

Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue

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INTRODUCTION

In the scholarship dedicated to legal transplants, the binary East/West permeates the images and understanding of the ways in which Islamic legal rules travel, penetrate, and get received by the West in a comparative law dialogue. Differences are thus being assigned *between* the legal regimes of the East and the West, two entities considered as sharply divided. This chapter seeks to understand the politics of transnational Islamic family law in Canada, the United States, France, and Germany, through the migration of one particular Islamic legal institution: Mahr, “the gift which the bridegroom has to give to the bride when the contract of marriage is made and which becomes the property of the wife.”¹ The issue of Mahr typically presents itself in a crisis: a married Muslim woman, engaged in a religiously structured marriage, and living in a Western liberal state, reaches out to the secular court upon the dissolution of her marriage to claim the enforcement of Mahr, presumably because her husband has previously refused to give her the amount of deferred Mahr.²

Through an analysis of the case law, I explore the ways in which substantive equality is being used by courts to accept or root out Islamic law from the family of institutions that are deemed appropriate in Western countries. What influences the selection and imposition of Mahr as a gendered institution?

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¹ *The Encyclopaedia of Islam* (Vol. 6)(New edition, Bosworth, Donzel, Lewis, & Pellat, eds., 1991).

² *Mahr* is usually divided into two parts: that which is paid at the time of marriage is called *prompt Mahr (muajjal)*, and that which is paid only on the dissolution of the marriage by death or divorce or other agreed events is called deferred *Mahr (muwajjal)*.

How does law shape substantive equality in a comparative religious framework? Does the way Mahr travels affect gender equality, in both productive and reactive terms? In addressing these questions, I draw on Edward Said's³ and Barbara Johnson's⁴ innovative perspectives on comparative law to deconstruct the discursive effects of the East/West binary and further assess the repression of differences *within* the entities of Western and Islamic law. I argue that the existence of a "State–Church / Western–Islamic contradiction" makes it difficult for courts "to turn the gaze back upon itself"⁵ and embark on the exercise of tracing back the analogy between Mahr and other Western legal institutions that share some of Mahr's characteristics or functions. In fact, to effectively preserve the binary opposition suggested by the East/West discourse, the (non-localized) Western judge must deny the differences *within* the West.

I. A SUBSTANTIVE EQUALITY APPROACH TO ISLAMIC FAMILY LAW: GENDER AND THE INDETERMINACY OF LEGAL DOCTRINE

The substantive equality approach is concerned with power differentials – how subjects are constituted through structural and hierarchical systems of inequality, and how the law specifically (re)produces systemic conditions of oppression. In such a context, treating everyone the same cannot lead to equality. Because the real world is marked by domination, the state can only deliver outcomes that are substantively equal if it examines the *effects* of legal policies. The purpose of the substantive equality approach is thus to name, expose, and ultimately eradicate the socially and economically inferior position of oppressed groups in society. To do so, it must start from the perspective of the oppressed, and critique existing doctrines, practices, and structures through the lens of subordination theory. In applying substantive equality, the judge embraces a general fairness policy in enforcing contracts: because, in intimate relationships, men and women are not considered at arm's length nor as equals in bargaining power, especially with regard to issues related to the family, the state intervenes to police the outcomes. How has this policy of equity worked in the translation of Mahr in Canada, the United States, France, and Germany?

³ Edward W. Said, *Orientalism* (1978).

⁴ Barbara Johnson, *The Critical Difference: Essays in the Contemporary Rhetoric of Reading* (1981).

⁵ I borrow the expression and methodology from Brenda Cossman, *Returning the Gaze? Comparative Law, Feminist Legal Studies and the Postcolonial Project*, 1997 *Utah L. Rev.* 525, 525 (1997). Cossman provides a way of differently inhabiting the ethnocentric gaze of comparison where "the geopolitical location of the author becomes the unstated norm against which the exotic 'other' is viewed."

A. The Enforcement of Mahr According to Gender Equity Standards

In the cases below, the substantive equality approach causes the courts to see Mahr from the “public” and highly interventionist standpoint of the state. In the German and Canadian cases (Québec) discussed in the following sections, courts have embraced the legitimacy of Mahr but have intervened to regulate its enforcement, an intervention that carries with it the mark of substantive equality. Whereas Germany has modified the initial amount of Mahr to meet equitable considerations, Québec has rejected the Islamic family law logic of *Khul Mahr* to welcome the enforcement of Mahr in a context where the Muslim wife is the one asking for divorce. According to Islamic law, *Khul* divorce can be initiated by the wife with the husband’s prior consent; however, divorce by this method dissolves the husband’s duty to pay the deferred Mahr.⁶

i. The Enforcement and Readjustment of Mahr as Alimony: The Case of Germany

In *OLG Koeln*⁷, a 1983 Court of Appeal decision from Cologne, the notarized marital contract between an Iranian wife and a German husband specified as Mahr, a Qur’an worth 1000 rials, jewelry worth 88,000 rials, plus four million rials (42,000 DM [21,000 Euros]). Christina Jones-Pauly notes that “[t]he four million rials were specifically referred to as a “debt” on the husband, payable at any time the wife wanted it.”⁸ The wife asked and obtained a divorce before the German Family Law Chamber and separately claimed the enforcement of Mahr plus interest as a legal debt before the Civil Law Chamber.

