

PRIVATE INTERNATIONAL LAW, MUSLIM LAWS AND GENDER EQUALITY

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

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"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 PC¹ and trying to do the right thing and knowing what the cultural etiquette's are and respecting them. There's a real fine line between trying to do the right things 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. A compulsory clause in the Muslim marriage contract, obliging the husband to pay sometimes considerable sums of money to the wife, it gives these women a particular claim which increasingly often is 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 when Muslims and Muslim laws migrate to Europe, what is the "right thing to do" for the courts, as seen by women like Hina in the quote above, in order to promote gender justice while at the same time respecting these women's cultural – and religious – identities?

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

¹ Probably "politically correct".

temporary situation, people are now realising that they're going to stay. Among Muslim immigrants, several normative systems are at work in two different situations depending in part on whether they've obtained a European nationality or not. 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 most 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 so 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 the general population.⁵ One of the reasons for this is that the Muslims claim divine authority for these

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 from the Cour d'appel de Douai, ch.7, 8 janvier 1976 and the Cour de Cassation, ch.civ.1, 4 avril 1978, and a Danish case from Københavns Byret February 22 2002 and Østre Landsteds Ret April 6 2005, published as U.2005.2314Ø.

⁵ Foblets (1996) p.9.

concepts and institutions. A newspaper headline about a Swedish or French court applying the *Shari'a* is bad enough,⁶ and if a government makes efforts to accommodate it, the political implications may be disastrous. This way the Muslims feel that they are not accepted as citizens, and the conflict level increases. The vicious circle is completed.

Not all Muslim laws, even the most patriarchal versions, are always discriminatory towards women. 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 event of their marriage, on demand or, usually, at the time of divorce. It was instituted by Mohammad to improve women's rights and position in a very patriarchal society. In practice it does not always improve the woman's situation, though, sometimes even the contrary. *Mahr* is a much debated topic among Muslims, both where they're the majority, and where they're the minority, but 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 space 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. Thus such cases 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 in where Muslims make claims based on Muslim norms and concepts.⁷ The courts have to deal with the matters that are brought before them as long as they're within their

⁶ See for example Kristeligt Dagblad 16.02.2008.

⁷ 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).

jurisdiction, and thus find themselves in the middle of the 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,⁸ 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.⁹ 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.¹⁰ A person’s personal status law, i.e. which country’s laws should regulate his personal matters, is normally determined either upon the basis of a person’s nationality or his or her 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 reveals the complex, ambiguous and often contentious relationship between human rights and legal pluralism.”¹¹

Full recognition and application of foreign norms when the conflict of laws rules require it, is a logical consequence of a policy of multiculturalism applied on the legal system. The

⁸ Nielsen in Foblets (1996) p.41.

⁹ See Zweigert (1998) and part I chapter 7.

¹⁰ See e.g. Thue (2002).

¹¹ Hellum (2007) p.xix.

courts have to choose between the laws of two very different legal cultures. The European legal systems were originally based upon Christian values, but have at the time of adjudication to a varying extent been modified and secularised. Today they provide a degree of gender justice by providing laws that are intended to be gender neutral – perhaps with the exception of English law, which is still to a large extent based upon the idea that the sexes are different.¹² The laws from the Muslim countries are to a greater or lesser extent influenced by Islam and its laws schools, which do not have gender equality¹³ as a goal, but to a varying degree try and provide gender justice in the form of equal worth. But 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? If they try and achieve some sort 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 way. The equal worth approach sees the two genders as different, but of equal worth, thus opening up for having different rules depending on people's gender. These two approaches will be further discussed in part II chapter 6.

In this thesis I compare divorce cases from French, English, Swedish and Norwegian involving the *mahr* with a view to the courts' use of comparative legal method when they interpret the Muslim laws, and in a gender justice perspective. I have only found two cases from Norway that indirectly concern *mahr*; one of them is rather an example of how things should not be done. Looking at other countries provides a broader perspective and may provide interesting perspectives applicable in Norway as well. The most obvious countries to compare with are Scandinavian countries like Sweden and Denmark, due to the social, cultural and legal commonalities. The Scandinavian countries, however, have a fairly short history with Muslim immigration. There are very few cases yet concerning *mahr*; only two from Sweden and one from Denmark. The Danish case, however, does not deal with private international law. On this background I have chosen to look at two countries with a

¹² Significant changes have happened since the Human Rights Act 1998 required that family law complied with the European Convention on Human Rights. Welstead (2006) p.7.

¹³ See Part I ch.6.2.

long history in this matter: France and Britain. These two countries have chosen 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 to as large a degree as possible. France has had a stronger tendency towards demanding assimilation and acceptance of what is considered to be French values, e.g. secularism and feminism. The British case law concerning *mahr* originates from the 60ies and early 70ies, and apparently there have been several cases since, which follow the same line of arguments, but these are not published. I've therefore only looked at the two judgments that are considered as basis for today's case law. In France I've only been able to find two private international law cases concerning *mahr*, and none where the wife claims it. This is an interesting find 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 the 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 supply with methodology concerning the analysis of texts.

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

The analysis of judgments as texts calls into focus the implicit communication contract between the writer and the reader of the text, and enables us to understand a foreign judgment better. 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, which both are necessary to understand the other, and to understand the text.¹⁴ This resembles comparative legal method, which stresses the importance of understanding the rules in the context of the entire legal system. It gives, however, a supplementary tool for the interpretation of judgments, as the comparative legal method mainly study *rules*, while the focus in this thesis is on *judgments*. 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 each

¹⁴ Asdal (2008) ch.2.

and every case, which have in common that we're in a situation of a divorce settlement where one or both spouses are Muslims. But the content, outline and style of a judgment are shaped by an entire legal system, with its laws and its jurisprudence, applied on 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 most of all 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 few of the judgments are from the Supreme Court, and are therefore 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 to a greater extent than the Muslim laws in question sees gender justice as a matter of gender *equality*. I have chosen to focus on two approaches that I assume are interdependent in order to obtain a correct and equitable result; an approach which acknowledges both the gendered and cultural context: 1) that the courts must apply comparative legal method in order to provide a foundation for making a correct and fair decision, and 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 1960ies and 1970ies.

3 Translations of judgments and literature

It's difficult to translate judgments, as the concepts often don't have any real equivalent in the other language. Since I write in English, Common Law concepts have to be used, but I try and remedy this to a certain extent 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, and 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, in lack of a real 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”,¹⁵ a distinction probably originating

¹⁵ Poulter (1986) p.40.

from the Indian subcontinent.¹⁶ 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. Since I strive to use as correct terms as possible and there are no real equivalents in English, I will use the Arabic word *mahr* except 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”.¹⁷ 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.¹⁸ The acceptance of the norms and institutions of such groups is by some seen as one of the legal aspects of such an approach, for example do many British and Canadian Muslims want formal acceptance of their Shari’a councils, a claim which e.g. 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 some issues, especially in its approach to headscarves in public schools. Feminism is often used as an argument against multiculturalism, and in 1997 Susan Moller Okin, a leading political theorist, strongly contested Kymlicka, asking whether multiculturalism is bad for women.¹⁹ She observed

¹⁶ See e.g. Diwan (1990).

¹⁷ Wikipedia on *multiculturalism*, read 08.09.2008.

¹⁸ Kymlicka (1995).

¹⁹ Okin (1997). First published in Boston Review in 1997, republished in a book together with comments from other researchers upon her article: Cohen (1999).

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”.²⁰ Many consider the solution to be a kind 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, which 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) “And if so, does he acknowledge these elements to be on *equal* terms with his (own) legal system?”²¹ If the answer is yes to both of these questions, this can be seen 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 while at the same promote gender justice? Before we move on to the framework of analysis – comparative law and gender justice norms – we need to look further into what legal pluralism is.

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

²⁰ As interpreted by the editors in Cohen (1999) p.4.

²¹ Foblets (2005) p.299.

includes norms for behaviour, status and suchlike, 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”.²² These fields can exist in various ethnic minority groups, in workplaces, and in any group in society, and will thus 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 which is used as a basis for this thesis.²³ 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 on others. One example is Lebanon, where the family law depends on which religious community you belong to, thus giving 19 different sets of rules.²⁴ 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”.”²⁵ This situation is “the normal situation in human society”.²⁶ This implies that also in a situation of formal legal pluralism, the informal pluralism is also present.

It follows from this, that even though the focus of this thesis will be on the formal legal pluralism, the informal legal pluralism is always present. One should also bear in mind that the concept of legal pluralism is descriptive, not normative²⁷. I use it as an explanation of the context of the judgments, and as a basis for my hypothesis on how the courts should handle such a context: a situation of legal pluralism. In order to thoroughly understand the

²² Moore (1978).

²³ Griffiths (1986).

²⁴ 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>.

²⁵ Griffiths (1986) p.38.

²⁶ Ibid. p.39.

²⁷ Hellum (1998) p.70.

unfamiliar norms the court will necessarily have to apply something similar 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, which, perhaps with the partial exception of English law, are mainly based on ideas of gender *equality*. Or they may choose the Muslim laws, claimed to be of divine inspiration, if not authority, which gives 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, and 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. Even in a Muslim context *mahr* is debated, not only because of differences in opinion as to 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, it is more often of vital importance as a tool for gender justice in Muslim countries, so to reject it altogether 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 no matter the justice of the result? Do they reject it altogether? Is there a common approach at all, even within the same country?

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 not likely 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.²⁸ 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 include the cultural dimension of women's lives? In order to answer this we first need to take a brief look into various theories concerning gender justice, both in a European and a Muslim context, and, more specifically, 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 CEDAW²⁹ I will not go into detail, and I 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.

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 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.³⁰ 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 1980ies. McKinnon criticises liberal feminism of not taking into consideration that “men are as

²⁸ This dichotomy is less used 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.

²⁹ And of the ECHR protocol 7.

³⁰ See e.g. Barnett (1998) and Dahl (1985).

different from women as women are different from men”, and that men still set the standard for comparison.³¹ 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.”³²

6.2.2 Theories of equal worth

Both in Europe and elsewhere, several scholars argue for a different approach, called difference feminism or cultural feminism, in a reaction against the gender equality thought in liberalism and Marxism. There is a variety of theories, counting among them the thoughts of Luce Irigaray³³ and Carol Gilligan.³⁴ They all strive to explain the differences between the sexes and promote a women’s perspective without falling into the stereotype trap; to promote the idea of equal worth instead of the mechanic equality.

One has to distinguish between gender equality in a legal sense, and in the sense of feminist theory. “Gender equality” as a legal obligation is most often interpreted in a way that includes both and 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 thought behind is obviously one of equal worth.³⁵ The CEDAW committee explicitly recommends this approach.³⁶ 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,³⁷ some of which concern Muslim laws, shows that a mechanic gender equality approach often leads to unfair results.

³¹ As quoted in Barnett (1998) p.133.

³² Ibid.

³³ See for example Joy (2006).

³⁴ See for example Gilligan (2002).

³⁵ Ncube (1989), Sverdrup (1997).

³⁶ CEDAW General Recommendation no.13 s2.

³⁷ See for example Hellum (2007).

The equal worth approach must be used with caution, though, 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 gives men and women different rights and obligations very explicitly, together with the fact that it's seen 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.³⁸ In addition to the use of comparative legal method, what I want to investigate in this thesis is whether the courts take gender justice into consideration, and if so, whether the courts 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 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's a right only women have, on their basis of being women, and 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 under the obligation of providing *substantial* equality, not only formal equality. If one goes straight to a gender equality norm by rejecting rights women have that are contrary to this norm, this may have the effect of making the situation worse for women, not better, thus not fulfilling the obligation of providing substantial equality. This is especially relevant for the courts, which are perhaps the most important part of the state when it comes to the actual application of the law.

³⁸ I base this on Hellum's review of Ali's book *Equal before Allah and Unequal before man?* See Hellum (2004).

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".³⁹ 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".⁴⁰ 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".⁴¹ Most country reports from Muslim countries from after 2000 mention their legislation concerning *mahr*, but the comment just mentioned is the only one I've found from the committee in response. This seems to imply that the committee has changed its views on *mahr*, from something like the "sales 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 quite contrary to the gender equality norm, this may indicate that the CEDAW committee opens up for 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 shall "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

³⁹ <http://daccessdds.un.org/doc/UNDOC/GEN/N95/801/12/PDF/N9580112.pdf?OpenElement> read 10.09.08.

⁴⁰ <http://daccessdds.un.org/doc/UNDOC/GEN/N02/426/33/PDF/N0242633.pdf?OpenElement> read 10.09.08.

⁴¹ <http://daccessdds.un.org/doc/UNDOC/GEN/N07/375/96/PDF/N0737596.pdf?OpenElement> read 10.09.08.

guaranteeing [women] the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”⁴² 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.⁴³ ⁴⁴ 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, except for in France. There the Court of Cassation have refused to accept the validity of a unilateral repudiation, *talaq*, if it was contested by the wife, on the basis of it being contrary to European Covenant on Human Rights (ECHR) protocol 7 art 5 on gender equality, and thus against French *ordre public*.⁴⁵ This is a form of negative *ordre public* which might be of interest also for other countries. However, the gender justice norms are relevant when determining whether *mahr* is against *ordre public*, as it sets a limit to what can be applied of foreign laws on the basis of cultural standards and values in the European country concerned.

⁴² Article 3.

⁴³ For reasons of space 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.

⁴⁴ See e.g. Cook (1994) or Vandenhole (2005) for further discussion of this topic.

⁴⁵ Table ronde, Cour de Cassation, February 17 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*.

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 much richer range of model solutions than a single legal system.⁴⁶ *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.”⁴⁷ The part of my hypothesis that concerns the use of comparative law in the courts, is based on this assumption by Zweigert and Kötz, which is in line with my own views on how one understands foreign cultures – which the legal system is 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.⁴⁸ 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. In the following 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?

⁴⁶ Zweigert (1998) p.15.

⁴⁷ Ibid. p.16.

⁴⁸ Ibid. p.33.

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*,”⁴⁹ state Zweigert and Kötz, two German scholars whose work “An Introduction to Comparative Law” is considered a classic. This is indeed valid as long as one studies concepts, but 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 such rules which regulate the same situations in people’s lives.”⁵⁰ 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 qualified⁵¹ 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. But the situational context is very much the same in

⁴⁹ Ibid. p.34, my italics.

⁵⁰ Bogdan (1994) pp.58-59.

⁵¹ See part II chapter 3.2.

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.⁵² For the purposes of this thesis I see these two categories as to a certain extent parallel to the situational and cultural contexts respectively. The main focus however, is on the former: How do the courts interpret the Muslim legal concept of *mahr*? But it’s rarely possible to do a good comparison without using both; macrocomparison of e.g. general policies provides a basis for the microcomparison of the adjudication of *mahr*.

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.⁵³ 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.

⁵² Zweigert (1998) pp.4-6.

⁵³ Ibid. pp.6-7.

The most natural choice of method of approach to understand the Muslim norms in question is thus comparative legal method. Firstly, 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 them for determining the contents of the Muslim laws in question.

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.⁵⁴ 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 basic 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 and 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",⁵⁵ 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

⁵⁴ See p.4.

⁵⁵ Bogdan (1994) p.49.

country's legal literature.”⁵⁶ The size of this thesis does not allow for a detailed mapping of the 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 and 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.⁵⁷

8 Other research on the adjudication of *mahr*

I have only found 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 most kind 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”. 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

⁵⁶ Ibid. p.46.

⁵⁷ 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 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.

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.” I commend her explanation of the different functions of *mahr*. I do however read all the French judgments, the Douai judgments⁵⁸ 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 quotes from this judgment originate from the Court of Cassation judgment, while she treats the two judgments as being from two different cases. But as they concern a man reclaiming *mahr* after a void marriage from the father of his bride, and no private international law is involved, I won’t go into further detail. The French judgments are the only ones we both have studied, and in my opinion she provides some interesting perspectives upon the adjudication of *mahr*, especially in a North American context. Her use of liberalist theory as a general basis, though, is constraining from a feminist perspective, especially while analysing such an institution as *mahr*. Myself I’ve chosen a different approach, with a stronger emphasis on feminist legal theory, which I’ll present in the following section.

The remainder 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.

⁵⁸ Cour d’appel de Douai, ch.7, 8 janvier 1976, Cour de Cassation, ch.civ.1, 4 avril 1978.

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 have a look at 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 sense⁵⁹ 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, thus not enforceable through Tunisian courts.⁶⁰

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 provides a better foundation for my analysis.

⁵⁹ See page 2.

⁶⁰ 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*

*Mahr*⁶¹ is “the goods and/or cash to be given by the groom to the bride as a requisite of a valid Muslim marriage”.⁶² 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 Tunisia⁶³ and Egypt.⁶⁴ ⁶⁵ 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.⁶⁶ In theory the woman may claim a deferred *mahr* at any time 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

⁶¹ 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 *mahr*, in Hebrew it is *mohar*, in some non-Arabic speaking countries it is called *mehar* and similar. The Encyclopaedia of Islam online on *mahr*, read March 31 2008.

⁶² WLUML (2003) p.8.

⁶³ Code du Statut personnel art. 12.

⁶⁴ Dupret (2002) p.23.

⁶⁵ See also Siddiqui (1995).

⁶⁶ See e.g. Blanc (1995), Wani (1996), Diwan (1990) ch.5.

social obstructions to an earlier claim are significant.⁶⁷ Whether *mahr* is prompt, deferred, or a combination, vary greatly between communities.

Some systems set a maximum or minimum amount of *mahr*, which vary greatly. Within these limits and elsewhere, the amount and nature (if paid in goods) of *mahr* is normally negotiated between the fiances 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.⁶⁸

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 take a look at marriage and divorce in Muslim laws. Marriage in Muslim law is a civil contract between two individuals, entered into by their free will, 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".⁶⁹ Two or three adult and sane witnesses are required.⁷⁰ Since the 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.⁷¹ 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 from Libya to Morocco, sees it as a condition of marriage, while the other law schools

⁶⁷ WLUML (2003) p.180.

⁶⁸ For an overview of some of the variations of practices concerning *mahr*, see an-Na`im (2002).

⁶⁹ Marghinani (1957) p.26.

⁷⁰ Two men, or one man and two women.

⁷¹ Ali (2003).

mainly see it as an effect of the marriage contract; a claim which arises from it.⁷² In either case, *mahr* is one such obligation,⁷³ 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. The husband is required to provide for the wife. There is no notion of property regimes in Muslim laws: each spouse has his 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.⁷⁴

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 defined as "the inducement to a contract",⁷⁵ the existence of which is a requirement for a contract to be valid in Common Law.⁷⁶ Considering that consideration is a concept that only exists in Common Law, one might argue that it is unnatural to go too deeply into this discussion, as the terms don't really translate between

⁷² 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) pp.90-91.

⁷³ 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.

⁷⁴ Mulla (1996) p.437 ff. Mir-Hosseini (2000) p.78 describes a case where a woman obtains a court order to confiscate a portion of her husband's property to secure her *mahr*.

⁷⁵ Black (1990).

⁷⁶ This is a very complicated matter, see e.g. Cheshire (2007).

the legal systems.⁷⁷ But 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”,⁷⁸ 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.”⁷⁹ Pearl and Menski mean 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 sale.⁸⁰

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),⁸¹ *faskh* (judicial divorce)⁸² or *khul'a* (divorce against compensation).⁸³ This compensation is very often the

⁷⁷ For more about this discussion, see Pearl (1998) p.191.

⁷⁸ Ibid. p.191

⁷⁹ Anwarul Hassan Siddiqui v. Family Judge in Pearl (1998) p.191.

⁸⁰ Pearl (1998) p.180. For more about the Muslim marriage contract, see also e.g. El Alami (1992), Ali (2000) p 138 ff, or Bano (2004) p.217 ff.

⁸¹ Carroll (1996).

⁸² 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.

⁸³ Balchin (2006) p.68, WLUML (2003) p.273 ff.

renouncement of a deferred *mahr*, or the return of a prompt *mahr* to the husband,⁸⁴ 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.⁸⁵

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,"⁸⁶ 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".⁸⁷ At the same time, many, especially those in favour of a strict gender equality policy, see *mahr* as something of a sales price of the woman's uterus. 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."⁸⁸ 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

⁸⁴ Mir-Hosseini (2000) pp.81-83.

⁸⁵ WLUML (2003) pp.179-180, El Razaz (1970). See Mir-Hosseini (2000) p.75 ff. for an example.

⁸⁶ Doi (1984), cited in Pearl (1998) p.179.

⁸⁷ Wani (1996) p.v.

⁸⁸ 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”.⁸⁹

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.⁹⁰ A deferred *mahr* is often set to an amount which 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*.⁹¹ 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.⁹² 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,⁹³ and *mahr* is sometimes seen as a way of evening out the differences in the economic situation of the spouses.⁹⁴

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 still going 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

⁸⁹ Mir-Hosseini (2000) pp.32-33.

⁹⁰ Schiratzki (2001) p.73.

⁹¹ Schacht (1982) p.167, as quoted in Fournier (2007) p.53. For a real life example, see Mir-Hosseini (2000) p.75 ff.

⁹² Fournier (2007) p.55 ff.

⁹³ WLUML (2003) p.181.

⁹⁴ Oudin (2006) pp.15-16.

marriage is not a sale.⁹⁵ 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 the women, and as we saw in part I chapter 6.2.3, the committee's views upon *mahr* has developed from very negative and formal to a somewhat positive and pragmatic view.⁹⁶ If the women in a given society most often are housewives, *mahr* is an important source of income, especially in case of divorce. But in some situations the link between the claim of *mahr* and the type of divorce may lead couples to try and make the other one make the first move to divorce, as this may mean that *mahr* goes to the person who don't initiate divorce. *Mahr* may then become an obstruction against a wanted divorce, instead of an insurance against an unwanted one.⁹⁷ 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 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 have 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.⁹⁸ Whether *mahr* is good or bad for women, or even an unfair burden upon the man, depends thus entirely on the circumstances in each 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

⁹⁵ The French-Egyptian jurist El Razaz (1970) discusses the matter thoroughly. See also for example Pearl (1998) p.179, Nørgaard (2001) p.161, Wani (1996), Nasir (1990) p.43 ff.

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

⁹⁷ See e.g. Fournier (2007) p.59 ff.

⁹⁸ Or rather, he has no *legal* basis for such a claim.

interpretation of concepts and rules derived from Islamic legal sources⁹⁹ 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 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,¹⁰⁰ or to give laws inspired by the Shari'a, but not claiming to *be* the Shari'a.¹⁰¹ 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.¹⁰² 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.¹⁰³

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

⁹⁹ The Qur'an, the Sunna (accounts of things the prophet Muhammads said and did), analogy from these, and consensus among legal scholars are considered the most important of these. See e.g. Eggen (2001).

¹⁰⁰ It must be noted that the term *shari'a* (Ar. *شريعة* "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*.

¹⁰¹ Vikør (2003) pp. 212 ff.

¹⁰² 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, 22 novembre 2005.

¹⁰³ Lecture at the Norwegian Centre for Human Rights by Khaled Abou El Fadl, professor in Islamic Law at the UCLA, on the occasion of his receiving the Human Rights Price of the University of Oslo, November 13 2007.

for a valid marriage, as the woman is otherwise entirely in the hands of her husband and their relatives on both sides.¹⁰⁴ 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*;¹⁰⁵ penal sanctions; “modernistic” interpretation of the textual sources (neo-*ijtihad*);¹⁰⁶ and the doctrine of public interest (*maslaha*).¹⁰⁷ Feminist rereading of the sources of Islamic law make a supplement to the reinterpretation (*ijtihad*) of the Qur’an, the *hadith*¹⁰⁸ and other sources of Islamic law.¹⁰⁹ 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.¹¹⁰ Its impact on the actual legislation and jurisprudence in Muslim countries is varying, depending on the political system and situation.

¹⁰⁴ WLUML (2003) pp.134-136.

¹⁰⁵ Governance and administration in accordance with the Shari’a.

¹⁰⁶ 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.

¹⁰⁷ Vikør (2003).

¹⁰⁸ Stories about the sayings and doings of the prophet Mohammad.

¹⁰⁹ 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).

¹¹⁰ Conversation with Dr. Taj Hargey, Islamic scholar and head of the Muslim Educational Centre in Oxford, March 6 2008.

3 Private international law¹¹¹

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.¹¹²

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,¹¹³ since they’re 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 analyze each judgment in part III.

¹¹¹ 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.

¹¹² See Sayed (2008) pp.188-189.

¹¹³ 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.¹¹⁴ Secondly, one has to determine which country's law should be applied. In order to do this, one has to choose which *set* of conflicts laws regulate 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 choice of laws question 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, which 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*¹¹⁵ 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 financial and personal 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, the latter refer to things like rights and duties concerning maintenance, and matrimonial property regimes. The division into two separate categories is mainly used for international marriages to determine which conflict of laws rule should

¹¹⁴ 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.

¹¹⁵ As usual the Britons 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.

be used for each claim. The “qualification problem” is which set of categories should be used to classify the foreign legal concept, and the three most widely known approaches are 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.¹¹⁶ The dominant view in the England, France, Norway and Sweden is that the *lex fori* should be used as a basis,¹¹⁷ but this creates problems with concepts such as *mahr*, which are completely foreign to domestic law. If a concept doesn’t 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 which to him seems to be the most in harmony with the rest of the system.¹¹⁸

Thue maintains that in cases concerning *mahr* and other concepts that don’t exist in Norwegian law, *lex causae* should be applied to determine which category of conflict of laws rules the court should apply.¹¹⁹ This theory has been much criticised, the Danish scholar Sverre Schmidt asks for example: “How can you characterize in accordance with a law you don’t know, before you have made the qualification and determined which conflict of laws rules is applicable?” A major weakness with this approach is that it’s based on

¹¹⁶ 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.

¹¹⁷ Bogdan (2004) pp.62-65 and Thue (2002) p.170.

¹¹⁸ Mayer (1994) pp.118-119.

¹¹⁹ Thue (2002) p.395.

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.¹²⁰ Due to the growth of private international law regulations from the EU, the comparative method is gaining influence in Europe,¹²¹ 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 the family law, the personal status law of the couple is in most cases applied on the case. Contract law matters are as a main rule determined by the law that the parties have chosen. The choice must be explicit,¹²² 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.¹²³ If no proof of such a choice is presented, the matter is most often regulated by the law of the country to which it has the strongest ties. 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 to be applied. According to the Belgian scholar of private international law and Muslim laws in

¹²⁰ Schmidt (1954) in Frantzen (2002) pp.147-148.

¹²¹ Frantzen (2002) p.145.

¹²² The Rome convention of 1980 art. 3.1. See also Moss (2007) p.2 ff.

¹²³ See e.g. Najm (2006), Annoussamy (1998).

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.*”¹²⁴ 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 to determine which law is the person’s personal status law, when this is the law referred to by the conflicts 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 that they should be regulated by the laws of the country to which one has the strongest ties, such as marital status and parental obligations.¹²⁵ 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.¹²⁶ 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 it takes for a person to be seen as domiciled in a country. In Norway, one needs to actually reside there plus to have the intention to continue to reside there,¹²⁷ while in Sweden one is considered as domiciled if one “resides there, if the residence when taking into account the duration of it and other circumstances must be seen as lasting.”¹²⁸ 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.¹²⁹

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

¹²⁴ Foblets (2005) p.300. My italics.

¹²⁵ Thue (2002) p.9.

¹²⁶ See e.g. Mayer (1994) p.556.

¹²⁷ Thue (2002) p.63.

¹²⁸ Bogdan (2004) p.149.

¹²⁹ Thue (2002) p.65, Stone (1995) p.12 ff.

being against public policy¹³⁰ or *ordre public*. It is very vague what *ordre public* really is; in France, according to a Court of Cassation¹³¹ lawyer, “*ordre public* is what the Court of Cassation says is *ordre public*,”¹³² 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’s 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 to determine the boundaries. It normally takes a lot for something to be considered against *ordre public*, as it would create a lot of both practical and political trouble if this exception was applied too often.¹³³ 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.¹³⁴ 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.¹³⁵

What I’ve just described is what sometimes is 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 choice of laws rules designate the application of a foreign rule which is different.¹³⁶ When I use the term *ordre public* I refer to the “positive” *ordre public* described above.

¹³⁰ The English term is in this context broadly equivalent to the term *ordre public*.

¹³¹ The highest court in civil matters in France.

¹³² Interview with Maître Courjon of the SCP de Chaisemartin et Courjon Jan. 16 2008.

¹³³ 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.135 ff about England

¹³⁴ Thue (2002) p.181.

¹³⁵ See part I chapter 6.4

¹³⁶ Thue (2002) p.199 ff.

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

In most European legal systems, except Switzerland and the UK, the validity¹³⁷ of a marriage is regulated by each spouse's national law.¹³⁸ 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.¹³⁹ 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,¹⁴⁰ although in French law this right is governed by a different conflicts rule than other personal effects.¹⁴¹ The personal rights and duties arising from a marriage barely exist in Western European law today, but there are some exceptions: In France¹⁴² the couple has a duty to help and support each other. This is different from Muslim laws, where, for example, in most countries the wife still has a certain duty to obey her husband.¹⁴³

The personal and financial effects of marriage are often governed by different conflicts rules: In French private international law, personal effects of the marriage and questions about marital status and suchlike are all governed by the Civil Code art. 3 s3, while most financial effects, including matrimonial property regimes, are seen as obligations law.¹⁴⁴ 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

¹³⁷ "Validité matérielle".

¹³⁸ Aldeeb Abu-Sahlieh (1999) p.50.

¹³⁹ Stone (1995) p.43.

¹⁴⁰ Thue (2002) p.382 ff, Mayer (1994) p.372.

¹⁴¹ Mayer (1994) p.372.

¹⁴² Code Civil art.212.

¹⁴³ See e.g. Nasir (1990) p.81.

¹⁴⁴ Mayer (1994) p.371 ff.

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 mariage* 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.¹⁴⁵ In France the couples have to fill out a form which matrimonial property regime they choose if they marry in France, or sign a tailor made marriage contract, a *contrat de mariage*, which determines the matrimonial property relations. In private international law, if the couple hasn't 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 can't be found, the Hague Convention of 1978 assigns the first joint domicile as the connecting factor.¹⁴⁶

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;¹⁴⁷ real estate is governed by *lex rei sitae* – the law of the place where the real estate is situated.¹⁴⁸

In Norway and Sweden the personal effects of marriage are as a main rule governed by *lex domicilii* – the law of the country of domicile. But 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

¹⁴⁵ Thue (2002) pp.382-383, Stone (1995) p.381 ff.

¹⁴⁶ Mayer (1994) pp.503 ff. See also Najm (2006) and Annoussamy (1998).

¹⁴⁷ Stone (1995) pp.381-382.

¹⁴⁸ Thue (2002) pp.392, 396-400.

and wife unequally, would be considered against Norwegian *ordre public*.¹⁴⁹ 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.¹⁵⁰ In most cases this means that the law of the wife's country is not applied, in favour of Norwegian law.¹⁵¹ This is the opposite of the Swedish solution. Other scholars maintain that if a divorce case is decided by a Norwegian court, the financial settlement should *probably* be governed by Norwegian law.¹⁵² In Sweden the main rule, if no written agreement is made, is the law of the country where the couple took up residence after marriage.¹⁵³

4 The European legal systems

4.1 Introduction

The last part of the cultural context we need to look into 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 his knowledge and experience of the foreign law, often in the shape of a custom certificate. It is not necessary that the person has acted or is entitled to act as a legal practitioner in the country in

¹⁴⁹ Ibid. p.384.

¹⁵⁰ Gaarder (2000) p.207.

¹⁵¹ Thue (2002) p.387.

¹⁵² Lødrup (2001) p.155.

¹⁵³ Bogdan (2004) p.200.

question.¹⁵⁴ 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.¹⁵⁵ 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 it is to some degree undergoing significant changes.¹⁵⁶ 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*, especially in cases where there are certain limits to what the parties can agree upon. One should not use these labels without caution, though, as the difference is not as big as it may seem, and there are strong elements of an adversarial process in continental legal systems.

4.3 Styles of judgments

These procedural rules, together with 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. The Norwegian and Swedish judgments are quite similar in style, with fairly thorough elaborations of both facts and reasoning, but not as much 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.

¹⁵⁴ Section 4(1) in the Civil Evidence Act 1972.

¹⁵⁵ Sjøfjell-Hansen (2000) p.13 ff.

¹⁵⁶ Darbyshire (2005) p.329 ff.

Part III. MAHR IN EUROPEAN COURTS

1 Introduction

In this section I will 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 will 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 very 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 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 p.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 thus 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 settlement¹⁵⁷ 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 common 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 court¹⁵⁸ 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 that was born in 1962. B lived in Oslo since 1975. Since 1985 he has lived 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. A assumedly lives in the house the couple lived in together in Karachi. Since 1986 she has accumulated a large debt towards her brother, who has maintained her and

¹⁵⁷ No. *ektepakt*.

¹⁵⁸ *Skifteretten*.

their daughter D from then on. A claims that there has been no rupture of the relationship; that she did not consent to the second marriage, which therefore should be pronounced invalid; she also demands that he pays her dower and maintenance since 1986. The wife claims that her husband has not paid her dower, but doesn't claim that he should pay it. Her lawyer only claims maintenance, with reference to the Marriage Act section 56(2)¹⁵⁹ which concerns the duty of maintenance, and the Norwegian Spouses' Act¹⁶⁰ 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, is that the wife gets no maintenance, but this is in part due to the husband's economic situation.

2.3 Norwegian courts and Muslim laws

Both cases concern financial settlements after divorce, which according to 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 the parties prove for the court.¹⁶¹ 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*. But 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.¹⁶²

RG 1983 p.1021 concerns matrimonial property regimes and choice of laws; LE-1986-447 concerns maintenance. In Norwegian 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

¹⁵⁹ Lov om indgaaelse og opløsning av egteskap av 31.mai 1918 nr 02 (Ekteskapsloven av 1918).

¹⁶⁰ Lov om ektefellers formuesforhold av 20. mai 1927 nr 01 (Ektefelleloven).

¹⁶¹ Tvisteloven § 11-4, cfr. Hov (2007) p.268 ff.

¹⁶² Tvisteloven § 11-5.

the law of the first common domicile.¹⁶³ The rule implies that if the couple had their first common domicile in a Muslim country, this country's laws regulates the matrimonial property regime and the matrimonial property in its entirety.¹⁶⁴ 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. 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. LE-1986-447 concerns both dissolution of marriage and maintenance, thus the matter should be solved in accordance with the law of the court, here Norwegian law.¹⁶⁵

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,¹⁶⁶ the court's interpretation of the marriage contract appears to be correct in that it doesn't see it as an expression of the parties' will 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.¹⁶⁷ The court chooses the interpretation which seems the most probable, in this case the wife's version. At the same

¹⁶³ 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.

¹⁶⁴ Norwegian law follows the principle of unity of the matrimonial property; all property is regulated by the same laws. Thue (2002) p.393.

¹⁶⁵ Thue (2002) p.386 ff.

¹⁶⁶ Hov (1999) p.261 ff.

¹⁶⁷ See chapter 4.

time it recognises the legal uncertainty as to choice of law in such matters, thus not 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 all the time, conflict of law questions should have been raised and addressed. The court ended up by chose 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 thus not used at all.

2.4 Muslim laws and gender justice in Norwegian courts

In neither of the judgments was comparative legal method 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 doesn't 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 a good idea to postpone the proceedings until the parties had provided further evidence. There's no indication of how the court considers matters relating to gender justice.

In RG 1983 p.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 Sjøfjell-Hansen found that among judges, little is known about how to deal with foreign law, and that many, consciously or unconsciously, try to avoid using it. At the same time there is consensus among the scholars that foreign law should be used *ex officio*.¹⁶⁸ This judgment is a good illustration of her point: The court has done little both with respect to get sufficient facts on the table and with regard examine to the international private law issues that arise. 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 often are 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

¹⁶⁸ Sjøfjell-Hansen (2000) p.3.

Swedish Ph.D. student Mosa Sayed in 2008,¹⁶⁹ who in addition mentions four unpublished municipal court cases, which I haven't been able to obtain. Bogdan describes one of these in a 2007 article: T 10 083-04 (Svea tingsrätt 20 december 2005). In this case Swedish law was applied. The claim for *mahr* to be paid was rejected, but on the basis of lack of authority for the husband's representative who had signed the marriage contract on his behalf.¹⁷⁰ No claim for *mahr* has yet been treated by the Swedish Supreme Court.¹⁷¹ 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 laws 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: T137-92¹⁷² and RH 1993:116¹⁷³

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 1988,¹⁷⁴ 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

¹⁶⁹ Sayed (2008).

¹⁷⁰ Bogdan (2007) p.180.

¹⁷¹ August 2008.

¹⁷² 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.

¹⁷³ Hovrätten över Skåne och Blekinge.

¹⁷⁴ 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 pays a *mahr*¹⁷⁵ amounting to NIS 11,250¹⁷⁶ plus maintenance during the divorce proceedings and for three months after the completion of the proceedings were completed.¹⁷⁷ 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 court¹⁷⁸ 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 saw it as a kind of maintenance after divorce, and did not grant her maintenance during the '*idda*'.¹⁷⁹ 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*¹⁸⁰ percentage-distribution of fault should be considered against Swedish *ordre public*. The question remains open how the court should have ruled if the

¹⁷⁵ *Mahr* is in this judgment called *mohar*, the Hebrew term for *mahr*. O. Spies on *mahr* in Encyclopaedia of Islam online, read 17.06.2008.

¹⁷⁶ 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.

¹⁷⁷ The '*idda*', three menstrual cycles after divorce.

¹⁷⁸ Malmö tingsrätt 1992-02-10.

¹⁷⁹ 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.

¹⁸⁰ Prop. 1973:158 pp.105-106.

wife had claimed the entire sum, and the husband had claimed a reduction based on the Muslim Israeli judgment.¹⁸¹

3.2.2 M.T.M. versus M.A: T952-99¹⁸² and RH 2005:66¹⁸³

Mr.M.A. had never gone back to Iran since he came 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 on 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 claims to be unbound by the *mahr* clause in the marriage contract, or that he has already paid the equivalent in the form of *shir baha*.¹⁸⁴ He wants the court to use Swedish law in solving the case; she wants the court to use Iranian law. The dispute is whether the husband is under the obligation of paying a *mahr* amounting to 500 Bahar Azadi gold coins, the equivalent of which is SEK 250,000.¹⁸⁵ The

¹⁸¹ Bogdan (2007) p.177.

¹⁸² Halmstads tingsrätt 2002-10-24.

¹⁸³ Hovrätten för Västra Sverige 2004-11-22.

¹⁸⁴ 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.

¹⁸⁵ 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 on Cyprus after the marriage. The question concerning the payment of *mahr* in marriages which haven't 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, 8 janvier 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 hasn't proven that he's 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 laws 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.¹⁸⁶ According to the municipal court's interpretation in RH 2005:66, Swedish law¹⁸⁷ 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. 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 laws 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

¹⁸⁶ Bogdan (2004) p.198. The classification in Norwegian law is similar, see e.g. Thue (2002) p.382.

¹⁸⁷ 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;¹⁸⁸ 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”¹⁸⁹ into consideration. In RH 1993:116 the facts were different from the Italian case, and this rule would have led 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.¹⁹⁰ 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.¹⁹¹

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.¹⁹² 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

¹⁸⁸ The nationality principle is still considered as regulating the financial effects of the marriage.

¹⁸⁹ RH 1993:116 p.5.

¹⁹⁰ ”För att det skall komma i fråga att pröva yrkandet om utfående av morgongåva materialt krävs emellertid därtill att den muslimska rätten ugör *lex causae*.” P.4 in the judgment.

¹⁹¹ Bogdan (1993) p.599.

¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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*¹⁹⁵ 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,¹⁹⁶ 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 doesn't expressly raise the issue of qualification; it upholds the municipal court's qualification of *mahr*. The municipal court states that "the morning gift

¹⁹³ Bogdan (2004) p.201.

¹⁹⁴ "hemvist".

¹⁹⁵ Prop. 1989/90:87 pp.43-44.

