

# In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment

Pascale Fournier

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# In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment

## **Abstract**

This article addresses the dilemmas of Muslim women living in Canada as they negotiate between the constitutional and juridical systems of the dominant society, on the one hand, and the Muslim community, on the other. It will examine the ideological assumptions about law and multiculturalism that have worked to depoliticize the stakes of law in Marion Boyd's report, *Protecting Choice, Promoting Inclusion*. With the Islamic institution of mahr in the background, this article suggests a methodology to evaluate the costs and benefits of abstract legal rules as they are actually used by the parties in the "shadow of the law" to acquire something from the other party, make concessions, or simply put an end to the relationship. In offering a distributional narrative of legal pluralism, this article demonstrates that while legal orders produce group subjectivities in plural spaces, they also, and more importantly, distribute desires, interests, and bargaining endowments between individuals and groups in an unpredictable and often contradictory fashion.

## **Keywords**

Legal polycentricity; Marriage law; Dowry; Islamic law; Muslim women

# IN THE (CANADIAN) SHADOW OF ISLAMIC LAW: TRANSLATING MAHR AS A BARGAINING ENDOWMENT<sup>©</sup>

PASCALE FOURNIER\*

This article addresses the dilemmas of Muslim women living in Canada as they negotiate between the constitutional and juridical systems of the dominant society, on the one hand, and the Muslim community, on the other. It will examine the ideological assumptions about law and multiculturalism that have worked to depoliticize the stakes of law in Marion Boyd's report, *Protecting Choice, Promoting Inclusion*. With the Islamic institution of *mahr* in the background, this article suggests a methodology to evaluate the costs and benefits of abstract legal rules as they are actually used by the parties in the "shadow of the law" to acquire something from the other party, make concessions, or simply put an end to the relationship. In offering a distributional narrative of legal pluralism, this article demonstrates that while legal orders produce group subjectivities in plural spaces, they also, and more importantly, distribute desires, interests, and bargaining endowments between individuals and groups in an unpredictable and often contradictory fashion.

Le présent article évalue les dilemmes qu'affrontent les femmes musulmanes vivant au Canada, alors qu'elles négocient, d'une part, avec les systèmes constitutionnel et juridique de la société dominante et, d'autre part, avec la communauté musulmane. J'examinerai les prémices à fondement idéologique relatives au droit et au multiculturalisme qui contribuent à dépolitiser les enjeux du droit dans le rapport de Mme Marion Boyd, intitulé *Pour protéger le choix, pour promouvoir l'inclusion*. Utilisant comme toile de fond le *mahr*, institution islamique, je suggère une méthodologie pour évaluer les coûts et avantages des règles juridiques abstraites dont se servent en pratique les parties dans "l'ombre du droit" pour effectuer un gain de l'autre, faire des concessions ou simplement mettre un terme à la relation. En offrant une narration distributive du pluralisme juridique, je démontre que, si les ordres juridiques produisent des subjectivités collectives dans les espaces pluriels, ils distribuent—aussi et surtout—des désirs, intérêts et capacités de négociation entre particuliers et groupes de façon imprévisible et souvent contradictoire.

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## I. INTRODUCTION

In many constitutional liberal states, members of Muslim communities are expressing and demanding recognition of their religious particularity. Some do so through the adjudicative process; others are asking for a degree of autonomous jurisdiction in educational policies or in the regulation of marriage and divorce. The struggle for cultural freedom, while affirmed as "an ethical imperative, inseparable from respect for human dignity"<sup>1</sup> at the international level, has found its

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<sup>1</sup> *Universal Declaration on Cultural Diversity*, UNESCO, 31<sup>st</sup> sess., (2001) art. 4, online: <<http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>>. "Human rights as guarantees of cultural diversity: The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in

home at the national level as well, specifically in the emergence of “identity politics” as the rising project of Canadian multiculturalism. The judicial enforcement of *mahr*<sup>2</sup> and the establishment of a shariah-based tribunal setup in Ontario as an arbitration board for family law matters have served as recent examples of such religious claims.

In this article, I will address the dilemmas of Muslim women living in Canada as they negotiate between the constitutional and juridical systems of the dominant society, on the one hand, and the Muslim community, on the other. I will examine the limits and perils of contemporary identity politics discourse as expressed more recently in Marion Boyd’s report, *Protecting Choice, Promoting Inclusion*.<sup>3</sup> While the Boyd Report reveals general blindness to the key elements of Islamic family law as a discursive framework of reference, it also fails to penetrate the material and symbolic importance of *mahr*, as well as the complicated incentives *mahr* produces for Muslim women negotiating love, marriage, and divorce in the Canadian context.

My analysis will attempt to uncover the implicit ideological assumptions about law and multiculturalism that have worked to depoliticize the stakes of law<sup>4</sup> in *Protecting Choice, Promoting Inclusion*. With the Islamic institution of *mahr* in the background, I will suggest a methodology to evaluate the costs and benefits of abstract legal rules as they are actually used by the parties in the “shadow of the law”<sup>5</sup> to acquire something from the other party, make concessions, or simply put an end to the relationship. In offering a distributional narrative of legal pluralism, my hope is to demonstrate that while legal

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particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”

<sup>2</sup> The *Encyclopaedia of Islam* defines *mahr* as “the gift which the bridegroom has to give to the bride when the contract of marriage is made and which becomes the property of the wife.” E.J. van Donzel *et al.*, eds., *The Encyclopaedia of Islam*, new ed., vol. 6 (Leiden: E. J. Brill, 1991) at 78.

<sup>3</sup> The Ontario government appointed the Honourable Marion Boyd, former Attorney General of the Province, to determine whether to allow shariah arbitration in family law. Her report is available online at Ministry of the Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (December 2004), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf>> [Boyd Report].

<sup>4</sup> I borrow this methodology from Duncan Kennedy in “The Stakes of Law, or Hale and Foucault!” (1991) 15 *Legal Stud. Forum* 327.

<sup>5</sup> I borrow this expression from Robert Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale L.J.* 950.

orders produce group subjectivities in plural spaces, they also, and more importantly, distribute desires, interests, and bargaining endowments between individuals and groups in an unpredictable and often contradictory fashion.<sup>6</sup> Throughout the article, I will propose an alternative image of legal subjects as *not* merely “law inventing,”<sup>7</sup> and *not* merely “law abiding,” but as bargaining agents who partly invent and partly abide by the legal order that they imagine and respond to simultaneously.

The discussion will proceed as follows. Part II presents the identity politics discourse in Canada as it permeates notions of multiculturalism, private justice, and the shariah court debate. More specifically, my analysis suggests that the Boyd Report has produced either a reification of culture and religion or a neo-liberal understanding of private choice in family law matters. Part III offers a distributive shift: it introduces the Islamic law conditions under which *mahr* is employed and deployed as a bargaining endowment for the husband and wife before, during, and after the dissolution of marriage. In telling the story of Samir and Leila, a fictional couple, Part IV illustrates the conflicting, and often unexpected, social effects created by the husband and wife as they use *mahr* as a tool of relative bargaining power. Through this functionalist reading, I hope to portray *mahr* as a functional institution that produces a series of inconsistent characteristics that we can study.

## II. IDENTITY POLITICS IN CANADA: MULTICULTURALISM, PRIVATE JUSTICE, AND THE SHARIAH COURT DEBATE

In contemporary constitutional democracies, the rise of “identity politics” has been concurrent with the de-legitimation and de-centering

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<sup>6</sup> For an example of such an approach, see Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006); Duncan Kennedy, “Sexual Abuse, Sexy Dressing, and the Eroticization of Domination” in *Sexy Dressing, etc.* (Cambridge: Harvard University Press, 1993) 126 [Kennedy, “Sexual Abuse”].

<sup>7</sup> I refer specifically to the work of Roderick Macdonald & Martha-Marie Kleinhaus, “What is a Critical Legal Pluralism?” (1997) 12 C.J.L.S. 25 at 39, where the authors suggest that “legal subjects” are “law inventing” and not merely “law abiding.” My approach incorporates the insights of legal realism into its analysis of social actors as producers of law, emphasizing the ways in which legal rules create many of the tools through which social agents interact.

of class struggle as a political model for achieving social justice.<sup>8</sup> Although the literature on identity politics is rich and advocates of differentiated citizenship have addressed a wide range of issues,<sup>9</sup> not much attention has been paid to the actual distributional effect of the so-called multicultural policies on the lives of minority citizens. Even less consideration has been given to the complex and subtle distributional impact of state accommodation policies upon women belonging to minority groups, particularly Muslim women.<sup>10</sup> As will be apparent in the analysis below, the state apparatus in the province of Ontario recently discussed the shariah court debate through the lens of religious freedom, multiculturalism, and private choice, and de-emphasized the socio-economic aspects of Muslim women's lives. It spoke of legal pluralism yet failed to observe and predict how specific rules of Islamic family law might affect the contractual conduct of Muslim men and women.