At the trial court level, the husband had convinced the court that the enforcement of Mahr constituted an unjust enrichment for the wife, one that would violate German public order. On appeal from the Civil Law Chamber, the appellate court viewed Mahr as an Islamic institution that serves as post-marital maintenance, but only insofar as its enforcement meets the German

⁶ As pointed out by Judith E. Tucker, *Khul* divorce is the exchange of Mahr for “freedom,” a form of divorce that has “often proved very costly indeed.” *Judith E. Tucker, Women in Nineteenth-Century Egypt* 54 (1985). See *Dawoud Sudqi ElAlami & Doreen Hinchcliffe, Islamic Marriage and Divorce Laws of the Arab World* 3, 27–28 (1996). See also Abdal-Rehim Abdal-Rahman Abdal-Rahim, *The Family and Gender Laws in Egypt during the Ottoman Period, in Women, the Family, and Divorce Laws in Islamic History* 105 (Amira El Azhary Sonbol, ed., 1996).

⁷ *OLG Koeln IPRax* 1983, 73 (Cologne).

⁸ See Christina Jones-Pauly, *Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law, in The Islamic Marriage Contract: Case Studies in Islamic Family Law* 10 (Asifa Quraishi and Frank E. Vogel, eds., 2008). (On file with the author).

standards of equity. It held that enforcing its full amount in this case – (42,000 DM [21,000 Euros]) – would be repugnant to German principles of justice. Consequently, the amount would have to be counted against any maintenance that the husband might be ordered to pay. To establish exactly how much of the 21,000 Euro Mahr would be awarded to the wife, the court decided to send the matter back to the Family Law Chamber. Mahr was thus translated as alimony and its amount fluctuated to adapt to fairness considerations.⁹

ii. The Enforcement of Mahr Even Though the Wife Initiated Divorce:
The Case of Québec

In *M.H.D. v. E.A.*,¹⁰ a family law trial court decision from Québec, the marriage contract provided for a prompt Mahr of 10 Syrian pounds and a deferred Mahr of 25,000 Syrian pounds.¹¹ The marriage was performed in Syria in April 1985, and the parties moved to Canada seven months later. In 1991, the wife filed for divorce in Montreal and claimed the enforcement of deferred Mahr. The Québec trial court concluded that Syrian Islamic law could not apply in Canada through private international law rules¹² because its application would create a negative effect on Muslim wives availing themselves of the Divorce Act. Had the court correctly applied Syrian Islamic law, it would have refused to enforce Mahr according to the logic of the Khul divorce. The trial court¹³ considered this outcome contrary to the Canadian Charter¹⁴:

⁹ It is worth noting that this analogy with alimony does not stand up to any analytical rigor as the wife was able to claim payment at any point, even prior to divorce, according to the agreement, which is clearly not the case for alimony.

¹⁰ *M.H.D. v. E.A.*, [1991] J.Q. no 1687; J.E. 91-1560; 42 Q.A.C. 144; [1991] R.D.F. 492; 29 A.C.W.S. (3d) 70 (Court of Appeal of Québec).

¹¹ *Id.* at 6.

¹² “Through the application of Article 6 C.C., the Québec law at the time, the matrimonial regime of the domicile of the parties at the moment of their marriage is applicable and the Québec courts have competence to decide matters regarding the existence and breadth of the rights derived from the legislation of their domicile, which in this particular situation was Syria.” *Id.* at 7, 8.

¹³ It should be noted that the analysis here does not take into account the Court of Appeal’s decision, which concludes that the Canadian Charter does not apply to Mahr because it is a donation between spouses derived from the law of obligations and, thus, constitutes an economic contractual relationship that escapes Charter protection.