¹⁹⁶ 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".¹⁹⁷ This might indicate that the court has used a comparative approach, investigating the functions of *mahr*. However, the court of appeal's statement that "[t]he morning gift in Muslim law is, at least in practice, seen as one of the personal effects [as opposed to financial effects]¹⁹⁸ of the marriage," interpreted literally, may give the idea that that the court has investigated how *mahr* is categorized in Muslim Israeli law, thus indicating a qualification *lex causae*, i.e. Iranian law. But there is no mention of such an investigation in the judgment, only the statement that *mahr* in cases of divorce function as "maintenance and financial protection/insurance for the wife, since she can't claim any sort of maintenance."¹⁹⁹ 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".²⁰⁰ 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 it on the basis of Johnson (1975) wrongly sees *mahr* as maintenance. The result is that the court sees *mahr* as one of the personal effects of the marriage, and thus chooses to apply the conflicts rule concerning maintenance.

More than ten years later, but with no significant changes in the statutes on this matter, the court of appeal in RH 2005:66 qualifies *mahr* as a redistribution of property to even out the

¹⁹⁷ "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.

¹⁹⁸ My brackets.

¹⁹⁹ P.3 in the judgment.

²⁰⁰ Bogdan (2007) p.182.

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, but the person who performed the marriage was.²⁰¹ 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.²⁰² *Mahr* is qualified in accordance with the Swedish act LIMF²⁰³ 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 censured to ensure the receiver’s continued expenses by replacing or supplementing [his or her] income”,²⁰⁴ 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 which would have 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.²⁰⁵

²⁰¹ Mr.M.H.N.S. See the municipal court judgment p.9-10 and the court of appeal judgment pp.3 and 6.

²⁰² The municipal court judgment p.11.

²⁰³ Lagen (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållanden.

²⁰⁴ Prop. 1989/90:87 p.35.

²⁰⁵ See e.g. Mir-Hosseini (2000) and WLUML (2003).

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),²⁰⁶ Iranian *mahr* is mostly deferred, 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.”²⁰⁷ 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,²⁰⁸ 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 must 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 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

²⁰⁶ WLUML, 2003 p.180.

²⁰⁷ <http://www.alaviandassociates.com/documents/civilcode.pdf>, read 18.06.2008.

²⁰⁸ Lag (1990:272) om internationella frågor rörande makars och sambors förmögenhetsförhållanden.

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 the foreign law was outdated and of poor quality, and was a direct cause for the wife not obtaining maintenance during the *'idda*, which she according to Muslim Israeli law had a right to. This judgment is from the early 90ies, and lots of better sources were available, but the courts chose to use Johnson together with an even older source, Bergmann/Ferid: Internationales Ehe- und Kindschaftsrecht: "Das Islamische Eherecht" from 1972, which I haven't been able to get a copy of. There is too little information to evaluate the quality of this source, but it doesn't seem to have improved the courts' understanding of the concept of *mahr* and Muslim maintenance law. It's impossible to tell 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's not against Swedish *ordre public* indicates that it's 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 can't claim any other sort of maintenance.²⁰⁹ 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.²¹⁰ This result is mainly due to the weaknesses in the courts' methods to interpret the foreign law: Old, secondary sources are the only supplement to the foreign act, and the courts clearly take Swedish concepts as a

²⁰⁹ Johnson (1975) pp.49-51.

²¹⁰ Also noteworthy is that both courts see Shari'a as unchangeable,²¹⁰ and refer to Michael Nordberg's work on the development of *the* Muslim law. This shows that the court, although provided with a copy of the Ottoman Family Law of 1917, is unaware of the variations in Islamic law, not to say the development it has undergone and still is undergoing.

starting point and try and see where *mahr* fits into these. Comparative legal method can thus not be said to have been applied.²¹¹

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. And 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. But 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.²¹²

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. This is probably due to the fact that such an evening out of the property relations must be

²¹¹ See also part I chapter 7.

²¹² ”Exercising the basic prerogatives in matters of education , ritual functions (prayers, marriages, funerals, etc.) and judicial functions, the *mollās* 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.

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 haven't done very 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.²¹³ 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.*"²¹⁴ 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.

²¹³ 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.

²¹⁴ Prop. 1989/90:87, p.35. See note 187.

To sum up, the courts in 1993 clearly struggled both in 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 doubtful. 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 a sounder and more thorough approach towards 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* it is pronounced to not be clearly against Swedish *ordre public*, but on the basis of a misinterpretation of Israeli Muslim law.²¹⁵ 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 taking difference into account within an equal worth approach?

As we saw in chapter 3.3, the municipal court in T137-92 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,²¹⁶ and that in the situation at hand, Swedish law was

²¹⁵ See ch.3.4.

²¹⁶ 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 thus 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 doesn't 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 her dower. The alternative in Swedish law would probably be that she came out with nothing: The main rule in both Swedish and Norwegian law is to divide the matrimonial property equally, but the marriage has been so short that the couple hasn't had the time to obtain a common property. The principle of unequal division, *skjevdeling*, applies, especially 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,²¹⁷ 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,²¹⁸ even though it's not an enormous sum. But 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 even the parties' situation. The parties are strictly held to the Iranian marriage contract and

²¹⁷ Agell (2003) p.378 and Äktenskapsbalken ch.6.

²¹⁸ NIS 11,250. See note 176.

no adjustments are made on base of equity.²¹⁹ 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 switched – 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. But 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 doesn't always leave the woman short; sometimes it's the man who has to pay.

²¹⁹ 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 don't 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,²²⁰ or through filling out the formula when performing the required civil marriage. The *régime legal* 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's fairly easy to apply, and has gradually replaced the localization of the couple's assets as indicator of their will.²²¹

The literature on the adjudication of *mahr* thus 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* quite thoroughly, although David Annoussamy, president of the *Société de législation comparée Pondichéry*,²²² also has some noteworthy remarks about *mahr*.

²²⁰ Bell (1998) p.254.

²²¹ See Mayer (1994) pp.507-508 and the Hague convention on the law applicable to matrimonial property regimes of 14 March 1978.

²²² 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”²²³

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.²²⁴ 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,²²⁵ which in this case meant that he couldn't 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.²²⁶

This case doesn't concern the wife's 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

²²³ Cour d'Appel de Paris, 2e ch., no.4, 14 juin 1995 and Cour de Cassation, ch.civ.1, 2 décembre 1997

²²⁴ Family law matters and suchlike are in Lebanon regulated by the law of the confession you (or your ancestors) belong to.

²²⁵ Still the case today, and no civil marriage exists.

²²⁶ 917,71 USD in 1970.

<http://perspective.usherbrooke.ca/bilan/servlet/BMTendanceStatPays?codeTheme=2&codeStat=PA.NUS.FC.RF&codePays=LBN&compareMonde=2&definitionMinimum=5&codeTheme2=2&codeStat2=x&langue=fr>, read 10.07.2008.

régime legal,²²⁷ community of after-acquired property, where the wife was accorded the right of use to an apartment and a monthly alimony of 6000 FF. In the Court of Appeal the husband claimed that the marriage should be annulled 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 citizenship²²⁸ 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 didn't 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”²²⁹

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. In this case as well 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 Appeal

²²⁷ *Régime de la communauté réduite aux acquis*. Code Civil art. 1400 ff, Bell (1998) p.255 and the Paris Court of Appeal judgment p.8.

²²⁸ French private international law has nationality as basis for determining a person's personal status law. See part II chapter 3.

²²⁹ Cour d'Appel de Lyon, 1996-01-11, Cour de Cassation, ch.civ.1, 7 avril 1998, Cour d'appel de Lyon, ch.civ.1, 2 décembre 2002 and Cour de Cassation, ch.civ.1, 22 novembre 2005.

judgment doesn't 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. According to the husband's lawyer, the last Court of Appeal judgment only confirmed this adjudication, and the division of property happened in accordance with the regime of separate estates. 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.²³⁰

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*.²³¹ 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

²³⁰ Conversation with Maître Courjon January 16 2008.

²³¹ Najm (2006) p.1367.

the clause of *mahr*. But 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 that it is seen as such and not 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.²³² 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 thus on a qualification based on French legal concepts,²³³ 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, the question remains open.²³⁴

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 look into the further

²³² See chapter 4.1.

²³³ See part II chapter 3.2.

²³⁴ With the reservation that municipal court judgments are not published.

interpretation of the concept of *mahr*, we need to look into the role *mahr* plays in the choice of laws.

The first judgment I've found concerning *mahr* in private international law, the Court of Appeal of Paris' judgment from 1995,²³⁵ 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 certificate²³⁶ presented."²³⁷ 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."²³⁸ 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.²³⁹ 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*," this seems to indicate that

²³⁵ Cour d'Appel de Paris, 2e ch., no.4, 14 juin 1995.

²³⁶ "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)

²³⁷ "... 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."

²³⁸ "un contrat emportant l'adoption de la séparation de biens avec clause de dot." Cour de Cassation, ch.civ.1, 2 décembre 1997.

²³⁹ See chapter 4.1 and part II chapter 3.5.

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. But 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 seem thus to confuse the French concept of *contrat de mariage* and the Muslim marriage contract. That the couple couldn't marry any other way than by performing a Muslim marriage,²⁴⁰ and that Mrs.K. most likely didn't 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.²⁴¹ It therefore has to adjudicate on the nature of *mahr*. The wife is the one who claims that it's against French *ordre public*, and argues that French law should be applied, but is not heard by the Court of Cassation.

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

²⁴⁰ I do not know if it would have been possible for Mr.K. to obtain a French divorce and then remarry, but his is less relevant. It seems that as far as the couple knew, this was the only way they could marry.

²⁴¹ 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.

of Appeal judgment²⁴² 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.”²⁴³ 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. The second time, in 2002, In the Lyons 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,”²⁴⁴ 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.”²⁴⁵ 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*.”²⁴⁶ This interpretation is annulled in the second Court of Cassation judgment²⁴⁷ on the basis that the evidence on the foreign laws has been misinterpreted. The court pronounces “the act of *mahr*” to be “a covenant establishing the couple’s consent to marry, which goes together with the payment of a dowry, and is not in conflict with the French

²⁴² Cour d'Appel de Lyon, 11 janvier 1996.

²⁴³ «... 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, 7 avril 1998.

²⁴⁴ Cour d'appel de Lyon, ch.civ.1, 2 décembre 2002 p.3.

²⁴⁵ Ibid.

²⁴⁶ « 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, 22 novembre 2005.

²⁴⁷ Ibid.

public order.”²⁴⁸ The court doesn’t 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 presumably 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*.

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*.²⁴⁹ 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.²⁵⁰ 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 a an indicator of a free choice such as the Court of Cassation interprets it. The Muslim marriage contract is in theory individually negotiated 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

²⁴⁸ « 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, 22 novembre 2005.

²⁴⁹ Cour de Cassation, ch.civ.1, 6 juillet 1988.

²⁵⁰ Najm (2006) p.1370-1371.

marriage contract.²⁵¹ 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.²⁵² This is especially 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 in the idea that the estates were separate, as maintained by Annoussamy, 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 want 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 doesn't 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's 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.²⁵³ A Court of Cassation judgment issued the same day as the last one in the Lyons case²⁵⁴ 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

²⁵¹ Many Muslims however, see their home country's requirements and custom as Islamic law, which may influence their choices.

²⁵² Najm (2006) p.1369 ff.

²⁵³ Ibid. pp.1371-1372.

²⁵⁴ Cour de Cassation, ch.civ.1, 22 novembre 2005, n° 03-12.224.

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 doesn't 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.²⁵⁵ 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.²⁵⁶ Most often this is done by means of a *certificat de coutume*.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ 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 the foreign rule at hand. The Lyon case is a good example of this, although the result may, as we have seen, be questioned.

²⁵⁵ Mayer (1994) p.128.

²⁵⁶ *Libre disposition des droits en litige*. Norwegian *fri rådighet over sakens gjenstand*. See Mayer (1994) p.132.

²⁵⁷ See note 236.

²⁵⁸ Zweigert (1998) p.19.

²⁵⁹ Mayer (1994) p.132. 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 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's on the interpretation of the custom certificate. There is little doubt that the interpretation made by the Court of Appeal was incorrect.²⁶⁰ 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. But 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.²⁶¹ It does however, when adjudicating on what *ordre public* is, replace the Court of Appeal's interpretation of *mahr* with its own.²⁶² 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.²⁶³ *Mahr* is not a legal act, it's 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,"²⁶⁴ this is an erroneous statement for two reasons: First, *mahr* is *the* money or asset paid or transferred similar to a 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.²⁶⁵

²⁶⁰ Oudin (2006) pp.15-16 and a conversation with the husband's lawyer, Maître Courjon of the SCP de Chaisemartin et Courjon Jan. 16 2008.

²⁶¹ Oudin (2006) pp.15-16.

²⁶² Ibid. pp.15-16.

²⁶³ Najm (2006) p.1367.

²⁶⁴ "... est assorti du versement d'une dot", 2nd page of the 2005 judgment.

²⁶⁵ Encyclopédie Dalloz (1990) on *dot* (dowry).

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”,²⁶⁶ 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 divorce²⁶⁷ simply by referring to article 270 in the Civil Code – which only concerns financial effects of divorce. This contradiction was not appealed and is thus 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 through their seemingly closest French equivalent, with little or no investigation into the differences.

²⁶⁶ Najm (2006) p.1374.

²⁶⁷ Although the marriage was seen as void, the couple were ruled to have been in good faith concerning its validity, and thus, according to *French* law, the financial effects were as if the marriage had been valid.

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 don't 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 it indeed 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 doesn't 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 basis for the case law concerning *mahr*.²⁶⁸ 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 law concerning *mahr*. Any interpretation of a judgment known to be used as 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, older

²⁶⁸ Another case is mentioned by Hasan (1998), but without giving any precise reference, nor describing the result.

than both the CEDAW and protocol 7 to the ECHR, the literature about them is not extensive. The following exploration is done with this in mind, and I have to a larger extent than with the other legal systems used literature on legal method including the interpretation of judgments.

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 within England itself, and further developed during the colonial period. Thus the difference between a formal legal pluralism and an informal one is more of a continuum than in the other countries we have looked at – or perhaps it is more correct to say that the formal legal pluralism is not limited to private international law, but also include non-codified norms within Britain.²⁶⁹ In any case, the only 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 the private international law aspects of the judgments before I take a look at the status of *mahr* between spouses domiciled in England, and finish 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 at the time of litigation residing in England, since when is not mentioned. The husband took out divorce in 1959, and the wife subsequently claimed the recovery of £1,400 in deferred *mahr*. The whole case concerns a preliminary issue: Whether the claim on *mahr* is within the jurisdiction of English courts. It's from the Queen's Bench division of the High Court, which in this case seems to be the court of first – and last – instance.

²⁶⁹ See e.g. Bano (2004) and Balchin (2006).

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 courts 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.”²⁷⁰ And indeed, 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.²⁷¹

Since the court only adjudicates upon whether it has jurisdiction or not, the result was not that the woman gets *mahr*, 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 based on a pre-nuptial agreement. One might say that the entire case is about the qualification of *mahr*, but the court does interpret the concept of *mahr* more in depth than what is strictly necessary for that purpose, as far as I can see. Thus questions such as how

²⁷⁰ Shahnaz v. Rizwan p.390.

²⁷¹ 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, following the judgment *Hyde v Hyde and Woodmansee* (1866), considered 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 e.g.. seek matrimonial relief, provided the marriage is de facto monogamous. There are exceptions, but none that concern the matter of this thesis. Balchin (2006) pp.7, 43-46. For more information, see Balchin, *Hyde v Hyde* or *Poulter* (1998) p.47 ff.

mahr should further be interpreted and its relation to British public policy²⁷² are touched upon.²⁷³

5.2.2 Qureshi versus Qureshi [1972]

The husband, a Pakistani citizen, and the wife, an Indian citizen, got married in Britain March 9 1966, and had lived there since. The marriage was performed 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.”²⁷⁴ It was probably during the religious ceremony *mahr* was agreed upon, but the judgment doesn’t give any direct information on this matter. The marriage didn’t 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 27 1967 comprising the phrase “I divorce you” three times. Reconciliation was sought through 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 1 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 a 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 divorce, but 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 was rather controversial since it

²⁷² The concept in British law which is the closest to *ordre public*. See also note 130.

²⁷³ 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.

²⁷⁴ Qureshi v. Qureshi p.186

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 will 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 since the marriage was considered potentially polygamous, while Qureshi the marriage was considered monogamous, so the wife could seek ancillary relief. But since the husband was planning to go back to Pakistan the only realistic way for the wife to get any money after the divorce, as the court saw it, was to get *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".²⁷⁵ 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*.²⁷⁶ Aldeeb gives no reference as basis for this statement. Whether this is what he means to imply or not, I don't think there's any basis in Shahnaz for maintaining that qualification of *mahr* should be or has been done on the basis of Muslim laws; on the contrary the court uses English legal terms when trying to qualify and further interpret it. There is no explicit qualification of *mahr* in Qureshi; the court seems to build upon Shahnaz in that *mahr* is seen, without any kind of debate, as within the jurisdiction of the English courts.

²⁷⁵ Aldeeb Abu-Sahlieh (1999) p.93.

²⁷⁶ Stone (1995) p.385.

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.”²⁷⁷ In English law, consideration is defined as “the inducement to contract”,²⁷⁸ 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, the “polygamous” marriage being considered as a very degrading thing for the woman. The court thus 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 law²⁷⁹ *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 an English lawyer, the result was not at all what he expected from reading the discussion leading up to it.²⁸⁰ The Muslim marriage contract has stronger elements of contractual obligations than the Common Law marriage contracts. 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.²⁸¹

²⁷⁷ *Shahnaz v. Rizwan* p.400.

²⁷⁸ Black (1990) on *consideration*.

²⁷⁹ 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.

²⁸⁰ Conversation with LLM Ezekiel Ward, March 3 2008.

²⁸¹ 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 that this assumption is correct. As we will see in the section 5.6, *mahr* is considered, under certain conditions, to be enforceable also if both spouses are domiciled in England. Thus 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

5.4 The choice of laws

Since the Shahnaz case is about 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.²⁸² However, the court explicitly distanced itself from this view, and chose to see the Muslim marriage contract as a *contract*.²⁸³ As a *contract* the *lex causae* should be the law the contracting parties expected to govern the matter,²⁸⁴ which in this case would be Indian law, but this is not a commercial contract, but a pre-nuptial one, thus it is uncertain whether this rule applies. There's not enough information as to 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.²⁸⁵ 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.”²⁸⁶ This statement is a strong indicator that one of the 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*.²⁸⁷

agreement with the *lex domicilii* of the other party. There are several interpretations of this case; for more information, see Aldeeb pp.54-56.

²⁸² Stone (1995) p.67.

²⁸³ Shahnaz v. Rizwan p.400.

²⁸⁴ Stone (1995) p.229-231.

²⁸⁵ Ibid. p.20 ff.

²⁸⁶ Qureshi v. Qureshi p.201; my brackets.

²⁸⁷ See also Pearl (1998) p.233.

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 and 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 what is 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 sources the court refers to for its interpretation of Indian law is the Indian Transfer of Property Act of 1882, but the court also refers to counsel as vital sources also on this subject,²⁸⁸ which is not surprising due to the adversarial process of English law. *Mahr* is seen as a *right in action*, which means a right “attainable or recoverable by action”,²⁸⁹ i.e. property one does not have in one’s possession, but which can be enforced through legal action, “without taking specifically matrimonial proceedings”.²⁹⁰ 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.²⁹¹ 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.”²⁹² The English court is thus 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 *lien*”.²⁹³ Mulla and Mannan see dower as a debt, but an unsecured one. The widow is

²⁸⁸ *Shahnaz* pp.395-396.

²⁸⁹ Black (1990) on *right in action*.

²⁹⁰ *Shahnaz v. Rizwan* p.401.

²⁹¹ I haven’t been able to get a copy of this act, so these views are based on general works on Hanafi law, which is the dominant branch of law on the Indian subcontinent: Marghinani (1957) and Mulla (1996).

²⁹² Mulla (1996) p.443; my brackets.

²⁹³ *Shahnaz v. Rizwan* p.401.

entitled to have it satisfied on his death 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."²⁹⁴ This is very close to the English court's interpretation, although more precise.

The judge in *Shahnaz*, Winn J., has understood quite a lot of the concept of *mahr*: He is aware of the difference between prompt and deferred *mahr*, sees the proprietary aspect of it, and his comparing it to lien picks up an important aspect of *mahr*, although the sources remain somewhat unclear. The judgment leaves a very contradictory impression: 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 as to its functions. It is surprising that the court should decide that the wife's claim doesn't arise from the marriage contract itself, which is a more obvious interpretation, a choice that can only be explained by the court's views on policy – and what the result should be. The court elaborates on 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 suchlike, the court actually comes closer to an understanding of the concept of *mahr* than if it had chosen what it saw as the alternative interpretation, which formally would have been more correct. The court seems to investigate rather thoroughly into the various functions of

²⁹⁴ Mulla (1996) pp 434-443.

mahr in Indian law as 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 said explicitly. Together with a pragmatic approach that seeks to obtain the most equitable result, this approach is indeed woman friendly, although the same may 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”,²⁹⁵ 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*,²⁹⁶ 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.”²⁹⁷ But according to John Buck, another barrister, *mahr* is decidedly not ancillary relief, but rather 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

²⁹⁵ Pearl (1998) p.234.

²⁹⁶ The Muslim marriage ceremony including the signing of a marriage contract.

²⁹⁷ Arshad (2007) pp.520-522, my brackets.

contract would necessarily impact upon the outcome of any claim to ancillary relief.²⁹⁸ 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 arrears²⁹⁹ might be enforceable.”³⁰⁰ 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.”³⁰¹ So if *mahr* theoretically can be enforced, and Muslim marriage contracts with a *mahr* clause will be taken into consideration, there are many obstacles left for a lone Muslim woman to enforce her claim in real life, even without taking into consideration the social pressure she’s not unlikely to be subject to.³⁰²

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 action³⁰³ (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

²⁹⁸ “A pecuniary payment to a party to a marriage in England and Wales, on [divorce](#), [nullity](#) or [judicial separation](#).” Wikipedia, read 05.11.2008.

²⁹⁹ Money which is overdue and unpaid. Black (1990).

³⁰⁰ Buck (2004) p.7, my brackets.

³⁰¹ Ibid.

³⁰² See Foblets (2005), Schmied (1999), Bano (2004) et al.

³⁰³ *Civil actions* “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.³⁰⁴ ³⁰⁵ It remains to see 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 as to the legal enforceability of them.³⁰⁶ 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, but there are some notable exceptions, and the tendency seems to be that more pre-nuptial contracts are enforced.³⁰⁷ English law is going through a lot of changes concerning the adjudication of financial aspects of marriage these days, one notable judgment on this matter, especially in a gender perspective, is *White v. White*.³⁰⁸ 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).”³⁰⁹ 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.

³⁰⁴ Poulter (1986) pp.42-43.

³⁰⁵ This statement is at least in part based on the case *Phrantzes v. Argenti*, in which a Greek girl claimed before English courts both to 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.

³⁰⁶ Balchin (2006) pp.9-10.

³⁰⁷ Freeman (2007) p.39-40, Welstead (2006) p.136.

³⁰⁸ *White v. White* [2000].

³⁰⁹ 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. Muslim marriages are apparently, in the court's view, so degrading to women that they would never enter them without receiving something in return. Since there are now so many of these women in England, it would probably be against what the court saw as good morals not to enforce what they supposedly had been promised in consideration of such marriages. The court therefore chooses to promote what it sees as the woman's interests, at the cost of making 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,"³¹⁰ 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,"³¹¹ i.e. that *mahr* is against 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",³¹² 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 1960ies 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.

³¹⁰ *Shahnaz* p.394, my brackets.

³¹¹ *Shahnaz* p.395.

³¹² *Shahnaz* 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.”³¹³ 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.”³¹⁴ 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,³¹⁵ 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.”³¹⁶ The court chooses to disregard the wife’s wishes, and accepts the *talaq* more or less to enable her to obtain the dower, this being, as the court sees it, her only realistic possibility to get any money from the husband after the divorce. The court seems to try and take as good care of the rights of the wife as it can, in a very practical way, plus to respect the religion and what it sees as religious laws for both spouses. Just as in *Shahnaz v. Rizwan*, the court applies something

³¹³ *Shahnaz* p.401.

³¹⁴ *Qureshi v. Qureshi* p.199.

³¹⁵ Muslim Family Laws Ordinance, valid in most of Pakistan.

³¹⁶ *Shahnaz* p.401.

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 often not used at all, but the courts in the Swedish 2005 judgment and the English Shahnaz judgment use this method at least to a certain degree, although the method itself is never 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, 11 janvier 1996, which was repealed by the Court of Cassation.

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

7 Introduction

Having analyzed the judgments within the context of their legal system, we have now come to the stage of comparison. The focus in this thesis is on the courts' approaches in dealing with Muslim laws in a gender justice perspective. I will first take a look at the use or absence of use of the comparative legal method, then at the use or absence of use of gender justice norms, and then look at the two together. I will finish with saying something about the limits of what can be learned from this study, and what I think needs further investigation.

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

8.1 The qualification of *mahr*

8.1.1 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, but Thue maintains that in

cases concerning *mahr* and other concepts that don't exist in Norwegian law, *lex causae* should be applied to determine which category of conflict of laws rules the court should apply.³¹⁷ It is thus not certain what would be the result 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 at least in part due to the fact that Sweden is the only country which has an act on the matter,³¹⁸ the *travaux préparatoires* of which³¹⁹ designate two options for the qualification of the payment of a lump sum between spouses. Either it's a redistribution of property, or it's 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 on the Hague convention on the law applicable to matrimonial property regimes of 1978.³²⁰ French law doesn't 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 which doesn't 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 e.g. Swedish law.

The Swedish solution implies a qualification *lex fori* with very limited options, which may narrow the options of qualification so much down that it may lead to incorrect results and provide an erroneous basis for the further interpretation of the foreign concept and laws,

³¹⁷ Thue (2002) p.395.

³¹⁸ Lag (1990:272) om internationella frågor rörande makars och sambors förmögenhetsförhållanden (LIMF).

³¹⁹ Prop. 1989/90:87.

³²⁰ 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 1 1992.

especially concerning concepts that are very different from those in Swedish law. So while clear legislation makes the courts more aware of the qualification process, it can at the same time narrow the options for qualification so much down 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. Rules based upon principles and jurisprudence may be more flexible, but 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*.³²¹ His main argument is that this is applicable as a general principle, and thus a practical solution. He further maintains that this approach supposedly will 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 both with the type of *mahr* and with other circumstances in each case. A redistribution of property is one of them. Another weakness is that it is not at all clear that 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 likeness to the French one, although French courts see *mahr* rather as an indication of which property regime is chosen. As we have seen, this solution is much criticised, the most thoroughly – and knowledgably – by Marie-Claude Najm. Her major point is that when it comes to laws based upon religion one has to be careful of assuming that there is

³²¹ Sayed (2008) p.207.

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 his 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 will create a situation similar to the one in countries that apply the nationality principle, where the couple may, after decades of residing in Europe, still find themselves bound by the laws of the Muslim country they originate from, or even only 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, as it is less favourable for the women, and she, 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,³²² which is the rule set forth in the Hague convention on the law applicable to matrimonial property regimes of 14 March 1978 article 4 and the main rule in Swedish and Norwegian law.

8.1.2 The consistency of the qualifications of *mahr*

Both in France and England, the judgments seem to build upon each other as to the qualification of *mahr* or the Muslim marriage contract, and there is no indication that the qualifications are inconsistent. The only exception is the French Court of Appeal in the Lyons 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 enough, *mahr* is qualified differently in the two Swedish judgments, even though the factual situations are rather similar. Both marriages were very short, and in both cases 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 thus also interpretations depending on the situation in each case, and Bogdan proposes that this may be a correct way of qualifying *mahr*: a prompt *mahr* is seen as a redistribution of property, while a deferred *mahr* is seen as maintenance.³²³ I do however fear that Bogdan's

³²² Foblets (2005) pp.307-308, Najm (2006) pp.1373-1374.

³²³ Bogdan (2007) p.185.

qualification based on the differences between prompt and deferred dower is based upon a misconception. He sees prompt *mahr* as being paid either at the time of marriage or on demand, but it is a deferred *mahr* which has to be paid upon demand, at the latest at the dissolution of the marriage by death or divorce. But since 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,³²⁴ this may not cause any problems in practice.

Mahr can have so many functions that it may be a good solution to open up for different qualifications and interpretations. This is a way of allowing 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 opens up for 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 then closer to what is sometimes called the private international law method, see part II chapter 3.2. A problem then is that the results are unpredictable. But then again, 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.³²⁵ Variables that can be relevant for the qualification are the duration of the marriage in question, the type of *mahr*, the size of it, 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.

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

Surprisingly enough, it is in the oldest judgments that the courts appear the most thorough and capable in applying the comparative legal method. According to Kötz and Zweigert,

³²⁴ WLUML (2003) p.181.

³²⁵ Najm (2005) note 242.

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 the reputation of using a completely different approach, applying foreign law and comparative legal method to a fair extent.³²⁶ My discoveries confirm these views. The Norwegian courts don’t really seem to have 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 stand in direct relation to the lack of use of the comparative legal method.

8.3 The various interpretations and functions of *mahr*

8.3.1 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’s seen 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 in each case. In addition the concepts of the *lex fori* shape the interpretation of *mahr* especially through the qualification process. Since comparative legal method is to a small degree applied in the judgments I’ve studied, these concepts have a strong influence on the courts’ further interpretation of the Muslim laws in question as well. However, some interpretations are more correct than others, and in this section I will present and evaluate the various interpretations of *mahr* in the judgments I’ve studied, in relation to the courts’ use of comparative legal method.

8.3.2 *Mahr* as maintenance

As we have seen, it is clear that *mahr* is not a kind of maintenance in the terms of Muslim laws,³²⁷ but this does not mean that this interpretation is wrong. The actual function of *mahr* may be a kind of maintenance, when analyzed through the comparative legal method.

³²⁶ Zweigert (1998) p.19.

³²⁷ See part II chapter 2.

However, if the qualification of *mahr* as maintenance is seen as a general principle, this may sometimes lead to a loss of rights for Muslim women, as we saw in the first Swedish judgment. In Islamic law she has a right to maintenance during the *'idda*, and in many Muslim countries the woman has a right to maintenance beyond this.³²⁸ It is clear that the Swedish judgment is based on a misinterpretation of Muslim Israeli law, and the court didn't use the comparative legal method to investigate the contents of it.

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. Supposing then that the woman is the one with the most wealth and income; is it still possible to talk of *mahr* as a maintenance obligation? In Swedish law, maintenance is seen as aimed to meet the receiver's needs, compensating for a low income or none at all. If this is not the case, we cannot, according to Sayed, say that *mahr* is maintenance in the Swedish sense.³²⁹ And indeed, in Muslim laws *mahr* is the wife's right and property no matter how the economic circumstances of the spouses are. At the husband's death, if still not transferred to her, it is separated from the husband's estate before the wife's share of inheritance is calculated. If the complete rules concerning *mahr* are to be practiced in Europe, the outcome may sometimes actually be unfair towards the husband. But this seems to be the exception so far.³³⁰ Even if *mahr* can never be seen as maintenance in the sense of Swedish domestic law, this does not mean that *mahr* may not be seen as maintenance in the private international law sense, especially if a comparative approach is used. As we saw in chapter 8.1.2, 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, but only if that is the approximate function it has in that particular case. A condition is then 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

³²⁸ See the Tunisian Code du Statut Personnel.

³²⁹ Sayed (2008) p.202.

³³⁰ See for example Bano (2004) p.251 ff.

developments into account.³³¹ Since the right to and the amount of maintenance can only be determined at the time of divorce, this is perhaps not the best solution if *mahr* is qualified as maintenance. If *mahr* is qualified as a redistribution of property, it may be different.

8.3.3 *Mahr* as a redistribution of property

Another Swedish solution was to see *mahr* as a redistribution of property between the spouses.³³² Again the correctness of this depends among other things on the economic situation of the spouses in each case, and in my opinion it is a requirement that *mahr* is prompt. This is one of the objects of *mahr* in Muslim laws, dating back to the Qur'an,³³³ 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. 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 where the woman doesn't take paid work outside the home. For a deferred *mahr* this solution is thus often very good in a comparative legal perspective. As to which factors should be taken into consideration, I here agree with Bogdan that only the circumstances at the time of signing the agreement are relevant; in any case the time lapse between this and the litigation is not likely to be long.³³⁴ It is again a requirement that the husband is the wealthier of the spouses.

8.3.4 *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 a very degrading thing for

³³¹ Bogdan (2007) p.185.

³³² RH 2005:66.

³³³ [Reference](#)

³³⁴ 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, but the entire question merits a much more thorough discussion than space permits me to do here.

the woman, for which *mahr* is a financial compensation. The French court goes the farthest when seeing *mahr* as “the sales price a woman claims for herself when marrying”,³³⁵ but in a comparative perspective the function of consideration is not all that different; in reality the sales price of a chose will most often be the consideration for one of the parties in a sales contract. But there is no requirement that consideration has the same value as the counter-performance,³³⁶ 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 similar. While the majority view is that it is not, the answer is not given, due to the rights and duties that still follow from marriage in the majority of the Muslim countries. Still, this debate concerns rather the symbolic value of *mahr*, not its actual functions. It is thus not a recommendable approach 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.

8.3.5 *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 appears to be considered within the parties’ autonomy, and it’s 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 others of the parties’ intentions.³³⁷ 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

³³⁵ Cour d’appel de Lyon, ch.civ.1, 2 décembre 2002 p.3.

³³⁶ Cheshire (1996) p.73 ff.

³³⁷ See Blenkhorn (2002) concerning the effect of interpreting *mahr* as a pre-nuptial agreement in US law.

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 the one expressed by the Norwegian court in RG 1983 p.1021: The Muslim marriage contract with a clause of *mahr* does neither imply 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 justly stated.³³⁸ In some Muslim countries civil marriage doesn't even exist.³³⁹ 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,³⁴⁰ exclude an aspect which is vital for the understanding of the Muslim laws in question.

8.3.6 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 already mentioned, 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 e.g. on the type of dower, the amount, and other circumstances in the specific case. One should therefore, in my opinion, not choose only one qualification and interpretation of *mahr*, as this may lead to erroneous and sometimes unfair results. In the following chapters we'll have further look into that in a gender justice perspective.

³³⁸ See note 252.

³³⁹ E.g. Lebanon.

³⁴⁰ See the introduction and note 8.

9 *Mahr* and gender justice in European courts

9.1 *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 switch from principles to pragmatism. In the European judgments I've studied, the CEDAW is never mentioned even when the adjudication was done after its entry 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 so surprising for the English judgments from the 1960ies and 1970ies, when the gender equality movement still had limited influence on English courts, especially on issues such as these, but 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. Still, the most striking discovery is that so few courts take gender justice into consideration in cases concerning *mahr*; less than half the cases studied. In none of the Norwegian and French cases is gender justice an issue, nor in the last Swedish judgment. France has a monistic system, which means that the CEDAW was part of French law at the time of adjudication of both the Lyons and the Paris case.

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

In almost all the cases *mahr* is claimed to be against *ordre public*, but this is never accepted by any of the courts. Very often it is a subsidiary claim, the matter is solved on another basis, and none of the courts give any thorough explanation as to why. In RH 1993:116 the basis for this conclusion is clearly wrong; the court sees *mahr* as an equivalent to the Swedish concept of morning gift, and on this basis 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 judgments³⁴¹ the French Court of Cassation has stated that the ECHR³⁴² protocol 7 article 5 on gender equality is part of French *ordre public*.³⁴³ 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.

All in all, 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 would need 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.³⁴⁴ It is also generally acknowledged that the courts should be very restrictive in applying the *ordre public* reservation, for a variety of reasons.³⁴⁵ In none of the judgments in this study has a wife's obtaining of *mahr* led to a very inequitable result, although the result in RH 2005:66 is strongly in favour of the woman, so 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* for being too unfair towards the husband, if the amount is high enough 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. Yet both court practice and legal scholarship leaves a lot to be desired as to bridge the

³⁴¹ Table ronde, Cour de Cassation, February 17 2005.

³⁴² The European Convention on Human Rights.

³⁴³ See part I chapter 6.4.

³⁴⁴ Thue (2002) p.182.

³⁴⁵ Ibid. p.176 ff.

existing gap between the equality and non-discrimination standard on the one hand *ordre public* on the other.

10 *Mahr*, comparative law and gender equality

10.1 Introduction

In the following section we'll have a 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 none or only one of them is applied? What happens if both are?

10.2 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 seem to make any effort to promote gender justice. In both of the French judgments and in LE-1986-447 the results were that the women were left with nothing or very little at divorce, and 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 question 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 the court seems to have used common sense rather than comparative law method with the result that the marriage contract was seen as nothing more than an agreement to marry, in accordance with the wife's claims. Thus in this single case pragmatism and common sense seems to

have done the job of both gender justice awareness and comparative legal method, while in all the other cases the result seems to have been rather inequitable towards the women concerned.

10.3 When a gender justice approach alone is applied

In the Swedish judgment RH 1993:116 the court makes a certain effort to promote gender justice, to the point of reinterpreting case law. But the method of comparative law is not used when trying to interpret the Muslim laws in question, and as a result not only is the nature of *mahr* misinterpreted, but the woman does not get any maintenance during the *'idda*, the first three months after divorce. In Swedish law it takes time for a joint matrimonial estate to be established, before that each takes out of the matrimonial estate only what 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, since the marriage was so short.³⁴⁶ Still, if the court had applied comparative legal method and made a correct interpretation of the Muslim laws in question, she would have gotten three months' maintenance in addition to *mahr*. In this example the result is thus only half favourable for the woman when only a gender justice approach is applied, and a somewhat mechanical one at that.

10.4 When a comparative approach alone is applied

In the other Swedish judgment, RH 2005:66, gender justice is not a topic, but the court does to a certain degree apply comparative legal method. 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 SEK 250,000 to the woman after a few months' marriage, and 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; whether the court just wasn't thorough enough in its interpretation of Iranian law, or the lack of gender justice approach in a man's favour, or something else. As the Canadian Professor in Sociology and Equity Studies in Education, Sherene Razack has

³⁴⁶ See part III chapter 3.5.

pointed out, there is a risk of essentialising and stereotyping too much, with the result that the Muslim woman is too often classified as a victim, and the Muslim man as an offender, leaving no room for nuances and complexity.³⁴⁷ But there is not enough information in this judgment to say whether that is what happened in this particular case.

10.5 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 as to the interpretation of *mahr* and related rules, and can therefore not shed any light upon the application of the two approaches together in relation to *mahr*. Within the boundaries of the legal³⁴⁸ and cultural³⁴⁹ context of the judgment, the court makes a significant effort both in trying to understand the Indian laws in question and to promote gender justice. Within the boundaries of its context, this appears to be the undoubtedly most equitable judgment, which is the most correct in result if not in reasoning behind it. But due to the legal reasoning and the views on Muslim marriage it is based upon, the equity – and quality – of the case law derived from it remains questionable, as we saw in part III chapter 5.6. It is surprising that no further case law on the matter is published.

³⁴⁷ Razack (2008). See also Phillips (2007), esp. ch.3.

³⁴⁸ I.e. *Hyde v. Hyde* and other case law at the time.

³⁴⁹ I.e. the 1960ies when orientalism was still a major feature of the world view in Western Europe, see e.g. Said (2004).

CONCLUSION

What can we learn from these judgments? Since they are so few, one must be careful not to generalise too much from the discoveries,³⁵⁰ but they may give some indications of how the courts may proceed to promote gender equality when they apply Muslim laws. As we saw in chapter 8.2 in this part, 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 as to 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 allows for a wider use of the comparative legal method and, since *mahr* may have such a variety of functions, it may provide more correct results in each case. But as we saw 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.

As to gender equality, we saw in chapter 9 that the courts seem more aware of their negative duties related to *ordre public* than of their positive duty to provide gender equality, and that gender equality most often is not an issue. It also seems that the most correct and equitable results are obtained when the courts use both a comparative approach

³⁵⁰ 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's 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.

and tries actively to promote gender equality in a wide sense with a view to accommodate 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, and we saw in part I chapter 6.2.3 that 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. How this can be done in a European context requires further study, together with 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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ANNEX: THE JUDGMENTS

INSTANS:	Eidsivating lagmannsrett - Dom.
DATO:	1988-05-27
PUBLISERT:	LE-1986-447
STIKKORD:	Ektefelleloven (1927) § 3 og tvistemålsloven § 366.
SAMMENDRAG:	Skilsmisse, underholdsbidrag.
SAKSGANG:	Dom av 27. mai 1988 i ankesak nr. 447/86, hl.nr. 686/86.
PARTER:	Ankende part: A (Prosessfullmektig: Advokat Helge Lochner, Oslo). Motpart: B (Prosessfullmektig: Advokat Kaj R. Bjørnstad, Oslo).
FORFATTER:	Lagdommer Einar M. Olsen, formann. Lagdommer Per Holm. Lagdommer Johannes Smit.

