PRIVATE INTERNATIONAL LAW, MUSLIM LAWS AND GENDER EQUALITY

The adjudication of *mahr*
in Scandinavian, English and French courts

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Content

"I don't necessarily think the British system, the official system is any better and I think they get very confused with trying to be PC[1] and trying to do the right thing and knowing what the cultural etiquettes are and respecting them. There's a real fine line between trying to do the right thing and actually doing the right thing and they sometimes mess up. I found that whole set-up really disturbing."

Hina, a Muslim woman from London, in

Complexity, difference and 'Muslim personal law': rethinking the relationship between Shariah Councils and South Asian Muslim women in Britain by Samia Bano.

INTRODUCTION

Mounir and Neila married in Iran, before moving to Europe where they later divorced. Which laws govern the divorce settlement? If the courts have to apply Iranian laws, how do the courts proceed to interpret them? Can gender equality be upheld by the court? It is often assumed that Muslim laws are discriminatory towards women. While the debate has been focusing on issues such as divorce and polygamy, *mahr*, the Muslim dower, has passed largely unnoticed by the majority populations in European countries. This is a compulsory clause in the Muslim marriage contract, obliging the husband to pay what can amount to considerable sums of money to the wife, it gives these women a particular claim which is increasingly often raised in divorce cases between Muslims residing in Europe. These women do not always want European laws to be applied on their divorce settlement. So, what is the "right thing" for the courts to do when Muslims and Muslim laws migrate to Europe (as depicted by women like Hina in the quote above) in terms of promoting gender justice while at the same time respecting these women's cultural – and religious – identities?

[1] Probably "politically correct".

In Western European countries today, a significant part of the population is Muslim. After several decades where both the Muslims themselves and the authorities saw this as a temporary situation, people are finally realising that they are here to stay. Among Muslim immigrants, several normative systems are at work in two different situations partly depending on whether or not they've obtained a European nationality. Firstly, a conflict of laws situation arises where the European court may have to apply the laws of the Muslim country in question. This can be seen as a situation of formal or "weak" legal pluralism as described by John Griffiths: when the dominant legal system "commands different bodies of law for different groups in the population".[2] The conflict of laws rules concerning choice of laws oblige the court to choose between several normative systems, i.e. the laws of different countries, and sometimes to apply the laws of a foreign country. Secondly, the Muslims sometimes resort to Muslim norms within the Western European legal system, in a situation of informal or "strong" legal pluralism: "when in a given social field more than one source of law (…) is observable".[3] In this thesis the focus will be on private international law cases. Private international law is invoked in the majority of court cases concerning *mahr*. I have found only two cases where *mahr* was claimed with no reference to private international law, in a situation of strong legal pluralism.[4]

These situations create new questions concerning the ability of the judiciary to accommodate concepts and institutions foreign to, and sometimes opposed to the national law of the European country. The treatment they have received thus far has been ambiguous. Political choices, that are sometimes difficult to separate from the legal treatment of these institutions, are often hidden. The cases are often badly received among

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[2] Griffiths (1986) p. 5. "In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds." In private international law it is for the most part based on nationality or domicile – a variety of geography as basis for the choice of laws.

[3] Griffiths (1986) p. 38. "Law" is here defined as "the self-regulation of a "semi-autonomous social field"".

[4] A French case adjudicated in Cour d'appel de Douai, ch.7, 8th January 1976 and Cour de Cassation, ch.civ.1, 4th April 1978, and a Danish case adjudicated in Københavns Byret February 22nd 2002 and Østre Landsteds Ret April 6th 2005, published as U.2005.2314Ø.

the general population.[5] One of the reasons for this is that the Muslims claim divine authority for these concepts and institutions. A newspaper headline about a Swedish or French court applying the *Shari'a* is bad enough;[6] should a government make efforts to accommodate it, the political implications could prove disastrous. Accordingly, the Muslims feel that they are not accepted as citizens and the conflict level increases. The vicious circle is complete.

Not all Muslim laws are discriminatory towards women, not even the most patriarchal versions. I've chosen to look into how European courts treat *mahr*, the dower or bridal gift, a compulsory gift given by the husband to the wife at the time of their marriage, on demand, or, more typically, given subsequently in the event of divorce.[7] It was instituted by Mohammad to improve women's rights and position in a very patriarchal society. In practice, however, it does not always improve the woman's situation, at times even the contrary. Although *Mahr* is a much debated topic among Muslims, both where they're the majority and where they're the minority, there is little research on it, especially in the European context. *Mahr* is interesting to study in cases concerning private international law for two reasons: Firstly, it's an institution totally foreign in European laws, which gives the courts more freedom of adjudication than is the case concerning e.g. *talaq*, unilateral divorce. Secondly, if Muslim laws are applied correctly, the outcome may be better for the woman than it would have been if European laws were applied. Such cases thus call for careful consideration of the relationship between justice, equality and protection against discrimination on the basis of gender or religion or culture. The subject matter of this thesis is the interaction between private international law and human rights in divorce cases brought before European courts, in which the issue of *mahr*, the bridal gift, is raised. I focus on how European *courts* handle cases where Muslims make claims based on Muslim

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[5] Foblets (1996) p. 9.

[6] See for example Kristeligt Dagblad 16.02.2008.

[7] It may also be given at the time of death of one of the spouses, to the woman or her heirs, but this is less relevant for our purposes.

norms and concepts.[8] The courts have to deal with the matters that are brought before them provided they're within their jurisdiction and thereby find themselves in the midst of events while the policy – and lawmakers – are usually a step behind.

Jørgen S. Nielsen, who has studied Muslim communities in Europe for several decades, states that an important first step towards a solution to the conflicts and tensions between Muslim and Western European norms is to look away from the ideological basis of the rules in question,[9] thus promoting a functionalist approach towards the norms concerned. This appears to be a fruitful starting point, in line with the comparative legal method as described by Zweigert and Kötz.[10] The norms that are dealt with in private international law cases constitute formal codifications of religious norms. These formalised versions of Islam are also influenced by cultural practices, political thought and imported Western laws. Behind the concept of "personal status law" in private international law, lies the recognition of the cultural aspect of the law when it concerns matters that are closely linked to one's person, such as family and inheritance law.[11] A person's personal status law, i.e. which country's laws should regulate her personal matters, is normally determined either upon the basis of a person's nationality or their domicile, depending on the private international law of the court of litigation. As stated by Anne Hellum *et al.* in a work on women's human rights in Africa and South Asia, but just as relevant in Europe: "In dealing with women's multiple positionalities, human rights and legal pluralist approaches need to be combined. This involves engaging a normative human rights framework with a descriptive analysis of its interaction with official and unofficial national and local norms in different contexts. Such a relational and contextual gender perspective epitomizes and

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[8] Research shows that most disputes between Muslim spouses are solved outside the courtroom, often involving negotiation by relatives or somebody from the mosque, or institutions such as the Shariah Councils in Britain. This means that the cases studied in this thesis are the ones which, for any number of reasons, made it to a European court. Suffice it here to refer to research on this subject, such as Bano (2004), Foblets (1996) and Schmied (1999).

[9] Nielsen in Foblets (1996) p. 41.

[10] See Zweigert (1998) and part I chapter 7.

[11] See e.g. Thue (2002).

reveals the complex, ambiguous and often contentious relationship between human rights and legal pluralism."[12] In part I chapter 6, we will take a brief look at the European countries' human rights obligations at the interface between gender justice and legal pluralism.

Full recognition and application of foreign norms when the conflict of laws rules require, is a logical consequence of a policy of multiculturalism applied to the legal system. The courts must choose between the laws of two very different legal cultures. The European legal systems were originally based upon Christian values, but have been modified and secularised to a varying extent at the time of adjudication. Today they yield a degree of gender justice through the provision of laws that are intended to be gender neutral – perhaps with the exception of English law, which, to a certain extent, is still based upon the idea that the sexes are different.[13] The laws from the Muslim countries are to a varying degree influenced by Islam and its laws schools, in which gender equality[14] is not a goal; yet they do try, to a variable extent, to provide gender justice in the form of equal worth. However, even in this context, the states are under an obligation to promote gender justice. How do the European courts handle such a complex institution of *mahr* in terms of gender justice? Should they try to achieve a form of gender justice, is it in terms of gender *equality* or *equal worth*? The gender equality norm implies that both genders are treated the same. The equal worth approach sees the two genders as different, but of equal worth, thus opening up the possibility of having different rules depending on one's gender. These two approaches will be further discussed in part II chapter 6.

In this thesis, I compare divorce cases from the French, English, Swedish and Norwegian legal systems involving the *mahr*, with a view to the courts' use of comparative legal method when they interpret the Muslim laws, and also with a gender justice perspective. I

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[12] Hellum (2007) p. xix.

[13] Significant changes have happened since the Human Rights Act of 1998 required that family law complied with the European Convention on Human Rights. Welstead (2006) p. 7.

[14] See Part I ch. 6.2.

have only found two cases from Norway that indirectly concern *mahr*; one of which constitutes an example of how things ought not to be done. Looking at other countries opens up a broader perspective and may provide interesting perspectives that are applicable in Norway too. The most obvious countries for comparison are Scandinavian countries such as Sweden and Denmark, owing to the social, cultural and legal commonalities. The Scandinavian countries, however, have a fairly short history of Muslim immigration. As yet, cases concerning *mahr* are very rare: only two from Sweden and one from Denmark. The Danish case, however, does not deal with private international law. On this basis, I have opted to look at two countries with a long history in this matter: France and Britain. These two countries have adopted different approaches, especially when it comes to the intersection between gender and minority cultures. Britain is known for promoting multiculturalism, in the sense that all cultures should be respected as much as possible. France has had a stronger tendency towards demanding assimilation and acceptance of what are considered to be French values, e.g. secularism and feminism. The British case law concerning *mahr* originates from the '60s and early '70s, and apparently there have been several cases since, which follow the same line of arguments, but these are not published. I have therefore only looked at the two judgments that are considered as basis for today's case law. In France, I have only been able to find two private international law cases concerning *mahr*, and none where the wife claims it. This is an interesting finding in itself, which demands further investigation, but this lies beyond the scope of this thesis.

The object of analysis, the method of approach and definitions of core concepts will be presented in part I; in part II the legal framework will be described, including the legal concept of *mahr* and its functions in a Muslim legal context and relevant law in the European countries studied. In part III the judgments will be described and analysed country by country, and in part IV the findings will be discussed and compared.

Part I. THE OBJECT OF ANALYSIS, HYPOTHESIS AND METHOD OF APPROACH

1 Introduction

In this part, the object of analysis will be defined, the main hypothesis of this thesis and the framework for analysis: Gender justice norms and comparative legal method. Since the judgments I've studied are all texts, I've found it useful to provide methodology concerning the analysis of texts in addition to legal methodologies.

2 The object of analysis: The judgments as texts – and beyond

The analysis of judgments as texts calls the implicit communication contract between the writer and the reader of the text into focus, and enables us to better understand a foreign judgment. A vital condition in these communication contracts is the *context* of the utterance, or the writing of the judgment, which again can be separated into two subcategories: the situational context and the cultural context, both of which are necessary to understand the other, and to understand the text.[15] This resembles comparative legal method, which stresses the importance of understanding the rules in the context of the entire legal system. It does provide, however, a supplementary tool for the interpretation of judgments, as the comparative legal method mainly study *rules*. The focus in this thesis is on *judgments,*however . Judgments concern rules and may provide a basis for rules, but they are also texts. The situational contexts in the judgments may be seen as the facts in

[15] Asdal (2008) ch. 2.

each and every case, which have the common denominator that we're in a situation of a divorce settlement in which one or both spouses are Muslim. However, the content, outline and style of a judgment are shaped by an entire legal system, with its laws and its jurisprudence, applied to this specific situation, i.e. the text is shaped by the implicit norms of the legal system in each country. Thus this is a kind of text that is best understood through its cultural context: the legal culture, both in a national and an international sense, since they all concern private international law. One should also take into account that only a few of the judgments are from the Supreme Court; therefore, they are not intended to provide a basis for case law. In order to understand the text in this context, I have applied comparative legal method, which will be described in chapter 7, and legal theory concerning private international law, described in part II chapter 3.

The situational context is also an encounter between Muslim and Western European legal cultures and norms, in a context of husband versus wife, man versus woman: a situation of legal pluralism with gender justice at stake. This sets the frame of reference for my analysis: theories of legal pluralism and women's human rights. These will be further described in chapters 5 and 6.

My purpose is to explore how issues concerning gender justice and legal pluralism are handled in European courts, with a view to outline options and choices for future legal policy. We are in a context of legal pluralism where the European legal system sees gender justice as a matter of gender *equality* to a greater extent than the Muslim laws in question. I have chosen to focus on two approaches, which I assume to be interdependent, in order to obtain a correct and equitable result; an approach which acknowledges both the cultural and gendered context:

1) that the courts must apply comparative legal method in order to provide a foundation for making a correct and fair decision,
2) that they also need to apply a gender justice norm of equal worth to obtain an equitable result when they apply Muslim laws.

I do not interpret the judgments with the purpose of using them as precedence – an exercise that often goes beyond the plain analysis of the judgment as a text, and demands a very sophisticated knowledge of the legal system it belongs to, that must be left to the lawyers of each legal system. I have, however, used some articles on the precedence of the English judgments, in order to say something about the validity of these judgments today, since they date back to the 1960s and 1970s.

3 Translations of judgments and literature

It is difficult to translate judgments, as the concepts often don't have any real equivalent in the other language. As I am writing in English, Common Law concepts have to be used, although I try and remedy this to a degree by giving the quote from the judgment in the original language in a footnote. When it comes to the labelling of the courts, Sweden, Denmark and France all operate with three levels in civil law cases. I have therefore chosen to use the term *municipal court* for the lowest level, and *court of appeal* for the second level courts for all countries. I use *Supreme Court* for the highest court in the Scandinavian countries. *Court of Cassation* is used for the French *Cour de Cassation*, since this is a description of its function, which differs from the Scandinavian courts. It only adjudicates in matters of law and very rarely makes the final decision itself. When an appeal is upheld, the case is normally sent back to the court of appeal, composed by other judges this time, for a new adjudication (*cassation*).

Mahr is a compulsory gift from the husband to the wife, the amount of which is normally agreed upon in relation to the marriage contract. It is paid either at the time of marriage, on demand, or at the dissolution of marriage by divorce or death. *Mahr* has no real equivalent in European law. The French translate it with the word *dot*, which is the old French dowry: a gift given from the parents of one of the spouses to the couple. In English it is common to translate *mahr* into the word dower, owing to the lack of an actual equivalent. Poulter and others consequently use *dower* to describe *mahr*, and *dowry* to describe "the transfer of

property to the bride herself from her own parents",[16] a distinction probably originating from the Indian subcontinent.[17] The Scandinavians use a variety of translations, including the term for the ancient dowry, *medgift*, approximately the same as in France and Britain; *morgongåva* [morning gift]; or, the closest equivalent, *brudegave/-gåva* [bridal gift]. When the Arabic term *mahr* is translated into European languages, it tends to pick up some of the aspects of the European term, which was originally used to describe a different concept. I strive to use terms that are as correct as possible and as there are no real equivalents in English, I will use the Arabic word *mahr* except for when I quote others or for the sake of explanation.

4 The multiculturalism versus feminism debate

Multiculturalism as a policy "advocates a society that extends equitable status to distinct cultural and religious groups, with no one culture predominating".[18] Will Kymlicka, a Canadian professor in philosophy, sees minority groups as having their own "societal cultures" and is one of the major contemporary proponents for the protection of these groups through group rights and privileges.[19] The acceptance of the norms and institutions of such groups is seen by some as one of the legal aspects of such an approach, for example many British and Canadian Muslims want formal acceptance of their Shari´a councils, a claim which, for example, the religious leader of the Church of England, the Archbishop of Canterbury, supports. The opposite approach is complete assimilation, an approach that the French government has pursued concerning certain issues, particularly in its approach to hijab in public schools. Feminism is often deployed in an argument against multiculturalism and, in 1997, Susan Moller Okin, a leading political theorist, strongly

[16] Poulter (1986) p. 40.

[17] See e.g. Diwan (1990) and Mulla (1996).

[18] Wikipedia on *multiculturalism*, read 08.09.2008.

[19] Kymlicka (1995).

contested Kymlicka, asking whether multiculturalism is bad for women.[20] She observed that "regnant cultural ideas – including religious ideas – sometimes provide rationales for controlling women's bodies and ruling their lives", and argued that "[w]hen the dominant ideas and practices in a group offend so deeply against the idea that men and women are moral equals, (…) we ought to be less solicitous of the group and more attentive to the costs visited on female members".[21] Many consider the solution to be a form of multiculturalism that is gender sensitive, but how can this be done in practice?

Each country has a set of rules that regulate transnational conflicts in order to determine which laws should be applied, these are called choice of laws rules. Concerning the choice of laws, especially when dealing with Muslim laws, the Belgian lawyer and legal anthropologist Marie-Claire Foblets poses two main questions: 1) "Does the European judge make some elements that comply with foreign law enforceable under his own jurisdiction?" 2) "If so, does he acknowledge these elements to be on *equal* terms with his (own) legal system?"[22] Should the answer be yes to both of these questions then this can be read as a first step towards an equitable result in terms of multiculturalism in the courtroom. At the same time, gender justice must be a goal. In our context, multiculturalism implies an acceptance of the formal legal pluralism in the shape of private international law. How can the courts apply Muslim laws and simultaneously promote gender justice? Before we move on to the framework of analysis – comparative law and gender justice norms – we need to take a closer look at what legal pluralism is.

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[20] Okin (1997). First published in Boston Review in 1997, and republished in a book together with comments from other researchers upon her article, see Cohen (1999).

[21] As interpreted by the editors in Cohen (1999) p. 4.

[22] Foblets (2005) p. 299.

5 Legal pluralism

A national legal system is often perceived as uniform, monolithic and exclusive: One single legal system is seen as the only set of legal rules regulating the population's behaviour. This monistic view is, however, challenged by the theories of legal pluralism: Every culture includes norms for behaviour, status and so forth, which vary in strength and degree of uniformity, which in real life may be strong and uniform enough to create what Sally Falk Moore describes as a "semi-autonomous social field".[23] These fields can exist in various ethnic minority groups, in workplaces, and in any group in society, and accordingly will often overlap. In 1986 John Griffiths published a groundbreaking essay about legal pluralism, as he calls it, which is still considered a major contribution to the development of this concept and is used as a basis for this thesis.[24] Griffiths was the first to distinguish between two types of legal pluralism: Formal or "weak" legal pluralism, and informal or "strong" legal pluralism. The formal legal pluralism is mainly used to describe the legal system in many formerly colonized countries, where local custom was applied to some ethnic groups, British or French law to others. One such example is Lebanon, where the family law depends on which religious community one belongs to, resulting in 19 different sets of rules.[25] Griffiths sees law as "the self-regulation of a 'semi-autonomous field'" as defined by Moore; "legal pluralism" thus "refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping, 'semi-autonomous social fields'."[26] This situation is "the normal situation in human society".[27] This implies that in a situation of formal legal pluralism, the informal pluralism is also present.

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[23] Moore (1978).

[24] Griffiths (1986).

[25] The 2007 report to the CEDAW committee made by the Committee for the Follow-Up on Women's Issues, at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CommitteeFollowuponWomen.pdf.

[26] Griffiths (1986) p. 38.

[27] Ibid. p. 39.

It follows that although the focus of this thesis will be on formal legal pluralism, informal legal pluralism is always present. One should also bear in mind that the concept of legal pluralism is descriptive, not normative.[28] I use it as an explanation of the context of the judgments, and as a basis for my hypothesis pertaining to how the courts should handle such a context: a situation of legal pluralism. In order to thoroughly understand the unfamiliar norms the court will necessarily have to apply something akin to the comparative legal method. In these judgments, the courts are in a situation of legal pluralism, where gender justice is at stake. The courts may choose their own laws, in which the judges are trained. Aside from the partial exception of English law, perhaps, these are predominantly based on ideas of gender *equality*. Alternatively, they may choose the Muslim laws, claimed to be of divine inspiration, if not authority, which afford men and women different rights and obligations in marriage and divorce and talk of *equal worth* as the desired gender justice.

Mahr is a right the woman has because she is a woman; the extent of her right, i.e. the amount or value of her dower, depends on social norms and the negotiations between the spouses and often their families. *Mahr* is debated even in a Muslim context, not only due to differences in opinion regarding what gender justice means, but also because *mahr* is not always good for the woman, even in terms of an equal worth perspective on gender justice. However, more commonly, it is of vital importance as a tool for gender justice in Muslim countries, so outright rejection of it is not a good move from a feminist perspective. So, when transferred to a European context, how do the courts handle this concept? Do they accept the claim regardless of the justice of the result? Do they reject it altogether? Is there a common approach at all, even within the same country?

[28] Hellum (1998) p. 70.

6 Human rights obligations at the interface between gender justice and legal pluralism

6.1 Introduction

Cultural norms are often seen as conflicting with a gender equality norm, to a large extent implemented in all the countries studied in this thesis, although to a somewhat lesser degree in the United Kingdom. The quest for women's rights is unlikely to be successful if we don't take the cultural context into consideration. I will thus focus on the state obligations concerning gender justice in a context of legal pluralism. The human rights obligations of the state may be seen as either negative or positive; i.e. a negative duty to refrain from certain actions, or a positive duty to provide.[29] The cases in this study are litigations between two individuals. The main focus will therefore be on the state's duty to provide gender justice between these individuals, as stated in the Convention on the Elimination of All Forms of Discrimination against Women of 1979 articles 2 and 3, which is the most detailed human rights convention concerning women's rights. How should the convention be interpreted in order to incorporate the cultural dimension of women's lives? In order to answer this, we first need to take a brief look at various theories concerning gender justice, both in a European and a Muslim context. More specifically, we need to examine how the CEDAW may be interpreted concerning *mahr*. However, a negative duty may arise through the question of whether the result of the application of foreign law is against *ordre public*, which may be interpreted in relation to the state's human rights obligations. We will come back to this issue in chapter 6.4. Since about half of the judgments came into being before the entry into force of the CEDAW[30] I shall not go into detail, and use the CEDAW and related theory mainly as a standard of gender justice in general. The CEDAW committee also provides some views on *mahr* in relation to gender justice that are highly relevant here.

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[29] This dichotomy is used less often today, to the benefit of a more nuanced and complex approach, but is useful in this specific context. Steiner (2000) p. 181 as quoted in Wærstad (2006) p. 111.

[30] Of the ECHR protocol 7 also, of which article 5 sets forth equality between spouses.

6.2 The CEDAW and gender justice norms

6.2.1 Gender equality theory

For a very long time, the campaign for gender justice in Western Europe mainly happened within the paradigms of Liberalism and Marxism. One of the main ideas of both of these is that all human beings are equal. A major criticism of this approach is that it may disguise inequality; that it gives women formal, but not substantial rights.[31] Both types of feminists have been important in ensuring that the two sexes have formally equal rights. This is the gender *equality* approach, which was the dominant feminist approach until the 1980s. MacKinnon criticises liberal feminism for not taking into consideration that "men are as different from women as women are different from men", and that men continue to set the standard for comparison.[32] The Marxists were among the main critics of liberalism, but this ideology has been criticised for being too essentialist and exclusionary, "essentialist because of the centrality of economic determinism, exclusionary in its failure to examine the position of women in society."[33]

6.2.2 Theories of equal worth

Both in Europe and elsewhere, several scholars have argued for a different approach, known as difference feminism or cultural feminism, in a reaction to the gender equality thought in liberalism and Marxism. There are a variety of theories, which count among them those of Luce Irigaray[34] and Carol Gilligan.[35] They all strive to explain the differences between the sexes and promote women's perspectives without falling into the stereotype trap, to promote the concept of equal worth rather than strict, mechanical equality.

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[31] See e.g. Barnett (1998) and Dahl (1985).

[32] As quoted in Barnett (1998) p. 133.

[33] Ibid.

[34] See for example Joy (2006).

[35] See for example Gilligan (2002).

One has to distinguish between gender equality in a legal sense, and in terms of feminist theory. "Gender equality" as a legal obligation is most often interpreted in a manner that incorporates both of these; it will be used in this sense throughout this thesis. Thus the recognition of women's work at home as a basis for their financial claims in divorce situations may be seen as a gender equality measure, although the underlying thought is obviously one of equal worth.[36] The CEDAW committee explicitly recommends this approach.[37] This is even more important in situations of legal pluralism: Research on the interrelationship between human rights and legal pluralism from Africa and South Asia,[38] some of which concern Muslim laws, shows that a mechanic gender equality approach often leads to unfair results. The equal worth approach must be used with caution, however, as one risks falling into the trap of stereotyping, which is prohibited in article 5 a).