¹⁴ Canadian Charter of Rights and Freedoms, constituting Schedule B of the Constitution Act, 1982 (R.-U.), 1982, c. 11. Textual support for substantive equality in Canada is found in s. 15 of the Canadian Charter of Rights and Freedoms, which guarantees “equal benefit of the law.” Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) 1982 c 11. Section 15(1) reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

However, this court believes that the legislation cannot be in conflict with sections of the Canadian Charter whereby fundamental rights and freedoms are guaranteed. The Canadian Charter is the supreme law of Canada. All must abide by it, including the legislator. The *Divorce Act* gives the opportunity to both spouses to initiate divorce proceedings, and punishing a spouse on the basis that she exercises her rights according to the *Act* is a violation of her freedom. In cases of conflict between spouses, each has the right to the equal protection and equal benefit of the law (s. 7 and 15(1)). Also, to deny the wife her right to equality by asking her to give back her wedding presents or gifts received or agreed upon in the marriage contract on the basis that she exercised rights recognized by the law, constitutes a form of discrimination.¹⁵

The key to understanding the performance of the Muslim woman in this case is to measure the *predicted* economic gains and losses of advocating the enforcement or the non-enforcement of Mahr, in relation to both Islamic family law and Western law. In response to the “waiver rule” of *Khul* Mahr, the Muslim woman has two options: either pretend that the waiver rule is not part of Islamic family law (the religious route); or suggest that the waiver rule is so discriminatory that it should be regarded as inherently contrary to public order in relation to international private law rules (the secular route). In *M.H.D. v. E.A.*, the Muslim wife embarked on a secular argumentation and convinced the court that *Khul* Mahr as a legal institution violates gender equality, which conflict of laws holds at the heart of the principle of *l'ordre public* (public order). Hence, such discriminatory Islamic traditions should be formally and rigidly rejected by the host legal system, despite rules of international private law incorporating Syrian Islamic law:

Finally, the respondent invoked the principle of international and Quebecois public order as a motive for the non-application of the Syrian law and regulations. In her written factum (p.21): “How can one claim that we are not confronted by questions of public order, as much Quebecois as Canadian and international, when faced with a regime where the husband may marry more than one wife and the wife cannot have a number of husbands at once, where the wife is obliged to request a divorce to be remarried whereas that is not the case for the husband, where all donations, whether foreseen in the marriage contract or not, are revoked for the sole reason that the husband does not accept the motive for divorce of the wife even if the Court concludes that the reason is well founded? We are dealing with a religion and matrimonial regime that flagrantly discriminate not only against women but against all people who, in this country or elsewhere, desire to exercise the

¹⁵ *M.H.D. v. E.A.*, *supra* note 10 at para. 26. (translated from the original French). This is an excerpt from the court of appeal, quoting the trial court decision.

recognised fundamental right to ask for divorce. How can one claim not to be confronted by questions of public order when the respondent asks for a divorce in Canada, on the basis of the Canadian Divorce Act, and finds herself stripped of all her rights due to the application of a foreign matrimonial regime which is, in and of itself, clearly discriminatory in all its aspects. We leave it to the Court to appreciate this question.¹⁶

Embracing egalitarian considerations in the interpretation of contract law, the trial court intervened in family/religious matters to police the outcomes. If *Khul Mahr* is seen as violating substantive equality, then the court should reject this religious institution: “With all due respect to the beliefs of the religious authority as well as to those of the husband, the court believes that such traditions, customs and doctrine put before us are not applicable to the wife, and that the court must consider the wedding present discussed above only with respect to the Quebec Civil Code.”¹⁷ The legal transplantation offered the following outcome: the non-enforcement of Mahr as a religious institution, but its enforcement as a secular institution despite the *Khul* divorce.

In contradiction with the cases just noted, the performative gesture of substantive equality produces, in the cases that follow, the *inexecution* of Mahr, as much in Québec, Canada, and the United States, as in France.

B. *The Unenforceability of Mahr According to Fairness Principles*

In this section, the unenforceability of Mahr is attached to the application of fairness principles: sometimes equity towards the Muslim *man* dictates the non-enforcement of Mahr, sometimes equity towards the Muslim *woman* dictates such outcome. I review cases from the United States, Canada, France, and Québec that have all attempted to bring about an egalitarian outcome through the non-enforcement of Mahr.

i. The Unenforceability of Mahr On the Basis of Equity: The Case of Québec

In *M. F. c. MA. A.*,¹⁸ a 2002 trial court decision from Québec, the substantive equality approach judged and ultimately rejected Mahr on the basis of equity towards the Muslim husband. In 1997, Mrs. Ajabi married in Montreal at the age of 23 years, and gave birth to a son the following year. The Muslim contract

¹⁶ *Id.* at 34, extract from the judgment at first instance (translated from the original French).

¹⁷ *Id.* at 27 (translated from the original French).