Den 11. juni 1986 avsa Oslo byrett dom med slik domsslutning:

"1. B og A skilles.

2. Saksomkostninger idømmes ikke."

"C" er feilskrift for A. I rettidig ankeerklæring anførte hennes advokat i Karachi blant annet at byrettsdommen ble avsagt uten hennes vitende og "at alle dokumenter som ble fremlagt i den ærede rett av hennes mann så vel som av advokat Helge Lochner i hennes navn er uekte, fingerte og falske, og hun vet ingenting om disse dokumenter i det hele tatt." Senere anførte advokaten at A først ble oppmerksom på ektefellens skilsmissehensikter da hun mottok et brev av 25. juni 1986 fra sin norske advokat.

Begge parter har hatt fri sakførsel for lagmannsretten. Ankeforhandling ble holdt 18. mai 1988. Retten hørte partsforklaring av B, samt forklaring av tre vitner som alle var nye for lagmannsretten. Det ble fremlagt en rekke nye dokumenter. Dokumentasjonen fremgår av rettsboken.

På vegne av A nedla advokat Helge Lochner slik påstand:

"1. A frifinnes for såvel krav om skilsmisse som separasjon.

2. B dømmes til å betale underholdsbidrag til A fra 1. juli 1986 med kr 1.500 pr. måned.

3. B dømmes til å betale sakens omkostninger til det offentlige og til A."

På vegne av B nedla advokat Kaj R. Bjørnstad slik påstand:

"1. Prinsipalt: Oslo byretts dom pkt. 1 stadfestes. Subsidiært: Partene separeres.

2. Prinsipalt: Kravet om underholdsbidrag avvises. Subsidiært: B frifinnes for kravet om underholdsbidrag.

3. A dømmes til å betale saksomkostninger for begge retter til det offentlige."

B opplyste i retten at han ikke husker om han giftet seg med A i 1960 eller i 1961. Hun har opplyst at det skjedde i 1960, og retten legger dette til grunn. Han er født *.*.1940, hun i 1943. Datteren D med

kjælenavnet E ble født *.*.1962. Hun er i live. En sønn døde for mange år siden. B har for lagmannsretten bestridt at han er far til barna. Den 15. mars 1983 giftet han seg i Karachi med kvinnen F som da var 27 år gammel. Med henne fikk han angivelig en sønn som døde i 1986.

B har bodd i Oslo siden 19. juni 1975. Fra 16. oktober 1985 fikk han attføringspenger fra Oslo trygdekontor. Han oppgir at han fra 1988 er fullt uføretrygdet og får utbetalt ca kr 5.000 pr. måned netto etter skatt. Fra og med april 1988 til og med juli 1988 får han kr 500 pr. måned i sosialstøtte. Hans hustru nr. 2 kom til Oslo i oktober 1987. De lever nå sammen i hans leilighet som angivelig består av 1 rom samt kjøkken og bad. Husleien er kr 1.110 pr. måned. Hustru nr. 2 har ingen inntekt. Hun er syk og er dessuten gravid.

A bor angivelig i partenes tidligere felles bolig i Karachi sammen med datteren E. Hun har opparbeidet en større gjeld til sin bror som har underholdt henne og datteren fra juni 1986.

Den ankende part, A ved den oppnevnte prosessfullmektig advokat Helge Lochner, har i det vesentlige anført:

A har ikke vært gift med andre enn B. Det er han som er far til hennes barn. Etter at han reiste til Norge for å få bedre betalt arbeid, har han sendt penger til henne, men sluttet med det i midten av 1986. Hun krever derfor underholdsbidrag fra 1. juli 1986, jfr. ektefelleloven § 3 og ekteskapsloven § 56 nr. 2.

Det har ikke vært noe brudd mellom ektefellene. Hun har ikke samtykket i at han giftet seg for annen gang. Han har ikke betalt tilbake medgiften. Bs ekteskap nr. 2 er derfor ugyldig. B har ikke godtgjort at A ble gjort kjent med hans ekteskap nr. 2. Et slikt nytt ekteskap betyr ikke nødvendigvis noe brudd mellom de første ektefeller.

Spørsmålet om bidrag ble ikke reist for byretten fordi saksøkte ikke fikk vite om saksanlegget før etter at dommen var avsagt. Bidragskravet kunne da reises for lagmannsretten, jfr. tvistemålsloven § 366 annet ledd.

Vilkårene for bidrag foreligger, jfr. ekteskapsloven § 56 nr. 2, idet særlige grunner taler for bidrag. Det bør gjøres permanent, jfr. kvinnenens stilling i Pakistan. Hun har ikke noe å leve av. Det må tas hensyn til at hun har omsorgen for datteren. Det bestrides at datteren er forlovet eller ferdig utdannet.

Ankemotparten, B ved den oppnevnte prosessfullmektig, advokat Kaj R. Bjørnstad, har i det vesentlige anført:

Det ble brudd mellom ektefellene under mannens besøk i Karachi fra desember 1982 til våren 1983. Da ble det ekteskaplige samliv hevet. Partene ble enige om å gå fra hverandre, jfr. det fremlagte gavebrev av 12. januar 1983, og As samtykkeerklæring av samme dato.

Ved gavebrevet fikk A den faktiske disposisjon over en fast eiendom som gir henne leieinntekter ca 5 000 Rupis pr. måned. Hun har ikke behov for bidrag. B har betalt tilbake medgiften som ikke var 50 000 Rupis, men 5 000. Hennes utsikter til å forsørge seg selv er ikke blitt forringet. Det er ikke mulig for B å betale bidrag, jfr. ekteskapsloven § 56. Han er som nevnt uføretrygdet. Det er lenge siden samlivet opphørte. Han har ansvaret for ny ektefelle og venter barn. Ingen særlige grunner taler for å gi A underholdsbidrag.

Det brev byretten bygget på er ekte. Likeså samtykkeerklæringen og gavebrevet. A må ha bestemt seg for å prøve å få bidrag i ankeinstansen til tross for at bidragsspørsmålet ikke ble reist for byretten. Endring etter tvistemålsloven § 366 annet ledd nr. 2 bør man være forsiktig med å tillate, særlig når det er adgang til å ta det nye kravet opp på annen måte og når det som her ikke foreligger noe grunnlag for kravet. Det bør avvises.

Lagmannsrettens bemerkninger:

Det er fremlagt en rekke dokumenter som viser at D (også kalt E) er Bs datter. Retten finner det bevist at så er tilfelle. Lagmannsretten kan ikke finne det bevist at den ankende part har samtykket i mannens nye ekteskap. Lagmannsretten kan heller ikke finne det bevist at B har betalt A hennes medgift. Han kan ikke

høres med at han allerede er skilt fra henne, slik som han overraskende hevdet under sin partsforklaring for lagmannsretten.

Retten tar ikke standpunkt til om Bs ekteskap med F er gyldig etter pakistansk rett. Retten tar heller ikke standpunkt til om det fremlagte gavebrev ("Gift Deed") er ekte og gyldig. Videre finner retten det unødvendig å ta standpunkt til om brevet av 30. juni 1986, som byretten bygget på, er et falsum. Retten bygger på Bs forklaring om at det i desember 1982 kom til brudd mellom ektefellene. De hadde i årevis levet langt fra hverandre, bortsett fra noen få besøk. Den 15. mars 1983 lot mannen seg vie til F. Retten ser dette som en bekreftelse på at bruddet var endelig. Det medførte hevning av samlivet mellom dem uten at det skjedde på lovformelig måte. Samlivet har senere ikke vært gjenopptatt. Den omstendighet at B av og til sendte penger også i tiden 1983 til 1986, representerte ikke en gjenopptakelse av samlivet. Lagmannsretten finner at betingelsene for å gi skilsmisse foreligger, jfr. ekteskapsloven § 43 annet ledd.

Anførselene i ankeerklæringen gjør det sannsynlig at den ankende part først var blitt kjent med saksanlegget etter hovedforhandlingen i byretten. Kravet om underholdsbidrag står i sammenheng med skilsmissekravet. Lagmannsretten finner at andre prosessregler ikke er til hinder og godtar den endring i sakens gjenstand som bestod i at bidragsspørsmålet ble inndratt, jfr. tvistemålsloven § 366 annet ledd nr. 2. Ankemotpartens avvisningspåstand tas således ikke til følge.

Under tvil er retten kommet til at bidragskravet ikke kan tas til følge. Retten legger til grunn Bs opplysning om at han ikke har andre inntekter enn sin uføretrygd. Retten bygger videre på at A oppebærer leieinntekter av den i gavebrevet omtalte faste eiendom med ca 2 000 Rupis pr. måned. Beløpet er skjønnsmessig ansatt og baserer seg på opplysning fra B om at leieinntekten var 1 500 Rupis pr. måned, hvilket han under ankeforhandlingen påsto skyldtes en misforståelse slik at beløpet angivelig var 5 000 Rupis pr. måned. Retten har ikke fullt ut festet lit til noen av disse utsagn. Den nevnte tvil knytter seg til dette og til den omstendighet at en fraskilt kvinnes muligheter for selv å kunne skaffe seg inntekter er opplyst å være dårlige i Karachi. Retten har ikke lagt noen vekt på anførselen om at A angivelig har økonomisk omsorgsansvar for sin voksne datter.

Etter omstendighetene tilkjennes ikke saksomkostninger.

Dommen er enstemmig.

Domsslutning:

- 1. Byrettens dom stadfestes.*
- 2. Wali Mohammad frifinnes for Amina Begums krav om underholdsbidrag.*
- 3. Saksomkostninger tilkjennes ikke.*

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TB
EIDSIVATING LAGMANNSRETT

gjør vitterlig:

Dom av 18. april 1983

i

ankesak nr. 252/82, hl.nr. 359/82:

Qureshi - Khatoon.

Ankende part: Abdur Rauf Qureshi

Prosessfullmektig: Advokat Knud Try, Oslo

Motpart: Saleha Khatoon

Prosessfullmektig: Advokat Helge Lochner, Oslo

Rettens medlemmer: 1. Lagdommer Jørgen Wilberg, formann

2. Lagdommer Knut Bøhn

3. Ekstraordinær lagdommer Dag Havrevold

Protokollfører: Lisbet Andresen

--o0o--

År 1983 den 18. april fortsatte behandlingen av ankesak nr. 252/82 i Oslo tinghus.

Etter rådslagning og stemmegivning for lukkede dører ble det avsagt slik

D O M:

Partene inngikk ekteskap i Pakistan i januar 1975 med sikte på å bosette seg i Norge der mannen hadde bodd siden 1973. I mars 1975 reiste mannen tilbake til Norge, og hustruen flyttet etter i juli samme år. Partene ble separert ved dom den 5. februar 1979, og Strømmen skifterett overtok boet til behandling etter mannens begjæring av 14. februar 1979.

Under skiftebehandlingen fremgikk at Qureshi mente at det ikke eksisterte noe felleseie mellom ektefellene, mens hustruen mente at ektefellene hadde vanlig formuesfellesskap etter norsk rett. Selv om det var mannen som begjærte boet skiftet av skifteretten, må hustruens standpunkt være slik å forstå at hun for sitt vedkommende også krever boet skiftet offentlig. Konsekvensen av mannens standpunkt vil være at skifteretten ikke har kompetanse til å foreta fordeling av partenes samlede formue og at skifteretten ikke skulle overta boet. Skifteretten opptok tvisten til avgjørelse og avsa den 1. mars 1982 kjennelse med slik slutning:

"Behandlingen av bo nr. 8/1979 - Saleha Khatoon og Abdur Rauf Qurechi's separasjonsbo av Skedsmo fortsetter for Strømmen skifterett."

Kjennelsen ble av mannen i rett tid innanket for lagmannsretten. Ved sin prosessfullmektig, advokat Knud Try, har han for lagmannsretten nedlagt slik endelig påstand:

1. Behandlingen av bo nr. 8/79 Abdur Rauf Qureshi og Saleha Khatoons separasjonsbo innstilles og boet avvises fra behandling for skifteretten og boets aktiva og passiva blir å tilbakeføre partene.
2. Saleha Khatoon tilpliktes å betale sakens omkostninger

eventuelt til det offentlige."

Hustruen har ved sin prosessfullmektig, advokat Helge Lochner, nedlagt slik endelig påstand:

- "1. Strømmen skifteretts kjennelse av 1.3.1982 stadfestes.
2. Saleha Khatoon tilkjennes saksomkostninger."

Ankeforhandling fant sted den 7. april 1983. Den ankende part møtte ikke personlig. Lagmannsretten mottok forklaring av Saleha Khatoon, og det ble foretatt slik dokumentasjon som rettsboken viser. Det er ikke uenighet om sakens faktum. Dette og partenes anførsler fremgår av skifterettens kjennelse supplert ved lagmannsrettens bemerkninger i det følgende.

Den ankende part har i det vesentlige anført:

Selv om det er på det rene at partenes første felles domisilland var Norge, vil det i denne sak være riktig å legge pakistansk rett til grunn. Partene inngikk ekteskap etter vanlig pakistansk mønster. Det ble inngått en avtale - "Nikah Nama" - som er påbudt etter pakistansk rett, og hvorved formuesforholdet dem imellom ble fastlagt. Avtalen innebar at det ikke oppsto noe felleseie mellom partene. Hustruens økonomiske rettigheter ble sikret gjennom den avtalte "dower" på 25.000 pakistanske rupies (ca. NOK 15.000) som tilsvarte ca. 5 års lønn etter pakistanske forhold. Partene tenkte seg ikke at formuesforholdet skulle avgjøres etter andre rettsregler, selv om de flyttet til Norge. Ved avtalen "Nikah Nama" kunne alternative formuesforhold vært avtalt. De valgte å begrense seg til å avtale det nevnte "dower" og lot således forholdene for øvrig bli regulert etter pakistanske rettsregler. Ved sin avtale har de derved bestemt at pakistanske rettsregler skal regulere formuesforholdet dem imellom.

Det er ikke grunnlag for å si at pakistansk rett fører

til resultater som ikke kan godtas i Norge ut fra ordre public-regelen.

I praksis har partene under sitt samliv opptrådt overensstemmende med den økonomiske ordning man har i Pakistan, idet mannen sørget for underholdet, mens hustruen stort sett beholdt sin inntekt for seg selv.

Subsidiært må "Nikah Nama" betraktes som en ektepakt med avtale om særeie etter norsk rett. Formkravene for ektepakt i ektefellelovens § 45 er tilfredsstillet ved måten "Nikah Nama" kom i stand på. For øvrig bestemmes formen for ektepakt av loven på opprettelsesstedet, jfr. Karsten Gaarder, Internasjonal privatrett s. 144.

Ankemotparten har fremholdt at spørsmålet om lovvalg må avgjøres etter norsk internasjonal privatrett. I ekteskapsaker som gjelder formuesforholdet, fører dette til at rettsreglene i første domisilland må legges til grunn, jfr. Rt. 1942 s. 214 og Gaarder s. 142.

Det er ikke grunnlag for å si at partene har avtalt at pakistansk rett skal gjelde for dem. Avtalen "Nikah Nama" var en forutsetning for å bli gift i Pakistan, og det eneste partene avtalte, var at de skulle gifte seg og størrelsen på det "dower" som etter pakistansk rett måtte avtales.

Under enhver omstendighet tilsier ordre public-regelen at pakistansk rett ikke kan anvendes på dette forhold. Sterke reelle grunner og rimelighetshensyn taler i samme retning.

"Nikah Nama" tilfredsstiller ikke formreglene for ektepakt. Det fremgår bl.a. ikke at partene underskrev i nær-^{dernest} vær av vitnene. Det var/ikke partenes hensikt å avtale hvorledes formuesforholdet skulle ordnes. De ønsket bare å fylle ut avtaleskjemaet på en slik måte at de kunne bli gift i Pakistan.

Lagmannsretten er kommet til samme resultat som skifteretten.

For å ta standpunkt til spørsmålet om saken skal avvises fra skifteretten må det prejudisielt tas stilling til om det foreligger et felleseie som kan behandles etter skiftelovens regler.

I spørsmålet om lovvalg i saker om formuesforholdet mellom ektefeller er det liten veiledning å hente fra rettspraksis. Avgjørelsen i Rt. 1942 s. 214 gjelder et forhold som ikke kan sammenlignes med det foreliggende.

Det er ikke uenighet mellom partene om at deres første felles bopel var i Norge. Dette er åpenbart et forhold av betydning for lovvalget, jfr. Gaarder s. 142. Lagmannsretten legger i tillegg vesentlig vekt på at partene under hele sitt ekteskap har hatt størst naturlig tilknytning til Norge. Deres felles hjem og de verdier dette omfatter, er i sin helhet bygget opp under ekteskapets beståen i Norge. De hadde ingen verdier av betydning med seg fra Pakistan. Ved ekteskapets inngåelse var de begge klar over at de skulle til Norge for å bygge opp et hjem der.

Det er heller ikke grunnlag for å si at "Nikah Nama" i realiteten er en avtale om å legge pakistansk rett til grunn for formuesforholdet uansett bopel. Hustruen har forklart at denne side av saken ikke var i hennes tanker. Hun hadde ikke kjennskap til norsk rett på dette punkt, knapt nok pakistansk. Lagmannsretten antar at ingen av partene hadde til hensikt å avtale noe konkret av betydning for lovvalgsspørsmålet. Det eneste de hadde i tankene, var å foreta seg det som var nødvendig for å bli gift. Til dette hørte utfylling av skjemaet "Nikah Nama" med fastsettelse av det beløp som skulle være "dower".

Ut fra tilsvarende synspunkter er det heller ikke grunnlag for anførselen om at "Nikah Nama" må betraktes som en ekte-

pakt med bestemmelse om fullstendig særeie mellom partene.

Prejudisielt antar således lagmannsretten at partene ved samlivets opphør hadde et felleseie som etter norsk rett kunne undergis offentlig skiftebehandling, og skifterettens kjennelse blir å stadfeste.

Anken har ikke ført frem. Den uklarhet som råder når det gjelder lovvalget i saker av denne art, gjør det rimelig å fritta den ankende part for erstatningsplikten, jfr. tvml. § 180 første ledd i.f. Den ankende part er innvilget fri sakførsel. Ankemotparten er bistått av Oslo kommune, Kontoret for fri rettshjelp.

Dommen er enstemmig.

D o m s s l u t n i n g:

1. Skifterettens kjennelse stadfestes.
2. Saksomkostninger tilkjennes ikke for noen av rettene.

Jørgen Wilberg

Knut Bøhn

Dag Havrevold

Bekreftes

for rettsskriveren:



Kant Pedersen

Målnummer: T137-92 **Avdelning:**

Avgörandedatum: 1993-03-04

Rubrik: Internationella rättsförhållanden. Mål om underhållsbidrag till make har prövats enligt lagen i det land där den underhållsberättigade har hemvist. Ett yrkande om betalning av mohar (morgongåva) enligt islamisk rätt har prövats utan hinder av att detta utgjort ett s.k. typfrämmande rättsinstitut och bifallits utan hinder av reglerna om ordre public.

Lagrum:

Rättsfall: NJA 1986 s. 615

REFERAT

F.S. var redan före äktenskapets ingående bosatt i Sverige. Han återvände därför hit relativt kort tid efter äktenskapets ingående. N.S., som behövde uppehållstillstånd, kom till Sverige först den 29 mars 1989. Parterna bodde tillsammans i Sverige i omkring fem månader. Därefter återvände N.S. till sin hemby i Israel.

F.S. väckte den 26 oktober 1988 talan mot N.S. och yrkade att tingsrätten skulle döma till äktenskapsskillnad mellan parterna. N.S. bestred yrkandet och invände samtidigt att svensk domstol inte var behörig att handlägga äktenskapsmålet. Invändningen lämnades utan bifall av såväl tingsrätt som hovrätt.

Sedan betänketid löpt framställde F.S. på nytt yrkande om att tingsrätten skulle döma till äktenskapsskillnad. N.S. medgav yrkandet och yrkade för egen del att tingsrätten skulle förplikta F.S. att betala underhållsbidrag till henne med 350 NIS, eller motsvarande belopp i svensk valuta, i månaden för tiden fr.o.m. den 2 oktober 1988 till tre månader efter det att domen på äktenskapsskillnaden vunnit laga kraft. Hon yrkade vidare att tingsrätten skulle förplikta F.S. att till henne betala 11250 NIS, eller motsvarande belopp i svensk valuta, utgörande kvarstående ej utbetald mohar. F.S. bestred yrkandena.

N.S. gjorde gällande att hennes yrkanden skulle bedömas enligt den för muslimer bosatta i Israel tillämpliga lagen. F.S. gjorde å sin sida gällande att målet i sin helhet skulle bedömas enligt svensk rätt. Han

gjorde vidare gällande att yrkandet om mohar inte lagligen kunde bifallas eftersom det är ett för svensk rätt främmande rättsinstitut samt att det under alla förhållanden skulle strida mot svensk ordre public att bifalla yrkandet.

Malmö tingsrätt (1992-02-10, hovrättsfiskalen Stefan Reimer) dömde till äktenskapsskillnad mellan parterna samt förpliktade F.S. att till N.S. betala mohar (morgongåva) med 11250 NIS, eller på betalningsdagen motsvarande svensk valuta. Däremot ogillades N.S. yrkande om underhållsbidrag.

Tingsrätten konstaterade inledningsvis att F.S. varit bosatt i Sverige i mer än ett år och att svensk domsrätt därför förelåg samt att yrkandet om äktenskapsskillnad enligt 3 kap. 4 § första stycket lagen (1904:26) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap (IÄL) skulle prövas enligt svensk lag. Eftersom betänketid löpt hade parterna rätt till äktenskapsskillnad. Tingsrätten övergick därefter till att pröva yrkandet om underhållsbidrag och anförde bl.a. följande.

Till en början kan fastställas att det inte föreligger något hinder mot att i äktenskapsmålet pröva frågor som rör makarnas ömsesidiga rättsförhållanden. Detta följer visserligen inte direkt av IÄL, men i förarbetena till de ändringar som företogs i 3 kap. 6 § IÄL 1973 uttalades bl. a. följande.

"Utan särskilt stadgande torde det vara klart att domstol i äktenskapsmål även skall kunna ta upp frågor beträffande äktenskapets rättsverkningar, t. ex. om makarnas inbördes underhållsskyldighet och bodelning. Frågan vilken lag som domstolen därvid skall tillämpa får avgöras enligt de regler som i allmänhet gäller på området." (se Prop. 1973:158 s. 109)

Frågor om underhåll mellan makar anses vara en av äktenskapets rättsverkningar i personligt hänseende. Tidigare gällde här att makarnas lex patriae skulle vara bestämmande för vilket lands lag som skulle tillämpas. Emellertid fann Högsta domstolen i rättsfallet NJA 1986 s. 615 att domicilprincipen bör vara bestämmande för lagvalet. I det aktuella fallet tillämpades italiensk rätt. Parterna hade såväl skilda medborgarskap som hemvist i olika länder. HD fann att då det rörde sig om den inte ovanliga situationen att den ene av de förutvarande makarna, i regel mannen, brutit upp och fått hemvist i ett nytt land, och skilt sig där, medan den andre bor kvar i det gamla hemlandet, talade det förhållandet att makarna under äktenskapet haft hemvist i ett land där en av dem alltjämt bor för att det landets lag

skulle tillämpas i underhållsfrågan. Denna lösning skulle enligt HD oftast leda till att underhållsfrågan bedömdes enligt lagen i det land där den som begär underhåll, vanligen hustrun, har sin hemvist, vilket befanns önskvärt eftersom det skulle öka förutsättningarna för att underhållsfrågan skulle kunna bedömas med hänsyn tagen till värderingar, levnadsförhållanden och sociala förmåner i det landet (se NJA 1986 s. 615, s. 619 y-n).

I det förevarande målet är båda parter israeliska medborgare men har hemvist i skilda stater. De levde tillsammans endast någon månad i Israel efter äktenskapets ingående, varefter F.S. återvände till Sverige var han redan tidigare hade sitt hemvist. N.S. följde efter så snart hennes uppehållstillstånd var beviljat. Parterna levde dock tillsammans i Sverige endast under en kortare tidsperiod om omkring fem månader. N.S. återvände därefter till sin hemby i Israel var hon alltjämt bor.

I denna situation, som skiljer sig från den i NJA 1986 s. 615, talar enligt tingsrätten övervägande skäl för att tillämpa lagen i det land där den som begär underhåll har sin hemvist, särskilt som de svenska sociala förhållandena måste te sig helt främmande för N.S. F.S. är å andra sidan fortfarande israelisk medborgare och har, vilket framgått av utredningen, alltjämt släktingar kvar i Israel; däribland sin fader. Äktenskapet ingicks i Israel enligt muslimsk rättstradition. Vid en samlad bedömning föreligger därför i förevarande mål starkare anknytning till Israel än till Sverige.

En bestämmelse av den innebörden att den underhållsberättigades hemvist skulle vara bestämmande för lagvalsfrågan har även föreslagits av familjelagssakkunniga i deras slutbetänkande. Betänkandets förslag i dessa delar har emellertid ännu inte lett till någon lagstiftning (jfr. SOU 1987:18 s. 102-104 och 233).

För muslimer bosatta i Israel har de religiösa Sharia-domstolarna exklusiv jurisdiktion vad gäller frågor rörande personalstatutet (se art. 52 Palestine Order in Council (1922-1947) jfr. med Law of Procedure of the Moslem Religious Courts (25 oktober, 1917). Den gällande muslimska rätten som tillämpas av Sharia-domstolarna inom detta rättsområde utgörs av 1917 års osmanska familjerättslag (1333 enligt osmansk tideräkning). Shariá, den muslimska i sig oföränderliga rätten, har sitt ursprung i Koranen. Den osmanska familjerättslagen kan sägas vara en kodifiering av delar av den i Koranen förekommande familjerätten baserat på ett selektivt urval av de tolkningar av denna som olika lagskolor kommit fram till genom århundradena (Johnson, Bo; Islamisk rätt, Stockholm 1975 s. 64 ö och

Bergmann/Ferid; Internationales Ehe- und Kindschaftsrecht, 1972 "Das Islamische Eherecht" s. 3 x-m. Se även allmänt om den muslimska rättens utveckling, Nordberg, Michael; Profetens folk, Kristianstad 1988, s. 87-111).

Tingsrätten fann att det av bestämmelserna i familjerättslagen följde att ömsesidiga rättigheter och förpliktelser på grund av äktenskapet upphörde vid äktenskapsskillnad, med verkan även för förfluten tid. Yrkandet om underhållsbidrag skulle därför ogillas.

Ifråga om N.S:s yrkande om mohar (morgongåva) gjorde tingsrätten följande överväganden.

Morgongåvan, vars storlek oftast fastställs i äktenskapskontraktet, fungerar för kvinnan som säkerhet för äktenskapets bestånd, eftersom mannen vid äktenskapsskillnad omedelbart måste uppfylla sin betalningsförpliktelse (se 83 § familjerättslagen jfr. Koranen 2:229, 242). Vid en eventuell äktenskapsskillnad kommer morgongåvan istället att fungera som hustruns underhåll och hennes finansiella skydd, eftersom något underhållsbidrag i enlighet med vad som ovan anförts inte kan utdömas (Johnson aa s. 51 y och Bergmann/Ferid aa s. 11 f).

Den första fråga som måste avgöras är om en svensk domstol överhuvudtaget kan pröva ett yrkande om utfående av morgongåva.

Vad gäller behandlingen av s. k. typfrämmande rättsinstitut finns det olika meningar inom doktrinen. Enligt den numera förhärskande meningen finns det inget som hindrar att svensk domstol vid sin tillämpning av utländsk materiell rätt använder sig av sådana; dock under förutsättning att det inte strider mot svensk ordre public (jfr. Bogdan, Michael; Svensk Internationell privat- och processrätt, 2 uppl. 1984 s. 82).

Ett utdömande av morgongåva kan i det förevarande fallet inte anses uppenbart strida mot grunderna för den svenska rättsordningen. Något hinder med hänsyn till ordre public kan därför inte anses föreligga (jfr. Bogdan aa s. 66 x och prop. 1973:158 s. 123 y, varav framgår att det är den utländska regelns tillämpning i det enskilda fallet som skall tas i beaktande).

Det förtjänar även att nämnas att morgongåva som institut har förekommit i svensk rätt, dock att det här sedermera ersattes av reglerna om giftorätt och därför hade en delvis annan funktion.

För att det skall komma i fråga att pröva yrkandet om utfående av morgongåva materiellt krävs emellertid därtill att den muslimska rätten utgör lex causae (den för saken tillämpliga lagen). Vilken svensk internationellt privaträttslig kollisionsregel som skall tillämpas på lagvalsfrågan är osäkert.

Enligt tingsrättens mening talar dock det förhållandet att morgongåva enligt muslimsk rätt, åtminstone i praktiken, ses som en av de personliga rättsverkningarna på grund av äktenskapet för att samma lagvalsregel som beträffande underhållsfrågan skall analogt tillämpas.

På grund av det anförda skall muslimsk rätt tillämpas även i denna fråga. Tingsrätten fann därefter att yrkandet skulle bifallas.

Båda parter överklagade tingsrättens dom. N.S. yrkade, efter en mindre justering, att hovrätten skulle bifalla hennes yrkande om underhållsbidrag. F.S. yrkade att hovrätten skulle ogilla N.S:s yrkande om betalning av kvarstående mohar (morgongåva). Parterna bestred varandras yrkanden.

Hovrätten över Skåne och Blekinge (1993-03-04, hovrättslagmannen Lars-Göran Engström, hovrättsrådet Lars Elmqvist samt t.f. hovrättsassessorn Nils Petter Ekdahl, referent) fastställde tingsrättens domslut och anförde:

Som tingsrätten funnit, är svensk domstol behörig att ta upp frågor om underhåll och om utgivande av mohar i samband med talan om äktenskapsskillnad.

Högsta domstolen fann i rättsfallet NJA 1986 s. 615, med frångående av den tidigare förhärskande nationalitetsprincipen, att svensk domstol vid prövning av fråga om makars inbördes underhållsskyldighet skall tillämpa lagen i den stat där makarna senast haft gemensamt hemvist. Högsta domstolen anförde som skäl för sitt ställningstagande bl.a. följande: "Denna lösning lär oftast leda till att underhållsfrågan prövas enligt lagen i det land där den som begär underhållsbidrag, vanligen hustrun, har sitt hemvist. Därmed ökar också förutsättningarna för att frågan skall kunna bedömas med hänsyn tagen till värderingar, levnadsförhållanden och sociala förmåner i det landet, något som i och för sig är önskvärt."

Eftersom makarna S. senast haft gemensamt hemvist i Sverige skulle en tillämpning av den av Högsta domstolen fastslagna principen innebära att yrkandet om underhållsbidrag skall prövas enligt svensk lag. Hovrätten anser emellertid att det finns övervägande skäl att i

fråga om underhållsbidrag till make i stället tillämpa lagen i det land där den underhållsberättigade maken har hemvist. En sådan regel har den fördelen att underhållsfrågan i princip alltid bedöms med hänsyn tagen till värderingar, levnadsförhållanden och sociala förmåner i det landet. Regeln är också lättillämpad och den kan utan olägenhet användas även i det fallet då inte någon av makarna längre bor kvar i det land där de senast haft gemensamt hemvist (se även SOU 1987:18 och Pålsson i SvJT 1992 s. 487).

Av hovrättens ställningstagande följer att israelisk lag skall tillämpas på underhållsfrågan. Med hänsyn till vad som framkommit om institutet mohar bör samma lagval göras i denna fråga.

Den omständigheten att mohar är ett s.k. typfrämmande rättsinstitut bör inte hindra svensk domstol att tillämpa institutet.

Den för muslimer bosatta i Israel tillämpliga lagen är 1917 års Ottoman Family Law. På de av tingsrätten angivna skälen finner hovrätten att N.S:s yrkande om underhållsbidrag inte kan vinna bifall. Lika med tingsrätten finner hovrätten vidare att F.S. enligt den angivna lagen är skyldig att utge yrkad mohar till N.S. samt att det inte kan anses strida mot svensk ordre public att bifalla yrkandet härom.

Till följd av det nu anförda skall tingsrättens domslut fastställas.

Målnummer T 137/92

Sökord: Ordre Public

Litteratur: Prop. 1973:158, s. 109, 123

SOU 1987:18

SvJT 1992, s. 487

Bogdan, Svensk internationell privat- och processrätt, 4 uppl. 1992, s. 94f och 177f

Bo Johnsson, Islamisk rätt 1975

Bergmann/Ferid, Internationales Ehe- und Kindschaftsgerecht, del I och IV

HALMSTADS TINGSRÄTT

DOM
2002-10-24
meddelad i
Halmstad

Mål nr T 952-99

PARTER**Kärande**

Mahnaz Tavakoli Matin, 670607-4504
c/o Advokaterna Carlson och Cederbom AB
Box 250
301 HALMSTAD
Medborgare i Iran

Ombud och biträde enligt rättshjälpslagen:
advokaten Tommy Carlson
Box 250
301 07 HALMSTAD

Svarande

Mehdi Arabshahi, 620115-2037
Norra vägen 20
302 31 HALMSTAD

Ombud och biträde enligt rättshjälpslagen:
advokaten Göran Ruthberg
Box 220
301 06 HALMSTAD

DOMSLUT

1. Tingsrätten förpliktar Mehdi Arabshahi att till Mahnaz Tavakoli Matin betala tvåhundrafemtio tusen (250 000) kr.
2. Tingsrätten fastställer enligt rättshjälpslagen Tommy Carlsons ersättning till åttioåttatusenett hundrafemtio (88 151) kr. Av beloppet avser 83 664 kr arbete, 3 225 kr tidsspillan och 1 262 kr utlägg. Mervärdesskatt ingår i beloppet med 17 378 kr. I förskott har utbetalats sammanlagt 39 000 kr.
3. Tingsrätten fastställer enligt rättshjälpslagen Göran Ruthbergs ersättning till etthundrafyrtusen femhundraåttio (104 580) kr, allt avseende arbete. I beloppet ingår mervärdesskatt med 20 916 kr.
4. Mehdi Arabshahi skall, enligt 30 § rättshjälpslagen, utge ersättning för Mahnaz Tavakoli Matins rättshjälpskostnader med åttioåttatusenett hundrafemtio (88 151) kr.

BAKGRUND

Mahnaz Tavakoli Matin och Mehdi Arabshahi är båda födda i Iran. Mehdi Arabshahi kom till Sverige 1986 och blev svensk medborgare i april 1992. Han har inte besökt Iran sedan han kom till Sverige. Mahnaz Tavakoli Matin är medborgare i Iran. Den 17 juli 1998 ingick de äktenskap i Iran inför vigsselförrättare, den iranske prästen Mohammad Hassan Naseri Salehabadi. Denne var verksam som notarius publicus i Karaj, en ort utanför Teheran. Mahnaz Tavakoli Matin var närvarande personligen. Mehdi Arabshahi företrädde av ombud, i enlighet med artikel 1071 och artikel 1063 i den iranska civillagen. Hans ombud var Mahnaz Tavakoli Matins mor. Enligt det äktenskapskontrakt som upprättades skall Mehdi Arabshahi på Mahnaz Tavakoli Matins begäran utge "mahr" (bröllopsgåva/brudpenning) i form av ett exemplar av Koranen, en spegel, ett par ljusstakar samt 500 Bahar Azadi guldmynt på de villkor som anges i äktenskapskontraktet, se domsbilaga 1. Parterna är ense om att 500 Bahar Azadi guldmynt motsvarar 250 000 svenska kronor.

Under cirka tio dagar i augusti 1998 vistades parterna tillsammans på Cypern. Efter vistelsen på Cypern återvände Mehdi Arabshahi till Sverige och Mahnaz Tavakoli Matin till Iran.

Den 3 december 1998 beviljades Mahnaz Tavakoli Matin ett tidsbegränsat uppehållstillstånd i Sverige. Tillståndet gällde t o m den 3 juni 1999 och förnyades inte.

Den 17 februari 1999 kom Mahnaz Tavakoli Matin med flyg till Sverige och bosatte sig hos Mehdi Arabshahis syster i Stockholm. Den 20 februari 1999 besökte Mehdi Arabshahi henne i Stockholm och förklarade att han ville skiljas.

Den 14 maj 1999 väckte Mahnaz Tavakoli Matin talan mot Mehdi Arabshahi och yrkade äktenskapsskillnad efter betänketid. Hon yrkade också, även interimistiskt, att Mehdi Arabshahi till henne skall betala 250 000 kr i mahr och förskottsvis för kalendermånad utge underhållsbidrag till henne med 2 000 kr i månaden under ett år fr o m betänketidens början. Mehdi Arabshahi medgav yrkandet om äktenskaps-skillnad men bestred hennes talan i övrigt.

Vid sammanträde inför tingsrätten den 13 augusti 1999 stod Mahnaz Tavakoli Matin kvar vid sina yrkanden, dock med den justeringen att yrkandet om underhållsbidraget skall gälla under ett år med början den 13 augusti 1999 och endast vara subsidiärt i förhållande till yrkandet om mahr. Hon förklarade att hon frånfäller sin begäran om betänketid och interimistiskt förordnande. Mehdi Arabshahi medgav yrkandet om äktenskapsskillnad och bestred övriga yrkanden. Sammanträdet avslutades med att tingsrätten avkunnade deldom på äktenskapsskillnad.

Mahnaz Tavakoli Matin har nåtts av beslutet att hon skall utvisas. Hon har överklagat utvisningsbeslutet. Hennes överklagande har ännu inte avgjorts.

YRKANDEN

Vid huvudförhandlingen har Mahnaz Tavakoli Matin – som hon slutligen bestämt sin talan - yrkat förpliktande för Mehdi Arabshahi att till henne betala 250 000 kr i mahr i enlighet med parternas äktenskapskontrakt.

Mehdi Arabshahi har bestritt hennes talan.

Båda parter har yrkat ersättning för rättegångskostnad.

PARTERNAS UTVECKLING AV TALAN JÄMTE GRUNDER

Mahnaz Tavakoli Matin:

Mehdi Arabshahi företrädde vid giftermålet av Mahnaz Tavakoli Matins mor med stöd av en fullmakt som Mehdi Arabshahi utfärdat. Fullmakten innehåller inte några begränsningar i ombudets möjligheter att ingå de avtal som normalt förekommer vid äktenskap. Upprättande av ett äktenskapskontrakt är enligt iransk rätt ett krav för giltigt äktenskap. Mahr, som också är ett obligatoriskt rekvisit för ett giltigt äktenskap, skall enligt artikel 1079 i den iranska civillagen anges i äktenskapskontraktet. Mahrs storlek avgörs efter förhandlingar mellan parterna (artikel 1080 i den iranska civillagen). I förevarande fall kom parterna överens om att bl a 500 Bahar Azadi guldmynt skulle ingå i mahr. Enligt artikel 1082 i den iranska civillagen blir

hustrun ägare till mahr genast efter vigseln och kan därefter fritt disponera över den. I samband med vigselakten ringde Mehdi Arabshahi dessutom från Sverige och talade med prästen som förrättade vigseln. Mehdi Arabshahi godkände att mahr skulle uppgå till 500 Bahar Azadi guldmynt. - En kort tid efter det att Mahnaz Tavakoli Matin anlät till Sverige sade Mehdi Arabshahi till henne att han inte längre ville veta av henne. - Mehdi Arabshahi är bunden av avtalet eftersom dels Mahnaz Tavakoli Matins mor med stöd av fullmakt slutit det för hans räkning, dels han personligen inför präst och vittnen godkänt villkoren, däribland 500 Bahar Azadi guldmynt i mahr.