Most feminists that work within the framework of Islam are promoting women's rights on the basis of equal worth. This is mainly because the Qur'an very explicitly confers men and women different rights and obligations, in conjunction with the fact that it is read as the words of God, as spoken directly to Mohammad. Ali (2000), a Pakistani legal scholar, former politician and a major proponent for the compatibility of the CEDAW with Islam, interprets the CEDAW in terms of the equal worth norm.[39] In addition to the application of comparative legal method, in this thesis, I wish to investigate whether the courts take gender justice into consideration, and if so, whether they apply a mechanic equality norm or an equal worth approach, and how the two may work.

6.2.3 *Mahr* and the CEDAW

The CEDAW article 16 obliges the state parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family

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[36] Ncube (1989), Sverdrup (1997).

[37] CEDAW General Recommendation no. 13 s2.

[38] See for example Hellum (2007).

[39] I base this on Hellum's review of Ali's book "Equal before Allah and Unequal before man?" See Hellum (2004).

relations and in particular ensure, on a basis of equality of men and women (…) c) The same rights and responsibilities during marriage and its dissolution". The text indicates that *mahr* is contrary to the CEDAW, as it is a right that only women have, on their basis of being women, and it is part of a set of legal effects of marriage which is not based on gender equality. At the same time, according to the CEDAW art 3, the signatory states are obliged to provide *substantial* equality, rather than just formal equality. If one goes straight to a gender equality norm by rejecting rights women have that are contrary to this norm then this may have the effect of making the situation worse for women, rather than better, therefore not fulfilling the obligation to provide substantial equality. This is particularly relevant to the courts, which are perhaps the most important part of the state when it comes to the actual application of the law.

Initially, the CEDAW committee was very negative towards the Muslim dower, *mahr*. During the 14th session of the committee, committee member Ms. Cartwright, in the committee's comments to the Tunisian country report, "noted that the persistence of the custom of providing a dowry indicated that women were still, to some degree, regarded as a commodity".[40] In the 27th session, committee member Ms. Manolo remarked, in the comments upon the Tunisian country report, "that the continuation of that practice gave the impression that the bride was bought and could be managed like a chattel".[41] However, in the 38th session of the Committee on the Elimination of Discrimination against Women it urged Syria to "review its existing laws and policies to ensure that women who go to shelters do not forgo other legal rights, such as rights to maintenance and dower".[42] Most country reports from Muslim countries from after the year 2000 mention their legislation concerning *mahr*, but the comment just mentioned is the only response I've found from the committee. This seems to imply that the committee has changed its views on *mahr*, from something approaching the "sale price" of the woman, to a financial right vital for the economic situation of women. Since it's a claim only women have, and thus not in line

[40] http://daccessdds.un.org/doc/UNDOC/GEN/N95/801/12/PDF/N9580112.pdf?OpenElement read 10.09.08.

[41] http://daccessdds.un.org/doc/UNDOC/GEN/N02/426/33/PDF/N0242633.pdf?OpenElement read 10.09.08.

[42] http://daccessdds.un.org/doc/UNDOC/GEN/N07/375/96/PDF/N0737596.pdf?OpenElement read 10.09.08.

with a strict gender *equality* norm, this may indicate that the CEDAW committee is open to the equal worth standard of gender justice also concerning *mahr*, and chooses a more culturally sensitive approach, instead of rejecting *mahr* on the basis of a strict and rather mechanical gender equality approach.

6.3 State obligations

The CEDAW article 2 and 3 establish a general duty for the states to eliminate all kinds of discrimination against women. For example according to article 2 d) and e), the states should "refrain from engaging in any practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation", and "take all appropriate measures to eliminate discrimination against women by any person (…)". The states are under the obligation "to take all appropriate measures … for the purpose of guaranteeing [women] the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."[43] This should imply that the courts, as the judiciary branch of the state, are under strong obligations to promote gender justice when dealing with cases as studied in this thesis.[44] [45] All the European countries in this thesis have ratified the CEDAW, an important fact for the future adjudication of *mahr*.

6.4 Human rights and *ordre public*

In addition to the question of whether one has a right to have one's personal status law applied, another aspect of the relationship between private international law and human rights must be taken into account. The relationship between private international law and *ordre public* must be considered with a view to whether the result of the application of a foreign rule is against the moral standards of the court's country. In the countries I've studied, courts, legislators and legal scholars give scarce if any attention to the relationship between human rights obligations and private international law, with the exception of

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[43] Article 3, my brackets.

[44] Due to space constraints, I cannot go into detail of the state obligations. As most of the judgments came into being before the entry into force of the CEDAW, this is mainly relevant for future adjudication.

[45] See e.g. Cook (1994) or Vandenhole (2005) for further discussion of this topic.

France. There, the Court of Cassation have refused to accept the validity of a unilateral repudiation, *talaq*, should it be contested by the wife, on the basis of it being contrary to the European Covenant on Human Rights (ECHR) Protocol 7 Article 5 on gender equality, and thus against French *ordre public*.[46] This is a form of negative *ordre public* which might be of interest for other countries too. However, the gender justice norms are relevant when determining whether *mahr* is against *ordre public*, as it sets a limit pertaining to what can be applied from foreign laws, on the basis of cultural standards and values in the European country concerned.

7 Comparative law

7.1 Introduction

An assumption underlying comparative legal method is that if "legal science" is understood as including the discovery of models for preventing or resolving social conflicts, in addition to the techniques of interpreting the texts, rules etc. of the national system, then comparative law can provide a far richer range of model solutions than a single legal system.[47] *Mahr* has only been dealt with in a few cases in Scandinavia, and in a small number of published cases in France and Britain. The aim of this thesis is to engage with this assumption by looking into the techniques used by the different courts in dealing with the Muslim legal concept of *mahr*, in a gender equality perspective. Comparative law "dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding."[48] The part of my hypothesis that concerns the use of comparative law in the courts, is based on this

[46] *Table ronde, Cour de Cassation*, February 17th 2005. As far as I can see, the ECHR is the only human rights convention that has been used in order to determine the boundaries of French *ordre public*.

[47] Zweigert (1998) p. 15.

[48] Ibid. p. 16.

assumption by Zweigert and Kötz, which is in line with my own views regarding how one understands foreign cultures – which the legal system is a part of.

There has been little systematic writing about the methods of comparative law. Experienced comparatists have found that a detailed method cannot be laid down in advance, and the right method must largely be discovered by gradual trial and error.[49] I have found no literature on the comparative analysis of judgments, only on the comparison of legal rules and concepts. Since interpretation of principles and concepts are an inherent part of court reasoning, the situation is perhaps not all that different. As follows, I analyse how the various legal systems deal with the same problem. The overall question is: How do courts within these different jurisdictions handle *mahr* in divorce settlements between spouses who have married in accordance with Muslim laws, but who live in Europe?

7.2 The method of comparative law

"The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to be compared, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law *the only things which are comparable are those which fulfil the same function*,"[50] state Zweigert and Kötz, two German scholars whose work "An Introduction to Comparative Law" is considered to be a classic. This is indeed valid as long as one studies concepts, although slightly less so when one studies judgments. The Swedish scholar in comparative and private international law, Michael Bogdan, maintains that "[f]or a comparison to be meaningful, the two objects of the comparison must share some common type of characteristics, which can serve as the common denominator. (…) Within comparative law, one is normally interested in comparing the substantive contents of the legal rules, or more specifically, how the various legal systems regulate a certain situation that arises in both of the countries. (…) When comparing legal rules from different countries, one should consequently strive to compare

[49] Ibid. p. 33.

[50] Ibid. p. 34, my italics.

such rules which regulate the same situations in people's lives."[51] There are no rules in Scandinavian, British or French law that deal with *mahr* directly, which is what makes it so interesting to study. There are rules of private international law, but it is often unclear how concepts that are totally foreign should be qualified[52] and interpreted. The main object of this study is thus how the *courts*, as the ultimate interpreter of a country's laws, handle "a certain situation". The case studies selected for the purpose of this study all concern the division of property in connection with divorce, and the interpretation of the *mahr* clause in Muslim marriage contracts within a European context. Important human rights issues are at stake, at the intersection between gender justice and minority rights. There are some minor differences. For example, all the French and Swedish cases concern conflict of laws, but the French ones never concern a direct claim on *mahr*, only choice of property regime – of which *mahr* is considered an indicator. However, the situational context is very much the same in all the judgments, thus providing comparable objects for my analysis; the judgments "share some common type of characteristics, which can serve as the common denominator" as mentioned above.

Kötz and Zweigert distinguish between *microcomparison*, which concerns specific legal institutions or problems and *macrocomparison*, which focuses on methods of thought, techniques of legislation and similar.[53] For the purposes of this thesis, I take these two categories to be parallel, to a certain extent, to the situational and cultural contexts, respectively. The main focus is however on the former: How do the courts interpret the Muslim legal concept of *mahr*? It is, however, seldom possible to carry out a good comparison without using both; macrocomparison of e.g. general policies provides a basis for the microcomparison of the adjudication of *mahr*.

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[51] Bogdan (1994) pp. 58-59.

[52] See part II chapter 3.2.

[53] Zweigert (1998) pp. 4-6.

7.3 The relationship between comparative law and private international law

Comparative law is essential for private international law, in that it provides tools for understanding the two legal systems and their concepts in relation to one another, and also in the application of the foreign law indicated by the conflict rules of the home system, when foreign terms have to be converted into the language of the court. The only way of doing this is to compare the institutions and concepts of both systems. Comparative law is also essential for the proper treatment of the concept of *ordre public*: when the result of a foreign rule is considered so alien or shocking that the domestic court is unwilling to apply it, even if it should according to a conflict of laws rule.[54] It is necessary to understand the foreign rules thoroughly before one can determine whether they will give a result contrary to *ordre public* in a particular case.

7.4 The use of comparative legal method in this thesis

Comparative legal method is essential when dealing with legal pluralism. A basic rule in comparative legal method is to compare the *function* of the rules and concepts in question. The most natural choice of a method of approach in order to understand the Muslim norms in question is therefore the comparative legal method. In this thesis, comparative legal method is used to understand the norms concerning *mahr* in their Muslim contexts, but with more emphasis on the *functions* of *mahr* than the comparison, but more importantly in the comparison of the judgments and in the analysis of the courts' handling of the foreign norms. The comparative legal method is a necessity when the courts deal with legal pluralism, in order for them to understand and apply the norms in question correctly. When the courts have to deal with matters of private international law, comparative legal method seems to be the best tool also for determining the contents of the Muslim laws in question. If the choice of laws rules determine that a claim for *mahr* is governed by the European laws in question, comparative legal method is every bit as important in order to interpret the claim and adjudicate it within that same European legal system.

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[54] Ibid. p. 7.

The comparative method should provide the courts with a way to follow Nielsen's recommendation about focusing on the functions of the foreign laws, not their ideological basis.[55] Whether they use it, and if so, how, is looked into in the analysis of the international private law cases selected for the purpose of this study. The overall purpose of my analysis is to discuss the assumption underlying this thesis: that the courts must apply comparative legal method in order to provide a foundation for making a correct and fair decision; if they don't, they won't be able to achieve a fair result in terms of gender justice. When I try to determine whether the courts apply the method of comparative law, I focus on whether they try and investigate into the functions of *mahr* in a Muslim legal context compared to the concepts and rules with similar functions in the European legal system. On the basis of information in the judgments themselves I have also paid attention to the sources the courts use as basis for their comparison.

7.4.1 Interviews with lawyers from the various legal systems

Bogdan stresses that "one must study the foreign legal system in its entirety",[56] which can be interpreted as understanding the judgment within its cultural context. He also warns that "the real importance of the various sources of law is by no means always expressed in the country's legal literature."[57] The size of this thesis does not allow for a detailed mapping of each legal system, but I have, in addition to reading literature on each legal system, contacted British and French lawyers, both people trained in the relevant legal field, as well as others, and asked them how they read the judgments concerned. I chose not to contact any Swedish lawyers as I found that I understood the judgments sufficiently well for the purposes of this thesis. The Swedish legal system is very similar to the Norwegian system, and the judgments are written in a style that provides quite a lot of information about the reasoning behind the decision.[58]

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[55] See p. 12.

[56] Bogdan (1994) p. 49.

[57] Ibid. p. 46.

[58] In France, Fadi El Abdallah – a PhD student in contract law – gave me an introduction into the structure, reasoning and terminology of French judgments. Rama Chalak, a lawyer working within the field of private

8 Other research on the adjudication of *mahr*

I have found only one comparative study of the adjudication of *mahr* in various jurisdictions: an unpublished PhD thesis from Harvard University by the Canadian lawyer Pascale Fournier. She has been kind enough to let me read it. Her approach has been how liberalism deals with religion, and "how the specific legal institution of *Mahr* is understood, reconstructed or erased by the legal system and the broader spectrum of ideology that permeates it".[59] She suggests that "Western liberal courts [French, German, Canadian and from the United States] have captured *Mahr* in three different ways: the Liberal-Legal Pluralist Approach (LLPA), the Liberal-Formal Equality Approach (LFEA), and the Liberal-Substantive Equality Approach (LSEA)", of which "[t]he LLPA views *Mahr* as central to cultural and religious recognition, the LFEA considers it as a mere secular contract, and the LSEA projects fairness principles into its regulation."[60] She concludes that the approach varies even within a single country, thus seeing Comparative Legal method as unsuitable for the study of the adjudication of *mahr* and confirming the thesis of Critical Legal Studies: that law is uncertain by its nature, and permits exceptions, ambiguities and grey areas which demand to be filled. She recommends a case by case approach by the courts, which takes into consideration the fact that each Muslim woman and each situation is different. I do, however, read all the French judgments, the Douai judgments[61] in particular, quite differently from Dr. Fournier, and I question her interpretation of the Court of Appeal of Douai judgment in particular, since she bases her analysis on the result in that case being the opposite of what I understand that it was. Her

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international law and family law, helped me place them further within their context of the French legal system, private international law and family law in particular. Maître Courjon, a Court of Cassation lawyer representing the husband (the winning party) in the very last French case concerning *mahr*, helped me understand this judgment in depth and provided some reflections upon the Court of Cassation and French *ordre public*. I did not manage to get in touch with British lawyers working with private international law, but LLM Ezekiel Ward read through the judgments with me and explained terminology, reasoning and the English technique of interpreting judgments.

[59] P. 143

[60] Fournier (2007) pp. 143-144.

[61] Cour d'appel de Douai, ch.7, 8th January 1976, Cour de Cassation, ch.civ.1, 4th April 1978.

quotes from this judgment originate from the Court of Cassation judgment, while she treats the two judgments as being from two different cases. Thus her conclusion that the approach varies even within a single country[62] is not all that certain concerning the French judgments, but these are the only ones we have both studied, so I cannot comment on the rest of her analysis. In my opinion she provides some interesting perspectives upon the adjudication of *mahr*, and I agree with her conclusions, perhaps, for reasons already mentioned, with the exception of her views upon the comparative legal method.

The remaining literature makes no comparisons between the adjudication of *mahr* within various European jurisdictions, and I will refer to it when I present the various cases and discuss them later on.

[62] Fournier (2007), e.g. on p. 231.

Part II. THE LEGAL FRAMEWORK

1 Introduction

Since we are in a situation of legal pluralism, the norms in question are part of the cultural context of the judgments as described in part I chapter 2. We therefore need to examine the norms in question before we study the judgments. I will start with presenting the concept of *mahr*, as it appears in a Muslim context. It must be noted that although the basic rules concerning *mahr* are rather similar in Muslim countries in North Africa, the Middle East and South Asia, the concept and rules do vary – also within a single country. Legal pluralism in the strong sense[63] is indeed a valid description of the norms concerning *mahr* also in a Muslim context. For example in Tunisia, the official *mahr* is rather low, close to symbolic, but in rural areas large amounts of *mahr* is paid, though unofficially, and therefore not enforceable through Tunisian courts.[64]

In this thesis I will focus on the basics that seem to be more or less generally accepted in the official laws of Muslim countries from Morocco in the west to Bangladesh in the east, thus excluding unwritten norms and countries like Indonesia, which is the most populous of all Muslim countries, and African countries south of the Sahara. The reason for the choice of written norms is quite simply accessibility. The reason for my choice of countries is my own background in Arabic and regional studies on the Middle East and North Africa; I have more knowledge about these countries, which therefore provides a better foundation for my analysis.

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[63] See page 10.

[64] Conversation with Tunisian lawyer Lemia Trad 17.05.2008.

2 *Mahr* in Muslim legal contexts

2.1 Introduction

What is *mahr*, a sales price for the woman's uterus or a gift to honour her? Is it good or bad for women? Both questions need to be discussed within a Muslim context before we analyze how it's interpreted in European courts. I will also say a little about the legal method and sources of law in Muslim countries, to provide a background for what the European judges have to deal with.

2.2 Some basic facts about *mahr*

In Tunisia and other North African countries where the Maliki law school is predominant, *mahr*[65] is "the goods and/or cash to be given by the groom to the bride as a requisite of a valid Muslim marriage."[66] In other parts of the Muslim world *mahr* is not seen as a requisite for a valid marriage, but as a legal effect of the marriage contract. But in all Muslim countries *mahr* is a claim for goods or money, that arises from the marriage contract. Some jurisdictions acknowledge *mahr* in the form of services as well, e.g. the teaching of the Qur'an, while some require it to be of economic value, for example Tunisia[67] and Egypt.[68] [69] It may be given at the time of the marriage ceremony, and is then often called *mahr mu'ajjal*, prompt dower, or at a later date, normally at the time of dissolution of marriage by divorce or the death of the husband. It is then called *mahr mu'akhkhar*, deferred dower.[70] In theory the woman may claim a deferred *mahr* at any time

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[65] In the Qur'an the word *mahr* (مهر) is not used; several other terms are seen as synonymous: *sadaq*, which properly means "friendship", "present", "a gift given voluntarily and not as a result of a contract" (verse 4:4); *`ajr* (pl. *`ujur*), which means "payment", "salary" or "gift" (verses 5:5, 60:10); or most often: *farida*, which means, among other things, "a gift or disposition instituted by God" (verses 2:236, 2:237, 4:24). In French it is called *maher*, in Hebrew it is *mohar*, in some non-Arabic speaking countries it is calles *mehar* and similar. The Encyclopaedia of Islam online on *mahr*, read March 31 2008.

[66] WLUML (2003) p. 9.

[67] Code du Statut personnel art. 12.

[68] Dupret (2002) p. 23.

[69] See also Siddiqui (1995).

[70] See e.g. Blanc (1995), Wani (1996), Diwan (1990) ch. 5.

after the marriage, but this is often interpreted as a sign of problems in the marriage. In practice, *mahr* is therefore seldom claimed before the event of divorce, as the social obstructions to an earlier claim are significant.[71] Whether *mahr* is prompt, deferred, or a combination, varies greatly between communities.

Some systems set a maximum or minimum amount of *mahr*, which varies greatly. The amount and nature (if paid in goods) of *mahr* is normally negotiated between the fiancées or their families, depending on personal, cultural and other circumstances. If the amount is not decided upon, the court may set an amount on the basis of what is common in that area, the *mahr* of the woman's sisters or other relatives, her age, education level etc. This type of *mahr* is called *mahr ul-mithl* (proper or exemplary dower), and may be either deferred or prompt.[72]

2.3 Rules concerning *mahr*, marriage and divorce

2.3.1 The Muslim marriage contract and *mahr*

Mahr is an essential part of the Muslim marriage contract. In order to understand the concept of *mahr*, we must therefore first investigate marriage and divorce in Muslim laws. Marriage in Muslim law is a civil contract between two individuals, entered into by consent, and is nothing like a sacrament. According to the author of the Hedaya, a major work within the Hanafi tradition of South Asia, "evidence is an essential condition of marriage".[73] Two or three adult and sane witnesses are required.[74] Since marriage is a contract, the non-performance of the obligations of one party may lead to a modification of the obligations of the other party, or even the termination of the contract, i.e. divorce.[75] It is debated whether *mahr* is a condition for the validity of the marriage (*hukm*), or a legal effect of it (*rukn*). The tendency is that the Maliki law school, prevalent in Northern Africa

[71] WLUML (2003) p. 181.

[72] For an overview of some of the variations of practices concerning *mahr*, see an-Na`īm (2002).

[73] Marghinani (1957) p. 26.

[74] Two men, or one man and two women.

[75] Ali (2003).

from Libya to Morocco, sees it as a condition of marriage, while the other law schools mainly see it as an effect of the marriage contract; a claim that arises from it.[76] In either case, *mahr* is one such obligation,[77] which in many countries is required to be written into the marriage contract. Since one of the duties of the wife, according to a traditional understanding of the law schools, is sexual availability, *mahr* is by some seen as the sales price of the woman's uterus or her virginity. The husband is required to provide for the wife. There is no notion of property regimes in Muslim laws: each spouse has their own separate property. This means that *mahr*, whether prompt or deferred, remains the woman's property during the entire marriage; a right to *mahr* may even, in some places, be inherited if the woman dies. She may even exercise a kind of lien, provided the property is held by her, and legally so.[78]

On the Indian subcontinent the interpretation of the *mahr* clause in the marriage contract is very much influenced by Common Law. The definition of *mahr* in Mulla's textbook on Hanafi law, a major source in Pakistani and Indian Muslim family law, is "a sum of money or other property which the wife is entitled to receive from the husband in *consideration* for the marriage". Consideration is defined as "the inducement to a contract",[79] the existence of which is a requirement for a contract to be valid in Common Law.[80] Taking into account that consideration is a concept that only exists in Common Law, one might argue that it is unnecessary to go too deeply into this discussion, as the terms don't really translate

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[76] Blanc (1995) pp. 155-157. This is, however, limited to the cases where the marriage contract says no *mahr* is to be paid, or where the clause concerning *mahr* is void and this is stated before the marriage, otherwise the wife can claim *mahr ul-mithl*. Linant de Bellefonds (1965-1973) p. 202, as quoted in Aldeeb Abu-Sahlieh (1999), p. 90.

[77] Traditionally, many see the wife's main duties as being obedience and sexual availability, the husband's as fair treatment of the wife, maintenance and dower. This is, of course, under continuous debate and change, especially in relation to the legislation in various Muslim countries.

[78] Mulla (1996) p. 437 ff. Mir-Hosseini (2000) p. 77 ff describes a case where a woman obtains a court order to confiscate a portion of her husband's property to secure her *mahr*.

[79] Black (1990).

[80] This is a very complicated matter, see e.g. Cheshire (2007).

between the legal systems.[81] However, it has created a huge debate on the Indian sub-continent. According to Pearl, judges in India still have a tendency to focus too much on the contractual aspect of *mahr*, while Pakistani judges "have appropriately captured the essence of the concept",[82] exemplified by a 1980 judgment from Karachi: "The dower (…) is a right which comes into existence with the marriage contract itself except that in case the dower is deferred its enforcement is held in abeyance till a certain event, i.e. dissolution of marriage by death or divorce, occurs."[83] Pearl and Menski suggest that the idea of *mahr* as a consideration for the marriage may have arisen as a result of ancient jurists comparing the loss of virginity to the loss of a limb, and emphasises that *mahr* is *not* consideration, and that subsequently the Muslim marriage contract is *not* a sales contract.[84]

2.3.2 The different types of divorce and *mahr*

In a few Muslim countries, such as Tunisia, men and women have the same right to divorce, at least formally. In countries where the family law is more influenced by the Islamic law schools, men and women have different rights and obligations both in marriage and at its dissolution. The consequences of a divorce, and the rights and obligations of the couple, depend on the type of divorce: If the husband initiates the divorce, it's either *talaq* or, if mutually agreed, *mubarat*. If the wife initiates the divorce, it is *mubarat*, *talaq bi-tawfid* (the husband has delegated his right to *talaq* to the wife),[85] *faskh* (judicial divorce)[86] or *khul´a* (divorce against compensation).[87] This compensation is very often the

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[81] For more about this discussion, see Pearl (1998) p. 190 ff.

[82] Ibid. p. 191.

[83] Anwarul Hassan Siddiqui v. Family Judge in Pearl (1998) p. 191.

[84] Pearl (1998) pp. 179-180. For more about the Muslim marriage contract, see also e.g. El Alami (1992), Ali (2000) p. 138 ff, or Bano (2004) p. 202 ff.

[85] Carroll (1996).