#### A. *The Shariah Court Debate in Ontario*

Ontario's 1991 *Arbitration Act*<sup>11</sup> does not exclude family-related disputes from the scope of arbitration in Ontario. Thus, the door has been open to shariah-based tribunals set up as arbitration boards for family matters.<sup>12</sup> As the act currently stands,<sup>13</sup> an arbitrator may apply

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<sup>8</sup> See Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age" in Nancy Fraser, ed., *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London: Routledge, 1997) 11.

<sup>9</sup> Legal recognition of group identities is discussed by the following authors: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Jeff Spinner, *The Boundaries of Citizenship: Race, Ethnicity, and Nationality in the Liberal State* (Baltimore: John Hopkins University Press, 1994); Judith Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994); Martha Minow, "The Constitution and the Subgroup Question" (1995) 71 *Indiana L.J.* 1; Charles Taylor, "The Politics of Recognition" in Charles Taylor & Amy Gutmann, eds., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25; and Christian Joppke, ed., *Challenge to the Nation State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1998).

<sup>10</sup> For a distributional critique in the context of legislating against the *hijab* in Europe, see Pascale Fournier & Gökçe Yurdakul, "Unveiling Distribution: Muslim Women with Headscarves in France and Germany" in Y. Michal Bodemann & Gökçe Yurdakul, eds., *Migration, Citizenship, Ethnos* (New York: Palgrave Macmillan, 2006) 167.

<sup>11</sup> S.O. 1991, c. 17.

<sup>12</sup> This legal framework is in contrast with that of the province of Quebec. Art. 2639 C.C.Q. 1991, c. 64, a. 2639 reads: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration. An arbitration agreement may not be

any set of norms: shariah law, rabbinical law, or any other set of values or “rules of law” that the parties have “agreed” to.<sup>14</sup> This broad freedom has resulted from the absence of procedural guidelines: there is no requirement to keep a record of arbitral awards, no requirement for the arbitrator to be trained or educated in Canadian law or shariah law, and no requirement to verify the validity of “consent” by both parties before signing the arbitration agreement.<sup>15</sup> Moreover, while a right of appeal<sup>16</sup> exists under the *Arbitration Act*, most arbitration agreements include a section on “opting out of appeal rights.”<sup>17</sup> In cases of judicial review,<sup>18</sup> courts will likely afford a high degree of deference to the arbitrator’s decision on the basis that the arbitrator can claim a specialized

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opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.” Moreover, a motion was passed unanimously in the Quebec legislature on 26 May 2005, which states that no shariah court in family matters will be allowed in the province, and that the laws of Quebec will apply to all its residents, regardless of religion, ethnicity, or culture. See Rhéal Séguin, “Quebec squashes idea of Islamic tribunals” *The Globe and Mail* (27 May 2005) A1.

<sup>13</sup> On 11 September 2005, the McGuinty government announced: “[T]here will be no *Sharia law* in Ontario ... There will be no religious arbitration in Ontario ... There will be one law for all Ontarians.” Colin Freeze & Karen Howlett, “McGuinty government rules out use of sharia law” *The Globe and Mail* (12 September 2005) A1. It is worth noting that the *Family Statute Law Amendment Act, 2005* proposes amendments to the *Arbitration Act* and the *Family Law Act*, as well as to the *Children’s Law Reform Act*. On a day to be named by proclamation of the Lieutenant Governor, such acts will be amended and substantially modified by S.O. 2006, c. 1.

<sup>14</sup> In fact, s. 32(1) of the *Arbitration Act* allows parties to agree to have their family law disputes resolved using any “rules of law” with no consideration to the applicable standards of the *Family Law Act*, the *Divorce Act*, or the *Children’s Law Reform Act*.

<sup>15</sup> See Jean-François Gaudrault-Desbiens, “The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario” (2005) 16:1 *World Arb. & Mediation Rep.* 18 at 20: “The vocation of private justice is, well, to remain as private as possible. This means that potentially unjust awards are never submitted to the broader, quasi-democratic scrutiny of the public institutions. In that, arbitral awards stand in stark contrast with public judgments issued by State courts. While private arbitrators need only to justify their awards, if at all, to the parties who appear before them, state judges, not only must ground their reasoning on publicly debated norms, they must also appeal to a form of public reason. Indeed, the legitimacy of a judicial judgment is in large part related to the court’s ability to persuade.”

<sup>16</sup> *Supra* note 11, s. 45.

<sup>17</sup> In “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women” (2004) 1:1:7 *Muslim World J. Hum. Rts.* 1 at 6, Natasha Bakht points out that “[g]iven that the purpose of arbitration is typically to avoid the traditional court system, it is likely that parties will contract out of their appeal rights in arbitration agreements, resulting in very limited judicial oversight through the mechanism of judicial review.”

<sup>18</sup> *Supra* note 11, s. 46.



expertise, such as religious knowledge and experience in interpreting religious texts.<sup>19</sup>

On 21 October 2003, the Islamic Institute of Civil Justice,<sup>20</sup> a Muslim organization established by a retired Ontario lawyer, Syed Mumtaz Ali, proposed to set up an Islamic tribunal where Islamic law would be applied in adjudicating family law matters through voluntary arbitration.<sup>21</sup> This proposal gave rise to strong reactions in the mainstream press and the Muslim community.<sup>22</sup> In response to these concerns, the Attorney General of Ontario appointed Marion Boyd, the former provincial Attorney General, to review the *Arbitration Act* and decide “what differential impact, if any, arbitration may have on women, elderly persons, persons with disabilities, or other vulnerable groups.”<sup>23</sup>

At the national level, numerous non-governmental organizations offered their political visions to Marion Boyd by way of oral and written submissions. The Canadian Council of Muslim Women (CCMW),<sup>24</sup> the National Association of Women and the Law (NAWL),<sup>25</sup> and the National Organization of Immigrant and Visible Minority Women<sup>26</sup> issued a statement with a number of substantive concerns about the proposed arbitration tribunal and recommended that family matters be

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<sup>19</sup> See Bakht, *supra* note 17 at 6: “Judicial review, unlike the appeal process, tends to be rooted in matters of a procedural nature. The standard of review used by the courts in judicial review of an arbitral award is a complex test that incorporates a variety of different factors. Where a matter is judicially reviewed, courts will usually respect and enforce the terms of an award unless the decision of the arbitrator is unreasonable or patently unreasonable.”

<sup>20</sup> Syed Mumtaz Ali & Rabia Mills, “Darul Qada: The Beginnings of a Muslim Civil Justice System in Canada,” online: The Islamic Institute of Civil Justice <<http://muslim-canada.org/DARLQADAform2andhalf.html>>.

<sup>21</sup> “Some Canadians may use Sharia law” *Al Jazeera.Net* (26 December 2003), online: <<http://english.aljazeera.net/NR/exeres/8AD9D094-4356-4428-BE23-2A6C1FAA19E6.htm>>: “Canada’s Islamic Institute of Civil Justice plans to begin arbitrating family and business disputes early next year using Muslim personal law in Ontario. Eventually, operations will be expanded across Canada.”

<sup>22</sup> For a collection of newspaper articles on this topic, see generally online: Stop Religious Courts in Canada <<http://muslimchronicle.blogspot.com>>; online: International Campaign Against Shari’a Court in Canada <<http://www.nosharia.com>>; and online: The Canadian Society of Muslims <<http://muslim-canada.org>>.

<sup>23</sup> Boyd Report, *supra* note 3 at 5.

<sup>24</sup> Canadian Council of Muslim Women, “Canadian Muslim Women at the Crossroads: From Integration to Segregations” (18 November 2006), online: <<http://www.ccmw.com>>.

<sup>25</sup> See National Association of Women and the Law, online: <<http://www.nawl.ca>>.

<sup>26</sup> See National Organization of Immigrant and Visible Minority Women of Canada, online: <<http://www.noivmwc.org>>.

excluded from the scope of the *Arbitration Act*.<sup>27</sup> According to their submissions, separate arbitration tribunals for settling family matters under shariah/Muslim family law would ghettoize and further marginalize Muslim women. Homa Arjomand founded the International Campaign Against the Shari'a Court in Canada<sup>28</sup> and called for a moratorium on family arbitration, whether in existing rabbinical courts or Islamic tribunals. Similarly, the Muslim Canadian Congress expressed its opposition to the shariah court on the basis that such division was in fact "racist."<sup>29</sup> Other Muslim organizations, led mostly by men, argued in favour of the implementation of a shariah court in Canada, including Masjid El Noor's Muslim arbitration board,<sup>30</sup> the Canadian Society of Muslims,<sup>31</sup> and several individual Imams and Islamic leaders.

#### B. *Locating Protecting Choice, Promoting Inclusion*

In many ways, *Protecting Choice, Promoting Inclusion* is a victory for identity politics. Based on the conclusion that there is no "legal evidence" of systemic discrimination against women in the

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<sup>27</sup> Bakht, *supra* note 17.

<sup>28</sup> See online: International Campaign Against Shari'a Court in Canada <<http://www.nosharia.com>>.

