

## LOST IN TRANSLATION? MAHR-AGREEMENTS, US COURTS, AND THE PREDICAMENT OF MUSLIM WOMEN

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### **Abstract**

*As a reciprocal contract, Islamic marriage (nikāh) furnishes rights and obligations for both spouses. Usually split into two portions, the deferred part of the bridal dower (mahr mu'akhhkar)—a one-time financial liability that both spouses agree on during the wedding proceedings—is customarily received by the Muslim wife where her husband seeks to divorce her unilaterally (ṭalāq). However, US courts faced with construing mahr-agreements have been reluctant to enforce the financial promises stipulated in such agreements. Based on evidence gathered from case law, this article argues that a combination of several factors, most importantly, the judicial anxiety to get involved in religious doctrinal interpretation, as well as the misinformed analogizing of bridal dowers to prenuptial agreements, adversely affects Muslim women as courts increasingly adhere to the presumption that mahr-agreements are non-enforceable, squarely placing the burden of proof to the contrary on women. Moreover, women's financial hardship is often the immediate result of the court's refusal to uphold a husband's commitment to pay dower. As a critical feature of Islamic marriage, the agreed-on dower payment assures financial stability after divorce, predictability, and women's bargaining power throughout a marital relationship. Since 2013, state legislators' partially successful endeavors to bar state courts from applying Islamic law under comity function as a compounding factor that has created dire prospects for the future of mahr-agreements in the US, posing a substantial risk not only to the institution of Islamic marriage, but also the parties' freedom of contract.*

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## INTRODUCTION

A dower<sup>1</sup> (usually: *mahr*;<sup>2</sup> sometimes: *ṣadāq*) or bridal gift is central to the institution of Islamic marriage. It usually consists of a considerable financial sum or number of assets. Where a dower is stipulated, a husband must confer it to the wife directly and nobody but the wife herself. Dowry are usually split into two portions, an immediate (*mu'ajjal*) and most often symbolic portion due before consummating a marriage, and a deferred (*mu'akhkhar*) portion due at the latest upon divorce or a husband's death. Dower-splitting historically evolved to ensure the financial integrity of women in the case of divorce (*ṭalāq*). Because under Islamic law,<sup>3</sup> spouses remain separate legal, financial, and social entities when married, women do not exercise the option of making alternative claims to their ex-husband's financial assets upon divorce.

This paper argues that the ways in which US courts have construed *mahr*-agreements pose significant legal barriers for Muslim women to succeed in having such agreements enforced, and thus securing the financial compensations that their husbands had agreed to as part of their marriage. The current translation of Islamic marriage (and divorce) into the US legal system has been unsuccessful on at least two levels. First, by seeking to comprehend Islamic marriage through the legal categories of secular marriage, especially prenuptials, judges have not only

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1 Secondary literature and courts regularly confuse dowers with dowries. The dower is a bridal gift that is conferred by the husband or the husband's family to the bride. The dowry is the property that a wife brings into the marriage; Melford E. Spiro, *Marriage Payments: a Paradigm from the Burmese Perspective*, in 31 *Journal of Anthropological Research* 89, 89 (1975).

2 Throughout this paper, I provide transliterations of Arabic and Persian *termini technici* in parentheses. The transliterations are in accordance with the *IJMES Transliteration System for Arabic, Persian and Turkish*; accessed March 2, 2019, <https://ijmes.chass.ncsu.edu/docs/TransChart.pdf>.

3 It is important to note that by Islamic law, I am not suggesting a monolithic Islamic legal tradition but am, in fact, always referring to a multiplicity of legal, cultural and discursive traditions which conceive of themselves as Islamic. Despite this limitation, we cannot shy away from establishing certain basic understandings about Islamic marriage and *mahr*-agreements which most Islamic legal schools agree on.

infused the assumptions that secular marriage is predicated on into the institution of Islamic marriage, but also tacitly reproduced the adverse effects that prenuptials tend to have on women. Second, as a result of the mistaken analogy to secular marriage, the court's construction of *mahr*-agreements systematically pushes women (and men) into settling their divorce cases under state property rules, which often diametrically contravene both spouses' marital intent, their freedom of contract, and the nature of Islamic marriage. Furthermore, flagging equitable distribution and community property rules as the only proper legal recourse jeopardizes the livelihoods of those women whose Islamic marriage is not also registered as a civil marriage and who would, therefore, typically end up not being able to claim any financial award, neither under their *mahr*-agreement, nor state property rules.

This paper's analysis shows that courts tend not to enforce *mahr*-agreements because

- (1) they will try to refrain from interpretations of religious doctrine out of fear of violating the Establishment Clause,
- (2) have public policy concerns, or
- (3) find the *mahr*-agreement to be non-compliant with contract law requirements.

While each of these reservations is in and of itself legitimate, it is important to understand how they function together as a seemingly concerted shield to dismiss the enforceability of *mahr*-agreements. This is especially problematic because, if one assumes that it is advantageous for women to have their *mahr*-agreements enforced, the undue burden to show that such agreements are enforceable is not on men, but women.

Yet case law indicates that it is not always a wife's counsel arguing that a *mahr*-agreement is enforceable, primarily because US courts have more than once understood them to be mutually exclusive with state property rules. Nonetheless, it is erroneous to assume that women are subjectively better off under state property rules because *mahr*-agreements are often considerable in amount and may significantly outweigh what ex-wives

would be entitled to under community property or equitable division.<sup>4</sup> For instance, in *Soleimani*, the *mahr*-agreement amounted to 1,354 gold coins, the equivalent of \$677,000 and thus significantly exceeded what the wife was entitled to under equitable division. Also, the courts have not recognized the predictable financial security that a *mahr* provides to a woman and how it is conducive to her decision-making and planning in and outside of marriage.

It is certainly not news that Islamic divorce in US courts has historically been messy. This messiness is reflected in the inconsistency with which courts construe *mahr*-agreements, and a lack of reliable precedents, legal standards, and theories of construction that a court will grant.<sup>5</sup> As others have noted,<sup>6</sup> courts will typically classify a *mahr*-agreement as either a prenuptial, a marriage certificate, or a simple contract.<sup>7</sup> Whereas many articles and organization reports have addressed the inconsistency surrounding Islamic divorce in US courts and made propositions as to how courts should construe *mahr*-agreements,<sup>8</sup> little has

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4 *Soleimani v. Soleimani*, No. 11CV4668, 15 (Johnson County Dist. Ct. 2013).

5 See Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 Family Law Quarterly 639, 639 (Fall 2007).

6 See Abed Awad, *Islamic family law in American courts. A rich, diverse and evolving jurisprudence*, in Elisa Giunchi, ed, *Muslim Family Law in Western Courts* 168, 170 (Routledge 2014).

7 For instance, in *Akileh v. Elchahal* (1996), the Court held that a *mahr*-agreement qualifies as an *antenuptial*, arguing that Florida contract law may be applied to its “secular” terms and that the stipulation of a previously agreed-on payment to the wife upon divorce, being part of these secular terms, was valid and enforceable; *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996). Yet in 2001 in *Shaban*, the California Court of Appeals noted that the financial provisions of a *mahr*-agreement were unenforceable because it ostensibly constituted only a *marriage certificate*. The Court held that the spouses’ agreement to have “Islamic law” applied to their contract is “hopelessly uncertain as to its terms and conditions” and applied state community property laws in line with California divorce laws instead; *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 864 (2001). Only a year later in *Odatalla*, the New Jersey Superior Court enforced a *mahr*-agreement on the argument that it is essentially a *simple contract*; *Odatalla v. Odatalla*, 355 N.J. Super. 305, 314, 810 A.2d 93, 98 (Ch. Div. 2002).

8 See Emily Sharpe, *Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: a Roadmap for U.S. Courts*, 14 The Georgetown Journal of Gender and the Law 189 (2013) (arguing that *mahr*-agreements should be interpreted as simple contracts under Islamic law and that *mahrs* should not be factored into eq-

been written on the gendered and highly unequal consequences that result from the court's dismissal of *mahr*-agreements.<sup>9</sup> This paper contributes to the study of Islamic divorce in the US legal system by trying to fill this literature gap. Specifically, it argues that the impacts of the courts' rulings are gendered and adversely affect women because they will usually relinquish either their *mahr*-claim or alternative claims that might have existed under state property rules.

Focusing on Islamic marriage as a case study, we can thus catch a glimpse of the legal, social, and cultural reconfiguration that occurs in the process of translating legal institutions. As will be apparent, in that process, new meanings are being created; meanings that redefine Islamic marriage and turn the individuals practicing it into virtually new legal and sociocultural subjects.

This paper makes three normative suggestions. First, it suggests that instead of construing *mahr*-agreements as prenups or marriage certificates, courts should treat them as simple contracts under Islamic law. The simple contract interpretation should be combined with the nexus-test the court applied in *Chaudry v. Chaudry* to determine whether a divorced wife may be entitled to additional compensations under state property rules.<sup>10</sup> I argue that the adoption of a combined approach to dealing with *mahr*-agreements as simple contracts under Islamic law and the nexus-test would (1) in most cases honor the original intent of the parties to have Islamic law applied when they entered the marriage contract, (2) allow women to rely on the enforcement of their *mahr*-agreements, especially when divorce is initiated by the husband, and (3) lead to a fair distribution of the resources

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uitable distributions of marital property).

9 Azizah al-Hibri has perhaps been most attentive to the gendered issues surrounding Islamic marriage; Azizah Y. al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual*, in John Witte Jr, and Eliza Ellison, eds, *Covenant Marriage in Comparative Perspective* 182 (William B. Eerdmans Publishing Company 2005).

10 *Chaudry v. Chaudry*, 159 N.J. Super. 566, 577, 388 A.2d 1000, 1006 (App. Div. 1978) (arguing that if there exists a sufficiently strong nexus between the marriage and the state where the married parties resided for a substantial period of time, claims for alimony and equitable distribution will be considered even if such relief could not be obtained in the state or country granting the divorce).

the parties may have additionally acquired due to changed life circumstances in the course of their marriage.

Second, I emphasize that bridal dowers need to be understood within the institution of Islamic marriage more broadly and particularly in isolation from divorce. Unlike courts in other Western countries, US courts are yet to be confronted with more challenging legal problems arising from *mahr*-agreements against which hitherto constructions of such agreements would be insufficient. For instance, German courts in the past dealt with the question of whether a wife is entitled to receive her *mahr*-payment without a divorce. The Berlin Kammergericht (KG) argued that a wife acquires ownership of her *mahr* when the marriage is contracted, and not when the parties are divorced. The court reasoned that *mahr*-claims cannot be considered contingent on the termination of a marriage. Instead, how marriage is terminated merely influences whether an unclaimed *mahr*-payment can be fully or partially sustained.<sup>11</sup> Other legal issues such as whether women may claim the rate of inflation on their dowers are yet to reach US family courts.<sup>12</sup>

Third, it is necessary that courts begin to account for the social function of *mahr*-agreements. The distinct purpose of a *mahr* in Islamic marriage is to preserve equal bargaining abilities of husband and wife and enable them to make real compromises by using its material and discursive force in cases of dispute. I argue that by failing to acknowledge how gender relations and equality in Islamic marriage are intricately tied to the *mahr*, US courts have effectively made women who currently find themselves in Islamic marriages more vulnerable. That is, the systematic dismissal of *mahr*-agreements and increasing public knowledge thereof has made Muslim women more prone to be divorced with lighthearted unconcern or threatened with divorce by their husbands, and has significantly reduced their ability to

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11 Kammergericht, *Beschluss vom 06.10.2004 – 3 WF 177/04*, accessed March 2, 2019, <https://openjur.de/u/271640.html>.

12 The Iranian Parliament (*majles-e shora-ye eslami*) resolved the issue in 1997 passing a law that provides for the indexation of *mahrs*; M.A. Ansari-pour, *Indexation of Mahr (Dower): A Precursor of the Law of Inflation in Iran*, 31 Arab Law Quarterly 187, 195 (2017).



bargain more favorable terms in marriage.

By analyzing the legal and social aspects implicated in the enforcement of *mahr*-agreements, this paper argues that enforcing and ensuring the implementation of such agreements is neither unconstitutional nor creates legitimate public policy concerns for courts or legislators. To be sure, that does *not* mean that this paper advocates the import of other Islamic legal institutions, arrangements, or rules. Any import will have to be analyzed carefully and in light of the public policy concerns that each of them might or might not give rise to. That is to say that I fully recognize that *parts* of Islamic law would, without a doubt, create such concerns, particularly in the realms of equity and gender equality. Nevertheless, to understand the particular ways in which Islamic law, in spite of imposing certain structural constraints, does create agency for women is essential for courts and legislators to realize what is individually at stake for women and how the dismissal of *mahr*-agreements may erode the particular forms of claim-making that Muslim women have historically mobilized.

This paper is divided into seven sections. Following the introductory section 1, section 2 discusses *mahr*-agreements in the context of marriage and divorce as practiced in Islamic law. This prelude seeks to comprehend the role of bridal dowers in the institution of Islamic marriage and anticipate how dowers organize marital relationships by creating leverage for both sides. The section shows that the practice of contracting dowers is designed to increase the bargaining power women exercise in an Islamic marriage. In sections 3 and 4, I attend to the obstacles that women face with regard to having their *mahr*-agreements enforced by scrutinizing the specific arguments based on which US courts usually dismiss them. Section 3 reveals that the statute of fraud and parol evidence create specifically gendered problems. Section 4 argues that the judiciary's concerns of violating the Establishment Clause are largely unfounded, illustrating that the secular provisions of *mahr*-agreements can be separated neatly. In Section 5, I focus on the legal analogies and parallels courts have drawn to construe *mahr*-agreements. I show that courts have

hitherto construed them as either prenuptials, simple contracts, or marriage certificates. I argue that the prenuptial and marriage certificate-theories are particularly unsuitable to capturing the substantive provisions intended by those agreements. These theories result in highly inequitable outcomes and put women in the position of having to choose between going after either the *mahr* or community property/equitable distribution and thus risk forfeiting financial compensation from their husbands entirely. Section 6 focuses on the recent anti-foreign law bills passed by several state parliaments. I argue that such legislation, despite public claims to the opposite, has increased the legal burden on Muslim women and threatens to obliterate the purpose of *mahr*-agreements as well as derail the institution of Islamic marriage more broadly.

**I. SETTING THE SCENE:  
MARRIAGE AND DIVORCE IN ISLAMIC LAW**

*a. Getting married*

i. Requirements and procedural formalities

In Islamic law, marriage (*nikāḥ*) is a contractual agreement (*‘aqd*) between a wife and husband.<sup>13</sup> For a marriage to be contracted, a woman’s guardian (*walī*) usually makes an offer (*ijāb*) on her behalf to the family of the prospective bridegroom.