Mehdi Arabshahi:

Han underrättades av sin mor i Iran att hon kände till en kvinna, Mahnaz Tavakoli Matin, som kunde tänkas lämplig för giftermål. Vissa kontakter förekom mellan Mehdi Arabshahi och Mahnaz Tavakoli Matin. Mahnaz Tavakoli Matin var vid det tillfället arbetslös och bodde hos sina föräldrar. Mehdi Arabshahi talade med Mahnaz Tavakoli Matins far, Ali Tavakoli, om utgivande av *shir baha* (direkt översatt till svenska *mjölkpengar*). - Enligt upplysningar om innehållet i iransk familjerätt som inhämtats från Sveriges ambassad i Teheran, se aktbil 100, är institutet *shir baha* inte lagreglerat utan är en lokal sedvänja i vissa delar av Iran, numera sällsynt men möjligen tillämplig i landsorten. *Shir baha* betalas till brudens mor och är avsett för inköp av möbler till det blivande gemensamma hushållet. I Iran är man mycket noga med att överenskommelsen om *shir baha* registreras hos notarius publicus. - Till en början begärde Ali Tavakoli en summa motsvarande 500 000 svenska kronor. Det var ett belopp som Mehdi Arabshahi omöjligen kunde betala. De kom slutligen överens om halva det ursprungligen begärda beloppet och ytterligare 15 000 kr för att bekosta Mahnaz Tavakoli Matins resa till Sverige. Mehdi Arabshahi överlät sin bostadsrättslägenhet till sin svåger Davoud Riahi för 180 000 kr enligt ett avtal undertecknat den 29 januari 1998 och tog banklån på resten. Han fullgjorde sin betalningsskyldighet för *shir baha* genom fem delbetalningar om vardera 50 000 kr under juni månad 1998. Pengarna förmedlades av Davoud Riahi som via penningmäklare förde över pengarna från Sverige till Iran där Davoud Riahis bror betalade dessa vidare till Ali Tavakoli. Det var aldrig tal om någon ytterligare betalning utöver de 250 000 kr som på ovan beskrivet sätt betalades till Ali Tava-

koli; mahr diskuterades överhuvudtaget inte. Mehdi Arabshahi kände för övrigt inte till mahr och vet därför inte om mahr är en obligatorisk del i äktenskapskontraktet. - Mehdi Arabshahi var personligen på Irans ambassad i Stockholm och införskaffade en fullmakt som han undertecknade och sände till Mahnaz Tavakoli Matins mor. Dagen för giftermålet, den 17 juli 1998, befann sig Mehdi Arabshahi i Halmstad. Han arbetade hela dagen och hade inte någon telefonkontakt med prästen i Iran. Först senare på kvällen ringde Mahnaz Tavakoli Matins mor och berättade att äktenskapet var klart. Inte heller vid det tillfället talades det om mahr. Han och Mahnaz Tavakoli Matin bestämde att de skulle träffas på Cypern. Mehdi Arabshahi bekostade Mahnaz Tavakoli Matins resa till Cypern, uppehållet där och de gävor hon införskaffade för att ge till familjen i Iran; sammanlagt betalade han 68 000 kr i samband med Cypernvistelsen. De kom överens om att hon skulle komma till Sverige så snart hon hade fått utresetillstånd från Iran och uppehållstillstånd i Sverige. I november 1998 beviljades hon samtliga tillstånd. Hennes avresa från Iran drog emellertid ut på tiden och när han frågade varför fick han endast undanflykter till svar. Han bad sin mor göra vissa efterforskningar och hon kunde mycket snart meddela att Mahnaz Tavakoli Matin hade ett förhållande med en annan man i Iran. Mehdi Arabshahi bestämde sig då för att upplösa äktenskapet. Han införskaffade en ny fullmakt, denna gång avseende skilsmässa, som han sände till Mahnaz Tavakoli Matins mor. Fullmakten är daterad den 15 januari 1999, sålunda en månad innan Mahnaz Tavakoli Matin kom till Sverige. Mahnaz Tavakoli Matin fick bo hos Mehdi Arabshahis syster. Efter någon dag besökte Mehdi Arabshahi henne på den adressen och berättade att han inte längre önskade vara gift med henne. Mahnaz Tavakoli Matin har enbart utnyttjat honom för att komma in i Sverige.

Enligt 4 § lagen (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållanden (nedan förkortad LIMF) skall lagen i det land makarna efter giftermålet tog hemvist tillämpas. Efter giftermålet tog de hemvist i Sverige. Dessutom befinner sig Mahnaz Tavakoli Matin i Sverige och hennes avsikt är att stanna här. Svensk lag skall därför tillämpas.

Mehdi Arabshahi godtar i och för sig att svensk domstol är behörig att pröva frågan

om mahr men vid denna prövning skall svensk lag tillämpas, bl a den svenska avtalslagens regler om fullmakt.

Giftermålet har ingåtts genom ombud. Fullmakten för ombudet har endast innefattat behörighet att sköta de myndighetskontakter som måste ske i samband med ett giftermål. Fullmakten har inte innefattat behörighet att sluta avtal om mahr. Om tingsrätten kommer fram till att fullmakten innefattat behörighet att sluta avtal om mahr invänder Mehdi Arabshahi att ombudet likväl inte haft befogenhet att sluta avtal om mahr samt att Mahnaz Tavakoli Matin insåg eller i vart fall borde ha insett befogenhetsöverskridandet. Mahnaz Tavakoli Matin har påstått att Mehdi Arabshahi ringde prästen under vigseln och personligen accepterade samtliga i äktenskapskontraktet intagna villkor. Påståendet om telefonsamtalet visar att hon var i ond tro angående befogenhetsöverskridandet, eftersom hon då borde ha insett att modern inte kunde sluta avtal om mahr utan Mehdi Arabshahis medgivande. Om tingsrätten kommer fram till att Mehdi Arabshahi ändå är bunden av äktenskapskontraktet invänder han att betalning har erlagts genom de fem betalningar om vardera 50 000 kr som har skett till Ali Tavakoli. Betalningen av shir baha skedde till Ali Tavakoli men för Mahnaz Tavakoli Matins räkning. Mehdi Arabshahi har under alla omständigheter kvittningsrätt.

Mahnaz Tavakoli Matin har invänt: Mehdi Arabshahi har inte tidigare sagt att svensk lag skulle vara tillämplig. Hon har därför utgått från att parterna var överens i lagvalsfrågan. Det får anses vara avtalat mellan parterna att iransk lag skall tillämpas. – Varken hon eller hennes far Ali Tavakoli har mottagit några pengar av Mehdi Arabshahi, vare sig vare sig i form av mahr eller shir baha.

BEVISNING

Mahnaz Tavakoli Matin har som skriftlig bevisning åberopat äktenskapskontraktet och fullmakten för Mahnaz Tavakoli Matins mor för äktenskapsmål (i översättning från farsi). Mehdi Arabshahi har som skriftlig bevisning åberopat fullmakten och sex kvitton på betalning om sammanlagt 265 000 kr samt avtalet om överlåtelse av bostadsrätten till Davoud Riahi.

Som muntlig bevisning har Mahnaz Tavakoli Matin åberopat förhör under sanningsförsäkran med sig själv samt vittnesförhör med prästen Mohammad Hassan Naseri Salehabadi och sin far Ali Tavakoli. Mehdi Arabshahi har åberopat förhör under sanningsförsäkran med sig själv samt vittnesförhör med sin svåger Davoud Riahi och med Sudabeh Iman.

Ali Tavakoli och Mohammad Hassan Naseri Salehabadi har inte kunnat lämna Iran för att komma till huvudförhandlingen. Tingsrätten har därför tillåtit att de hörts per telefon.

Mahnaz Tavakoli Matin har inte varit personligen närvarande vid huvudförhandlingen. Hon har uppgett att hon fruktade att polisen skulle gripa henne om hon kom till tingsrätten. En huvudförhandling skulle därmed inte ha kunnat komma till stånd, och hon skulle inte ha fått sin sak prövad. Tingsrätten har därför tillåtit att hon hörts per telefon. - Vid huvudförhandlingens början infann sig två uniformsklädda poliser som förklarade sin närvaro med att de var "allmänt intresserade" av målet. Så snart de fick klart för sig att Mahnaz Tavakoli Matin inte skulle inställa sig lämnade de genast rättssalen.

Från förhören antecknar tingsrätten följande.

Mahnaz Tavakoli Matin: Hon och Mehdi Arabshahi är kusiner. Mehdi Arabshahi lämnade tillsammans med sin syster Iran 1986. Efter sju år kom systemen tillbaka till Iran för att hälsa på släktingar. Systemen friade för Mehdi Arabshahis räkning. Mahnaz Tavakoli Matin arbetade då som tolk vid ett företag och bodde hos sina föräldrar. Ungefär två år därefter ringde Mehdi Arabshahis mor och berättade att han fortfarande stod fast vid frieriet. Efter vissa ytterligare telefonkontakter gifte de sig den 17 juli 1998. - Mehdi Arabshahi hade före vigseln kommit överens med hennes far per telefon om att mahr skulle uppgå till bland annat 500 Bahar Azadi guldmünt. Det var inte tal om något annat belopp eller om shir baha. Storleken på mahr måste bestämmas före vigseln så att prästen kan ange summan i det skriftliga äktenskapskontraktet. Både Mahnaz Tavakoli Matin och hennes mor kände till överenskommelsen om mahr. Eftersom Mehdi Arabshahi inte ville åka till Iran hade han skickat

en fullmakt till Mahnaz Tavakoli Matins mor. - Personligen närvarande vid vigselakten var Mahnaz Tavakoli Matin själv, hennes föräldrar, hennes moster, vigselförrättaren och två grannar som var bröllopsvittnen. Vigselförrättaren hade framfört till Mahnaz Tavakoli Matin att det vore lämpligt om Mehdi Arabshahi ringde till honom under ceremonin om villkoren i äktenskapskontraktet. Av den anledningen hade hon och Mehdi Arabshahi kommit överens om att han klockan 10 på morgonen lokal tid skulle ringa till det kontor där vigseln förrättades. På avtalad tid ringde Mehdi Arabshahi till prästens kontor. Under telefonsamtalet berättade prästen om de tolv villkoren, där storleken av mahr var ett. Mehdi Arabshahi godtog samtliga villkor, inklusive mahr. Hon hörde hela samtalet mellan prästen och Mehdi Arabshahi och är säker på att Mehdi Arabshahi accepterade samtliga villkor. Hon talade själv med Mehdi Arabshahi efter det att han avslutat sitt samtal med prästen. Mehdi Arabshahi sade till henne "jag har svarat ja på alla villkoren". Också Mahnaz Tavakoli Matins mor talade med Mehdi Arabshahi när de var hos vigselförrättaren. Vittnena skrev under äktenskapskontraktet. - Under vistelsen på Cypern kom de överens om att hon skulle komma till Sverige så snart hon fått uppehållstillstånd i Sverige. Hennes avresa till Sverige drog ut på tiden beroende på vissa missförstånd mellan Migrationsverket och den svenska ambassaden i Teheran. I februari 1999 fick hon en stämpel i passet och kunde resa. Hon kom till Sverige den 17 februari 1999. - Varken hon eller hennes far har fått de 250 000 kr Mehdi Arabshahi påstår att han har betalat. Han har inte heller skickat en fullmakt till hennes mor för skilsmässa. Påståendet att Mahnaz Tavakoli Matin har haft ett förhållande med en annan man i Iran är falskt. Det stämmer att det finns ett utvisningsbeslut avseende henne men det har hon överklagat och utlänningsnämnden har ännu inte avgjort frågan slutligt.

Mehdi Arabshahi: Han och Ali Tavakoli förhandlade om shir baha; det var aldrig tal om mahr. Mehdi Arabshahi känner inte till att mahr skulle vara ett krav för giltigt äktenskap enligt iransk rätt. Förhandlingarna skedde per telefon tre månader före bröllopet. Från början krävde Ali Tavakoli motsvarande 500 000 kr men de enades slutligen om 250 000 kr. Pengarna skulle gagna Mehdi Arabshahis och Mahnaz Tavakoli Matins framtida familj och till viss del också Ali Tavakoli. Överenskommelsen var muntlig. För att kunna betala den överenskomna summan sålde Mehdi Arabshahi sin bostadsrättslägenhet till sin svåger, Davoud Riahi, för 180 000

kr och lånade 100 000 kr av Sparbanken. Han hade förvärvat bostadsrätten 1994 för 50 000 kr. Efter överlåtelsen bodde han kvar i bostadsrättslägenheten mot att han betalade hyra till Davoud Riahi. Han erlade shir baha genom fem delbetalningar. Efter varje betalning ringde Ali Tavakoli till honom och bekräftade att han hade fått pengarna. - Mehdi Arabshahi var inte personligen närvarande vid bröllopet eftersom han inte kunde resa till Iran på grund av sitt dubbla medborgarskap. Han hade fått veta att man kunde gifta sig genom ombud och hade införskaffat en fullmakt som han sänt till Mahnaz Tavakoli Matins mor. Dagen för bröllopet arbetade han mellan klockan 07.00 och 18.00 som ambulansförare. Han hade inte telefonkontakt med någon i Iran under hela dagen och kan därför inte heller ha talat med prästen under bröllopet. De hade inte kommit överens om att han skulle ringa till vigselförrättaren klockan 10.00. På kvällen ringde Mahnaz Tavakoli Matins mor och berättade att äktenskapet var klart; hon sade inget om mahr. - Mahnaz Tavakoli Matin fick uppehållstillstånd den 3 december 1998, men eftersom hennes avresa drog ut på tiden och hon endast kom med undanflykter som förklaringar blev han misstänksam. När han fick reda på att hon hade ett förhållande med en man i Iran bestämde han sig för att begära skilsmässa. På Irans ambassad i Stockholm hämtade han en fullmakt som han skickade till Mahnaz Tavakoli Matins mor. Modern har senare i telefonsamtal påstått att hon inte har fått fullmakten. Giftermålet har enbart varit ett medel för Mahnaz Tavakoli Matin att komma till Sverige.

Mohammad Hassan Naseri Salehabadi: Han har varit vigselförrättare i 23 år och förrättar 30 till 40 vigslar per månad men han minns denna vigsel när han ser handlingarna framför sig. Vigseln förrättades på kvällen, han är osäker på exakt tidpunkt. Mehdi Arabshahi ringde till honom under vigseln. Mohammad Hassan Naseri Salehabadi gick igenom samtliga villkor, inklusive storleken på mahr, med honom och Mehdi Arabshahi godkände samtliga villkor. Det var inte Mohammad Hassan Naseri Salehabadi som hade bestämt att Mehdi Arabshahi skulle tala med honom under vigseln; det kan ha varit familjen som ville att det skulle ske. Samtliga som var närvarande vid vigseln – Mahnaz Tavakoli Matin och hennes föräldrar och en moster samt släktingar till Mehdi Arabshahi och två bröllopsvittnen - hörde samtalet mellan honom och Mehdi Arabshahi. Mehdi Arabshahi talade därefter också med några av de andra närvarande. Äktenskapskontraktet undertecknades av

Mahnaz Tavakoli Matin och hennes mor som hade fullmakt att underteckna för Mehdi Arabshahis räkning. – Mohammad Hassan Naseri Salehabadi vet inte hur vanligt förekommande shir baha är i Iran eftersom det är något som avtalas mellan parterna och inte heller registreras hos notarius publicus. Mahr kan eventuellt sättas till ett mycket lågt belopp, men det skall alltid utges och tas in i äktenskapskontraktet.

Ali Tavakoli: Han och Mehdi Arabshahi har inte diskuterat utgivande av shir baha. De har däremot talat om mahr vid ett eller två tillfällen före vigseln. Under vigselakten ringde Mehdi Arabshahi till vigselförrättarens kontor. Han godkände alla villkoren i äktenskapskontraktet, däri inbegripet storleken på mahr, när vigselförrättaren läste upp dem för honom. Ali Tavakoli är osäker på vid vilken tidpunkt på dagen som vigseln ägde rum, det kan ha varit på kvällen eller på eftermiddagen. - Han vet inte vem Davoud Riahi eller dennes bror är. Han har aldrig träffat dem. Han har inte fått några pengar från Mehdi Arabshahi via dessa personer eller genom någon penningmäklare eller på annat sätt.

Davoud Riahi: Han fick veta av Mehdi Arabshahi att denne skulle betala 250 000 kr i shir baha till Mahnaz Tavakoli Matins far. Under juni 1998 fullgjorde Mehdi Arabshahi sin betalningsskyldighet genom fem överföringar om 50 000 kr vid varje tillfälle. Det var Davoud Riahi som lånade Mehdi Arabshahi de 250 000 kr. På kvittona skrev emellertid Davoud Riahi att han mottagit beloppen av Mehdi Arabshahi. Det berodde på att först lånade Davoud Riahi pengarna till Mehdi Arabshahi och därefter fick han tillbaka dem för vidare befordran till Iran. Davoud Riahi anlätade en penningmäklare. Denne överförde pengarna till Davoud Riahis bror i Teheran. Brodern i sin tur överlämnade pengarna till Ali Tavakoli. Brodern ringde vid varje tillfälle och bekräftade att pengarna hade överlämnats. Betalningen delades upp i fem mindre delar för att förmedlingsavgiften då blir lägre. Davoud Riahi vet inte om Ali Tavakoli undertecknade något kvitto på att han mottagit betalningarna. Han har aldrig frågat sin bror om det. Kvitto behövs inte eftersom det gäller penningöverföring inom släkten. – Davoud Riahi erhöll Mehdi Arabshahis bostadsrättslägenhet som pantsäkerhet för sitt lån om 250 000. De har inte anmält överlåtelser till bostadsrättsföreningens styrelse.

Sudabeh Iman: Hon fick höra talas om att en iransk kvinna, som inte hade någon bostad och inte behärskade svenska, hade kommit till Halmstad. Sudabeh Iman sökte upp kvinnan, som var Mahnaz Tavakoli Matin, för att erbjuda sin hjälp. Under juni månad 1999 hyrde Mahnaz Tavakoli Matin en lägenhet av Sudabeh Imans make. Sudabeh Iman och Mahnaz Tavakoli Matin umgicks en del under tre månaders tid mellan april och juni 1999. Mahnaz Tavakoli Matin berättade för henne bland annat att hon gift sig med Mehdi Arabshahi enbart för att få komma till Sverige, att hon hade många manliga vänner i Iran och att hon redan före avfärden från Iran visste att Mehdi Arabshahi ångrat sig.

DOMSKÄL

Äktenskapet mellan Mehdi Arabshahi och Mahnaz Tavakoli Matin ingicks i Iran i enlighet med muslimsk sed och iranska rättsregler. Mahnaz Tavakoli Matin är iransk medborgare. Mehdi Arabshahi är både iransk och svensk medborgare. Enligt parternas äktenskapskontrakt skall Mehdi Arabshahi utge mahr till Mahnaz Tavakoli Matin enligt de regler som gäller i den iranska civillagen.

Genom UD:s försorg har tingsrätt och parter haft tillgång till den iranska civillagen i tysk version, Bergmann-Ferid, Internationales Ehe- und Kindschaftsgerecht, Frankfurt 1987, VII. Buch: Die Eheschliessung und die Ehescheidung artikel 1034 – artikel 1157.

Mahr saknar motsvarighet i den svenska rättsordningen. Att mahr är ett typrämmande rättsinstitut har i praxis inte ansetts utgöra ett hinder för svensk domstol att tillämpa det och ett utdömande av mahr har i visst fall inte ansett strida mot svensk ordre public (se RH 1993:116). Mehdi Arabshahi har godtagit att svensk domstol prövar Mahnaz Tavakoli Matins talan.

Mehdi Arabshahi har, med hänvisning till lagen (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållanden (LIMF) ansett att svensk lag – och därmed den svenska avtalslagens regler om fullmakt - skall tillämpas på frågan om utdömande av mahr, eftersom parterna tog hemvist i Sverige efter giftermålet.

Mahnaz Tavakoli Matin har anfört att det får anses vara avtalat mellan parterna att iransk lag skall gälla.

Av 1 § LIMF framgår att lagen skall tillämpas på frågor om *makars förmögenhetsförhållanden* som har anknytning till en främmande stat. Begreppet makars förmögenhetsförhållanden definieras inte. I motiven till lagen har angetts bl a följande. Gränsdragningsproblem kan uppstå när en make i samband med skilsmässa skall utge ett engångsbelopp till den andra maken enligt bestämmelser i någon utländsk lag. Tvekan kan råda om beloppet skall anses som ett engångsunderhåll och följa de internationella reglerna om underhåll eller om det avser en sådan utjämning av makarnas förmögenhetsförhållanden som skall följa bestämmelserna i LIMF. Oavsett vilken beteckning ett engångsbelopp har, bör bedömningen av om det i det enskilda fallet ligger inom ramen för det som utgör makars förmögenhetsförhållanden göras med ledning av syftet med utbetalningen och omständigheterna under vilka den görs. Det typiska för underhållet är att det syftar till att tillgodose mottagarens löpande försörjning genom att ersätta eller komplettera en inkomst. En ersättning som hänför sig till makarnas förmögenhetsförhållanden syftar däremot i princip till att åstadkomma en utjämning mellan makarna enligt grunder där försörjningsaspekten typiskt sett är av underordnad betydelse. Den närmare gränsdragningen i enskilda fall har överlämnats åt rättstillämpningen. (Prop. 1989/90:87 s 35)

Enligt artikel 1082 i den iranska civillagen blir mahr kvinnans egendom omedelbart efter genomförd äktenskapsceremoni och hon är då berättigad att disponera fritt över mahr. Tingsrätten finner med hänsyn till det framförda att mahr inte kan jämföras med underhållsbidrag, utan skall anses vara en sådan utjämning av makars förmögenhetsförhållanden som faller under LIMF:s tillämpningsområde.

Målet inleddes som ett äktenskapsmål och svensk domsrätt förelåg i enlighet med 3 kap 2 § 4 p lagen (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, eftersom Mehdi Arabshahi har hemvist i Sverige. Svensk domsrätt i fråga om utdömande av mahr föreligger genom att målet har uppkommit i samband med ett äktenskapsmål i Sverige och också genom att Mehdi Arabshahi har hemvist i riket, se 2 § 1 st 1 p och 2 p LIMF.

Tillämplig lag är enligt 4 § 1 st LIMF, om makarna inte avtalat annat, lagen i det land där de tog hemvist när de gifte sig.

Av utredningen framgår inte att parterna före eller i samband med vigselakten berört frågan om vilket lands lag som skall gälla för deras egendomsförhållanden. Med hänsyn till Mehdi Arabshahis inställning i lagvalsfrågan kan Mahnaz Tavakoli Matin inte anses ha visat att parterna avtalat om tillämplig lag. Tingsrätten har därför att pröva vilket lands lag som skall gälla i målet. (Se Michael Bogdan, Svensk internationell privat- och processrätt, femte upplagan, Stockholm 1999, s 43 f ; jfr NJA 1973 s 57).

Tingsrätten behandlar härfter frågan om Mehdi Arabshahi och Mahnaz Tavakoli Matin tog hemvist i Sverige när de gifte sig.

Hemvistbegreppet definieras i 14 § LIMF, vari framgår att den som är bosatt i viss stat skall anses ha hemvist där, om bosättningen med hänsyn till vistelsens varaktighet och omständigheterna i övrigt får anses stadigvarande.

Det har framgått att Mahnaz Tavakoli Matin kom till Sverige den 17 februari 1999 och att hennes tidsbegränsade uppehållstillstånd som gällde mellan den 3 december 1998 och den 3 juni 1999 inte har förnyats. Hon har således vistats illegalt i Sverige sedan dess. För närvarande föreligger även ett beslut om att Mahnaz Tavakoli Matin skall utvisas ur landet. Under förevarande förhållanden finner tingsrätten inte att Mahnaz Tavakoli Matin vistelse i Sverige kan anses stadigvarande. Då makarna sålunda aldrig under äktenskapet haft hemvist i samma stat, kan lagvalsregeln i 4 § 1 st LIMF inte tillämpas. Tillämplig lag får därför bestämmas med hänsyn till vilken stat makarna har starkast anknytning till. (Se prop. 1989/90:87 s 43 f).

Mahnaz Tavakoli Matin är iransk medborgare och äktenskapet ingicks i Iran enligt de seder och rättsregler som gäller i Iran. Hennes föräldrar och övrig släkt bor i Iran. Hon har alltid bott i Iran och hon har ingen anknytning till Sverige genom någon anhörig. Hon har nåtts av beslutet att hon skall utvisas från Sverige. Mehdi Arabshahi, som är både svensk och iransk medborgare, har enligt egen uppgift sina

föräldrar och övrig släkt i Iran. Vid en samlad bedömning kommer tingsrätten fram till att starkast anknytning föreligger till Iran; därmed skall iransk rätt tillämpas på frågan om mahr.

Enligt iransk rätt är det tillåtet att ingå giftermål genom ombud, se artikel 1071 i den iranska civillagen. I målet är ostridigt att Mehdi Arabshahi har upprättat en fullmakt för Mahnaz Tavakoli Matins mor att företräda honom vid äktenskapets ingående och att hon för hans räkning träffat avtal med Mahnaz Tavakoli Matin om mahr. Enligt äktenskapskontraktet är Mehdi Arabshahi skyldig att utge mahr, innefattande bland annat ett belopp motsvarande 250 000 kr, till Mahnaz Tavakoli Matin vid anfordran.

Det är ostridigt i målet att Mehdi Arabshahi och Mahnaz Tavakoli Matins far, Ali Tavakoli, avtalat att Mehdi Arabshahi skulle betala motsvarande 250 000 kr i anledning av giftermålet. Mehdi Arabshahi har uppgett att han erlagt beloppet i form av shir baha till Ali Tavakoli och att frågan om mahr aldrig varit på tal mellan dem. Mahnaz Tavakoli Matin har invänt att avtalet gällt mahr och att mahr därför angetts till 250 000 kr i äktenskapskontraktet.

Mahnaz Tavakoli Matin har åberopat att Mehdi Arabshahi är bunden av avtalet eftersom han personligen per telefon har accepterat detsamma och att han i allt fall är bunden av avtalet eftersom Mahnaz Tavakoli Matins mor med stöd av en giltig fullmakt har accepterat avtalet för hans räkning. Mehdi Arabshahi har bestritt med invändningarna att något telefonsamtal aldrig har ägt rum och att fullmakten inte innefattat behörighet att träffa avtal om mahr. I allt fall har ombudet överskridit sin befogenhet genom att träffa ett sådant avtal.

Mehdi Arabshahi har förnekat att det förekommit något telefonsamtal mellan honom och vigselförrättaren under vigselceremonin. Mahnaz Tavakoli Matin har till stöd för påståendet att Mehdi Arabshahi lämnat sitt samtycke vid telefonsamtal med vigselförrättaren åberopat vittnesförhör med sin far Ali Tavakoli och med vigselförrättaren, prästen Mohammad Hassan Naseri Salehabadi. Enligt Mahnaz Tavakoli Matin förekom samtalet klockan 10.00 på morgonen lokal tid i Iran. Mohammad

Hassan Naseri Salehabadi har uppgett att vigseln ägde rum på kvällen och Ali Tavakoli har inte kunnat ange någon tidpunkt med säkerhet, men att det kan ha varit på kvällen eller eftermiddagen. Mahnaz Tavakoli Matin har även uppgett att det var prästen som begärde att Mehdi Arabshahi skulle ringa under vigselceremonin, men Mohammad Hassan Naseri Salehabadi har uppgett att han inte framställt någon sådan begäran.

Det har förflutit drygt fyra år sedan vigseln förrättades och under den tiden har vigselförrättaren medverkat i 1 500-2 000 vigslar. Det finns därför utrymme för tvivel om riktigheten av de uppgifter som Mohammad Hassan Naseri Salehabadi lämnat om ett telefonsamtal mellan honom och Mehdi Arabshahi, i synnerhet som det av Mehdi Arabshahis uppgifter framgår att Mehdi Arabshahi varit av föreställningen att han redan fullgjort sin betalningsskyldighet i förhållande till Mahnaz Tavakoli Matin. Det kan därför antas att Mehdi Arabshahi skarpt skulle ha reagerat för om han skulle behöva betala ytterligare 250 000 kr. Mahnaz Tavakoli Matins påstående att Mohammad Hassan Naseri Salehabadi begärt att Mehdi Arabshahi skulle vara närvarande per telefon motsägs av Mohammad Hassan Naseri Salehabadis egna uppgifter. De har också olika uppfattningar om när samtalet skulle ha ägt rum. Avvikelserna i viktiga detaljer förringar i viss mån tilltron till de uppgifter som Mahnaz Tavakoli Matin lämnat. På grund av det anförda finner tingsrätten att Mahnaz Tavakoli Matin inte med tillräcklig styrka visat, mot Mehdi Arabshahis bestridande, att Mehdi Arabshahi under vigseln per telefon skulle ha accepterat att utge mahr med 500 Bahar Azadi guldmynt.

Vad avser bundenhet vid avtalet på grund av fullmakt gör tingsrätten följande överväganden.

Numera anses allmänt att ett ombuds möjligheter att binda fullmaktsgivaren skall bedömas enligt lagen i det land där ombudet handlat. (Se Michael Bogdan, Svensk internationell privat- och processrätt, femte upplagan, Stockholm 1999, s 264 med hänvisningar). Då fullmakten för Mahnaz Tavakoli Matins mor avsett ett institut som inte förekommer i svensk rätt och då syftet med fullmakten varit att giftermålet skulle kunna ingås i Iran enligt iranska rättsregler och seder finner tingsrätten inte

anledning att göra en annan bedömning; iransk rätt skall således tillämpas på invändningarna om bristande behörighet respektive befogenhet.

Fullmakten för Mahnaz Tavakoli Matins mor har följande lydelse (i svensk översättning) såvitt nu är av intresse. "Saken om fullmakt och ombudens befogenheter: För äktenskapsmål, kontakt med berörda myndigheter samt kontakt med notarius publicus för registrering av äktenskapsmål mellan mig och fru Mahnaz Tavakoli Matin. --- Ombuden har rätt att i sin tur ha ställföreträdare." Av förhöret med Mohammad Hassan Naseri Salehabadi framgår att mahr alltid skall utges och skrivas in i äktenskapskontraktet. Det får därför förutsättas att det ligger inom ombudets behörighet att bestämma om mahr. Ordalydelsen i den fullmakt som Mehdi Arabshahi utfärdat ger inte stöd för hans påstående att fullmakten varit inskränkt och inte omfattat mahr. Han har inte heller visat att ombudets behörighet varit begränsad eller att det skulle ha förelegat ett befogenhetsöverskridande. Han är därför bunden av det äktenskapskontrakt som Mahnaz Tavakoli Matins mor ingått för hans räkning.

Mehdi Arabshahi har invänt att han i allt fall har kvittningsrätt eftersom han har erlagt 250 000 kr till Ali Tavakoli för Mahnaz Tavakoli Matins räkning.

Davoud Riahi har uppgett att han via sin bror i Teheran vid fem tillfällen överlämnat pengarna till Ali Tavakoli och att brodern sagt att Ali Tavakoli bekräftat att han mottagit dem. Mehdi Arabshahi har uppgett att Ali Tavakoli ringt till honom och sagt att han erhållit pengarna. Ali Tavakoli har emellertid förnekat att han skulle ha fått några pengar från Mehdi Arabshahi av Davoud Riahis bror eller av någon annan. Ali Tavakoli har inte utfärdat några kvitton på beloppen och de kvitton som Mehdi Arabshahi åberopat från Davoud Riahi saknar betydelse för frågan om Ali Tavakoli faktiskt mottagit pengarna. Tingsrätten finner inte att den bevisning som Mehdi Arabshahi åberopat har sådan styrka att han kan anses ha visat att han fullgjort den påstådda betalningen till Ali Tavakoli. Vid sådant förhållande saknar tingsrätten anledning att ingå i prövning av frågan om kvittning överhuvudtaget varit tillåten mot fordringen på mahr.

Tingsrätten förpliktar sålunda Mehdi Arabshahi att betala 250 000 kr till Mahnaz Tavakoli Matin.

Rättegångskostnader

Med hänsyn till utgången i saken är Mehdi Arabshahi skyldig att enligt huvudregeln i 18 kap 1 § rättegångsbalken jämfört med 30 § rättshjälpslagen (1996:1619) utge ersättning till staten för Mahnaz Tavakoli Matins kostnader för rättshjälpsbiträde. Från huvudregeln i 18 kap 1 § rättegångsbalken finns i 2 § samma kapitel undantag för det fall att målet angår rättsförhållande, som enligt lag inte får bestämmas på annat sätt än genom dom. I sådant fall får förordnas att vardera parten skall bära sin rättegångskostnad.

Målet har inletts genom Mahnaz Tavakoli Matins ansökan om stämning på Mehdi Arabshahi med yrkande om äktenskapsskillnad, underhållsbidrag och mahr. Yrkandet om äktenskapsskillnad avser rättsförhållande av sådan beskaffenhet att det inte kan bestämmas på annat sätt än genom dom. Målet har därför till en början kommit att handläggas som ett äktenskapsmål enligt de regler som gäller för ett indispositivt tvistemål. För sådana mål är huvudregeln i fråga om kostnadsansvaret att vardera parten skall bära sin rättegångskostnad. Detta mål innehåller emellertid både indispositiva och dispositiva frågor; det är således ett s k blandat mål. Uttryckliga lagregler rörande handläggningen av mål, där indispositiva och dispositiva frågor handläggs i en rättegång, saknas i fråga om tvistemål. (Jfr NJA 1985 s 338)

En förutsättning för att 18 kap 2 § rättegångsbalken skall tillämpas på blandade mål bör vara att grunden för det dispositiva anspråket är helt beroende av utgången i den indispositiva delen, såsom de svenska reglerna i 6 kap 7 § äktenskapsbalken om underhåll till make efter äktenskapsskillnad.

Enligt den iranska civillagen som tillämpas i målet blir mahr kvinnans egendom omedelbart efter genomförd äktenskapsceremoni och hon är då berättigad att fritt förfoga över mahr. Av åberopat äktenskapskontrakt i målet framgår att Mahnaz Tavakoli Matin äger utfå mahr vid anfordran. Det innebär att en process vid svensk

domstol om utfående av mahr kan föras utan att maken samtidigt väcker talan om äktenskapsskillnad. Det dispositiva anspråket är således helt oberoende av utgången i den indispositiva delen.

Den 13 augusti 1999 meddelade tingsrätten deldom på äktenskapsskillnad och de kostnader som uppkommit i målet har nästan uteslutande sin grund i frågan om mahr. Frågorna har således skilts åt.

På grund av vad ovan anförts finner tingsrätten att den dispositiva frågan, dvs mahr, bör följa reglerna för dispositiva mål. (Jfr Fitger, Rättegångsbalken 3, 4:e avdelningen s 1:5 före 42 kap; SOU 1982:26 s 241 x; Gärde, Nya rättegångsbalken s 570 m.). Mehdi Arabshahi skall således förpliktas att utge ersättning till staten för Mahnaz Tavakoli Matins kostnader för rättshjälpsbiträde.

HUR MAN ÖVERKLAGAR, se bilaga (DV 401)

Överklagande ges in till tingsrätten senast den 14 november 2002 och ställs till Hovrätten för Västra Sverige.


Bengt Erdmann

شری / الف

شماره ۴۹۶۸۱



Domsbilaga 1

جمهوری اسلامی ایران
اداره فنی قوه قضائیه
شماره ردیف دفتر مترجم

EMBLEM OF ISLAMIC REPUBLIC OF IRAN
MINISTRY OF JUSTICE
STATE ORG. FOR REGISTRATION OF DEEDS & PROPERTIES
MARRIAGE CERTIFICATE

Marriage Certificate No. : 314901 76/A
Marriage Reg. Office No. : 57-Karaj
Serial No. : 3510
Date of Marriage : 17.7.1998 Date of Reg. : As above

WIFE : Miss. Mahnaz TAVAKOLI MATIN

ID No. 1097-Tehran 24 dated 3.7.1967, D/o Ali & Seyedeh Sedigheh, born on 7.6.1967, ID Serial No. A/69-479416, Health Certificate No. 2767 dated 15.7.1998, Translator, Moslem, Iranian, residing at Karaj.

HUSBAND : Mr. Mehdi ARABSHAHI

ID No. 724-Tehran 24 dated 1.2.1962, S/o Mohammad Taghi & Fatemeh Soltan, born on 15.1.1962, ID Serial No. A/84-277166, Health Certificate No. 2767 dated 15.7.1998, Computer Engineer, Moslem, Iranian, residing at Sweden.

HUSBAND HAS NO OTHER WIFE.

TYPE OF MARRIAGE : PERMANENT

MARRIAGE SETTLEMENT : A holy Koran, a mirror, a pair of candlesticks, plus 500 Bahar Azadi Gold Coins, due by husband to be paid on wife's demand. Signed. ✓
CONDITIONS PROVIDED IN OR BY A SEPARATE COLLATERALLY BINDING MARRIAGE CONTRACT

A) The wife makes condition that in the case of divorce not petitioned by her or by petition caused by infraction of matrimonial obligations or misconduct as judged by the court, the husband shall transfer to her free of consideration half of the assets acquired by him during matrimonial life. B) The husband gives the wife an irrevocable power with the right of substitution so that she may in cases below cause herself to be divorced and to accept bestowal should this be made by the wife. 1-Refusal by the husband to meet cost of maintenance of compelling him to do so. Also husband's failing to discharge his duties regarding wife's indispensable of inducing him to discharge such duties. 2-Husband's misconduct or ill-natured socialization so that it would render the continuance of marriage insupportable to the wife. 3-Husband's affection of such refractory disease as it would, if matrimonial life is continued, become a perilous factor for the wife. 4-Husband's insanity in a way that it would render marriage dissolution impossible under Canonical Law. 5-Defaulting a court prohibiting the husband from engaging in occupation found by court in consistent with the family interest or wife's prestige. 6-Husband's conviction by final verdict to five years prison term or more to pecuniary punishment together covering 5 years term and the sentence being in execution. 7-Husband's involvement in harmful; addiction would as judged by the court endanger family life and make it difficult for the wife. 8-Husband's desertion of family life implausibly or absence for 6 consecutive months. 9-Conviction of husband for committing effective and execution of punishment whether in excess or to the amount prescribed by law contrary to family prestige of the wife to be determined by the court. 10-Husband's sterility or other physical defect affecting wife's childbirth. 11-Husband's missing not be found within 6 months from wife's petition. 12-Husband committing bigamy without the wife's consent or unfair treatment toward his wife. Sgd & Sld.

OTHERS : Ms. Sedigheh Arabshahi, ID No. 1224-Tehran 7, D/o Seyed Esmail, Wife's Mother, is Husband's Attorney, as per Power of Attorney dated 7.7.1998, being certified by Ministry of Foreign Affairs under No. 5675 dated 7.7.1998.

WITNESSES :

Mr. Hadi Ahmadi Jirandeh, ID No. 1846-Roodbar, S/o Shafi; Mr. Siamak Ahmadi Jirandeh, ID No. 1359-Tehran, S/o Hadi; Mr. Hossein Malek, ID No. 195-Arak, S/o Ali signature.

REFERENCES :

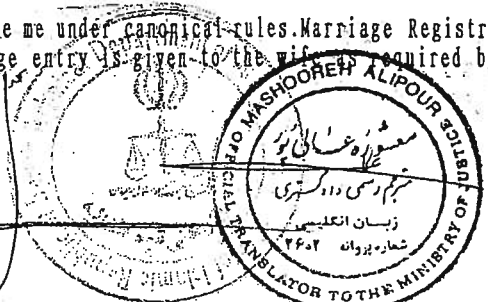
Ms. Sedigheh Arabshahi, ID No. 1224-Tehran 7, D/o Seyed Esmail; Mr. Ali Tavakoli, ID No. 43726-Tehran, S/o Abolghasem

AFFIRMATION AND ACCEPTANCE PERFORMED & SIGNED: We the couple did sign this certificate and the conditions provided with full knowledge and at free will. Sign.

The identity of the couple established and the whole matters certified before me under canonical rules. Marriage Registry Office No. : 57-Karaj. This certificate which is in conformity with marriage entry is given to the wife as required by order provided under Art. 14 of the Marriage Act. (Seal & Signature)

TRUE TRANSLATION CERTIFIED 19.9.1998

Signature of the official translator
marked (x) is certified without any
consideration to the contents.