<sup>29</sup> Rocco Galati & The Muslim Canadian Congress, "Submissions by Muslim Canadian Congress Review of Arbitration Process by Marion Boyd," Submission to Marion Boyd (26 August 2004) [unpublished]: "In practical and realistic terms, what began as a demand to introduce 'Sharia Law' has now dishonestly mutated into the same thorn by any other name, and is still offensively unacceptable for the following reasons ... This insidious and discriminatory ghettoization and marginalization, into 'out of sight' only plays into: (i) The hands of the extremist political and ideological agenda of a certain sector of Muslim-Canadian proponents of 'Muslim Law' that is antithetical to the Canadian Constitution and values; and (ii) Equally into the hands of the reactionary, intolerant and otherwise racist segments of Canadian non-Muslim society who want nothing better than to exclude Muslims from the mainstream; all of this, behind the dishonest guise of religious tolerance and accommodation."

<sup>30</sup> Mubin Shaikh, "Shariah Tribunals and Masjid El Noor: A Canadian Model," Submission to Marion Boyd (24 August 2004) [unpublished]: "It is ludicrous to suggest that the majority of Muslim women oppose the Shariah, otherwise they would not be Muslim. ... The fact is, Shariah Tribunals have been in operation already for many years and nothing terrible has occurred. It is clear that the hyperbole and polemic that has been promoted has totally skewed the reality of what is happening, 'on the ground.' The Islamic nature of this Tribunal attracts people to pursue their disputes through it versus the courts. The added privacy and confidentiality is paramount (particularly for women) if this is to have credibility."

<sup>31</sup> See online: The Canadian Society of Muslims <<http://muslim-canada.org>>.

absence of arbitral awards to this effect,<sup>32</sup> *Protecting Choice, Promoting Inclusion* confirms that religious freedom is a decisive factor in defining minority groups in the Canadian political arena. *Protecting Choice, Promoting Inclusion* rests upon two interdependent and complementary theses: first, the primacy of multiculturalism as a constitutional guiding principle; and second, the significance of “freedom of contract” in religious and family law matters. Ultimately, the reasoning presented in the report transforms the discussion from a debate about gender equality and economic fairness into a set of speculations on the necessity of accepting and valuing the Other as the Other, as well as on the non-interventionist role of the Canadian state in the “private sphere.”

First, *Protecting Choice, Promoting Inclusion* relies extensively on currently circulating narratives about the true meaning of “multiculturalism”<sup>33</sup> as a Canadian political project whose central unit is not the individual or the state but the minority group. Such a project, referred to as “differentiated citizenship”<sup>34</sup> by Iris Young, aims at granting traditionally marginalized cultural communities jurisdictional autonomy over legal domains such as education and family law. As demonstrated in the identity-based arguments expressed below, the premises and normative commitments of *Protecting Choice, Promoting Inclusion* explicitly push for the recognition of distinct racial or religious groups in Canada, and insist on the articulation of a multicultural project that protects expression and values in the name of community standards:

The use of religious principles in arbitrations of family law matters illustrates the fundamental role of family law in delineating who is inside and who is outside the community according to the community's own norms. Being able to police these boundaries is a basic aspect of cultural self-determination for all communities. ...

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<sup>32</sup> Boyd Report, *supra* note 3 at 133: “The review did not find any evidence to suggest that women are being systematically discriminated against as a result of family law issues.” The arbitration agreement is signed by the parties to authorize the arbitrator to act, whereas the arbitral award is the decision or reasons of the arbitrator. The irony lies in the fact that arbitration is by definition a private system that is entered into by agreement, without any duty on the part of the arbitrator to render the arbitral award public. Hence, it is hardly surprising that Marion Boyd did not find any “legal evidence,” the evidence being of a “private” nature.

<sup>33</sup> Section 27 of the Canadian *Charter* reads as follows: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 27.

<sup>34</sup> Kymlicka, *supra* note 9 at 26.

Allowing and supporting communities' and individuals' links to cultures (including their religions) of origin is a central aspect of multiculturalism.<sup>35</sup>

Yet in deciding to advocate, embrace, and adopt racial multiculturalism, and in naming religious subjects, desires, and realities, *Protecting Choice, Promoting Inclusion* produces benefits with implicit costs. As a response to the claim that well-meaning accommodation policies by the state may allow systematic discrimination against women in a minority group, *Protecting Choice, Promoting Inclusion* simply transcends the liberal dichotomy between gender equality and religious freedom/multiculturalism by (re)organizing and (re)locating the first *as part of* the latter. Under this view of racial multiculturalism, the absence of "equality" becomes a defining feature of the minority group's identity:

Leaders within the Muslim community have repeatedly made statements that justify unequal treatment of women under Muslim law. As a result, many Ontarians have understandable difficulty in believing that the rights of women in arbitrations undertaken by Imams or other male members of the Muslim communities, will be respected ... . Nonetheless, incorporating cultural minority groups into mainstream political processes remains crucial for multicultural, liberal democratic societies.<sup>36</sup>

Second, by embracing identity politics, *Protecting Choice, Promoting Inclusion* portrays the multicultural state as having little justification for intervening in a minority group's affairs, on the theory that such intervention would unduly restrict transactional relationships in arbitration. This approach is based on a liberal conception of freedom of contract that regards unequal bargaining power as economically justified in the name of "freedom to choose":

People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law. In those areas where the state has chosen to allow people to order their lives according to private values, the state has no place enforcing any particular set of values, religious or not. ... Accepting this form of agreement rests on the notion that the parties entering into such an agreement are capable of making such decisions for themselves. State scrutiny of each privately ordered arrangement implies that no one is capable of making decisions on their own behalf. This is a degree of paternalism which I would find intrusive and inappropriate.<sup>37</sup>

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<sup>35</sup> Boyd Report, *supra* note 3 at 89-90.

<sup>36</sup> *Ibid.* at 93.

<sup>37</sup> *Ibid.* at 75-76.

Not only is the so-called non-intervention of the state already a form of intervention,<sup>38</sup> but the “private sphere” that allows people to make “bad choices” is, ironically, the very creation of the state. Absent the *Arbitration Act*, people would be required to take their family law disputes to Ontario’s Superior Courts of Justice and engage in a public and transparent process. Hence, the *Arbitration Act* does not shelter pre-existing private space; it potentially carves off elements of public space, *making* them private.<sup>39</sup> If the legal realist, Robert Hale, is right in affirming that the background legal rule of property is infused with the invisible hand of state regulation,<sup>40</sup> is the arbitration agreement—based on the parties’ “consent” to be bound by Islamic family law—similarly affected by the state’s shadow? Is the often unproblematic and even celebrated “private” sphere already coloured by the disciplinary power of the state? These questions remain out of sight and, in fact, are never problematized, as *Protecting Choice, Promoting Inclusion* typically fails to highlight the distributive stakes involved, especially for Muslim women, in allowing religious arbitration in family law matters.

In claiming that Muslim women should be free to live as they wish in the private sphere, *Protecting Choice, Promoting Inclusion* adopts a neo-liberal vision of choice that disregards the overall socio-economic and distributive background of Muslim women living in Canada. Hence, factors such as the susceptibility to marriage at a younger age,<sup>41</sup> the precariousness of immigration status,<sup>42</sup> the higher

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<sup>38</sup> See Robert Hale, “Bargaining, Duress, and Economic Liberty” (1943) *Colum. L. Rev.* 603 at 603 [Hale, “Bargaining”].

<sup>39</sup> The author would like to thank Robert Leckey for his precious comments on this part of the article.

<sup>40</sup> Hale, “Bargaining,” *supra* note 38 at 625: “The market value of a property or a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others.” See also Robert Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38 *Pol. Sci. Q.* 470 at 473 [Hale, “Coercion and Distribution”]: “It is the law that coerces him into wage-work under penalty of starvation—unless he can produce food. Can he? ... This again is the law of property.” See also Hale, “Bargaining,” *supra* note 38 at 628: “It is with unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining.”

<sup>41</sup> In Canada, Muslim women marry at a younger age: “over 18% of them compared with 5% of all women, were married before reaching the age of 24 years.” See Canada Council of Muslim Women, “Muslim Women in Canada: Fact Sheets” (November 2004), online: <[http://www.ccmw.com/publications/Fact\\_Sheets/Fact%20Sheet%201%20e.pdf](http://www.ccmw.com/publications/Fact_Sheets/Fact%20Sheet%201%20e.pdf)> at 2 [“Fact Sheets”].

rate of unemployment,<sup>43</sup> and the segregation into sectors of low-income jobs<sup>44</sup> are neither mentioned nor considered in the analysis of what “consent” represents. *Protecting Choice, Promoting Inclusion* thus produces an abstract vision of multiculturalism: racial and religious subjects are not named, and the broader landscape in which they coexist is never uncovered. The disciplinary power of legal rules will be explained in Part III, in an attempt to better understand Islamic law as a site of ongoing and subversive struggle over identities, desires, and interests.