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13 Kecia Ali, *Marriage in Classical Islamic Jurisprudence: a Survey of Doctrines*, in Asifa Quraishi and Frank E. Vogel, eds, *The Islamic Marriage Contract. Case Studies in Islamic Family Law* 12, 12 (Harvard University Press 2008). Islamic law knows other forms of marriage, many of which have either historically fallen out of use or are only practiced to a limited extent. The most widely known is perhaps the temporary marriage (*mut‘a*). This type of matrimonial agreement is practiced primarily among Shī‘ī Muslims in Iran, Iraq, and Lebanon. A temporary marriage is contracted with a stipulated duration that can reach from one hour to 99 years. That is, the married parties knowingly enter a matrimonial alliance which expires after a previously agreed-on duration. Although temporary marriages may seem outlandish to the Western beholder, they are rather important because they create legal frameworks within which trial period marriages, temporary sexual encounters, and sex work can be legitimized; Dietrich von Denffer, *Mut‘a – Ehe oder Prostitution*, 128 *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 299, 325 (1978).

For a marriage to be initiated, the offer must be followed by their acceptance (*qubūl*). Depending on several criteria, the approval of a woman's guardian to her marriage may be considered either mandatory or recommended for that marriage to be lawful.<sup>14</sup> The wedding itself must be conducted in the presence of witnesses (*shāhid*), usually two male ones or, alternatively, one male and two female witnesses.<sup>15</sup>

The issue of consent (*riḍā*) has historically been complicated. Judith Tucker notes that, in classical Islamic law, most Muslim jurists agreed that the consent of a bride who had reached legal majority (*bulūgh*) was mandatory to ensure the validity of a marriage contract.<sup>16</sup> However, a prospective bride's silence or laughter could be interpreted as her giving consent.<sup>17</sup> The Sunni legal schools' discussions of consent in marital affairs especially focus on a bride's puberty and virginity, with each school prioritizing either or a combination of these aspects. The Ḥanafīs squarely tie consent to the attainment of puberty. If puberty has been reached, then a woman's consent is necessary for a marriage's validity with the implication that non-pubescent girls could be married off against their will.<sup>18</sup> Concerning the pubescent daughter's consent, Aḥmad ibn Ḥanbal (d. 241 H./855) held a similar position, noting that: "There is disagreement on this question. I prefer that he [the father] consult her, and if she is silent, that is her consent."<sup>19</sup> On the contrary, the Shāfi'īs

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14 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 42 (Cambridge University Press, 2008).

15 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 61 (Brill 2009).

16 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 42 (Cambridge University Press, 2008). Legal majority was usually attained upon the body's showing of the signs of puberty. For a discussion of the concept of legal majority (*bulūgh*), see Nayel A. Badareen, *Shī'ī Marriage Law in the Pre-Modern Period: Who Decides for Women?* 23 *Islamic Law and Society* 368, 378-381 (2016).

17 Burhān al-Dīn 'Alī b. Abī Bakr al-Marghīnānī, *al-Ḥidāya*, quoted in Judith Tucker, *Women, Family, and Gender in Islamic Law*, 42 (Cambridge University Press 2008).

18 Kecia Ali, *Marriage and Slavery in Early Islam*, 33 (Harvard University Press, 2010).

19 'Abd Allāh b. Aḥmad b. Ḥanbal, *Chapters on Marriage and Divorce. Responses to Ibn Ḥanbal and Ibn Rāhwayh*, tr. by Susan A. Spector, 97 (University of Texas Press, 1993).

conceptually link the necessity of a girl's legal consent to her virginity (*bakāra*). If a girl had lost her virginity, she could not be married off without her consent, even if she was a legal minor. As explained by al-Sarakhsī (d. c500 H./1106), the reasoning behind this is that being a non-virgin (*thayyib*) negates a woman's legal guardian's independent authority (*nafy wilāyat al-istibdād*) to interfere in her marital affairs.<sup>20</sup> By implication, a woman who had reached puberty, but was a virgin, could be married off without her consent due to her virginity. The Mālikī jurist Saḥnūn b. Sā'īd al-Tanūkhī (d. 240 H./854) notes that Mālik (d. 179 H./796) advocated against compulsion (*ijbār*) in marriage, "except where the father [compels] his virgin daughter, his little son, his slave girl and slave, and the guardian his orphan child."<sup>21</sup> Similar to the Shāfi'ī opinion, the Mālikīs took virginity to be the decisive factor concerning the necessity of bridal consent.<sup>22</sup> On the whole, marriage without consent was less problematic in the case of pre-pubescent legal minors. Although classical legal works do consider the question of whether a non-virgin legal minor should provide consent, because male and female children were deemed to have limited legal capacity, they could mostly be married off non-consensually.<sup>23</sup>

Bridal consent was discounted by male guardianship (*wilāya*). A male guardian was assumed to have authority over the persons whose guardianship he possesses and would thus get involved in decisions concerning marriage. Although sometimes confused, the concept of male guardianship is distinct from a husband's authority over his wife (*qiwāma*). Thanks to the genealogical study of *qiwāma* by Omaima Abou-Bakr, we now

20 Shams al-Dīn al-Sarakhsī, 5 *Kitāb al-Mabsūt*, 2 (Dār al-Ma'rifa, 1989).

21 Saḥnūn b. Sa'īd al-Tanūkhī, 2 *al-Mudawwana al-Kubrā*, 100 (Dār al-Kutub al-'Ilmīya, 1994).

22 Kecia Ali, *Marriage and Slavery in Early Islam*, 34 (Harvard University Press, 2010).

23 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 43 (Cambridge University Press 2008). A guardian's right to compulsion is eliminated when the woman whose guardianship he possesses is a spinster or was previously married. In many Muslim-majority countries including Morocco and Iraq, the right to compulsion has been explicitly prohibited; Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 49 (Brill 2009).

know that Muslim exegetes and jurists of the classical period, beginning with Abū Jaʿfar al-Ṭabarī (d. 310 H./923), gradually transformed the Quranic notion of men serving as women’s protectors or maintainers (*qawwāmūn*) into a prescriptive norm that entailed a husband’s comprehensive authority over his wife.<sup>24</sup> With the exception of Abū Ḥanīfa (d. 150 H./767), the majority opinion was that for an Islamic marriage to be contracted, women would have to gain approval by their fathers, a guardian (*walī*) from their agnatic line, or in the absence of both, a public official.<sup>25</sup>

In classical Islamic law, lawful marriage was predicated on the equality of the spouses (*kafāʿa*). By taking into consideration aspects of class, profession and wealth, the jurists’ proclaimed goal was to ensure conjugal harmony.<sup>26</sup> In his *Mughnī*, the Ḥanbalī Ibn Qudāma (d. 620 H./1223) lists five criteria for establishing spousal equality: lineage (*nasab*), degree of freedom (*hurriya*), property (*māl*), occupation (*ḥiraf*), and public esteem (*ḥasab*).<sup>27</sup> Although many of these criteria have been abandoned with modernizing reforms throughout the Islamic world, some endure. In Syria and Morocco, spousal equality now remains a matter of local custom. In Jordan, the amount of property held by the intended spouses might figure into considerations of marriage. Kuwaiti law considers only

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24 Omaima Abou-Bakr, *The Interpretive Legacy of Qiwamah as an Exegetical Construct*, in Ziba Mir-Hosseini, Mulki Al-Sharmani, and Jana Rumminger, eds, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015). Q 4:34 states “Men are legally responsible (*qawwāmūn*) for women, inasmuch as God has preferred some over others in bounty, and because of what they spend from their wealth. Thus, virtuous women are obedient, and preserve their trusts, such as God wishes them to be preserved. And those you fear may rebel, admonish, and abandon them in their beds, and smack them. If they obey you, seek no other way against them. God is Highest and Mightiest;” *The Qurʿan*, tr. Tarif Khalidi, 66 (London: Penguin Classics, 2008).

25 Kecia Ali, *Marriage and Slavery in Early Islam*, 30 (Harvard University Press, 2010).

26 Also, see Judith Tucker, *Women, Family, and Gender in Islamic Law*, 45 (Cambridge University Press 2008) (stating that a woman only had a real choice to choose a marriage partner within the parameters set by the social and economic status of her family).

27 Ibn Qudāma, 5 *Al-Mughnī. Sharḥ Mukhtaṣar al-Khiraqī*, 24-25 (Dār ʿĀlam al-Kutub, 1997).

religious devotion—clearly a legacy of classical Islamic law—as a criterion for ensuring spousal equality.<sup>28</sup>

Nowadays, countries in which Islamic law is currently exercised generally have different regulations as to how an Islamic marriage contract must be filed and what its precise legal implications are.<sup>29</sup>

ii. Mahr-agreements

Dowers are usually split into two portions, an immediate (*mu'ajjal*) and most often symbolic portion due before consummating a marriage, and a deferred (*mu'akkhar*) portion that is usually paid upon divorce or a husband's death. The splitting of dowers is designed to ensure the financial integrity of women in the case of divorce (*ṭalāq*). Even though the deferred portion (*mu'akkhar*) of the dower is customarily paid upon divorce, the Mālikīya required it to be specified in scheduled installments. In modern times, pre-divorce claims for a dower's deferred portion may arise if the wife becomes doubtful about her husband's continued commitment or ability to pay in case they get divorced.<sup>30</sup> Because US courts tend to analogize dowers primarily to prenuptials, they have failed to recognize that under Islamic law, a wife may be entitled to claim the deferred portion of the dower before a marriage is terminated.

In line with the Quranic injunction to “give women their dower,”<sup>31</sup> the Muslim majority view prescribes that

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28 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 59 (Brill 2009); Aharon Layish and Ron Shaham, *Nikāh. II. In the Modern Islamic World*, in *Encyclopaedia of Islam*, Second Edition, accessed February 26, 2021, [http://dx.doi.org/10.1163/1573-3912\\_islam\\_COM\\_0863](http://dx.doi.org/10.1163/1573-3912_islam_COM_0863).

29 *Id.* at 59.

30 For instance, in one Iranian marriage, the wife filed a complaint against her “very stingy husband” who allegedly would not even pay for a cup of coffee claiming from him her entire dower of 124,000 roses; *Iranian to pay 124,000-rose dowry*, BBC News (March 3, 2008), accessed May 25, 2019, [http://news.bbc.co.uk/2/hi/middle\\_east/7275506.stm](http://news.bbc.co.uk/2/hi/middle_east/7275506.stm).

31 *The Qur'an*, tr. Tarif Khalidi, 62 (London: Penguin Classics, 2008), Q 4:4: “Give women their dowry [sic! dower], a free offering (*ṣaduqātihinna niḥlatan*). And if they willingly offer you any of it, then consume it in peace of mind and wholesomeness.”

*mahr*-agreements are obligatory (*wājib*).<sup>32</sup> Yet, classical legal discussions feature instances where marriages were contracted without the explicit mention of a dower. Al-Shāfi‘ī (d. 204 H./820), the eponym of one of the Sunni legal schools, argued that even where a marriage is concluded without a dower, it should not be annulled.<sup>33</sup> Most schools developed the doctrine that where a marriage had been consummated without the explicit mention of a dower, the husband would be required to provide to his wife a fair dower (*ṣadāq al-mithl*).<sup>34</sup> Nowadays, it is without a doubt most common for prospective Muslim spouses to negotiate a bridal dower when contracting marriage. In the process of doing this research, I did not come across a single case where a US court was confronted with an Islamic divorce in which a *mahr*-agreement had not been part of the spouses’ marriage contract.

iii. Legal and sociological dimensions  
of Islamic marriage

The bridal dower should also be understood in sociological terms. That is, a dower creates extensive leverage on the part of Muslim wives by creating enhanced opportunities for them to bargain their positionality in marriage, sexual pleasure, and divorce. For instance, in the case a husband seeks an immediate divorce, an outstanding dower-payment would in most cases prevent him from quickly moving ahead with divorce proceedings and would require him to consult and bargain with his wife. Many studies show that a high *mahr* often induces men to push their wives into applying for divorce (*khul’*), which is penalizing for women as it often, though not always, causes

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32 For instance, Emily Sharpe, *Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: a Roadmap for U.S. Courts*, 14 *The Georgetown Journal of Gender and the Law* 189, 193 (2013).

33 Muḥammad b. Idrīs al-Shāfi‘ī, *The Epistle on Legal Theory [Risāla fī uṣūl al-fiqh]* 250 (New York University Press 2013): “Marriage should not be annulled because the dower [*ṣadāq*] is omitted since God confirmed in his scripture [the validity] of marrying without a dower and this is written in other places than this.”

34 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 48 (Cambridge University Press 2008).

them to lose all or some financial rights under Islamic doctrine<sup>35</sup> and under the law of most Muslim-majority countries.<sup>36</sup>

According to classical Islamic jurisprudence, a husband generally did not need his wife's approval to enter an additional marriage. However, on several occasions, classical doctrine explicitly configures a wife's dower as a weapon against undesired additional marriages of her husband. In one example, Saḥnūn b. Sa'īd al-Tanūkhī features a hypothetical where a wife, after the marriage has been performed, demands from her husband that he refrain from taking additional wives. In his response to Saḥnūn, Mālik notes that the wife can legitimately give up part of her dower in exchange for her husband's promise not to take additional wives. If he takes an additional wife despite such a promise, the money the first wife gave him would be used to purchase her divorce from him.<sup>37</sup> The example illustrates that although Mālikī doctrine enjoined wives from imposing conditions on their husband in their marital contracts, it furnished opportunities for them to use their dowers for intramarital bargaining. Even though such hypotheticals may not be the norm, they substantiate the point that the dower's value should not be misconstrued as subsisting primarily in its face value but also lies in its *inherent quality to be exchanged against enhanced rights and conditions in marriage*.

Even though Muslim men were mostly at liberty to stipulate additional marriages, documentary evidence from ninth century-Egypt shows that women regularly inserted clauses in their marriage contracts that prohibited their husbands from taking additional wives.<sup>38</sup> Meanwhile, in contemporary Muslim

35 See Muhammad Ahmad Munir, *Development of Khul' Law: Legal, Judicial and Interpretive Trends in Pakistan*, 34-35 (PhD dissertation, McGill University, 2020), archived at <https://escholarship.mcgill.ca/downloads/dn39x556t?locale=en>.

36 Anthropological fieldwork conducted in Zanzibar, Egypt, Indonesia, Morocco, India, Germany and the Netherlands shows that in all of these diverse settings, "the practice of khul' consistently requires the wife to compensate her husband for the divorce," Nadia Sonneveld and Erin Stiles, *Khul': Local Contours of a Global Phenomenon*, in 26 *Islamic Law and Society* 1, 6 (2019).

37 Saḥnūn b. Sa'īd al-Tanūkhī, 2 *al-Mudawwana al-Kubrā* 132 (Dār al-Kutub al-'Ilmiya, 1994) (*shurūṭ al-nikāḥ ayḍan*).

38 Yossef Rapoport, *Matrimonial Gifts in Early Islamic Egypt*, 7/1 *Islam-*



jurisdictions such as Iran and Pakistan, a husband will, at least officially, require his first wife's consent before contracting an additional marriage. In Egypt, where polygyny is generally allowed, Sheikh Ahmed El Tayib's 2019 announcement, in which he emphasized that polygyny is governed by narrow conditions and is often practiced in ways unfair for women, sparked an ongoing public controversy and fueled legal efforts to curb men's ability to enter such marriages without constraints.<sup>39</sup>

A critic might argue that the alleged financial and personal integrity achieved by stipulating for the Muslim wife a dower is not apparent. Her integrity can, one may hold, be eroded easily because even though a wife is formally entitled to retain her dower, it might be merged with her parents' property in the case of divorce because she would often have to move back into her parental home in line with cultural expectations.