[86] A *faskh* divorce can in most Muslim countries be obtained either as a result of fault, e.g. the lack of maintenance, or as"a result of the absence or presence of a condition [in the marriage contract] in one of the parties". Mir-Hosseini (2000) p. 40, my brackets.

[87] Balchin (2006) pp. 68-69, WLUML (2003) p. 273 ff.

renouncement of a deferred *mahr*, or the return of a prompt *mahr* to the husband,[88] which means that a woman loses her right to *mahr* if she wants divorce without the husband's consent, and if she can't claim a judicial divorce (faskh) on the grounds specified in national law. In practice, women often renounce a deferred *mahr* when the divorce proceedings are difficult, even when they have no legal obligation to do so; it is an important bargaining tool, e.g. to obtain the custody of children.[89]

2.4 Some views on the nature of *mahr*

Doi and many others, including many women, emphasize *mahr*'s character as a "free gift by the husband to the wife, at the time of contracting the marriage,"[90] which is a sign of the husband's respect for his wife and her "right to earn, own and possess property independently and to enjoy an equitable position on the matrimonial dais".[91] At the same time, many, particularly those in favour of a strict gender equality policy, see *mahr* as something of a sales price of the woman's uterus or her virginity. Mir-Hosseini, a British-Iranian anthropologist who has made extensive studies of marriage and divorce in Iran and Morocco, quotes a prominent Maliki scholar as follows: "When a woman marries, she sells a part of her person. In the market one buys merchandise, in marriage the husband buys the genital *arvum mulieris.* As in any other bargain and sale, only useful and ritually clean objects may be given in dower."[92] Since the Malikis see *mahr* as a condition for the marriage contract to be valid, the link between *mahr* and the husband's access to the woman's uterus is emphasised. Mir-Hosseini emphasises, however, that "[t]o identify certain similarities in the legal structures of marriage and sale contracts is not to suggest that Islamic law does conceptualize marriage as a sale", and that "Muslim jurists have

[88] Mir-Hosseini (2000) pp. 81-83.

[89] WLUML (2003) pp. 179-180. See Mir-Hosseini (2000) p. 75 ff. for an example.

[90] Doi (1984) p. 159, cited in Pearl (1998) p. 179.

[91] Wani (1996) p. v.

[92] Ruxton (1916) p. 106, as quoted in Mir-Hosseini (2000) p. 32.

shown awareness of possible misunderstandings and are careful to enumerate the ways in which marriage contracts differ from that of a sale".[93]

2.5 Some functions of *mahr*

In addition to being a bargaining tool, *mahr* may have a variety of functions, depending on the situation and whether it's prompt or deferred. The Swedish scholar Johanna Schiratzki sees it as a kind of economic insurance for the woman, in case of divorce.[94] A deferred *mahr* is often set to an amount that is beyond the immediate means of the husband. This is often used as a manner of trying to prevent him from divorcing her: If he pronounces *talaq*, he has to give her the entire *mahr*.[95] A prompt *mahr*, however, may prove a barrier to a divorce the woman wants, as she most often will have to return her dower, which in many cases will have been spent.[96] A dower set beyond the husband's means is sometimes, in countries where polygamy is allowed, also supposed to prevent him from taking a second wife since he then will have nothing left to give as *mahr* a second time. In some places, especially in Palestinian communities in Israel, women use their *mahr* to invest or trade and secure themselves a degree of economic independence,[97] and *mahr* is sometimes seen as a way of evening out the differences in the economic situation of the spouses.[98]

2.6 *Mahr* and gender equality

So, is *mahr* good or bad for women? There is no simple answer to that question, and the debate is ongoing in Muslim communities all over the world. Concerning the nature of *mahr*, the vast majority of scholars, men and women alike, seem to agree with Mir-Hosseini that *mahr* is not a sales price of the woman's uterus or anything else; Muslim

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[93] Mir-Hosseini (2000) pp. 32-33.

[94] Schiratzki (2001) p. 73.

[95] Schacht (1982) p. 167, as quoted in Fournier (2007) p. 53. For a real life example, see Mir-Hosseini (2000) p. 75 ff.

[96] Fournier (2007) p. 53 ff.

[97] WLUML (2003) p. 181.

[98] Oudin (2006) pp. 15-16.

marriage is not a sale.[99] Muslim feminists are divided; those promoting a strict gender equality norm are necessarily against it. In my opinion, one has to look at the function *mahr* has in each society, and in each situation. As implied in the CEDAW committee's comments on the Syrian country report in 2007, *mahr* is an important right for women, and as we saw in part I chapter 6.2.3, the committee's views upon *mahr* have developed from very negative and formal to a somewhat positive and pragmatic view.[100] If the women in a given society are most often housewives, *mahr* is an important source of income, particularly in case of divorce. On the other hand, in some situations the link between the claim of *mahr* and the type of divorce may lead couples to try to make the other initiate the divorce, as this may mean that *mahr* goes to the person who did not initiate the divorce. *Mahr* may then become an obstruction against a wanted divorce, instead of an insurance against an unwanted one.[101] If the woman has her own income, *mahr* becomes less important, and may, together with the right to maintenance, sometimes become an unjust burden upon the man. It is a right that the woman has on the sole basis of her being a woman and marrying. The only possible adaptation to economic and other circumstances is the negotiation of the terms of the marriage contract including the amount of *mahr*, which has to take place before the marriage contract is signed. Any circumstances at the time of payment of a deferred dower are not taken into account.[102] Whether *mahr* is good or bad for women, or even an unfair burden upon the man, thus depends entirely on the circumstances within each individual situation.

2.7 Legal method and the sources of law in Muslim countries

Family law in Muslim countries today is indeed diverse, and covers a vast range of solutions and interpretations of legal concepts and rules derived from Islam and its law schools, local custom, and the law of colonial powers such as France and Britain. The

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[99] The French-Egyptian jurist El Razaz (1970) discusses the matter thoroughly. See also for example Pearl (1998) pp. 178-180, Nørgaard (2001) p. 161, Wani (1996), Nasir (1990) p. 43 ff.

[100] http://daccessdds.un.org/doc/UNDOC/GEN/N07/375/96/PDF/N0737596.pdf?OpenElement read 10.09.08.

[101] See e.g. Fournier (2007) p. 52 ff.

[102] Or rather, he has no *legal* basis for such a claim.

interpretation of concepts and rules derived from Islamic legal sources[103] has always been debated, see for example El Razaz (1970), but the works of the scholars of the law schools (*madhahib*) still provide a basis of Muslim family law today – to a greater or lesser extent. When the countries became independent, the government had three main options to keep Shari´a[104] as a basis for the family law while at the same time not giving too much power to the judiciary. To give special Shari´a courts the power to adjudicate upon family matters, but little else, to codify the Shari´a, or to give laws inspired by the Shari´a, but not claiming to *be* the Shari´a.[105] Today the latter solution is the most common. Case law sometimes plays an important role, depending on the power structures and legal system in each country, but to a lesser extent than codification.[106] Although traditional Islamic legal reasoning use more of an inductive method, which is also the main approach in Common Law, most Muslim countries today use a deductive method, and create general laws more than they use induction from case law.[107]

Since the beginning of the 20th century, criticism of traditional family law increased and led to several reforms, aiming among other things to restrict the husband's right to repudiate his wife unilaterally, to develop grounds for judicial dissolution at the wife's initiative, and to restrict the practice of polygamy. A major issue has been to make registration necessary

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[103] The Qur'an, the Sunna (accounts of things the prophet Muhammad said and did), analogy from these, and consensus among legal scholars are considered the most important of these. See e.g. Eggen (2001).

[104] It must be noted that the term *shari´a* (Ar. شدر عيةة ”way” or ”path”, has a vast number of meanings. Shari´a in the sense ”Islamic law” consists mainly of family law, a bit of contract law, and a few rules concerning penal law. The contents are mainly based on the elaborations done by the four law schools of Sunni Islam or, for Shi´a Islam, its one major law school, but vary greatly even within a single law school. There is no uniform law that is called the *Shari´a*.

[105] Vikør (2003) pp. 212 ff.

[106] Pakistan is one country where the courts play a predominant role in determining the contents of the laws of that country, see e.g. Ali (2000). Muslim family law in India seems to be codified only to a small degree, see e.g. the French judgment Cour de Cassation, ch.civ.1, 22nd November 2005.

[107] Lecture at the Norwegian Centre for Human Rights by Khaled Abou El Fadl, professor in Islamic Law at UCLA, on the occasion of his receiving the Human Rights Price of the University of Oslo, 13th November 2007.

for a valid marriage, as the woman is otherwise entirely in the hands of her husband and the relatives on both sides.[108] Different methods have provided the juristic basis for the reforms. Among the most important are *takhayyur* – picking and choosing from whichever law school or doctrine one prefers; extension of the court's discretion; administrative measures anchored in the doctrine of *siyasa shar´iyya*;[109] penal sanctions; "modernistic" interpretation of the textual sources (neo-*ijtihad*);[110] and the doctrine of public interest (*maslaha*).[111] Feminist rereading of the sources of Islamic law constitute a supplement to the reinterpretation (*ijtihad*) of the Qur'an, the *hadith*[112] and other sources of Islamic law.[113] A major argument is that the *hadith* in practice often have precedence over the Qur'an, another is that the *hadith* chosen as basis for legal rules are more patriarchal than other *hadith*, which are overlooked.[114] Its impact on the actual legislation and jurisprudence in Muslim countries is varying, depending on the political system and situation.

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[108] WLUML (2003) pp. 133-136.

[109] Governance and administration in accordance with the Shari´a.

[110] The contemporary Sudanese scholar, Abdullahi an-Na´im, is a well-known example. The Tunisian prohibition on polygamy, based on the reasoning that Islamic law requires a man to treat all his wives equally, and that this is impossible to achieve (Muhammad himself exempted), is perhaps the most well-known example of legislation.

[111] Vikør (2003).

[112] Accounts of the sayings and doings of the prophet Mohammad.

[113] For a brief overview, see Offenhauer (2005) p. 27 ff. For examples of reinterpreters and reinterpretations of traditional sources of Islamic law, see Ali (2000), Badran (1990), Barlas (2002), Mernissi (1991), and Wadud (1999).

[114] Conversation with Dr. Taj Hargey, Islamic scholar and head of the Muslim Educational Centre in Oxford, March 6 2008.

3 Private international law[115]

3.1 Introduction

An Indian Muslim couple moves to Europe, and after 20 years a claim for *mahr* arises in their divorce case. A Polish woman and a Lebanese man, both living in France, contract a Muslim marriage in Lebanon. When *mahr* travels to Europe, claims may arise on the background of a whole range of situations. Private international law is, as mentioned earlier, a kind of formal or "weak" legal pluralism, but the line between formal and informal pluralism is a continuum rather than clear cut. The major variables that determine whether it's a private international law case or not, are the personal status of the spouses and where the contract containing a clause of *mahr* was signed. Only a case where two citizens of the same European country sign a marriage contract with a clause of *mahr*, in the same European country, has no elements of private international law.[116]

In this thesis we will focus on cases concerning private international law, and it is therefore necessary to give a brief overview of some of the basic principles and rules that exist in the European countries concerned: Norway, Sweden, France and England,[117] since they are part of the cultural context of the judgments and thus essential to understanding them. Some basic principles are the same, but each country has its own set of rules of private international law. Due to lack of space I have to simplify matters; the focus is on the main concepts and principles that are used in all the European countries concerned, and how these are used in the main rules of each country. I will go into some further detail when I analyse each judgment in part III.

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[115] In English law, but not in American law, private international law is the same as conflict of laws. Stone (1995) p. 1. I use both terms interchangeably.

[116] See Sayed (2008) pp. 188-189.

[117] Since there are differences between different parts of the UK, I have chosen to focus on England.

In matters of private international law, one first has to determine whether the court has jurisdiction. This question is not relevant for our purposes.[118] Secondly, one has to determine which country's law should be applied. In order to do this, one has to choose which *set* of conflict laws regulates the matter at hand. Different rules apply depending on whether the legal question concerned is qualified as inheritance law, contract law, etc. Which set of categories should be used to classify the matter at hand and which rules apply? This part of the question of the choice of laws, is called the problem of *qualification*. The interpretation of *mahr* related to the actual application is necessarily shaped by the process of qualification, and thus by the conflict of laws rules. This is why we need to look into this matter, even though the focus of this thesis in relation to the interpretation and application of foreign law, is on the use of comparative legal method. Is comparative legal method used in the process of qualification as well as in the further interpretation and application of the Muslim laws?

3.2 Qualification

Qualification[119] is the classification of a concept or legal question that determines which choice of laws rules to apply. The categories and their contents vary, and do not always correspond with the categories in national law. For example in Continental European private international law, as well as in Scandinavian law, it is common to separate between personal and financial effects of marriage in private international law, while they are often both categorized as family law within the national legal system. The former include matters related to personal status and the spouses' daily rights and duties towards each other in personal and practical matters, including maintenance, the latter refers to matrimonial property regimes and suchlike. The division into two separate categories is mainly used for international marriages to determine which conflict of laws rule should be used for each

[118] For more about this, see e.g. Gaarder (2000) on Norwegian law, Bogdan (2004) on Swedish, Dicey (2006) on British, or Mayer (1994) on French law.

[119] As usual the British do things their own way, and separate between *characterization of connecting factors*, such as domicile and place of celebration, and *characterization of issues*, for example the meaning such concepts as "capacity" and "formal validity". For our purposes the latter is approximately what in France and Scandinavia is called *qualification*. Stone (1995) p. 384 ff.

claim. The "qualification problem" refers to which set of categories should be used to classify the foreign legal concept. The three most widely known approaches are as follows: qualification in terms of the court's legal system (*lex fori*); the laws which should be applied on the case according to the choice of laws rules (*lex causae*) – sometimes the laws of the court's own legal system, sometimes those of another country; or autonomously, based on comparative study, i.e. comparative legal method.[120] The dominant view in England, France, Norway and Sweden is that the *lex fori* should be used as a basis,[121] but this creates problems with concepts such as *mahr*, which are completely foreign to domestic law. If a concept does not exist in French law, the technique that has been developed in French jurisprudence is to have the French categories as a starting point, but enlarge them until they include the foreign concepts that are sufficiently similar. This solution has been criticised for being too much of an abstraction, in that one starts with the categories of the conflict rules without taking into consideration the actual legal consequences of the choice of conflict law, and that the reasons behind the conflict rule for each category should alone determine the extent of the rule. For concepts that have no similarity at all with French ones, the judge is left to set down the conflict rule that to him or her seems to be most harmonious with the rest of the system.[122]

The Norwegian scholar Helge Thue maintains that in cases concerning *mahr* and other concepts that don't exist in Norwegian law, the Muslim law in question should be applied to determine which category of conflict of law rules the court should apply, therefore in practice a qualification *lex causae*.[123] This theory has been much criticised; to exemplify, the Danish scholar Svenné Schmidt asks: "How can you characterize in accordance with a law you don't know, before you have made the qualification and determined which conflict

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[120] According to Frantzen, no country has codified the process or method of qualification, so the major sources are judgments and legal theory. Frantzen (2002) p. 145. There may be variations from one judgment to another in a single country, but normally one method is clearly more accepted than the others.

[121] Bogdan (2004) pp. 62-65 and Thue (2002) p. 170.

[122] Mayer (1994) pp. 118-119.

[123] Thue (2002) p. 395.

of laws rules is applicable?" A major weakness with this approach is that it's based on every legal system determining itself in which cases its laws are applicable. This may easily lead to there being several legal systems or none whatsoever that is applicable in a particular case.[124] Due to the growth of private international law regulations from the EU, the comparative method is gaining influence in Europe,[125] even though it is criticized for being too complicated and creating too much work for the judges. A middle way is what is sometimes referred to as the private international law approach. It may be seen as a mixture of the *lex fori* and the comparative approach, in that it takes *lex fori* as a starting point, but classifies the foreign institution or concept according to its functions, and how these may be interpreted in relation to the relevant statute in *lex fori*. The term "marriage" in *lex fori* is, for example, interpreted in a way that comprises other institutions with mainly the same functions in other legal systems, i.e. polygamy, gay marriages etc.

If the matter is qualified as a matter related to family law, the personal status law of the couple is in most cases applied to the case. Contract law matters are as a main rule determined by the law that the parties have chosen. The choice must be explicit,[126] i.e. in writing, but under certain circumstances the choice may be implicit, see the Rome convention art. 3.1. In France the choice of matrimonial property regime is qualified under obligations law, and the choice may then be implicit.[127] If no proof of such a choice is presented, the law of the country to which it has the strongest ties most often regulates the matter. It is not given that *mahr* is qualified as a matter related to family law; as we have seen it has strong contractual elements as well.

3.3 The choice of laws

Once the matter at hand is qualified as belonging to a certain category of law, the choice of laws rules give one or more connecting factors that determine which country's laws are to

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[124] Schmidt (1954) in Frantzen (2002) pp. 147-148.

[125] Frantzen (2002) p. 145.

[126] The Rome convention of 1980 art. 3.1. See also Moss (2007) p. 2 ff.

[127] See e.g. Najm (2006), Annoussamy (1998).

be applied. According to the Belgian scholar of private international law and Muslim laws in Europe, Marie-Claire Foblets, "[t]he four main factors that, either independently or in combination, form the basis of contemporary choice-of-law debate among legal practitioners in Europe today are: *nationality*, *domicile*, *the choice of "the better law"* and *party autonomy*."[128] Few courts seem to use the "better law theory", and it will not be discussed any further in this thesis. Nationality and domicile are most often seen as relevant factors in order to determine which law is the person's personal status law, when this is the law referred to by the conflict rules for a specific category of law. The thought behind the concept of personal status law is that some things are seen as so close to one's identity, such as marital status and parental obligations, that the laws of the country to which one has the strongest ties should regulate them.[129] Nationality is the easiest to determine, although double or triple nationality may cause some difficulty. Some scholars maintain that if one or both of the spouses have a double nationality, and one of them is the same as the courts', then *lex fori* normally should be applied.[130] In France, as in most countries on the continent, nationality is the determining factor of one's personal status law. As to domicile, it varies what is required for a person to be seen as having domicile in a country. In Norway, one needs to actually reside there, as well as having the intention to continue to reside there,[131] while in Sweden one is considered as having domicile if one "resides there, if the residence when taking into account the duration of it and other circumstances must be seen as lasting."[132] In England one distinguishes between *domicile of origin* and *domicile of choice*, both subcategories to the concept of *domicile*, which is the basis for determining the personal status law.[133]

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[128] Foblets (2005) p. 300. My italics.

[129] Thue (2002) p. 9.

[130] See e.g. Mayer (1994) p. 556.

[131] Thue (2002) p. 63.

[132] *Animus remanendi* is thus a requirement, but not necessarily on a permanent basis. Bogdan (2004) pp. 148-149.

[133] Stone (1995) p. 12 ff.

3.4 *Ordre public* or public policy

If the *result* of the application of a foreign law is considered contrary to fundamental norms and values in the court's own country, it may refuse to apply the law on the basis of it being against public policy[134] or *ordre public*. The true meaning of *ordre public* is rather vague; in France, according to a Court of Cassation[135] lawyer, "*ordre public* is what the Court of Cassation says is *ordre public*,"[136] and in all the countries concerned this is approximately the case: What is against *ordre public* must be determined for each and every case, as it is the result of the rule, not the rule itself, which is the object of evaluation. Thus the Supreme Court has the final word in each country regarding determining the boundaries. It normally takes a lot for something to be considered against *ordre public*, as it would create substantial practical and political trouble if this exception were applied too often.[137] In England the state policy elements in the concept of public policy are less emphasised than before, and the term public policy is now close to the concept of *ordre public* used in continental law.[138] As we saw in part I chapter 6.4, the relationship between *ordre public* and human rights obligations, including the CEDAW, is unclear. The issue raises numerous questions, which so far seem to have received little attention, to some degree with the exception of France.[139]

What I have just described is what is sometimes called "negative *ordre public*", to separate it from "positive *ordre public*", which is now more often called international mandatory rules. This is when a domestic rule or regulation is considered mandatory even when the

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[134] The English term is in this context broadly equivalent to the term *ordre public*.

[135] The highest court level in civil matters in France.

[136] Interview with Maître Courjon of the SCP de Chaisemartin et Courjon January 16 2008.

[137] For a detailed study of *ordre public* in Swedish courts, see Fallah (2002). For more about *ordre public* in other countries see e.g. Gaarder (2000) p. 99 ff or Thue (2002) p. 176 ff about Norway, Mayer (1994) p. 139 ff about France, Stone (1995) p. 335 ff about England.

[138] Thue (2002) p. 181.

[139] See part I chapter 6.4

choice of law rules designate the application of a foreign rule which is different.[140] When I use the term *ordre public* I refer to the "negative *ordre public*" described above.

3.5 Marriage contracts and legal effects of marriage in private international law

In most European legal systems, except Switzerland and the UK, each spouse's national law regulates the validity[141] of a marriage.[142] In the UK the general rule is that the validity of a marriage is governed by *lex loci celebrationis* – the law of the country where the marriage was celebrated.[143] As to the legal effects of a valid marriage, this is another matter altogether. These are in all the European countries studied in this thesis except the UK, separated into two categories: financial and personal effects of marriage. The contents of each category varies somewhat, but in French, Swedish and Norwegian law the right and duty of maintenance is considered a personal effect of marriage,[144] although in French law this right is governed by a different conflicts rule than other personal effects.[145] The personal rights and duties arising from a marriage barely exist in Western European law today, but there are some exceptions: In France a couple has a duty to help and support each other. [146] This is different from Muslim laws, where there is a whole range of personal rights and duties that are different for wife and husband. For example, the wife in most Muslim countries still has a certain duty to obey her husband.[147]

The personal and financial effects of marriage are often governed by different conflict rules: In French private international law, personal effects of the marriage and questions about marital status and similar issues are all governed by the Civil Code art. 3 s3, while

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[140] Thue (2002) p. 199 ff.

[141] French "*validité matérielle*".

[142] Aldeeb Abu-Sahlieh (1999) p. 50.

[143] Stone (1995) p. 43.

[144] Thue (2002) p. 382 ff, Mayer (1994) p. 372.

[145] The question of maintenance is in French law governed by the Hague convention of October 2 1073, to the difference of other personal effects of marriage. Mayer (1994) p. 372.

[146] Code Civil art. 212.

[147] See e.g. Nasir (1990) p. 35 ff.

most financial effects, including matrimonial property regimes, are seen as obligations law.[148] In Scandinavian law both are seen as part of family law. The category it's sorted under has consequences for the choice of conflict of law rules. It's not given which category *mahr* belongs to, and this separation may influence how the term is interpreted. Matrimonial property regimes are an essential part of the financial effects of marriage in French law, and they have quite a number to choose from. The choice of property regime is a compulsory part of the civil marriage in France (which is compulsory in itself, no other marriage performed on French territory is considered valid). The French *contrat de marriage* is different from marriage contracts in other countries in that it often regulates the property relations between the spouses in detail, and is considered part of obligations law rather than family law. In other jurisdictions matrimonial property regimes are not seen as a separate category in terms of law, i.e. in British and in Muslim laws.[149] In France the couples have to fill out a form as to which matrimonial property regime they choose if they marry in France, or sign a *contrat de mariage* that determines the matrimonial property relations. In private international law, if the couple has not signed a *contrat de mariage*, the court has to search for the parties' intentions. Only if sufficient indications of an implicit choice of matrimonial property regime cannot be found, the Hague Convention of 1978 assigns the first joint domicile as the connecting factor.[150]

In British law the term "matrimonial property" is only used in matters concerning private international law, but under the category of property law. In England matrimonial property regimes are qualified as property law, and if no written agreement is made, the law governing the matter is that of the husband's domicile at the time of marriage;[151] real estate is governed by *lex situs* – the law of the place where the real estate is situated.[152]

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[148] Or rather, as governed by the freedom of contract, *la loi d'autonomi*e. Mayer (1994) p. 503 ff.

[149] Thue (2002) pp. 382-383, Stone (1995) p. 381 ff.

[150] Mayer (1994) pp. 503 ff. See also Najm (2006) and Annoussamy (1998).

[151] Stone (1995) pp. 381-382.

[152] Stone (1995) p. 352.