Målnummer: T4594-02 **Avdelning:** 6
Avgörandedatum: 2004-11-22
Rubrik: Svensk domstols behörighet, tillämplig lag m.m. i fråga om äktenskapskontrakt avseende brudpenning (mahr) enligt iransk rätt.
Lagrum: 2 § första stycket 1 och 2, 4 § första stycket, 5 § och 14 § lagen (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållanden
Rättsfall: • NJA 1973 s. 57
• RH 1993:116

REFERAT

M.T.M och M.A. är båda födda i Iran. M.A. kom till Sverige år 1986 och blev svensk medborgare i april 1992. Han har inte besökt Iran sedan han kom till Sverige. M.T.M. är medborgare i Iran. Den 17 juli 1998 ingick de äktenskap i Iran inför vigselförrättare, den iranske prästen M.H.N.S. Denne var verksam som notarius publicus i Karaj, en ort utanför Teheran. M.T.M. var närvarande personligen. M.A. företräddes av ombud, i enlighet med artikel 1071 och artikel 1063 i den iranska civillagen. Hans ombud var M.T.M:s mor. Enligt det äktenskapskontrakt som upprättades skall M.A. på M.T.M:s begäran utge mahr (bröllopsgåva/brudpenning) i form av bland annat 500 Bahar Azadi guldmynt på de villkor som anges i äktenskapskontraktet. Parterna är ense om att 500 Bahar Azadi guldmynt motsvarar 250 000 svenska kronor.

Under cirka tio dagar i augusti 1998 vistades parterna tillsammans på Cypern. Efter vistelsen på Cypern återvände M.A. till Sverige och M.T.M. till Iran.

Den 3 december 1998 beviljades M.T.M. ett tidsbegränsat uppehållstillstånd i Sverige. Tillståndet gällde t.o.m. den 3 juni 1999 och förnyades inte.

Den 17 februari 1999 kom M.T.M. med flyg till Sverige och bosatte sig hos M.A:s syster i Stockholm. Den 20 februari 1999 besökte M.A. henne i Stockholm och förklarade att han ville skiljas.

Den 14 maj 1999 väckte M.T.M. talan mot M.A. om äktenskapsskillnad. Hon yrkade också att M.A. skulle förpliktas att till henne betala 250 000 kr i

mahr i enlighet med parternas äktenskapskontrakt. M.A. medgav yrkandet om äktenskapsskillnad men bestred betalningskravet.

Halmstads tingsrätt meddelade den 13 augusti 1999 deldom på äktenskapsskillnad.

M.T.M. åberopade som grund för yrkandet om betalning att M.A. var bunden av ett avtal som hennes mor med stöd av fullmakt slutit för hans räkning. Till närmare utveckling av detta anförde hon följande. M.A. företrädde vid vigseln av M.T.M:s mor med stöd av en fullmakt som M.A. utfärdat. Fullmakten innehåller inte några begränsningar i ombudets möjligheter att ingå de avtal som normalt förekommer vid äktenskap. Upprättande av ett äktenskapskontrakt är enligt iransk rätt ett krav för giltigt äktenskap. Mahr, som också är ett obligatoriskt rekvisit för ett giltigt äktenskap, skall enligt artikel 1079 i den iranska civillagen anges i äktenskapskontraktet. Mahrs storlek avgörs efter förhandlingar mellan parterna (artikel 1080 i den iranska civillagen). I förevarande fall kom parterna överens om att bland annat 500 Bahar Azadi guldmynt skulle ingå i mahr. Enligt artikel 1082 i den iranska civillagen blir hustrun ägare till mahr genast efter vigseln och kan därefter fritt disponera över den. - En kort tid efter det att M.T.M. anlät till Sverige sade M.A. till henne att han inte längre ville veta av henne.

M.A. bestred att han var bunden av ett avtal och anförde följande. Han underrättades av sin mor i Iran att hon kände till en kvinna, M.T.M., som kunde tänkas lämplig för giftermål. Vissa kontakter förekom mellan M.A. och M.T.M. Vid det tillfället var M.T.M. arbetslös och bodde hos sina föräldrar. M.A. talade med M.T.M:s far, A.T., om utgivande av shir baha (direkt översatt till svenska mjölkpengar). - Enligt upplysningar om innehållet i iransk familjerätt som inhämtats från Sveriges ambassad i Teheran, är institutet shir baha inte lagreglerat utan är en lokal sedvänja i vissa delar av Iran, numera sällsynt men möjligen tillämplig i landsorten. Shir baha betalas till brudens mor och är avsett för inköp av möbler till det blivande gemensamma hushållet. I Iran är man mycket noga med att överenskommelsen om shir baha registreras hos notarius publicus. - Till en början begärde A.T. en summa motsvarande 500 000 svenska kronor. Det var ett belopp som M.A. omöjligen kunde betala. De kom slutligen överens om halva det ursprungligen begärda beloppet och ytterligare 15 000 kr för att bekosta M.T.M:s resa till Sverige. M.A. överlät sin bostadsrättslägenhet till sin svåger D.R. för 180 000 kr enligt ett avtal undertecknat den 29 januari 1998 och tog banklån på resten. Han fullgjorde sin betalningsskyldighet för shir baha genom fem delbetalningar om vardera 50 000 kr under juni månad 1998. Pengarna förmedlades av D.R. som via penningmäklare förde över pengarna från Sverige till Iran där D.R:s bror betalade dessa vidare till A.T. Det var aldrig tal om någon ytterligare

betalning utöver de 250 000 kr som på ovan beskrivet sätt betalades till A.T.; mahr diskuterades överhuvudtaget inte. M.A. kände för övrigt inte till mahr och vet därför inte om mahr är en obligatorisk del i äktenskapskontraktet. - M.A. var personligen på Irans ambassad i Stockholm och införskaffade en fullmakt som han undertecknade och sände till M.T.M:s mor. Dagen för giftermålet, den 17 juli 1998, befann sig M.A. i Halmstad. Senare på kvällen ringde M.T.M:s mor och berättade att äktenskapet var klart. Inte heller vid det tillfället talades det om mahr. Han och M.T.M. bestämde att de skulle träffas på Cypern. M.A. bekostade M.T.M:s resa till Cypern, uppehållet där och de gåvor hon införskaffade för att ge till familjen i Iran; sammanlagt betalade han 68 000 kr i samband med Cypernvistelsen. De kom överens om att hon skulle komma till Sverige så snart hon hade fått utresetillstånd från Iran och uppehållstillstånd i Sverige. I november 1998 beviljades hon samtliga tillstånd. Hennes avresa från Iran drog emellertid ut på tiden och när han frågade varför fick han endast undanflykter till svar. Han bad sin mor göra vissa efterforskningar och hon kunde mycket snart meddela att M.T.M hade ett förhållande med en annan man i Iran. M.A. bestämde sig då för att upplösa äktenskapet. Han införskaffade en ny fullmakt, denna gång avseende skilsmässa, som han sände till M.T.M:s mor. Fullmakten är daterad den 15 januari 1999, sålunda en månad innan M.T.M. kom till Sverige. M.T.M fick bo hos M.A:s syster. Efter någon dag besökte M.A. henne på den adressen och berättade att han inte längre önskade vara gift med henne. M.T.M. har enbart utnyttjat honom för att komma in i Sverige. - Enligt 4 § lagen (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållanden (nedan förkortad LIMF) skall lagen i det land makarna efter giftermålet tog hemvist tillämpas. Efter giftermålet tog de hemvist i Sverige. Dessutom befinner sig M.T.M. i Sverige och hennes avsikt är att stanna här. Svensk lag skall därför tillämpas. - M.A. godtar i och för sig att svensk domstol är behörig att pröva frågan om mahr men vid denna prövning skall svensk lag tillämpas, bl.a. den svenska avtalslagens regler om fullmakt. - Giftermålet har ingåtts genom ombud. Fullmakten för ombudet har endast innefattat behörighet att sköta de myndighetskontakter som måste ske i samband med ett giftermål. Fullmakten har inte innefattat behörighet att sluta avtal om mahr. Om tingsrätten kommer fram till att fullmakten innefattat behörighet att sluta avtal om mahr invänder M.A. att ombudet likväl inte haft befogenhet att sluta avtal om mahr samt att M.T.M. insåg eller i vart fall borde ha insett befogenhetsöverskridandet. - Om tingsrätten skulle finna att han är bunden av äktenskapskontraktet invänder han att han fullgjort betalning genom de fem betalningarna om vardera 50 000 kr till A.T. för shir baha.

M.T.M. invände följande. M.A. har inte tidigare sagt att svensk lag skulle vara tillämplig. Hon har därför utgått från att parterna var överens i lagvalsfrågan. Det får anses vara avtalat mellan parterna att iransk lag skall tillämpas. - Varken hon eller hennes far A.T. har mottagit några pengar av

M.A., vare sig i form av mahr eller shir baha.

M.T.M. åberopade som skriftlig bevisning äktenskapskontraktet och fullmakten för M.T.M:s mor (i översättning från farsi). M.A. åberopade som skriftlig bevisning fullmakten och sex kvitton på betalning om sammanlagt 265 000 kr samt avtalet om överlåtelse av bostadsrätten till D.R.

Som muntlig bevisning åberopade M.T.M. förhör under sanningsförsäkran med sig själv samt vittnesförhör med sin far A.T. och prästen M.H.N.S. M.A. åberopade förhör under sanningsförsäkran med sig själv samt vittnesförhör med sin svåger D.R. och S.I.

A.T. och M.H.N.S. kunde inte lämna Iran för att komma till huvudförhandlingen. Tingsrätten tillät därför att de hördes per telefon.

M.T.M. var inte personligen närvarande vid huvudförhandlingen. Hon uppgav att hon fruktade att polisen skulle gripa henne om hon kom till tingsrätten. En huvudförhandling skulle därmed inte ha kunnat komma till stånd och hon skulle inte ha fått sin sak prövad. Tingsrätten tillät att hon hördes per telefon.

Halmstads tingsrätt (2002-10-24, rådmannen Bengt Erdmann) förpliktade M.A. att till M.T.M. betala 250 000 kr.

I domskälen anförde tingsrätten följande.

Äktenskapet mellan M.A. och M.T.M. ingicks i Iran i enlighet med muslimsk sed och iranska rättsregler. M.T.M. är iransk medborgare. M.A. är både iransk och svensk medborgare. Enligt parternas äktenskapskontrakt skall M.A. utge mahr till M.T.M. enligt de regler som gäller i den iranska civillagen.

Genom UD:s försorg har tingsrätt och parter haft tillgång till den iranska civillagen i tysk version, Bergmann-Ferid, Internationales Ehe- und Kindschaftsgerecht, Frankfurt 1987, VII. Buch: Die Eheschliessung und die Ehescheidung artikel 1034 - artikel 1157.

Mahr saknar motsvarighet i den svenska rättsordningen. Att mahr är ett typfrämmande rättsinstitut har i praxis inte ansetts utgöra ett hinder för svensk domstol att tillämpa det och ett utdömande av mahr har i visst fall inte ansetts strida mot svensk ordre public (se RH 1993:116). M.A. har godtagit att svensk domstol prövar M.T.M:s talan.

M.A. har, med hänvisning till LIMF ansett att svensk lag - och därmed den svenska avtalslagens regler om fullmakt - skall tillämpas på frågan om

utdömande av mahr, eftersom parterna tog hemvist i Sverige efter giftermålet.

M.T.M. har anfört att det får anses vara avtalat mellan parterna att iransk lag skall gälla.

Av 1 § LIMF framgår att lagen skall tillämpas på frågor om makars förmögenhetsförhållanden som har anknytning till en främmande stat. Begreppet makars förmögenhetsförhållanden definieras inte. I motiven till lagen har angetts bl.a. följande. Gränsdragningsproblem kan uppstå när en make i samband med skilsmässa skall utge ett engångsbelopp till den andra maken enligt bestämmelser i någon utländsk lag. Tvekan kan råda om beloppet skall anses som ett engångsunderhåll och följa de internationella reglerna om underhåll eller om det avser en sådan utjämning av makarnas förmögenhetsförhållanden som skall följa bestämmelserna i LIMF. Oavsett vilken beteckning ett engångsbelopp har, bör bedömningen av om det i det enskilda fallet ligger inom ramen för det som utgör makars förmögenhetsförhållanden göras med ledning av syftet med utbetalningen och omständigheterna under vilka den görs. Det typiska för underhållet är att det syftar till att tillgodose mottagarens löpande försörjning genom att ersätta eller komplettera en inkomst. En ersättning som hänför sig till makarnas förmögenhetsförhållanden syftar däremot i princip till att åstadkomma en utjämning mellan makarna enligt grunder där försörjningsaspekten typiskt sett är av underordnad betydelse. Den närmare gränsdragningen i enskilda fall har överlämnats åt rättstillämpningen. (Prop. 1989/90:87 s. 35.)

Enligt artikel 1082 i den iranska civillagen blir mahr kvinnans egendom omedelbart efter genomförd äktenskapsceremoni och hon är då berättigad att disponera fritt över mahr. Tingsrätten finner med hänsyn till det framförda att mahr inte kan jämföras med underhållsbidrag, utan skall anses vara en sådan utjämning av makars förmögenhetsförhållanden som faller under LIMF:s tillämpningsområde.

Målet inleddes som ett äktenskapsmål och svensk domsrätt förelåg i enlighet med 3 kap. 2 § 4 lagen (1904:26 s. 1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, eftersom M.A. har hemvist i Sverige. Svensk domsrätt i fråga om utdömande av mahr föreligger genom att målet har uppkommit i samband med ett äktenskapsmål i Sverige och också genom att M.A. har hemvist i riket, se 2 § 1 st. 1 och 2 LIMF.

Tillämplig lag är enligt 4 § 1 st. LIMF, om makarna inte avtalat annat, lagen i det land där de tog hemvist när de gifte sig.

Av utredningen framgår inte att parterna före eller i samband med vigselakten berört frågan om vilket lands lag som skall gälla för deras egendomsförhållanden. Med hänsyn till M.A:s inställning i lagvalsfrågan kan M.T.M. inte anses ha visat att parterna avtalat om tillämplig lag. Tingsrätten har därför att pröva vilket lands lag som skall gälla i målet. (Se Michael Bogdan, Svensk internationell privat- och processrätt, femte upplagan, Stockholm 1999, s. 43 f; jfr NJA 1973 s. 57).

Tingsrätten behandlar härefter frågan om M.A. och M.T.M. tog hemvist i Sverige när de gifte sig.

Hemvistbegreppet definieras i 14 § LIMF, vari framgår att den som är bosatt i viss stat skall anses ha hemvist där, om bosättningen med hänsyn till vistelsens varaktighet och omständigheterna i övrigt får anses stadigvarande.

Det har framgått att M.T.M. kom till Sverige den 17 februari 1999 och att hennes tidsbegränsade uppehållstillstånd som gällde mellan den 3 december 1998 och den 3 juni 1999 inte har förnyats. Hon har således vistats illegalt i Sverige sedan dess. För närvarande föreligger även ett beslut om att M.T.M. skall utvisas ur landet. Under förevarande förhållanden finner tingsrätten inte att M.T.M:s vistelse i Sverige kan anses stadigvarande. Då makarna sålunda aldrig under äktenskapet haft hemvist i samma stat, kan lagvalsregeln i 4 § 1 st. LIMF inte tillämpas. Tillämplig lag får därför bestämmas med hänsyn till vilken stat makarna har starkast anknytning till. (Se prop. 1989/90:87 s. 43 f.)

M.T.M. är iransk medborgare och äktenskapet ingicks i Iran enligt de seder och rättsregler som gäller i Iran. Hennes föräldrar och övrig släkt bor i Iran. Hon har alltid bott i Iran och hon har ingen anknytning till Sverige genom någon anhörig. Hon har nåtts av beslutet att hon skall utvisas från Sverige. M.A., som är både svensk och iransk medborgare, har enligt egen uppgift sina föräldrar och övrig släkt i Iran. Vid en samlad bedömning kommer tingsrätten fram till att starkast anknytning föreligger till Iran; därmed skall iransk rätt tillämpas på frågan om mahr.

Enligt iransk rätt är det tillåtet att ingå giftermål genom ombud, se artikel 1071 i den iranska civillagen. I målet är ostridigt att M.A. har upprättat en fullmakt för M.T.M:s mor att företräda honom vid äktenskapets ingående och att hon för hans räkning träffat avtal med M.T.M. om mahr. Enligt äktenskapskontraktet är M.A. skyldig att utge mahr, innefattande bland annat ett belopp motsvarande 250 000 kr, till M.T.M. vid anfordran.

Det är ostridigt i målet att M.A. och M.T.M:s far, A.T., avtalat att M.A. skulle betala motsvarande 250 000 kr i anledning av giftermålet. M.A. har uppgett att han erlagt beloppet i form av shir baha till A.T. och att frågan om

mahr aldrig varit på tal mellan dem. M.T.M. har invänt att avtalet gällt mahr och att mahr därför angetts till 250 000 kr i äktenskapskontraktet.

M.T.M. åberopade att M.A. är bunden av avtalet eftersom M.T.M:s mor med stöd av en giltig fullmakt har accepterat avtalet för hans räkning.

Vad avser bundenhet vid avtalet på grund av fullmakt gör tingsrätten följande överväganden.

Numera anses allmänt att ett ombuds möjligheter att binda fullmaktsgivaren skall bedömas enligt lagen i det land där ombudet handlat. (Se Michael Bogdan, a.a. s. 264 med hänvisningar.) Då fullmakten för M.T.M:s mor avsett ett institut som inte förekommer i svensk rätt och då syftet med fullmakten varit att giftermålet skulle kunna ingås i Iran enligt iranska rättsregler och seder finner tingsrätten inte anledning att göra en annan bedömning; iransk rätt skall således tillämpas på invändningarna om bristande behörighet respektive befogenhet.

Fullmakten för M.T.M:s mor har följande lydelse (i svensk översättning) såvitt nu är av intresse. "Saken om fullmakt och ombudens befogenheter: För äktenskapsmål, kontakt med berörda myndigheter samt kontakt med notarius publicus för registrering av äktenskapsmål mellan mig och fru M.T.M. - - - Ombuden har rätt att i sin tur ha ställföreträdare." Av förhöret med M.H.N.S. framgår att mahr alltid skall utges och skrivas in i äktenskapskontraktet. Det får därför förutsättas att det ligger inom ombudets behörighet att bestämma om mahr. Ordalydelsen i den fullmakt som M.A. utfärdat ger inte stöd för hans påstående att fullmakten varit inskränkt och inte omfattat mahr. Han har inte heller visat att ombudets behörighet varit begränsad eller att det skulle ha förelegat ett befogenhetsöverskridande. Han är därför bunden av det äktenskapskontrakt som M.T.M:s mor ingått för hans räkning.

Tingsrätten fann inte styrkt att M.A. erlagt någon betalning.

M.A. överklagade domen och yrkade att hovrätten skulle ogilla M.T.M:s talan.

M.T.M. bestred ändring.

Parterna åberopade i hovrätten samma grunder som vid tingsrätten.

M.A. åberopade samma bevisning som vid tingsrätten varvid han dock åberopade förhören från tingsrätten genom banduppspelning.

M.T.M. åberopade bandinspelning av förhöret med sig själv vid tingsrätten.

Hovrätten för Västra Sverige (2004-11-22, hovrättslagmannen Kjell Björnberg, hovrättsrådet Gunilla Smith, referent, och kammarrättsassessorn Ulrika Svanholm) fastställde tingsrättens domslut på följande skäl.

Av äktenskapskontraktets lydelse framgår att M.A. genom ombud åtagit sig att betala det begärda beloppet som mahr till M.T.M.

M.A. har till utveckling av sin inställning om att svensk lag skall tillämpas rörande parternas förmögenhetsförhållanden anfört att han är svensk medborgare och bosatt i Sverige sedan tjugo år samt att det aldrig varit parternas avsikt annat än att stadigvarande bo i Sverige.

M.T.M. har invänt att parterna aldrig under äktenskapet haft hemvist i samma stat, att den stat de har starkast anknytning till är Iran samt att tre dagar efter att hon anlant till Sverige förklarade M.A. att han ville skiljas varför det inte varit hans avsikt att de skulle stadigvarande bo i Sverige.

Hovrätten gör i fråga om svensk domsrätt i målet samma bedömning som tingsrätten.

I likhet med tingsrätten finner hovrätten att mahr skall anses vara en sådan utjämning av makars förmögenhetsförhållanden som faller under LIMF.

En rättshandling mellan makar avseende deras förmögenhetsförhållanden är enligt 5 § första stycket LIMF giltig, om den stämmer överens med den lag som är tillämplig på makarnas förmögenhetsförhållanden när handlingen företas.

Den huvudsakliga frågan i målet rör huruvida det i äktenskapskontraktet intagna åtagandet att utge mahr skall fränkännas rättsverkan på grund av utgången i fråga om hemvist och därmed tillämplig lag. Enligt uttalande i förarbetena till 5 § LIMF skall dock paragrafen inte tolkas motsatsvis. En rättshandling kan således tänkas vara giltig även i andra fall, eftersom man bör vara återhållsam med att underkänna rättshandlingar som makar med fog har utgått från skall gälla (se prop. 1989/90:87 s. 46). Med hänsyn till vad som upptagits i tingsrättens dom om parternas anknytning till Iran, där båda parterna har medborgarskap, och hur äktenskapet ingåtts finner hovrätten att iransk rätt skall tillämpas i fråga om mahr i målet.

När det gäller fråga om M.A. på grund av den fullmakt han utfärdat för M.T.M:s mor är bunden av det avtal om mahr instämmer hovrätten i tingsrättens bedömning att iransk rätt skall tillämpas på invändningarna om bristande behörighet respektive befogenhet. På av tingsrätten anförda skäl

finner hovrätten att det inte finns stöd för att fullmakten varit inskränkt på sådant sätt att den inte omfattat mahr samt inte heller att ombudets behörighet varit begränsad. M.A. har själv sagt att han inför äktenskapet träffade en överenskommelse med M.T.M:s far om ett belopp - shir baha - som slutligen bestämdes till exakt det belopp som M.T.M. begär i form av mahr. I likhet med tingsrätten finner hovrätten att det inte förelegat ett befogenhetsöverskridande. M.A. är sålunda bunden av det äktenskapskontrakt som M.T.M:s mor ingått för hans räkning.

M.A. har inte visat att han fullgjort betalning och tingsrättens domslut skall därför fastställas.

Målnummer T 4594-02

Sökord: Domstols behörighet; Tillämplig lag

Litteratur: Prop. 1989/90:87 s. 35, 43 f, 87; Bogdan, Svensk internationell privat- och processrätt, 5 uppl. 1999, s. 43 f, s. 264 med hänvisningar; Bergmann-Ferid, Internationales Ehe- und Kindschaftsgerecht, 1987, VII. Buch: Die Eheschliessung und die Ehescheidung artikel 1034-artikel 1157

ENREGISTRE le 06 JUIL 1995
à la R.P. des ACTES JUDICIAIRES
de PARIS Bd 126 n° 2

Popu: Joignante Gille sept
Cent vingt et un francs

pc 720 000
abr 330 000
390 000
DNTG sur 11 60500
timbre 221
60721

M

N° Répertoire Général :

[Signature]
J. G. CHAUVEAU

91.003132

Grosse Délivrée
Le 13 JUIL 1995
A la requête de : *sel Fisselier*

COUR D'APPEL DE PARIS

2ème chambre, section A

ARRET DU 14 JUIN 1995

(N° 4 , 13 pages)

et dernier

PARTIES EN CAUSE

AIDE JURIDICTIONNELLE

Admission du
au profit de

Date de l'ordonnance
de clôture :

S/ appel d'un jugement rendu le
9 Novembre 1990 par le T.G.I. de
PARIS (Affaires Matrimoniales
Section C 7)

Extrait des minutes du Secrétariat-Greffe
de la Cour d'Appel de Paris

1°/ Monsieur Raymond **TOHME**
né en 1930 à KFARSHIMA BAABDA
(Liban), de nationalité libanaise
demeurant 16, avenue Montaigne
75008 PARIS

APPELANT Au PRINCIPAL
INTIME INCIDEMMENT
Représenté par la SCP FISSELIER
CHILOUX, Avoué
Assisté de Me GIRAUD, Avocat

ARRET AU FOND

2°/ Madame Magdalena **KUBICKA**
née le 13 Octobre 1944 à KANIE
(Pologne), de nationalité
polonaise
demeurant 16, avenue Montaigne
75008 PARIS

VOIR MENTION RECTIFICATIVE PAGE 14

INTIMEE AU PRINCIPAL
APPELANTE INCIDEMMENT
Représentée par la SCP BARRIER
MONIN, Avoué
Assistée de Me DEBY, Avocat

COMPOSITION DE LA COUR

Lors des débats et du délibéré :

Président : Mme HONORAT
Conseillers : Mme DINTILHAC
et Mme TIMSIT

MINISTERE PUBLIC

Représenté aux débats par
M. PAIRE, Avocat Général, qui a
été entendu en ses réquisitions

Jain

[Signature]

GREFFIER

Mme COCHET

DEBATS

A l'audience hors la présence du public du 12 Avril 1995

ARRET

Contradictoire

Prononcé publiquement par Mme HONORAT, Président, laquelle a signé la minute avec Mme COCHET, Greffier

La Cour statue sur l'appel prononcé par M. Raymond TOHME du jugement prononcé le 9 Novembre 1990 par le Tribunal de Grande Instance de PARIS qui a :

- prononcé le divorce entre lui et Mme Magdalena KUBICKA à leurs torts partagés,

- dit que jusqu'à la fin de la procédure celle-ci aura la jouissance gratuite de l'appartement constituant le domicile conjugal et percevra une pension alimentaire mensuelle de 6.000 F,

- dit qu'à titre de prestation compensatoire il devra lui verser une rente mensuelle de 6.000 F pendant trois ans et lui abandonner l'usufruit de l'appartement 16 avenue Montaigne - 75008 PARIS.

M. TOHME ayant indiqué qu'il s'était marié avec Mme KUBICKA le 28 Février 1970 à BEYROUTH (Liban) non pas devant l'officier d'état civil de BEYROUTH mais devant le Tribunal Musulman sunnite par un mariage exclusivement religieux et la photocopie produite de la traduction en langue française d'un "certificat de mariage" étant incomplète, un arrêt prononcé le 25 Janvier 1993 par cette même chambre a renvoyé l'affaire à la mise en état pour :

- production de l'original du certificat de mariage en langue arabe, de sa traduction en langue française par un traducteur assermenté et d'un certificat de coutume portant sur les formes légales du mariage au Liban,

- justification par M. TOHME de sa situation matrimoniale au 27 Février 1990,

- communication de l'affaire au Ministère Public.

9 A

Par conclusions écrites le Ministère Public a relevé que M. TOHME avait épousé Mme Joséphine ABOU GHAMMAN le 1er Décembre 1951 et que cette première union n'était pas dissoute lors de son mariage avec Mme KUBICKA.

Il a ainsi demandé à la Cour de déclarer nul le mariage contracté par M. TOHME et Mme KUBICKA pour cause de bigamie aux seuls torts de l'époux bigame et de liquider la communauté de fait ayant existé entre eux en rappelant que l'application des articles 270 et suivants du Code Civil relatifs à la prestation compensatoire était possible en cas de nullité de mariage.

Appelant, M. TOHME poursuit l'infirmité du jugement du 9 Novembre 1990.

Par conclusions postérieures à l'intervention de l'arrêt du 25 Janvier 1993 il demande à la Cour :

- de dire nul leur mariage, par application de la loi polonaise, avec bénéfice de la putativité pour Mme KUBICKA et lui-même,
- de dire que les conséquences de cette nullité doivent être régies par la loi française,
- de rejeter la demande prestation compensatoire,
- de dire que leurs rapports ont été régis par le régime matrimonial de la séparation de biens tel que défini par la loi musulmane loi d'autonomie, depuis le 28 Février 1970 et qu'il sera liquidé conformément à cette loi,
- de lui allouer une somme de 15.000 F sur le fondement de l'article 700 du Nouveau Code de Procédure Civile.

Intimée, Mme KUBICKA demande à la Cour d'écarter l'argumentation de M. KUBICKA et d'écarter des débats d'une part le document n° 8 communiqué le 23 Novembre 1994 concernant un pseudo contrat de mariage, en tout état de cause de le lui déclarer inopposable et en tout cas de lui faire application des articles 1108 et suivants du Code Civil et d'autre part l'attestation signée le 21 Novembre 1994 par M. KADOURA.

Demandant le bénéfice de ses écritures antérieures elle sollicite la confirmation du jugement entrepris en ce qu'il lui a conféré la jouissance gratuite de l'appartement pendant l'instance et son infirmité par le surplus.

Elle demande ainsi :

- de prononcer le divorce aux torts exclusifs de son mari,

- de fixer à 20.000 F par mois la pension alimentaire due par lui jusqu'à la fin de l'instance,

- de lui attribuer à titre de prestation compensatoire une somme de 720.0000 F ainsi que tous droits sur l'appartement constituant le domicile conjugal, avenue Montaigne,

- de dire qu'ils se sont mariés sans contrat et qu'il y a lieu d'appliquer le régime français de la communauté d'acquêts,

- de lui allouer une somme de 20.000 F pour ses frais non taxables.

En réplique M. TOHME demande le rejet de sa demande en divorce, de sa demande en contribution aux charges du mariage et subsidiairement de sa demande de prestation compensatoire et de constater que le régime matrimonial qui leur est applicable est étranger aux débats.

CECI EXPOSE LA COUR

Sur la validité du mariage du 28 Février 1990

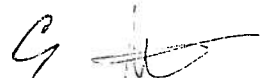
Considérant qu'il résulte du certificat de coutume délivré par le chef du service des Avis et Législations du Ministère de la Justice de la République Libanaise :

- que le libanais est soumis en ce qui concerne son état civil à la religion à laquelle il appartient,

- que le libanais qui s'était déjà marié selon la loi d'une religion déterminée, peut changer de religion et en adopter une autre et qu'il peut, si cette dernière lui permet la polygamie, contracter un autre mariage conformément aux lois régissant l'état civil de cette nouvelle religion à laquelle il a adhéré.

Considérant que M. Raymond TOHME, de nationalité libanaise, s'est marié le 1er Décembre 1951 à BEYROUTH avec Mme ABOU GHANNAM tous deux de confession grecque catholique ;

Que les services consulaires de l'Ambassade du Liban ont attesté qu'au 5 Mai 1984, date du document qui



leur était présenté, aucune mention de dissolution de ce mariage n'apparaissait, M. TOHME ne contestant d'ailleurs pas que ce mariage n'ait pas été dissous lors de sa nouvelle union avec Mme KUBICKA et qu'il ne le soit d'ailleurs toujours pas ;

Que le 28 Février 1970 devenu musulman sunnite après s'être converti à cette religion, il a épousé devant le Juge du Tribunal Shérieh de BEYROUTH, Mme Magdalena KUBICKA, de nationalité polonaise, célibataire et de religion catholique ;

Considérant que M. TOHME a ainsi contracté un second mariage valide selon la loi libanaise ;

Qu'en effet, son premier mariage, catholique, étant indissoluble, il s'est marié une seconde fois, usant des possibilités offertes par la loi libanaise, après s'être converti à l'Islam, devant l'autorité musulmane de sa nouvelle confession qui admet le mariage polygamique ;

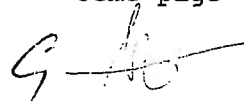
Considérant qu'un mariage contracté à l'étranger avec état de bigamie pour l'un des époux ou les deux n'est pas nécessairement nul en France et que certains effets peuvent être reconnus à une deuxième union ;

Qu'il ne peut cependant en être ainsi, s'agissant d'une condition de fond du mariage, que si cette union a été valablement contractée à l'étranger au regard de la loi nationale de chaque époux et donc si les lois nationales ou statuts personnels éventuellement différents de chacun d'eux autorisent la bigamie ;

Considérant que Mme KUBICKA n'a acquis la nationalité libanaise qu'en 1972 et qu'elle était au moment du mariage de nationalité polonaise ;

Considérant qu'il résulte des dispositions du Code de la Famille et de Tutelle polonais figurant dans le certificat de coutume délivré par le Consulat Général de la République de Pologne à Paris que la loi polonaise, selon laquelle ne peut contracter mariage celui qui est déjà marié, ne reconnaît pas davantage la validité du mariage si l'un des conjoints a antérieurement contracté un mariage encore existant ;

Considérant en conséquence que le mariage de M. TOHME et de Mme KUBICKA contracté le 28 Février 1970 à



BEYROUTH doit être déclaré nul, compte tenu de l'empêchement bilatéral de la loi polonaise ;

Que la demande en divorce de Mme KUBICKA est donc irrecevable ;

Sur le caractère putatif du mariage

Considérant que le mariage qui a été déclaré nul produit néanmoins ses effets à l'égard des époux lorsqu'il a été contracté de bonne foi ;

Que si la bonne foi n'existe que de la part d'un des époux le mariage ne produit ses effets qu'en faveur de cet époux ;

Considérant que la bonne foi est toujours présumée et que c'est à celui qui allègue la mauvaise foi à la prouver ;

Considérant en ce qui concerne M. TOHME, qu'il convient de rappeler que son second mariage est valable au regard de la loi libanaise dont les dispositions ont été rappelées ci-dessus ;

Qu'il ressort d'ailleurs de la consultation du Professeur FADLALLAH que le comportement de M. TOHME n'a pas été exceptionnel mais est au contraire assez largement adopté par la communauté catholique libanaise en raison de l'existence de l'indissolubilité du mariage catholique ;

Considérant ainsi que M. TOHME, en contractant un second mariage de droit musulman après avoir adhéré à l'Islam, a manifesté sa volonté de contracter un second mariage valide au regard de sa loi nationale ;

Qu'il n'est pas démontré qu'il ait su que ce second mariage pourrait être déclaré nul en France du fait de l'empêchement bilatéral de la loi polonaise auquel la loi libanaise n'accorde aucun effet ;

Que dans ces conditions il y a lieu d'estimer que M. TOHME était de bonne foi lorsqu'il a contracté mariage avec Mme KUBICKA ;

Considérant que Mme KUBICKA affirme n'avoir pas été informée au moment du mariage de l'absence de dissolu-

tion du précédent mariage, qu'elle ne savait rien du caractère religieux de la célébration du mariage au Liban et qu'elle ignorait tout de la législation libanaise des différentes communautés religieuses ;

Considérant que l'attestation établie par Me KADDOURA, avocat à BEYROUTH qui déclare que M. TOHME était un client de longue date et qu'il a reçu le couple le 21 Février 1970 pour leur proposer une solution permettant à M. TOHME de se remarier alors que sa première union n'était pas dissoute, si elle ne peut être écartée des débats, présente cependant peu de crédibilité compte tenu des circonstances qui y sont relatées ;

Que le mariage aurait eu en effet lieu simplement une semaine après, le 28 Février, et qu'il est certain que M. TOHME s'était préoccupé avant son arrivée au Liban, le couple vivant en France, des modalités d'un nouveau mariage ;

Considérant ainsi qu'aucun élément n'établisse que Mme KUBICKA ait su que la première union de M. TOHME n'était pas dissoute et ait connu les raisons d'un mariage religieux devant une autorité musulmane, étant observé que n'est rapporté aucun rite de la célébration qui lui aurait permis de penser que le mariage qu'elle contractait devant le Juge du Tribunal Sherech était uniquement religieux, le mariage civil n'existant pas au Liban ;

Considérant que la preuve de sa mauvaise foi n'est donc pas rapportée ;

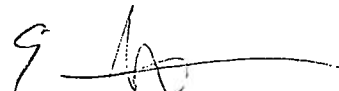
Considérant dans ces conditions qu'il y a lieu d'accorder le bénéfice de la putativité du mariage à chacun des deux époux, tous deux ayant été de bonne foi ;

Sur les effets du mariage putatif sur le régime matrimonial

Considérant que M. TOHME et Mme KUBICKA s'opposent sur la nature de leur régime matrimonial ;

Que M. TOHME soutient qu'il est régi par celui de la séparation de biens de la loi musulmane et qu'un contrat de mariage a été signé en ce sens ;

Que Mme KUBICKA allègue qu'il n'a jamais été question pour elle de signer un contrat de mariage, que cela ne lui a pas été annoncé et que si elle a signé des



documents en langue arabe elle n'a entendu signer que le registre des mariages selon ce qui lui était indiqué ;

Qu'elle expose que le régime légal de communauté réduite aux acquêts de la loi française doit s'appliquer puisque leurs centres d'intérêt ont toujours été en France;

Qu'elle demande d'écarter des débats les pièces produites compte tenu des anomalies qu'elles contiennent et en tout cas de les lui déclarer inopposables ;

Considérant que Mme KUBICKA est arrivée en France en 1968, qu'elle a vécu à partir de 1969 avec M. TOHME à Paris, qu'ils n'ont passé que quelques semaines au Liban à l'occasion de leur mariage et sont revenus à Paris où ils ont toujours résidé ;

Considérant que M. TOHME et Mme KUBICKA ont certes toujours fixé leur établissement commun en France où a été fixé leur premier domicile conjugal ;

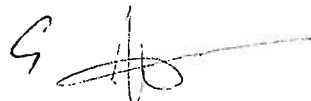
Que leur régime matrimonial pourrait être ainsi celui de la communauté réduite aux acquêts de la loi française mais à défaut seulement d'un contrat de mariage adoptant un régime différent ;

Considérant que M. TOHME a produit deux documents qui selon lui établissent qu'ils se sont mariés en signant un contrat de mariage :

- le premier intitulé "contrat de mariage" (copie conforme à l'original) selon la traduction faite par M. WEHBE, expert, dont il résulte que le montant total de la dot s'élevait à 3.000 livres libanaises, payée ultérieurement et que le contrat est conforme à la loi islamique, ce document étant signé par le juge musulman de Beyrouth et le greffier en chef

- le deuxième traduit par M. BOUTANOS, également expert traducteur assermenté avec mention du même montant de la dot, le document portant les signatures de l'auteur de l'acte, des témoins, de M. TOHME et de Mme KUBICKA :

Considérant que Mme KUBICKA ne peut invoquer les anomalies qui selon elle existeraient entre ces documents à l'appui d'une demande tendant à les voir écarter des débats ;



Qu'en effet le premier document traduit par M. WEHBE est non pas une photocopie de l'original mais une copie certifiée conforme du contrat de mariage enregistré, délivré par le Tribunal Musulman Sunnite de Beyrouth et qui ne comporte pas la signature des époux mais seulement celle du juge président du tribunal ;

Que le second document est lui une photocopie de l'original du contrat enregistré auprès du Tribunal et qui seul est signé ;

Considérant que Mme KUBICKA, qui n'allègue pas que sa signature soit un faux, ne peut dénier avoir signé ce contrat de mariage ;

Qu'elle ne peut non plus soutenir l'avoir signé par erreur ou que son consentement aurait été extorqué par violence ou surpris par dol ;

Considérant qu'il résulte en effet des mentions du contrat de mariage que les deux parties ont échangé en français les formules légales d'acceptation et de consentement mutuels et réciproques ;

Que d'ailleurs elle a par la suite présenté une demande en rectification de cet acte, son nom patronymique ayant été indiqué par erreur comme MAGDALENA au lieu de KUBICKA, rectification intervenue selon décision du 6 Juillet 1972 et figurant sur l'original du contrat de mariage ;

Considérant que l'existence d'une dot est exclusif d'un régime de communauté et qu'en signant ce contrat de mariage M. TOHME et Mme KUBICKA 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 ;

Considérant compte tenu de ce choix express que la volonté présumée des conjoints n'a pas à être recherchée ;

Qu'il ne peut être tiré d'argument contraire de l'acte de cession de parts pour l'appartement de l'avenue Montaigne dressé le 27 Décembre 1976, le cessionnaire étant M. TOHME seul, représenté par Mme KUBICKA et étant présenté



comme marié sans contrat, les époux ne pouvant modifier de leur propre autorité le régime matrimonial qu'ils ont choisi ;

Considérant dans ces conditions qu'il sera dit que le régime matrimonial de M. TOHME et de Mme KUBICKA est celui de la séparation de biens ;

Sur la prestation compensatoire

Considérant que les dispositions des articles 270 et suivants du Code Civil relatifs à la prestation compensatoire sont ainsi applicables, en tant que de raison, lorsque la rupture du mariage résulte de la nullité de l'union ;

Considérant que M. TOHME est actuellement âgé de 65 ans et Mme KUBICKA de 50 ans, le couple n'ayant pas eu d'enfant ;

Que l'appartement de l'avenue Montaigne est un bien propre de M. TOHME compte tenu du régime matrimonial de séparation de biens et que le seul bien acheté en indivision est représenté par un parking acquis en 1987 moyennant le prix de 87.000 F ;

Considérant que M. TOHME allègue être en pré retraite et ne disposer que d'un revenu annuel de 198.000 F, qu'il doit payer 117.000 F de loyer, 31.424 F pour les charges de copropriété de l'avenue Montaigne et actuellement la pension alimentaire de 6.000 F par mois ;

Qu'il ne vit qu'au prix de nombreuses difficultés, les prêts qu'il avait consentis et les placements qu'il avait faits ayant connu un sort malheureux ;

Qu'il ne peut donc régler une prestation compensatoire sous quelle que forme que ce soit et que Mme KUBICKA peut travailler ce qu'elle fait d'ailleurs en se livrant à des travaux de couture non déclarés ;

Considérant que Mme KUBICKA soutient que M. TOHME a organisé sa vie ailleurs sans doute en Espagne où il a dû transférer tous ses avoirs ce qui l'amène à demander une prestation compensatoire en capital de 720.000 F outre l'abandon par M. TOHME de ses droits sur l'appartement de l'avenue Montaigne ;

Considérant que Mme KUBICKA n'a pas exercé d'activité professionnelle depuis son arrivée en France et que compte tenu de son âge elle rencontrera des difficultés pour trouver un emploi, aucun élément ne permettant de penser qu'elle aurait actuellement une activité très rémunératrice non déclarée ;

Considérant qu'il ressort du rapport de M. BARRAD, déposé le 5 Décembre 1989, lequel avait été désigné par l'ordonnance de non conciliation du 3 Mai 1989 que M. TOHME a été employé en qualité d'interprète par des cercles de jeux parisiens mais qu'il exerçait en réalité celle de conseiller et de directeur des relations publiques et qu'il a été ensuite directeur commercial de la Société IDEAL GESTION ;

Qu'étant en pré-retraite il soutient n'avoir comme ressources que le montant de sa pension ;

Considérant cependant qu'il se présentait comme un professionnel du jeu et reconnaissait être souvent invité par des amis qui dirigeaient des casinos en Angleterre ou en Espagne et qui réglaient ses séjours et servir de conseiller pour des financiers orientaux désirant acheter des participations dans des casinos, son but n'étant pas de toucher des commissions mais de devenir membre dirigeant d'un casino, aucune affaire de ce genre n'ayant toutefois selon lui abouti ;

Considérant qu'il résulte des constatations faites par M. BARRAD que le train de vie de M. TOHME était bien supérieur à celui qu'aurait permis le seul montant de sa pré-retraite ;

Considérant que M. TOHME explique les voyages fréquents qu'il continue à effectuer par les invitations en Espagne ou en Angleterre de ses amis qu'il "conseille" dans la mesure où il s'est toujours occupé de la gestion de casinos ;

Considérant qu'il y a lieu de relever qu'il est en mesure de payer environ 10.000 F par mois pour se loger outre les charges de copropriété de l'appartement de l'avenue Montaigne et la pension alimentaire versée à Mme KUBICKA, ce qui absorbe le montant de sa pension de pré-retraite d'ailleurs non négligeable alors que son train de vie est resté très aisé ;

Considérant que la rupture du mariage crée ainsi une disparité dans les conditions de vie respectives des

parties au détriment de la femme et qu'il y a lieu, alors que sa bonne foi a été reconnue, de lui allouer une prestation destinée à la compenser ;

Considérant compte tenu des éléments exposés ci-dessus qu'il y a lieu d'allouer à Mme KUBICKA une prestation compensatoire en capital de 720.000 F ;

Qu'en revanche l'abandon en nature à ce titre de l'avenue Montaigne, bien propre de M. TOHME même limité à l'usufruit, modalité qui pourrait seule être juridiquement retenue n'est pas justifiée ;

Sur les autres demandes

Considérant que la jouissance gratuite de l'appartement de l'avenue Montaigne a été à juste titre accordée à Mme KUBICKA et qu'il sera précisé qu'elle bénéficiera de cette jouissance à titre gratuit jusqu'à ce que le présent arrêt devienne définitif ;

Considérant qu'elle n'établit pas que la pension alimentaire de 6.000 F par mois qui lui a été allouée soit insuffisante, sa demande tendant à ce qu'elle soit portée à 20.000 F par mois étant rejetée ;

Considérant que les dépens d'appel comme ceux de première instance seront partagés par moitié par chacune des parties mais que l'équité et leur situation économique justifient qu'il soit alloué à Mme KUBICKA une indemnité de 20.000 F sur le fondement de l'article 700 du Nouveau Code de Procédure Civile ;

PAR CES MOTIFS

Réformant le jugement entrepris en toutes ses dispositions ;

Statuant à nouveau,

Rejette les demandes de Mme KUBICKA tendant à ce que les pièces n°8 de la communication du 23 Novembre 1994, n° 2 et 3 soient écartées des débats, qu'elles lui soient déclarées inopposables ou qu'elles soient déclarées nulles ;

Déclare nul le mariage contracté le 28 Février 1970 à BEYROUTH (Liban) par M. Raymond TOHME né en 1930 à KFARSHIMA BAABDA (Liban) et Mme Magdalena KUBICKA née le 13 Octobre 1944 à KANIE (Pologne) ;



Dit que ce mariage produire cependant ses effets à l'égard de chacun des époux ;

Dit que leur régime matrimonial est celui de la séparation de biens ;

Condamne M. TOHME à payer à Mme KUBICKA une prestation compensatoire en capital de 720.000 F ;

Accorde à Mme KUBICKA la jouissance à titre gratuit de l'appartement de l'avenue Montaigne ancien domicile conjugal, jusqu'à ce que le présent arrêt devienne définitif ;

Rejette sa demande tendant à l'augmentation de la pension alimentaire qui lui a été allouée ;

Rejette toute autre demande plus ample ou contraire ;

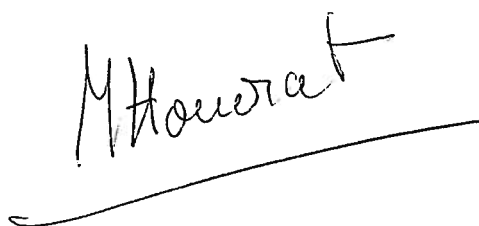
Fait masse des dépens et dit qu'ils seront supportés comme ceux de première instance par moitié par chacune des parties ;

Condamne M. TOHME à payer à Mme KUBICKA une somme de 20.000 F sur le fondement de l'article 700 du Nouveau Code de Procédure Civile ;

Admet les avoués de la cause au bénéfice de l'article 699 du Nouveau Code de Procédure Civile.