There are several problems with this argument. First, it is widely recognized in Islamic legal scholarship that a *mahr* does provide financial security and leverage to the wife.<sup>40</sup> Historical evidence suggests that the practice of conferring dowers to women directly, rather than their guardians (*wali*), came about in the early seventh century either with the rise of Islam or shortly before.<sup>41</sup> Spies has noted that the change in the way dowers were conferred obliterated the pre-Islamic conception of the *mahr* being the price paid for a bride.<sup>42</sup> By reconfiguring the role of the *mahr* in marriage, women's lot was ameliorated by turning them into the beneficiaries of the property released by their husbands and significantly increasing their financial and

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ic Law and Society 1, 16 (2000).

39 George Sadek, *Egypt: Grand Imam Issues Religious Opinion Calling Polygamy Oppression of Women* (Global Legal Monitor, 2019), accessed February 27, 2021, <https://www.loc.gov/law/foreign-news/article/egypt-grand-imam-issues-religious-opinion-calling-polygamy-oppression-of-women/>. Also, see Ahmed El Tayib, *Twitter post from March 2, 2019*, accessed February 27, 2021, <https://twitter.com/AlAzhar/status/1101914023795326976>.

40 See, for instance, Joseph Schacht, *An Introduction to Islamic Law*, 167 (Clarendon Press 1964) or Kecia Ali, *Marriage and Slavery in Early Islam*, 49 (Harvard University Press 2010).

41 Otto Spies, *Mahr*, in Peri Bearman, et al, *Encyclopaedia of Islam, Second Edition*.

42 Id.

social independence and decision-making.

Apart from historical arguments, ethnographic evidence collected by Hoodfar among low-income communities in Egypt in the 1990s suggests that women do take *mahr*-negotiations seriously, realizing “the importance of these negotiations for their future relationship with their husband.”<sup>43</sup> The women interviewed by Hoodfar perceived these negotiations as crucial in order to avoid foreseeable problems in marriage.<sup>44</sup> Hoodfar finds that by negotiating substantial *mahrs*, women come to utilize the *mahr* as a strategy to secure financial integrity and protect themselves from some of the legal restrictions they face in the institution of Islamic marriage, particularly their limited ability to initiate divorce.<sup>45</sup>

Second, no evidence suggests that women’s dowers are customarily merged into family property upon divorce. The argument subscribes to the assumption that Muslim women lack agency to protect their interests. While an extensive critique is not in order here, the argument denies the ways in which women, in Western as well as non-Western societies, engage in making claims despite the structural limitations they confront. To deny the recognition of these forms of claim-making is to deny that Muslim women do actively negotiate and utilize dower-arrangements to secure social and economic benefits.

Entering an Islamic marriage creates rights and obligations for both parties. A husband becomes obliged to provide maintenance (*nafaqa*) to his wife, which at the minimum must include adequate clothing, food, and shelter.<sup>46</sup> Breaching his obligation to provide support, in all but the Ḥanafī and Shī‘ī legal schools, creates the grounds for a wife to divorce her husband.<sup>47</sup> In classical jurisprudence, the married parties were

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43 Homa Hoodfar, *In the Absence of Legal Equity: Mahr and Marriage Negotiation in Egyptian Low Income Communities*, 6/7 *The Arab Studies Journal* 98, 107 (1998/1999).

44 *Id.* at 108.

45 *Id.* at 109.

46 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 105 (Brill 2009).

47 Rudolph Peters, *Nafaqa*, in *Encyclopaedia of Islam*, Second Edition, accessed February 27, 2019, [http://dx.doi.org/10.1163/1573-3912\\_islam\\_COM\\_1436](http://dx.doi.org/10.1163/1573-3912_islam_COM_1436)

both considered to have a right to sexual intimacy. If a husband failed to consummate the marriage due to impotence, his wife could demand the dissolution of their marriage. However, once the marriage had been consummated, there was no official legal recourse for her to end the marriage unilaterally, and she would have to endure her husband's sexual incapacitation<sup>48</sup> just like any other medically disabling condition that he might develop. Of course, wife-initiated divorce (*khul'*) could be an option, but it likely came at the cost of forfeiting parts of her dower and requiring her husband's consent.

In stark contrast to the Western historical conception of a singular legal identity of the spouses,<sup>49</sup> when entering an Islamic marriage, husband and wife maintain their individual identities, legally, financially, and socially.<sup>50</sup> The parties remain separate legal entities, enter no community of property, and most often do not take on the other spouse's last name.<sup>51</sup> The continuing separateness of the spouses after getting married matters because it implies that, under Islamic law, the primary legal recourse for Muslim women to make claims for financial support is through their *mahr*-agreements.

*b. Getting divorced*

Islamic marital jurisprudence mainly knows three ways for spouses to obtain a divorce. Islamic divorce is explicitly gendered in that it constitutes a matter of rights for husbands and can only be demanded by wives under certain circumstances.<sup>52</sup>

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(obligation to maintenance arises from kinship, ownership or marriage).

48 Kecia Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence*, 12–13 (Oneworld Press, 2006).

49 Hendrik A. Hartog, *Marital Exits and Martial Expectations in Nineteenth Century America*, 80 *Georgetown Law Journal* 95, 97 (1991) (arguing that in 19th-century America, the spouses were thought of as having a singular and permanent legal and social identity).

50 Azizah Y. al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual*, in John Witte Jr, and Eliza Ellison, eds, *Covenant Marriage in Comparative Perspective* 182, 199 (William B. Eerdmans Publishing Company 2005).

51 *Id.* at 199.

52 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 92 (Cam-

The first and probably most common type is a husband-initiated divorce (*ṭalāq*). The majority legal opinion is that to perform *ṭalāq*, a husband must be in a state of majority, sanity, free from coercion, and free from intoxication.<sup>53</sup> Having made the intent (*nīya*) to obtain a divorce, he must verbally express or write down the *ṭalāq*-formula three times. The legal schools hold different opinions on whether a triple pronouncement of *ṭalāq* may be performed all at once. Generally, it is recommended to refrain from such practice so that the spouses will have an opportunity to reconcile.<sup>54</sup> The performance of *ṭalāq* usually obliges the husband to come up with the full amount of the deferred *mahr*-portion.

The second form of divorce is wife-initiated (*khulʿ*). This type of divorce has undergone significant changes in modern times. In classical law, the *khulʿ* was permissible in circumstances where the husband was “blameless” and generally required his consent. Once a husband agreed to his wife’s divorce proposal, she would become liable for financial compensation of him.<sup>55</sup> In other words, a wife essentially purchased her divorce. Concerning a wife’s financial rights, Abū Ḥanīfa argued that a *khulʿ* forfeits all her financial claims, including her dower and maintenance. According to Jamal A. Nasir, his position differed from the Mālikis, Shāfiʿīs and other Ḥanafī jurists who held that “the effects of the *khula* contract shall be confined solely to those specified, which is the practice adopted by the court.”<sup>56</sup> In practice, a wife’s compensation payment was

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bridge University Press 2008).

53 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, 121–122 (Brill 2009). Classical Ḥanafī jurisprudence considers repudiation by an intoxicated husband permissible, id. at 122.

54 Triple *ṭalāq* was recently criminalized in India, Kai Schultz, *India Criminalizes Instant ‘Talaq’ Divorces for Muslim Men*, New York Times (Sep 20, 2018), accessed May 14, 2019, <https://www.nytimes.com/2018/09/20/world/asia/india-talaq-muslim-divorce.html>.

55 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 129–130 (Brill 2009).

56 Id. at 133. Also, see Mohammad H. Fadel, “Political Liberalism, Islamic Family Law, and Family Law Pluralism,” in Joel A. Nichols, ed, *Marriage and Divorce in a Multicultural Context. Multi-tiered Marriage and the Boundaries of Civil Law and Religion* 164, 177 (Cambridge University Press 2012) (arguing that the



deferred portion and thus furnishes a significant advantage for women seeking a divorce when compared to wife-initiated divorce (*khul'*). The number of circumstances in which court order divorces will be granted again varies depending on the legal school, with the Ḥanafīs generally allowing many fewer than the Mālikīs. However, today many of these differences have been obfuscated due to the fact that in matters of divorce, the legislations of most Muslim majority countries have adopted the Mālikī view.

## II. WHENCE ISLAMIC LAW?

### a. *The multitude of Islamic legal opinions and authorities causes uncertainty in courts*

There is no orthodoxy in Islam or Islamic law. That is, there exists no singular authority or Islamic legality that is generally considered binding or authoritative for all Muslims. Nevertheless, the Islamic tradition's heterogeneity does not imply formlessness, since Islamic legal practice is controlled and policed by a range of reasonable interpretations and norms.<sup>60</sup> The notion of Islamic justice is grounded in religious ethics that are predominantly Quranic, and social ethics of the community's integrity and social harmony.<sup>61</sup> For most Muslims, the Quran and the traditions and sayings of the Prophet (*sunna*) constitute foundational texts. Additionally, the scholarly opinions from the Islamic legal schools (*madhāhib*) may be employed as additional guidelines or rules for deciding legal issues. The Islamic professions of legal scholar (*faqīh*), jurisconsult (*muftī*), and judge (*qāḍī*) are tasked with, among other things, establishing whether and how the Muslim community's social practices can be reconciled with the legal and ethical demands inscribed in

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<sup>60</sup> Mohammad H. Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in S. Langvatn, M. Kumm, and W. Sadurski, eds, *Public Reason and Courts* 115, 130 (Cambridge University Press, 2020).

<sup>61</sup> Wael B. Hallaq, *Sharī'a. Theory. Practice. Transformations*, 16 (Cambridge University Press 2009).

the Islamic foundational texts and traditions.<sup>62</sup> Yet “Islamic” law as applied in Muslim majority-countries varies significantly and depends on the particular political system under which Islamic laws may be fully, partially, or not at all, applied.<sup>63</sup>

The multitude of Islamic legal opinions about Islamic marriage, divorce, and *mahr*-agreements complicates the process of translating Islamic marriage into the US legal system. For instance, suppose the married parties are US citizens with an Iranian cultural background and concluded an Islamic marriage in a local mosque in Minnesota. Suppose also that the spouses had agreed on a bridal dower and now seek a divorce. Should the court enforce the *mahr*-agreement applying Iranian law under comity? Should it construe it using Islamic law? If it aims to apply Islamic law, which Islamic legal doctrine would prevail?<sup>64</sup>

The application of Islamic law on US soil generally falls under the principle of comity. Parties, therefore, do not have a legal right to have foreign laws apply to their litigation but the court will consider it to be a matter of courtesy that is based on the “recognition of legislative, executive, and judicial acts” by other political entities.<sup>65</sup> Of course, enforcing the terms of a

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62 In that regard, Islamic law is similar to the US legal system in which lawyers endorse, question, or intervene into social practices by balancing them against legal doctrines prescribed by the US Constitution and legal precedents.

63 For instance, in Lebanon, legal issues related to personal affairs are handled by sectarian courts depending on the religious confession of an individual. In Iran, the courts combine civil and religious authority. In Turkey, religious courts have long been abolished and entirely been replaced by civil courts.

64 The perplexing outcomes of the courts’ interpretations of what Islamic marriage is or might be under Islamic law became alarmingly obvious in *S.D. v. M.J.R.* (2010) where a Muslim husband had raped his wife and argued that his religious beliefs, which ostensibly demanded that a husband does not require consent to have sexual intercourse with his wife, created an exception to his being found guilty of sexual assault or criminal sexual conduct. Although the New Jersey Superior Court later repealed the judgement, the argument was granted by the trial judge; *S.D. v. M.J.R.*, 415 N.J. Super. 417, 432–33, 2 A.3d 412, 422 (App. Div. 2010). The judicial confusion and helplessness of how to deal with and translate Islamic marriage into the US legal system can hardly be missed.

65 “Comity,” in: *Black’s Law Dictionary*, edited by Brian A. Garner (West Group, 2014). The Supreme Court was confronted with the issue of comity in *Hilton v. Guyot* holding that “[c]omity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative,

*mahr*-agreement is not necessarily contingent on the application of Islamic law. Other theories of why a *mahr*-agreement is enforceable, even without applying Islamic law, might yield the same outcome. But the issue of Islamic law has often been raised in Islamic divorce trials. The problem that US courts regularly face is establishing what the parties' stated intent to have "Islamic law" govern their marriage contract actually means. In determining what Islamic law is and whether it can be applied, the courts frequently confront two related issues, a substantive and a procedural one. The first is whether the spouses' stated intent to have Islamic law apply to a *mahr*-agreement satisfies the statute of frauds. The second is whether parol evidence is admissible to determine what the parties meant by "Islamic law."

b. *Statute of frauds*

- i. Does "Islamic law" state the choice of law with reasonable certainty?

First, when determining what legal system or legal code a *mahr*-agreement falls under, the court will typically look to the "writing" of a contract. Generally, to satisfy the statute of frauds, the contract itself must indicate its terms, including the choice of law the parties agreed on.<sup>66</sup> But establishing the parties' choice of law for *mahr*-agreements has proved to be an arduous undertaking. In *In re Marriage of Shaban*, the Court held that the phrases "in Accordance with his Almighty God's

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executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws;" *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895).

<sup>66</sup> In *Habibi-Fahnrich v. Fahnrich*, the New York Supreme Court applied a three-pronged test, based on the New York General Obligations § 5-701, to determine whether a *mahr* (*ṣadāq*)-agreement satisfies the requirements of the statute of frauds; see *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at \*2 (N.Y. Sup. Ct. July 10, 1995) (establishes that for a contract to satisfy the statute of frauds [1] parties must have reached a mutual understanding to be evidenced by a written instrument, [2] the material terms of the contract must be specific enough that anyone can understand them, and [3] the writing must be plainly sufficient on its face).



Holy Book and the Rules of the Prophet” and “[the] two parties [having] taken cognizance of the legal implications” do not satisfy the California statute of frauds because they do not state with reasonable certainty what the material terms of the parties’ contract are under Islamic law.<sup>67</sup>

The court’s concern here was not that the parties had failed to expressly state that they seek for their contract to fall under “Islamic law.” Instead, the court demanded that the spouses specify what they mean by “Islamic law.” Put differently, even if the spouses had explicitly stated that they seek for their contract to be governed by “Islamic law,” the *Shaban* Court would have probably ruled in the same vein, holding that such a reference alone does not suffice to establish what the material terms of the contract are. However, what other options do the married parties have other than to mention, explicitly or implicitly, that Islamic law is to govern the marriage contract? Of course, spouses may state that they seek for their agreement to fall under the laws of a specific country or legal code. But especially in the case of *Shaban*, where both spouses were Egyptian and where the marriage contract had been concluded in Egypt long before the parties had migrated to the US, it seems reasonable to assume that the implicit reference to Islamic law functioned as a placeholder for Egyptian (Islamic) law as the spouses’ intended choice of law.<sup>68</sup>

Would Egyptian (Islamic) law suffice as a descriptor to state the choice of law? At the time of the *Shabans*’ divorce, Egyptians’ personal affairs such as family disputes were governed by the 1929 personal status laws (*qawānīn al-aḥwāl al-shakhṣīya*) and their amendments.<sup>69</sup> In Egypt, the case would have likely been submitted to a Family Dispute Resolution office for the parties to settle before being forwarded to a court.<sup>70</sup> If it

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67 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 864 (2001), as modified on denial of reh’g (May 9, 2001).