In Norway and Sweden the personal effects of marriage are as a general rule governed by *lex domicilii* – the law of the country of domicile. However, according to Thue, a foreign rule setting forth the duty of a wife to be obedient, or any rule which in personal matters treat husband and wife unequally, would be considered against Norwegian *ordre public*.[153] Some scholars maintain that in cases where a claim for maintenance is raised against a person living in Norway, the law of the court where the lawsuit is made, *lex fori*, should be used.[154] In most cases this means that the law of the wife's country is not applied, in favour of Norwegian law.[155] This is the opposite of the Swedish solution. Other scholars maintain that if a divorce case is adjudicated by a Norwegian court, the financial settlement should *probably* be governed by Norwegian law.[156] In Sweden the main rule, if no written agreement is made, is that the law of the country where the couple took up residence after marriage is applied.[157]

4 The European legal systems

4.1 Introduction

The last part of the cultural context we need to examine before we move on to the judgments themselves, is the European legal systems in a broad perspective: a few basic procedural rules and styles of judgments.

4.2 Some relevant procedural rules in the various European countries

In both France and England, foreign law is considered a fact, and evidence on foreign law may be given by a person who is qualified to do so on account of their knowledge and

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[153] Ibid. p. 384.

[154] Gaarder (2000) pp. 206-207.

[155] Thue (2002) p. 387.

[156] Lødrup (2001) p. 155.

[157] Bogdan (2004) p. 200.

experience of the foreign law, often in the shape of a custom certificate. It is not a necessity that the person has acted or is entitled to act as a legal practitioner in the country in question.[158] In Norwegian law, foreign law is considered to be law, on mainly the same terms as Norwegian law, and the judge should apply foreign law *ex officio* if required.[159] The Common Law procedure is for the main part adversarial, i.e. the two parties are left to their own devices to prepare and present the case, unaided by the court, although nowadays it is undergoing some significant changes.[160] The other legal systems in this thesis, however, have a mainly inquisitorial procedure: the court has a certain responsibility for the enlightenment of the case and may also have a duty to apply legal rules *ex officio*, particularly in cases where there are certain limits to what the parties can agree upon. The difference between Common Law and the other legal systems is not as big as it may seem, though there are strong elements of an adversarial process in continental legal systems and vice versa.

4.3 Styles of judgments

These procedural rules, together with the rest of the legal system, necessarily influence the style of judgments, which again has an impact of what information it is possible for a foreign law student to gather from a judgment .The Court of Cassation, the highest French court, only adjudicate upon matters of law, and very rarely make final decisions: if a Court of Appeal decision is deemed incorrect, the case is sent back to that court, composed by other judges. This means that the Court of Cassation judgments are very brief, and focus on the grounds of appeal and whether they are upheld or not by the court; very little is said about the facts in each case. The English judgments, on the contrary, are influenced by the fact that the process is adversarial in that much space is given to the explanations and elaborations of the parties' witnesses and lawyers. Probably due, at least in part, to the role of precedence in Common Law, the courts write in detail both about facts and reasoning.

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[158] Concerning English law, see s4(1) in the Civil Evidence Act 1972; concerning French law, see Mayer (1994) p. 128.

[159] Sjåfjell-Hansen (2000) p. 13 ff.

[160] Darbyshire (2005) p. 329 ff.

The Norwegian and Swedish judgments are quite similar in style, with fairly thorough elaborations of both facts and reasoning, but not to the same extent as the English ones, and are more formal and less literary in style than those, which means that the personal opinions of the judge are less evident.

Part III. *MAHR* IN EUROPEAN COURTS

1 Introduction

In this section I shall present seven private international law cases from Norway, Sweden, Britain and France which all concern *mahr*. The process of interpreting and applying a foreign legal concept is complex, and should go through several steps: First the qualification and subsequent choice of laws, then, if the foreign law is *lex causae*, further interpretation and, if the result of the rule is not contrary to *ordre public*, application of the foreign law in relation to *mahr*. I shall follow this order in my analysis of the judgments of each country, and then compare the practices of the different countries in part IV.

2 Norway

2.1 Introduction

Norway does not have a long history of immigration, and I've only found two cases that seem to concern *mahr*, but from description only, as the terms *mahr* or *sadaq* are not used at all, and it is not claimed in either of the cases. Both cases are from *Lagmannsretten*, the Norwegian equivalent to a Court of Appeal. As we will see, both cases shed a light upon the Norwegian approach to Muslim laws and *mahr*, even if no direct claims for *mahr* are made. After presenting the two cases, I will look into how the courts have handled their encounter with Muslim laws, and whether and how they seek to obtain gender justice.

2.2 The judgments

2.2.1 RG 1983 page 1021 Mr. Q versus Mrs. K

The first judgment concerns the Muslim marriage contract; whether it implies a choice of laws regulating the matrimonial property, or a choice of matrimonial property regime.

Mr. Q and Mrs. K married in Pakistan in 1975, with the intention of settling in Norway afterwards. The first joint domicile was therefore in Norway. The parties separated in 1979, and the husband claimed that the couple by signing a Pakistani Muslim marriage contract with a clause of "dower", i.e. *mahr*, had agreed that Pakistani law should regulate the financial effects of the marriage, alternatively that the marriage contract was an equivalent to a marriage settlement[161] stipulating separate estates as the matrimonial property regime plus the payment of dower. The wife responded that Norwegian law was applicable on the settlement, since Norway was their first joint domicile, and that the signed marriage contract only implied the parties' consent to marry and the obligation of dower. She seems not to have claimed *mahr*, as this probably would have meant that she accepted that the matrimonial property regime was that of separate estates. The court held that since the first and only joint domicile was in Norway, and the matrimonial property in its entirety had been acquired during their residence in Norway, Norwegian law was applicable and the matrimonial settlement court[162] was thus competent. The Pakistani marriage contract was not considered a sufficient basis for stating that the couple had chosen Pakistani law to regulate their marriage or matrimonial property regime.

2.2.2 LE-1986-447 Mrs. A versus Mr. B

Mrs. A and Mr. B married in Pakistan in 1960, and had a daughter who was born in 1962. Mr. B lived in Oslo from 1975. Since 1985 he had been living on social security benefits. In 1983 he married F, who joined him in Norway in 1987. She had no income at the time of the judgment. Mrs. A was assumedly living in the house the couple lived in together in Karachi. Since 1986 she had accumulated a large debt towards her brother, who had maintained her and their daughter D from then on. Mrs. A claimed that there had been no rupture of the relationship; that she had not consented to the second marriage, which therefore should be pronounced invalid. She claimed that her husband had not paid her dower, but not that he should pay it. Her lawyer only claimed maintenance, with reference

[161] No. *ektepakt.*

[162] *Skifteretten*.

to the Marriage Act section 56(2),[163] which concerns the duty of maintenance, and the Norwegian Spouses' Act[164] section 3, which sets forth the enforceability of this duty. The dower is mentioned only as part of the woman's supposed financial resources. The result, "under doubt", as the court states, was that the wife got no maintenance, but this was in part due to the husband's economic situation.

2.3 Norwegian courts and Muslim laws

Both cases concern financial settlements after divorce, concerning which the Norwegian law professor Jo Hov maintains that the parties are free to make agreements during the case, and that the court cannot deviate from the claims of the parties, nor can it base its decision upon other facts than those the parties prove to the court.[165] Other scholars maintain that the parties in such cases are not free to agree on whatever they like, and that the court has a responsibility both for ensuring that the necessary facts are provided, and to apply relevant statutes *ex officio*. However, the law says explicitly that the court has a duty to at least *advise* the parties so that the dispute gets as correct a solution as possible, including ensuring that the legal claims are clarified, and it may ask the parties to provide evidence.[166]

RG 1983 page 1021 concerns matrimonial property regimes and choice of laws; LE-1986-447 concerns maintenance. In Norwegian private international law, the former is seen as a financial effect of marriage, the latter as a personal effect. As mentioned in part II chapter 3.5, the main rule concerning matrimonial property regimes in Norwegian law is that they are regulated by the law of the first joint domicile.[167] The rule implies that if the couple had their first common domicile in a Muslim country, this country's laws regulates the

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[163] Lov om indgaaelse og opløsning av egteskap av 31.mai 1918 nr. 02 (Ekteskapsloven av 1918).

[164] Lov om ektefellers formuesforhold av 20. mai 1927 nr. 01 (Ektefelleloven).

[165] Tvisteloven § 11-4, cfr. Hov (2007) p. 268 ff.

[166] Tvisteloven § 11-5.

[167] Thue (2002) p. 398. This raises further questions, e.g. concerning when this is obtained, which remain unanswered. These are, however, less relevant for our purposes.

matrimonial property regime and the matrimonial property in its entirety.[168] It is not clear what the matrimonial property regime should include in Norwegian private international law, but Thue maintains that *mahr* should be qualified as part of it.[169] There is some confusion as to the choice of laws concerning maintenance. According to Thue, the rule changes depending on whether the claim is made in the same case as a claim for divorce or not, although the matter is not entirely settled yet.[170] LE-1986-447 concerns both dissolution of marriage and maintenance, thus the matter should probably be solved in accordance with the law of the court, thus Norwegian law.

In the first case, the relevant facts seem to be on the table and the court is reasonably thorough in its discussion of the Pakistani Muslim marriage contract (*nikah nama*) and the parties' intentions in signing it. It is fairly clear that the parties did not choose which laws to regulate their matrimonial property in signing this marriage contract. The court does not go into Pakistani law to investigate whether a *nikah nama* in this situation may be an equivalent to marriage settlement in Norwegian law, *ektepakt*, thus determining the matrimonial property regime; comparative legal method is not used. The facts and arguments provided by the parties and the Norwegian rules concerning burden of proof taken into consideration,[171] the court's interpretation of the marriage contract appears to be correct in that it does not see it as an expression of the parties' intention as to choice of laws or matrimonial property regime. This question will be further discussed in relation to the French cases, in which the same questions are raised.[172] The court chooses the interpretation that seems the most probable, in this case the wife's version. At the same time it recognises the legal uncertainty as to choice of law in such matters, thus not

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[168] Norwegian law follows the principle of unity of the matrimonial property; all property is regulated by the same laws. Thue (2002) p. 393.

[169] Thue (2002) pp. 395-396.

[170] Ibid. p. 386 ff.

[171] Hov (1999) p. 261 ff.

[172] See chapter 4.

demanding that the husband pay for expenses. It is uncertain whether this judgment implies that *mahr* is accepted as part of the Muslim Pakistani matrimonial property regime.

The second case is of a somewhat poorer legal quality than the first. There is no mention of private international law at all, and Pakistani law is only mentioned when the court states that it doesn't take into consideration whether Mr. B's marriage with his second wife, Mrs. F, was valid according to Pakistani law. Since Mrs. A had been domiciled in Pakistan the whole time, conflict of law questions should have been raised and addressed. The court ended up choosing Norwegian law, which as mentioned above is the correct choice of laws when maintenance is claimed in a case concerning divorce, but this seems to be by accident rather than by deliberate thought, and both lawyers and judges seem to have made little effort in interpreting the wife's claims and to obtain the relevant facts. Since *mahr* is not claimed, no investigation is made into its functions in Pakistani law. As to Pakistani law, the courts don't even get the relevant statutes, nor do they interview any legal practitioners from Pakistan. Comparative legal method was therefore not used at all.

2.4 Muslim laws and gender justice in Norwegian courts

In neither of the judgments comparative legal method was used, nor did the courts explicitly discuss gender justice. Norwegian law was correctly chosen as *lex causae*, but only in the first judgment as a result of deliberate thought. In the second judgment little effort seems to have been made to understand both the wife's claims and her situation. The court states that it cannot see that he has paid the promised dower, but doesn't go any further into this issue. The court even states that it has reached its decision under doubt, with reference to the difficulties a divorced woman in Karachi has to get an income. This may indicate that the court sees the problem of obtaining some kind of gender justice in this situation, but it does not really make any effort to clarify the issues at stake. The facts as they appear in the judgment are so scarce and unclear that it might have been advisable to postpone the proceedings until the parties had provided further evidence. There is no indication of how the court considers matters relating to gender justice.

In RG 1983 page 1021 the wife claimed, if none of her other claims won through, that the application of Pakistani law would be against Norwegian *ordre public*. The court did not address this issue, as it held that the Pakistani marriage contract did not imply a choice of Pakistani law to regulate the matrimonial property relations. In LE-1986-447 *ordre public* was not an issue.

In a study from 2000, Beate Sjåfjell-Hansen found that among judges, little is known about how to deal with foreign law, and that many, intentionally or unintentionally, try to avoid using it. At the same time there is consensus among the scholars that foreign law should be used *ex officio*.[173] This judgment is a good illustration of her point: The court has done little both with respect to getting sufficient facts on the table and with regard to examining the private international law issues that arose. In addition to the lack of understanding of foreign concepts, legal rules and ways of communicating, one is left with the impression of a job badly done by all the professionals involved, which led to the result that the wife did not get anything of what she petitioned for. There is no doubt that such a practice runs a great risk of leading to arbitrary results for immigrant women who are often the weakest party in marriage conflicts. It is a known and accepted fact that the courts "jump over the fence where it's lowest"; this time the court has rather cut a hole in it to get through.

3 Sweden

3.1 Introduction

The main rules concerning choice of laws are most often the same in Sweden as in Norway, and what makes the Swedish cases even more interesting for this study is that Muslim laws are applied. To my knowledge only two Swedish cases concerning *mahr* have been published, from two different courts of appeal. The most recent counting was done by the

[173] Sjåfjell-Hansen (2000) p. 3.

Swedish Ph.D. student Mosa Sayed in 2008,[174] who in addition mentions four unpublished municipal court cases, which I have not been able to obtain. Bogdan describes one of these in a 2007 article: T 10 083-04 (Svea tingrätt 20 december 2005). In this case Swedish law was applied. The claim for *mahr* to be paid was rejected, but on the basis of the lack of authority of the husband's representative who had signed the marriage contract on his behalf.[175] No claim for *mahr* has yet been processed by the Swedish Supreme Court.[176] As to literature on the Swedish judgments, to my knowledge only two scholars have written anything about these judgments so far: The "grand old man" of Swedish private international law and comparative law, Michael Bogdan, and Mosa Sayed. Both focus on the qualification of *mahr*. In the following section I will present the two court of appeal cases, and say a little about the relevant choice of law rules before we move on to the analysis of the process of interpretation of *mahr* and the gender justice norms in the judgments.

3.2 The judgments

3.2.1 F.S. versus N.S: T137-92[177] and RH 1993:116[178]

Mr. F.S and Mrs. N.S. were both Palestinian citizens of Israel. They got married in Israel, and lived together there for a few months before Mr. F.S. returned to Sweden, his country of residence. Not long after his return, in March 1988,[179] Mrs. N.S. arrived in Sweden to join her husband. They lived together for about five months in Sweden before the marriage irretrievably broke down and she went back to her hometown in Israel. Mr. F.S. petitioned

[174] Sayed (2008).

[175] Bogdan (2007) p. 180.

[176] August 2008.

[177] Malmö tingsrätt 1992-02-10. I have not been able to obtain a copy of the entire municipal court judgment, so my analysis is based upon the parts that are quoted in the court of appeal judgment.

[178] Hovrätten över Skåne och Blekinge.

[179] The remaining facts indicate that there must be a typing error, the judgment says 1989.

for divorce in October 1988. Mrs. N.S. countered this by demanding that he pay *mahr*[180] amounting to NIS 11,250[181] plus maintenance during the divorce proceedings and for three months after the completion of the proceedings were completed.[182] She further claimed the dispute should be solved according to the Ottoman Family Code from 1917, which is used for Muslims in Israel. Mr. F.S. claimed it should be solved according to Swedish law, and that *mahr* is a concept alien to Swedish law and that it in any case is in conflict with the Swedish *ordre public*. The municipal court[183] gave the wife the right to *mahr*, in accordance with Israeli Muslim family law, and saw this as not contrary to Swedish *ordre public*, but rather as a kind of maintenance after divorce, and did not grant her maintenance during the *ʿidda*.[184] The court of appeal upheld the judgment on all major points.

It is noteworthy that the claim for *mahr* in Sweden (11,250 NIS) was lower than the one stipulated in the marriage contract (15,000 NIS). This is probably connected to the adjudication of the Muslim Israeli court, which ruled that the wife was only entitled to 75% of the dower, since what had happened was 25% her fault. According to the Swedish *travaux préparatoires*[185] percentage-distribution of fault should be considered against Swedish *ordre public*. The question remains open as to how the court should have ruled if

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[180] *Mahr* is in this judgment called *mohar*, which is the Hebrew term for *mahr*. O. Spies on *mahr* in Encyclopaedia of Islam online, read 17.06.2008.

[181] In 1993 equivalent to approximately 4,200 USD or 22,500 FRF. https://www.highbeam.com/reg/reg1.aspx?origurl=http%3a%2f%2fwww.highbeam%2fdoc%2f1G1-14676058.html&refid=lsfa_gorp&docid=1G1%3a14676058 read 30.06.2008.

[182] The *ʿidda*, three menstrual cycles after divorce.

[183] Malmö tingsrätt 1992-02-10.

[184] After the husband petitioned for divorce in Sweden, and before the proceedings were completed, the wife had petitioned for and obtained a Muslim Israeli divorce. This raises questions concerning the recognition of foreign judgments, but that is beyond the scope of this thesis. For a discussion of this topic see Bogdan (1993) pp. 597-598.

[185] Prop. 1973:158 pp. 105-106.

the wife had claimed the entire sum, and the husband had claimed a reduction based on the Muslim Israeli judgment.[186]

3.2.2 M.T.M. versus M.A: T952-99[187] and RH 2005:66[188]

Mr. M.A. had never been back to Iran after coming to Sweden in 1986, but had kept his Iranian citizenship in addition to his Swedish citizenship. He married his cousin, Mrs. M.T.M, in July 1998 by giving her mother authority to negotiate and sign the marriage contract on his behalf. The couple spent ten days together in Cyprus in August 1998, and then went back to their respective countries. Mrs. M.T.M. was granted leave to go to Sweden from Swedish and Iranian authorities in December 1999. According to the husband, he started investigations since she postponed the departure without giving any reasons, and found that she had a relationship with another man. She went to Sweden January 17 1999, and stayed with Mr. M.A.'s sister. He there announced that he wanted to divorce her, but she was the one who went to court to claim divorce with payment of *mahr*. At the time of the court of appeal's judgment, she was still living in Sweden, illegally since her residence permit expired June 3 1999. He claimed not to be bound by the *mahr* clause in the marriage contract, or that he had already paid the equivalent in the form of *shir baha*.[189] He wanted the court to use Swedish law in solving the case; she wanted the court to use Iranian law. The dispute is whether the husband is under obligation to pay a *mahr* amounting to 500 Bahar Azadi gold coins, the equivalent of which is SEK 250,000.[190] The

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[186] Bogdan (1993) p. 600.

[187] Halmstads tingsrätt 2002-10-24.

[188] Hovrätten för Västra Sverige 2004-11-22.

[189] Iranian custom where the groom gives the bride's mother money to buy furniture etc. for the couple's new residence. See Mir-Hosseini (2000) p. 74.

[190] The couple never really lived together, and the judgment does not clearly state whether the marriage was consummated, although this is likely since they spent time together in Cyprus after the marriage. The question concerning the payment of *mahr* in marriages that have not been consummated remains, as far as I know, open in a Scandinavian context. The French judgment from the Cour d'appel de Douai, ch.7, 8th January 1976 seems to open up of a total refund, but this may depend on the situation. In Muslim laws the wife is normally entitled to half the dower in such cases.

court sees Mr. M.A. as bound by the actions of his chosen representative, and that he has not proven that he has already paid, and is thus seen as obliged to pay the full sum of SEK 250,000 to Mrs. M.T.M.

3.3 The choice of law rules

Swedish private international law distinguishes between two kinds of legal effects of the marriage. The *personal effects* are, for example, maintenance duties towards each other during and after the marriage; the *financial effects* include, for example, the matrimonial property regime.[191] According to the municipal court's interpretation in RH 2005:66, Swedish law gives two options for the qualification of a foreign rule stipulating the payment of a lump sum from one spouse to the other: Either it's a kind of maintenance, or it is a kind of redistribution of property to even out the differences in the economic situation of the spouses.[192] This means that *mahr* may be seen either as a personal effect of the marriage, or a financial one. One consequence of this interpretation of the law is that the courts' options concerning how to interpret *mahr* are very limited and may exclude a qualification as a gift or a contractual obligation.

It is not entirely clear which choice of law rules should regulate maintenance, which is a personal effect of marriage. The only source that the courts in RH 1993:116 found on the subject was a Supreme Court judgment, NJA 1986 p.615. This judgment concerned an Italian couple, where the husband had moved to Sweden after only a year's cohabitation in Italy. The couple was, according to Swedish law, divorced long ago, but was still married in Italy, where divorce became legal only in 1975. The woman was in serious economic difficulties, and petitioned for a raise in the amount of maintenance paid to her since the divorce. The application of Swedish law would have left her with nothing. The Supreme Court seems to base its result on two main arguments: 1) That the nationality principle is no longer the main rule in the choice of laws concerning the personal effects of the marriage; during the years it has been replaced by the domicile principle, which indicates

[191] Bogdan (2004) p. 198. The classification in Norwegian law is similar, see e.g. Thue (2002) p. 382.

[192] LIMF and its preparatory works: Prop. 1989/90:87 p. 35.

that since the couple has different domicile as well as nationalities, that the law of their first common domicile should be applied, i.e. Italian law;[193] 2) That this rule in maintenance cases most often will lead to the *lex domicilii* of the woman being applied, which makes it easier for the court to take the "valuations, living conditions and the social benefits in that country"[194] into consideration. In RH 1993:116 the facts were different from the Italian case, and this rule would have lead to the application of Swedish law on the claim for *mahr*. The court explicitly sees the application of Muslim law as a condition for the claim for *mahr* to have any chance of winning through.[195] The municipal court appears to take the second argument in the Supreme Court judgment as a starting point, thus ending up with a new rule: The *lex domicilii* of the person claiming maintenance should be applied in cases concerning maintenance. In our case, *mahr* is interpreted as a kind of maintenance, and is thus governed by the *lex domicilii* of the woman claiming it, i.e. Israeli Muslim law. Unfortunately, the case never went to the Supreme Court, so it remains uncertain whether this has become a general rule. Bogdan applauds the result in RH 1993:116 and upholds the *lex domicilii* of the one claiming maintenance as the best rule.[196]

In the 2005 judgment, *mahr* was qualified as a financial effect of the marriage: a redistribution of property to even out the differences in the financial situation of the spouses. In Swedish private international law, fiancés or spouses have the right to make written agreements concerning the choice of law in matters concerning the financial effects of marriage, provided they choose a law which is *lex domicilii* or *lex patriae* of at least one of the parties at the time of making the agreement.[197] Written agreements concerning the financial aspects of marriage are valid as long as the agreement is made in accordance with the law regulating the financial aspects of marriage at the time it was made. This includes

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[193] The nationality principle is still considered as regulating the financial effects of the marriage.

[194] RH 1993:116 p. 5.

[195] "För att det skall komma i fråga att pröva yrkandet om utfående av morgongåva materiallt krävs emellertid därtill att den muslimska rätten ugör *lex causae*." P. 4 in the judgment.

[196] Bogdan (1993) p. 599.

[197] Lag (1990:272) om internationella frågor rörande makars och sambors förmögenhetsförhållanden § 3.

both the formal and the material aspects of the agreement. Gifts between spouses domiciled in Sweden at the time of action must be registered to be valid.[198] If there is no valid written agreement on the choice of laws regarding matrimonial property regime, the matter should be solved in accordance with the law of the country where the couple had their first common domicile.[199] In RH 2005:66 the couple had not made any written agreements on the choice of laws, nor had they obtained a common domicile. The Swedish act regulating the financial effects of international marriages, LIMF, does not give any solution to such a situation, but its *travaux préparatoires*[200] state that in such cases the law of the country to which the case has the strongest connections should be applied. Since both spouses had Iranian citizenship and had close relatives in Iran, the municipal court considered Iranian law to be *lex causae*. To this the court of appeal adds, with reference to the preparatory works,[201] that the judiciary should only exceptionally annul any agreements concerning the matrimonial property regime which the spouses had reason to believe valid. It is noteworthy that this is mentioned in relation to the choice of laws question, although it might formally be considered irrelevant here, and perhaps more related to the question of public policy. This may indicate that the Swedish legislator and the court itself are aware of the temptation to use the *lex fori* when, strictly speaking, the foreign law should be applied; in any case the result seems to be that Swedish courts are very conscientious when they qualify and choose the *lex causae*.