### III. THE DISTRIBUTIVE SHIFT: “ISLAMIC LAW IN ACTION,” AND *MAHR* AS A BARGAINING ENDOWMENT

The ideological premises underlying *Protecting Choice, Promoting Inclusion* reflect the significance of “identity politics” as a growing political project in Canada. Yet in referring to Islam, the report does not adequately define shariah law. In this part, I will present “Islamic law in action” by using the concrete institution of *mahr* as a bargaining endowment for the parties involved in a marital relationship. *Mahr*, meaning “reward” (“*ajr*”) or “nuptial gift” (“*sadaqa*” or “*faridah*”), is the expression used in Islamic family law to describe the “payment that the wife is entitled to receive from the husband in consideration of the marriage.”<sup>45</sup> *Mahr* is usually divided into two parts: prompt *mahr* (*muajjal*), which is paid at the time of marriage; and deferred *mahr* (*muwajjal*), which is paid at the termination of marriage by death, divorce, or other agreed events. Through a functionalist

<sup>42</sup> “Nearly one-half (48 per cent) of Muslim women immigrated to Canada in the 1990s, and 30 per cent arrived during 1996-2001” (*ibid.* at 1). See also the publications of the National Organization of Immigrant and Visible Minority Women of Canada, *supra* note 26, whose objective is to “put in place strategies that will combat sexism racism, poverty, isolation and violence.”

<sup>43</sup> “The rate of unemployment (16.5 per cent) among Muslim women is more than double the rate for all Canadian women (7.2 per cent).” “Fact Sheets,” *ibid.* at 3.

<sup>44</sup> In spite of their higher levels of education, Muslim women are concentrated in lower paying clerical, sales, and service occupations. The average annual income of a Muslim woman was “\$16,010, compared with \$22,885 for all women in Canada ... [Moreover,] the majority (84%) of Muslim women earned less than \$30,000 compared with 72% of all women.” “Fact Sheets,” *ibid.*

<sup>45</sup> John L. Esposito & Natana J. DeLong-Bas, *Women in Muslim Family Law*, 2d ed. (Syracuse: Syracuse University Press, 2001) at 23. The *Encyclopaedia of Islam* underlines the fact that *mahr* must be paid to the wife herself and not to her guardian. See *supra* note 1.

reading of *mahr*, I hope to offer a distributional narrative, that is concerned primarily with the social effects created by the husband and wife when they use *mahr* as a tool of relative bargaining power in the negotiation of contractual obligations related to the family. By playing with the amount of *mahr* as well as other factors colouring the marital relationship, I will tell the story of a fictional couple, Samir and Leila. My intent is to provide the reader with an insight into the contradictory, and often unexpected, effects and uses of *mahr* by both parties.

In order to assess the economic and functional importance of *mahr* and the negotiating structure it designs for both spouses, I will present *mahr* in relation to a set of subrules that regulates the rights and duties of husband and wife under Islamic family law more broadly and affects the internalization of different costs and bargaining endowments as the spouses navigate in time (before, during, and after marriage). I will introduce the functional, fragmented *mahr*, and explore its journey as it permeates a broad range of personal decisions in response to questions such as: *Whether* to marry *this* man? *When* to move to the marital residence? *When* to have sex for the first time *and how*? *Whether and when* to ask for divorce? *How many* children to have?

#### A. *Mahr Before Marriage: The Initiation Mahr*

An Islamic “marriage contract can only be concluded through the principles of offer (*ijab*) and acceptance (*qabul*) by the two principals or their proxies.”<sup>46</sup> *Mahr* is often introduced in the literature as a symbolic representation of this contract:

*Mahr*, when presented and accepted, makes a symbolic representation of the earnestness of each spouse to live with the other a mutually cooperative and trustful life. In other words, by giving and taking *mahr*, each spouse takes the vow to stand by the other with the purpose of attaining transcendent tranquility under the chaste alliance known as *nikah* (marriage).<sup>47</sup>

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<sup>46</sup> Jamal J. Nasir, *The Islamic Law of Personal Status*, 3d ed. (New York: Kluwer Law International, 2002) at 45 [Nasir, *Personal Status*].

<sup>47</sup> M. Afzal Wani, *The Islamic Law on Maintenance of Women, Children, Parents & Other Relatives: Classical Principles and Modern Legislations in India and Muslim Countries*, 1st ed. (Noonamy, Kashmir: Upright Study Home, 1995) at 193 [Wani, *Islamic Law on Maintenance*].

In its legal structure, Islamic marriage is a contract of exchange with defined terms that legally affect each spouse in various ways.<sup>48</sup> In this part, I will introduce the concept of *Initiation Mahr*: the *mahr* partially paid at the time of marriage called prompt *mahr* (*muqaddam*), and the *mahr* partially deferred until divorce or death (*muakkhar*), which *initiates* the set of rights and duties conferred to husband and wife as a regulatory system during their marriage.

Under Islamic family law, marriage establishes a reciprocity system in which each party is assigned a set of contractual rights that will confer a duty towards the other party. Upon marriage, the husband acquires the right to the wife's obedience and sexual availability. The wife acquires the right to her *mahr*, to maintenance, and to fair and just treatment by the husband. I will first review each of the contractual rights and duties as isolated from one another, and then explore the motivations and effects they are expected to produce individually, as well as relationally.

B. *Him: The Right to the Wife's Obedience to Him / The Right to Her Sexual Availability*

Obedience is a right which the husband can demand from his wife and a duty that she must fulfill at all times. It involves abiding "by the Islamic instructions regarding her behavior toward the husband,"<sup>49</sup> obeying "all his lawful commands for the duration of marriage,"<sup>50</sup> and not leaving the house without his permission or for a reasonable cause.<sup>51</sup> The right to be sexually available requires the wife to give her husband "free access to herself at all lawful times."<sup>52</sup>

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<sup>48</sup> See Lama Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt" (2004) 37 Vand. J. Transnat'l L. 1043 at 1063.

<sup>49</sup> Wani, *Islamic Law on Maintenance*, *supra* note 47 at 49.

<sup>50</sup> Nasir, *Personal Status*, *supra* note 46 at 98.

<sup>51</sup> David Pearl & Werner Menski, *Muslim Family Law*, 3d ed., (London: Sweet & Maxwell, 1998) at 178: "The concept of obedience is closely related to the wife's physical presence in the matrimonial home and her duty not to leave it without the husband's permission or for a legitimate reason." See also Muhammad Jawad Maghniyyah, *The Five Schools of Islamic Law*, 1st ed., (Qum, Iran: Anssariyan, 1995) at 359: "If a wife leaves her husband's home without his permission or refuses to reside in a house which fits her status, she shall be considered 'disobedient' and shall not be entitled to her maintenance according to all the schools."

<sup>52</sup> Nasir, *Personal Status*, *supra* note 46 at 98.



C. *Her: The Right to Maintenance (Nafaqah) / The Right to a Fair and Just Treatment by the Husband*

Maintenance, "the husband's primary obligation,"<sup>53</sup> includes food, lodging, and clothing<sup>54</sup> for the wife and children<sup>55</sup> during marriage, as well as for the period of *iddah*<sup>56</sup> (three months) following the dissolution of marriage. Doctor Wani, Islamic expert on the institution of *mahr*, specifies that "the purpose of the obligation of nafaqah is to create a chaste social order, to strengthen family ties and to concretize the family bonds. The husband is bound to enjoy his wealth at home only and the wife has to obtain her necessities only through legitimate means, that is, through her husband."<sup>57</sup> Maintenance as a central duty for the husband, and as a right for the wife, constructs man as the "protector."<sup>58</sup>

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<sup>53</sup> Esposito & DeLong-Bas, *supra* note 45 at 25.

<sup>54</sup> Jamal J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*, 2d ed. (London: Graham & Trotman, 1994) at 59: "Once married, a man bears the primary responsibility to sustain his wife and family financially, regardless of the woman's wealth. The wife is entitled to maintenance according to her husband's means, including food, clothing, housing, toiletries, medical attention, and servants for those women at certain social positions."

<sup>55</sup> Nasir, *Personal Status*, *supra* note 46 at 174: "[M]aintenance is a right of the minors who have no property, on their father."

<sup>56</sup> Wani, *Islamic Law on Maintenance*, *supra* note 47 at 195: "[W]here the basic fibre of the home is hit and marriage dissolution takes place the obligation of nafaqah no more survives. It continues only up to expiry of the period of Iddah during which the nikah is notionally supposed to continue so that the opportunity of reconciliation is available to the parties, and disputes about the parentage of children avoided." See Esposito & DeLong-Bas, *supra* note 45 at 26-27: "A wife is also entitled to maintenance during the period of *iddah* following a divorce, and if she ceases to menstruate before the completion of this period, the wife is entitled to maintenance until she completes three menstrual cycles. The ruling is intended to protect women who may be pregnant."

<sup>57</sup> Wani, *Islamic Law on Maintenance*, *supra* note 47 at 195.