68 *Id.* at 865.

69 Nathalie Bernard-Maugiron, *Courts and the Reform of Personal Status Law in Egypt. Judicial Divorce for Injury and Polygamy*, in Elisa Giunchi, ed, *Adjudicating Family Law in Muslim Courts* 106, 106 (Routledge 2014).

70 Nathalie Bernard-Maugiron, *Promotion of Women’s Rights (Egypt). Personal Status Laws in Egypt. FAQ* at 15, accessed May 15, 2019, <http://horizon>.



and until the dawn of modernity, Islamic law (*sharīʿa*) was never homogenous and functioned primarily as a moral imperative that was embodied by a multitude of localized practices and customs.<sup>74</sup> Arguably it is only under conditions of the modern nation-state that the demand for an identifiable and unified body of laws became intimately bound up with the idea of sovereignty. In the wake of modernizing reforms, attempts to turn Islamic legal practices into a form of modern governance were made abundantly. But most of these failed. As Wael Hallaq states,

the Sharīʿa itself was eviscerated, reduced to providing no more than the raw materials for the legislation of personal status by the modern state.<sup>75</sup>

While that might seem like an unsatisfactory answer to the question of “what Islamic law is,” it sharpens our understanding of why that question is asked in the first place and, more importantly, why the answer should remain idiosyncratic to the particular legal case at hand.

- ii. Should spouses commit to a foreign legal system or code instead of Islamic law?

An argument to consider is that whereas in *Shaban*, the choice of law was apparent because it could reasonably be inferred from the context in which the marriage contract was entered, in many cases of Islamic marital dispute, it is not. As an alternative to the expression “Islamic law,” the contracting parties could commit to the laws of a specific country. But should spouses be obliged to commit to a foreign legal system that they might at best be vaguely familiar with, merely to ensure that a US court will enforce a *mahr*-agreement in future?

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<sup>74</sup> Wael Hallaq, *The Impossible State. Islam, Politics, and Modernity's Moral Predicament* ix (Columbia University Press, 2013).

<sup>75</sup> Id. Also, see Wael Hallaq, *Sharīʿa. Theory, Practice, Transformations* 19 (Cambridge University Press, 2009) (arguing that the discursive and cultural practices of the classical Sharīʿa met their structural death at the dawn of modernity).

As the example of *Obaydi v. Qayoum* shows,<sup>76</sup> spouses often do not have extensive knowledge about Islamic legal practices and their consequences, let alone the application of foreign laws that might pertain to their Islamic marriage in the case of divorce.

The requirement to commit to a foreign legal system to ensure the payment of bridal dowers would likely have a chilling effect on spouses. That is, the expectation to expressly commit to a foreign state’s legal system or code about which the spouses have only vague ideas might deter them into refraining from Islamic marital arrangements altogether because of the legal consequences they might unintentionally and unwillingly subscribe to.<sup>77</sup>

One might counterargue that parties who are unwilling to explicitly commit to a specific foreign legal system or code to have their Islamic marriage contract enforced, should refrain from stipulating such contracts if they want to avoid liability for the unintended consequences that such commitment entails. However, the argument is discounted by the point that the only solution to ensure that US courts enforce *mahr*-agreements under Islamic law cannot simply be to oblige the parties to commit to a foreign legal system that they are mostly unfamiliar with. Apart from ignorance, such a requirement would unreasonably assume that the applicability of Islamic law and its customs is contingent on the existence of foreign states in which these laws are already being enforced, rather than infer its legitimacy from the reality that Muslim communities exist and actively practice Islam in the United States.

- iii. Is a reference to US federal or state law more reasonably certain than “Islamic” law?

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<sup>76</sup> *In re Marriage of Obaidi & Qayoum*, 154 Wash. App. 609, 612, 226 P.3d 787, 789 (2010) (husband arguing that he was unfamiliar with the concept of the *mahr* and ignorant of what he was signing at the wedding despite being a Muslim and having previously attended a Muslim wedding).

<sup>77</sup> These can be quite significant such as unintentionally acquiring another country’s citizenship, e.g., when marrying a male Iranian citizen.

I believe that the argument about the reference to Islamic law not stating the choice of law with reasonable certainty is flawed for other reasons. One can argue that a contract in which the parties imply or explicitly state that they seek it to be enforced under US state or federal law, would not necessarily create significantly more reasonable certainty. Any choice of law merely establishes a likelihood of a contract being enforced in a certain way. In other words, a reference to a specific body of substantive and procedural laws only makes it more likely that a contract will be interpreted by a court in one way or the other. It is unreasonable to assume that spouses seeking to apply California law to their marriage contract would be able to foresee or have exact knowledge of how their agreement will be construed, interpreted, and enforced under that legal system. Consequently, even where parties enter a contract under California law, they cannot be expected to anticipate with absolute certainty of what materials, statute or theory of construction a court might avail itself in case they have a legal dispute concerning their contract.

A reference to Islamic law achieves a similar result in that it specifies for the judge a body of substantive and procedural rules to take into account in the process of construing the *mahr*-agreement. It increases the likelihood that the contract will be interpreted in a certain way, without creating absolute certainty.

*c. Parol evidence*

- i. The essential terms of a mahr-agreement should be stated, the particulars need not be

The ostensible lack of specificity in the expression “Islamic law” and the multiplicity of Islamic legal practices have occasionally made it necessary for parties to Islamic divorce proceedings to call on expert-witnesses to testify about particular understandings and concepts in Islamic marriage.<sup>78</sup> The courts in

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<sup>78</sup> *Akileh v. Elchahal*, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996) (expert witness of the wife’s counsel testifying that a *mahr* is not forfeited if a wife

*Soleimani* (2013) and *Shaban* (2001) recognized the potential dangers of admitting parole evidence to allow the married parties to clarify the terms of their contract. The *Shaban* Court refused to hear the expert the husband’s counsel had tried to introduce arguing that he would virtually (re)write the marriage contract for the parties.<sup>79</sup> The Court’s opinion was effectively overruled in *Sterling v. Taylor* (2007). In *Sterling*, the California Supreme Court held that *even in the absence* of a written contract, the parties will nevertheless be considered to have contracted with each other if they produced a memorandum. Specifically, the court made two arguments that are relevant to the case of *mahr*-agreements.

First, it held that a memorandum regarding the sale of several apartments satisfies the statute of frauds when it establishes that (1) the parties made a contract, (2) specifies the subject of that contract, and (3) the essential terms it is governed by with reasonable certainty.<sup>80</sup> The Court clearly states that only the essential terms of the contract must be stated, “details or particulars” need not be.<sup>81</sup>

Second, the *Sterling* Court argued that the writing requirement of the statute of frauds has an evidentiary purpose, serving merely “to prevent the contract from being unenforceable; it does not necessarily establish the terms of the parties’ contract.”<sup>82</sup> Thus, the Court concluded that when an ambiguous term in a memorandum is disputed between the parties, extrinsic

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initiates divorce); *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010) (expert testifying that where a wife constitutes an impediment to the marriage, she must refund a previously paid *mahr*).

<sup>79</sup> *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 400, 105 Cal. Rptr. 2d 863, 864 (2001), *as modified on denial of reh’g* (May 9, 2001) (Court refusing to hear the expert introduced by the husband’s counsel on the argument that he would effectively write a contract for the parties); *Soleimani v. Soleimani*, No. 11CV4668, 26 (Johnson County Dist. Ct. 2013) (arguing that parole evidence cannot be used to aid the court in the construction of the contract before it has determined where ambiguities exist); *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 408 (Fla. 1974) (holding that subsequent party differences concerning the construction of a contract do not affect the contract’s validity).

<sup>80</sup> *Sterling v. Taylor*, 40 Cal. 4th 757, 766, 152 P.3d 420, 425 (2007).

<sup>81</sup> *Id.* at 766.

<sup>82</sup> *Id.* at 767; based on court opinion in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 345, 9 Cal.Rptr.3d 97, 83 P.3d 497.

evidence is admissible to resolve the uncertainty.<sup>83</sup>

But is a *mahr*-agreement like a memorandum and should it be considered as satisfying the statute of frauds? It is, in fact, more than a memorandum. It is intended to serve as the actual written contract between the parties. Its content establishes that (1) the parties did enter a marriage contract entailing financial obligations for the husband and (2) specifies that financial obligation as the subject of that contract. However, does a *mahr*-agreement also (3) specify the essential terms the contract is governed by with reasonable certainty? That depends. It usually states the parties and witnesses' names, the negotiated sum, and makes an explicit or implicit reference to "Islamic law." As argued previously, such reference would not determine the body of laws that should be applied to a *mahr*-agreement with less reasonable certainty than a reference to US state or federal law.<sup>84</sup>

Even if a court rejects the argument that a *mahr*-agreement is a written contract, under the memorandum precedent, the stipulations of a *mahr*-agreement could be considered valid on the theory that it is a memorandum fulfilling the criteria set out by the court for memorandums to effectuate contracts.

- ii. The court is granted extensive liberties in construing *mahr*-agreements under FRCP 44.1

The *Sterling* opinion echoes Rule 44.1 of the Federal Rules of Civil Procedure which implies a more liberal understanding about using and admitting parol evidence than what the Court's opinion in *Shaban* suggested:

[...] In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.<sup>85</sup>

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83 *Sterling v. Taylor*, 40 Cal. 4th 757, 767, 152 P.3d 420, 425 (2007).

84 See section on statute of frauds.

85 Fed. R. Civ. P. 44.1.

The *Notes of the Advisory Committee* on Rule 44.1 support that impression stating that the ordinary rules of evidence applied to determine foreign law had proved to be inapposite. To create an effective remedy to this situation, Rule 44.1 was drafted by the legislator with the intent to permit courts to include “*any* relevant material, including testimony, without regard to its admissibility under Rule 43 [“Taking Testimony”].”<sup>86</sup>

Considering FRCP 44.1 and the *Sterling* opinion, courts dealing with *mahr*-agreements can be expected to more freely avail themselves of additional material in cases where the term “Islamic law” is not further specified in the contract and where the parties’ choice of law may not be inferred from the circumstances in which that contract was entered. The *Soleimani* Court’s decision is instructive because it states that courts’ concern about parol evidence is more narrowly related to when and by whom an ambiguous contractual term is identified. Such terms, the Court states, need to be identified *by courts* and *before* the parties introduce parol evidence.<sup>87</sup> It thus affirmed the standard the Kansas Supreme Court applied in *Robertson v. McCune* according to which parol evidence may be used to clarify an ambiguous provision but not to nullify one that is “clear and positive.”<sup>88</sup> That is, a court must determine what parts of a *mahr*-agreement it considers ambiguous and in need of clarification. These must provide the grounds for parol evidence. It cannot be the parties who tell the court which parts of their agreement they hold to be ambiguous and which they do not.

*d. Statute of frauds and parol evidence  
as gendered problems*

When enforcing contracts under “Islamic” law, the discomfort of US courts, as David Forte has noted long ago, tends to increase when the laws they are expected to enforce are

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<sup>86</sup> Id. (Advisory Committee Notes).

<sup>87</sup> *Soleimani v. Soleimani*, No. 11CV4668, 26 (Johnson County Dist. Ct. 2013).

<sup>88</sup> *Robertson v. McCune*, 205 Kan. 696, 699, 472 P.2d 215, 218 (1970).



not expressed in the form of statutes, codes, or legal decisions.<sup>89</sup> Also, the application of foreign laws becomes much easier where the Islamic laws to be enforced belong to a country whose laws are essentially based on European legal codes. According to Forte, courts tend to be more reluctant when they are supposed to enforce substantive laws based on a mixture of European and Islamic legal systems.<sup>90</sup>

It is important to realize the gravity of a court's dismissal of the married parties' choice of law that is stated in a *mahr*-agreement. Dismissing the spouses' stated choice of law because a court finds the expression "Islamic law" too vague to satisfy the statute of frauds and because such agreements ostensibly do not specify "the essential terms" of the contract is questionable. It is questionable because (1) it would in many cases contravene the married parties' original intent to have their contract enforced under Islamic law, and (2) fails to adequately take into account FRCP 44.1 or equivalent state procedural rules which grant courts significant liberties in using and having the spouses use parol evidence to clarify what "Islamic" law was intended to mean. Emily Sharpe and others have noted that dismissing the married parties' stated choice of law in a contractual dispute will often be "outcome determinative."<sup>91</sup> Not granting the spouses' stipulated choice of law will create a significant obstacle, albeit not an absolute one, for the enforcement of a *mahr*-agreement.

In less obvious ways, statute of frauds and parol evidence issues constitute specifically gendered problems. This is so mainly because the available alternative theories under which a court may enforce a *mahr*-agreement are not particularly weighty. If one assumes that the enforcement of a *mahr*-agreement creates a benefit for Muslim women, statute of frauds and parol evidence issues raised by the court are gendered because they tend to negatively affect women, not men, making

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89 David F. Forte, *Islamic Law in American Courts*, 7 *Suffolk Transnational Law Journal* 1, 7 (1983).

90 *Id.* at 11.

91 Emily Sharpe, *Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: a Roadmap for U.S. Courts*, 14 *The Georgetown Journal of Gender and the Law* 189, 193 (2013).

the enforcement of *mahr*-agreements much less likely.

While in many cases, wives might be entitled to community property or equitable distribution schemes, the enforcement of *mahr*-agreements, I think, should be regarded as a strictly separate legal issue. This has rarely been the case because US courts predominantly tend to think of *mahr*-agreements as prenuptials. If enforceable as a prenup, the court, in most cases, does not also apply community property or equitable distribution of assets.

The failure to neatly separate *mahr*-claims from other marital claims has turned Islamic divorce proceedings in US courts into matters of the-winner-takes-it-all. The spouses will usually opt for the theory that promises them a higher financial outcome. If a wife's *mahr* is higher in value than what she would receive under community property or equitable distribution, the wife's counsel will almost always argue based on a theory that seeks to establish the enforceability of the *mahr*-agreement, while a husband will argue that the contract does not satisfy the statute of frauds, was made under duress, or that its enforcement would violate the Establishment Clause. If the *mahr* is below the financial value the wife would be compensated with under community property or equitable distribution of assets, each party will essentially argue the opposite.<sup>92</sup>

But there is a real legal as well as moral danger emanating from this sort of legal practice. For a Muslim wife, having her *mahr*-agreement enforced should, in most circumstances, be paramount because her entering of the marriage was predicated on the husband's promise to pay a monetary sum or to release a previously negotiated set of his assets in the case of divorce. That is, the *mahr* constitutes the husband's reverse contractual obligation of an Islamic marriage whose obligations a Muslim wife has *already* performed.<sup>93</sup>

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92 Nathan Oman has made similar observations, Nathan Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contract and the Perils of Legal Specialization*, 45 Wake Forest Law Review 579, 593 (2010).