Le Greffier,

Le Président,



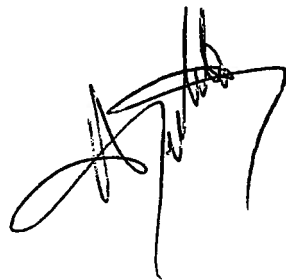
Le Greffier en Chef
CONFIRMÉ
n/



Par arrêt rectificatif en date du 2 juin 1998, la Cour a dit que le présent arrêt sera complété en ce sens qu page 13 est ajoutée la mention suivante après le deuxième paragraphe :

"Ordonne la liquidation des intérêts patrimoniaux de M. TOHME et de Mme KUBICKA et désigne à cet effet le Président de la Chambre Interdépartementale des Notaires de Paris avec faculté de délégation".

Pour le Greffier en Chef,
M.C. HERBELOT, agent administratif faisant fonction de Greffier.



COPIE CERTIFIÉE CONFORME
Le Greffier en Chef

Cour de Cassation
Chambre civile 1
Audience publique du 2 décembre 1997

Rejet.

N° de pourvoi : 95-20026

Publié au bulletin

Président : M. Lemontey .

Rapporteur : M. Ancel.

Avocat général : M. Sainte-Rose.

Avocats : la SCP Piwnica et Molinié, la SCP Guiguet, Bachellier et Potier de la Varde.

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

Sur les deux moyens, réunis et pris en leurs diverses branches :

Attendu que Mme X..., de nationalité polonaise, mariée au Liban avec M. Y..., de nationalité libanaise, fait grief à l'arrêt attaqué (Paris, 14 juin 1995), qui a prononcé la nullité du mariage avec putativité, d'avoir jugé que le régime matrimonial des époux était celui de la séparation de biens du droit musulman alors qu'un tel choix n'existait pas, ce régime étant imposé aux époux par la loi libanaise et que le consentement de l'épouse était entaché d'erreur ; qu'il est encore reproché à la cour d'appel d'avoir fixé le montant de la prestation compensatoire due par M. Y... sans répondre aux conclusions faisant état des manoeuvres de M. Y... pour organiser son insolvabilité ;

Mais attendu que la cour d'appel a relevé que les époux avaient signé, lors de leur mariage au Liban, un contrat emportant adoption de la séparation de biens avec clause de dot, conformément à la loi musulmane, et que les deux époux avaient échangé en français les formules légales d'acceptation et de consentement réciproques ; que les juges du second degré en ont justement déduit l'existence d'une volonté expresse des époux quant à la détermination de leur régime matrimonial ;

Et attendu que la cour d'appel a souverainement fixé le montant de la prestation compensatoire, sans avoir à répondre dans le détail à l'argumentation présentée sur ce point par Mme X... ;

Que l'arrêt attaqué est légalement justifié ;

PAR CES MOTIFS :

REJETTE le pourvoi.

Publication :Bulletin 1997 I N° 337 p. 230

Décision attaquée :Cour d'appel de Paris, 1995-06-14

Titrages et résumés : CONFLIT DE LOIS - Régimes matrimoniaux - Contrat de mariage - Loi applicable - Loi d'autonomie - Détermination - Critères - Volonté expresse des époux .

Le régime matrimonial étant soumis à la loi d'autonomie, justifie légalement sa décision de soumettre les intérêts pécuniaires d'époux de nationalité différente, mariés au Liban, au régime de droit musulman de séparation de biens avec clause de dot, la cour d'appel qui retient une manifestation de volonté expresse des époux pour le choix de ce régime, caractérisée par la signature d'un contrat et l'échange, dans leur langue commune, le français, des formules légales d'acceptation et de consentement.

REGIMES MATRIMONIAUX - Contrat de mariage - Conflit de lois - Loi applicable - Loi d'autonomie - Détermination - Critères - Volonté expresse des époux

Cour de Cassation

Chambre civile 1

Audience publique du 7 avril 1998

Cassation.

N° de pourvoi : 96-13973

Publié au bulletin

Président : M. Lemontey .

Rapporteur : M. Ancel.

Avocat général : M. Sainte-Rose.

Avocat : la SCP de Chaisemartin et Courjon.

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

Sur le moyen unique, pris en sa première branche :

Vu l'article 3 du Code civil ;

Attendu que, pour juger que le régime matrimonial des époux X...-Y... était le régime légal du droit français, déterminé par l'établissement en France du premier domicile matrimonial, l'arrêt attaqué énonce que le " contrat de mariage " produit, établi en Inde en 1969, 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 " ;

Attendu qu'en se déterminant ainsi, sans rechercher si les stipulations de cet acte, qui mentionnait, outre le consentement des époux au mariage, un contrat de mariage comportant le versement, par le mari, d'une somme dénommée " maher ", avec l'indication de la célébration d'un mariage " dit nickah " selon le rite hanéfite, n'emportaient pas adoption, par les époux, d'un régime matrimonial particulier, la cour d'appel n'a pas donné de base légale à sa décision ;

PAR CES MOTIFS, et sans qu'il y ait lieu de statuer sur les autres branches du moyen :

CASSE ET ANNULE, dans toutes ses dispositions, l'arrêt rendu le 11 janvier 1996, entre les parties, par la cour d'appel de Lyon ; remet, en conséquence, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt et, pour être fait droit, les renvoie devant la cour d'appel de Lyon, autrement composée.

Publication : Bulletin 1998 I N° 140 p. 94

Décision attaquée : Cour d'appel de Lyon, 1996-01-11

Titrages et résumés CONFLIT DE LOIS - Régimes matrimoniaux - Régime légal - Détermination - Recherche de la volonté présumée des époux - Conditions - Défaut de choix exprès par les conjoints - Insertion des conventions matrimoniales dans l'acte de mariage dressé à l'étranger.

Manque de base légale l'arrêt qui décide que le régime matrimonial d'époux mariés à l'étranger était le régime légal français, en raison de l'établissement en France du premier domicile matrimonial, sans rechercher si les stipulations de l'acte de mariage, établi en Inde et qui mentionnait la conclusion d'un " contrat de mariage " et la célébration d'une union dite " nickah " selon le rite hanafite, n'emportaient pas adoption, par les époux, d'un régime matrimonial particulier.

Précédents jurisprudentiels : A RAPPROCHER : Chambre civile 1, 1988-07-06, Bulletin 1988, I, n° 224, p. 157 (cassation), et l'arrêt cité.

Codes cités : Code civil 3.

COUR D'APPEL DE LYON

PREMIERE CHAMBRE CIVILE

ARRET DU 02 DECEMBRE 2002

APPELANT :

Monsieur Abdoul HAMIDOU 32 Route de Malagnou
1211 GENEVE (Suisse)

représenté par la SCP BAUFUME-SOURBE, avoués el la Cour

assisté de Me FOREST, avocat

INTIMEE :

Madame Myriam RAZACK 431 Rue des Abattoirs Résidence
Clos des Abeilles 01170 GEX

représentée par Me GUILLAUME, avoue à la Cour

assistée de Me ARNOUX-GENETELLI, avocat

COMPOSITION DE LA COUR lors des débats et du délibéré :

MONSIEUR LORIFERNE, président, suppléant monsieur le premier président, désigne à cet effet par ordonnance du 18 juin 2002, MONSIEUR AZOULAY, président,
MONSIEUR GERVESIE, conseiller,
MADAME BAYLE, conseiller,
MADAME MORIN conseiller,

en présence pendant les débats de madame KROLAK, greffier.

INSTRUCTION CLÔTURÉE LE : 22 AVRIL 2002

DEBATS : En audience solennelle et publique du LUNDI 7
OCTOBRE 2002

ARRET: contradictoire

prononce à l'audience solennelle et publique du 2 DECEMBRE 2002 par monsieur LORIFERNE, président, en présence de madame KROLAK, greffier, qui ont signé la minute.

FATIS ET PROCEDURE

Monsieur Abdoul HAMIDOU et Madame Myriam RAZACK se sont mariés le 4 août 1969 à KARIKAL (Inde), et leur divorce a été prononcé le 19 novembre 1990 par le Tribunal de Grande Instance de BOURG-EN-BRESSE.

Les opérations de liquidation du régime matrimonial ont donné lieu à difficultés, Monsieur HAMIDOU invoquant l'existence d'un régime séparatiste de droit musulman résultant d'un acte intitulé "contrat de mariage" du 4 août 1969.

Par jugement du 13 décembre 1993 le Tribunal de BOURG-EN-BRESSE a dit que le mariage des époux HAMIDOU-RAZACK est soumis quant aux biens au régime légal français de communauté des articles 1400 et suivants du Code Civil, et a renvoyé les parties devant le notaire, condamnant en outre Monsieur HAMIDOU à payer 3.000 francs au titre de l'article 700 du Nouveau Code de procédure civile.

L'arrêt confirmatif de la Cour d'Appel de LYON du 11 janvier 1996 a été cassé par arrêt de la Cour de Cassation du 7 avril 1998 qui a renvoyé la cause et les parties devant la Cour de LYON autrement composée.

Devant la formation de renvoi, Monsieur HAMIDOU sollicite la réformation du jugement rendu par le Tribunal de Grande Instance de BOURG-EN-BRESSE.

Il expose que dans le contrat de mariage rédigé par l'officier d'état-civil, il est indiqué que les époux ont déclaré observer le rite "HANAFITE", et que le mariage contracté ressortit du droit musulman puisqu'il s'agit d'un mariage "niccah".

Il soutient que les époux ont clairement manifesté leur volonté de leur attachement pour le régime séparatiste de droit musulman, qu'ils ne sont pas soumis au régime légal français de communauté, qu'ils sont restés mariés sous le régime de la séparation de bien et que c'est le régime légal français de séparation des biens qui s'appliquera aux biens acquis en France.

Madame RAZACK revendique l'application du régime français de communauté légale.

Elle estime que Monsieur HAMIDOU a entendu se soumettre sans réserve à la loi française en ne faisant pas valoir lors de son divorce l'application de la loi musulmane et en ne faisant pas transcrire l'existence d'un contrat préalable, sur les registres consulaires français.

Elle indique également que l'acte de "CALIANA CADOUTTAME" n'est pas conforme à l'article 1387 du Code Civil puisqu'il contient le paiement par le mari d'une somme à titre de "maher", lequel constitue le prix de vente que la femme fait de sa personne en se mariant, ce qui est contraire à l'ordre public français.

Elle réclame 25.000 francs au titre de l'article 700 du Nouveau Code de Procédure Civile.

MOTIFS DE LA DECISION

Attendu que le mariage des époux HAMIDOU-RAZACK a été célébré le 4 août 1969 par le Cazi de KARIKAL (Inde) lequel a dressé un acte intitulé "contrat de mariage" dans lequel le rédacteur, après avoir constaté la présence des futurs époux, indique avoir été requis d'un commun accord de rédiger le contrat de mariage dont la teneur suit:

"L'époux a déclaré avoir donné à l'épouse 3.000 roupies à titre de Maher.

L'épouse a accepté et a déclaré avoir pris possession dudit Maher".

Que le Cazi précise ensuite qu'après lecture et signature du contrat, il a célébré le mariage dit "Niccah" ;

Attendu qu'il en résulte que l'acte en cause comporte, outre le consentement des époux au mariage, la rédaction d'un contrat de mariage préalable ;

Attendu que le contrat de mariage se réduit à une clause dite de "Maher" ;

Attendu qu'il résulte du certificat de coutume établi par Monsieur SELVASHANMUGNAM, avocat et notaire à PONDICHERY, que d'après la loi musulmane indienne, le Mahr ou Maher est "la somme qui devient payable par le mari à la femme au moment du mariage suivant un accord entre les parties ou suivant l'opération de la loi" et qu'il est " le prix de la vente que la femme fait de sa personne en se mariant";

Attendu que cette clause signifie donc clairement que le mari achète son épouse, le mariage étant assimilé à une vente;

Attendu que s'agissant des biens, la loi française contenue dans l'article 1387 du Co de Civil, autorise les époux à faire les conventions qu'ils jugent à propos, pourvu qu'elles ne soient pas contraire aux bonnes mœurs et aux dispositions d'ordre public;

Attendu que la clause de Maher est de toute évidence contraire à l'ordre public français qui ne saurait tolérer la vente des êtres humains. Qu'elle est la clause unique et déterminante du contrat de mariage signé par les parties ;

Que dans ces conditions le régime matrimonial particulier adopté par les époux HAMIDOU-RAZACK ne peut recevoir application en France ;

Attendu que les époux HAMIDOU sont de nationalité française, qu'ils ont fait transcrire leur mariage sur les registres consulaires français sans apporter aucune précision quant à l'existence d'un contrat de mariage et qu'ils ont fixé leur résidence en France ;

Qu'ils ont ensuite fait des acquisitions immobilières en France en se déclarant mariés sous le régime de la communauté légale ;

Qu'à défaut de choix d'un régime particulier applicable en France, seul le régime légal français peut recevoir application pour la liquidation de leur situation matrimoniale en France ;

Que le jugement sera ainsi confirmé ;

Attendu que compte tenu des circonstances de l'espèce, il n'y a pas lieu de faire application des dispositions de l'article 700 du Nouveau Code de procédure civile au delà des sommes allouées par le Tribunal;

PAR CES MOTIFS,

LA COUR,

Vu l'arrêt de la Cour de Cassation du 7 avril 1998,

Confirme le jugement rendu par le Tribunal de Grande Instance de BOURG-EN-BRESSE le 13 décembre 1993,

Déboute les parties de leurs autres demandes,

Dit que Monsieur HAMIDOU supportera les dépens des deux procédures d'appel, avec distraction au profit de Maître GUILLAUME, avoué, pour les dépens du présent arrêt.

LE PRESIDENT

Cour de Cassation
Chambre civile 1
Audience publique du 22 novembre 2005

Cassation.

N° de pourvoi : 03-14961

Publié au bulletin

Président : M. Ancel.

Rapporteur : Mme Pascal.

Avocats : la SCP de Chaisemartin et Courjon, la SCP Tiffreau.

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, PREMIERE CHAMBRE CIVILE, a rendu l'arrêt suivant :

Sur le moyen unique, pris en sa première branche :

Vu l'article 3 du Code civil ;

Attendu que M. X... et Mme Y... ont contracté un mariage nickah selon le rite hanéfite devant le Cazi de Karikal (Inde) ;

qu'ils se sont installés en France ; que, par jugement du 19 novembre 1990, le tribunal de grande instance de Bourg-en-Bresse a prononcé le divorce des époux et ordonné la liquidation de leurs intérêts patrimoniaux ; que des difficultés ont surgi, M. X... revendiquant un régime de séparation de biens et Mme Y... se prévalant de la communauté légale du droit français ; que, par jugement du 13 décembre 1993, le tribunal de grande instance a dit le mariage soumis au régime légal français de communauté ; que l'arrêt confirmatif de la cour d'appel de Lyon du 11 janvier 1996 a été cassé par un arrêt du 7 avril 1998 (pourvoi n° W 96-13.973 bull. I n° 140) ;

Attendu que, pour dire le mariage soumis au régime de la communauté légale de droit français, l'arrêt attaqué retient que l'acte de mariage comporte un contrat de mariage préalable, que ce contrat se réduit à une clause unique et déterminante dite de "maher" et que selon le certificat de coutume versé aux débats le "maher" est "le prix de vente que la femme fait de sa personne en se mariant" de sorte que la clause est contraire à l'ordre public français qui ne saurait tolérer la vente des êtres humains ;

Attendu cependant que 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, de sorte que la cour d'appel a violé le texte susvisé ;

PAR CES MOTIFS et sans qu'il y ait lieu de statuer sur les autres branches :

CASSE ET ANNULE, dans toutes ses dispositions, l'arrêt rendu le 2 décembre 2002, entre les parties, par la cour d'appel de Lyon ;

remet, en conséquence, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt et, pour être fait droit, les renvoie devant la cour d'appel de Lyon, autrement composée ;

Condamne Mme Y... aux dépens ;

Vu l'article 700 du nouveau Code de procédure civile, rejette les demandes ;

Dit que sur les diligences du procureur général près la Cour de Cassation, le présent arrêt sera transmis pour être transcrit en marge ou à la suite de l'arrêt cassé ;

Ainsi fait et jugé par la Cour de Cassation, Première chambre civile, et prononcé par le président en son audience publique du vingt-deux novembre deux mille cinq.

Publication : Bulletin 2005 I N° 430 p. 360

Décision attaquée : Cour d'appel de Lyon, 2002-12-02

Titrages et résumés : CONFLIT DE LOIS - Régimes matrimoniaux - Contrat de mariage - Clause de "Maher" - Définition - Convention établissant le consentement des époux au mariage assorti du versement d'une dot - Portée.

L'acte de "Maher" qui est une convention établissant le consentement des époux au mariage, assorti du versement d'une dot, n'est pas contraire à l'ordre public international français.

CONFLIT DE LOIS - Régimes matrimoniaux - Contrat de mariage - Clause de "Maher" - Conformité à l'ordre public international français - Portée

Codes cités : Code civil 3.

*390 Shahnaz v. Rizwan.

[1964] 3 W.L.R. 759

Queens Bench Division

QBD

Winn J.

1964 June 9.

Husband and Wife--Marriage--Polygamous system--Dower--Marriage in India-- Polygamous--Marriage contract providing dower payable to wife on divorce--Right enforceable by civil action under Mohammedan law--Parties divorced--Whether dower recoverable in English courts--Whether matrimonial relief--Whether policy of law contravened.

Conflict of Laws--Jurisdiction--Contract--Marriage--Right to dower arising out of polygamous marriage contract--Whether enforceable by English courts.

The parties were married in India on January 21, 1955, in accordance with the provisions of Mohammedan law. The marriage was evidenced by a certificate which was recorded by the local authority. The marriage contract, evidenced by the certificate, provided that the wife was to have deferred "mehar" or dower, payable to her in the event of the husband's death or a divorce. Under Mohammedan law such right to dower, once it had accrued as payable, was enforceable by civil action and was regarded as an assignable proprietary right, for the protection of which the wife was entitled to a lien over any property of her spouse of which she had possession or control.

In an action by the wife after the valid dissolution of the marriage, claiming the amount of the dower 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 courts had no jurisdiction over, or *391 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.

On the trial of the issues raised by the defence as a preliminary issue:-

Held:

(1) that, a polygamous or potentially polygamous marriage which was lawful by the personal law of the parties and by the *lex loci celebrationis* was not regarded as an unlawful marriage under English law, although the English courts would not enforce such a marriage or any right arising specifically by virtue of the marriage relationship between the parties.

Sinha Peerage Claim[1946] 1 All E.R. 348n. and *Hyde v. Hyde and Woodmansee*(1866) L.R 1 P. & D. 130 applied.

(2) But that the right which the plaintiff wife was seeking to enforce was a right in personam, arising, not out of the relationship of husband and wife, but from a contract entered into in contemplation and in consideration of the marriage and was therefore not a matrimonial right which the court would refuse to enforce.

(3) That the fact that no such claim had hitherto been recognised by the English courts was no sufficient reason why the court should not accept jurisdiction; and that, accordingly, the pleas in the defence were insufficient to exclude the action from the jurisdiction of the court.

[Phrantzes v. Argenti](#)[1960] 2 Q.B. 19; [1960] 2 W.L.R. 521; [1960] 1 All E.R. 778 applied.

Per curiam: As a matter of policy, in view of the large number of Mohammedans resident in England, the law should rather lend its aid to women who come here as a result of a Mohammedan marriage by enforcing the husband's contractual promise than leave them without recourse to legal assistance (post, pp. 401G - 402A).

PRELIMINARY ISSUE.

The plaintiff, Amir-un-Nisa Shahnaz, claimed the recovery of £1,400 from the defendant, Mohammad Abdul Naeem Rizwan. By her statement of claim she alleged that she and the defendant were married in Hyderabad, Deccan, India, in accordance with Mohammedan law; that the marriage was evidenced by "Siyaha" or certificate recorded with the "Qazi" or local authority, and the marriage contract as so evidenced provided that the wife was to have deferred "Meher" in the sum of 21,000 osmania Hali Sicca and five Sirkh Dinars; that the personal law of both parties was Mohammedan law and under such law the wife had a right to be paid the deferred "Meher" on the dissolution of her marriage by divorce. It was further *392 alleged that by a document in writing signed by the defendant husband and dated November 16, 1959, the husband had divorced the wife and that the effect in Mohammedan law was to dissolve the marriage by divorce.

By his defence, the defendant pleaded that he was domiciled in England; that since the marriage was a polygamous or potentially polygamous marriage the courts of England had no jurisdiction or, alternatively, should not extend jurisdiction to the plaintiff wife's claim by reason of the fact that the provision in the marriage contract relied upon was in consideration of a polygamous or potentially polygamous marriage; and/or alternatively, that, in any event the relief sought was in the form of matrimonial relief. Further, or in the further alternative, the defendant pleaded that if it was held that the court had jurisdiction to entertain the plaintiff's claim, which was denied, he would contend that the claim was unenforceable by reason of such a contract of marriage and the provision therein being contrary to the distinctive policy and good morals of the law of England. The plaintiff delivered a reply in which she denied that the relief sought was in the form of matrimonial relief, or that the court was being asked to exercise any form of matrimonial jurisdiction; further, that even if the marriage was polygamous or potentially so it was recognised in England as a valid marriage; that her claim was a contractual one; that she was enforcing a lawful proprietary right which arose out of a lawful contract of marriage, and the court had jurisdiction and ought to exercise it, and that her claim was not unenforceable, nor was it in any way contrary to the distinctive policy and good morals of England.

By an order of Master Jacob dated February 12, 1964, the issues raised by the statement of claim, defence and reply were ordered to be tried as a preliminary issue.

E. H. Laughton-Scott for the husband. The basic point is whether or not the law will recognise a contract giving rise to a claim in our courts for mehar. The type of marriage is vital, since although for certain purposes the law will recognise a polygamous or potentially polygamous marriage, it will refuse to give ancillary relief. It is necessary to look at the limits of recognition of a polygamous or potentially polygamous marriage. A person who has gone through a polygamous marriage and then through a ceremony of marriage here is committing bigamy: [Baindail \(orse. Lawson\) v. Baindail](#). [FN1] The courts pay regard to *393 questions of status and succession even if they arise under a polygamous marriage, but they will not entertain a suit for divorce in a polygamous or potentially polygamous marriage: *Hyde v. Hyde and Woodmansee*. [FN2] That decision was applied in [Ohochuku v. Ohochuku](#) [FN3] where a Nigerian polygamous marriage was in fact dissolved but as a result of certain statutory provisions. In the present case the wife is seeking to enforce the matrimonial duties of the husband. In [Risk \(orse. Yerburgh\) v. Risk](#) [FN4] it was again held that a wife could not enforce her rights under a marriage where the contract specified that the husband might have more than one wife. A similar decision was reached in [Sowa v. Sowa](#). [FN5] The action for the mehar asks for the enforcement of a right which is inextricably connected with the polygamous marriage: [Baindail \(orse. Lawson\) v. Baindail](#). [FN6] In [Cheni \(orse. Rodriguez\) v. Cheni](#) [FN7] there was a marriage which was polygamous but became monogamous. Here there is a distinction as the marriage is polygamous or potentially so. This marriage was also validly dissolved according to the *lex domicilii*: *Warrender v. Warrender*. [FN8]

FN1 [\[1946\] P. 122; 62 T.L.R. 263; \[1916\] 1 All E.R. 342](#), C.A.

FN2 (1886) L.R. 1 P. & D. 130.

FN3 [\[1960\] 1 W.L.R. 183; \[1960\] 1 All E.R. 253](#).

FN4 [\[1951\] P. 50; 66 T.L.R. \(Pt. 2\) 918; \[1950\] 2 All E.R. 973.](#)

FN5 [\[1961\] P. 70; \[1961\] 2 W.L.R. 313; \[1961\] 1 All E.R. 687](#), C.A.

FN6 [\[1946\] P. 122; 62 T.L.R. 263; \[1946\] 1 All E.R. 342](#), C.A.

FN7 [\[1963\] 2 W.L.R. 17; \[1962\] 3 All E.R. 873.](#)

FN8 (1835) 2 Cl. & Fin. 488, H.L.

David Kemp for the wife. This is a claim for a proprietary right which was created by the personal law of both parties. English law will enforce such a right unless the authorities explicitly provide otherwise: [Phrantzes v. Argenti](#). [FN9] The authorities cited by the husband were limited by *Hyde v. Hyde and Woodmansee*, [FN10] that is, they were all cases before the matrimonial courts, in which the parties were seeking matrimonial relief under English law in the Divorce Division - [Risk \(orse. Yerburch\) v. Risk](#) [FN11] where "this" court was specifically referred to. Here this is not so. In the present case the right is more direct than that sought in [Phrantzes v. Argenti](#). [FN12] and it is more of a proprietary right than the plaintiff had in that case. Further, the right to mehar or dower has an element akin to lien. The reason why such a right is proprietary is that it arises from the contract of marriage but is not primarily an obligation dependent solely on the marriage, and it is assignable. In any event, the *394 courts have recognised as valid a polygamous marriage for most purposes: see Dicey, Conflict of Law, rule 37, for instances which are exactly on all fours with the present case. For example, a valid polygamous marriage entitles a person to a decree of nullity: [Sri Vasani \(orse Clayton\) v. Sri Vasani](#) [FN13] and [Baindail \(orse Lawson\) v. Baindail](#) [FN14]; and also legitimation and succession by children can be decided by the courts: *Sinha Peerage Claim* [FN15]; and succession by spouses: [Coleman v. Shang](#). [FN16] In [Russ \(orse Geffers\) v. Russ \(Russ orse De Waele Intervening\)](#) [FN17] a divorce by Talak was recognised in England as validly dissolving a marriage. The argument that this contract arises out of polygamous marriage and being incidental to it is unenforceable is inconsistent with the recent case of [Lee v. Lau](#). [FN18] This right to mehar has been held to be assignable, and this shows definitely it is a right in the nature of property: *Hasan Khan v. Muhammad Nairain Husain*. [FN19] If the jurisdiction exists but is at the court's discretion, discretion ought, in this particular instance, to be exercised in favour of the wife. It is submitted that it is not a matter of discretion. The plaintiff has the right to enforce her claim.

FN9 [\[1960\] 2 Q.B. 19; \[1960\] 2 W.L.R. 521; \[1960\] 1 All E.R. 778.](#)

FN10 (1866) L.R. 1 P. & D. 130.

FN11 [\[1951\] P. 50; 66 T.L.R. \(Pt. 2\) 918; \[1950\] 2 All E.R. 973.](#)

FN12 [\[1960\] 2 Q.B. 19; \[1960\] 2 W.L.R. 521; \[1960\] 1 All E.R. 778.](#)

FN13 [\[1946\] P. 67; 61 T.L.R. 415; \[1945\] 2 All E.R. 21.](#)

FN14 [\[1946\] P. 122; 62 T.L.R. 263; \[1946\] 1 All E.R. 342](#), C.A.

FN15 [\[1946\] 1 All E.R. 348.](#)

FN16 [\[1961\] A.C. 481; \[1961\] 2 W.L.R. 562; \[1961\] 2 All E.R. 406](#), P.C.

FN17 [\[1963\] P. 87; \[1962\] 2 W.L.R. 708; \[1962\] 1 All E.R. 649.](#)

FN18 [\[1964\] 3 W.L.R. 750; \[1964\] 2 All E.R. 248.](#)

FN19 (1932) LIV Indian L.Reps. (Allahabad series) 499.

Laughton-Scott in reply. English courts refuse to recognise a multiplicity of wives but will give effect to the *lex domicilii*: they do not give rights in consequence of the marriage or divorce. The wife comes to this court with a marriage which would not be recognised here, and so the court should not enforce a term of the contract. What the wife wishes to do is to sever some terms of the contract, which is impossible. It is not a mere proprietary right, as the evidence shows that this right exists only in close connection with a polygamous marriage. It is a part of the totality of the wife's rights. There is no difference in jurisdiction between the various divisions of the court. The action ought not to be allowed; if any doubt exists it ought not to be encouraged. If there is any discretion, there is a mass of evidence to be taken in India and accordingly the discretion ought not to be exercised in the wife's favour.

***395** WINN J.

This claim is brought by the plaintiff for recovery of a sum of some £1,400 said by the statement of claim indorsed upon the writ to be payable to her by the defendant by force of a contract of marriage, which is pleaded in the statement of claim. The marriage (which I will refer to in a moment) is pleaded as having been evidenced by a marriage certificate, and is said to have been recorded by the local authority or Qazi. That paragraph of the statement of claim then pleads and relies upon a marriage contract contained in or evidenced by the marriage certificate or *Siyaha*, and it is alleged that that contract provided that the plaintiff was to have from the defendant deferred "*Mehar*" (which seems also to be spelled sometimes "*Mahr*"), for which word the word "*dower*" is a rough translation, and the amount of it is alleged as the equivalent of the £1,400 mentioned. By the amended defence various issues are raised which are irrelevant for the purposes of this judgment, but it was thereby pleaded as follows: "In the alternative the defendant will contend that since the said marriage" - that is a reference to a marriage admittedly entered into by the parties to the action on January 21, 1955, in Hyderabad in the Deccan - "was a polygamous or potentially polygamous marriage the courts of England have no jurisdiction or alternatively should not extend jurisdiction to the plaintiff's claim by reason of the fact that the provision in the said contract of marriage relied upon was in consideration of a polygamous or potentially polygamous marriage and/or alternatively in any event that the relief sought by the plaintiff is a form of matrimonial relief." Later it was pleaded: "Further or in the further alternative if it be held that the court has jurisdiction to entertain the plaintiff's said claim (which is denied) the defendant will contend that the same is unenforceable by reason of such a contract of marriage and the said provision being contrary to the distinctive policy and good morals of the law of this country."

By an order of Master Jacob dated February 12, 1964, it was ordered that, by way of preliminary issues, the questions or issues raised by those paragraphs should be tried in the Special List.

There was an amended reply - which traversed and put in issue those pleas in the defence; it was specifically contended that the plaintiff in the action is making a claim which is a contractual claim and enforcing a lawful proprietary right arising out of a lawful contract of marriage.

So far as the researches of counsel have gone - and I am quite ***396** satisfied that they have been thorough and patient - this problem is *res integra*. I would like to take the opportunity of expressing my sincere indebtedness and gratitude to both counsel for the great help that they have given to the court. The lucidity and - having regard to the difficulty of the matter - the brevity with which they have presented their respective contentions is most creditable; it is worthy of comment that their skilled services have been made available to these parties through legal aid.

I have to determine this matter as one of first impression, with such assistance as can be derived from certain cases which have been brought to my attention; it is quite plain that in none of those cases do I find a decision directly governing my decision.

It seems to me that, in approaching the problem, it is essential at the outset to distinguish between an unlawful marriage and a marriage which the courts of this country will not regard as a marriage in the sense in which the English court conceives of marriage, that is to say, tested by comparison with the concept of marriage proper entertained by the English court. The very firm impression has been made upon my mind by the arguments of counsel and the cases brought to my attention that our court has never treated a marriage as unlawful merely because it is potentially, or indeed contemporaneously with its celebration, a polygamous marriage; provided of course, that the marriage is a marriage lawful by the personal law of the parties and the *lex loci celebrationis*. There are a number of instances - which it would be otiose to enumerate, save for the purpose of putting it upon record that I have given attention to them - where the courts of this country have given effect to consequences of a polygamous

marriage, using that word in a vague and wide meaning; for example, to a change of status brought about by such a marriage, and indeed to declare the legitimacy of children and the right of succession of children born of such a marriage, a polygamous marriage. Lord Maugham said in *Sinha Peerage Claim* [FN20]: "It cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country" [FN21]- subject to an exception or possible exception.

FN20 [1946] 1 All E.R. 348.

FN21 *Ibid.* 349.

The change of status effect of a polygamous marriage is further illustrated by the decision or decisions, first, that a polygamous marriage constitutes a bar to a subsequent monogamous *397 marriage in England or, probably, elsewhere, and so entitles the second wife to a decree of nullity on the ground that the ceremony through which she went was bigamous. I read from the passage in Dicey, 7th ed. (1959), p. 279, and the authority for that passage is *Srini Vasam (or. Clayton) v. Srini Vasam*, [FN22] and another case, reported in the same volume, *Baindail (or. Lawson) v. Baindail*, [FN23] a Court of Appeal decision. In the latter case Lord Greene put the matter in a pithy way by reducing it to the simple question: Was the husband or was he not, a married man at the date of the English ceremony? That question he thought must be answered by reference to the law of the husband's domicile at the date of the polygamous ceremony.

FN22 [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.

FN23 [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.

Dicey, basing himself upon those decisions - and upon a further decision that bigamy could be committed by a man whose status had been so changed - expressed his rule 37 in these terms: "A marriage which is polygamous under rule 34, but not invalid under 35 or 36, will be recognised in England as a valid marriage unless there is some strong reason to the contrary."

I think it follows that I am bound to recognise the marriage between the parties to this action as a lawful marriage upon the admissions which are contained in the pleadings. Nor do I see any foundation in any of the decided cases that have been brought to my notice for any judicial ruling that that marriage involved any element offensive to the standards of decency accepted by the English law. Equally, on the other hand, it is clear that I must not, whether or not I am to be regarded today as sitting as a matrimonial court, enforce that marriage or any right which arises specifically by virtue of the marriage relationship between the parties to which it gave rise.

Before I consider explicitly the extremely important decision in *Hyde v. Hyde and Woodmansee*, [FN24] I would desire to say, appreciating that it is only a loose paraphrase of the effect of that decision and certain later decisions (to which reference must be made) of the Divorce Division of this court, it does seem to me that what the courts have held, and always have held, is that neither a husband nor a wife can be granted by the English court any right which inheres in the person seeking the assistance of the court specifically in the character of a husband or of a wife; and, by parity of reasoning, neither party coming to the court can enforce against the other any obligation which arises from, and *398 specifically from, the capacity of the other party as wife or husband. It is quite clear that no order for restitution of conjugal rights, no order for divorce or nullity, will be made by the English court in favour of a person who, coming to it for help, has to say "I seek this assistance as husband" - "as wife" - "by force of this marriage, which is a polygamous marriage." The reason, I think, is one of policy, of morality as conceived first in the mid-19th century but surviving into modern times, that nothing should be done to blur the distinction between Christian marriage - marriage properly understood and the concept of such proper marriage - and, on the other hand, polygamous associations more resembling concubinage or slavery. Lord Penzance in *Hyde v. Hyde and Woodmansee*, [FN25] said in much better language - language much more carefully chosen and much more eloquent - than the words which I have just used that that was the approach which he thought the English court was bound to adopt. That was a case which related to a Mormon marriage involving incidents of polygamy. Lord Penzance said [FN26]: "The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring." A little later he said: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others"; he drew

a contrast between the associations of the sexes under arrangements approved by the local law in Turkey and other countries. He pointed out that here, but not there, "personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are ... matrimonial offences, for they violate the vows of wedlock." But, having laid down in such terms and phrases the proper approach of the English court to the requirements of the moral law that no jurisdiction should be accepted to enforce directly or indirectly in any way the obligations arising out of a polygamous marriage, the judge ordinary said, at the end of his judgment [FN27]: "... this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights of obligations in *399 relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

FN24 (1866) L.R. 1 P. & D. 130.