¹⁸ *M. F. c. MA. A.*, [2002] J.Q. no 2690 (A, Cour supérieure, March 11, 2002), No. 500-12-254264-009.

of marriage reads: “There is a Mahr of Holy QURAN Book, one piece Sugar Candy, one Kilo of Gold payable by the groom to the bride.”¹⁹ The marriage lasted a little less than three years and during these years Mrs. Ajabi stayed at home to raise her son.²⁰ The court refused to enforce Mahr,²¹ an amount that would have been worth 15,960\$.²² Justice Hurtubise concluded:

It is true that Imam Salek Sebouweh wrote a letter dated January 7, 2002, to this Court, but he did not testify despite the efforts of defence counsel. Since, as a consequence, it was impossible to cross-examine him, we disregard his opinion.

The only proof regarding the interpretation to be given to Islamic Mahr is cited above (a particular type of dowry according to the expert witness) consists of the transcript of an examination of Mr. Nabil Abbas, a Muslim minister of worship who also holds a PhD. The examination took place and was completed on January 25, 2002.

The message is clear: given what the husband has already given to the wife, he is not obliged to offer more. He has satisfied his commitment.

Given the uncontradicted testimony of the Imam, expert on this topic, this request is denied.²³

In applying the family law rules of the Quebec Civil Code, Justice Hurtubise divided equally the family patrimony²⁴ (which resulted in the wife taking 7,304.85\$) and determined that the alimony granted to the wife shall be 150\$/week.²⁵

ii. The Unenforceability of Mahr on the Basis of Substantial Justice: The Case of Canada

In *Vladi v. Vladi*,²⁶ a 1987 decision from Nova Scotia (Canada), the court refused to enforce Mahr on the basis of “substantial justice.” In 1973, Mr. and Mrs. Vladi, who were Iranian nationals residing in West Germany, married religiously and civilly in Germany. In 1978, the parties began visiting

¹⁹ *Id.* at 7.

²⁰ *Id.* at 23.

²¹ *Id.* at 8.

²² *Id.* at 32.

²³ *Id.* at 32 (translated from the original French).

²⁴ *Id.* at 7.

²⁵ *Id.* at 7.

²⁶ *Vladi v. Vladi*, Nova Scotia Supreme Court, Trial Division, 1987 Carswell, NS, 72, 7 R.F.L. (3d) 337, 79 N.S.R. (2d) 356, 196 A.P.R. 356, 39 D.L.R. (4th) 563.

the province of Nova Scotia in Canada and subsequently became Canadian citizens. *Vladi* is an application under the Matrimonial Property Act²⁷ of Nova Scotia, made by Mrs. Vladi subsequent to a divorce granted to her husband by a West German court in September 1985. At separation, the parties had assets in Nova Scotia and elsewhere in the world. Although the wife and child had taken up residence in Nova Scotia, the parties were found to have had their last common residence in West Germany.

Pursuant to section 22(1) of the Matrimonial Property Act,²⁸ the division of matrimonial assets in Nova Scotia is governed by the law of the place where the parties had their last common habitual residence, in this case West Germany. Because West German law would have applied Iranian law, the law of citizenship, application of the doctrine of *renvoi* would result in the case being decided according to Iranian Islamic family law. Justice Burchell thus considered that Mahr was attached to Iranian Islamic family law, and that, under such a legal regime, women could not benefit from the principle of equal sharing: “In Iran, a wife in the position of Mrs. Vladi would be entitled to minimal support and a nominal award in relation to a so-called ‘mahr’ or ‘morning-gift.’ Otherwise she would have no direct claim against assets standing in the name of her husband.”²⁹ Justice Burchell further wrote: “To put it simply, I will not give effect to Iranian matrimonial law because it is archaic and repugnant to ideas of substantial justice in this province.”³⁰ Having found Iranian law inapplicable, Justice Burchell returned the matter to German domestic law instead of to the Nova Scotia internal rule. In applying West German law, Mrs. Vladi was entitled to an equal division of matrimonial assets.³¹

iii. The Unenforceability of Mahr on Grounds of Public Policy: The Case of France and the United States

In 1976, a French Court of Appeal³² refused to enforce Mahr in conformity with French public order provisions. In applying international private law

²⁷ Matrimonial Property Act, R.S.N.S. 1989, c. 275.

²⁸ *Id.* art. 22(1):

Conflict of laws 22 (1) The division of matrimonial assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the Province.

²⁹ *Vladi*, *supra* note 26 at par. 11.

³⁰ *Id.* at par. 30.

³¹ *Id.* at par. 46.