93 *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (noting that the wife performed under the *mahr*-agreement by having entered the marriage in the first place).

Entitlements under state property rules should be considered separately.<sup>94</sup> Courts should not put Muslim women in the awkward position where prior to the divorce trial they must choose whether they will seek the enforcement of the bridal dower or of community property/equitable distribution of assets because they will potentially forfeit claims if they end up choosing the “wrong” option. That became painfully obvious in *Zawahiri v. Alwattar* where the wife ended up with no financial compensation at all because she had relied on the theory that a *mahr*-agreement constitutes a prenuptial.<sup>95</sup>

When two parties contract a marriage, they make a deliberate choice to contract according to Islamic law. Rejecting such a choice often creates an undue substantive and procedural advantage for husbands in Islamic divorce proceedings. That is, if the court holds that a *mahr*-agreement does not satisfy the statute of frauds because “Islamic law” is not a reasonably certain expression, ex-wives will be compelled to revert to other theories based on which their *mahr*-agreement could be enforced. But as this study shows, none of those theories is particularly suitable to succeed in court because they do not adequately capture the substantive aspects and implications of a *mahr*-agreement.

### III. BLESSING OR QUAGMIRE: RELIGIOUS DOCTRINAL INTERPRETATIONS

#### a. *Adjudicating on matters of religion cannot be entirely avoided*

Are secular courts qualified to interpret *mahr*-agreements given that they originate in religious contexts? Should spouses who entered a contract in the context of a religious ceremony have a right to have that contract enforced by civil courts? And, just how much should a court get involved in interpreting *mahr*-

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<sup>94</sup> Especially since in some cases, insisting on the enforcement of the *mahr*-agreement will be the only recourse a wife has to her ex-husband’s assets.

<sup>95</sup> *Zawahiri v. Alwattar*, 2008-Ohio-3473. Also, Nathan Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contract and the Perils of Legal Specialization*, 45 Wake Forest Law Review 579, 595 (2010).

agreements?

First, the idea of dealing with religious doctrine could be considered a matter of historical continuity. Najmeh Mahmoudjafari notes that “family law has had a long history [in the US] of accommodating religious practices while still upholding the principles of the Constitution and the US legal system generally.”<sup>96</sup> Her statement gains credence when considering the historical argument that normative conceptions of civil marriage in the West arguably emerged from a historical trajectory which has been infused with and significantly shaped by Western Christian attitudes of partnership and monogamy.

But even if one finds the argument about historical continuity persuasive, the adjudication of religious matters does present a special challenge for courts because of the precarious balance that state institutions must strike in order not to get entangled in matters of religion and religious doctrine.<sup>97</sup> As Justice Rehnquist wisely noted in his dissent in *Serbian E. Orthodox Diocese v. Milivojevich* (1976), civil courts “obviously cannot avoid all such adjudications.”<sup>98</sup> In other words, the hands-off rule concerning religious matters, justified by the argument that state involvement may “corrupt” religion, cannot reasonably be applied to *all* decisions which a court must make and in which religion is involved.<sup>99</sup>

*b. Is the enforcement of contractual obligations that arise from contracts made in religious contexts constitutional?*

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<sup>96</sup> Najmeh Mahmoudjafari, *Religion and Family Law: The Possibility of Pluralistic Cooperation*, 82 UMKC Law Review 1077 (2014).

<sup>97</sup> U.S. Constitution, 1st Amendment (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

<sup>98</sup> *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 735, 96 S. Ct. 2372, 2392, 49 L. Ed. 2d 151 (1976) (Rehnquist dissenting).

<sup>99</sup> Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What are we Talking About?*, 84 Notre Dame Law Review 837, 858 (2009) (arguing that in some cases courts’ failure to adjudicate matters involving religious questions presents a danger of its own).

i. Outlining the Lemon test

Let us consider the question of whether the courts' enforcement of contractual obligations arising from contracts of religious provenance such as *mahr*-agreements is constitutional. Fortunately, the court previously introduced a test to determine what kind of government activity constitutes the establishment of religion. In *Lemon v. Kurtzman*, the Supreme Court applied a three-pronged test for determining the constitutionality of *statutes* regarding the establishment of religion. It held that a statute is unconstitutional when (1) it does not have a secular legislative purpose, (2) when its principal or primary effect is the advancement or inhibition of religion, and (3) when it constitutes "excessive government entanglement with religion."<sup>100</sup> Presupposing that the *Lemon* test applies to court actions, three questions concerning *mahr*-agreements emerge:

1. DOES THE ENFORCEMENT OF A MAHR-AGREEMENT HAVE A NON-SECULAR PURPOSE?
2. DOES ITS ENFORCEMENT PRIMARILY ADVANCE OR INHIBIT RELIGION?
3. AND DOES THE ENFORCEMENT OF SUCH AN AGREEMENT CONSTITUTE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION?

ii. Does the enforcement of a *mahr*-agreement have a non-secular purpose?

In *Avitzur v. Avitzur* (1983), a Jewish couple had signed a *Ketubah* (premarital agreement) which stipulated the condition that the spouses submit to the jurisdiction of the Beth Din of the Rabbinical Assembly regarding marital affairs. After obtaining a civil divorce, the wife sought to execute a religious divorce through the Beth Din. The New York Court of Appeals ruled that the ex-husband's refusal to appear before the Beth Din when summoned for religious divorce constituted a breach of

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<sup>100</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971).

the spouses' contract.<sup>101</sup> The ex-husband's counsel had argued that because of the religious provenance of the *Ketubah*, any relief granted to the ex-wife would "involve the civil court in impermissible consideration of a purely religious matter."<sup>102</sup> The Court gave no merit to the husband's argument and stated that the ex-wife's appeal for the husband to appear before the Beth Din constituted a demand within the secular obligations that he had contractually bound himself to.<sup>103</sup>

The Court's ruling in *Avitzur* might be seen as having a non-secular purpose, but only *indirectly*. The wife sought a religious divorce from her husband, which could only be obtained by compelling him to appear before the Beth Din. The Court enforced the contract to ensure the husband does uphold his contractual obligation to *appear* before the Beth Din. Only the husband's appearance was a matter at trial. His appearance was the direct result of having the *Ketubah* enforced by the Court. The Court's enforcement of the *Ketubah* entailed no guarantee that the parties would actually attain a religious divorce through the Beth Din.

When applying this reasoning to the fact pattern of *mahr*-cases, the secular purpose of court involvement should become more apparent. Just as in the *Ketubah*-agreement in which the spouses had stipulated submission to the Beth Din, in a *mahr*-agreement, the spouses specify the husband's provision of a previously negotiated monetary sum or asset in the event of divorce. But contrary to the religious divorce that at least indirectly results from the Court's enforcement of the *Ketubah*, there is no religious divorce the spouses seek to obtain here. The purpose of court involvement is secular in that the litigation between the spouses primarily rests on the hope that the court will either grant or dismiss a monetary transaction between the parties.

But what if spouses do not care primarily about the monetary value of the *mahr* but the spiritual benefits attached

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101 *Avitzur v. Avitzur*, 58 N.Y.2d 108, 112, 446 N.E.2d 136, 137 (1983).

102 *Id.* at 112–13.

103 *Id.* at 115.

to it? After all, one might argue that for a devout Muslim, endowing or receiving the *mahr* may be considered a religious obligation. Indeed, in Islamic legal theory, the fulfillment of religious obligations is always associated with the creation of benefit (*ni‘am*) for the believer in the afterlife (*al-ākhirah*). However, the argument is discounted by the fact that Islamic legal collections are by convention separated into matters of religious worship (*‘ibādāt*) and social transactions (*mu‘āmalāt*). Issues on marriage and divorce are commonly found in the latter category, and do not have a direct bearing on one’s relationship with God. As Mohammad Fadel notes, the laws governing social transactions “disclose an inner rationality that is instrumentally related to particularly human ends, such as the protection and enhancement of property.”<sup>104</sup> This is by no means to argue that everything pertaining to social transactions in Islamic law is clear-cut secular with no spiritual value attached. Rather, it shows that argued from the vantage point of the Islamic tradition itself, marriage and divorce are primarily conceived as mechanisms for regulating and ordering society.

One should not underestimate the debilitating effects of conceptualizing bridal dowers exclusively as vestiges of religion. That is, by declaring them to be of “religious” or “divine” character, courts implicitly subscribe to an oversimplified logic that collapses the world into the religious and the secular. As Fournier has noted, this dichotomy tends to render invisible the similarities that do exist between Islamic and Western laws and the overlapping purposes that specific legal institutions often fulfill.<sup>105</sup> The message often driven home becomes not only that a *mahr* is supposedly religious and foreign, but also that the legal system into which that institution is translated is ostensibly the opposite, secular and home-grown.

A more forceful objection in the debate on secularism is that the whole controversy about which Islamic law to apply

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104 Mohammad H. Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in S. Langvatn, M. Kumm, and W. Sadurski, eds, *Public Reason and Courts* 115, 128 (Cambridge University Press, 2020).

105 Pascale Fournier, *Muslim Marriage in Western Courts. Lost in Transplantation* 131 (Ashgate 2010).

indicates that the enforcement of *mahr*-agreements is, in fact, primarily a matter with a non-secular purpose because the court is put in a position where it first needs to interpret religious doctrine in order to adjudicate whether the claim to a *mahr* can legitimately be sustained. If the primary purpose of bringing *mahr*-agreements before courts were to move them to declare certain religious doctrines as either true or false, the argument of a non-secular purpose could be upheld. But *mahr*-litigations are far from being such concerted efforts. Parties tend to be one-shotters who cannot be assumed to care about precedent or public policy when the court rules on the enforceability of their *mahr*-agreements. They are not likely to end up in a similar litigation again and, even if they do, they would have probably learned from previous litigation the lesson that the court will not easily honor such contracts.

- iii. Does the enforcement of a *mahr*-agreement advance or inhibit religion?

Honoring bridal dowers, one may object, will encourage prospective spouses to contract *mahr*-agreements and therefore result in more Islamic marriages because couples can reasonably rely on their enforcement by the court. But under that logic, it could be said that even when enforcing an ordinary premarital agreement, more prospective spouses will be encouraged to enter such agreements in the future, resulting in the spread of more secular marriages to the detriment of religious marriages. Thus, enforcing a *mahr*-agreement does not advance or inhibit religion any more than the enforcement of a secular marriage contract or prenuptial.

- iv. Does the enforcement of a *mahr*-agreement constitute excessive government entanglement with religion?

Based on the judgment in *Avitzur*, it seems that the secular obligations arising from marital contracts made in



religious contexts can usually be separated neatly. In *Aziz v. Aziz* (1985), the New York Supreme Court followed this line of reasoning holding that the secular terms of an Islamic marriage contract, in which the payment of a dower ostensibly partakes, are enforceable independent of whether the contract was entered in a religious ceremony.<sup>106</sup> But separating what is secular in a contract and what is not cannot always be done easily.

What constitutes “excessive” government entanglement is arguably in the eye of the beholder. However, courts have drawn relatively clear boundaries regarding how much entanglement is constitutional. In *Najmi*, the Ohio Court of Appeals stated that “evaluating the merits of religious doctrine or defining the contents of that doctrine” is flatly prohibited.<sup>107</sup> The concern with evaluations of the merits of religious doctrine is obvious: evaluation creates ostensibly objective criteria against which religious beliefs can be measured making the idea of religion obsolete in that non-compliance necessarily indicates falsehood and results in the quasi-elevation of religious beliefs that do comply with criteria of “objectiveness.”

In *Thomas v. Review Board* (1981), the Supreme Court was confronted with the question of whether an employee who is a Jehovah’s Witness and who had been transferred to a department that manufactured turrets for military tanks could claim unemployment compensation benefits after quitting his job on the grounds of his religious beliefs.<sup>108</sup> The dissent, written by Justice Rehnquist, drew the line of court involvement at the employee’s religious sincerity:

By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant’s belief is “religious” and whether it is *sincerely* held.<sup>109</sup>

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<sup>106</sup> *Aziz v. Aziz*, 127 Misc. 2d 1013, 1013, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

<sup>107</sup> *Najmi v. Najmi*, 2008-Ohio-4405, ¶ 12.

<sup>108</sup> *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 707, 101 S. Ct. 1425, 1426, 67 L. Ed. 2d 624 (1981).

<sup>109</sup> *Id.* at 726/1436 (Rehnquist dissenting).

The Rehnquist dissent would allow for more court involvement in *mahr*-litigation than has hitherto been the case. Yet courts have not endeavored to inquire into the sincerity of the spouses' religious beliefs. They certainly could have, given that parties in *mahr*-litigations often make *ex post* claims that seem to precisely aim at discounting the religious sincerity with which they signed *mahr*-agreements.

For instance, the husband in *Obaidi v. Qayoum* argued that, despite being a Muslim and having attended Muslim wedding ceremonies prior to his own, he was unfamiliar with the concept of the *mahr* and did not know what he was signing. Because his argument persuaded the Court, his ex-wife lost her *mahr*-claim of \$20,000.<sup>110</sup> Similarly, in *Zawahiri v. Alwattar* (2008), the Ohio Court of Appeals granted a husband's argument that his signing of a dower-agreement of \$25,000 two hours before the wedding ceremony was coerced because in the negotiation process he was feeling "embarrassed and stressed" and ostensibly had no opportunity to consult an attorney before signing the contract.<sup>111</sup>

In both cases, the judicial refusal to inquire into how sincerely those agreements were made created a procedural and substantive advantage for the parties opposing the *mahr*-agreement—the ex-husbands. But the Court's refusal to address questions such as sincerity because it fears to overstep its judicial competency is dangerous because it allows one spouse to bring forth arguments that discount their religious sincerity without being able to counterargue that their sincerity at the time of signing the *mahr*-agreement might have been a decisive factor outweighing other more circumstantial factors in that situation.

I do not seek to deny that focusing on the parties' religious sincerity causes a seeming paradox: in order to enforce a supposedly *secular* promise that stipulates the payment of a previously agreed-on sum of money, courts end up taking into consideration the Muslim parties' *religious* intentions.<sup>112</sup> But

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110 *In re Marriage of Obaidi & Qayoum*, 154 Wash. App. 609, 612, 226 P.3d 787, 789 (2010).

111 *Zawahiri v. Alwattar*, 2008-Ohio-3473, ¶ 23.

112 See Pascale Fournier, *Flirting with God in Western Secular Courts*:

that paradox, I think, is inevitable in the current legal culture that refuses to acknowledge that many contracts cannot avoid being made in the shadow of religion. If one collapses the religion-secularism binary, there is minimal ground from which to argue against the enforcement of *mahr*-agreements especially given the sacrosanct assumption in US contract law that “[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract [...]”<sup>113</sup>

- c. *The fear of overstepping judicial authority by enforcing mahr-agreements is unfounded and the court should endeavor to more thoroughly inquire with how much religious sincerity such contracts were made*

The *Lemon* test indicates that *mahr*-agreements should raise little concern with regard to constitutionality. Historically, court reluctance to get involved in doctrinal disputes of religion related to questions arising out of the Establishment Clause’s prohibition against state interference in ecclesiastical affairs of the churches. However, because in Islam there is no ecclesiastical governance, *mahr*-litigation does not implicate such affairs. When a *mahr*-agreement is brought before the court, the stakes of adjudication are set by the resolution of a judicial dispute between two parties concerning a husband’s liability to pay to his wife a bridal dower. As one-shotters to *mahr*-litigations, spouses have little interest beyond the material benefit or loss resulting from the court’s judgment. Furthermore, sustaining a wife’s dower claim does not advance or inhibit religion any more than the enforcement of a prenuptial would. The real issue that courts should focus on is the spouses’ religious sincerity at the time they signed the *mahr*-agreement. Failure to take that sincerity into consideration creates an undue advantage for the

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*Mahr in the West*, 24 International Journal of Law, Policy and the Family 67, 77–78 (2010).