<sup>58</sup> *Ibid.*: "Basically the obligation of the husband towards the wife is that of quwwam (Protector or maintainer) and when the children are born his liability extends to maintain them also."

D. *The Islamic Marriage Contract as Reciprocity: When He Meets Her*

The obedience of the wife and her sexual availability,<sup>59</sup> two crucial "duties" of the wife often referred to by Islamic jurists as "conjugal society,"<sup>60</sup> give rise to the right to maintenance. These are so interrelated<sup>61</sup> that as soon as she refuses sex or is otherwise disobedient, the duty of maintenance is temporarily suspended.<sup>62</sup> Where a disobedient wife is not legally entitled to maintenance,<sup>63</sup> a negligent husband similarly "loses his right to retain the wife on failure to maintain her."<sup>64</sup>

E. *The Initiation Mahr and What It Entails*

*Mahr* occupies a significant role in the marital relationship, to the extent that all of the wife's duties are delayed until *mahr* is paid to her. For instance, the wife may refuse sexual intercourse<sup>65</sup> and refuse to move to the marital residence<sup>66</sup> upon marriage, duties that she would

<sup>59</sup> Nasir, *Personal Status*, *supra* note 46 at 98 mentions that maintenance is due if the wife "places, or offers to place, herself in the husband's power so as to allow him free access to herself at all lawful times."

<sup>60</sup> Maghniyyah, *supra* note 51 at 316: "Conjugal society involves providing the husband sexual access as well as not leaving the house without his permission."

<sup>61</sup> Esposito & DeLong-Bas, *supra* note 45 at 25 express this reciprocity in the following terms: "In return for her maintenance, the wife owes the husband her faithfulness and her obedience."

<sup>62</sup> *Ibid.*: "Maintenance ... continues unless she refuses him conjugal rights or is otherwise disobedient."

<sup>63</sup> Wani, *Islamic Law on Maintenance*, *supra* note 47 at 195: "a nashiza (refractory wife) has no right to be maintained by the husband."

<sup>64</sup> *Ibid.*

<sup>65</sup> A. Schleifer, "The Legal Aspects of Marriage According to Hanafi Fiqh" (1985) 29:4 *The Islamic Q.* at 193-219: "If the whole *mahr* is stipulated in the contracts as "deferred" (to be paid in the future), the woman is not at liberty to refuse the embraces of her husband, as she has dropped her right by agreeing to the "deferred" dowry."

<sup>66</sup> Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, 4th ed. (Delhi: Oxford University Press, 1974) at 141: "[I]f the husband files a suit for restitution of conjugal rights before cohabitation, non-payment of prompt dower is a complete defence; but after cohabitation, the proper course for the court is to pass a decree for restitution conditional on payment of prompt dower." See Esposito & DeLong-Bas, *supra* note 45 at 25: "The guardian of a minor wife whose husband refuses to pay prompt dower may refuse to send the wife to her husband's house." See Schleifer, *ibid.*: "If all or part of the *mahr* is stipulated as "prompt," a woman may refuse

otherwise have to fulfill as a wife,<sup>67</sup> as long as *mahr* has not been received. She may even go on a journey without her husband's consent, an act that would otherwise constitute disobedience (*nashuz*).<sup>68</sup>

It may be helpful to call this initiating bargaining standpoint the initiation *Mahr*. By virtue of the power structure it designs, the initiation *mahr* presupposes a give-and-take relationship in which the differentiated line of normalcy/expected behaviour has been drawn along gender lines. But whereas the wife may fail to perform *all* marital duties until payment of *mahr*, she will still enjoy the benefits of maintenance. As specified by David Pearl:

Problems arise in relation to the payment of the prompt dower, not least when wives refuse to have sexual relations until the prompt dower has been paid. The matter will often come to court on the basis of a suit initiated by the husband for a decree for restitution of conjugal rights. The defence raised by the wife will invariably be that she has denied sexual intercourse to the husband because the dower has not been paid. ... [R]efusal to have sexual intercourse under these circumstances does not constitute disobedience (*nashuz*), and the husband remains under a duty to continue to provide his wife with maintenance.<sup>69</sup>

Once the wife receives her prompt *mahr*, she must immediately start *acting as a wife* (be obedient, have sex when her husband demands it, and take care of the house) *in exchange for* maintenance and a fair and just treatment by the husband. But since the payment of the deferred *mahr* will depend directly on the behaviour of the parties during marriage and upon divorce, it always remains in the shadow of

cohabitation with her husband until she receives her dowry of him, as the dowry is payment for cohabitation rights."

<sup>67</sup> Maghniyyah, *supra* note 51 at 316: "Having received the agreed Mahr, the woman must then move to her husband's residence and provide him with her "conjugal society." Conjugal society involves providing the husband sexual access as well as not leaving the house without his permission."

<sup>68</sup> Schleifer, *supra* note 65 at 205: "She may also resist her husband carrying her on a journey until she gets the dowry from him. And the husband has no power to restrain his wife from going on a journey, or from going abroad or visiting her family, until such time as he has paid the whole of the 'prompt' *mahr*, because a husband's right to keep his wife at home does not exist until after payment of the return for it."

<sup>69</sup> Pearl & Menski, *supra* note 51 at 181. See Esposito & DeLong-Bas, *supra* note 45 at 25: "Maintenance ... also continues unless she refuses conjugal rights or is otherwise disobedient. However, if her behaviour is caused by non-payment of prompt dower ... maintenance must still be paid." See generally M.A. Wani, *Maintenance Rights of Muslim Women: Principles, Precedents & Trends* (New Delhi: Genuine Publications, 1987) at 18: "Under Islamic law the wife can lawfully refuse to live with her husband on the ground of non-payment of prompt *mahr* (dower) without losing her right to maintenance."

the relationship.<sup>70</sup> I will first trace the legal portrait of *mahr's* ritualistic and exclusive place in the Islamic family law of divorce and inheritance (what I will call *Talaq Mahr*, *Khul Mahr*, *Faskh Mahr*, and *Inherited Mahr*), in an attempt to understand how *mahr* can be dynamically employed and deployed in a series of different and contradictory purposes and scenarios.

F. *Mahr at Divorce: Talaq Mahr, Khul Mahr, and Faskh Mahr*

Islamic family law structures the economic relations of the spouses and maintains its regulatory power at the dissolution of marriage. Legal institutions such as *talaq* divorce, *khul* divorce, and *faskh* divorce determine the degree to which each party may or may not initiate divorce and the different costs associated with it. As pointed out by Doctor Wani, *mahr* will play itself out differently under each institution: "The position of a divorced woman's claim to *mahr* can be determined with reference to the respective form of marriage dissolution followed in a particular case."<sup>71</sup> I will review each institutional setting independently.

G. *Talaq Divorce / Talaq Mahr: Repudiation by the Husband Without the Wife's Consent*

According to classical Islamic family law, *talaq* (repudiation) is a unilateral act which dissolves the marriage contract through the declaration of the husband only. The law recognizes the power of the husband to divorce his wife by saying "talaq" three times<sup>72</sup> without any need for the enforcement of his declaration by the court.<sup>73</sup> What comes with this unlimited "freedom" of the husband to divorce at will and on any grounds is the (costly) obligation to pay *mahr* in full as soon as the

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<sup>70</sup> See Mnookin & Kornhauser, *supra* note 5.

<sup>71</sup> M. Afzal Wani, *The Islamic Institution of Mahr: A Study of Its Philosophy, Working & Related Legislations in the Contemporary World*, 1st ed. (Kashmir: Qazi 1996) at 183.

<sup>72</sup> If the husband says *talaq* only once or twice, he can rescind, but if he says "talaq, talaq, talaq," this formulation will bind him as well as her to a divorce.

<sup>73</sup> Dawoud Sudqi El Alami & Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: Kluwer Law International, 1996) at 22: "The most common method by which marriages are dissolved in the Muslim world is by the husband exercising his right of *talaq* ... Islamic law grants to the husband the right unilaterally to terminate the marriage at will without showing cause and without having recourse to a court of law."

third *talaq* has been pronounced. *Talaq mahr*, this “provision for a rainy day,”<sup>74</sup> is conceived by Islamic jurists as a “powerful limitation”<sup>75</sup> on the possibly capricious exercise of the husband, as well as a form of “compensation”<sup>76</sup> to the wife once the marriage has been dissolved.

Henceforth, *talaq mahr* will be referred to as “the deterrent *mahr*”: the higher *mahr* is, the higher chances are that the husband will hesitate before repudiating his wife.<sup>77</sup> In most cases, this will be a source of security for wives who do not want a divorce. For those who do,<sup>78</sup> however, high *mahr* means the opposite of security: it will only be at the price of behaving in a disgraceful manner that the wife will obtain a *talaq* from her husband. Judith Tucker, in analyzing peasant women in nineteenth-century Egypt, affirms that “many women who wanted a divorce preferred that their husbands repudiate them”<sup>79</sup> because of “the material advantages of *talaq*.”<sup>80</sup> The forms of disobedience used by Muslim women to push men into repudiation have, of course, varied,

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<sup>74</sup> Fyzee, *supra* note 66 at 133: “Thus Islam sought to make mahr into a real settlement in favour of the wife, a provision for a rainy day and, socially, it became a check on the capricious exercise by the husband of his almost unlimited power to divorce. A husband thinks twice before divorcing a wife when he knows that upon divorce the whole of the dower would be payable immediately.”