³² Arrêt de la Cour d’appel de Douai, January 8, 1976: N. 76–11–613.

principles, the court concluded that marriage contracts requiring the existence of Mahr for forming a valid marriage contradict French public order because they reduce marriage to a financial “purchase.” Mahr itself is, therefore, contrary to “public order and French morals.”³³ Public policy was similarly used in *In re Marriage of Dajani*,³⁴ a 1988 Court of Appeal decision from California, which understood Mahr to be facilitating divorce, and as such, void as it is against public policy.

In *In re Marriage of Dajani*, Awatef argued on appeal that the trial court decision not to enforce Mahr because she had initiated the divorce proceedings was an unjust result and against public policy.³⁵ The court agreed that a public policy argument was appropriate, but not the one urged by Awatef. Justice Crosby’s opening remarks are very telling: “Will a California court enforce a foreign dowry agreement which benefits a party who initiates dissolution of the marriage? No.”³⁶ The court in *Dajani* held that the Jordanian marriage contract must be considered as one designed to facilitate divorce, because “with the exception of the token payment of one Jordanian dinar . . . the wife was not entitled to receive any of the agreed upon sum unless the marriage was dissolved or her husband died. The contract clearly provided for the wife to profit by divorce, and it cannot be enforced by a California court.”³⁷

In *In re Marriage of Dajani*, we are left with the impression that Mahr is no longer an individual, private matter incorporating Islamic family law rules: it is regulated by a public law doctrine; its unenforceability is the direct result of a violation of a collective notion of “public morals.”³⁸ The decision welcomed substantive equality in its internal understanding of contract law and explicitly closed the door to a battle of expert witnesses on the meaning and enforceability of Mahr according to Islamic family law: “Wife devotes a considerable portion of her brief to a challenge of the qualifications of husband’s expert. It is not necessary for us to enter that fray, however.”³⁹

³³ *Id.* at 110.

³⁴ *In re Marriage of Dajani*, 204 Cal.App.3d 1387 (1988).

³⁵ *Id.* at 1389.

³⁶ *Id.* at 1388.

³⁷ *Id.* at 1390.

³⁸ An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals.

Odatalla v. Odatalla, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002). *See also* *Garlinger v. Garlinger*, 322 A.2d 190 (N.J. Super. Ct. Ch. Div. 1974).

³⁹ *In re Marriage of Dajani*, *supra* note 34 at 1389.

II. THE STATE–CHURCH / WESTERN–ISLAMIC CONTRADICTION

In his book *Orientalism*, a key text on colonial and post-colonial discourse, Edward Saïd suggested that the West codifies and discursively produces knowledge about the East through the paradigm of colonial/imperial structures.⁴⁰ Borrowing from Saïd’s methodology, I consider in this section the existence of a State–Church / Western–Islamic contradiction in the reception of Mahr: the Western state, by obsessively “looking when the gaze is not returned,”⁴¹ conveniently registers the differences *between* the East and the West and fails to see the differences *within* the two legal orders in a comparative law context. I explore the construction of both Western and Islamic law as revealed in cases adjudicating Mahr and ask whether the rhetorical emphasis on the Orient as the outside of the West has created a monolithic vision of both systems of law. I also use Barbara Johnson’s approach to highlight the differences and similarities that exist within the West and the East as entities. Johnson brilliantly proposed, in *The Critical Difference: Essays in the Contemporary Rhetoric of Reading*, that the production of binary relations suppose, on each part of the dualist difference, the existence of several elements and their opposite, which it hides.⁴²

A. *The Production of Western Law*

In most of the cases analyzed in the previous section, the production of Western law posits itself as the outside of Mahr: courts project the Western legal system as having no history of dowry or dower practices. In *M.H.D. v. E.A.*⁴³ and *M. F. c. MA. A.*,⁴⁴ two trial court decisions from Québec, Mahr is represented as the religious and cultural expression of the Muslim minority group. In *M.H.D. v. E.A.*, the court attempted to penetrate the logic of the *Khul* divorce under Syrian Islamic law: “If it is the husband that starts divorce proceedings, he owes the dowry; however, if it is the wife who takes the initiative to start proceedings, she loses her right to the dowry; unless of course the husband agrees to pay it, which I repeat, and for the reasons mentioned above, is not the situation before us.”⁴⁵ In refusing to enforce Mahr, the court concluded that this foreign institution was contrary to gender equality as expressed in the Canadian Charter. In *M. F. c. MA. A.*, the court attempted to translate

⁴⁰ Saïd, *supra* note 3, at 41.

⁴¹ Cossman, *supra* note 5, at 525.

⁴² Johnson, *supra* note 4, at x.

⁴³ *M.H.D. v. E.A.*, *supra* note 10.

⁴⁴ *M. F. c. MA. A.*, *supra* note 18.

⁴⁵ *M.H.D. v. E.A.*, *supra* note 10 at 22 (translated from the original French).