3.4 The qualification and further interpretation of *mahr* in Swedish private international law

3.4.1 The method of approach in the qualification of *mahr*

As mentioned, *mahr* is qualified in different ways in these two judgments. In RH 1993:116 the court of appeal does not expressly raise the issue of qualification; it upholds the municipal court's qualification of *mahr.* The municipal court states that "the morning gift

[198] Bogdan (2004) p. 201.

[199] "hemvist".

[200] Prop. 1989/90:87 pp. 43-44.

[201] Ibid. p. 46.

[*mahr*], the amount of which is most often written into the marriage contract, *functions as insurance for the woman for the continuation of the marriage,* since the man immediately upon an eventual divorce has to fulfil his obligation [of paying *mahr*]. In case of divorce the morning gift [*mahr*] instead *functions as the wife's maintenance and her financial protection*, since (…) no maintenance can be paid".[202] This might indicate that the court has used a comparative approach, investigating the functions of *mahr*. However, the court of appeal's statement that "the morning gift in Muslim law is, at least in practice, seen as one of the personal effects [as opposed to financial effects][203] of the marriage," interpreted literally, may give the idea that the court has investigated how *mahr* is categorized in Muslim Israeli law, thus indicating a qualification *lex causae*, i.e. Iranian law. However, there is no mention of such an investigation in the judgment, only the statement that *mahr* in cases of divorce functions as "maintenance and financial protection/insurance for the wife, since she can't claim any sort of maintenance."[204] In Bogdan's opinion, *mahr* is in reality qualified *lex fori*, "since it was in accordance with *Swedish* legal concepts that *mahr* was seen as closely related to a spouse's duty of maintenance".[205] I still think it noteworthy that the court's approach has strong elements of the comparative legal method, with its emphasis on how the concept of *mahr* actually functions, even though the court here, on the basis of Johnson (1975), erroniously sees *mahr* as maintenance. The result is that it sees *mahr* as one of the personal effects of the marriage, and therefore chooses to apply the conflicts rule concerning maintenance.

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[202] "Morgongåvan, vars storlek oftast fastställs i äktenskapskontraktet, *fungerar för kvinnan som säkerhet för äktenskapets bestånd*, eftersom mannen vid äktenskapsskillnad omedelbart måste uppfylla sin betalningsförpliktelse. Vid en eventuell äktenskapsskillnad kommer morgongåvan istället att *fungera som hustruns underhåll och hennes finansiella skydd*, eftersom något underhållsbidrag (…) inte kan utdömas." The municipal court, quoted on p. 3 in RH 1993:116. My italics and brackets.

[203] "… morgongåva enligt muslimsk rätt, åtminstone i praktiken, ses som en av de personliga rättsverkningarna [as opposed to financial effects] på grund av äktenskapet…" Page 4 in RH 1993:116, my brackets.

[204] Page 3 in the judgment, see note 200.

[205] Bogdan (2007) p. 182.

More than ten years later, but with no significant changes in the statutes relevant for this matter, the court of appeal in RH 2005:66 qualifies *mahr* as a redistribution of property to even out the differences in the economic situation of the spouses, i.e. a financial effect of marriage. The 1993 judgment is referred to, so it must be a conscious choice, although there is no discussion of this in the 2005 judgment. Again the court of appeal upholds the judgment of the municipal court, and we find the most thorough investigation of Iranian law in the latter. This time the court has interviewed several witnesses about the contents of Iranian law, and how *mahr* and other concepts in Iranian law function. No Iranian lawyers were interviewed, however the person who performed the marriage was.[206] A translation of the marriage certificate is attached to the judgment, and through the Ministry of Foreign Affairs the court has obtained a German translation of the Iranian civil code, Bergmann/Ferid (1987), a later edition of the book used in the 1993 judgment.[207] *Mahr* is qualified in accordance with the Swedish act LIMF[208] and its *travaux préparatoires*, which as mentioned in chapter 3.3 gives two options as to the qualification of the payment of a lump sum between spouses: Maintenance, or redistribution of property to even out the differences in the economic situation of the spouses. As the municipal court stated in the 1993 judgment, it is not clear how *mahr* should be qualified. In both the 1993 case and the 2005 case the marriage was very short, and the marriage contract stipulated a dower paid upon demand, i.e. deferred *mahr*, but in the latter case the sum was much higher: The equivalent of 250,000 SEK. The *travaux préparatoires* state that "maintenance typically is censed to ensure the receiver's continued expensed by replacing or supplementing [his or her] income",[209] which cannot be said to be the case in the circumstances of Mr. M.A. and Mrs. M.T.M. The court thus opts for the other alternative: redistribution of property. This is clearly a qualification based on the *lex fori*, which doesn't really investigate the functions and rules concerning *mahr* in Iranian law. The result is a qualification that would have

[206] Mr. M.H.N.S. See the municipal court judgment pp. 9-10 and the court of appeal judgment pp. 2 and 4.

[207] The municipal court judgment p. 11.

[208] Lagen (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållanden.

[209] Prop. 1989/90:87 p. 35.

made more sense if the marriage contract had stipulated a prompt dower, but in any case remains somewhat alien to the concept of *mahr* in Iranian law.[210]

One of the reasons for the change in interpretation may be that the general knowledge about Islam and Muslim laws in Sweden has developed. The court does indeed seem more at ease with the issue. Another reason may be the differences in the foreign statutes. Because of the political situation, Israeli Muslims still use the Ottoman Family Code from 1917, while the Iranian code is not only 60 years younger, but it is in form, if not in content, inspired by the French Civil Code and is therefore very systematic and detailed. According to the NGO Women Living Under Muslim Laws (WLUML), Iranian *mahr* is mostly deferred, [211] but the Iranian Civil Code art. 1082 states that "Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like."[212] As a result of the interpretation of the Iranian code, *mahr* was qualified as a redistribution of property to even out the difference between the spouses, that should take place at the entering into a marriage, in accordance with LIMF,[213] and not as a form of maintenance, since the wife according to Iranian law can claim it immediately after the wedding. This is actually the general rule concerning *mahr*, as we saw in part II, although in practice *mahr* is rarely claimed before divorce.

3.4.2 Legal pluralism in practice: The further interpretation and application of the concept of *mahr*

How do the courts then proceed to further interpret the foreign law they have found should be applied? The courts in RH 1993:116 seem to struggle. The question is posed whether *mahr* can be adjudicated at all by a Swedish court. According to the court of appeal, there are different opinions as to the courts' right to adjudicate at all upon concepts that are

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[210] See e.g. Mir-Hosseini (2000) and WLUML (2003).

[211] WLUML, 2003 p. 180.

[212] http://www.alaviandassociates.com/documents/civilcode.pdf, read 18.06.2008.

[213] Lag (1990:272) om internationella frågor rörande makars och sambors förmögenhetsförhållanden.

totally foreign to Swedish law, but it concludes that the dominant point of view is that it can, provided it's not contrary to Swedish *ordre public*, citing Bogdan (1984) p. 82. It then states that *mahr* is not clearly in conflict with Swedish *ordre public*, but bases this upon Bo Johnson's book *Islamisk rätt* from 1975, where the term *mahr* is translated as *morgongåva,* "morning gift", a gift from the groom to the bride, traditionally given the morning after the wedding night; an old Swedish concept which has only a superficial likeness with *mahr*. In other words, a major source the court chose to use on foreign law was outdated and of poor quality, and was a direct cause of the wife not obtaining maintenance during the *ʿidda*, which she according to Muslim Israeli law had a right to. This judgment is from the early '90s, and a great number of better sources were available, however the courts chose to use Johnson together with an even older source, Bergmann/Ferid: Internationales Ehe- und Kindschaftsrecht: "Das Islamische Eherecht" from 1972, of which I have not been able to obtain a copy. There is too little information to evaluate the quality of this source, but it does not seem to have improved the courts' understanding of the concept of *mahr* and Muslim maintenance law. It is impossible to determine to what extent the courts' views are shaped by the translation into "morning gift," but the fact that this is the basis for the court's statement that it is not against Swedish *ordre public* indicates that it is not insignificant. The consequence, both of the translation and of the remainder of what Johnson and Bergmann/Ferid say about *mahr*, seems to be that the court misses some vital aspects of it. E.g. both prompt and deferred *mahr* have to be paid in each case, according to Johnson, and he sees deferred dower as maintenance after divorce, since the wife cannot claim any other sort of maintenance.[214] Thus not only in terms of qualification, but also in the remainder of the interpretation of the concept of *mahr*, it is reduced to a kind of maintenance, but with a hint of the (morning) gift aspect.[215] This result is mainly due to the weaknesses in the courts' methods of interpreting foreign law: Old, secondary sources are

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[214] Johnson (1975) pp. 49-51.

[215] Also noteworthy is that both courts see Shariʿa as unchangeable, and refer to Michael Nordberg's work on the development of *the* Muslim law. This shows that the courts, although provided with a copy of the Ottoman Family Law of 1917, are unaware of the variations in Islamic and Muslim laws, not to say the development these have undergone and are still undergoing.

the only supplement to the foreign act, and the courts clearly take Swedish concepts as a starting point and attempt to see where *mahr* fits into these. Comparative legal method can therefore not be said to have been applied.[216]

The situation for the court when it comes to interpreting foreign law is perhaps a little easier in 2005: the court has some fairly recent and very clearly formulated statutes from Iran to deal with, compared to the old Ottoman Family Code that was applied in the 1993 case. Also, the court goes straight to the Iranian act, although it still uses a copy of Bergmann/Ferid: Internationales Ehe- und Kindschaftsrecht: "Das Islamische Eherecht", this one from 1987. It is noteworthy that the courts still use such old secondary sources on Muslim laws, although there is indeed an improvement in the approach. In RH 2005:66 the municipal court supplies the written sources with an interview with, among others, the Iranian mullah who married the couple, an approach which lessens the risk of making mistakes such as the courts did in 1993 concerning the maintenance question. A certain degree of comparative legal method can thus be said to have been applied. On the other hand, the fact that the courts call the mullah a "priest" seems to indicate that they still go too far in translating foreign terms with "not-really-equivalents" from their own culture.[217]

The interpretation of *mahr* is clearly based on the qualification as a redistribution of property to even out the differences between the spouses at the time of marrying, but it does take up certain contractual elements: The husband is seen as having entered into the marriage and thereby also into the agreement on *mahr* through a valid authority, and is thus seen as bound by an obligation to pay *mahr,* which is very similar to a contractual obligation. The basis for this is an interpretation of Iranian law. Although, any function of *mahr* beyond evening out the differences in the economic situation is not mentioned, in practice the contractual aspects of *mahr* are to a large extent taken up by the Swedish court.

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[216] See also part I chapter 7.

[217] "Exercising the basic prerogatives in matters of education , ritual functions (prayers, marriages, funerals, etc.) and judicial functions, the *mollā*s constitute the basis of what has been called, erroneously in the view of some, a veritable clergy." Encyclopaedia of Islam online on *mollā*, read 27.08.2008.

This is probably due to the fact that such an evening out of the property relations must be based on a valid agreement. If the couple has reason to believe that the agreement is valid, the court should be very careful to reject it. When the agreement is made in accordance with *lex loci contractus*, Iranian law, the couple has such a reason. The qualification as a redistribution of property is also more in line with the original purpose of *mahr*, see part II chapter 2.

To what extent do the courts apply comparative legal method? In these two cases, the courts have not done much research into the various *functions* of *mahr* in Israeli and Iranian law. Major works on the subject, available at the time of the judgments, were not consulted.[218] The result is that only one function of *mahr* is picked up in each case, and although the 2005 judgment in practice picks up some of the contractual aspects of *mahr*, as mentioned above, this is not due to the courts' use of comparative legal method. The courts seem to have looked briefly into the function of *mahr* in the specific case, but not to any great extent, and only with "Swedish eyes". And they are hardly to be blamed, given the existing instructions from the legislator on the method of qualification: "No matter how [the payment of a lump sum] from one spouse to another is labelled, the assessment in each and every case of whether it is within the frame of what constitutes the matrimonial property relations, should be based *on the purpose of the payment* and *the circumstances under which the payment is made*."[219] I understand Kötz and Zweigert as seeing the function of a legal rule or concept as how it actually works, rather than how the rule is intended to function, or how the parties' acts are intended. This means that the approach prescribed by Swedish law is not quite up to the standards set by international comparative legal method; its emphasis is more on subjective and circumstantial aspects, while comparative legal method puts more emphasis on the function as seen more objectively, although both approaches include taking the circumstances in each case into consideration.

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[218] In 1993, Schacht (1982) was, and still is today, a chef d'oeuvre on Muslim laws in general, and in 2005 Mir-Hosseini (2000) could have provided substantial information on Iranian law.

[219] Prop. 1989/90:87, p. 35. See note 192.

In summation, the courts in 1993 clearly struggled both with the interpretation and the application of Muslim law, while in the 2005 case I cannot detect any direct misinterpretations of Iranian law, although the qualification remains dubious. This may in part be due to the differences in the quality of the foreign legislations in question, but the Swedish courts now seem to have both a more judicious and more thorough approach to the interpretation of the foreign law.

3.5 *Mahr* and gender equality in Swedish courts

Did the courts take gender equality into consideration? If they did, which gender equality norm did they apply? Human rights are not explicitly an issue in either of these cases, the CEDAW is not mentioned at all, nor is gender justice. The most obvious way these issues could have been raised would have been in relation to *ordre public*, but this has not happened. In the 1993 case *mahr* is pronounced to be not clearly against Swedish *ordre public*, but on the basis of a misinterpretation of Israeli Muslim law.[220] The court does not, as prescribed in legal theory, consider whether the *result* of the rules concerning *mahr* is against Swedish *ordre public*; it only considers the concept itself. In the 2005 case the husband claimed that the wife's claim for *mahr* was against *ordre public*, but the court did not discuss this issue at all. What kind of justice does this gender neutral legal discourse deliver? How do the courts in both cases consider the gendered social, cultural and economic reality of the parties? Do they apply a mechanic concept of equality or take difference into account within an equal worth approach?

As we saw in chapter 3.3, the municipal court in RH 1993:116 created an entirely new rule based on considerations concerning gender justice, which was upheld by the court of appeal: that the *lex domicilii* of the person claiming maintenance should be applied in cases concerning maintenance. The *ratio decidendi* were among others that this would enable the court to better take into consideration the conditions in the country where the person, most often the woman, were domiciled,[221] and that in the situation at hand, Swedish law was

[220] See ch.3.4.

[221] T137-92 as quoted in RH 1993:116, pp. 2-3.

quite unfamiliar for Mrs. N.S. The court held that the couple all in all had stronger ties to Israel than Sweden, and therefore chose to apply Israeli law. Lacking the municipal court judgment in its entirety, and with only brief references to it in the court of appeal judgment, it is difficult to say which gender justice norm that lies behind this reasoning. The court does not really seem to investigate into the social and cultural conditions in Israel, it just assumes that it is better for the woman to have the laws she's familiar with applied. Nor does it discuss the degree of gender justice in any of the two legal systems it has to choose between. The court thus appears somewhat mechanical in its effort to provide a degree of gender equality.

The result of the 1993 judgment is, at first glance, in the woman's favour: She obtains *mahr*. The alternative in Swedish law would probably be that she would come out with nothing: The main rule in both Swedish and Norwegian law is to divide the matrimonial property equally, but the marriage had been so short that the couple had not had the time to obtain a common property. The principle of unequal division, *skjevdeling,* applies, particularly in short marriages like this one: each spouse takes out of the matrimonial property what they can prove that they brought into it. In Sweden, after a year's marriage 20% of the joint (netto) property is to be divided equally, [222] and this marriage was shorter than that, especially if the basis for the calculation is the time the properties really were joined together. By letting her have *mahr*, she was at least left with a certain amount of money,[223] even though it is not an enormous sum. However, she did not get her maintenance, which she most likely would have had a right to in Israel. If the court had applied comparative law and investigated a bit further into the matter, this could have been avoided.

The reasoning in the 2005 case seems to be more formalistic also in its approach towards the gendered aspects of the case: The courts rather mechanically apply their interpretation of the marriage contract and Iranian law, and no mention is made of gender justice issues or

[222] Agell (2003) p. 378 and the Swedish Marriage Act, *Äktenskapsbalken,* ch. 6.

[223] NIS 11,250. See note 181.

even the parties' situation. The parties are strictly held to the Iranian marriage contract and no adjustments are made on base of equity.[224] The husband must be said to have been rather unwise in making his mother-in-law-to-be his proxy in negotiating the marriage contract, and the court holds him responsible for that decision. The result is indeed woman-friendly: She gets the entire *mahr* of SEK 250,000. *Mahr* is qualified as a redistribution of property to even out the differences in economic situation, and further seen as a kind of contractual obligation the husband has to fulfil. The husband's economic situation is not taken into account, even though this is indeed a large sum and the fact that the couple never really lived together. Had *mahr* only been seen as a way to even out property relations, the result might have been different, but the contractual aspects win through in the Swedish courts and create this very woman-friendly result. One might wonder what the result would have been if the roles had been reversed – if the result in this particular case is unfair towards anybody it is not the woman. There are lots of sub-currents in this case that only in part come to the surface. From the parties' allegations it seems that the husband has been a tool for the wife so she could come to Sweden, where she is obviously most determined to stay. However, he is still obliged to pay her the entire dower. He does have some responsibility for his misfortune, since he made his mother-in-law his proxy, but the equity of the result is debatable due to the large amount of money involved. The court never discussed the limits of the authority given to his mother-in-law. This case illustrates very well that the application of Muslim laws does not always leave the woman short; sometimes it is the man who has to pay.

[224] Since Iranian law was applied, the only way this could have happened is probably through the *ordre public* reservation. On a world wide basis the courts rarely have the same opportunity as Scandinavian courts to modify contracts.

4 France

4.1 Introduction

The French cases distinguish themselves from the cases from other countries in that they do not concern a woman claiming *mahr*. *Mahr* rather plays a part as an indicator of the parties' choice of matrimonial property regime. French couples when marrying choose freely between several different property regimes, but a written agreement is required, either in the form of a *contrat de mariage*, an individually negotiated contract which often regulates the matrimonial property relations in detail,[225] or through filling out the formula when performing the required civil marriage. The *régime legal*[226] is applied if no such agreements exist. In French private international law, there are several ways the spouses may be seen as having chosen a particular country's laws to regulate their matrimonial property relations. First of all, there is the *contrat de mariage* or what is interpreted as its equivalent. If no written expression of the parties' intentions exists, which is the situation in the vast majority of cases, the court has to investigate into the *presumed* intentions of the parties. The first joint domicile is now favoured by the tribunals as the major indicator, since it is fairly easy to apply, and has gradually replaced the localization of the couple's assets as indicator of their will.[227]

The literature on the adjudication of *mahr* thereby focuses on the choice of matrimonial property regimes as well. Only the Lebanese-French scholar and judge Marie-Claude Najm discusses the interpretation of the concept *mahr* thoroughly, although David Annoussamy, president of the *Société de législation comparée Pondichéry*,[228] also has some noteworthy remarks about *mahr*.

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[225] Bell (1998) p. 254.

[226] *Régime de la communauté réduite aux acquis*, the regime of community of the property obtained after marriage. Code Civil art. 1400 ff, Bell (1998) p. 255.

[227] See Mayer (1994) pp. 507-508 and the Hague convention on the law applicable to matrimonial property regimes of March 14, 1978.

[228] Pondichéry or Puducherry is a former French colony in India, of which Karikal is one of the provinces.

I have found two private international law cases which concern *mahr*, one of which has been twice in the Court of Cassation. After presenting the cases I will say a little about the qualification issues in these judgments. The gender justice aspects are so closely related to the choice of laws in the French judgments that I will treat those together before moving on to the further interpretation of *mahr* and the use of comparative legal method.

4.2 The judgments

4.2.1 Mrs.K. versus Mr.T. – "the Paris case" [229]

Mrs. K. and Mr. T. had lived together in Paris from 1969. Mrs.K. was a Polish citizen; Mr. T. was Lebanese of the Greek Catholic confession.[230] Mr. T. was already married to a Lebanese woman, whom he long ago had ceased to live with. According to Lebanese law, however, his personal status was governed by the Lebanese laws for his religious community,[231] which in this case meant that he could not get a divorce. The only way the couple could marry was if he converted to Islam, and they married in Lebanon according to Muslim rites. Then he could take a "second wife" without having to divorce the first one. So they did, and the marriage certificate stipulated a deferred dower of 3,000 Lebanese pounds.[232]

This case does not concern the wife claiming *mahr*, but rather the choice of property regime. *Mahr* is in the Court of Appeal and in the Court of Cassation seen as an indicator of the choice of the regime of separate estates, in French courts assumed to be the regime of all Muslim marriages. The Municipal Court pronounced a divorce following the French

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[229] Cour d'Appel de Paris, 2e ch., no.4, 14th June 1995 and Cour de Cassation, ch.civ.1, 2nd December 1997.

[230] Family law matters and similar issues are in Lebanon regulated by the law of the confession you (or your ancestors) belong to.

[231] This is still the case today, and no civil marriage exists.

[232] 917,71 USD in 1970.
http://perspective.usherbrooke.ca/bilan/servlet/BMTendanceStatPays?codeTheme=2&codeStat=PA.NUS.FCRF&codePays=LBN&compareMonde=2&definitionMinimum=5&codeTheme2=2&codeStat2=x&langue=fr, read 10.07.2008.

régime legal,[233] community of after-acquired property, where the wife was accorded the usufruct of an apartment and a monthly alimony of 6000 FF. In the Court of Appeal the husband claimed that the marriage should be considered as void as he was married to another woman at the time when he married Mrs. K, that the consequences of this should be regulated by French law, and that the property regime was the Muslim one of separate estates, as indicated by the clause on *mahr*, and that the liquidation of property should follow Lebanese law. The wife claimed a divorce based on the fault of the husband, that the division of property should follow French law, an allowance of 720,000 FF and the ownership of their marital home. The marriage was declared void on the basis of bigamy, using Polish law, Mrs. K. still retaining her Polish citizenship[234] at the time of marrying, but since both were in good faith, the economic consequences were still valid. Since Mrs. K. had signed the Muslim marriage contract, and the French *régime legal* can only be assumed if the couple did not agree on a different regime, the matrimonial regime of this marriage is considered by the court to be the Muslim regime of separate estates. This case was adjudicated by the Court of Appeal of Paris, and I will use the term "the Paris case" when I refer to it later on.

4.2.2 Mr. H. versus Mrs. R. – "the Lyon case" [235]

Mr. H. and Mrs. R., a Muslim couple of Indian origin, married in Karikal, a former French colony in India, in 1969. Shortly afterwards they took up residence in France, where they divorced in 1990. The issue at stake in this case as well was how the financial settlement should be done, focusing on the choice of matrimonial regime. As in the Paris case, the wife claimed a division of property following the French *régime legal*; the husband claimed that there was a valid agreement on the adoption of the regime of separate estates: the marriage contract from India which contained a clause concerning *mahr*. The first Court of

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[233] See note 224 and the Paris Court of Appeal judgment p. 8.

[234] French private international law has nationality as basis for determining a person's personal status law. See part II chapter 3.

[235] Cour d'Appel de Lyon, 1996-01-11, Cour de Cassation, ch.civ.1, 7th April 1998, Cour d'appel de Lyon, ch.civ.1, 2nd December 2002 and Cour de Cassation, ch.civ.1, 22nd November 2005.

Appeal judgment does not really address the question of *mahr*, only states that the division of property shall happen in accordance with the French *régime legal*. The Court of Cassation says that the Court of Appeal should have investigated whether the payment of *mahr* indicated that a Muslim marriage, *nikah*, had been contracted, as this would mean that the couple had chosen Muslim law to regulate their marriage. According to the Court of Cassation, the regime of separate estates is the only one accepted by Muslim law. When the Court of Appeal treats the matter again, *mahr* is then seen as the sales price of the woman, but this view as well is annulled by the Court of Cassation. All judgments except for the last two were in favour of the wife; the final result was an acceptance of *mahr* and the *nikah* as indicators of the choice of the Muslim property regime, the husband thus winning through with almost all of his claims. I have studied both of the Court of Cassation judgments, and the Court of Appeal judgment between the two. I have not been able to get a copy of that last judgment, nor the first Court of Appeal judgment, but the result was in accordance with the last Court of Cassation judgment: the couple was considered to have adopted the regime of separate estates.[236]

4.3 The qualification of *mahr*

As mentioned in part II chapter 3.2, qualification is in French doctrine based on *lex fori*. The main questions here are what the object of qualification is, and whether *mahr* is qualified at all. Najm maintains that both of these Court of Cassation judgments give an imprecise definition of *mahr* and thereby do not really address how the institution of *mahr* should be qualified in relation to the matrimonial property regime or give any thorough definition of the concept of *mahr*.[237] It is perhaps more precise to see the Muslim marriage contract as the object of qualification, and *mahr* only as an indicator of the existence of such a contract, thus indirectly applying the French concept of *contrat de mariage* also on the clause of *mahr*. However, the fact that *mahr* is seen as closely linked to the choice of matrimonial property regimes, and thus to the financial effects of marriage, may indicate

[236] Conversation with the husband's lawyer, Maître Courjon, January 16, 2008.