<sup>75</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982) at 167: “The obligation of the husband to pay the Mahr in full in the case of repudiation, acts as a powerful limitation of his freedom to repudiate.” See N.J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964) at 207: “A further device formulated by the law to safeguard the wife’s position was that of deferred dower. Payment of a portion of the dower could be postponed by agreement of the parties until the termination of the marriage, and if the amount so stipulated was high enough it would obviously provide an effective brake upon the capricious exercise of the right of repudiation by the husband.” Judith E. Tucker, *Women in Nineteenth-century Egypt* (Cambridge: Cambridge University Press, 1985) at 54: “The male right to divorce his wife without cause or court process was limited, in practice, by economic relations within the family.”

<sup>76</sup> Esposito & DeLong-Bas, *supra* note 45 at 35: “Considering the husband’s unilateral right to divorce and the potential wrong to which the wife is exposed, *Quranic* verses cite many conditions granting the wife compensation once the divorce is carried out . . . . If the marriage was consummated, the total amount of dower is due immediately.”

<sup>77</sup> Homa Hoodfar, “Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities” in Homa Hoodfar, ed., *Shifting Boundaries in Marriage and Divorce in Muslim Communities* (Montpelier: Women Living Under Muslim Laws, 1996) 121 at 131: “[T]he larger the sum of the mahr, the more effective the wife’s leverage.”

<sup>78</sup> Throughout this section, I assume that the woman does want a divorce. I am perfectly aware that the desire to divorce does not necessarily reflect reality.

<sup>79</sup> Tucker, *supra* note 75 at 55.

<sup>80</sup> *Ibid.*

and surely depended on the historical and social context of the society in which they lived. In her study, Tucker noticed the following:

Having enlisted the cooperation of the local shaykh al-bald, one woman managed to bully her husband into pronouncing a divorce. Another used blackmail: she threatened to take her husband to court and claim that he had stolen her jewelry unless he divorced her; so she "frightened him" and he indeed complied with a repudiation.<sup>81</sup>

In this regulatory regime, there is no shortcut for a wife who wants to obtain a divorce but cannot obtain the consent of her husband. A wife may unilaterally terminate her marriage and without cause only when such power has been explicitly delegated to her by her husband in the marriage contract.<sup>82</sup> Otherwise, she may apply to the courts either for a *khul* or a *faskh* divorce.

#### H. *Khul Divorce / Khul Mahr: Divorce by Mutual Consent but at What Price?*

*Khul* divorce can be initiated by the wife with the husband's prior consent; however, the qadi must grant it, and divorce by this method dissolves the husband's duty to pay the deferred *mahr*.<sup>83</sup> *Khul* divorce is therefore *the exchange* of *mahr* for "freedom,"<sup>84</sup> a form of divorce that has "often proved very costly indeed."<sup>85</sup> Unsurprisingly, the Arabic word *khula* means "to take off one's dress." As suggested by Mir-Hosseini:

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<sup>81</sup> *Ibid.*

<sup>82</sup> Muhammad Abu Zahra, "Family Law, in Origin and Development of Islamic Law" in Majid Khadduri & Herbert J. Liebesny, eds., *Law in the Middle East* (Washington: Middle East Institute, 1955) 132 at 140-41.

<sup>83</sup> See El Alami & Hinchcliffe, *supra* note 73 at 27-28. See Abdal-Rehim Abdal-Rahman Abdal-Rahim, "The Family and Gender Laws in Egypt During the Ottoman Period" in Amira El Azhary Sonbol, ed., *Women, the Family, and Divorce Laws in Islamic History* (Syracuse: Syracuse University Press, 1996) 96 at 105: "A large portion of the cases that wives brought before the *qadi*, however, involved husbands who were unwilling to divorce and who had not broken any of the conditions in the marriage contract. In such cases, the wife demanded *khul* (repudiation), by which the *qadi* allowed for a legal separation, but on the condition that the wife ... pay back all or part of the dowry paid to her by her husband at the time of marriage."

<sup>84</sup> This is reflected in the old Persian saying: "I release you from my mahr to free my life. (mahram halal janam azad)," quoted in Ziba Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco*, rev. ed. (London: St. Martin's Press, 2000) at 82.

<sup>85</sup> Tucker, *supra* note 75 at 54.

Both the types of marriage dissolution and the nature of the payments involved suggest that a man's right to divorce emanates from his paying *mahr*. He has to forfeit what he paid as *mahr* if he takes the initiative to repudiate the wife; and he regains the *mahr* if the wife initiates the termination of the contract. Consistent with the logic of marriage as a contract, his right can be relinquished only through compensation; therefore the wife must pay in order to be on an equal footing with him.<sup>86</sup>

In her study of peasant women in nineteenth-century Egypt, Tucker further argues that, at times, the economic losses entailed in waiving *mahr* were so difficult that they would act as "a brake on [wives'] recourse to *khul* proceedings."<sup>87</sup>

Before embarking on a *khul* divorce, the distributional conflict for the wife who seeks a divorce becomes the following: what are the benefits to be gained from divorce as opposed to the costs of freedom? Benefits may include leaving an unhappy relationship, putting an end to obedience, having sex with an attractive neighbour, and going to an unknown destination without the husband's permission. Costs may include waiving *mahr*, possible exclusion from the extended family and the community,<sup>88</sup> taking the blame for the dissolution of marriage, and being worse off economically as a result of the absence of maintenance at the end of the *iddah* period.

For the husband, the distributional script could be phrased in the following manner: what are the benefits to be gained from an unwanted divorce as opposed to the costs of giving consent to the *khul* divorce? Benefits may include gaining the amount of *mahr*, seeing the end of maintenance after the *iddah* period, and increasing the chances of starting a new, happy relationship. Costs may include losing the marriage itself, losing the obedience of the loved one, less sex in the short term, and the high cost of remarriage.<sup>89</sup>

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<sup>86</sup> Mir-Hosseini, *supra* note 84 at 41:

<sup>87</sup> Tucker, *supra* note 75 at 54 provides examples of women who would not only waive *mahr* but also give up material support during the *iddah* period and child support payments in order to obtain their freedom: "One Bedouin woman obtained her divorce by canceling her husband's debts to her, forfeiting all claim to support during her *iddah*, and returning a *mahr* of most handsome proportions: five silver bracelets, fifteen camels, two cows, and four woolen blankets."

<sup>88</sup> Diane Singerman, *Avenues of Participation: Family, Politics, and Networks in Urban Quarters of Cairo* (Princeton: Princeton University Press, 1995) at 61: "Divorced women, especially if they lose their right to remain in their home, can face difficult economic and social problems. They must struggle to survive and are vulnerable to many forms of exploitation."

<sup>89</sup> *Ibid.* at 53: "The high cost of marriage remains another important factor that severely discourages separation and divorce."

I. *Faskh Divorce / Faskh Mahr: Judicial Dissolution of Marriage Upon One of the Grounds Provided Under the Law*

If the *khul* divorce route is not desirable or available, the wife may apply for a *faskh* divorce, but only insofar as she can demonstrate to the court (*qadi*) that her case meets the limited grounds under which divorce can be granted.<sup>90</sup> It is basically a fault-based divorce initiated by the wife. In the case of termination of marriage by *faskh* divorce, the wife is entitled to *mahr*. Tucker thus concludes that “[*faskh* ... appears the most favorable to the woman insofar as she obtains a wanted divorce but yet retains her claim to the balance of the *mahr* and support during her waiting period (*iddah*).”<sup>91</sup>

Although most favourable to Muslim women, this form of divorce is also the most difficult to obtain.<sup>92</sup> Grounds to issue a decree of *faskh* often include impotence on the part of the husband,<sup>93</sup> “insufficient material support and companionship”<sup>94</sup> (more poetically described as “the loneliness of the marriage bed”<sup>95</sup>), non-fulfillment of the marriage contract,<sup>96</sup> mental or physical abuse,<sup>97</sup> or a husband’s lack of piety.<sup>98</sup>

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<sup>90</sup> El Alami & Hinchcliffe, *supra* note 73 at 29: “[A] wife who is unhappy in her marriage and who wishes to obtain a dissolution must petition the court for divorce by judicial decree, showing cause why such a decree should be granted.”

<sup>91</sup> Tucker, *supra* note 75 at 53.

<sup>92</sup> In analyzing the situation of peasant women in nineteenth-century Egypt, Tucker asserts that “they rarely succeeded in obtaining a decree of *faskh* from a *qadi*; we did not find a single request in the Mansurah records” (*ibid.* at 54).