Mahr through the lens of a religious expert witness, but considered, “given the uncontradicted testimony of the Imam, expert on this topic,” that the enforcement of Mahr would unjustly profit the wife and should, therefore, not be enforced. Similarly in *OLG Koeln*,⁴⁶ *Vladi v. Vladi*,⁴⁷ and *Arrêt de la Cour d’appel de Douai*,⁴⁸ three cases respectively from Germany, Canada, and France, courts have embarked on the exercise of translating the foreign nature of Mahr, based on the application of international private law rules.

Of all the cases that have adjudicated Mahr, only *In re Marriage of Dajani*, a 1988 California court of appeal decision, has embarked on this concrete exercise of comparing Mahr to dower/dowry practices in American law. The court thus stated:

Black’s Law Dictionary explains, “‘Dower,’ in modern use, is distinguished from ‘dowry.’ The former is a provision for a widow on her husband’s death; the latter is a bride’s portion on her marriage. *Wendler v. Lambeth* [1901] 163 Mo. 428, 63 S.W. 684.” (Black’s Law Dict. (4th ed. 1951) p. 581, col. 1.) (. . .) The estate of dower is not recognized in California, pursuant to *Cal. Prob. Code* § 6412, but parties to a premarital agreement may contract with respect to the disposition of property upon death, pursuant to *Cal. Civ. Code* § 5312(a)(3).⁴⁹

As this passage suggests, the deconstruction of the Western/Islamic binary renders explicit what otherwise would remain hidden, that is, that there exists a *similarity* of legal rules between Western law and Islamic law. Although the court refused to enforce Mahr based on public policy in *In re Marriage of Dajani*, it nevertheless moved away from painting Mahr as an “exotic other,” a recurring narrative under the other cases. Allowing for the existence of hybridity, this methodological difference reverses the relation between the West and the East and facilitates the emergence of another story, one which creates a space where Muslim men and women might be able to negotiate their claims outside the recognition/non-recognition binary.

B. *The Production of Islamic Law*

In this section, I explore how the dominant legal discourse around Islamic law in the adjudication of Mahr has created, perpetuated, or regulated prevailing conceptions of personal identity and group affiliation along the West/East

⁴⁶ OLG Koeln IPRax 1983, 73 (Cologne).

⁴⁷ *Vladi*, *supra* note 26 at par.28.

⁴⁸ Arrêt de la Cour d’appel de Douai, January 8, 1976: N. 76–11–613.

⁴⁹ *In re Marriage of Dajani*, *supra* note 34 at 1388.

binary. In most of the cases analyzed in the previous section, courts have conceptualized Muslim identity to be derivative of an already circumscribed subjectivity, equated in many ways to truth claims about subordinated Muslim groups living in dominant Western states. Yet, not only is law itself predicated on the very process of making subjects that it purports merely to regulate,⁵⁰ but the production of Islamic law from the location of the Western judge constructs Mahr as a purely religious and non-civil law institution, a conclusion that is questionable from a legal perspective. Indeed, the Mahr that *preexists* the road to Western liberal states is strongly contractual in form – in Islamic law, marriage is a civil contract that, unlike Christian marriages, is not sacramental in nature.⁵¹ As such, parties may insert a variety of clauses as long as they do not contradict the purpose of marriage itself.⁵² However, by insisting on the differences between the secular/religious, the civil/Islamic, the Us/Them, the national/foreign *within* Western states, *none* of the cases on the adjudication of Mahr have noticed the civil character and the significant importance of contract *within* Islamic law.

Moreover, even when Islamic law does present itself as divinely made, many contradictory and conflicting interpretations dispute its content – schools of interpretation that are defined as traditionalist,⁵³ liberal,⁵⁴ utilitarian,⁵⁵ feminist, and so forth. In fact, an interesting debate takes place among Islamic feminist scholars over the symbolic nature of Mahr for Muslim women: Mahr is seen as a complex and controversial institution structured by a series of

⁵⁰ See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 5 (1990).

⁵¹ Islamic law stipulates that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage. One is not required to have an official position in a religious institution such as a mosque (masjid) to be qualified to perform such ceremonies. See Mohamad Afifi, *Reflections on the Personal Laws of Egyptian Copts, in Women, the Family, and Divorce Laws in Islamic History* 202, 214 (Amira El Azhary Sonbol, ed., 1996) (where Afifi argues that Christian copts in Egypt, who regard marriage as a sacrament, have always advocated for a very strong personal law regime in Egypt so that they could stay out of the more permissive Islamic rules).

⁵² Commonly used stipulations include agreements related to Mahr, polygamy, the wife's financial independence, her right to work, her right to education, etc.