[237] Najm (2006) p. 1367 ff.

that it is seen as such and not as a personal effect of marriage – which would have been regulated by the law of personal status.

French law gives full autonomy to the spouses on the choice of matrimonial property regimes.[238] In private international law this autonomy mainly concerns which country's laws should regulate the matter. Any further choice of property regime is only relevant where the law in question gives several options in this matter, which is not the case with Muslim law. This means that the choice of laws regulating the matter at hand depends not on the interpretation of a French conflicts rule, and thereby on a qualification based on French legal concepts,[239] but on the interpretation of the parties' intentions. Since there is no claim in any of these cases for the payment of *mahr*, a precise qualification of it in French private international law has not yet been necessary. Since it's seen as part of the marriage contract determining the matrimonial property regime, *mahr* must necessarily be interpreted as a financial effect of marriage, and is thus likely to be treated under French conflicts laws on obligations. In addition, because individual marriage contracts which regulate in detail the property regulations between the spouses are well established in French law, I find it unlikely that a claim for *mahr* will not be enforceable in French courts if the court finds that the couple has chosen Muslim law to regulate the financial effects of their marriage, but until there is an actual adjudication, [240] the question apparently remains open.

4.4 The choice of laws and gender justice

In these French cases the choice of laws rests upon the interpretation of *mahr*, although, as we have seen, not in the way of qualification. So before we investigate the further interpretation of the concept of *mahr*, we need to examine the role *mahr* plays in the choice of laws.

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[238] See chapter 4.1.

[239] See part II chapter 3.2.

[240] With the reservation that municipal court judgments are not published.

The first judgment I have found concerning *mahr* in private international law, the Court of Appeal of Paris' judgment from 1995,[241] classifies *mahr* as an indicator of the choice of property regime. It simply states that "the existence of a dower excludes the choice of a [matrimonial] regime of community of property, and (…) in signing this marriage contract [Mr. T.] and [Mrs. K.] have expressed their wish to place themselves under the regime of separate estates, which is the only regime recognised by Muslim law, with a clause concerning dower, and also in accordance with the laws of Lebanon, according to which the matrimonial regime is that of separate estates, as well as the custom certificate[242] presented."[243] No reference is made to any sources or reasons behind such a conclusion. The Court of Cassation upheld this view by briefly stating that the couple had signed a marriage contract "which implied the adoption of the regime of separate estates with a dower clause."[244] The main rule in French private international law concerning the financial effects of the marriage, as stated earlier, provides that couples may either choose which country's laws should regulate their property relations, or they can design their own contract regulating the matter as they wish.[245] When the Court of Cassation states that the Court of Appeal "has justly deducted the existence of the expression of the parties' intentions as to the choice of their *matrimonial property regime,*"[246] this seems to indicate

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[241] Cour d'Appel de Paris, 2e ch., no.4, 14 juin 1995.

[242] "A document written in French, which derives either from the French consulate or embassy in the foreign country, or simply from a lawyer (foreign, or a Frenchman specialized in relations with that country)" which should "provide information on the [foreign] laws." (Mayer (1994) pp. 132-133)

[243] "… l'existence d'une dot est exclusif d'un régime de communauté et (…) en signant ce contrat de mariage [M. T.] et [Mme. K.] ont exprimé la volonté de se placer sous le régime de la séparation de biens seul reconnu par loi musulmane avec clause de dot, conformément d'ailleurs à la législation en vigueur au Liban selon laquelle le régime matrimonial est celui de la séparation de biens ainsi qu'en atteste le certificat de coutume délivré." My brackets.

[244] "un contrat emportant l'adoption de la séparation de biens avec clause de dot." Cour de Cassation, ch.civ.1, 2nd December 1997.

[245] See chapter 4.1 and part II chapter 3.5.

[246] Les juges de la Cour d'Appel "ont justement déduit l'existence d'une volonté expresse des époux quant à la détermination de leur régime matrimonial". Page 2 in Cour de Cassation, ch. civ. 1, 2nd Decmber 1997.

that the Court of Cassation sees the Muslim marriage contract with a clause of *mahr* to be a contract designating directly the matrimonial property regime and not the choice of which laws should regulate the property relations. Because *mahr* is a transfer of property from the husband to the wife, which may take place at the time of marriage, it may be seen as a redistribution of property between spouses which implies that the estates are separate. However, to see the Muslim marriage contract or the payment of *mahr* an *explicit* choice of property regime is to stretch the interpretation rather far; at best it is an indicator of which country's laws should regulate the matter, which must be taken into consideration together with other indicators of such. Both courts therefore seem to confuse the French concept of *contrat de mariage* and the Muslim marriage contract. That the couple could not marry any other way than by performing a Muslim marriage,[247] and that Mrs. K. most likely did not have any thorough knowledge of Muslim laws, including the matrimonial property regime, is not taken into consideration. The Court of Appeal seems to reason as follows: The marriage contract only stipulates the payment of *mahr*. The fact that *mahr* has been paid shows that the couple has contracted their marriage under Muslim laws, so if *mahr* is accepted as not being in conflict with the French *ordre public*, the clause of *mahr* indicates that the choice of property regime is the Muslim one of separate estates.[248] It therefore has to adjudicate on the nature of *mahr*. The wife is the one who claims that it is against French *ordre public*, and argues that French law should be applied, but is not heard by the Court of Cassation.

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[247] I do not know if it would have been possible for Mr. T. to obtain a French divorce and then remarry, but this is less relevant. It seems that as far as the couple knew, this was the only way they could marry.

[248] If *mahr* is an indicator of the intentions of the parties concerning the choice of laws regulating their matrimonial property, not just the Court of Cassation but also most or all French scholars take it for granted that the matrimonial property regime in Muslim law is separate estates, see e.g. Annoussamy (1998) p. 650. There is no notion of matrimonial property regimes in Muslim law, but in my opinion it seems too simple to state that this means that one should apply an equivalent of the French regime of separate estates. At least one cannot see it as such without accepting claims for *mahr*, which is closely linked to the matrimonial property regime. Any further investigation into this matter will, however, fall outside the scope for this thesis.

In the Lyon case, the marriage contract from India only stated that the husband had paid *mahr* and that the wife had received it. With no reference to the Paris case, the first Court of Appeal judgment[249] quite justly stated that the marriage contract presented was nothing more than an act stating the mutual consent of the spouses to marry, "and that this act doesn't constitute a *contrat de mariage* which permits the establishment of any [matrimonial] regime for the property of the spouses-to-be."[250] This is corrected by the Court of Cassation, perhaps on the basis of the Paris case, but with no reference to it. It says that the Court of Appeal should have investigated whether the *mahr* clause indicated a choice of property regime. In the Lyon case, in the second Court of Appeal judgment, the court tries to investigate the nature of *mahr*, using a *certificat de coutume*, a custom certificate: a written statement from lawyer practicing in Karikal in India. Perhaps due to a bad translation, this certificate states that *mahr* is "the sales price that a woman claims for herself when marrying,"[251] The court thereupon states that this marriage was like a sale, and that the husband had bought his wife, so *mahr* is "obviously against French *ordre public*, which doesn't tolerate the sale of human beings."[252] This is overruled by the Court of Cassation in the 2005 judgment, which simply states that "the act called *mahr* is a convention establishing the spouses' consent to marry to which the payment of a dower is added, and which is not contrary to French *ordre public*." [253] This interpretation is annulled in the second Court of Cassation judgment[254] on the basis that the evidence on the foreign laws has been misinterpreted. The court pronounces "the act of *mahr*" to be "a covenant

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[249] Cour d'Appel de Lyon, 11th January 1996.

[250] «… le "contrat de mariage" produit … n'est autre que l'acte de mariage constatant l'accord de volonté des époux d'être mari et femme, "et que cet acte ne constitue pas un contrat de mariage permettant d'établir un régime pour les biens des futurs époux." » As quoted in the appeal case, Cour de Cassation, ch.civ.1, 7th April 1998.

[251] Cour d'appel de Lyon, ch.civ.1, 2nd December 2002 p. 3.

[252] Ibid.

[253] « L'acte dit maher est une convention établissant le consentement des époux au mariage, assorti du versement d'une dot, sans contrariété à l'*ordre public* international français. » Cour de Cassation, ch.civ.1, 22nd November 2005.

[254] Ibid.

establishing the couple's consent to marry, which goes together with the payment of a dowry, and is not in conflict with the French public order."[255] The court does not give any reasons or sources for this interpretation. The case was then sent back to the Court of Appeal, which adjudicated in accordance with this statement. I have not been able to get a copy of this judgment, but according to his lawyer the husband got what he wanted: That *mahr* was seen as an indication that the couple had adopted the Muslim matrimonial regime, and not against French *ordre public*.[256]

In both cases the Muslim marriage contract seems to be interpreted as an equivalent of the French *contrat de mariage*, a freely negotiated document expressing the will of the parties concerning their matrimonial property relations, and *mahr* as an indicator that such a contract exists. It is likely that this interpretation is influenced by a Court of Cassation judgment concerning a Jewish marriage contract, *ketouba*, which on somewhat better grounds was qualified as a marriage contract equivalent to the French *contrat de mariage*.[257] Najm criticises the solution in both the Jewish and the Muslim case, since both religions require such contracts for the marriage to be valid. One can therefore not speak about a choice or a freely negotiated contract like the French marriage contract, and the qualification of these religious marriage contracts as indicators of the parties' choice of matrimonial property regime is thus wrong.[258] It would have made more sense to see *mahr* and a Muslim marriage contract as a choice of which country's laws should regulate the matrimonial property relations, although this as well would be to stretch the interpretation of the parties' intentions. *Mahr* is in itself seen as compulsory from a religious point of view, and should therefore not be seen as an indicator of a free choice such as the Court of Cassation interprets it. The Muslim marriage contract is in theory individually negotiated

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[255] « l'acte dit « Maher » est une convention établissant le consentement des époux au mariage, assorti du versement d'une dot, sans contrariété avec l'*ordre public* international français. » Cour de Cassation, ch.civ.1, 22nd November 2005.

[256] Conversation with Maître Courjon January 16 2008.

[257] Cour de Cassation, ch.civ.1, 6th July 1988.

[258] Najm (2006) pp. 1370-1371.

and may contain a huge variety of clauses. This means that most European marriage contracts, with the addition of a *mahr* clause, may fill the requirement of a Muslim marriage contract.[259] To see the clause of *mahr* alone as an indicator of a choice of property regime might thus be going too far.

Marie-Claude Najm strongly criticizes all these Court of Cassation judgments for seeing a deliberate choice of property regime where there is no such thing.[260] This is particularly evident in the first case, where the Polish-Lebanese couple had only one option to get married, which was to perform a Muslim marriage in Lebanon. In both cases the couple had lived in France since right after the marriage and until the time of divorce, in both cases about 20 years. That the Indian-French couple probably had lived through their entire relationship with the idea that the estates were separate, as maintained by Annoussamy,[261] is probably to stretch the interpretation of the facts too far. Both couples have lived in France during the entire or almost entire marriage, and both women wanted French law to be applied. Being Polish, Mrs. K. had better reason to know French law than Lebanese. The approach in both cases is rather formalistic: a mechanical application of the court's interpretation of the marriage contract, which does not take the actual circumstances and negotiation opportunities into consideration. Gender justice is not an issue, and the result is undoubtedly unfair towards the women.

An alternative way of interpreting *mahr* and the Muslim marriage contract is presented by Marie-Claude Najm: It is not an explicit expression of the parties' intentions, i.e. an equivalent to the French *contrat de mariage*, but an indicator of the parties' *implicit* intentions.[262] A Court of Cassation judgment issued the same day as the last one in the

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[259] Many Muslims however, see their home country's requirements and custom as Islamic law, which may influence their choices.

[260] Najm (2006) p. 1369 ff.

[261] Annoussamy (1998) p. 648.

[262] Najm (2006) pp. 1371-1372.

Lyon case[263] opened for other indicators of the parties' implicit will than the location of their assets or first common domicile to be taken into consideration. In the following section I will take a closer look at the interpretation of foreign law related to *mahr* in the two French cases.

4.5 The further interpretation of *mahr* in French private international law

The Court of Cassation judgments are very brief, and give few indications of the reasoning behind them. Because it does not see *mahr* as an indicator of the choice of laws, but of the existence of a marriage contract indicating the matrimonial property regime, foreign law is to a small degree interpreted and applied. In addition the Court of Cassation can only adjudicate matters of law, not of facts. Foreign law is seen to be more or less of the same level as contracts, i.e. something between fact and law. The interpretation of foreign law cannot, as a main rule, be overruled by the Court of Cassation.[264] The contents of foreign law have to be proven by the parties in a case where the parties have the free disposal of their rights and litigations.[265] Most often this is done by means of a *certificat de coutume*.[266] Depending on the content and how they are used, these certificates may be a way of applying comparative legal method, but French courts have the reputation, as stated by Kötz and Zweigert, of not applying the comparative legal method.[267] The use of these certificates is in any case much criticized, as the ones not produced by French officials most often are adapted to support the litigation of one of the parties.[268] The Court of Cassation may intervene in some situations, e.g. when the Court of Appeal clearly has misinterpreted the foreign rule, and this includes misinterpretations of the proof concerning

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[263] Cour de Cassation, ch.civ.1, 22nd November 2005, nº 03-12.224.

[264] Mayer (1994) p. 128.

[265] *Libre disposition des droits en litige*. Norwegian *fri rådighet over sakens gjenstand*. See Mayer (1994) p. 132.

[266] See note 242.

[267] Zweigert (1998) p. 19.

[268] Mayer (1994) pp. 132-133. Mayer prefers the Common Law method, where the authors of the certificates appear together before the judge and are questioned on the matter, but sees no room for this approach in the practices of French courts.

the foreign rule at hand. The Lyon case is a good example of this, although the result may, as we have seen, be questioned.

The main question in all the Lyon judgments is how the Muslim marriage contract consisting only of a declaration that *mahr* is paid and received should be interpreted. While the focus in the first cassation is on whether the Muslim marriage contract with a clause of *mahr* should be seen as an expression of the parties' intentions concerning matrimonial property regime, as discussed in section 4.4, in the second it is on the interpretation of the custom certificate. There is little doubt that the interpretation made by the Court of Appeal was incorrect.[269] The Court of Cassation can only overrule the Court of Appeal in the interpretation of foreign law in cases of misinterpretation, but this is not necessarily the case with the custom certificates since they are *evidence* on what the foreign law is. However, in our case the Court of Appeal had stated, on the basis of the certificate, that *mahr* was against French *ordre public*, and that is clearly within the jurisdiction of the Court of Cassation to adjudicate upon.[270] It does however, when adjudicating on what *ordre public* is, replace the Court of Appeal's interpretation of *mahr* with its own.[271] When seeing *mahr* as an *act* the Court of Cassation, according to Najm, confuses the part with the whole, a single clause with the entire contract.[272] *Mahr* is not a legal act, it is an asset, which the husband is obliged to transfer to his wife as a consequence of the Muslim marriage contract, i.e. the *object* of an act, not the act itself. When the Court of Cassation states that *mahr* "goes together with the payment of a dowry,"[273] this is an erroneous statement for two reasons: First, *mahr* is *the* money or asset paid or transferred similar to a

[269] Oudin (2006) pp. 15-16 and a conversation with the husband's lawyer, Maître Courjon of the SCP de Chaisemartin et Courjon January 16, 2008.

[270] Oudin (2006) pp. 15-16.

[271] Ibid. pp. 15-16.

[272] Najm (2006) p. 1367.

[273] "… est assorti du versement d'une dot", 2nd page of the 2005 judgment.

dower, but paid by the husband, it doesn't "go together" with it. Second, it is not the equivalent of the French dowry, *dot*, which is paid by the parents to the couple.[274]

In the Paris case, no investigation seems to have been made into the functions of *mahr* in Lebanese law, i.e. comparative legal method was not applied in this case either. The Court of Appeal used Polish and Lebanese law in accordance with the nationality principle in French law when adjudicating the validity of the marriage, and the sources were custom certificates provided by the Polish Consulate in Paris and the Lebanese Ministry of Justice respectively. Najm criticises the custom certificate for "giving imprecise information on the inter-communitarian law in Lebanon",[275] but without saying in what way. The Court of Appeal used Lebanese law only to determine the validity of the marriage contract, and applied French law when determining the financial duties the couple had towards each other. This is fairly contradictory, as this implies that the couple had, by signing a Muslim marriage contract, chosen the regime of separate estates, but not that Muslim law should govern their matrimonial property relations. The court does not give any reasons for this; after it had concluded that *mahr* implies that the couple explicitly has chosen the regime of separate estates it started to deal with the question of financial effects of the marriage and divorce[276] simply by referring to article 270 in the Civil Code – which only concerns financial effects of divorce. This contradiction was not appealed and is therefore not reversed or commented upon by the Court of Cassation, probably because the application of French law in this matter was very much to the wife's advantage. In practice the final result is, in any case, a compromise between the claims of the two parties.

To conclude, I have found few traces of any application of comparative legal method in any of the cases. The only factor which resembles a comparative approach in any way is the use of statements from local practitioners, but the foreign concepts are interpreted

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[274] Encyclopédie Dalloz (1990) on *dot* (dowry).

[275] Najm (2006) p. 1374, my translation.

[276] Although the marriage was seen as void, the couple were ruled to have been in good faith concerning its validity, and thereby, according to *French* law, the financial effects were as if the marriage had been valid.

through their seemingly closest French equivalent, with little or no investigation into the differences.

4.6 *Mahr*, comparative legal method and gender equality in French courts

As we have seen, the French courts are very formalistic in their approach, and use a mechanical gender equality norm, based on the assumption that both parties are equal. At the same time they do not apply any comparative legal method, the little investigation which is made into the foreign law is always done with French law and legal concepts as a starting point: It tries to fit the Muslim norms and concepts into the French norms and concepts, seeing the Muslim marriage contract as an equivalent of the French one, which indeed it is not. This way it misses the target when adjudicating *mahr*, which is seen as an expression of the spouses' will concerning choice of property regime, which at best is to stretch the interpretation. The woman is the one who loses from this interpretation, as she does not get what she would have expected to get after living her entire married life in France. The English courts have the reputation of having a completely different approach: pragmatic and using comparative legal method to a large extent. In the next section we will see if this applies to their adjudication of *mahr*.

5 England

5.1 Introduction

The two English judgments presented are the only ones I've found that are published; to my knowledge this is because these are the ones that are seen as a basis for the case law concerning *mahr*.[277] They are both from the High Court; neither the House of Lords nor the Court of Appeal have yet had to adjudicate any claims of *mahr* to my knowledge. Due to the status of judgments in Common Law, these judgments still provide a basis for the case

[277] Another case is mentioned by Hasan (1998), but without giving any precise reference, nor describing the result.

law concerning *mahr*. Any interpretation of a judgment known to be used as a precedence is necessarily also an interpretation of what the case law derived from it should be, even more so than in other legal systems. Although these judgments are several decades old, indeed older than both the CEDAW and protocol 7 to the ECHR, there is no extensive literature about them. The following exploration is done with this in mind, and I have used literature on legal method that includes the interpretation of judgments to a larger extent than with the other legal systems.

Although both Shahnaz and Qureshi concern private international law, the literature concerning the case law derived from them seems to focus on disputes *within* the English legal system. This is less surprising than one might think, since a certain degree of acceptance of legal pluralism is built into the Common Law system, starting with the various norms in the different counties in England, and further developed during the colonial period. Accordingly, the difference between a formal legal pluralism and an informal one is on more of a continuum than in the other countries we have looked at – perhaps it is more fitting to say that the formal legal pluralism is not limited to private international law, but also includes non-codified norms within Britain.[278] In any event, the sole scholar who tries to give an explicit interpretation of the private international law aspects of any of these judgments is not British. In the following section, I will start with aspects of the judgments that relate to private international law before I turn my attention to the status of *mahr* between spouses domiciled in England and close with an evaluation of the gender equality aspects.

5.2 The judgments

5.2.1 Shahnaz versus Rizwan [1965]

Mrs. Shahnaz and Mr. Rizwan married in India in 1955 in accordance with Muslim law, but were residing in England at the time of litigation, since when is not specified. The husband filed for divorce in 1959 and the wife subsequently claimed the recovery of £1,400

[278] See e.g. Bano (2004) and Balchin (2006).

in deferred *mahr*. The whole case concerns a preliminary issue: whether or not the claim on *mahr* is within the jurisdiction of English courts. It is from the Queen's Bench division of the High Court, which in this case seems to be the court of first – and last – instance. The wife claimed *mahr* "on the ground that the claim was a lawful contractual one enforcing a proprietary right arising out of a lawful contract of marriage." The husband claimed that "the marriage was polygamous or potentially polygamous and that the English court has no jurisdiction over, or should not extend jurisdiction to, the wife's claim, since the provision in the marriage contract relied on was in consideration of a polygamous or potentially polygamous marriage; alternatively that the claim was in the form of matrimonial relief; in the further alternative that the claim was unenforceable since the contract of marriage and the dower provision was contrary to the policy and good morals of English law."[279] Moreover, according to English law at the time, any effect, whether personal or financial, of what was seen as a "polygamous marriage" – including "potentially polygamous marriages" – was beyond the jurisdiction of English courts.[280]

The result was not that the woman received *mahr*, as the court only adjudicates upon whether or not it has jurisdiction, it was that English courts *have* jurisdiction. The only way to reach that decision without overruling the precedence on so-called "polygamous marriages" was to qualify it as something other than an effect of marriage, i.e. an obligation

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[279] Shahnaz v. Rizwan pp. 390-391.

[280] For many years, and at the time of *Shahnaz* and *Qureshi*, English law regarded marriages contracted under a system that permits polygamy as "polygamous" – even if the couple had lived monogamously for 20 years. The matter was further confused with the use of the sub-category "potentially polygamous" for de facto monogamous marriages. Duties between man and wife, arising from their being so, were considered, based on the judgment Hyde v Hyde and Woodmansee (1866), to be outside the jurisdiction of English courts. "Polygamous" marriages were thus denied matrimonial relief by the English courts, but the marriages were considered valid for tax and legitimacy purposes. Today the marriage of a person domiciled in Britain, who has married in a country where polygamy is permitted, is normally considered valid for the spouses to be able to seek matrimonial relief for example, provided the marriage is de facto monogamous. There are exceptions, but none that concern the matter of this thesis. Balchin (2006) pp. 7 and 41-46. For more information, see Balchin, Poulter (1986) p. 47 ff or the judgment Hyde v Hyde.

based on a pre-nuptial agreement. One might say that the entire case is about the qualification of *mahr*; although, as far as I can see, the court does interpret the concept of *mahr* in greater depth than is strictly necessary here. Thus questions such as how *mahr* should further be interpreted and its relation to British public policy[281] are touched upon.[282]

5.2.2 Qureshi versus Qureshi [1972]

The husband, a Pakistani citizen, and the wife, an Indian citizen, got married in Britain on March 9th 1966 and had lived there since. The marriage ceremony was conducted in Britain at the Kensington Register Office. "This was followed by a further ceremony in accordance with Muslim rites; but it is common ground that the register office ceremony constituted a legal marriage and that the subsequent religious ceremony had no legal significance."[283] It was probably during the religious ceremony that *mahr* was agreed upon, but the judgment does not provide any direct information upon this matter. The marriage did not work out very well and they separated in June, the same year. The wife obtained a weekly allowance of maintenance at the Magistrates Court on the basis of "persistent cruelty and desertion" by the husband. The husband divorced her by sending a letter dated April 27th 1967 which contained the phrase "I divorce you" three times. Reconciliation was sought via mediation by counselor and head of chancery at the London Office of the High Commissioner for Pakistan, Tabarak Husain, in accordance with Pakistani law, before the divorce was pronounced to be absolute 90 days after the wife was notified, on August 1st 1967.

The case cited is from the Probate Division of the High Court. The wife's principal claim is that the marriage subsists and that the husband continues to provide maintenance. Alternatively, if the marriage has been validly dissolved, she claims a dower of £788 33s 5d plus maintenance of £5 a week. The main question in the case is where the couple was domiciled and thereby which laws should govern the case in determining the validity of the

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[281] The concept in British law that is the closest to *ordre public.* See also note 134.