113 *Lochner v. New York*, 198 U.S. 45, 57, 25 S. Ct. 539, 543, 49 L. Ed. 937 (1905).

spouse opposing the *mahr*-agreement—often the husband—because he can make compulsion and ignorance issues at trial without these factors being discountable by his own religious sincerity at the time of signing the contract which might, in fact, have outweighed other factors.

In terms of political philosophy, the judicial act of construing *mahr*-agreements may be understood in terms of Rawls' conception of a politically liberal society, in which judges, as representatives of the ideal of public reason, interpret Islamic legal rules in a way that reconciles the historical complexity of these rules with the political values of the target jurisdiction in which they come to be applied.<sup>114</sup> As Mohammad Fadel aptly notes,

While it would not be appropriate for a public reason-minded judge to conjecture about the ultimate, theological significance of a particular rule of Islamic law, that judge, having identified the political values vindicated by that rule, should engage in conjecture that seeks to specify how the political value embedded in that rule or case can be appropriately specified or adjusted so as to produce a politically reasonable outcome in the case before him.<sup>115</sup>

The notion of judicial conjecture, of course, implies an increased burden on judges, as it requires not only intimate familiarity with Islamic jurisprudential science and legal doctrines but also discernment as to what political values might be implicated by incorporating Islamic legal aspects or institutions into the target jurisdiction. At any rate, it should have become clear by now that in the case of *mahr*-agreements, there is hardly a (competing) metaphysical or broader political truth at stake when a US court is asked to enforce such agreements.

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<sup>114</sup> See Mohammad H. Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in S. Langvatn, M. Kumm, and W. Sadurski, eds, *Public Reason and Courts* 115, 124 (Cambridge University Press, 2020).

<sup>115</sup> *Id.* at 125–126.

#### IV. CONSTRUING *MAHR*-AGREEMENTS

- a. *What is a mahr-agreement?*
  - i. Theory 1: a *mahr*-agreement is a premarital agreement

Since the more widespread recognition and enforcement of premarital agreements in the US, courts and spouses have often analogized *mahr*-agreements to prenuptials. But why is the analogy to prenuptials so compelling to courts? And is the analogy justified?

The recognition of premarital agreements by US courts constitutes a relatively recent phenomenon. In *In re Marriage of Dajani* (1988), a California court held that the spouses' *mahr*-agreement constituted a prenuptial but was void against public policy because it ostensibly facilitated divorce by making the wife profit upon divorce.<sup>116</sup> The divorce-profiteering argument was not specifically directed against *mahr*-agreements. Before the Florida Supreme Court's ruling in *Posner v. Posner* in 1970,<sup>117</sup> courts used to regularly dismiss prenuptial agreements made in contemplation of divorce on the arguments that (1) they encourage divorce-profiteering and (2) because the parties would not know their circumstances at separation at the time they contracted the marriage.

To remove the barriers of enforcing prenuptial agreements, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act (UPAA) which as of 2019 has been adopted by 27 states.<sup>118</sup>

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<sup>116</sup> *In re Marriage of Dajani*, 204 Cal. App. 3d 1387, 1388, 251 Cal. Rptr. 871, 871 (Ct. App. 1988). Al-Hibri has noted that the argument is flawed because it implies that Islamic marriage creates an incentive for murder given that a *mahr* is also due upon a husband's death; Azizah al-Hibri quoted in Ghada G. Qaisi, *A Student Note: Religious Marriage Contracts: Judicial Enforcement of "Mahr" Agreements in American Courts*, 14 *Journal of Law and Religion* 67, 78, footnote 61 (2000–2001).

<sup>117</sup> *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970) (holding that antenuptial agreements cannot *per se* be held unenforceable because they are contrary to public policy).

<sup>118</sup> Uniform Law Commission, *Premarital Agreement Act*, accessed

Under the UPAA, prospective spouses may contract premarital agreements on a wide array of matters so long as they are “not in violation of public policy or a statute imposing a criminal penalty.”<sup>119</sup> Consequently, court attitudes towards prenuptials began to radically change in the 1990s to the extent that courts started treating them like ordinary contracts, often to the financial detriment of women.<sup>120</sup>

Based on empirical data, Gail Brod argues that premarital agreements increase the gendered distribution of wealth and earnings because they adversely affect women.<sup>121</sup> These agreements put women at the risk of increased economic inequality because they primarily carry the economic and social burden of divorce.<sup>122</sup> In *The Divorce Revolution*, Lenore Weitzman corroborates this impression by showing that men on average experience a 42% rise in their standard of living in the first year after a divorce, while women experience a 73% decline.<sup>123</sup>

With regard to the underlying financial motive, *mahr*-agreements thoroughly differ from prenuptials because the former are bargained to mitigate the adverse effects on women after divorce by ensuring their financial integrity through a one-time financial remuneration by their husbands. Therefore, the premise of stipulating a *mahr* contradicts the premise of a prenuptial. The former is executed because the contracting parties are aware that if it is not, the wife ends up without financial compensation upon divorce. On the contrary, the latter

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March 10, 2019, <https://www.uniformlaws.org/committees/community-home?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa>.

119 Uniform Premarital Agreement Act (UPAA), § 3 (a) (8).

120 The adverse effects for women resulting from the unquestioning enforcement of premarital agreements are predicated on the assumption that the *de jure* equality of women, manifest in their equal bargaining position as contracting partners, also implies their *de facto* social and economic equality; Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 *Yale Journal of Law and Feminism* 229, 266 (1993).

121 *Id.* at 252.

122 *Id.* at 248–249.

123 Lenore J. Weitzman, *The Divorce Revolution: the unexpected social and economic consequences for women and children in America* 323 (Free Press 1985).

is usually executed because a husband, realizing that his wife might receive “too much” upon divorce, seeks to curb what she is entitled to.

The procedural formalities of contracting a prenuptial indicate that they serve to contemplate on the nature of spousal assets and determine ownership in the case of divorce. But this argument cannot convincingly be made for a *mahr*-agreement. Because spouses maintain their separate financial and legal identities when entering an Islamic marriage, the spousal assets need not be contemplated on in the first place. Of course, one could argue that premarital *mahr*-bargaining between a prospective Muslim husband and wife involves the mutual consideration of assets. But even then, their bargaining does not aim at mitigating an entitlement that is created for the wife as a legal consequence of marriage, but rather, attempts to strike a balance between what the husband is financially capable of conferring and what the wife will need in accordance with her social class, profession, and previous lifestyle.

The analogy to prenuptials is flawed for other reasons. In *Akileh*, a Florida court held that a *mahr*-agreement was antenuptial and enforceable because it had been executed in *contemplation* of marriage.<sup>124</sup> This echoes the UPAA which defines a prenuptial as “an agreement between prospective spouses made *in contemplation* of marriage and to be effective upon marriage.”<sup>125</sup> But can a *mahr*-agreement be said to have been executed in contemplation of marriage? The husband in *Zawahiri* signed the *mahr*-agreement only two hours before the wedding ceremony.<sup>126</sup> This timing of executing *mahr*-agreements is indeed not the exception but rather the rule. While a prenuptial that is made just shortly before the wedding ceremony might not be considered unenforceable *per se*,<sup>127</sup> legal advice recommends

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124 *Akileh v. Elchahal*, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996).

125 Uniform Premarital Agreement Act, § 1.

126 *Zawahiri v. Alwattar*, 2008-Ohio-3473, ¶ 23.

127 *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 302, 834 N.E.2d 56, 67 (2005) (holding that the period of time between the execution of a prenuptial and the wedding ceremony is only one factor among many to be considered by the court); also, *In re Estate of Hopkins*, 166 Ill. App. 3d 652, 658, 520 N.E.2d 415, 418–19 (1988).

that spouses sign their prenuptial as much in advance as possible, but at least thirty days before a wedding.<sup>128</sup> In comparison, a *mahr*-agreement is arguably not in *contemplation* of marriage because it is most often executed during or only hours before the prospective spouses' wedding ceremony.

The parallel to premarital agreements is also inaccurate because premarital agreements become effective upon marriage.<sup>129</sup> However, in the case of a *mahr*-agreement, the marriage is effectuated with the husband's payment of the advanced portion (*mu'ajjal*) of the *mahr*. Thus, a *mahr*-agreement is unlike a prenuptial in that the institution of Islamic marriage itself is, according to the legal majority view, contingent on the partial payment of the advanced portion of the dower. This logic applies even in the rare case that a bridal dower was not specified in the marriage contract because, as mentioned earlier, most Islamic legal schools assume that the husband, irrespective of his failure to specify a dower, will provide to his wife a fair dower (*ṣadāq al-mithl*). In other words, the husband's payment would merely be considered postponed, with the marriage nonetheless considered effectuated by his will to pay.

The flaws in the analogy between *mahrs* and prenuptials cannot be reduced to mere technicalities. Instead, they lead to real consequences, some of them adversely affecting women. One risk has often been taken for granted. That is, by creating the analogy to prenuptial agreements, claims to community property or equitable distribution might be defeated because prenups are usually made precisely to eliminate the possibility of alternative claims. Thus, where the court grants the argument that a *mahr*-agreement is prenuptial, it is less likely also to grant spousal claims under community property or equitable distribution.

The prenuptial analogy may also result in importing the assumption that the spouses should have had the choice not to choose a prenuptial. But as the *Chaudry* Court noted, the option to choose is unavailable when a *mahr*-agreement is entered in

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128 Charles Douglas, 3 *New Hampshire Practice, Family Law* § 1.05 at 13 (Lexis Nexis 3d ed 2002).

129 Uniform Premarital Agreement Act (UPAA), § 4.



a Muslim-majority country such as Pakistan where alternatives to a “prenuptial” do not exist. Stipulating a *mahr* was the ‘only choice’ the spouses could make. The *Chaudry* Court ruled that the inability to choose among options was counter to New Jersey public policy and thus refused to enforce the *mahr*-agreement.<sup>130</sup> In other words, measuring the observation of a lack of alternatives against his home-grown expectations that there should have been alternative forms of financial remuneration, the judge concluded that the prenuptial was entered under compulsion and was thus unacceptable due to public policy concerns.<sup>131</sup>

US courts have yet to encounter a case in which a wife is claiming her *mahr* before and without a divorce. In 2004, the Berlin Kammergericht (KG) in Germany was faced with the question of whether a wife may claim her *mahr* without a divorce. That Court held that a wife acquires ownership over her *mahr* not when the parties are divorced, but when the marriage is contracted. Thus, she may demand the husband’s payment of the deferred portion of her *mahr* at any time during the marriage.<sup>132</sup> The analogy to prenuptials might be difficult to sustain though, if such a case reaches a US court. That is not to say that prenuptials cannot theoretically include stipulations governing an ongoing marriage. However, courts have been somewhat reluctant to recognize causes of action in which a premarital agreement regulates an ongoing marriage.<sup>133</sup> The fear is that judicial interference into family life will increase spousal conflicts and present severe challenges with regard to enforcement.<sup>134</sup>

Another possible litmus test for the prenuptial analogy might arise from the problem of husband-*(talāq)* as opposed to wife-initiated divorce (*khul’*). Under Islamic law, a wife’s claim to an outstanding *mahr*-payment is usually forfeited when she

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130 *Chaudry v. Chaudry*, 159 N.J. Super. 566, 571, 388 A.2d 1000, 1002 (App. Div. 1978).

131 *Id.* at 571.

132 Kammergericht, *Beschluss vom 06.10.2004 – 3 WF 177/04*, accessed March 2, 2019, <https://openjur.de/u/271640.html>.

133 Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 Wake Forest Law Review 1037, 1043 (1993).

134 *Id.* at 1043.

initiates divorce proceedings.<sup>135</sup> In *Akileh v. Elchahal*, the wife’s “Islamic expert” incorrectly testified that the wife’s right to her *mahr* was sustained despite her filing for divorce.<sup>136</sup> Although it could seem particularly harsh or unfair to recommend that the court refrain from enforcing *mahr*-agreements when a divorce is initiated by the wife, the impression of inequity is contingent on the assumption that wives have no alternative legal recourse in the case of dismissal of their *mahr*-agreements. If community property and equitable distribution claims were taken into account separately, the concern about inequity would probably fade.

The construction of *mahr*-agreements as prenuptials is prone to producing bad law. The only similarities that minimally justify the analogy are that (1) both are executed roughly prior to marriage, and (2) that a *mahr*’s deferred portion (*mu’akkhar*), similar to payments that might become due under a prenuptial, is customarily due in the event of divorce. Although both these types of financial arrangements are contracted in the “shadow” of marriage, they differ considerably in terms of their purpose, effect, motive, and even time of execution. Prenups tend to increase the financial burden of women after divorce. *Mahr*-agreements curb them. Prenups are made in contemplation of spousal assets in order to determine ownership in the case of divorce. *Mahr*-agreements are often made in the absence of alternative entitlements to a husband’s assets. Prenups tend to be made at least a couple of days before a wedding, but preferably more than 30 days in advance. *Mahr*-agreements are almost invariably signed on the day of the wedding ceremony.

The analogy to prenuptial agreements presents a real danger because (1) the courts’ understanding of prenups and the interpretive standards used for them do not easily lend themselves to *mahrs*, (2) the adverse effects of prenups tend to spill over to *mahrs*, and (3) the legal and cultural rationales underlying *mahr*-agreements are threatened to be obliterated

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135 As previously noted, there are specified grounds based on which a wife can demand a divorce by court order (*tafriq*) without forfeiting her *mahr*-payment.

136 *Akileh v. Elchahal*, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996).

so that Islamic marriage as such becomes quite meaningless. A more severe problem that arises from the prenuptial theory is that it invariably imports the logic that state community property or equitable distribution rules cannot simultaneously be applied.<sup>137</sup> It thus bears a significant risk for women by making alternative claims moribund.

ii. Theory 2: a *mahr*-agreement  
is a simple contract

The simple contract approach may be the most promising theory in terms of balancing out adverse effects on women and preserving their ability to make alternative claims under community property or equitable distribution. Unlike a premarital agreement, when decided that a *mahr*-agreement constitutes a simple contract, a wife will not automatically forfeit such claims. In addition, the simple contract theory has the advantage of fewer restrictions. It does not need to have been made either in contemplation of or prior to marriage. On the other hand, choosing to opt for the simple contract theory (under US federal or state law) mandates compliance with contract law requirements which include the “meeting of the minds,” conscionability, and the absence of duress.