⁵³ The “traditionalist approach” deals with the Qur'an verse by verse, follows the Qur'anic text and expounds it in a piecemeal fashion, employing those instruments of exegesis that it believes to be effective.

⁵⁴ The liberal tradition in Islam is traced back to leaders and writers in the 19th century like Jamal al-Din al-Afghani, Sayyid Ahmad Khan, and Muhammad Abduh who emphasized the ideas of freedom from *taqlid* (tradition) and expansion of the right to practice *ijtihad* (independent interpretation).

⁵⁵ This is a type of exegesis that emphasizes the philological and literary aspects of the Qur'anic text and thus concentrates on meaning and content.

characteristics that can be described as paired opposites. On the one hand stand the vivid proponents of Mahr, the “Islamic feminists” who claim through a historical and emancipating narrative that Mahr came into Islam as the first symbol of women’s empowerment.⁵⁶ Mahr is thus conceptualized in this literature as marking the shift from the “wife as an object of sale,”⁵⁷ under the pre-Islamic era, to the “wife as a contracting party in her own right,”⁵⁸ under Islam. Indeed, one of the greatest empowerments given to women by Islam lies in her right to property.⁵⁹ Woman’s independent legal status in the eyes of the law,⁶⁰ and deserving of dignity, love, and respect in the eyes of men, is “symbolized by making Mahr obligatory for her and binding upon men.”⁶¹ Expressions such as “mark of respect for the wife,”⁶² “honour to the bride,”⁶³ “free gift by the husband,”⁶⁴ or symbol of the “prestige of the marriage contract”⁶⁵ are indistinctly being used to describe the very *raison d’être* of Mahr: the recognition of the dignity of Muslim women.

Opposing them, however, are the “liberal secular feminists”⁶⁶ who condemn Mahr as the expression, at the time of marriage, of the sale of the Muslim woman’s vagina. The main thrust of the liberal secular feminists consists of understanding “revelation as both text and context,”⁶⁷ that is, as

⁵⁶ The “Islamic feminists” claim not only that Islam provides a liberating worldview for women, but also that the “the Qur’an’s epistemology is inherently antipatriarchal.” *Asma Barlas, Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur’an* 2 (2002). With the revelation of Islam through the Prophet Mohamed, the Qur’anic scripture is presented as offering a radical departure from the patriarchal customs of pre-Islamic Arabia and ensuring an authoritative basis for the emancipation of *all* Muslim women.

⁵⁷ Zainab Chaudhry, *What is Our Share? A Look at Women’s Inheritance in Islamic Law*, 3 *Azizah Atlanta* 14 (August 2004).

⁵⁸ See David Pearl & Werner Menski, *Muslim Family Law* 4 (3rd ed., 1998).

⁵⁹ *Sabiq al-Sayyid, Fiqh al-sunnah* 155 (Beirut, Dār al-Kitāb al-‘Arabī, 1969).

⁶⁰ M. Afzal Wani, *The Islamic Law on Maintenance of Women, Children, Parents & Other Relatives: Classical Principles and Modern Legislations in India and Muslim Countries* 194 (1995).

⁶¹ *Sabiq al-Sayyid, supra* note 59, at 155.

⁶² See Pearl & Menski, *supra* note 58, at 179.

⁶³ M. Afzal Wani, *supra* note 60, at 193.

⁶⁴ *Abdur Rahmān I. Doi, Shari’ah: the Islamic Law* 159 (1984), (emphasizing Mahr’s character as a “free gift by the husband to the wife, at the time of contracting the marriage”).

⁶⁵ *Jamal J. Nasir, The Islamic Law of Personal Status* 43 (3d ed., 2002) (suggesting in the words of a Hanafi jurist that “dower has been ordered to underline the prestige of the marriage contract and to stress its importance”).

⁶⁶ For a general view of the secularization movement of Islamic law, see Aharon Layish, *Contributions of the Modernists to the Secularization of Islamic Law*, 14 *Middle Eastern Studies* 263 (1978).

⁶⁷ *Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh* 231 (1997).

