osaka University of Foreign Studies. Available from: <http://www.casas.org.uk/papers/pdfpapers/osakalecture.pdf> [Accessed 11 Sep 2011].
- Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).
- Okin, S. M., 1999. Is multiculturalism bad for women? *In: Cohen, J., Howard, M., Nussbaum, M.C., eds. Is Multiculturalism Bad for Women?* Princeton: Princeton University Press.
- Pearl, D., 1979. *A Textbook on Muslim Law*, London: Croom Helm.
- Pearl, D. and Menski, W., 1998. *Muslim family law*. London: Sweet and Maxwell, 3rd ed.
- Qureshi v Qureish* [1971] 2 W.L.R. 518.
- Rawls J., 1993. *Political Liberalism*. New York: Columbia University Press.
- Rostami Povey, E., 2001. Feminist Contestations of Institutional Domains in Iran. *Feminist Review*, 69 (Winter), 44-72.
- Schleifer A., 1985. The Legal Aspects of Marriage according to Hanafi Fiqh. *The Islamic Quarterly*, 29 (4), 193-219.
- Shahnaz v Rizwan* [1965] 1 Q.B.D. 390.
- Siddiqui, M., 1996. Law and the Desire for Social Control: An Insight into the Hanafi Concept of Kafa.a with Reference to the Fatawa .Alamgiri *In: Yamani, M. ed. Feminism and Islam: Legal and Literary Perspectives*. New York: NYU Press.
- Tucker, J.E., 2008. *Women, Family and Gender in Islamic Law*. Cambridge: Cambridge University Press.
- Uddin v Choudhury* [2009] EWCA Civ 1205.
- Wynn, L., 2009. Marriage Contracts and Women's Rights in Saudi Arabia. *In: Vogel, F.E. and Quraishi, A., eds. The Islamic Marriage Contract: Case Studies in Islamic Family Law*. Cambridge: Harvard University Press.
- Zaman, S., 2008. Amrikan Shari'a: the reconstruction of Islamic family law in the United States. *South Asia Research*, 28 (2), 185- 202.