The simple contract-approach was embraced without reservations in *Odatalla v. Odatalla* (2002) where the New Jersey Superior Court held that:

Clearly, the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war

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<sup>137</sup> See also Lindsey E. Blenkhorn, *Notes. Islamic Marriage Contract in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 Southern California Law Review 189, 208 (2002).

with any public morals.<sup>138</sup>

But *Odatalla* could be judged with relative ease because evidence was offered in the form of a videotape of the wedding ceremony showing that the husband made an offer to the wife freely and voluntarily and that the wife accepted the proposal with the same terms.<sup>139</sup> The requirements for the validity of the contract could thus be established without any uncertainty.

Obviously not all parties to a *mahr-agreement* would be able to provide videotape evidence to prove that their contract was entered freely, voluntarily, with a “meeting of the minds,” and show that it was conscionable. In *Afghahi v. Ghafoorian* (2010), the husband claimed that the marriage contract was unconscionable because it was based on extreme inequity.<sup>140</sup> The husband stated that he had never possessed the financial assets that he committed to paying in the *mahr-agreement*. Failing to present more compelling evidence for ostensible inequity, the Virginia Court of Appeals refused the argument obliging the husband to pay the agreed-on 514 gold coins to his ex-wife.<sup>141</sup> It is difficult to tell whether the Court might not have enforced the *mahr-agreement* if the husband had come up with more compelling arguments that it was indeed based on severe inequity.<sup>142</sup>

The cases in which courts have applied the simple contract-theory are too few to make decisive statements about its potential implications. In *Odatalla*, *Afghahi*, and also *Aziz*,<sup>143</sup> the wives were able to claim their *mahrs* based on this theory.

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138 *Odatalla v. Odatalla*, 355 N.J. Super. 305, 314, 810 A.2d 93, 98 (Ch. Div. 2002).

139 *Id.* at 311.

140 *Afghahi v. Ghafoorian*, No. 1481-09-4, 2010 WL 1189383, 4 (Va. Ct. App. Mar. 30, 2010).

141 *Id.* at 4. At the time the 514 Bahar-e Azadi gold coins had a value of \$141,100; *id.* at 4.

142 Another possibility would be for the court to make use of the Islamic legal concept of the “fair dower” (*mahr al-mithl*) in such cases and determine a dower in line with husband and wife’s social standing, profession, etc.

143 *Aziz v. Aziz*, 127 Misc. 2d 1013, 1013, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (holding that a *mahr-agreement* is a contract the secular obligations of which can be enforced).

When compared to the prenuptial analogy, the simple contract-approach seems preferable based on its outcome and because it is less tailored to a particular social situation and thus provides an interpretive framework that is more amenable.

Nevertheless, to qualify as a simple contract, a *mahr*-agreement will still have to satisfy the US contract law requirements. The theory thus reproduces some of the obstacles inherent in the pre-nup theory. Given the peculiar cultural format of *mahr*-agreements, mutual assent, offer and acceptance, and consideration can be particularly hard to prove in the absence of evidence that is not written in the marriage contract itself and court reluctance to admit parol evidence.<sup>144</sup> For instance, in *Obaidi v. Qayoum*, the Court held that there was no meeting of the minds on the essential terms of the contract because the husband Qayoum was supposedly unaware of the contract's terms until an uncle had explained them to him after the wedding.<sup>145</sup> Duress, too, can easily arise as an issue given that many *mahr*-agreements would be executed at the wedding ceremony only hours before the parties wed.

The overwhelming advantage of the simple contract theory is its non-interference into women's other claims to communal property. It, therefore, captures the nature of *mahr*-agreements more adequately in that those agreements are simply not made in consideration of communal or spousal assets and are generally based on the assumption that the spouses retain their separate financial identities.

iii. Theory 3: a *mahr*-agreement  
is a marriage certificate

In at least one case of Islamic divorce, a court ruled that a *mahr*-agreement is neither a prenuptial nor a simple contract, but rather a marriage certificate. This was in *In re Marriage of Shaban* (2001), a case that was peculiar in some

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<sup>144</sup> See *supra* note 79.

<sup>145</sup> *In re Marriage of Obaidi & Qayoum*, 154 Wash. App. 609, 226 P.3d 787, 788 (2010).

ways. Here, it was the husband who argued for the validity of the government-issued *mahr*-agreement using the prenuptial theory. His insistence to have the bridal dower enforced was not accidental given that his wife would have been entitled to no more than 500 Piasters (\$30). Yet, the Court did not grant the husband's argument and instead held that the *mahr*-agreement is a marriage certificate affirming the lower court's application of state community property law to the parties' assets.<sup>146</sup>

For women, a court's granting of the marriage certificate theory will result in a definite loss of the deferred portion of the *mahr*. This is only an advantage if one assumes that, as in *Shaban*, the enforcement of *mahr*-agreements and the application of state community property or equitable distribution are mutually exclusive. As argued in the previous sections, *mahr*-agreements should not generally be understood as superseding state property rules.<sup>147</sup>

In the *Shaban* case, the marriage-certificate theory prevailed because the California Court of Appeal was struggling with the unusual format of the *mahr*-agreement. It did not find the husband's argument that the *mahr*-agreement is prenuptial persuasive because the terms of the contract did not satisfy the statute of frauds.<sup>148</sup> Meanwhile, the Court did not allow the terms it found ambiguous to be clarified at trial by admitting parol evidence. That the Court was consternated by the *mahr*-agreement's format becomes apparent in the section where it states that "all three translations of the document provide far more information about the two witnesses to the wedding than they provide about any agreement of the parties."<sup>149</sup> The Court seemingly felt that a contract stipulating a monetary sum should look more like a "contract" in that its epistemic focus be on the financial transaction. But that misses the point entirely. Although

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146 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 865 (2001).

147 Also, see Lindsey E. Blenkhorn, *Notes. Islamic Marriage Contract in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 Southern California Law Review 189, 208 (2002).

148 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 865 (2001).

149 *Id.* at 407.

a *mahr*-agreement indeed stipulates a financial deal, it is also more than that. That is, it is also a certification of the validity of the parties' marriage and frequently has an aesthetic appeal to spouses.

Going forward, *Shaban* is likely to function as a harmful precedent for Muslim wives getting a divorce. Under its theory, a *mahr*-agreement is considered void of any contractual obligations binding the husband. This is especially problematic given that a wife performed consideration of the contract by entering the marriage in the first place. Yet the problem with the marriage-certificate theory is more substantial. It fails to attribute any peculiar meaning to the gendered nature of Islamic marriage and the temporal and cultural situatedness of the *mahr* in the institution of marriage. Islamic marriage, under this theory, is mainly relegated to a cultural footnote without any real consequences. The process of translating Islamic marriage into the US legal system falls through here not because the features of Islamic marriage cannot adequately be imported into the US legal system but due to the marriage-certificate theory's denying any peculiarity to Islamic marriage. Instead, the approach forges the idea that the spouses' entering a *mahr*-agreement is equivalent to a Western-style marriage and even though they did stipulate a *mahr*, the application of state property rules is assumed to be better for them. The paternalizing assumptions, as well as the sense of cultural hegemony inherent in this approach, can hardly be overlooked.

*b. Moving forward: identifying alternatives, enforcing mahr-agreements*

*i. Spouses*

*Make better mahr-agreements.* Muslim community centers in the US have become increasingly aware of the problems that spouses might face concerning the enforcement of *mahr*-agreements in US jurisdictions. Responding to these challenges, some initiatives have sought to create awareness among Muslim

couples that US courts might be charged with adjudicating on bridal dowers in case of a future divorce and ensure the legal recognition of *mahr*-agreements by encouraging couples to add explanatory attachments to them.<sup>150</sup> In those, potentially ambiguous terms are clarified to account for the possibility that a family court might later have to judge on the enforceability of the *mahr*-agreement. Nonetheless, this is not an option available to all Muslim couples, especially not migrants or refugees who simply may not anticipate that their *mahr*-agreement would ever end up in an American courtroom. Lindsay Blenkhorn has claimed that “[all] Muslim women can create prenuptials, just as any other woman or man may.”<sup>151</sup> However, her claim fails to take into consideration those women abroad who entered an Islamic marriage in a jurisdiction where a prenuptial may have been unavailable due to legal or cultural reasons.

These suggestions are no cure-all remedies. They do not necessarily translate the cultural implications of Islamic marriage. But they facilitate the recognition of *mahr*-agreements in the US legal system by attempting to frame them in legal terms that are legible and more readily accessible to the judiciary.

ii. Imams and other religious authorities

*Insist on spouses’ stipulating better mahr-agreements.* As wedding officiants and upholders of Islamic marriage, religious authorities assume a central role and responsibility in ensuring that the spouses are aware of the legal consequences a *mahr*-agreement will have on them and all the potential obstacles those agreements may face in court. That creates a special duty to inform and provide adequate counseling to Muslim women

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150 See, for instance, Iman Center, Islamic Marriage Contract, accessed March 16, 2019, [http://iman-wa.org/cms/wp-content/uploads/2009/12/IMAN\\_Marriage\\_Contract.pdf](http://iman-wa.org/cms/wp-content/uploads/2009/12/IMAN_Marriage_Contract.pdf); also see Kahf.net, Prenuptial Agreement, accessed March 16, 2019, [http://monzer.kahf.com/marriage/PRENUPTIAL\\_AGREEMENT\\_FORM\\_REVISIED\\_FEB\\_2008.pdf](http://monzer.kahf.com/marriage/PRENUPTIAL_AGREEMENT_FORM_REVISIED_FEB_2008.pdf).

151 Lindsey E. Blenkhorn, *Notes. Islamic Marriage Contract in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 Southern California Law Review 189, 208, footnote 108 (2002).



who bear the primary financial burden in case the court does not honor such agreements.

iii. Lawyers and political activists

*Consider creative strategies for ensuring enforcement.* In *Zawahiri v. Alwattar*, Alwattar argued that the trial court's denial to uphold her *mahr*-agreement violated her right to equal protection.<sup>152</sup> She stated that "the trial court refused to enforce the marriage contract because she is Muslim," contending that the Court would have upheld a non-Muslim marriage contract.<sup>153</sup> The Court rejected her argument, shielding the trial court by referring to the Establishment Clause and stating that the contract was not valid as a prenuptial.<sup>154</sup> While precise strategies for action cannot be fleshed out here, it is worthwhile considering whether claims based on the violation of Muslim women's equal protection rights can be made more persuasively. The court's regular dismissal of *mahr*-agreements does give rise to the impression that the legal system is susceptible to more systemic and cultural biases against Islamic laws, the primary victims of which, coincidental or not, are Muslim women.

iv. Courts

*Consider enforcing mahr-agreements as simple contracts under Islamic law or defer to Islamic arbitration courts.* Implementing *mahr*-agreements by applying Islamic law under comity would arguably be an effective way to ensure the parties' contractual obligations are upheld in accordance with spousal intent at the time the marriage was contracted and in line with Islamic legal tenets.<sup>155</sup> Yet even where the enforcement of *mahr*-agreements under Islamic law is legally possible, the question of whether spousal claims under state property rules exist requires

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152 *Zawahiri v. Alwattar*, 2008-Ohio-3473, ¶24.

153 *Id.* at ¶26.

154 *Id.* at ¶26.

155 The next section shows that this option has been severely curbed with the passing of the foreign law ban in 32 state jurisdictions.

further consideration. Should such claims be considered mutually exclusive with bridal dowers or in addition to them? Case law at least partially offers support to the idea that bridal dowers and state property rules may be reviewed together and balanced against each other. In *Chaudry v. Chaudry*, the Court used a nexus-test to balance *mahr*-claims against additional claims that might exist under state property rules:

where there is a sufficiently strong nexus between the marriage and this State e. g., where the parties have lived here for a substantial period of time a claim for alimony and equitable distribution may properly be considered, in the court's discretion, after a judgment of divorce elsewhere, under N.J.S.A. 2A: 34-23, even though such relief could not have been obtained in the state or country granting the divorce.<sup>156</sup>

The Chaudrys had been married in Pakistan. After moving to the US, the husband obtained a divorce judgment back in Pakistan. The wife argued that in addition to the *mahr*, she was entitled to a claim for equitable distribution under New Jersey state law. The Court denied her request on the basis that a sufficient nexus between the marriage and the state of New Jersey did not exist because she had only resided in New Jersey for about two years before returning to Pakistan.<sup>157</sup>

The nexus test's achievement, though, was an assessment of whether the spouses' move from Pakistan to New Jersey and their residing there created an additional entitlement for alimony and equitable distribution. It presumed the gradual acculturation of the spouses to a jurisdiction that might be at odds with their home jurisdiction. The nexus test implied that the more enduring the acculturation (or, the more prolonged the stay), the more sustainable spousal claims under state property rules become, even if that kind of relief does not exist in their jurisdiction of

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<sup>156</sup> *Chaudry v. Chaudry*, 159 N.J. Super. 566, 577, 388 A.2d 1000, 1006 (App. Div. 1978).

<sup>157</sup> *Id.* at 577.

origin. It arguably serves as a useful instrument to counterbalance state property rules against *mahr*-payments and could provide the grounds for a more equitable distribution of marital assets in cases where the material life circumstances after contracting Islamic marriage and after the spouses' migration to the US changed significantly.<sup>158</sup>

An alternative and more systemic remedy would be based on the British model of Islamic arbitration courts (so-called *shari'a*-courts). That model was enacted in 1996 under the U.K.'s Arbitration Act in order to guarantee parties that their disputes be resolved in whatever manner they seek to address them.<sup>159</sup> State courts cannot interfere with dispute resolutions in these tribunals except if the Act sanctions such interference.<sup>160</sup> Mona Rafeeq argues that Islamic arbitration tribunals could be furnished in the United States in a manner that advances American as well as Islamic ideas of justice.<sup>161</sup> She suggests that by applying certain restrictions, Islamic arbitration tribunals can be prevented from abusing their authority or making judgments that would be at odds with American secular notions of justice.<sup>162</sup> But, as she also notes, that would first require a *meaningful* public debate about Islamic laws in the United States.<sup>163</sup>

In Texas, one Islamic arbitration tribunal was established in 2013. Besides divorce and family matters, the tribunal arbitrates other affairs such as business disputes.<sup>164</sup> The establishment of the tribunal was accompanied by a media outcry that rekindled the public fear of Islamic laws. In the absence of a meaningful debate about how the US judiciary can accommodate Islamic laws and how many of the values embedded in Islamic legal

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158 See page 92 for a model that shows how bridal dowers can be balanced against state property rules in *mahr*-litigation; *Figure 1*.

159 Mona Rafeeq, *Rethinking Islamic law arbitration tribunals: are they compatible with traditional American notions of justice*, 28 Wisconsin International Law Journal 108, 127 (2010).

160 *Id.* at 127.

161 *Id.* at 111.