<sup>93</sup> Abdal-Rahim, *supra* note 83 at 105: “When it was the wife who wished for a divorce and the husband refused, then she was required to appear before the chief *qadi* to explain her reasons for demanding divorce. If she proved that such reasons were “legal” then the *qadi* found for her. Legal reasons included a husband’s impotence (interpreted differently according to the particular *madhhab*).”

<sup>94</sup> Tucker, *supra* note 75 at 54: “As military and corvée recruitment during the Muhammad Ali period drained the villages of men, many women found themselves legally married but without husbands. In order to remarry, they sometimes prevailed upon the court to issue a divorce decree on the grounds of lack of material support or even the ‘loneliness of the marriage bed.’”

<sup>95</sup> *Ibid.*

<sup>96</sup> Abdal-Rahim, *supra* note 83 at 105: “A usual cause for a wife’s demand of divorce was the husband’s nonfulfillment of the marriage contract. If the wife proved this to be so, normally through ‘acceptable witnesses,’ the *qadi* found for her and granted her the divorce without compromising her financial rights.”

<sup>97</sup> Esposito & DeLong-Bas, *supra* note 45 at 34.

<sup>98</sup> Abdal-Rahim, *supra* note 83 at 105: “Legal reasons included ... a husband’s lack of piety.”



#### J. *Mahr After Death: The Inherited Mahr*

*Mahr* is not extinguished by the death of the husband, wife, or both. According to Islamic family law, *mahr* is a debt<sup>99</sup> and comes under the second head, after funeral expenses, in the order of application of the property. Hence, in the event of the husband's or the wife's death, and even if prior to consummation,<sup>100</sup> *mahr* is a claim that can be maintained by the wife against the husband's inheritors, by the wife's inheritors against the husband, or by the wife's inheritors against the husband's inheritors. This "widow's right of retention"<sup>101</sup> refers to the capacity to retain the husband's whole estate until *mahr* is paid in full.

#### IV. BARGAINING IN THE SHADOW OF MAHR DURING MARRIAGE: SAMIR AND LEILA

In this Part, I will present *mahr* as asserting a continuing regulatory power over husband and wife during the marriage. This form of power may control or influence their decision to remain within the institution, their performance of respective marital duties, and their use of power to strike bargains. Bargaining in the shadow of *mahr* inevitably means bargaining in the shadow of divorce, because what is at stake during marriage is the (in)visible presence of its dissolution, and with it, the possibility, among other things, that deferred *mahr* will be due. Throughout this Part, I will use the methodology of Robert Mnookin and Lewis Kornhauser in "Bargaining in the Shadow of the Law: The Case of Divorce"<sup>102</sup> to demonstrate that Muslim spouses take their respective power in marriage and/or divorce in part from the Islamic

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<sup>99</sup> Esposito & DeLong-Bas, *supra* note 45 at 24: "The wife's claim for the unpaid portion of her dower is legally considered an unsecured debt ranking equally with other unsecured debts due from her husband or, after his death, from his estate. The wife is entitled to receive the debt herself."

<sup>100</sup> Pearl & Menski, *supra* note 51 at 180.

<sup>101</sup> Fyze, *supra* note 66 at 142: "Muhammadan law gives to the widow, whose dower has remained unpaid, a very special right to enforce her demand. This is known as 'the widow's right of retention.' A widow lawfully in possession of her deceased husband's estate is entitled to retain such possession until her dower debt is satisfied. Her right is not in the nature of a regular charge, mortgage or a lien; it is in essence a *personal* right as against heirs and creditors to enforce her rights; and it is a right to *retain, not to obtain*, possession of her husband's estate. Once she loses possession of her husband's estate, she loses her special right and is no better position than an unsecured creditor."

<sup>102</sup> Mnookin & Kornhauser, *supra* note 5.

family law rules that govern their conduct. I will also apply Hale's "Coercion and Distribution" approach<sup>103</sup> to highlight the distributive conflict between Muslim men and Muslim women from the starting point of initiation *mahr*, until the possible, perhaps never actualized point of *talaq-khul-fashk mahr* or inherited *mahr*. As will be apparent below, contradictory forces may undermine or strengthen a Muslim woman's position within the family, and "law in theory" is rarely a depiction of "law in practice."

I will introduce below the story of Samir and Leila, and try to assess the potential costs and benefits for both spouses of putting an end to the relationship when *mahr* is either extremely high or extremely low. This story is fictional, although I have used some of the observations of Doctor Ziba Mir-Hosseini, a well-known anthropologist specialized in gender, family relations, and Islam. Doctor Mir-Hosseini has recorded, transcribed, and assembled into dossiers case studies of the ways in which "*Mahr* was used as the main bargaining strategy"<sup>104</sup> upon divorce in Iran and Morocco from 1980 to 2000. Professor Homa Hoodfar has similarly highlighted, in the case of Egypt, "the ways in which women have used *mahr* and marriage negotiations to circumvent some of the limitations imposed by the legal system and traditional ideology, both of which are legitimized in the name of religion."<sup>105</sup>

Suppose Samir and Leila moved from Iran to Canada in 1989 and married in Toronto in 1991, being twenty-eight and twenty-four years old at the time of marriage, respectively. Their Islamic marriage contract specifies that *mahr* is eighty thousand dollars: five thousand dollars as prompt *mahr* (given upon marriage) and seventy-five thousand dollars as deferred *mahr*. Samir works as an engineer and Leila stays at home. Their relationship is difficult and stormy. In 1996, after five unhappy years, they both want to put an end to their marriage.

Let us assume that all the Islamic family law rules presented above apply in full force, and that Canadian family law is completely in abeyance. Samir may think twice before issuing *talaq*, given that such a decision will be extremely costly for him: seventy-five thousand dollars is

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<sup>103</sup> Hale, "Coercion and Distribution," *supra* note 40.

<sup>104</sup> Mir-Hosseini, *supra* note 84 at 75.

<sup>105</sup> Hoodfar, "Circumventing Legal Limitation," *supra* note 77 at 123.

a substantial sum and well beyond his means. Leila, on the other hand, may be inclined to be overly disobedient (go on a journey on her own without Samir's permission, spend time in the public sphere and in an intimate fashion with Ahmed the attractive neighbor, et cetera), in order to provoke Samir to issue *talaq* and trigger his obligation to pay the seventy-five thousand dollars.<sup>106</sup> Ironically enough, and precisely because *mahr* is so high, Leila may find herself in the unfortunate situation of not obtaining *talaq* from Samir no matter how "bad a wife" she presents herself to be. In fact, Samir might tolerate a broader spectrum of behaviour and action than he would have had *mahr* been lower.

Before disobeying, however, and risking some physical or psychological abuse from Samir and/or the community at large,<sup>107</sup> which may even impel her to go back to live at her parents' home,<sup>108</sup> Leila might consider negotiating her "exit" from the marriage through a *khul* divorce.<sup>109</sup> However, she knows that such an option would hurt her economically since she would have to forego seventy-five thousand dollars.

Let us include an additional dimension/institution: polygamy.<sup>110</sup> Classical Islamic law allows the man to marry up to four wives on the condition that he can provide and treat them equally. The shadow of polygamy as a male prerogative remains, as Tucker states, "a powerful

<sup>106</sup> Tucker, in analyzing peasant women in nineteenth-century Egypt, comes to the same conclusion: "Recognizing, on balance, the material advantages of *talaq*, many women who wanted a divorce preferred that their husbands repudiate them" (Tucker, *supra* note 75 at 55).

<sup>107</sup> Singerman, *supra* note 88 at 54: "The cost of illicit sexual activities for men and women are unequal. ... [F]or young women the costs of illicit sexual activity can be much higher, and arguments about a woman's morality, honor, and virginity are one of the common causes of domestic violence in the community."

<sup>108</sup> *Ibid.* at 51: "A wife who feels wronged or exploited will return to her parental home ... to seek protection from physical, verbal, or economic abuse."

<sup>109</sup> We assume for the purposes of the story that the *khul* divorce would be performed by an Imam in Toronto.

<sup>110</sup> In the context of oral submissions made to Marion Boyd, several imams admitted to celebrating polygamous marriages in Canada. See Boyd Report, *supra* note 3 at 61: "The Review also heard that some Imams and leaders continue to celebrate polygamous marriages, even though such actions are clearly against the *Criminal Code of Canada*. Aly Hindy, Imam of the Alaheddin Mosque, is quoted as saying: The *Qur'an* says a man is limited to four wives. Canadian Law doesn't allow it—God does, so I marry them myself. ... If your wife doesn't like sex, you can take another wife. If she can't give you children, you can take another wife. If a man is financially capable and a woman doesn't have a husband, you can marry her as well."

disciplinary tool enforcing female submission.”<sup>111</sup> Further, let us imagine that in response to Leila’s disobedience, Samir decides not to issue *talaq* (an outcome that she had so hoped for, and one that had motivated her disobedience in the first instance), but rather to marry a second wife, religiously, in Toronto. In this case, not only will Leila not receive any immediate compensation, but *mahr* will remain in an identical position, *i.e.* deferred until divorce or death. Leila will have lost considerable bargaining power as a result of this miscalculation, as polygamy will most probably reduce her status<sup>112</sup> and eventually bring competing claims among wives (and their children) to the relatively scarce family resources provided by Samir.