[282] Whether these deliberations should be reckoned as *obiter dicta*, and the further evaluation of their value as precedent is beyond my knowledge to comment upon.

[283] Qureshi v. Qureshi p. 186

divorce; although, this is also the second of the two judgments that provide the basis for case law on *mahr*. The divorce was found to be valid, which proved rather controversial as it was a divorce by repudiation that had taken place on British soil. As a result, the husband's cross-prayer that the court had no jurisdiction to adjudicate upon the claim for *mahr* had to be considered. I shall concentrate on the parts of the judgment that concern this matter.

A significant difference between the Shahnaz and the Qureshi judgments is that, in Shahnaz, the wife was excluded from seeking ancillary relief on the basis that the marriage was considered potentially polygamous, while in the case of Qureshi the marriage was considered monogamous so the wife could seek ancillary relief. As the husband was planning to return to Pakistan, the only realistic way for the wife to get any money after the divorce, as the court saw it, was through *mahr*, as this would be easier to enforce by English courts than any ancillary relief.

5.3 The qualification of *mahr* in English law

Aldeeb, a Swiss scholar on Muslim laws in Europe and private international law, maintains that the English position towards *mahr* depends on the legal context in which it appears. If *mahr* is "qualified by a foreign law as a fundamental requirement for the marriage, this law will be applied by English courts if it's considered the *lex domicilii* of one of the spouses".[284] The expression "qualified by a foreign law" seems to imply that the qualification is based on *lex causae*. This is, however, not the main rule in English law, which is qualification based on *lex fori*.[285] Aldeeb gives no reference as basis for this statement. Irrespective of whether this is what he means to imply or otherwise, I do not believe there to be any basis in Shahnaz maintaining that qualification of *mahr* should be carried out on the basis of Muslim laws. On the contrary, the court uses English legal terms when trying to interpret it and the interpretation of *mahr* is only for the purpose of determining whether the court has jurisdiction. There is no explicit qualification of *mahr* in

[284] Aldeeb Abu-Sahlieh (1999) p. 93.

[285] Stone (1995) p. 385.

Qureshi either; the court appears to build upon the interpretation of *mahr* in Shahnaz, and *mahr* is considered, without any form of debate, as within the jurisdiction of the English courts.

In Shahnaz, *mahr* was seen as *consideration* for entering into the marriage; it was agreed upon "in contemplation of, by reason of and (…) in consideration of a marriage that was indeed polygamous."[286] In English law, consideration is defined as "the inducement to contract",[287] and no contract is valid unless there is consideration, i.e. one must always receive something in return for entering into an obligation. Apparently, in order to go into what the court saw as a "polygamous marriage", the court saw it as natural that the woman would want something in return - "polygamous" marriage is considered to be very degrading for the woman. The court therefore chose to qualify the Marriage contract with a clause of *mahr* as a contract, not unlike a pre-nuptial agreement and *mahr* is seen as consideration. In Indian law[288] *mahr* is indeed an *effect* of marriage and part of the marriage contract. This qualification is therefore not entirely correct and it seems influenced by what the court saw as the desired result: that the English courts *have* jurisdiction. According to one English lawyer, the result was not at all what he expected from reading the discussion leading up to it.[289] The Muslim marriage contract has stronger elements of contractual obligations than the Common Law marriage contracts do. The interpretation of *mahr* in Shahnaz pulls in more contractual elements than what would have been possible if *mahr* had been seen as part of the marriage contract, so the result, if not the reasoning behind it, is not entirely wrong in a comparative legal perspective.[290]

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[286] Shahnaz v. Rizwan p. 400.

[287] Black (1990) on *consideration*.

[288] As mentioned earlier, all law schools except for the Maliki school sees *mahr* as an *effect* of marriage, and not a *condition*, even though it's still seen as compulsory.

[289] Conversation with LLM Ezekiel Ward, March 3rd 2008.

[290] If *mahr* has *not* been paid, i.e. in cases concerning *mahr mu'akhkhar*, Aldeeb is of the opinion that a claim for its enforcement probably would be seen as an impediment not known in English law and the claim would probably be rejected with reference to Sottomayor v. De Barros if one of the spouses resides in England and the marriage is celebrated there (Aldeeb Abu-Sahlieh (1999) p. 93). I cannot see how this assumption is

5.4 The choice of laws

Since the Shahnaz case concerns the preliminary issue of whether the courts have jurisdiction, the choice of laws is not really debated. If *mahr* had been seen as an effect of the marriage, it would probably have had to be enforced through matrimonial proceedings with the consequence that English law was applied.[291] However, the court explicitly distanced itself from this view, and chose to see the Muslim marriage contract as a *contract*.[292] As a *contract*, the *lex causae* should be the law the contracting parties expected to govern the matter,[293] which in this case would be Indian law. This is not a commercial contract, however, it is a pre-nuptial one, and therefore it is uncertain whether this rule applies. There is not enough information regarding the final choice of laws in this case.

Qureshi v Qureshi, however, has an *obiter dictum* concerning the requirements to obtain an English domicile of choice, and thus for choosing English law, which is even used as precedence on this matter.[294] The actual choice of laws seems closely linked to the claim for *mahr*. The court held that "it is only if the marriage is recognised as dissolved that the wife is entitled to dower. Whatever the judgment of this court, the husband will not return to the wife. I trust that it will not be thought cynical if I feel that she is really better off with a judgment for a considerable sum of money [i.e. *mahr*], which is likely to be more easily enforceable while the husband is in this country, than with a largely meaningless right to be recognised locally as his wife."[295] This statement is a strong indicator that one of the

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correct. As we will see in the section 5.6, *mahr* is considered, under certain conditions, to be enforceable also should both spouses be domiciled in England. Therefore a rejection of a petition for the enforcement of *mahr* depends not on the personal status of the spouses, but on other conditions. In Sottomayor v. De Barros the *lex domicilii* of one of the spouses was contradictory to the rule in question, and the *lex loci celebrationis* was in agreement with the *lex domicilii* of the other party. There are several interpretations of this case; for more information, see Aldeeb pp. 54-56.

[291] Stone (1995) pp. 66-67.

[292] Shahnaz v. Rizwan p. 400.

[293] Stone (1995) p. 229-231.

[294] Ibid. p. 20 ff.

[295] Qureshi v. Qureshi p. 201; my brackets.

determining factors for the decision to apply Pakistani law on a *talaq* pronounced in England was that this would enable the court to enforce the wife's claim for *mahr*.[296]

5.5 Legal pluralism in practice: The further interpretation and application of the concept of *mahr*

Only in Shahnaz v. Rizwan does the court try to interpret the concept of *mahr*; in Qureshi v. Qureshi, the nature of *mahr* and its enforceability in English law is seen as given. In the former, the court goes much further into the interpretation of the concept of *mahr* than strictly necessary for the qualification; it actually interprets the right to *mahr* in Indian law thoroughly by using a variety of concepts from English law. The only source the court refers to for its interpretation of Indian law, is the Indian Transfer of Property Act of 1882, although the court does also refer to counsel as vital sources on this subject also,[297] this is not surprising considering the adversarial process of English law. *Mahr* is seen as a *right in action*, which means a right "attainable or recoverable by action",[298] i.e. property one does not have in one's possession, but which can be enforced through legal action, "without taking specifically matrimonial proceedings".[299] Based on an interpretation of the Indian Transfer of Property Act, the court sees *mahr* as a "proprietary right", i.e. something the wife owns, which is "assignable": She has the right to transfer the property to someone else.[300] According to Mulla and Mannan (1996), a major work in the Hanafi tradition on the Indian subcontinent, there is a "conflict of opinion whether the widow's right to hold possession [of *mahr*] is transferable and heritable."[301] The English court is therefore not wrong in asserting this.

Mahr is also seen as "a right for the protection of which, should the wife or widow gain physical possession or control of any property of her spouse, she is entitled to assert a

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[296] See also Pearl (1998) p. 233.

[297] Shahnaz v. Rizwan p. 401.

[298] Black (1990) on *right in action*.

[299] Shahnaz v. Rizwan p. 401.

[300] Ibid.

[301] Mulla (1996) p. 443; my brackets.

lien".[302] Mulla and Mannan see dower as a debt, yet an unsecured one. The widow is entitled to have it satisfied upon the death of the husband and out of his estate, but her right is no greater than that of any other unsecured creditor, except that she has a right of retention when she is in possession of the deceased husband's property, on condition of having obtained this possession "lawfully and without force or fraud."[303] This is very close to the English court's interpretation, although more precise.

The judge in Shahnaz, Winn J., has understood the concept of *mahr* fairly well: he is aware of the difference between prompt and deferred *mahr*, sees the proprietary aspect of it, and his comparison of *mahr* to lien highlights an important aspect of *mahr*, although the sources remain somewhat unclear. The judgment leaves a very contradictory impression. On the one hand, the court upholds the antiquated rule from Hyde v. Hyde that the legal effects of a polygamous or potentially polygamous marriage are outside the jurisdiction of the English court, and expresses some rather orientalist views on Muslim marriage. On the other hand, the court provides a very good interpretation of *mahr* in a comparative perspective and appears rather perspicacious in terms of its functions. It is surprising that the court decides that the wife's claim doesn't arise from the marriage contract itself, a more obvious interpretation; this is a choice that can only be explained by the court's views on policy – and what the result should be. The court elaborates its views concerning policy as follows: "…there being now so many Mohammedans resident in this country, it is better that the court should recognise in favour of women who have come here as a result of a Mohammedan marriage the right to obtain from their husband what was promised to them by enforcing the contract and payment of what was so promised, than that they should be bereft of those rights and receive no assistance from the English courts."

In choosing to interpret *mahr* as a clause in a contract rather than ancillary relief or so forth, the court actually comes closer to an understanding of the concept of *mahr* than it would, had it have chosen what it saw as the alternative interpretation, which would have

[302] Shahnaz v. Rizwan p. 401.

[303] Mulla (1996) pp 434-443.

been more correct formally. The court seems to rather thoroughly investigate the various functions of *mahr* in Indian law, compared to concepts with similar functions in English law, and is indeed more focused on the functional aspects than the formalistic ones. The court's approach may be said to be an example of the use of a fair degree of comparative legal method, even though this is not stated explicitly. Together with a pragmatic approach that seeks to attain the most equitable result, this approach is indeed woman friendly, although the same could not necessarily be said of the case law derived from it.

5.6 The enforceability of *mahr* within the English legal system

Concerning the enforceability of a deferred *mahr* when both spouses are domiciled in England, two well-known scholars of Muslim laws in Britain, David Pearl and Werner Menski, suggest that *mahr* might "fall within section 25 of the Matrimonial Causes Act of 1973",[304] i.e. be seen as ancillary relief. Raffia Arshad, a barrister, seems to agree with this view, provided the couple has conducted a civil ceremony in addition to signing a Muslim marriage contract with a clause of *mahr*. She sums up the rules based on *Shahnaz* and *Qureshi* as follows: "If the parties [have] conducted a civil ceremony as well as the *nikah*,[305] they will be entitled to pursue an ancillary relief application. In these circumstances the *nikah* contract, which is rather like a pre-nuptial agreement [if containing financial provisions], could be used to support a party's case. (…) [If] the marriage is short, any financial provisions within the *nikah* contract could be used to reflect the intention of the parties as would happen if a formal pre-nuptial contract had been drawn up. English courts do give consideration to the financial agreement the parties reached before effecting the marriage contract and this carries more weight if the marriage is short."[306] However, according to John Buck, another barrister, *mahr* is decidedly not ancillary relief; instead it is a contractual obligation, the enforcement of which may have an impact on any claims for ancillary relief. He maintains that "[a]ny decision to award payment of a dowry [sic] in

[304] Pearl (1998) p. 234.

[305] The Muslim marriage ceremony including the signing of a marriage contract.

[306] Arshad (2007) pp. 520-522, my brackets.

contract would necessarily impact upon the outcome of any claim to ancillary relief.[307] In *Qureshi* the court considered that any decision to award a payment of dowry would impact on the way in which justices exercise their discretion both as to the quantum of maintenance payable and the extent to which any arrears[308] might be enforceable."[309] He continues: "A wife should, therefore, elect whether to enforce a claim to unpaid dowry as a contractual right or within an ancillary relief claim. If she is for some reason precluded from making an ancillary relief claim, or is concerned any award made might be unenforceable, she has no option other than to claim in contract. If, and to the extent that, she successfully sues in contract and thereafter brings an ancillary relief claim, any award of damages made would, in all likelihood, serve otherwise to reduce her capital claim, unless the circumstances of its non-payment were such as to be considered by the family court as unconscionable conduct."[310] Thus if *mahr* can theoretically be enforced, and Muslim marriage contracts with a *mahr* clause will be taken into consideration, many obstacles remain for a lone Muslim woman who wishes to enforce her claim in real life, even without taking into consideration the social pressure she is likely to be subject to.[311]

It seems likely that another condition for the enforcement of *mahr* is that the amount is specified in the contract. According to Poulter, "Winn J upheld the plaintiff's claim on the ground that it was based on a recognised contractual obligation, enforceable under Islamic law by ordinary civil action[312] (aside from matrimonial proceedings) and that there was no sufficient reason why the same remedy should not be afforded here. However, had the amount of dower not been specified in the marriage contract it may be doubted whether the

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[307] "A pecuniary payment to a party to a marriage in England and Wales, on divorce, nullity or judicial separation." Wikipedia, read 05.11.2008.

[308] Money which is overdue and unpaid. Black (1990).

[309] Buck (2004) p. 7, my brackets.

[310] Ibid.

[311] See Foblets (2005), Schmied (1999), Bano (2004) *et al*.

[312] *Civil action*s "are such as lie in behalf of persons to enforce their rights or obtain redress of wrongs in their relation to individuals" according to the US federal law of civil procedure and Blacks law dictionary (6th edition, 1990)

wife would have been successful in her claim. (…) English courts might well feel incompetent to make such an assessment."[313] [314] It remains to be seen how a court would handle such a claim in practice.

Balchin and Warraich assess the status of pre-nuptial agreements in English law – including Muslim marriage contracts with *mahr* clauses – to be divided according to their legal enforceability.[315] As a general rule, they are not considered enforceable, even though they are seen as the closest equivalent to matrimonial property regimes in other legal systems. There are some notable exceptions, however, and the tendency seems to be that more pre-nuptial contracts are enforced.[316] English law is currently undergoing a great many changes concerning the adjudication of financial aspects of marriage, one notable judgment on this matter, particularly from a gender perspective, is White v. White.[317] Referring to Shah-Kazemi (2001), Balchin and Warraich state that "it is clear that the uncertain status of Muslim marriage contracts negatively affects women's access to certain property rights arising out of Muslim marriage – specifically *mehr* (dower)."[318] It is also evident that the procedural aspects complicate the matter considerably, as one cannot sue for a contractual claim and for ancillary relief or any other financial claim based upon marriage or divorce within the same case. *Mahr* seems to be enforceable, at least upon certain conditions, but the exact contents of these conditions can probably only be determined by further adjudication of *mahr* in English courts.

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[313] Poulter (1986) pp. 42-43.

[314] This statement is, at least in part, based on the case Phrantzes v. Argenti, in which a Greek girl claimed before English courts to both enforce her claim against her father to be provided with a dowry, and to have the amount set. The court found that this was beyond their jurisdiction.

[315] Balchin (2006) pp. 9-10.

[316] Freeman (2007) p. 39-40, Welstead (2006) p. 136.

[317] White v. White [2000].

[318] Balchin (2006) p. 10.

5.7 *Mahr* and gender equality in English courts

As a result of its rather outdated views on Muslim marriage, a remnant from the colonial period, the court in Shahnaz interprets *mahr* as part of something similar to a pre-nuptial agreement, made in *consideration* of the marriage. In the court's view, Muslim marriages are apparently so degrading to women that they would never enter them without receiving something in return. As there are now so many of these women in England, it would probably contravene what the court sees as good morals to not enforce what they had supposedly been promised in consideration of such marriages. The court therefore chooses to promote what it sees as the woman's interests, at the expense of reaching the more obvious and correct interpretation of *mahr*, and does exactly what the husband's lawyer says he cannot do: "sever some terms of the [marriage] contract,"[319] thus proclaiming petitions for *mahr* to be within the jurisdiction of English courts. The husband claims that the claim is "unenforceable by reason of such a contract of marriage and the provision therein [of *mahr*] being contrary to the distinctive policy and good morals of the law of England,"[320] i.e. that *mahr* is againt English public policy. The court, however, doesn't "see any foundation (…) that that marriage involved any element offensive to the standards of decency accepted by the English law",[321] i.e. it can't find any foundation for the husband's claim. The Muslim marriage contract and *mahr* is not against English public policy.

Within the framework of Muslim laws, as the court interprets it, the court tries to ensure the woman's rights. Muslim laws give husband and wife different rights and obligations, and English law, especially in the 1960s when the adjudication took place, was to a large extent based on the same idea. The court does not withdraw or apply a mechanical gender equality norm in the face of Muslim laws; it makes a great effort to give the woman her dower, seen as her consideration and compensation for entering into a Muslim marriage, applying something approaching an equal worth norm of gender justice.

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[319] Shahnaz v. Rizwan p. 394, my brackets.

[320] Ibid. p. 395.

[321] Ibid. p. 397.

On behalf of Mrs. Qureshi, and presumably in accordance with her wishes, it is argued that "she should not be precluded from herself invoking the jurisdiction of an English divorce court, not only to secure the dissolution of her marriage but also to secure an order for ancillary relief. She claims that recognition of the *talaq* and the denial of rights otherwise available to her under English law would be unconscionable."[322] Public policy is an issue only concerning the recognition of the unilateral repudiation of the wife, not concerning *mahr*. The court, however, considers it "preferable for the courts to proceed generally on legal principle, and to leave any necessary modifications called for by public policy to other organs of the constitution."[323] It also lists five factors that make it consider that "the judicial discretion should not be exercised to refuse recognition to the otherwise applicable rule of foreign law":

1) Case law indicates that this discretion should be used sparingly;
2) The marriage will be dissolved in any case, and the court sees no point in postponing this;
3) The husband intends to return to Pakistan, and the English court considers that Pakistani courts are unlikely to enforce any ancillary relief orders from English courts, and that they will recognise the *talaq* as valid;
4) The court is of the opinion that the wife will be "better off with a judgment for a considerable sum of money, which is likely to be more easily enforceable while the husband is in [England], than with a largely meaningless right to be recognised locally as his wife," and in order to have her dower claim enforced, the court considers that the divorce has to be recognised.
5) The rule of foreign law, here the Pakistani MFLO,[324] which the husband followed in his suit for divorce, "has the authority of the holy scriptures of the common faith of himself and the wife."[325]

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[322] Qureshi v. Qureshi p. 201.

[323] Ibid. p. 199.

[324] Muslim Family Laws Ordinance, valid in most of Pakistan.

[325] Qureshi v. Qureshi p. 201.

The court chooses to disregard the wife's wishes, and accepts the *talaq* largely to enable her to obtain the dower, this being, as the court sees it, the only realistic possibility of her receiving any money from the husband after the divorce. The court appears to try to take as much care of the rights of the wife as it can, in a very practical way, in addition to respecting the religion and what it sees as religious laws for both spouses. Just as in Shahnaz v. Rizwan, the court applies something approaching an equal worth norm of gender justice, giving the woman her rights within the limits of the Muslim laws as the English court interprets it.

6 Summary of the findings

We have now seen that even though *mahr* is a completely foreign concept, all the courts in this study qualify *mahr* on the basis of *lex fori*, i.e. the courts' own laws and concepts. The concept of *mahr* is not interpreted in any of the Norwegian judgments; in the other countries *mahr* is qualified and further interpreted in a variety of ways: as maintenance, as a redistribution of property between the spouses, as common law consideration, and as an indicator of the spouses' choice of matrimonial property regime. Comparative legal method is most typically not used at all, but the courts in the Swedish 2005 judgment and the English Shahnaz judgment do apply this method, at least to a certain degree, despite the method itself never being mentioned. Gender justice seems to be taken into consideration only in RH 1993:116 from Sweden and the two English judgments; in the Swedish judgment in a rather mechanical gender equality approach, in the English judgments in the shape of the equal worth norm or something approaching it. In the majority of the cases, *mahr* has been claimed to be against the *ordre public* or public policy of the European country, but this has never won through, except for in the French case Cour d'Appel de Lyon, 11th January 1996, which was repealed by the Court of Cassation.

Part IV. DISCUSSION: *MAHR*, COMPARATIVE LEGAL METHOD AND GENDER JUSTICE IN EUROPEAN COURTS

1 Introduction

Having analysed the judgments within the context of their legal system, we have now reached the stage of comparison. The focus in this thesis is on the courts' approaches in dealing with Muslim laws in a gender justice perspective. First, I will look at the use, or absence of use, of the comparative legal method; next at the use, or absence of use, of gender justice norms; I will then look at both together. I shall finish by saying something about the limits of what can be learned from this study, and what I believe merits further investigation.

2 *Mahr* and the comparative legal method in European courts

2.1 The qualification of *mahr*

2.1.1 The rules concerning qualification

Muslim laws don't distinguish between personal and financial effects of marriage. *Mahr* has elements of both, plus contractual elements. This explains some of the difficulties European courts have when they qualify, interpret and apply the concept of *mahr*. In the Norwegian judgments, *mahr* cannot be said to be qualified at all, and in France it is the Muslim marriage contract rather than *mahr* which is qualified. In France, the doctrine is to qualify *lex fori*; this is also the majority view in Norwegian law. Thue maintains that in

cases concerning *mahr* and other concepts that don't exist in Norwegian law, the Muslim law in question should be applied to determine which category of conflict of laws rules the court should apply, in practice a qualification *lex causae* therefore.[326] It is thus not certain what the result would be in Norwegian law. In the remainder judgments, *mahr* is qualified *lex fori*, even though *mahr* is a foreign concept to all the European courts studied.

The only country in this study where the qualification is very clear and discussed by the court in explicit terms is Sweden. It seems likely that this is due (at least in part) to the fact that Sweden is the only country that has an act on the matter,[327] the *travaux préparatoires* of which[328] designate two options for the qualification of the payment of a lump sum between spouses. It takes the form of either a redistribution of property or maintenance, i.e. either a financial or a personal effect of marriage. Both English and French courts rely on jurisprudence to determine the contents of the rules concerning qualification, the French ones also rely upon the Hague convention on the law applicable to matrimonial property regimes of 1978.[329] French law does not classify the financial effects of the marriage as part of the family law, but of the law of obligations. On the one hand, this distinguishes between the financial and personal effects of marriage, a distinction that does not exist in Muslim laws, and thus emphasises the difference between the legal systems. On the other hand, this may allow French law to pick up more of the obligation law aspects of Muslim marriage, and is perhaps closer to the notion of Muslim marriage contracts than financial effects of marriage are in Swedish law, for example.

The Swedish solution implies a qualification *lex fori* with very limited options, which may narrow the options of qualification down so much that it could lead to incorrect results and

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[326] Thue (2002) p. 395.

[327] *Lag* (1990:272) *om internationella frågor rörande makars och sambors förmögenhetsförhållanden* (LIMF).

[328] Prop. 1989/90:87, see part III chapter 3.3.

[329] The UK is also a party to this convention, but the English judgments came into being long before this convention entered into force on September 1st 1992.

provide an erroneous basis for the further interpretation of the foreign concept and laws, particularly with respect to concepts that are very different from those in Swedish law. Therefore, while clear legislation makes the courts more aware of the qualification process, it can at the same time narrow the options for qualification down so much that the court may find itself barred from the best approach, e.g. the application of comparative legal method in the case of concepts that are entirely foreign to the European legal system. Although rules based upon principles and jurisprudence may be more flexible, they are more difficult to apply, demand a high degree of awareness and knowledge from the courts, and may lead to more unpredictable results.