FN25 L.R. 1 P. & D. 130.

FN26 Ibid. 133.

FN27 Ibid. 138.

In various subsequent cases the court has had to deal in one way or other with situations an element in which was that there had been a polygamous marriage. I have already referred to several of those. It is right that I should make it clear that I have not overlooked the decision of Barnard J. in [Risk \(orse. Yerburgh\) v. Risk](#), [FN28] in which he held that a petitioner cannot come to this court either to enforce rights under, or seek relief from, a polygamous marriage.

FN28 [\[1951\] P. 50; 66 T.L.R. \(Pt. 2\) 918; \[1950\] 2 All E.R. 973](#).

Again, the concept of the court was clearly expressed in [Sowa v. Sowa](#), [FN29] where it was held that a polygamous marriage does not come within the word "marriage," nor do the parties to it come within the words "wife," "married woman," or "husband" for the purposes of the Matrimonial Causes Acts or the Summary Jurisdiction Acts.

FN29 [\[1961\] P. 70; \[1961\] 2 W.L.R. 313; \[1961\] 1 All E.R. 687](#), C.A.

As I think, it is clearly the law that this court cannot give to a person the rights which are the property of a wife or a husband, as such, specifically by force of a marriage which is polygamous.

I do not propose to refer to any more authorities, except two of recent date. [Cheni \(orse. Rodriguez\) v. Cheni](#) [FN30] was a case decided by Lord Merriman P., where it was held, inter alia, that, since the marriage which there was in question, although originally polygamous, had become, in the course of time and as a result of certain events, monogamous by the proper law of the marriage, the court had jurisdiction to hear a matrimonial suit, and further that the marriage between the parties would be recognised as valid since it was so recognised by the court of the domicile at the time when it was entered into. The President said that, provided the marriage had become monogamous by the time the court had to deal with it and the rights of the parties to it, the court would recognise and give effect to its changed character as a monogamous marriage. That seems to imply to me that the court does not regard as so inherently illegal and offensive a marriage which is potentially polygamous that it will for all time, *400 even though thereafter it be changed, refuse to give effect to rights of the parties to the marriage.

FN30 [\[1963\] 2 W.L.R. 17; \[1962\] 3 All E.R. 873](#).

Before Cairns J. in March of this year there came a case which related to a marriage in Hong Kong, [Lee v. Lau](#), [FN31] He, too, had regard to the marriage as a valid marriage, and thought it right, noting the change in the attitude of the courts in recent times so that they now "leaned in favour of enabling a petitioner who was domiciled in England to obtain a declaration of his status without having to go abroad," to grant a declaration that the contract of divorce was valid in respect of that marriage, dissolving it, albeit it was a polygamous marriage. But the report is not complete, and it is perhaps not satisfactory to rest particularly upon that

case.

FN31 [\[1964\] 3 W.L.R. 750; \[1964\] 2 All E.R. 248.](#)

Fundamentally, it seems to me that the problem here is whether matrimonial relief is being sought; whether the court is being asked to enforce a right or obligation which arose in favour of the plaintiff in the action, and was imposed upon the defendant in the action, as wife and husband respectively, and in their specific capacity of wife and husband respectively. I have come to the conclusion that that is not the right way to view this claim made in the action. I prefer the opposed view that what is being sought to be enforced here is a contract entered into in contemplation of, by reason of, and - as has been said in at least one decided case, though I doubt if it be very accurate - in consideration of a marriage which was indeed polygamous. It may well be - and I think on the evidence I ought to hold that it is the case - that seldom would such a marriage be entered into in India, at the date, at any rate, when this marriage was entered into, unless such a contract as is here sued upon were made by the bridegroom. It does seem that sometimes, though rarely, marriages are contracted by Mohammedan law without the obligation to provide dower being undertaken by the husband, but those cases are rare. It happens, too, rather more often it seems, that sometimes the amount of the dower is not fixed before the marriage ceremony is performed; in which cases there is jurisdiction in the courts of the place of marriage to fix an amount for dower. But, in the vast majority of cases, as a condition of the marriage - it may be in many cases as a condition of the consent of the families or relatives to the marriage - a bridegroom promises, and promises contractually, to provide dower. That dower may be of two kinds, and usually is of both of the two kinds, that is to say, prompt dower (to which the wife is entitled *401 on demand at any time), and deferred dower, which is the kind of dower which is in question here. That deferred dower becomes payable to her in the event of the husband's death or upon a divorce, whether she be the party divorcing (which is a very rare thing for a woman to do or be able to do) or the party divorced (which happens often and easily, and is the event against which in particular the dower is intended to protect her).

It is quite clear on the evidence that the right to dower, once it has accrued as payable, is a right in action, enforceable by a civil action without taking specifically matrimonial proceedings, regarded by Mohammedan law as a proprietary right assignable under section 3 of the Transfer of Property Act, 1882, of the Indian Code, and is a right for the support or 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 lien. In my judgment, it is quite different in essence from maintenance as understood in English or in Mohammedan law. This right is far more closely to be compared with a right of property than a matrimonial right or obligation, and I think that, upon the true analysis of it, it is a right *ex contractu*, which, whilst it can in the nature of things only arise in connection with a marriage by Mohammedan law (which is *ex hypothesi* polygamous), is not a matrimonial right. It is not a right derived from the marriage but is a right in personam, enforceable by the wife or widow against the husband or his heirs.

It has been said that the court should not extend jurisdiction to entertain such a claim as the present. I have in mind what was said by Lord Parker C.J. in a case relating to the Greek law of dower, [Phrantzes v. Argenti](#), [FN32] to the effect that it was not sufficient reason to refuse to exercise jurisdiction that the wife's claim did not come within one or other of the definite rules enumerated by Dicey. The relevant parts of the judgment in [Phrantzes v. Argenti](#), [FN33] including in particular the quotation from the judgment of Judge Cardozo in *Loucks v. Standard Oil Co. of New York*, [FN34] are sufficient guide to the conclusion that it is no sufficient reason why I should not accept jurisdiction in this case that it is *res integra*, that no such claim has hitherto been entertained by the English courts. As a matter of policy, I would incline to the view that, there being now so many Mohammedans resident in this country, it is better that the court should recognise *402 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.

FN32 [\[1960\] 2 Q.B. 19; \[1960\] 2 W.L.R. 521; \[1960\] 1 All E.R. 778.](#)

FN33 [\[1960\] 2 Q.B. 19; \[1960\] 2 W.L.R. 521; \[1960\] 1 All E.R. 778.](#)

FN34 (1918) 224 N.Y. 99.

For those reasons, I think that the answer upon the issues must be that the pleas in the defence are not sufficient in law to exclude this action from the court's jurisdiction.

Representation

Solicitors: Sanderson, Lee, Morgan, Price & Co.; Gregory, Rowcliffe & Co. for Ritsons, Bolton.
Order accordingly. Costs reserved to trial of action. ([Reported by TIMOTHY RYLAND, Esq., Barrister-at-Law.])

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[1971] 2 W.L.R. 518

*173 Qureshi v. Qureshi

Probate, etc., Division

PDAD

Sir Jocelyn Simon P.

1970 June 22, 23, 24, 25, 26, 29, 30; July 1, 2, 3, 6, 9; Oct. 30

Husband and Wife--Divorce--Foreign decree, validity--Talaq divorce--Husband domiciled in Pakistan--Marriage celebrated in England--Both spouses resident in England--Jurisdiction of court to make declaration on validity of talaq-- Whether talaq valid in English law--Whether non--forensic character of talaq relevant--Jurisdiction to adjudicate on dower rights--Court's discretion in recognising foreign decree--[R.S.C., Ord. 15, r. 16](#)

In 1966, the parties, who were Muslims, were married at an English register office. The register office ceremony was followed by a Muslim ceremony, in connection with which sadaqa, a type of dower, was arranged, whereby the husband promised to pay to the wife on demand at any time (by agreement), or (perforce) on the dissolution of the marriage by divorce or death, the sum of 9,000 Pakistani rupees (about £788). The parties continued thereafter to reside in England. On April 27, 1967, the husband, who claimed to be domiciled in Pakistan, sent a letter to the wife containing the sentence "I divorce you " three times, in compliance with the ancient Islamic law of talaq. In accordance with modern procedural modifications of that ancient law, effected by Pakistani law, that letter was followed by a hearing at the London office of the High Commissioner for Pakistan, to explore the possibilities of a reconciliation between the parties, following which, upon the expiry of 90 days from the date of the letter of talaq, and reconciliation having proved impracticable, the divorce was pronounced absolute on August 1, 1967.

The wife petitioned the court for a declaration that the marriage still subsisted and for maintenance and, alternatively, if the marriage had been validly dissolved, that she was entitled to dower in the sum of £788. The husband cross-prayed for a declaration that the divorce by talaq was valid, contending that the claim for maintenance was not maintainable in a petition for a declaration and that the court had no jurisdiction to adjudicate upon the claim for dower:-

Held:

(1) that the court had power to make a declaration under [R.S.C., Ord. 15, r. 16](#) in such circumstances as would have given the English ecclesiastical courts in their totality before 1857 jurisdiction to accord matrimonial relief, namely if both parties were, at the date of the commencement of proceedings resident in England; accordingly, as the parties were resident in England at the commencement of and throughout the proceedings the court had jurisdiction to make the declarations (post, p. 194D); that section 43 of the Supreme Court of Judicature (Consolidation) Act 1925 empowered the court to adjudicate upon the wife's claim to dower (post, pp. 194H-195C) but that it had no jurisdiction to order maintenance for the wife (post, p. 194E-F).

[Garthwaite v. Garthwaite \[1964\] P. 356](#), C.A. applied.

*174 (2) That the husband having established a Pakistani domicile (post, pp. 191A, 193G), the marriage had been validly dissolved, either on August 1, 1967, by ancient (or substantive) Islamic law as procedurally modified by Pakistani law or, alternatively, on April 27, 1967, by ancient Islamic law not so modified (post, p. 197G).

(3) That no rule of English law precluded the recognition of talaq by reason of its non-forensic character, the absence of judicial intervention being irrelevant if the purported divorce was effective by the law of the domicile, and it should be recognised as such unless the result would be offensive to the conscience of the English court (post, p. 199F-G).

[Sasson v. Sasson \[1924\] A.C. 1007](#), P.C., [Har-Shefi v. Har-Shefi \[1953\] P. 161](#), C.A.; [Har-Shefi v. Har-Shefi \(No. 2\) \[1953\] P.](#)

[220](#) and [Russ \(orse. Geffers\) v. Russ \(Russ orse. De Waele intervening, \[1964\] P. 315, C.A.](#) followed.

Per curiam. In so far as [Rex v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin \[1917\] 1 K.B. 634](#), C.A. may appear to be laying down the contrary, it is not to be followed (post, p. 198C-D).

(4) That the court's residual discretion to refuse to recognise a foreign divorce effective by the law of the domicile if to do so would offend the conscience of the court was to be most sparingly exercised (post, p. 201D); and, in the circumstances of the present case it should not be exercised to refuse recognition of the talaq divorce, so that there would be judgment for the husband on his prayer for a declaration that the talaq divorce was valid and for the wife for £788 by way of dower.

Dictum of Scarman J. in [Varanand v. Varanand \(1964\) 108 S.J. 693](#) applied.

Per curiam. Where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objective with which it was set up (post, p. 196F-G).

Where an act is required to be done within a time to be prescribed by rules, and there are no rules prescribing time, it is sufficient if the act required is done within a reasonable time (post, p. 196G-H).

The following cases are referred to in the judgment:

Aikman v. Aikman (1861) 3 Macq. 854; 4 L.T. 374, H.L.(Sc.).

Anderson v. Laneville (1854) 9 Moo.P.C.C. 325, P.C..

Bruce v. Bruce (1790) 2 Bos. & P. 229n, H.L.(Sc.).

[Cheni \(orse. Rodriguez\) v. Cheni \[1965\] P. 85; \[1963\] 2 W.L.R. 17; \[1962\] 3 All E.R. 873.](#)

D'Etchegoyen v. D'Etchegoyen (1888) 13 P.D. 132.

Doucet v. Geoghegan (1878) 9 Ch.D. 441, C.A..

[Drexel v. Drexel \[1916\] 1 Ch. 251.](#)

Flynn, decd., In re [1968] 1 W.L.R. 103; [1968] 1 All E.R. 49.

Fremlin v. Fremlin (1913) 16 C.L.R. 212.

Gardezi v. Yusuf, P.L.D. 1963 Sup.Ct. 51.

[Garthwaite v. Garthwaite \[1964\] P. 356; \[1964\] 2 W.L.R. 1108; \[1964\] 2 All E.R. 233, C.A..](#)

Guaranty Trust Co. of New York v. Hannay & Co. [1915] 2 K.B. 536, C.A..

*175 [Gulbenkian v. Gulbenkian \[1937\] 4 All E.R. 618.](#)

[Har-Shefi v. Har-Shefi \[1953\] P. 161; \[1953\] 2 W.L.R. 690; \[1953\] 1 All E.R. 783, C.A..](#)

[Har-Shefi v. Har-Shefi \(No. 2\) \[1953\] P. 220; \[1953\] 3 W.L.R. 200; \[1953\] 2 All E.R. 373.](#)

Hart v. Hart (1881) 18 Ch.D. 670.

Harvey (orse. Farnie) v. Farnie (1882) 8 App.Cas. 43, H.L.(Sc.).

Jatoi v. Jatoi, P.L.D. 1967 Sup.Ct. 580.

Lauderdale Peerage, The (1885) 10 App.Cas. 692, H.L.(Sc.).

Mandel v. Mandel [1955] V.L.R. 51; [1955] A.L.R. 379.

[Marsh v. Marsh \[1945\] A.C. 271, P.C.](#).

[Montreal Street Railway Co. v. Normandin \[1917\] A.C. 170, P.C.](#).

[Rex v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin \[1917\] 1 K.B. 634, C.A.](#).

[Ross v. Ellison \(or Ross\) \[1930\] A.C. 1, H.L.\(Sc.\)](#).

[Russ \(orse. Geffers\) v. Russ \(Russ orse. De Waele intervening\) \[1964\] P. 315; \[1962\] 3 W.L.R. 930; \[1962\] 3 All E.R. 193, C.A.](#).

[Sasson v. Sasson \[1924\] A.C. 1007, P.C.](#).

[Varanand v. Varanand \(1964\) 108 S.J. 693](#).

Wahl v. Attorney-General (1932) 147 L.T. 382, H.L.(E.).

[Wood v. Wood \[1957\] P. 254; \[1957\] 2 W.L.R. 826; \[1957\] 2 All E.R. 14, C.A.](#).

[Young v. Bristol Aeroplane Co. Ltd. \[1944\] K.B. 718; \[1944\] 2 All E.R. 293, C.A.; \[1946\] A.C. 163; \[1946\] 1 All E.R. 98, H.L.\(E.\)](#).

The following additional cases were cited in argument:

[Abate v. Abate \(orse. Cauvin\) \[1961\] P. 29; \[1961\] 2 W.L.R. 221; \[1961\] 1 All E.R. 569](#).

[Aldrich v. Attorney-General \(Rogers intervening\) \[1968\] P. 281; \[1968\] 2 W.L.R. 413; \[1968\] 1 All E.R. 345](#).

[Ali v. Ali \[1968\] P. 564; \[1966\] 2 W.L.R. 620; \[1966\] 1 All E.R. 664](#).

[Annesley, In re, \[1926\] Ch. 692](#).

Attorney-General v. Yule and Mercantile Bank of India (1931) 145 L.T. 9, C.A..

Bailet v. Bailet (1901) 84 L.T. 272.

[Bryce v. Bryce \[1933\] P. 83](#).

Capdevielle, In re (1864) 2 H. & C. 985.

[Casdagli v. Casdagli \[1919\] A.C. 145](#), H.L.(E.).

Castrique v. Imrie (1870) L.R. 4 H.L. 414, H.L.(E.).

[Chung Chi Cheung v. The King \[1939\] A.C. 160; \[1938\] 4 All E.R. 786](#), P.C..

[Craignish, In re \[1892\] 3 Ch. 180](#), C.A..

Crookenden v. Fuller (1859) 1 Sw. & Tr. 441.

[De Gasquet lames \(Countess\) v. Mecklenburg-Schwerin \(Duke\) \[1914\] P. 53](#).

[Dogliani v. Crispin \(1866\) L.R. 1 H.L. 301](#), H.L.(E.).

[Fuld, decd. \(No. 3\), In the Estate of \[1968\] P. 675; \[1966\] 2 W.L.R. 717; \[1965\] 3 All E.R. 776](#).

[Gray \(orse. Formosa\) v. Formosa \[1963\] P. 259; \[1962\] 3 W.L.R. 1246; \[1962\] 3 All E.R. 419](#), C.A..

Haque v. Haque (1962) 108 C.L.R. 230; [1963] W.A.L.R. 15.

[Henderson v. Henderson \[1967\] P. 77; \[1965\] 2 W.L.R. 218; \[1965\] 1 All E.R. 179](#).

Hodgson v. De Beauchesne (1858) 12 Moo.P.C.C. 285, P.C..

[Hopkins v. Hopkins \[1951\] P. 116; \[1950\] 2 All E.R. 1035](#).

***176**[Igra v. Igra \[1951\] P. 404](#).

[Indyka v. Indyka \[1969\] 1 A.C. 33; \[1967\] 3 W.L.R. 510; \[1967\] 2 All E.R. 689](#), H.L.(E.).

Johnstone v. Beattie (1843) 10 Cl. & Fin. 42, H.L.(E.).

[K. \(Infants\). In re \[1965\] A.C. 201; \[1963\] 3 W.L.R. 408; \[1963\] 3 All E.R. 191](#), H.L.(E.).

Khan (orse. Worresck) v. Khan (1959) 21 D.L.R. (2d) 171.

[L. \(An Infant\), In re \[1968\] P. 119; \[1967\] 3 W.L.R. 1645; \[1968\] 1 All E.R. 20](#), C.A..

[Langley's Settlement Trusts, In re \[1962\] Ch. 541; \[1961\] 3 W.L.R. 1169; \[1961\] 3 All E.R. 803](#), C.A..

[Lepre v. Lepre \[1965\] P. 52; \[1963\] 2 W.L.R. 735; \[1963\] 2 All E.R. 49](#).

Lord v. Colvin (1859) 4 Drew 366.

Lyell v. Kennedy (1889) 14 App.Cas. 437, H.L.(E.).

McGowan v. Middleton (1883) 11 Q.B.D. 464.

McMullen v. Wadsworth (1889) 14 App.Cas. 631, P.C..

[Mahadervan v. Mahadervan \[1964\] P. 233; \[1963\] 2 W.L.R. 271; \[1962\] 3 All E.R. 1108, D.C.](#)

[Martin, In re \[1900\] P. 211, C.A.](#)

[Merker v. Merker \[1963\] P. 283; \[1962\] 3 W.L.R. 1389; \[1962\] 3 All E.R. 928.](#)

Moorhouse v. Lord (1863) 10 H.L.Cas. 272, H.L.(E).

[Padolecchia v. Padolecchia \(orse. Leis\) \[1968\] P. 314; \[1968\] 2 W.L.R. 173; \[1967\] 3 All E.R. 863.](#)

[Pemberton v. Hughes \[1899\] 1 Ch. 781, C.A.](#)

Pertreis v. Tondear (1790) 1 Hag.Con. 136.

[Reg. v. Bham \[1966\] 1 Q.B. 159; \[1965\] 3 W.L.R. 696; \[1965\] 3 All E.R. 124, C.C.A.](#)

[Reg. v. Gyngall \[1893\] 2 Q.B. 232, C.A.](#)

[Ramsay v. Liverpool Royal Infirmary \[1930\] A.C. 588, H.L.\(Sc.\).](#)

[Ruding v. Smith \(1821\) 2 Hag.Con. 371.](#)

[Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. \[1921\] 2 A.C. 438, H.L.\(E\).](#)

[Saccharin Corporation Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft \[1911\] 2 K.B. 516, C.A.](#)

Salt v. Cooper (1880) 16 Ch.D. 544, C.A..

[Salvesen \(or von Lorang\) v. Austrian Property Administrator \[1927\] A.C. 641, H.L.\(Sc.\).](#)

[Schwebel v. Ungar \(or Schwebel\) \(1963\) 42 D.L.R. \(2d\) 622; affd \(1964\) 48 D.L.R. \(2d\) 644.](#)

[Shahnaz v. Rizwan \[1965\] 1 Q.B. 390; \[1964\] 3 W.L.R. 759; \[1964\] 2 All E.R. 993.](#)

Stanley v. Bernes (1830) 3 Hag.Ecc. 373.

Stevenson v. Masson (1873) L.R. 17 Eq. 78.

[Thynne v. Thynne \[1955\] P. 272; \[1955\] 3 W.L.R. 465; \[1955\] 3 All E.R. 129, C.A.](#)

Udny v. Udny (1869) L.R. 1 Sc. & Div. 441, H.L.(Sc.).

Whicker v. Hume (1858) 7 H.L.Cas. 124, H.L.(E).

SUIT FOR DECLARATORY JUDGMENT.

The wife petitioned under [R.S.C., Ord. 15, r. 16, and Ord. 112, r. 3](#), (1) for a declaration that her marriage to the respondent husband subsisted and that her status was that of a married woman and (2) that she might be granted such sums by way of

maintenance as might be just or that she *177 might continue to receive the sum of £5 a week from the husband as ordered by the magistrates' court on December 9, 1966. In the alternative, she prayed that, if the court were of opinion that the marriage had been validly dissolved, (1) that she was entitled to recover dower in the sum of £788 13s. 5d., and (2) that she was entitled to maintenance in the sum of £5 a week as ordered by the court on August 11, 1967. The husband cross-prayed for a declaration that the marriage had been validly dissolved by talaq and alleged that the claim for maintenance was not maintainable in a petition for a declaration of the subsistence of a marriage and as to the wife's status as a married woman. He further alleged that the dower was payable (if at all) only on the dissolution of the marriage or upon his death and denied that the wife was entitled to include a prayer for its recovery in her petition, alleging that the dower (as to recovery of which he made no admission) was not a matrimonial relief within the meaning of the English law, but that the wife's right (if any) to dower (if any) was ex contractu and, as such, not a cause of action (if at all) maintainable in the Divorce Division.

The facts are stated in the judgment of Sir Jocelyn Simon P.

Joseph Jackson Q.C. and *A. B. Ewbank* for the Queen's Proctor as amicus curiae. As to domicile the questions arise: (i) where was each party domiciled before the marriage?; (ii) where were they both domiciled after the marriage?; (iii) where were they both domiciled at the time of the talaq? (iv) where were they both domiciled after the talaq?

It might be that the law of an after-acquired domicile would recognise the talaq as validly dissolving the marriage. Thus, for example, the husband might have re-acquired, since the talaq, his Indian domicile, and India might recognise talaq.

There is the possibility that the husband acquired a Pakistani domicile of choice, abandoned it, and then wished to re-acquire it. The abandonment might have coincided with the acquisition of an English domicile of choice or the re-acquisition of the husband's Indian domicile, but he could not reacquire a Pakistani domicile of choice without actually returning there.

Domicile is a matter not only of private interest but also of public concern; [Bryce v. Bryce \[1933\] P. 83](#), per Lord Merrivale P. at p. 84. It follows that domicile is determined by applying the relevant principles of English law. The fact that the husband's solicitors or Pakistani officials or courts regard him as domiciled in Pakistan, as stated in his passport and in the talaq itself, is by no means conclusive. [Reference was made to [In re Martin \[1900\] P. 211](#) and [In re Annesley \[1926\] Ch. 692](#).]

A man may change his domicile as often as he pleases: *Udny v. Udny* (1869) L.R. 1 Sc. & Div. 441, per Lord Hatherley L.C. at p. 450. But it is not possible to have more than one domicile at one and the same time: [Garthwaite v. Garthwaite \[1964\] P. 356](#), per Willmer L.J. at p. 379. Domicile is the legal consequence of a state of facts. The existence of the relevant facts determines a person's domicile. He or she must have a domicile at every moment whilst living: [Garthwaite v. Garthwaite](#), per Diplock L.J. at p. 393; [Saccharin Corporation Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft \[1911\] 2 K.B. 516](#), per Farwell L.J. at p. 527, and [In re Craignish \[1892\] 3 Ch. 180](#), per Chitty J. at p. 192.

*178 It was said authoritatively over a century ago that it is impossible to lay down an absolute definition of domicile: *Whicker v. Hume* (1858) 7 H.L.Cas. 124, per Lord Cranworth at pp. 157, 159, 160. See also [Henderson v. Henderson \[1967\] P. 77](#), per Sir Jocelyn Simon P. at p. 79; [In the Estate of Fuld, decd. \(No. 3\) \[1968\] P. 675](#), per Scarman J. at p. 682; and *Attorney-General v. Yule and Mercantile Bank of India* (1931) 145 L.T. 9.

A domicile of choice is acquired by the fact of being in a new territory and the intention to stay there. Both fact and intention require considerable explanation, especially the latter.

If it is assumed that the husband acquired a domicile of choice in Pakistan, the question is whether he has retained that domicile of choice or acquired a fresh domicile of choice in England or abandoned his domicile of choice without acquiring a fresh domicile, thereby re-acquiring his Indian domicile of origin. He could not re-acquire his Pakistani domicile of choice, if he had lost it, without actually returning to Pakistan.

It is difficult to define the term "domicile of choice." In *Lord v. Colvin* (1859) 4 Drew 366, Sir Richard Kindersley V.-C. said at p. 376 that a man who "voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home" thereby acquired a new domicile. In [Casdagli v. Casdagli \[1919\]](#)

[A.C. 145](#), Lord Dunedin said at p. 173: "Intention may be (and in most cases is) gathered from what a person does, not merely from what he says." See also [McMullen v. Wadsworth \(1889\) 14 App.Cas. 631](#); [Crookenden v. Fuller \(1859\) 1 Sw. & Tr. 441](#); [Bryce v. Bryce \[1933\] P. 83](#), [Hodgson v. De Beauchesne \(1858\) 12 Moo. P.C.C. 285](#); [In re Craignish \[1892\] 3 Ch. 180](#) and [Moorhouse v. Lord \(1863\) 10 H.L.Cas. 272](#).

While there is no end to the evidence that may be adduced to ascertain domicile, too much detail may stultify: *per* Megarry J. in [In re Flynn, decd. \[1968\] 1 W.L.R. 103](#).

"A domicile of choice may be acquired even though there is no deliberate decision to acquire it: see [Gulbenkian v. Gulbenkian \[1937\] 4 All E.R. 618](#) and [D'Etchegoyen v. D'Etchegoyen \(1888\) 13 P.D. 132](#).

"A mere 'floating intention' to return to the country of origin at some future period is not sufficient for the retention of domicile if the propositus has settled in some other territory subject to a distinctive system of law with the intention of remaining there for an indefinite time": [Henderson v. Henderson \[1967\] P. 77](#), *per* Sir Jocelyn Simon P. at p. 79, citing [Stanley v. Bernes \(1830\) 3 Hag. Ecc. 373](#); [Aikman v. Aikman \(1861\) 3 Macq. 854](#); [Bruce v. Bruce \(1790\) 2 Bos. 229n.](#); [Doucet v. Geoghegan \(1878\) 9 Ch.D. 441](#); and [Anderson v. Laneville \(1854\) 9 Moo.P.C.C. 325](#). See also [In re Capdevielle \(1864\) 2 H. & C. 985](#); [Fremlin v. Fremlin \(1913\) 16 C.L.R. 212](#) and [Schwebel v. Ungar \(ar Schwebel\) \(1964\) 48 D.L.R. \(2d\) 644](#).

If a person has a genuine intention to return to a country in which he was, his residing for an indefinite time in another country only makes him "ordinarily resident" there: [Hopkins v. Hopkins \[1951\] P. 116](#). Acquiring a house and establishing a business may be evidence of the acquisition of a domicile of choice: [Stevenson v. Masson \(1873\) L.R. 17 Eq. 78](#). [Reference was made to [Johnstone v. Beattie \(1843\) 10 Cl. & Fin. 42](#).] Change *179 of nationality is a factor to be considered but is not conclusive: [Wahl v. Attorney-General \(1932\) 147 L.T. 382](#). The quality of residence, as opposed to its length, may afford the necessary inference of a change of domicile: [Ramsay v. Liverpool Royal Infirmary \[1930\] A.C. 588](#). See also [Haque v. Haque \(1962\) 108 C.L.R. 230](#).

As to marriage the question is: what kind of marriage is the court considering? An ordinary, regular monogamous marriage was created by the civil ceremony. The religious ceremony was a nullity. [Reference was made to [Jatoi v. Jatoi, P.L.D. 1967 Sup.Ct. 580](#); [Reg. v. Bham \[1966\] 1 Q.B. 159](#); [Thynne v. Thynne \[1955\] P. 272](#) and [Merker v. Merker \[1963\] P. 283](#).]

What is the effect in English law of the first ceremony if, by the laws of the domicile of one or both parties, it is not an effective ceremony? Is this a question of form or essentials? Does public policy play a part? See [Gray \(or. Formosa\) v. Formosa \[1963\] P. 259](#).

Can a monogamous marriage celebrated in England be dissolved by talaq? It is too late to contend save in the House of Lords - that a Christian marriage celebrated in England cannot, in the eyes of English law, ever be dissolved by talaq, "notwithstanding that the law of the parties' domicile permits it": see [Russ \(or. Geffers\) v. Russ \(Russ or. De Waele intervening\) \[1964\] P. 315](#); *per* Donovan L.J. at p. 331.

Does it affect the matter that the talaq was effected at the embassy in England? This raises the question where, in contemplation of law, the divorce took place. By a fiction of extra-territoriality, marriages celebrated at foreign embassies are sometimes said to be celebrated in the dominions of the sovereign represented: see [Ruding v. Smith \(1821\) 2 Hag.Con. 371](#); [Pertreis v. Tondear \(1790\) 1 Hag.Con. 136](#); [Reg. v. Bham \[1966\] 1 Q.B. 159](#); [Baillet v. Baillet \(1901\) 84 L.T. 272](#); [Khan \(or. Worresck\) v. Khan \(1959\) 21 D.L.R. \(2d\) 171](#); [Varanand v. Varanand \(1964\) 108 S.J. 693](#); and [Mandel v. Mandel \[1955\] V.L.R. 51](#). The court has to consider whether it is dealing with extra-territoriality or with immunities: [Chung Chi Cheung v. The King \[1939\] A.C. 160](#). The doctrine of extra-territoriality is, as stated in Khan's case, 21 D.L.R.(2d) 171, "a fiction": see [British Year Book of International Law 1926](#), pp. 126, 127, and 1948, pp. 236-240; [Restatement of American Law](#), 2nd ed. (1965), pp. 241-243; 1950 [International Court of Justice Reports](#), pp. 274-275; [Digest and Reports of Public International Law Cases](#), No. 166, pp. 385-386; [McNair, International Law Opinions](#), pp. 85-88; and [Oppenheimer's International Law](#), 8th ed. (1955), vol. 1, pp. 790-805.

Suppose the embassy were not the proper place to effect talaq, from the English point of view, would the result be that the talaq was effected out of court in England? If so, is it valid or invalid? See [Har-Shefi v. Har-Shefi \(No. 2\) \[1953\] P. 220](#), [Mandel v. Mandel \[1955\] V.L.R. 51](#); [Varanand v. Varanand \(1964\) 108 S.J. 693](#).

As to the extent of jurisdiction to make declaratory judgments, this is not a nullity suit and [R.S.C., Ord. 15, r. 16](#), applies. The basis of jurisdiction may vary with the basic nature of the relief sought. [Har-Shefi v. Har-Shefi \[1953\] P. 161](#), was a nullity case. [Garthwaite v. Garthwaite \[1964\] P. 356](#) was a restitution case. The present case may be both; a *180 restitution case by the wife and a nullity (and even a jactitation) case by the husband.

Doubts as to the effect of [Har-Shefi v. Har-Shefi, \[1953\] P. 161](#) and [Garthwaite v. Garthwaite \[1964\] P. 356](#) were raised by Ormrod J. in [Aldrich v. Attorney-General \(Rogers intervening\) \[1968\] P. 281](#).

One should look first at section 21 of the Judicature Act 1925, and [section 39 of the Matrimonial Causes Act 1965](#).

Can only British subjects seek a declaration of validity of marriage? Are the parties, in English law, British subjects? The effect of the India (Consequential Provisions) Act 1949 and the Pakistan (Consequential Provisions) Act 1956 is that the position of India and Pakistan is unaffected by their becoming republics, so far as the British Nationality Act 1948 is concerned. Hence both the husband and the wife are British subjects. If they are domiciled in England they can rely on [section 39 of the Matrimonial Causes Act 1965](#). If they are not domiciled in England and there is no personal estate within the meaning of section 39, can the court make a declaration on the validity of the marriage? Can it be said that the wife's petition constitutes a restitution suit and the husband's a nullity and jactitation suit? If so, then in the words of Sir Jocelyn Simon P. in [Lepre v. Lepre \[1965\] P. 52](#), 57: "... determination of the validity of a foreign judgment is a necessary step in proceeding to adjudication on a matter within the jurisdiction of the court ... and the court has jurisdiction under ([Ord. 15, r. 16](#)) to make a declaration on such validity."

Is the jurisdiction discretionary? See [Garthwaite v. Garthwaite \[1964\] P. 356](#); [De Gasquet James \(Countess\) v. Mecklenburg-Schwerin \(Duke\) \[1914\] P. 53](#); [Igra v. Igra \[1951\] P. 404](#); [Abate v. Abate \(orse. Cauvin\) \[1961\] P. 29](#); [Padolecchia v. Padolecchia \(orse. Leis\) \[1968\] P. 314](#); [Khan \(orse. Worresck\) v. Khan \(1959\) 21 D.L.R. \(2d\) 171](#) and [Mandel v. Mandel \[1955\] V.L.R. 51](#). Can the court "look behind" the talaq to see if it was properly performed?

We do not inquire whether a "competent foreign court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed": *per* Viscount Haldane, in [Salvesen \(or von Lorang\) v. Austrian Property Administrator \[1927\] A.C. 641](#), 659. See also [Pemberton v. Hughes \[1899\] 1 Ch. 781](#); [Merker v. Merker \[1963\] P. 283](#); [Castrique v. Imrie \(1870\) L.R. 4 H.L. 414](#) and [Doglioni v. Crispin \(1866\) L.R. 1 H.L. 301](#).

Even if the husband is domiciled in England, should this court recognise talaq because it is recognised in India or Pakistan and the parties have a substantial connection with India or Pakistan? The parties may have no substantial connection with Pakistan now: see [Indyka v. Indyka \[1969\] 1 A.C. 33](#).

Does this court have a residual discretion to refuse recognition of foreign decrees and, if so, should it refuse to recognise this talaq? "It may well be that in exercising what has been called a residual discretion to refuse to follow the law of the domicile, the English court might reasonably take the view that, since in this country a divorce can be pronounced only after a judicial hearing, our courts will not countenance any attempt to obtain within their jurisdiction a divorce by any other means, such as by a unilateral declaration": *per* Davies L.J. in [Russ \(orse. Geffers\) v. Russ \(Russ orse. De Waele intervening\) \[1964\] P. 315](#)*181, 335. See also [In re Langley's Settlement Trusts \[1962\] Ch. 541](#) and [Cheni \(orse. Rodriguez\) v. Cheni \[1965\] P. 85](#).

The court might take the view that even though it has a discretion to recognise the talaq, it will refuse to recognise it, not because it is divorce by unilateral declaration in England but because the parties by their conduct have shown an intention to govern their matrimonial relations by the law of England and to exclude such divorce procedure, regardless of the acquisition by them of an English domicile.

If the court recognises the talaq as validly dissolving the marriage, does the existing magistrates' court order survive? It does: see [Wood v. Wood \[1957\] P. 254](#), *per* Lord Evershed M.R. at p. 284.

Finally there is the question whether this court can adjudicate upon the wife's claim to dower contained in her petition. See [McGowan v. Middleton \(1883\) 11 Q.B.D. 464](#); [Salt v. Cooper \(1880\) 16 Ch.D. 544](#); [Reg. v. Gyngall \[1893\] 2 Q.B. 232](#); [In re L.](#)

[\(An Infant\) \[1968\] P. 119](#); [In re K. \(Infants\) \[1965\] A.C. 201](#) and [Shalmaz v. Rizwan \[1965\] 1 Q.B. 390](#).

Philip L. W. Owen Q.C. and *A. M. Azhar* for the wife. The husband was born in 1933 in Hyderabad. In 1948, the State of Hyderabad became part of India. Accordingly, the husband's domicile then became Indian. In 1957, he acquired a domicile of choice in Pakistan. The question is whether, by 1966, he had lost that domicile and had acquired an English domicile. He had because: (1) a domicile of choice is less retentive than a domicile of origin and therefore less evidence is required to satisfy the court that a domicile of choice has been lost than is the case with a domicile of origin; (2) a change of domicile may be inferred from conduct, without proof of any mental element having been operative in producing the change; (3) if a person leaves the country in which he has acquired a domicile of choice and takes up residence in another country, his doing so may lead to an inference that he has abandoned his former domicile. The formation of an *express animus non revertendi* in relation to the country that has been left is unnecessary. [Reference was made to *Wahl v. Attorney-General* (1932) 147 L.T. 382.]

The argument of the Queen's Proctor on the jurisdictional points is adopted. The fact that the parties are resident in England is sufficient to confer jurisdiction on the court to grant the wife the relief sought. The claim for dower takes the case out of the category of "bare declaration" cases. [Reference was made to [Shahnaz v. Rizwan \[1965\] 1 Q.B. 390](#); [Ali v. Ali \[1968\] P. 564](#); *Jatoi v. Jatoi*, P.L.D. 1967 Sup.Ct. 580 and section 43 of the Judicature Act 1925.] English contract law should be applied to the document relating to dower. Dower can be claimed in the Divorce Division.

It is against public policy for our law to recognise talaq. Talaq should also be refused recognition on the ground that it is unjust. [Rex v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin \[1917\] 1 K.B. 634](#) is still good law and is binding on this court.

Bruce Holroyd Pearce Q.C. and *A. M. Abbas* for the husband. To establish the abandonment of a domicile both factum and animus are necessary. This also applies to the acquisition of a domicile of choice. *182 Both parties are pawns in the English legal system. The fact that a party is legally aided, being extraneous, should be disregarded. Both parties are Muslims. Their marriage was a Muslim marriage between Muslim citizens. There is no justification for refusing to recognise their status according to the law of their domicile. A woman entering a Muslim marriage knows that one of the hazards of so doing is that she may be one of four wives. She also knows that she is liable to be divorced unilaterally.

Whilst the wife is resident in the United Kingdom, the court will give her the protection which goes with her status, so long as she enjoys that status by her personal law. The determination of the marriage does not put an end to the magistrates' order: [Wood v. Wood \[1957\] P. 254](#). Whilst the wife resides in England she has the benefit of the laws of Christendom. She should not be entitled to the benefit of the laws of Christendom after the marriage has been determined. She should not be able to choose the best law. The husband will, in the near future, either go to the U.S.A. and then to Pakistan, or he will go straight to Pakistan. The magistrates' order would be unenforceable either in the U.S.A. or Pakistan.

If the wife received dower and stayed in the United Kingdom, there would be no reason why the court should exercise its discretion against recognising the talaq.

Jackson Q.C. replied.

Cur. adv. vult.

October 30. SIR JOCELYN SIMON P.

read the following judgment. The main issue in this case concerns whether this court should accord recognition to a pronouncement of divorce, known as a talaq, made in this country in 1967, and purporting to dissolve a marriage celebrated in this country in 1966 between two persons of the Muslim faith resident in England, the husband being a citizen of Pakistan and the wife a citizen of India.