Would the script have unfolded differently had Leila been in the Canadian market labour force, one might ask? In discussing the impact of labour market participation on Egyptian women’s emancipation, Hoodfar notes:

On a different occasion, I visited Umm Abir. Her husband owned a tam’iya and ful shop, which sold cooked beans and a variety of traditional sandwiches. Every day she peeled over twenty kilograms of potatoes and many kilos of onions and cleaned a huge amount of beans, then carried them on her head to the shop, which was a ten-minute walk from their home. One day while I was helping Umm Abir prepare the vegetables, we discussed women and work. She told me every woman should work and earn money because men have no respect for the wife who doesn’t earn. She added that if she had had an income when her husband married a second wife, she would have left him. But with four children and no income, her only option was to accept his second wife.<sup>113</sup>

In our scenario, Samir refuses to issue both *talaq* and *khul*, despite Leila’s efforts. Presented as “a system of incentives” rather than as “a source of values,” law becomes for Leila a shifting, imaginary entity whose precise outcomes she attempts to predict within narrow bounds.<sup>114</sup>

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<sup>111</sup> Tucker, *supra* note 75 at 53.

<sup>112</sup> Singerman, *supra* note 88 at 66: “In many cases, when a man marries a second wife, for whatever reasons, the first wife and family is neglected. These women, while officially married, are better characterized as permanently separated, since they receive minimal financial support for their children from their husband and no longer engage in conjugal relations. Additionally, because they are not divorced they cannot remarry. Thus, although it is legal, this latter type of polygynous relationship is universally condemned for eroding the familial ethos in the community.”

<sup>113</sup> Homa Hoodfar, *Between Marriage and the Market. Intimate Politics and Survival in Cairo* (Berkeley: University of California Press, 1997) at 111.

<sup>114</sup> I borrow here from the methodology developed by Duncan Kennedy in “Sexual Abuse,” *supra* note 6 at 134. For law and economics literature on bargaining around marriage and divorce in

At the opposite extreme would be a situation in which Samir offers a minimal financial *mahr* to Leila—a ton of jasmine—at the time of the marriage contract. Leila thinks “the idea of a ton of jasmine as *mahr* was romantic at the time of her wedding, although it [is] of no use after she was divorced by her husband.”<sup>115</sup> In this case, the phantasmatic initiation *mahr* (a ton of jasmine) obliges Leila to waive any bargaining power she would otherwise have had during marriage because she initially refused to have *mahr* as a market value. Romantic *mahr* does not pay off. Hence, Samir issues *talaq* with no hesitation and still with no hesitation he decides to remarry immediately. Leila would later testify that “if her *Mahr* had been high enough her husband would have thought twice before divorcing her to marry another woman, or at least she could have been compensated or exacted revenge by forcing him to pay afterwards.”<sup>116</sup> Having been economically dependent on Samir, Leila does not feel the real benefit of a ton of jasmine now that she is divorced and left without financial support.

Between these two extremes lies a continuum of bargaining possibilities in which Samir or Leila would use *mahr* directly or indirectly in all kinds of everyday life situations to gain something from the other person; these possibilities range from the custody of children upon religious divorce,<sup>117</sup> to better, or less, or more sex during marriage,

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the United States and Canada, see L. Cohen, “Marriage, Divorce and Quasi Rents; Or, I Gave Him the Best Years of My Life,” (1987) 16 J. Legal Stud. 267; A.L. Wax, “Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?” (1998) 84 Va. L. Rev. 509; and, M.J. Trebilcock & R. Keshvani, “The Role of Private Ordering in Family Law: A Law and Economics Perspective” (1991) 41 U.T.L.J. 533.

<sup>115</sup> This is based on a true story. Mir-Hosseini reports: “Once again, the important function of a high *Mahr* as a safeguard for women in marriage was brought into relief. ... In one case, a woman whose ‘romantic’ marriage broke down was furious about her *Mahr*, which was a ton of jasmine. She said that the idea of a ton of jasmine as *Mahr* was romantic at the time of her wedding, although it was of no use after she was divorced by her husband.” Mir-Hosseini, *supra* note 84 at 75.

<sup>116</sup> *Ibid.* at 75.

<sup>117</sup> According to classical Islamic family law, men have the custody of their children beyond a certain age: seven years for boys and puberty for girls: “It is evident that, contrary to what the wife maintained throughout the court case, she was negotiating the terms of her divorce rather than salvaging her marriage. In doing so, she used her right to *Mahr* effectively to achieve her goals: to obtain the custody of her son and as a kind of alimony. Both would have been denied to her under a normal divorce” (*ibid.* at 77). See generally Hoodfar, “Circumventing Legal Limitation,” *supra* note 77 at 130: “*Mahr* has emerged as a controversial topic in recent decades, and in many Muslim communities (such as Iran and Egypt) women have come to use it as a bargaining chip to compensate for rights such as divorce or obtaining custody of their children which are often denied to them by the law.”

to entering or not entering the labour market,<sup>118</sup> or to wearing or not wearing the *hijab*,<sup>119</sup> and so on.

## V. CONCLUSION

We can reach a number of conclusions from the above hypothetical scenarios of Samir and Leila in relation to *mahr*. First, although *Protecting Choice, Promoting Inclusion* attempts to welcome Islamic family law in the name of legal pluralism, the legal framework ("law in books") used to translate the Other does not always account for the ways in which Muslim men and women themselves deploy power in a fluid, contradictory, and, at times, subversive fashion in diverse scenarios ("law in action"). Second, initiation *mahr* designs the initial bargaining power structure that *this* particular woman will enjoy as she enters marriage and love, and which will often reflect and measure *her* underlying socio-economic conditions and personal characteristics. Third, *mahr* may at times be used as deterrence and/or compensation, in anticipation of *talaq* in the first case and in relation to ex post facto religious divorce in the latter.

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<sup>118</sup> A wife may in fact decide, as part of her strategies, to go to work against her husband's wish as a form of disobedience that would encourage him to issue *talaq*. Hoodfar, in *Between Marriage*, *supra* note 113 at 139 states: "[A]ll the men, married or not, were adamant that it was a husband's prerogative to deny his wife the right to work. None of the informants was asked to express his view on this issue, but all volunteered an opinion. Few women contested men's claim to the right to stop their wives from 'working' or leaving the house. The majority said that by custom, tradition, and religion, husbands were entitled to such rights." Muslim women in contemporary Egypt justify their participation in the labour market as a way to protect themselves in the event of divorce, even if such choice is at times very costly. Sadia, a thirty-seven year old mother of three children confesses at 116: "This is not a life, this is misery. If only I could trust my husband, I would stop working at least for a few years because I have to spend all I earn on child care and buses. But I do not trust him. One cannot trust men these days, life is getting harder and they want to get out of their family responsibility. I feel I have to work so I will have enough to survive in my old days should my marriage fail. I don't want to give up the security of my job even at the cost of divorce. Who would look after me if tomorrow something happened to him or if he divorced me? My brothers don't even come to see me, much less look after me and my three children. I need the security. These days life is difficult. Women need security."

<sup>119</sup> Hoodfar explains that veiling can have an economic function (*ibid.* at 116). "This starting picture has evoked a great deal of attention and speculation, but very little systematic research has been conducted to examine the phenomenon from the perspective of the women who have chosen to veil, not merely out of custom, but as a strategy that enables them to continue to have access to some independent cash income. At the same time, they are undermining religious conservatives, for whom veiling means women's exclusion from the labor market."

*Protecting Choice, Promoting Inclusion* illustrates what it might mean to pay attention to identity, multiculturalism, and religious freedom, while failing to address the distributive stakes involved for Muslim women in allowing religious law through the *Arbitration Act*. By placing *mahr* at the centre of contractual obligation and in the shadow of the law, I have privileged a conception of individuals as bargaining power agents, exchanging their obligations for precise purposes. I have tried to argue that there are costs to isolating and dissociating Islamic law from the “informal” marital web of rights and duties within which husband and wife love each other, fight, hope, and play through the use of various strategies. The attractive dimension of the cost-benefit analysis I have used, as opposed to the unchanging and predictable subjects and outcomes of *Protecting Choice, Promoting Inclusion*, lies in its acceptance of the existing and inherent conflict of interests between Muslim men and women in relation to *mahr*, and to family relations more generally. Moreover, it brings into focus what remains hidden by the normative and normalizing discourse of legal pluralism, *i.e.* that sometimes *mahr* can be a tool of considerable power and discipline for *this* woman, sometimes it can oppress her, and sometimes it can exist as a non-existent value, such as a ton of jasmine.