Sayed argues, *de lege ferenda*, for a new private international law rule in using *lex loci contractus* – the law of the country where *mahr* was agreed upon – in cases concerning *mahr*.[330] His main argument is that this is applicable as a general principle and therefore a practical solution. He further maintains that this approach will supposedly be "in line with the spouses' intention on the matter of the applicable law at the time of signing the contract", and that this would "better fulfil the objectives of *mahr* agreement in every specific case". He admits that this solution may have weaknesses in relation to spouses who change residence and stay in Europe for a very long time. The original purpose of *mahr*, which he considers to be "a safeguard within marriage or against divorce", "may not be enforceable (or meaningful) after a long residence in the new country". He proposes to use the *ordre public* reservation in such cases. One weakness in his reasoning is that *mahr* has many purposes and functions, which vary with the type of *mahr* and other circumstances in each case, a redistribution of property is one of them. Another weakness is that it is not at all clear whether public policy could be used in such cases as it takes a lot more to refuse the enforcement of a foreign rule on this basis. His solution has some similarities with the French one, although French courts see *mahr* rather as an indication of which property regime is chosen. As we have seen, this solution has recieved a great deal of criticism, the most thorough – and knowledgable – criticism is from Marie-Claude Najm. Her main point

[330] Sayed (2008) pp. 206-207.

is that, when it comes to laws based upon religion, one has to be careful of assuming that there is an explicit choice of matrimonial regime that can be read out of the choice of marriage rites. She proposes that if no clearly formulated, written agreement is made, the law of the first common domicile should be applied. Another argument against Sayed's solution is that one cannot isolate one legal effect of a marriage contract, i.e. *mahr*, thus the entire contract must be considered enforceable, with the reservations of *ordre public* only. This would create a situation similar to the one in countries that apply the nationality principle, where the couple may, after residing in Europe for decades, nevertheless find themselves bound by the laws of the Muslim country they originate from, or even simply contracted the marriage in. This solution has been criticised in a study by Foblets, on the basis of interviews with a large number of Muslim women residing in Belgium. A major finding in her study is that Muslim women who know both sets of rules prefer the European solution, which in most cases is more favourable for them. Foblets, as well as Najm, is of the opinion that the law of the first common domicile should be applied if no written agreement between the spouses is provided, [331] which is the rule set forth in the Hague convention on the law applicable to matrimonial property regimes of 14th March 1978, article 4 and the main rule in Swedish and Norwegian law.

2.1.2 The consistency of the qualifications of *mahr*

Both in France and England, the judgments seem to build upon each other regarding the qualification of *mahr* or the Muslim marriage contract; there is no indication that the qualifications are inconsistent. The only exception is the French Court of Appeal in the Lyon case, which repeatedly wanted to qualify *mahr* differently from the Paris case (and perhaps more correctly) but was overruled by the Court of Cassation. Remarkably, *mahr* is qualified differently in the two Swedish judgments, even though the factual situations are fairly similar. In both cases, the marriages were very short and the husband was resident in Sweden while the wife moved to Sweden from the couple's country of origin. This solution is interesting in that it allows for different qualifications and therefore also interpretations depending on the situation in each case. Bogdan proposes that this may be a correct way of

[331] Foblets (2005) pp. 307-308, Najm (2006) p. 1373.

qualifying *mahr*: a prompt *mahr* is seen as a redistribution of property, while a deferred *mahr* is seen as maintenance.[332] I fear that Bogdan's qualification based on the differences between prompt and deferred dower is based upon a misconception however. Bogdan sees prompt *mahr* as being paid either at the time of marriage or on demand, although it is a deferred *mahr* which must be paid upon demand, at the latest at the dissolution of the marriage by death or divorce. However, this may not cause any problems in practice as a deferred *mahr* is very rarely claimed before the dissolution of marriage, as this is seen as an indication that the marriage is not going well.[333]

Mahr can have so many functions that it may be a good solution to be open to different qualifications and interpretations. This is a way of admitting stronger elements of the comparative legal method into the process of qualification while at the same time maintaining *lex fori* as a basis for it. It creates the possibility of taking various functions of the concept into consideration, and that the concept may have different functions in different situations. The actual method of qualification is closer then to what is sometimes called the private international law method, see part II chapter 3.2. A problem that then arises is that the results are unpredictable. However, as Najm states in her thesis: While an inequitable result is most often unpredictable by the parties, since they will not have been able to adapt, the contrary is not necessarily the case; an unpredicted result is not always inequitable.[334] Potentially relevant variables for the qualification are the duration of the marriage in question, the type of *mahr*, its size, and the financial and other circumstances of the couple concerned. The actual phrasing in the laws of the Muslim country in question is likely to play an important part, as these are bound to differ, see for example the Swedish judgments, and not only on the basis of which law school is predominant in the area, see part II chapter 2.7.

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[332] Bogdan (2007) pp. 184-185.

[333] WLUML (2003) p. 181.

[334] Najm (2005) note 242 on pp.360-361.

2.2 The use of the comparative legal method in the interpretation of *mahr* and Muslim laws

Surprisingly, it is in the oldest judgments that the courts are apparently the most thorough and capable in application of the comparative legal method. According to Kötz and Zweigert, the French Court of Cassation "has adopted a style of judgment which precludes any reference to considerations of sociology, legal history, policy or comparative law," while the English courts have a reputation of using a completely different approach, applying foreign law and comparative legal method to a considerable extent.[335] My discoveries confirm these views. The Norwegian courts don't seem to have really discovered the comparative legal method, while in Sweden things have noticeably improved from 1993 to 2005. In all the judgments, the degree of misinterpretation of the Muslim laws in question seems to be directly related to the lack of use of the comparative legal method.

2.3 The various interpretations and functions of *mahr*

2.3.1 Introduction

As mentioned, *mahr* is qualified and interpreted in a variety of ways: as maintenance or a personal effect of marriage, as redistribution of property or a financial effect of marriage, and as common law consideration for entering into a Muslim marriage contract. In the French Court of Cassation judgments, it is viewed as an indicator of the choice of matrimonial property regime. The functions of *mahr* and the subsequent interpretation of it in a European context depend on the circumstances of each case. Additionally, the concepts of the *lex fori* shape the interpretation of *mahr,* particularly through the qualification process. As comparative legal method is to a small extent applied in the judgments that I have studied, these concepts have a strong influence on the courts' further interpretation of the Muslim laws in question too. However, some interpretations are more correct than others and in this section I shall present and evaluate the various interpretations of *mahr* in the judgments studied, in relation to the courts' use of comparative legal method.

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[335] Zweigert (1998) p. 19.

2.3.2 *Mahr* as maintenance

As we have seen, it is clear that *mahr* is not a kind of maintenance in the terms of Muslim laws,[336] although this does not mean that this interpretation is wrong. The actual function of *mahr* may indeed be a kind of maintenance, when analysed through the comparative legal method. However, if the qualification of *mahr* as maintenance is seen as a general principle, this may lead to a loss of rights for Muslim women at times, as we saw in the first Swedish judgment. In Islamic law, the woman has a right to maintenance during the *'idda*, the first three months after divorce, and in some Muslim countries the woman has a right to maintenance beyond this.[337] It is clear that the Swedish judgment is based on a misinterpretation of Muslim Israeli law and the court did not use the comparative legal method to investigate its contents.

Sayed upholds the example where the wife is a Swedish citizen and the husband domiciled in a Muslim country. According to Swedish jurisprudence, questions concerning maintenance are regulated by the personal status law of the person entitled to it. Suppose then that the woman is the one with the greatest wealth and income; is it still possible to talk of *mahr* as a maintenance obligation? In Swedish law, maintenance is seen as aimed at meeting the recepient's needs, compensating for a low income or none at all. Should this not be the case, we cannot, according to Sayed, say that *mahr* is maintenance in the Swedish sense.[338] Indeed, in Muslim laws, *mahr* is the wife's right and property regardless of the economic circumstances of the spouse. Upon the husband's death, if it has still not been transferred to her then it is separated from the husband's estate prior to the wife's share of inheritance being calculated. If the complete rules concerning *mahr* are to be practiced in Europe, the outcome may at times actually be unfair to the husband. Nevertheless, this appears to be the exception thus far.[339] Even if *mahr* can never be seen as maintenance in the sense of Swedish domestic law, this does not mean that *mahr* may

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[336] See part II chapter 2.

[337] See the Tunisian Code du Statut Personnel.

[338] Sayed (2008) p. 202.

[339] See for example Bano (2004) p. 251 ff.

not be seen as maintenance in the private international law sense, especially if a comparative approach is used. As we saw in chapter 2.1.2, Bogdan is of the opinion that a deferred *mahr* should be qualified in Swedish law as maintenance. Only a deferred *mahr* should be qualified as maintenance, and then only if that is the approximate function it has in that particular case. Accordingly, a condition is that the husband is the one with the most money. Bogdan maintains that the qualification should be based on the circumstances at the time when the agreement was signed and not take later developments into account.[340] Since the right to, and the amount of, maintenance can only be determined at the time of divorce, this may not be the best solution if *mahr* is qualified as maintenance. If *mahr* is qualified as a redistribution of property, however, it may be a different case.

2.3.3 *Mahr* as a redistribution of property

Another Swedish solution was to see *mahr* as a redistribution of property between the spouses.[341] Again, the correctness of this depends (among other things) on the economic situation of the spouses in each case. in my opinion, it should be a requirement that *mahr* is prompt. This is probably one of the objects of *mahr* in Muslim laws, dating back to the Qur'an, and must be seen in relation to the absence of matrimonial property regimes in Muslim laws: there is no joint matrimonial property, but the husband is required to provide for his wife and their children. In this way, the woman has some property of her own, of which she disposes freely. Depending on the circumstances, a redistribution of property may also be a vital function of *mahr* in a Muslim legal context, especially in situations where the woman has no paid work outside of the home. For a prompt *mahr*, this solution often proves to be very good from a comparative legal perspective. In terms of which factors should be taken into consideration, I agree here with Bogdan, that only the circumstances at the time of signing the agreement are relevant; in any event, it is unlikely

[340] Bogdan (2007) pp. 184-185.

[341] RH 2005:66.

that much time has elapsed between this and the litigation.[342] Once more, it is a requirement that the husband is the wealthiest of the spouses.

2.3.4 *Mahr* as consideration or sales price

The interpretations of *mahr* in Shahnaz and in the second Cour d'Appel de Lyon judgment have several features in common: both see Muslim marriage as very degrading for the woman, for which *mahr* is a financial compensation. The French court goes farther in seeing *mahr* as "the sales price a woman claims for herself when marrying",[343] although in a comparative perspective, the function of consideration is not so different; in reality the sales price of an item will most often be the consideration for one of the parties in a sales contract. However, there is no requirement that consideration has the same value as the counter-performance,[344] thus the comparison has its limits. Compared to the function of *mahr* in a Muslim legal system, the correctness of such an interpretation is uncertain. As we saw in part II chapter 2, it is still debated in Muslim countries whether *mahr* is the sales price of the woman's uterus or something approaching this. Although the majority view is that it is not, the answer is not a given, due to the rights and duties that still follow from marriage in the majority of the Muslim countries. Nevertheless, this debate concerns the symbolic value of *mahr* rather than its actual functions. It is therefore not an approach to be recommended from a comparative perspective. In these judgments, this interpretation seems to be based on erroneous assumptions about the nature of Muslim marriage in the English case and on a mistranslation of a custom certificate in the French case, and was actually repealed by the Court of Cassation on the basis of misinterpretation of the foreign law.

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[342] In Scandinavian law, a consequence of this interpretation might be that prompt *mahr* is seen as part of the woman's own property and not part of the matrimonial property, which is divided equally upon divorce. A requirement might be that Muslim laws are applied on her right to *mahr*, but Scandinavian law on the divorce settlement, however, the entire question merits a much more thorough discussion than space permits here.

[343] Cour d'appel de Lyon, ch.civ.1, 2nd December 2002 p. 3.

[344] Cheshire (1996) p. 73 ff.

2.3.5 *Mahr* as part of a pre-nuptial agreement

When *mahr* is qualified as part of a pre-nuptial agreement, which has many of the same functions as the French *contrat de mariage*, it is apparently considered to be within the parties' autonomy and it is the actual contract that is the main object of interpretation. An advantage of both interpretations is that they include some of the contractual aspects of Muslim marriage contracts, of which *mahr* is a part. Contrary to the French concept, however, a pre-nuptial agreement is not seen as binding in English law, but as one indicator, among many, of the parties' intentions.[345] Another major difference between them is that in English law matrimonial property regimes exist mainly in private international law, while this is a major feature of French law on marriage. Najm criticises the French judgments for seeing the *mahr* clause as an explicit choice of matrimonial property regime, i.e. that the Muslim marriage contract is an equivalent to the French *contrat de mariage,* while a better interpretation would have been to see it as one of several indicators of the spouses' implicit intentions, i.e. more in line with a pre-nuptial agreement in English law. Perhaps the most correct solution is that expressed by the Norwegian court in RG 1983 p.1021: the Muslim marriage contract with a clause of *mahr* neither implies an explicit choice of matrimonial property regime, nor a choice of laws regulating the matter. Islam requires a marriage contract with a clause of *mahr* for a marriage to be valid, as Najm quite rightly stated.[346] In some Muslim countries, civil marriage doesn't even exist.[347] On this matter, the comparative legal method, with its focus on the functions of a concept, and Nielsen's statement about the necessity of not taking the ideological background of the rules into consideration,[348] exclude an aspect which is vital for the understanding of the Muslim laws in question.

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[345] See Blenkhorn (2002) concerning the effect of interpreting *mahr* as a pre-nuptial agreement in US law.

[346] See note 260.

[347] E.g. Lebanon.

[348] See the introduction and note 9.

2.3.6 Other possible functions of *mahr* in European private international law

There is no doubt that *mahr* can be qualified and interpreted in other ways than those mentioned above, depending, among other things, on the specific circumstances in each case and the European legal system. One of the most interesting features of *mahr* is that it has so many functions depending, for example, on the type of dower, the amount, and other circumstances in each case. In my opinion, one should not adopt only one qualification and interpretation of *mahr*, as this may lead to erroneous and sometimes unfair results. In the following chapters, I shall further explore this, from a gender justice perspective.

3 *Mahr* and gender justice in European courts

3.1 *Mahr*, the CEDAW and gender justice in the judgments

As stated in part I chapter 6.2.3, the CEDAW committee's views on *mahr* seems to have developed from a rather mechanical gender equality approach which rejected *mahr*, to an equal worth approach accepting *mahr* as important for women in Muslim countries. This may be interpreted as a move from principles to pragmatism. In the European judgments I have studied, the CEDAW is never mentioned, even in cases where the adjudication was conducted after its coming into force, nor are any other human rights obligations concerning gender equality. While the English courts have a more of an equal worth approach to the gender equality issue, the Swedish court in RH 1993:116 is rather mechanical in its approach. This is not particularly surprising in terms of English judgments from the 1960s and 1970s, when the gender equality movement still only had limited influence on English courts, especially on issues such as these, even more so for the Swedish judgment from 1993. Of the two approaches, the equal worth approach appears to lead to a more equitable result for the woman involved. Nevertheless, the most striking discovery in this respect is that so few courts take gender justice into consideration in cases concerning *mahr*: less than half of the cases studied. Gender justice is not an issue in any of the Norwegian and French cases, nor is it in the most recent Swedish judgment. France has

a monistic system with regard to treaties signed by the French state, this means that the CEDAW was part of French law at the time of adjudication of both the Lyon and the Paris case.

3.2 *Mahr* and *ordre public* in the judgments

In almost all of the cases, *mahr* is claimed to be against *ordre public*; although this is never accepted by any of the courts. It is frequently a subsidiary claim, the matter is solved on another basis and none of the courts provide a thorough explanation concerning the reasoning behind this. In RH 1993:116, the basis for this conclusion is clearly incorrect; the court sees *mahr* as equivalent to the Swedish concept of *morgongåva,* morning gift, on this basis it concludes that it is not against *ordre public*. In the French Lyon case, the Court of Cassation, in its last judgment, also seems to base this conclusion on a misinterpretation, as it sees *mahr* as a convention or an act. In the *talaq* judgments,[349] the French Court of Cassation has stated that the ECHR[350] protocol 7 article 5 on gender equality is part of French *ordre public*.[351] I have found no indication of such reasoning in any of the other countries, although it is clear that a gender equality principle is part of the *ordre public* in the European countries in this study. The type of gender equality norm and how strictly it should be interpreted in relation to *ordre public* remains uncertain.

Overall, it seems that the courts are more aware of their negative duty in relation to gender equality and *ordre public*, than their positive duty: to promote gender equality. The exact contents of each and the relationship between them merit a more thorough investigation.

With a few exceptions, it is the *result* of the foreign rule that must be contrary to *ordre public*, not the rule itself.[352] It is also generally acknowledged that the courts should be

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[349] Table ronde, Cour de Cassation, February 17th 2005.

[350] The European Convention on Human Rights.

[351] See part I chapter 6.4.

[352] Thue (2002) p. 182.

highly restrictive in applying the *ordre public* reservation, for a variety of reasons.[353] In none of the judgments in this study, does a wife obtaining *mahr* lead to a very inequitable result, despite the result in RH 2005:66 being strongly in favour of the woman, thus it's not surprising that *mahr* is not considered to be against *ordre public*. Since *mahr* is a claim the wife has on the sole basis of being a woman, it is perhaps more likely that the result is proclaimed against *ordre public* in terms of being too unfair to the husband, should the amount be high enough when compared to the husband's means. The *ordre public* reservation remains useful, in that it gives the courts a means of testing the result of the foreign law in each case, which may include a test of the functionality of *mahr* in a gender justice perspective. Both court practice and legal scholarship leave a lot to be desired, however, in terms of bridging the existing gap between the equality and non-discrimination standard, on the one hand, and *ordre public* on the other.

4 *Mahr*, comparative law and gender equality

4.1 Introduction

In the following section, I shall look into questions concerning the interaction of the comparative legal method and gender equality approach as a final test of the hypothesis we started out with: that the courts must apply comparative legal method in order to provide a foundation for making a correct and fair decision, and that they also need to apply a gender justice norm of equal worth to obtain an equitable result when they apply Muslim laws. How do the comparative law and gender equality approaches interact? What happens if neither or only one of them is applied? What happens if both are?

4.2 When neither a comparative nor a gender justice approach are applied

In none of the French or Norwegian judgments, did the courts use the method of comparative law or appear to make any effort to promote gender justice. In both of the

[353] Ibid. p. 176 ff.

French judgments, and in LE-1986-447, the outcome was that the women were left with either nothing or very little upon divorce, undoubtedly less than they had reason to expect. In all three cases, the Muslim laws and concepts in question must be said to have been misinterpreted by the European courts.

In RG 1983 p.1021, the issue was the same as in the French judgments: whether the Muslim marriage contract with a clause on *mahr* expressed a choice of matrimonial property regime or a choice of laws regulating the effects of marriage. The court didn't have to interpret the Muslim laws in question, only the marriage contract, and seems to have applied common sense rather than comparative law method. The result of this was that the marriage contract was seen as nothing more than an agreement to marry, in accordance with the wife's claims. Therefore, in this individual case, pragmatism and common sense seem to have done the job of both gender justice awareness and comparative legal method, while in all the other cases, with the exception of the Swedish RH 2005:66, the result seems to have been rather inequitable towards the women concerned.

4.3 When a gender justice approach alone is applied

In the Swedish judgment RH 1993:116, the court makes a particular effort to promote gender justice, to the point of reinterpreting case law. However, the method of comparative law is not used in attempts to interpret the Muslim laws in question; as a result, not only is the nature of *mahr* misinterpreted, but the woman does not receive any maintenance during the *ʹidda*. In Swedish law, it takes time for a joint matrimonial estate to be established, prior to that each party takes from of the matrimonial estate only that which he or she brought into it. If the court had not made an effort to promote gender equality, the woman would probably have been left with nothing, as the marriage was so short.[354] Nevertheless, if the court had applied comparative legal method and made a correct interpretation of the Muslim laws in question, she would have been awarded three months' maintenance in addition to *mahr*. In this example, the result is thereby only partly favourable for the

[354] See part III chapter 3.5.

woman when only a gender justice approach is applied, and a somewhat mechanical one at that.

4.4 When a comparative approach alone is applied

In the other Swedish judgment, RH 2005:66, gender justice does not feature, although the court does apply comparative legal method to a certain degree. This is the only judgment where the equity of the result seems to be debatable from the point of view of the husband. He had to pay 250,000 Swedish kroner to the woman after a few months' marriage, the allegations that he was being used to obtain a residence permit in Sweden are not addressed by the courts, nor are the nature and limits of the authority he have to his proxy. The reasons for this remain uncertain, in terms of whether the court simply wasn't thorough enough in its interpretation of Iranian law, the lack of gender justice approach in a man's favour, or other reasons. As the Canadian Professor in Sociology and Equity Studies in Education, Sherene Razack, has pointed out, there is a risk of essentialising and stereotyping too much, with the result that the Muslim woman is classified as a victim too often and the Muslim man as an offender, leaving no room for nuances and complexity.[355] However, there is not enough information in this judgment to say whether this happened in this particular case.

4.5 When the two are applied in combination

What happens, then, when the two approaches are applied in combination? There is only one judgment in this study where this was done in relation to *mahr*: Shahnaz v. Rizwan. The other English judgment, Qureshi v. Qureshi, is based on this one in terms of the interpretation of *mahr* and related rules, and cannot therefore shed any light upon the application of the two approaches together in relation to *mahr*. Within the boundaries of the legal[356] and cultural[357] context of the judgment, the court makes a significant effort both to

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[355] Razack (2008). See also Phillips (2007), esp. ch.3.

[356] I.e. Hyde v. Hyde and other case law at the time.

[357] i.e. the 1960s when orientalism was still a major feature of the world view in Western Europe, see e.g. Said (2004).

try to understand the Indian laws in question and to promote gender justice. Within the boundaries of its context, this undoubtedly appears to be the most equitable judgment, which is the most correct in terms of its outcome even if the reasoning behind it is less correct. However, owing to the legal reasoning and the views on Muslim marriage that it is based upon, the equity – and quality – of the case law derived from it remains questionable, as seen in part III chapter 5.6. It is surprising, that no further case law on the matter has been published.

CONCLUSION

What can we learn from these judgments? Since there are so few, one must be cautious not to generalise too much from the discoveries,[358] although they may give some indication of how the courts could proceed to promote gender equality when they apply Muslim laws. As we saw in chapter 2.2 in this section, there seems to be a direct connection between the use of comparative legal method and the correctness of the interpretation of the foreign law. The Swedish examples showed that narrow options concerning the qualification of *mahr* may lead to incorrect interpretations of the Muslim laws concerned, but also that it may be a good solution to allow for different qualifications and interpretations of *mahr* depending on the type of *mahr*, the Muslim laws in question and the circumstances in each case. This solution also enables a wider use of the comparative legal method and, since *mahr* may have such a variety of functions, it may yield more correct results in each case. However, as seen with the French judgments and Najm's criticism of them, the religious aspect is vital for the full understanding of a Muslim marriage contract, and the comparative legal method with its focus on functionality does not take this into consideration.[359]

In terms of gender equality, it was seen in chapter 3 that the courts seem to be more aware of their negative duties relating to *ordre public* than their positive duty to provide gender

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[358] Pearl suggests that the lack of further case law on *mahr* from Britain may be "to some extent due to pressure being placed on Muslim wives, or ex-wives as the case may be, not to approach English courts for relief of this kind." Pearl (1998) p. 233. See also Schmied (1999), Foblets (1994) and Bano (2004). In Norwegian conflict of laws, it is the couple's *domicile* that determines which laws govern the legal effects of the marriage. This probably limits the number of cases where Muslim laws concerning *mahr* should be applied, perhaps unless we see it as part of the wife's property in terms of the Norwegian Marriage Act of 1991 s66, but this needs further discussion.

[359] See also Fournier (2007) pp. 303-304, where she states that the courts in trying not to get involved in religious matters, as a result "fail (…) to appreciate the richness and heterogeneity of both legal systems".

equality, and that gender equality is most frequently not an issue. It also seems that the most correct and equitable results are obtained when the courts use both a comparative approach and also try to actively promote gender equality in a wide sense, with a view to accommodating gender difference. This points to the potential of an equal worth standard which is sensitive to the social and cultural aspects of the laws in question, without going too far. It was seen in part I, chapter 6.2.3 that the CEDAW committee's views on *mahr* seem to have developed from a rather mechanical gender equality approach that rejected *mahr* to an equal worth approach accepting *mahr* as important for women in Muslim countries. How this can be achieved in a European context requires further study, alongside a number of other issues. First, more knowledge is needed concerning the relationship between *talaq*, *mahr* and other effects of Muslim marriage in relation to European human rights obligations and private international law; second, on the implementation of CEDAW in each state in relation to dealing with both strong and weak legal pluralism among minority groups, formally and substantially; third, on how to deal with the religious aspects of the norms in question, also in relation to human rights obligations in the intersection of freedom of religion and gender equality.

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