“an interpretation of the spirit and broad intention behind the specific language of the texts.”⁶⁸ The liberal secular conception of Mahr is accompanied by images of the family, sexuality, and the significance of marriage that seek to distinguish between Islam as a pure religion and religious doctrine as a socially constructed phenomenon subject to human context.⁶⁹ Here, marriage is often portrayed as a “fundamentally unequal social institution.”⁷⁰ This feminist literature further suggests that Mahr, in valuing the existence of virginity, perpetuates the “patriarchal domination [which] remained most entrenched in the family.”⁷¹ In fact, “it was usual that the dowry of a virgin be higher than that of a divorced woman.”⁷² On this view, not only is Mahr intended to serve male interest and desire; it also reflects “the social position of the bride’s father’s family as well as her own qualifications, such as those cited in the *Hedaya*: age, beauty, fortune, understanding, and virtue.”⁷³ Hence, Mahr is not, as claimed by classical Islamic law and Islamic feminists, a universal and equal symbol of dignity, love, and respect for *all* women despite differences of income and status: it is rather determined *as a marketplace value, for that woman, daughter of that man, at this particular moment of her history*. Moreover, if no Mahr has been agreed or expressly stipulated by the parties, the marriage contract is still valid but “proper Mahr” (*mahr al-mithl*) will be determined by comparing “the *mahr* paid to other female members of the wife’s family, for instance sisters, paternal aunts and female cousins.”⁷⁴

An understanding of this complex, hybrid character of Islamic law surely has not traveled to Western liberal courts. Rather, what the case law has demonstrated is that Mahr is equated to Islam, to the religious, to the non-Western, and ultimately to the non-civil law. What would we gain from considering this historical knowledge in the interpretation of Mahr? Is the relationship between the family and the state in the case of Western dower, “premised

⁶⁸ *Id.*

⁶⁹ See generally Yvonne Yazbeck Haddad, *Islam and Gender: Dilemmas in the Changing Arab World*, in *Islam, Gender and Social Change* (Yvonne Yazbeck Haddad & John Esposito, eds., 1988).

⁷⁰ Homa Hoodfar, *Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities*, in *Shifting boundaries in marriage and divorce in Muslim communities, Women Living Under Muslim Laws, Special dossier no. 1* at 124 (Homa Hoodfar, ed., 1996).

⁷¹ Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* 124 (1995).

⁷² Abdal-Rehim Abdal-Rahman Abdal-Rahim, *supra* note 6, at 103.

⁷³ John L. Esposito with Natana J. DeLong-Bas, *Women in Muslim Family Law* 24 (2nd ed., 2001).

⁷⁴ See Pearl & Menski, *supra* note 58, at 180.

on marriage's ability to privatize women's material needs,"⁷⁵ similar to the relationship between the Muslim family and the state in the case of Mahr? If so, how does the provider function of both legal institutions resonate with feminist activism? Can this history of Western dower provide a new framework within which to analyze the contemporary legal and political dimensions of the adjudication of Mahr in Western liberal states, by ultimately stepping out of the liberal parameters of "religious difference," on the one hand, and "gender equality/fairness," on the other?

CONCLUSION

The migration of Mahr to Western liberal courts unfolds at the crossroads of several doctrinal fields and disciplinary boundaries – contract and family law, constitutional and Islamic law, public policy and private ordering, and (majoritarian) public order and (minority-based) identity politics. Through an analysis of the case law in Canada, the United States, France, and Germany, I suggest that once Mahr departs from Islamic family law to land in a Western chamber of law, it can never go back home. In fact, as soon as Mahr penetrates the Canadian, American, French, or German forum, it is animated by a diverse and often unpredictable set of legal constructs grouped under the general banner of substantive equality (concepts of substantial justice, fairness, public policy, gender equity, etc). Far from producing a homogeneous and predictable Mahr, substantive equality has revealed its indeterminate nature when brought into contact with comparative religious law: in the decisions being examined, the process of legal translation quite logically produced both the recognition *and* the non-recognition of Mahr, that is, its execution *and* its inexecution.

Through the use of what I have called the State–Church / Western–Islamic contradiction, this chapter specifically dealt with the secular/religious dichotomy and addressed the blind spots created, in the process of applying substantive equality, by the overemphasis on Mahr as religious, Islamic, and divinely made. In using the strategy of "turning the gaze back upon itself," my hope was to approach the hybridity⁷⁶ of both the East and the West to shed light on the fact that legal doctrines and institutions very similar to Mahr have been central elements of Western marriage law. Hence, Islamic and Western

⁷⁵ In *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *Yale L.J.* 1641, 1652 (2003), Ariela R. Dubler argued that "Dower, like coverture, sought to ensure a woman's economic reliance on a particular man. In so doing, it bolstered the assumption that the state had no responsibility for her financial needs."

⁷⁶ See generally Homi K. Bhabha, *The Location of Culture* (1994).

law cannot so easily be marked as “opposites,” reflecting the complete incommensurability of these legal worlds. It might be useful to view the opposition between the West and the East, *not* as a binary relation between traditionalists and modernists, Islam and secularism, gender inequality and gender equality, and so forth, but rather quite simply as “two conceptions of language, or between two types of reading.”⁷⁷

⁷⁷ Johnson, *supra* note 4, at 84.