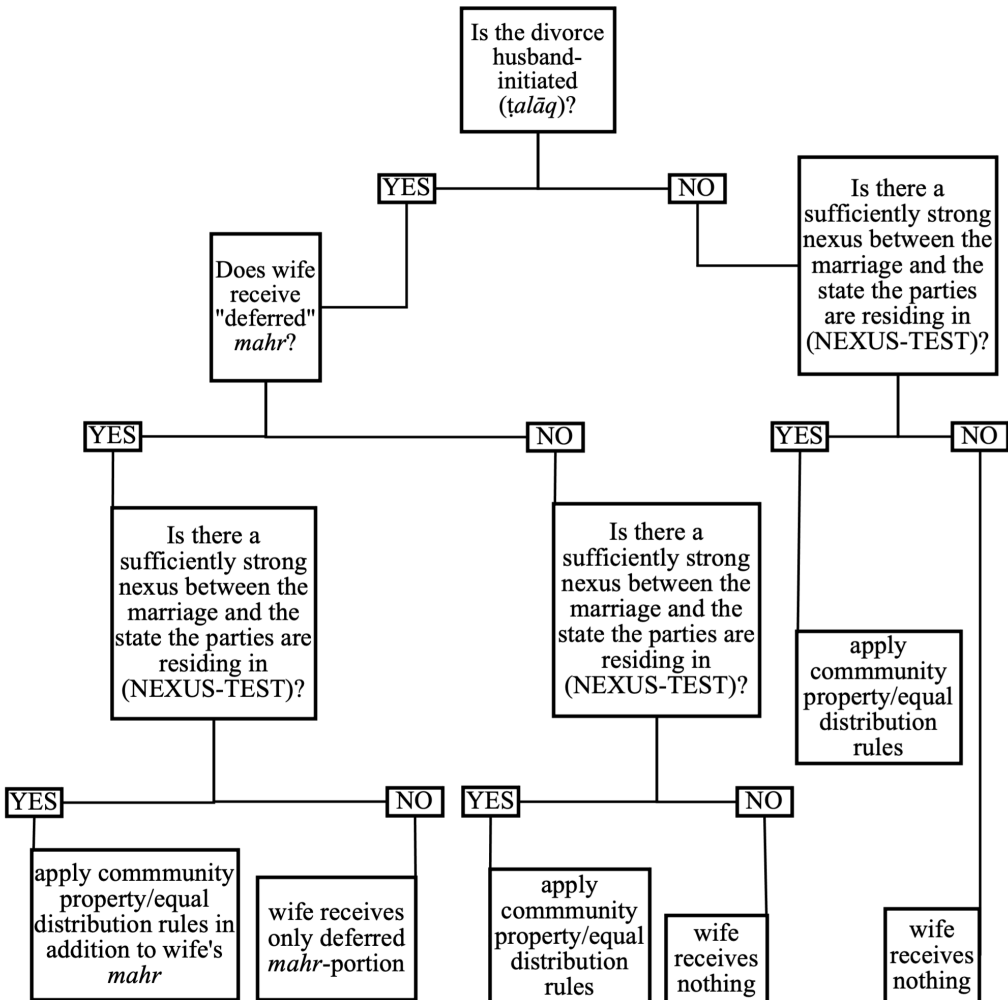
162 *Id.* at 128.

163 *Id.* at 110.

164 Islamic Tribunal, accessed March 17, 2019, <https://www.islamictribunal.org>.

culture could easily be reconciled with the ambitions of the US legal system, the idea of Islamic arbitration courts remains difficult to imagine. At the same time, there is a much broader liberal value at stake that is not merely or at all about Islamic laws, but rather about the citizen's ability to choose in what manner and under what laws she wants to execute contracts, respecting the peculiarity of her choice, and the human dignity that is tied to that choice.

FIGURE 1: POSSIBLE TESTS FOR MAHR-LITIGATIONS



**V. NEW OBSTACLES ON THE HORIZON:  
MAHR-AGREEMENTS IN THE SHADOW OF  
ANTI-SHARĪ‘A BILLS**

In 2012, the Kansas Senate voted to adopt Bill No. 79. Section 4 of the bill specifies that a contract which is partially or fully governed by a foreign law, legal system, or legal code will be considered void and unenforceable if the substantive or procedural law that would be applied in a dispute between the parties violates Kansas’ public policy. Such public policy violation is deemed to occur where the contracting parties would not be granted the fundamental liberties, rights, and privileges that they hold under the United States and Kansas laws.<sup>165</sup>

Kansas was not the only state to adopt what is usually referred to in the literature as a “foreign law ban.” Thirty-one other states have passed similar bills, most of them banning either reliance on or enforcement of foreign laws.<sup>166</sup> These bills seek to eliminate the court’s discretion to decide whether a specific matter would create a public policy concern by transforming certain groups of foreign laws, particularly Islamic laws, into a general public policy concern.

That Islamic laws were at the heart of legislators’ concerns becomes apparent when looking to the statutory texts and the legislative history surrounding the passing of the anti-foreign law bills. In Oklahoma, the House passed the 2010 Amendment bill to the Oklahoma constitution which explicitly singled out Islamic (Sharia) law as its intended target:

[...] The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or *Sharia Law*. The provisions of this subsection shall apply to all cases before the

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<sup>165</sup> 2011 Kansas Senate Bill No. 79, Kansas Eighty-Fourth Legislature 2012 Regular Session (May 15, 2012).

<sup>166</sup> Faiza Patel, Matthew Duss, and Amos Toh, *Foreign Law Bans. Legal Uncertainties and Practical Problems*, Brennan Center for Justice, Center for American Progress 1, 18 (May 2013) (clustering states which passed a foreign law ban into four distinct groups based on the ban’s scope).

respective courts including, but not limited to, cases of first impression.<sup>167</sup>

In its judicial review of the resolution in *Awad v. Ziriya*, the Court of Appeals of the Tenth Circuit struck down the Amendment arguing it violated the Establishment Clause.<sup>168</sup> A similar situation prevailed in Idaho. But there, after the legislator’s bill had been overruled by the court for singling out “Sharia law,” the House eliminated the explicit mention of “Sharia law” enacting its practically identical foreign law ban in the form of House Bill No. 419.<sup>169</sup>

In Kansas, the bill was framed as a matter of citizens’ and especially women’s rights under US and Kansas laws. This was made clear during the Senate debates. Senator Susan Wagle encouraged members to vote for the bill in order to protect citizens from the “inhumanness” of Islamic laws. On the Senate floor, she explained that “if you vote to not adopt (the bill), it’s a vote against women” because “[t]hey stone women to death in countries that have Sharia law.”<sup>170</sup> Thus, voting for the Kansas bill was, one would infer, supposedly a matter of advancing (Muslim) women’s rights.<sup>171</sup>

The Brennan Center for Justice predicts that foreign law

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167 Enrolled House Joint Resolution 1056, 52nd Legislature, 2nd Regular Session, §1(C), (Oklahoma 2010), accessed March 9, 2019, <https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf>.

168 *Awad v. Ziriya*, 670 F.3d 1111 (10th Cir. 2012).

169 House Bill No. 419, Legislature of the State of Idaho, accessed February 24, 2019, <https://legislature.idaho.gov/sessioninfo/billbookmark/?yr=2018&bn=H0419>.

170 *Groups urge veto of anti-Sharia law bill*, Lawrence Journal-World, accessed February 25, 2019, <http://www2.ljworld.com/news/2012/may/18/groups-urge-veto-anti-sharia-law-bill/>.

171 Such gendered discourses centering on the protection of Muslim women from the inhumane legal and social practices they face in Muslim countries are not a novel phenomenon; Edward W. Said, *Orientalism*, 207 (Vintage Books 1978) (showing that in Orientalist representations women are usually presented with “unlimited sensuality, [...] more or less stupid, and above all [...] willing”); Lila Abu-Lughod, *Do Muslim Women Need Saving*, 32 (Harvard University Press 2013) (arguing that the stigmatization of Muslim women as oppressed in Laura Bush’s radio address on November 17, 2001 justified US military intervention in Afghanistan and the War on Terror).

bans will create significant disruptions in family life, particularly in the realms of marriage licenses, prenuptial agreements, adoption agreements, divorce decrees, and child custody orders which are likely to be held non-enforceable by state courts.<sup>172</sup> The immediate effects of the ban became apparent shortly after the enactment of the Kansas ban. The District Court of Johnson County in Kansas was confronted with the case of *Soleimani* where the wife asserted that her *mahr*-agreement qualifies as a prenuptial. The Court dismissed the argument due to lack of evidence produced by the wife's counsel. But the *dictum* states that if the court were to interpret the *mahr*-contract, it would essentially create "a remedy under a contract that clearly emanates from a legal code that may be antithetical to Kansas law."<sup>173</sup> Thus, regarding marriage contracts under Islamic law, the Brennan report might understate the impact of foreign law bans because, as this paper intended to show, such contracts have historically been challenged by US courts and are now even less likely to be honored.

Wagle's claim is somewhat ironic. By nature, *mahr*-agreements defy the rationales of state property rules because they are intended to secure a woman's livelihood after divorce without consideration of spousal assets. They create predictability, certainty, and fairness because women know what they are entitled to in the case of divorce. The *mahr* is not only central to Islamic marriage, but its enforcement constitutes the primary Islamic legal recourse for women in the absence of alternative claims that can be made to a husband's financial assets when a divorce has been granted. When Wagle claims that not voting for the Kansas Bill is a "vote against women," she underestimates the undue effects the Kansas ban will have on the lives of Muslim women because they are being deprived of that recourse to enforce the contractual obligations their husbands had agreed to. Particularly because these women have already

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<sup>172</sup> Faiza Patel, Matthew Duss, and Amos Toh, *Foreign Law Bans. Legal Uncertainties and Practical Problems*, Brennan Center for Justice, Center for American Progress 1, 11 (May 2013).

<sup>173</sup> *Soleimani v. Soleimani*, No. 11CV4668, 31 (Johnson County Dist. Ct. 2013).

performed their contractual obligations by entering marriage. Refusing to implement *mahr*-agreements systematically threatens to permanently unsettle the ways in which Islamic marriage is crafted as an institution in which the bargaining powers of husband and wife maintained in marriage depend on and are equalized precisely because a dower is stipulated prior to wedlock.

## CONCLUSION

This paper was dedicated to scrutinizing the theories US courts have employed to construe *mahr*-agreements and the adverse effects these constructions have on Muslim women. Although no approach has yet assumed normative status, the analogy to prenuptials has been applied most often due to the ostensible similarities that prenuptials have with *mahr*-agreements. But the analogy is not persuasive because apart from being roughly stipulated prior to a wedding, a *mahr*-agreement differs significantly in terms of intent, effect, motive, and even its precise time of execution. Unlike prenuptials, *mahr*-agreements are *not* made in contemplation of marriage, as is defined by US law, nor do they increase the financial burden on women upon divorce. Most importantly, the analogy to prenuptial agreements risks forfeiting women's claims under state property rules because prenuptials are most commonly made in order to avoid spousal division of assets in case of a divorce.

The simple contract theory is a more promising candidate for enforcing *mahr*-agreements. Under that theory, *mahr*-agreements are subject to less scrutiny with regard to their particular purpose or time of execution. Yet, providing proof that *mahr*-agreements satisfy US contract law requirements can create a burden for those seeking enforcement because not only the manner in which *mahr*-agreements are entered, but also their physical format, can easily create doubt as to whether they were contracted with mutual assent, offer and acceptance, and with spousal consideration. Where there is no videotape evidence from the wedding ceremony such as in *Odatalla*, a



husband's claim that the contract was entered under duress or with ignorance has the potential to be granted by the court.

The marriage certificate theory carries no conceivable advantage, except if a woman seeks to prevent the contractual obligations in a *mahr*-agreement from being enforced by the court. It denies peculiarity to the institution of Islamic marriage by upholding it merely as a cultural practice without any hard consequences.

Under these theories, Muslim women's prospects of getting their *mahr*-agreements enforced by a US court are dire. Although facially neutral, each theory tends to reinforce substantive inequality between men and women by producing effects that are almost exclusively detrimental to women. In addition, gendered inequality is also entrenched in the legal obstacles that women encounter in *mahr*-litigations. At least some of these obstacles may be resolved by the courts. For instance, the court's anxiety to violate the Establishment Clause by getting entangled in religious interpretations is often unfounded. On the one hand, under FRCP 44.1, the court is granted extensive liberties to make use of parol evidence. Thus, where the court first determines what the ambiguous terms in a *mahr*-agreement are and then hears expert witnesses clarify these terms, such contracts are not necessarily being rewritten. On the other hand, instead of religious interpretations that the court sometimes feels it must judge on, it is most often the sincerity with which spouses contracted a *mahr*-agreement that should be part of the court's consideration of whether such contracts are enforceable.

This paper also meant to show that the constructions of *mahr*-agreements, and their regular dismissal, directly impact the institution of Islamic marriage by uprooting the ways in which conceptions of gender and authority in these marriages have traditionally been configured. The construction of *mahr*-agreements, whatever theory the courts avail themselves of, creates precedents to which other courts, lawyers and Muslim couples will look to in *mahr*-litigations. The enforcement problems that pertain to the theories that *mahr*-agreements are prenuptials, simple contracts, or religious marriage certificates

currently convey the message that *mahr*-agreements are unlikely to be honored by courts. The foreign law ban, by casting doubts on whether courts should at all tend to such agreements, reinforces that impression. Thus, the sense that *mahr*-agreements are unlikely to be upheld by US courts increases the real-time bargaining power of Muslim husbands in marriage to the detriment of women because the partners' bargaining abilities are designed to rest on the predictability that a *mahr* will be due in case of unilateral husband-divorce (*talāq*). Against the backdrop of a growing epistemic certainty that *mahr*-agreements have little to no value in the American courtroom, the lives and livelihoods of Muslim women become more disenfranchised and more susceptible to husband-initiated divorce.

Thinking of *mahr*-enforceability in dynamic terms, one should account for how parties to *mahr*-litigations may respond if such agreements were more regularly enforced. If that were the case, women could be induced to negotiate higher *mahrs*. But that argument is discounted by the fact that women currently ending up in *mahr*-litigations often do not seem to have assumed that their *mahr*-agreement would not be enforceable upon divorce. Therefore, standardized enforceability would not necessarily change how women approach *mahr*-negotiations. Things are different for men, though. Because the *mahr*-litigation market currently sends out mixed signals with a tendency towards non-enforcement, certitude that such agreements are enforceable would likely induce men to more carefully consider whether they can afford such agreements. Such certitude arguably could make men want to avoid such contracts, which might make women more seriously consider other options such as state property rules. These arguments, however, assume that enforceability of a *mahr*-agreement on US soil is something the parties can anticipate when they get married and would thus exclude Islamic marriages that are concluded without any knowledge or anticipation that the parties will one day find themselves before a US court.

There is a more disquieting problem underlying the translation of *mahr*-agreements into the US legal system. The

predominant construction of *mahr*-agreements as prenuptials presumes similarity between *mahrs* and prenuptial agreements where there is in fact little. By imposing the prenuptial framework onto *mahr*-agreements, the peculiarities of these contracts tend to be assimilated within a legal philosophy that seemingly defines itself in opposition to and as being incapable of accommodating the needs of the most vulnerable in society. In this process of assimilation, Islamic marriage becomes virtually unrecognizable and meaningless because the very reasons for spouses choosing this particular form of matrimony are relegated into a cultural footnote.

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