By what has been called the "ancient" (or "substantive") Islamic law, marriages have a limited polygamous potential. But it has been common ground that the marriage in the instant case, having taken place in England, where monogamy is the rule, must be

regarded as monogamous for the purpose of invoking the jurisdiction of this court.

Though there were sectarian differences irrelevant to the instant case, by ancient Islamic law a marriage between Muslims could be terminated by the husband pronouncing three times words which can be translated as "I divorce you." This is the talaq. It will be apparent that it has affinities with the "bill of divorcement" mentioned in the Authorised Version of the Book of Deuteronomy, chapter 24, verse 1, the modern modification of which (the Jewish divorce by "ghet") has received judicial consideration.

Both of the rules of ancient Islamic law I have mentioned - that of limited polygamy and that of divorce by talaq - are considered by Muslims to be of scriptural, and therefore of divine, authority. But, so far as Pakistan is concerned, the ancient Islamic law has received statutory modification of a procedural nature for the greater protection of wives. The interaction of the ancient Islamic law and the modern statutory modification *183 was one of the issues in this case; and I must describe the statutory modification before the factual history of this case can be understood.

Pakistani legislation

The principal legislation is the Muslim Family Laws Ordinance (VIII of 1961), which came into force on July 15, 1961 (see the edition of the Ordinance by Shaukat Mahmood, 5th edition (1968), which must, however, be used with caution since it contains some significant misprints).

By section 1 (2) the Ordinance "extends to the whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be." Section 2 is an important definition section:

"(a) 'arbitration council' means a body consisting of the chairman and a representative of each of the parties to a matter dealt within this ordinance: [Provided that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the arbitration council]."

In the original ordinance the word "chairman" was followed by the words "of the union council" (i.e., the local authority): but these words were deleted by an amendment of 1961 and the words I have placed in square brackets were added.

"(b) 'chairman' means the chairman of the union council or a person appointed by the [Central Government in the Cantonment areas, or by the Provincial Government in other areas,] or by an officer authorised in that behalf by any such Government, to discharge the function of chairman under this ordinance."

The words in square brackets were substituted in 1964 for the words "Central or a Provincial Government."

"(c) 'prescribed' means prescribed by rules made under section 11."

By section 3 (1), "the provisions of this ordinance shall have effect notwithstanding any law, custom or usage ..." Section 5 deals with registration of marriages. Section 6, while not proscribing polygamy, stipulates for certain procedural requirements.

Section 7, dealing with talaq, is crucial to the decision of this case. The relevant subsections read as follows:

"(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the chairman notice in writing of his having done so, and shall supply a copy thereof to the wife ...

"(3) ... a *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of 90 days from the day on which the notice under subsection (1) is delivered to the chairman.

"(4) Within 30 days of the receipt of notice under subsection (1) the chairman shall constitute an arbitration council for the purpose of bringing about a reconciliation between the parties, and the arbitration council shall take all steps necessary to bring about such reconciliation."

*184 Section 9, dealing with maintenance, provides that a wife who is inadequately or inequitably maintained may, in addition to any other legal remedy available to her, apply to the chairman, who shall constitute an arbitration council to determine the matter.

Section 10 deals with "dower"; but although I shall be concerned with "dower" its provisions are not relevant to any issue in the present case.

Section 11 enacts a power to make rules, as follows:

"(1) The [Central Government in respect of the cantonment areas and the Provincial Government in respect of other areas] may

make rules to carry into effect the purposes of this Ordinance ...

"(3) Rules made under this section shall be published in the official Gazette and shall thereupon have effect as if enacted in this Ordinance."

Two sets of rules were promulgated under the Ordinance, one for East Pakistan and the other for West Pakistan, published in their respective official gazettes on July 20, 1961. They do not differ materially; though it is agreed that it is the West Pakistan Muslim Family Law Rules which (in so far as they are relevant at all) govern the present case. Rule 3 deals with the arbitration council. It provides (inter alia) that the union council which shall have jurisdiction in the case of a notice of talaq under section 7 (1) of the Ordinance shall, if the wife was not residing in any part of West Pakistan, be the union council of the union or town where the person pronouncing the talaq is permanently residing in West Pakistan. Rule 5 (3) provides that, subject to the provisions of sub-rule (4), proceedings before an arbitration council shall not be vitiated by reason of a vacancy in the arbitration council, whether on account of failure of any person to nominate a representative or otherwise. Sub-rule (4) provides that where a vacancy arises otherwise than through a failure to make a nomination, the chairman shall require a fresh nomination. Sub-rule (6) provides that all decisions of the arbitration council shall be taken by majority, and where no decision can be so taken, the decision of the chairman shall be the decision of the arbitration council. Rub 6 deals with "the prescribed time." It provides:

"(1) Within seven days of receiving ... a notice under subsection (1) of section 7, the chairman shall, by order in writing, call upon each of the parties to nominate his or her representative, and each such party shall, within seven days of receiving the order, nominate in writing a representative and deliver the nomination to the chairman or send it to him by registered post. (2) Where a representative nominated by a party is, by reason of illness or otherwise, unable to attend the meeting of the arbitration council, or wilfully absents himself from such meeting, or has lost the confidence of the party, the party may, with the previous permission in writing of the chairman, revoke the nomination and make, within such time as the chairman may allow, a fresh nomination: [Provided that where a party on whom the order is to be served is residing outside Pakistan, the order may be served on such party through the consular officer of Pakistan in or for the country where such party is residing.]"

*185 On November 17, 1961, the following notice appeared in the "Gazette of Pakistan," the notice itself bearing the date November 8, 1961:

"In exercise of the powers conferred by clause (b) of section 2 of the Muslim Family Laws Ordinance 1961 (VIII of 1961) the Central Government is pleased to authorise the Director General (Administration), Ministry of External Affairs, to appoint officers of Pakistan missions abroad to discharge the functions of chairman under the aforesaid Ordinance."

Exhibit R 2 has been accepted as showing that the Director General (Administration), Ministry of External Affairs, purported to appoint heads of chancery in Pakistan missions abroad to discharge the functions of chairman under section 2 of the Ordinance.

The factual background

The wife and the husband, and their present solicitors, respectively Mr. Boyle and Mr. Thorne, gave evidence on which I rely in setting out the facts. I preferred the evidence of the husband to that of the wife where they differed. There was little variance between the evidence of Mr. Boyle and that of Mr. Thorne, but I thought that the latter's recollection was more vivid, and I accept his evidence as a touchstone to test the validity of all other oral evidence.

The husband, Mohammad Abdul Hai Qureshi, and the wife, then Ayesha Asghari, were born in Hyderabad in respectively 1933 and 1937. Hyderabad was then a princely state situated in the centre of the Indian sub-continent. Its royal house and ruling class were Muslim, though the bulk of the population was Hindu. Both the wife and the husband have at all times been Muslims. In 1947 India and Pakistan became separate states independent of the British Crown: Hyderabad (emancipated from British paramountcy) was surrounded by Indian territory. In 1948 Hyderabad was invaded by India, its royal house deposed, and the state itself incorporated in India: this is the episode which is ironically referred to in the correspondence as "the police action."

In 1955 the husband qualified as a medical practitioner in Hyderabad; and took a job as medical officer in the government of Hyderabad. In February 1957 he went to Pakistan, taking a post as medical officer at the airport at Karachi. Two of his sisters had preceded him to Pakistan, one brother accompanied him and another went later. In October 1957 the husband assumed Pakistani nationality (which he has retained ever since), formally renouncing Indian citizenship and surrendering his Indian passport. On June 28, 1958, he came to England, his purpose being to qualify as a Fellow of the Royal College of Surgeons, a qualification which would have greatly improved his prospects in Pakistan. He took a number of hospital appointments in England under the National Health Service, and made a number of attempts over the years to qualify as F.R.C.S., though unsuccessfully.

Before leaving Hyderabad the husband had apparently become very friendly with the wife and thereafter correspondence by letter took place between them: exhibit P 3 contains English translations of letters written in Urdu by the husband to the wife and to her brother in the United States *186 from 1960 onwards: reliance was placed on them on the issue of domicile. I think it was towards the end of 1963 that the wife and the husband became formally engaged to marry. The husband was still in England, the wife still in Hyderabad. At all material times she was an Indian citizen. On March 9, 1966, she arrived in England for the purpose of marriage with the husband. On March 19, 1966, the wife and the husband went through a ceremony of marriage 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. However, I think it was in connection with the religious ceremony that a "sadaqa" was arranged between the parties. Sadaqa has been conveniently referred to as "dower" (which is what it is called in the Ordinance), though it does not correspond to the concept of dower in former English law. The particular type of sadaqa in the instant case amounted to a promise by the husband on behalf of himself and his estate to pay to the wife the sum of 9,000 rupees (Pakistani) (equivalent to £788 13s. 5d. in sterling) either (by agreement) on demand at any time or (perforce) on the dissolution of the marriage by divorce or death.

At the time of the marriage the husband was working as a casualty officer at Farnham Hospital. After the marriage the wife and husband lived together in one room at 3 Eggars Hill, Aldershot; but this was only envisaged as temporary accommodation; the husband had paid a deposit on and arranged a mortgage for a newly built house in Farnborough. However, though both parties have lived in England ever since their marriage, they never lived together elsewhere than at 3 Eggars Hill, and occasionally at an address in London where the husband went during weekend duties. The marriage was not a happy one. The principal cause of contention was that the husband wished the wife to assume Pakistani nationality and take a Pakistani passport, whereas the wife wished to retain her Indian nationality and passport. In consequence of their dissensions they separated in June 1966.

On October 29, 1966, the wife took out a summons before the Aldershot magistrates, complaining of persistent cruelty and desertion, and asking for a separation and maintenance order. Her complaints were heard by the magistrates on November 18 and December 9, 1966. The issues were contested; both parties were legally represented, the wife by Mr. Boyle. According to the agreed notes of evidence the husband said:

"My wife knew I intended to go to Pakistan when I got my fellowship and she agreed to this arrangement ... I negotiated for the house in this country for my use for two or three years before I returned to Pakistan ... I did not know that my wife would not live in Pakistan but I took it for granted that she would do so."

The wife said in evidence: "My husband had a Pakistani passport, I had an Indian passport. My passport expired in 1966. My husband suggested that I should have a Pakistani passport like him. He wanted to go back to Pakistan." (The importance of this evidence is that it was given at a time when there was no sort of issue as to the husband's domicile.) On December 9, 1966, the magistrates held that both of the wife's complaints *187 were proved. They made a separation order; and ordered the husband to pay the wife £5 a week by way of maintenance. There was no appeal from this decision and for some months the husband paid to the wife the maintenance ordered by the magistrates.

On April 27, 1967, the husband wrote to the wife a letter which was settled by counsel. It is in the following terms:

"This is to inform you that as irreconcilable differences have arisen between you and myself I have formed an irrevocable intention to divorce you and I am divorcing you under the Pakistani law applicable to me, myself being a Muslim and a citizen of Pakistan domiciled in Pakistan. I divorce you; I divorce you; I divorce you. Please take notice that this act of mine, which is irrevocable, dissolves the marriage between you and myself solemnised at Kensington registry (sic) office in England, and it also puts an end to the relationship between you and myself which might have been created by the form or ceremony of marriage which I went through with you at 37 Collingham Place, London, S.W.5 before the Imam of the East London Mosque, 448, Commercial Road, London E.1 on the 19th day of March, 1966. From today I am not your husband and you are not my wife. Under provisions of the Muslim Family Laws Ordinance 1961 (of Pakistan) I am serving a copy of this divorce instrument upon His Excellency The High Commissioner for Pakistan in U.K. of 35 Lowndes Square, London S.W.1. For your information I am enclosing herewith an extract from the said Ordinance relating to the divorce."

Having himself received a copy of this letter, Mr. Tabarak Husain, counsellor and head of chancery at the London office of the High Commissioner for Pakistan, wrote to the wife on May 3, 1967, a letter in the following terms:

"Please find herewith a copy of the notice of divorce submitted to this office in accordance with the provision of the Muslim Family Laws Ordinance 1961 of Pakistan. Now the said Ordinance also empowers the undersigned to constitute an arbitration

council consisting of one representative from you and the other party. You are, therefore, requested to appear before the undersigned with such representative on May 26, 1967, at 11.30 a.m. at the Pakistan High Commission office."

The date of the meeting was subsequently, by general agreement, changed to May 25.

On that date a meeting took place at the High Commission office. Mr. Husain presided. The wife was accompanied by Mr. Boyle; the husband by Mr. Thorne, who was at that time in articles in the office of the solicitor who had represented the husband before the magistrates. Mr. Thorne has at all material times been a personal friend of the husband. Mr. Husain made it clear that he regarded himself as chairman of an arbitration council under the Ordinance and that Mr. Boyle and Mr. Thorne were in attendance as the spouses' "representatives," not as solicitors (Mr. Thorne was not yet in fact at that time a solicitor). Mr. *188 Boyle protested to the jurisdiction - perhaps not formally, but at least in the sense that he drew attention to the fact that his client had secured a matrimonial order from the Aldershot justices on December 9, 1966, which, he claimed, governed the matrimonial situation. He indicated, and the wife confirmed, that she was willing to be reconciled to the husband. Mr. Husain was apparently of opinion that a reconciliation might be possible and he adjourned the meeting to July 12. But on May 30, 1967, Mr. Thorne wrote to the wife's solicitors a letter which contains the following passage:

"Our client is firmly of the opinion that his wife's statement that she wishes for a reconciliation is without foundation and he does not, himself, seek such a reconciliation. Unless you are able to suggest any steps which we might usefully take we can see no alternative to the divorce being finalised on July 12 next."

On July 11, 1967, Mr. Boyle wrote to Mr. Husain a letter in the following terms: "We write to inform you that we will not be attending at your office tomorrow in view of certain advice we have received nor, we understand, will Mrs. Qureshi be attending." The advice referred to was apparently that Mr. Husain had no jurisdiction to act as chairman of an arbitration council, and that nothing should be done that might appear to be conceding any such jurisdiction or the validity of any talaq that might ensue or be sanctioned.

On July 12, 1967, the husband together with Mr. Thorne, attended on Mr. Husain at the High Commission office. Neither the wife nor Mr. Boyle attended. Mr. Boyle's letter of July 11 apparently not yet being to hand, Mr. Husain confirmed by a telephone call to Mr. Boyle's office that neither he nor his client intended to attend. Discussion with the husband and Mr. Thorne must then have satisfied Mr. Husain that no reconciliation could be expected.

On July 25, 1967, Mr. Boyle wrote to the husband's solicitors a letter in the following terms:

"We shall be obliged if you would let us know the outcome of the hearing at the office of High Commissioner of Pakistan on July 12. We should also be obliged to hear from you as to whether it is now considered that the letter of divorce dated April 27, 1967, has taken effect. We ourselves have taken the advice of counsel versed in both English and Pakistani law and he advised that on hearing from you confirming that in your view the divorce is complete we should institute proceedings in the High Court for a declaration as to the validity or otherwise of the alleged divorce. We are also advised that the document dated October 12, 1966, concerning the sadaqa of 9000 rupees, is in fact now due to our client and we shall be obliged to hear from you as to what proposals your client has for settling this amount."

(It was subsequently agreed between the solicitors that questions of liability in maintenance and for the sadaqa should be left for decision in the present proceedings.)

*189 On August 7, 1967, Mr. Husain drew up the following document, sending copies to the wife and the husband:

"In the matter of dissolution of marriage in accordance with the provision of the Muslim Family Laws Ordinance, 1961. AND In the matter of Dr. Mohamed Abdul Hai Qureshi, s/o late Abdul Nabi Qureshi of "Al-Quraish," behind "Naz" Cinema, Karachi-3, presently living at Farnham Hospital, Hale Road, Farnham, Surrey and Mrs. Ayesha Qureshi of 10 Acacia Avenue, Wembley, Middx. In pursuance of the notice issued by this office vide No. CON/8/1/A/67, dated 10th May 1967 both the parties with their respective representatives appeared before me on the 25th May 1967. Heard both the parties and efforts were made to bring about a reconciliation between the estranged parties. Both the parties sought time to see if they could settle up the matter among themselves amicably and so the proceedings of the arbitration council was adjourned till the 12th July 1967. On 12 July, 1967 Dr. Qureshi with his representative appeared before the arbitration council but the solicitor of Mrs. Qureshi informed me that they would not attend the arbitration council. The decision had, therefore, to be taken ex-parte. Dr. Qureshi was adamant to see the marriage dissolved and was not agreeable to any reconciliation. Hence it was not possible to grant a new lease of life to the marriage. It was therefore, ordered that the divorce would be absolute on 1st August 1967, that is, the notice of divorce as received by this office, as provided under section 7 of the Muslim Family Laws Ordinance, 1961."

The significance of the date, August 1, 1967, is that it is 90 days from the purported pronouncement of talaq.

On August 11, 1967, the husband ceased making payments under the maintenance order of December 9, 1966; and he made no payment thereafter up to the date of the hearing before me. On November 28, 1967, the wife lodged a complaint in the magistrates' court in respect of the arrears of maintenance. On December 12, 1967, the husband lodged a complaint, claiming that he was no longer liable to pay maintenance at the rate of £5 a week, on two grounds: first, that he and the wife were divorced and, second, that the wife's circumstances had changed, in that she was by then in gainful employment. Both complaints came before the magistrates on January 5, 1968, when both were adjourned sine die. The reason for that was that the present proceedings were impending in the High Court; the wife presented her original petition on January 12, 1968.

On February 8, 1968, the husband was issued by the Pakistani High Commission in London with his current passport. It purports to show him by nationality to be a citizen of Pakistan, domiciled in Pakistan, and (under heading "Home in Pakistan") having an accommodation address in Islamabad. I know nothing of the contents of any previous passport.

On August 28, 1968, the husband completed the purchase of the Farnborough house, where he is now living.

190The Pleadings*

By a document called her amended re-amended petition the wife alleged that she was not aware of the husband's domicile: alternatively that both he and she were domiciled in England. She alleged that each had been bona fide residents in England since the date of the marriage, March 19, 1966. She prayed: (a) that the court might declare that her marriage with the husband subsists and that her status is one of a married woman; (b) that she might be granted such sums by way of maintenance as might be just or that she might continue to receive the sum of £5 a week from the husband as ordered by the magistrates' court [on December 9, 1966.] In the alternative, she prayed, if the court were of opinion that her marriage with the husband had been validly dissolved: (i) that she was entitled to recover dower in the sum of £788 13s. 5d., and (ii) that she was entitled to maintenance in the sum of £5 as ordered by this court, from August 11, 1967.

By his amended answer the husband denied that he was or had been domiciled in England. He prayed that the prayer of the petition might be rejected and that the court should declare that the divorce (by talaq) was valid. So far as the claim for maintenance was concerned, the husband alleged that it was not maintainable in a petition for a declaration of the subsistence of a marriage and as to the wife's status as a married woman. As for the claim to dower, the husband alleged that the dower is payable (if at all) only on the dissolution of the marriage or upon his death and he denied that the wife was entitled to include a prayer for its recovery in her petition for a declaration as aforesaid. He further alleged that the dower (as to recovery of which he made no admission) was not a matrimonial relief within the meaning of the English law, but that the wife's right (if any) to dower (if any) was ex contractu and as such it is not a cause of action (if at all) maintainable in the Divorce Division of the High Court.

The principal relief asked for on each side is, therefore, a declaration as to status under [R.S.C., Ord. 15, r. 16 and Ord. 112, r. 3](#).

Domicile

It is common ground that, if the husband is domiciled in England, talaq will not be accorded recognition by an English court. The situation which would obtain if he were domiciled in India was not exhaustively explored. The main domiciliary situations for the husband claimed by the parties respectively were a domicile in Pakistan by the husband and a domicile in England by the wife; though the wife was also content to allege alternatively merely that the husband had lost any domicile he had acquired in Pakistan. It was expressly disclaimed that the wife had assumed any domicile independently of the husband at any time since the marriage. The domicile of the parties might also have some bearing on the jurisdiction of the court. It is therefore the first issue to be determined.

It was only faintly controverted that in 1957 the husband abandoned his domicile of origin in India and acquired a domicile of choice in Pakistan. The most significant event, in my view, was the change of nationality: cf. *D'Etchegoyen v. D'Etchegoyen* (1888) 13 P.D. 132, 134, and *Wahl v. Attorney-General* (1932) 147 L.T. 382 *191, 383, 385. There is also the movement of other members of his family. I accept that Pakistan was far more attractive than India culturally and politically, with consequent

repercussions on career prospects. The evidence in favour of the abandonment of the domicile of origin in India, and the acquisition of a domicile of choice in Pakistan, seems to me to be overwhelming.

The wife, however, claims that the husband has abandoned his domicile of choice in Pakistan. The legal background of the argument on her behalf rests on three propositions, all of which I accept as correct. First, a domicile of choice is less retentive, and therefore more easily abandoned, than a domicile of origin. Secondly, a person may change his domicile without any intention to do so - indeed, without being conscious of doing so: see *D'Etchegoyen v. D'Etchegoyen*, 13 P.D. 132, 134, *Gulbenkian v. Gulbenkian* [1937] 4 All E.R. 618, 627 (though it has been said that the evidence in such circumstances must be very clear: *D'Etchegoyen v. D'Etchegoyen*, 13 P.D. 132, 134). Thirdly, given the necessary fact of a physical departure from the country of domicile of choice, for its abandonment the animus that must be shown is not necessarily non revertendi; it is sufficient that the residence in the new country is *sine animo revertendi*; and in this connection there may be a "withering away" of an intention to return to the country of the domicile of choice (see *In re Flynn* [1968] 1 W.L.R. 103, 115 to 117; although I think that what Megarry J. said in that case on these matters was obiter, these seem to me to be valid and valuable tools of analysis: see also *The Lauderdale Peerage* (1885) 10 App.Cas. 692, 739, by Lord Selborne; *Fremlin v. Fremlin* (1913) 16 C.L.R. 212, 233, by Isaacs J., with whom Gavan Duffy J. agreed.)

So far as the facts are concerned, as Megarry J. said in *In re Flynn*, *decid.* [1968] 1 W.L.R. 103, 107:

"In one sense there is no end to the evidence that may be adduced: for the whole of a man's life and all that he has said and done, however trivial, may be prayed in aid in determining what his intention was at any given moment of time. ... All that the courts can do is to draw inferences from what has been said and done; and in doing this, too much detail may stultify."

I therefore propose to refer only to the matters on which the parties placed particular reliance and to those which struck me as being particularly significant. For the wife it was principally urged, first, that the husband had spent less than a year out of his 35 in Pakistan; secondly, that English social customs were obviously congenial to him; thirdly, that he had held, and could hope to continue to hold, responsible and remunerative posts under the National Health Service in this country (resignation from which would involve financial sacrifice), whereas his prospects in Pakistan were less favourable and were deteriorating with the effluxion of time; fourthly, that the letters that the husband wrote before marriage are inconsistent with an intention to return to Pakistan; and, fifthly, that he had told her that he intended to remain in England.

I do not accept that the husband ever declared or evinced to the wife an intention to make this country his permanent home or not to return to *192 Pakistan: this seems to me inconsistent with her evidence before the magistrates, some passages from which I have cited. Nor can I take the husband's letters before marriage as providing any serious evidence of his domiciliary situation: they seem to me to be typical effusions of the *Weltschmerz*, restlessness and self-pity which are common form among many young people. The other matters are certainly to be weighed carefully, but together with all the other circumstances of the case.

The principal evidence relied on by the husband for the retention of his domicile of choice in Pakistan was criticised as amounting to nothing more than his *ipse dixit*. It is true that, in determining domicile, the courts approach direct declarations of intention with some caution: see Dicey and Morris, *The Conflict of Laws*, 8th ed. (1967), pp. 96, 97. But this is because a declaration may be influenced by self-interest; it may be inconsistent with conduct (which, in this connection, may well speak louder than words); and, if the word "domicile" is used, the declarant is unlikely to have understood the meaning of a legal term embodying concepts of great complexity. In my view the law was authoritatively declared by Lord Buckmaster in [Ross v. Ellison \(or Ross\)](#) [1930] A.C. 1, 6, 7, in a passage with which Viscount Dunedin, Lord Warrington and Lord Atkin were content merely to express agreement:

"Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purpose for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

Although I believed the husband when he told me in evidence that he intended to return to Pakistan after having another attempt to qualify as F.R.C.S. (whether or not he does in fact qualify), this evidence might not have sufficed alone, on the ground of his knowledgeable self-interest in the matter. The statement in the passport that his domicile was in Pakistan must similarly be received with caution, since it must have been based on a statement of the husband's at a time when his domicile was to his knowledge a matter of legal significance: though a domicile may be changed with a specific legal end in view ([Drexel v. Drexel](#) [1916] 1 Ch. 251 - the objective there being a forum for divorce), and in principle it seems to me that a domicile may be similarly retained. The evidence given by both spouses before the magistrates at the end of 1966 was, in my view, of great importance. So

were the declarations made by the husband to Mr. Thorne: they are personal friends and have seen each other on an average once a month since the autumn of 1966. Mr. Thorne told me that the husband had undeviatingly stated that he had every intention of returning to Pakistan. In the early days he would add, "as soon as I have got my fellowship": latterly these words were omitted (presumably because hope has somewhat been fading). The husband would use the words, "I am a Pakistani and I am going home." Under cross-examination Mr. Thorne could not recall any change in emphasis over the year the husband always said that he was a Pakistani and that he was going home one day. It is true that Mr. Thorne accepted that on May 25, 1967, no one claimed, *193 in response to Mr. Boyle's objections, that Mr. Husain had jurisdiction because the husband was domiciled in Pakistan. But I am unable to treat such omission as derogating significantly from the probative effect of the declarations which I am satisfied the husband made as to his intention - many at a time when he had no possible interest other than in speaking his true mind on the matter: see *D'Etchegoyen v. D'Etchegoyen*, 13 P.D. 132, 135.

Nor does the husband's case rest solely on his declarations. He retained his Pakistani citizenship throughout: and there is no evidence that he ever contemplated applying for British nationality. In 1962 the husband took out in London an endowment policy of insurance with a Pakistani company, in Pakistani currency, the sum assured being payable in Pakistan; and in 1967 he raised money on it to buy land in Karachi for construction of a house (though this was after the purported pronouncement of talaq.) Moreover, it is stated in *Dicey and Morris, The Conflict of Laws*, 8th ed. (1967), at p. 95, "There is a presumption against the acquisition of the domicile of choice by a person in a country whose religion, manners and customs differ widely from those of his own country," citing a number of authorities; and see also *Fremlin v. Fremlin* (1913) 16 C.L.R. 212, 233. This seems to me not so much a proposition of law as an expression of common experience: people are generally unlikely to make a permanent home in a country which is ethnically and culturally alien - particularly where one which is culturally and ethnically congenial is available as an alternative. Nor am I bound, I think, to pretend ignorance of certain racial tensions and intolerances in this country of recent years and their possible repercussion on domiciliary intention.

It was argued on behalf of the wife that residence in England with the intention of passing an examination or of obtaining a qualification was analogous to residence with the intention to remain until the happening of some doubtful event, such as the making of a fortune (*Bruce v. Bruce* (1790) 2 Bos. & P. 229, 230; *Doucet v. Geoghegan* (1878) 9 Ch.D. 441) or the death of a mistress (*Anderson v. Laneville* (1854) 9 Moo.P.C.C. 325, 335) which will not necessarily affect domicile; see also *Aikman v. Aikman* (1861) 3 Macq. 854, 858, by Lord Campbell. But such contingencies are, so to speak, open-ended; not so, ordinarily, the attempt at a qualification.

I was satisfied that the husband at all times during his residence in this country intended to return to Pakistan; and that he had never lost his Pakistani domicile of choice. I made an interim finding to this effect (reserving my reasons), so as to define the compass of the ensuing argument.

Jurisdiction

Counsel were all agreed that the decision of the Court of Appeal in [Garthwaite v. Garthwaite \[1964\] P. 356](#) has been misunderstood. It does not decide that the court has jurisdiction to make a declaration as to status under [R.S.C., Ord. 15, r. 16](#), only if, on the petitioner's own case, he or she is domiciled in England at the commencement of the proceedings. (If that were the case, the wife would not be entitled to the declaration she seeks in her petition.) [Garthwaite v. Garthwaite](#) in reality decides that (in *194 addition to jurisdiction based on domicile) the court has power to make a declaration under [R.S.C., Ord. 15, r. 16](#), in such circumstances as would have given the English ecclesiastical courts in their totality before 1857 jurisdiction to accord matrimonial relief - in particular to grant a decree of restitution of conjugal rights. I respectfully concur with this view of the decision: see *Willmer L.J.* at pp. 383-385, *Danckwerts L.J.* in the first paragraph of his judgment at p. 385, and *Diplock L.J.*, particularly in the middle of p. 397. In [Har-Shefi v. Har-Shefi \[1953\] P. 161](#), 174, *Hodson L.J.* agreed with *Barnard J.* that petitions in nullity were analogous to declarations under [R.S.C., Ord. 25, r. 5](#) (now [Ord. 15, r. 16](#)), and thought that jurisdiction in respect of each should be decided on the same principles. The ecclesiastical courts before 1857 had jurisdiction to entertain suits for marital relief if both parties were, at the date of commencement of proceedings, resident in the territorial area over which the court exercised jurisdiction. The High Court still has jurisdiction to entertain a suit for nullity, judicial separation or restitution of conjugal rights where the parties are resident in England at the commencement of proceedings, see *Dicey and Morris, The Conflict of Laws*, 8th ed. (1967), rule 43, p. 333; see also rule 44, pp. 344-345. Both the wife and the husband have been resident in England at the commencement of and throughout the present proceedings. It follows that each party is entitled to the declaration sought under [R.S.C., Ord. 15, r. 16](#), as to the effect of the purported talaq. It is possible that the wife might be entitled to the declaration she

seeks on the further ground that according to her contention both parties were domiciled in England at the time of the petition; but I prefer not to rest my decision on this ground, because it is arguable that, on the court deciding the issue of domicile against her, it should not proceed further in the suit.

So far as the municipal jurisdiction of this court is concerned, I propose to consider first the wife's claims as to maintenance. I am satisfied that the High Court has no power itself to make any order for maintenance ancillary to a declaration under [R.S.C., Ord. 15, r. 16](#): cf. [Matrimonial Causes Act 1965, ss. 16, 19, 20 and 21](#). Counsel for the Queen's Proctor urged, however, that the court should declare in the present proceedings that an effective talaq did not necessarily terminate the maintenance order of December 9, 1966 (see [Wood v. Wood \[1957\] P. 254](#)); and that this is one of those exceptional cases envisaged in *Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 K.B. 536 (see especially pp. 563-565, 572) where the court should declare that a person is liable in an existing or possible action. It was argued that it is desirable that the justices should have such guidance, so as to avoid a possible appeal to the Divisional Court. I did not find it necessary to decide this question of jurisdiction, because in the event it seemed to me to be preferable to deal with the matter by way of interim judgment, indicating to the justices that they could proceed properly with the cross-complaints that stood adjourned before them without waiting for final judgment in the High Court. I shall refer later to the terms of the interim judgment.

As for the wife's claim to dower and the husband's denial of the jurisdiction of this division of the High Court to determine the matter, the Supreme Court of Judicature (Consolidation) Act 1925, s. 43, provides:

"The High Court ... shall, in every cause or matter pending before *195 the court grant ... all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

(See also the notes to the section in *The Supreme Court Practice*, 1970, vol. 2, pp. 882, 883.) In *Hart v. Hart* (1881) 18 Ch.D. 670, 680, 681, Kay J. had no doubt that the Divorce Division could have decreed specific performance of the terms of a separation agreement negotiated in compromise of a divorce suit. It was conceded on behalf of the husband that, if his marriage with the wife has been validly dissolved, the sum claimed by way of dower is payable to her on demand. It is, therefore, immaterial whether the claim arises ex contractu or as an incident of status: judgment in the matter can be given in the present suit, according to the decision on the validity of the talaq in the eyes of English law. To hold otherwise would be to put the forensic clock back a hundred years; and, indeed, the denial of jurisdiction to deal with the matter in this division and in this suit was abandoned during argument.

The Pakistani law

Having found that the court has jurisdiction to declare the parties' status, my next task is to endeavour to ascertain whether what happened here would be held in Pakistani law to be effective to dissolve the marriage; since prima facie the effectiveness of a divorce is to be referred to the law of the domicile, which I have found to be in Pakistan.

The issue before me has unfortunately never fallen for decision by a court in Pakistan, but the expert witnesses were agreed that the Muslim Family Laws Ordinance would be construed according to English rules of construction; and there are two decisions of the Supreme Court of Pakistan which show clearly what was the object of the Ordinance, so providing a guide to its construction and scope: *Gardezi v. Yusuf*, P.L.D. 1963 Sup. Ct. 51 and *Jatoi v. Jatoi*, P.L.D. 1967 Sup.Ct. 580. At p. 75 of *Gardezi v. Yusuf* (paragraph 39) it was said that the object of section 7 of the Ordinance was "to prevent hasty dissolution of marriages by talaq, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status"; and at p. 76 (paragraph 42), "the policy of the Ordinance seems to be to provide some curbs on too facile pronouncements of divorce and unnecessary or unjustified plural marriages." Moreover, the two cases make it clear that the Ordinance applies to parties to a marriage in a register office in England (save for the provisions as to registration), and that it is irrelevant that one of the parties is not a Muslim or a citizen of Pakistan, provided that the other is one.

The first point for decision in this part of the case is whether the appointment of Mr. Husain, the head of chancery in London, as chairman of the relevant arbitration council, was ultra vires section 2 (b). Dr. Fatmi, the wife's expert witness, was inclined to doubt the vires. In his view the proper chairman in the case of the husband's purported talaq was the chairman of the appropriate union council in West Pakistan, *196 though the latter could appoint the head of chancery in London as his surrogate. Dr. Fatmi pointed out that, by section 11 (3) of the Ordinance, the rules thereunder were to be considered as part of the Ordinance itself. He

was of opinion that, since the husband's Pakistani residence had been in West Pakistan, the West Pakistan rules would be applicable; and that they provide for the chairman of a union council in West Pakistan to be the chairman of the arbitration council (see rule 3). But rule 3 seems only to apply to talaq where the wife was at the time of the talaq resident in West Pakistan, or where the last joint residence was there, or where the husband is permanently resident there; none of which conditions applies in the present case. Moreover, by section 1 (2), the ordinance is to apply to all Muslim citizens of Pakistan, wherever they may be: if they were in London, there would be no conceivable purpose in appointing the chairman of a local authority in Pakistan as the primary chairman of the arbitration council. Whatever difficulties arise from the literal force of the words of section 2 (b) as they now stand, I am clearly of opinion that before their amendment in 1964 the appointment of heads of chancery to act as chairmen of arbitration councils abroad was *intra vires*; and, since the 1964 amendment obviously had an internal constitutional significance. I do not believe that it would be construed as invalidating the appointment of heads of chancery as chairmen of arbitration councils abroad. It was not disputed that heads of chancery had exercised functions under the Ordinance on a number of occasions without their power to do so being questioned.

But Dr. Fatmi argued, secondly, that, even if Mr. Husain was validly appointed as chairman of an appropriate arbitration council, he was incapable of acting as such because no rules were made under section for arbitration councils abroad: the only rules made had reference to arbitration councils in East and West Pakistan respectively. In particular, Dr. Fatmi emphasised that by the proviso to section 2 (a) there is a reference to a party nominating a representative within the "prescribed" time: and by section 2 (c) "prescribed" means "prescribed by rules made under section 11": no time was prescribed for the nomination of a representative to an arbitration council outside Pakistan. But in my judgment, where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objective with which it was set up, and possibly by analogy with the rules of procedure prescribed for comparable tribunals or bodies. I am satisfied that Mr. Husain acted according to natural justice and to promote the objectives of the Ordinance. As for "prescribed" time where no time is prescribed, it is sufficient in my view if the act required is done within a reasonable time. In response to Mr. Husain's letter of May 3, 1967, requesting the wife to attend on him with a "representative," she brought Mr. Boyle to the meeting of May 25. Both Mr. Husain's letter and the meeting were within a reasonable time from the receipt of the document of talaq (indeed, within the time stipulated in the West Pakistan rules); and *197 Mr. Husain made it plain at the meeting that Mr. Boyle was present as a "representative" of the wife.

But Dr. Fatmi argued, thirdly, that Mr. Husain failed to act in accordance with the West Pakistan rules (as Dr. Fatmi considered necessary), or at least by analogy with them, in two further respects. He failed to comply with rule 5 (4) by failing to require the wife to make a fresh nomination of a representative when Mr. Boyle indicated that he was no longer proposing to attend as a member of an arbitration council, and he failed to comply with rule 6 (1) by failing to require the wife to nominate her representative in writing. These failures, in his view, vitiated the proceedings. But the wife in fact brought Mr. Boyle to the meeting of May 25, in response to Mr. Hussain's request to her to nominate a representative and even if Mr. Hussain had called on the wife to make a fresh nomination she would not have done so. I do not believe that immaterial and technical failure to comply with rules, that at most were applicable only by analogy would be held to vitiate the proceedings. Moreover, in my view, the provisions of rules 5 (4) and 6 (1), in so far as relevant at all, would be construed as directory and not imperative: see [Montreal Street Railway Co. v. Normandin \[1917\] A.C. 170](#), 175 and [Marsh v. Marsh \[1945\] A.C. 271](#), 284. I do not think that a Pakistan court would hold that the proceedings before Mr. Husain were invalid and the resultant sanctioning of the talaq ineffective.

It will be apparent that on the foregoing issues of foreign law I have in general preferred the evidence of the husband's expert witness, Mr. Saaid, to that of Dr. Fatmi; though I have in addition tried to form my own view by scrutinising the written material placed before me (see *Halsbury's Laws of England*, 3rd ed. (1956) vol. 15, pp. 329, 330), particularly as their language is English and their construction is according to English law. But for a residual issue I must rely entirely on the expert evidence. Assuming that Dr. Fatmi is right in thinking that there was no means by which the Ordinance could be complied with outside Pakistan, would the document of April 27, 1967, operate as an effective immediate talaq under the substantive Islamic law as it existed unmodified by the Ordinance? Mr. Saaid answered this question in the affirmative. Dr. Fatmi would have agreed, had it not been that the document purported to be made in accordance with and to invoke the Ordinance. I prefer the view of Mr. Saaid.

It follows that, in my judgment, according to Pakistani law the marriage between the wife and the husband was dissolved in August 1967 by substantive Islamic law as procedurally modified by the Ordinance (in my opinion, the preferable view), or alternatively on April 27, 1967, by substantive Islamic law not so modified.

Attitude of English law to non-judicial divorce

There can be no doubt that the law of the domicile is prima facie the proper law for determining the efficacy of a purported divorce to bring about a change of status by dissolving a marriage: *Harvey (or. Farnie) v. Farnie* (1882) 8 App.Cas. 43. There is equally no doubt that here, as elsewhere, there is a residual discretion in an English court to refuse to recognise the proper rule of foreign law, when to do so would cause *198 injustice - I shall be discussing the application of this discretion later in this judgment. The issue which I have to determine under the present heading is whether there is a rule of English law which compels refusal of recognition to a divorce valid by the law of domicile, if it is not the creature of judicial act or performed in judicial presence, either generally, or if the marriage is celebrated in England, or if the purported divorce takes place in England, or both.

I am satisfied that there is no general rule to this effect: see [Sasson v. Sasson \[1924\] A.C. 1007](#); [Har-Shefi v. Har-Shefi \[1953\] P. 161](#); [Har-Shefi v. Har-Shefi \(No. 2\) \[1953\] P. 220](#); [Russ \(or. Geffers\) v. Russ \(Russ or. De Waele intervening\) \[1964\] P. 315](#). I was also referred to a number of cases either unreported or reported only in newspapers in which a divorce valid by the law of the domicile was recognised by the courts of this country notwithstanding the absence of judicial intervention or presence in the divorce. In so far as [Rex v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin \[1917\] 1 K.B. 634](#) may appear to be laying down the contrary, it is, in my view, in conflict with the other Court of Appeal decisions which I have cited, and not to be followed: see [Young v. Bristol Aeroplane Co. Ltd. \[1944\] K.B. 718, 725, 726](#); [\[1946\] A.C. 163](#). Nor can it be a material factor that the marriage purported to be dissolved took place in England (any more than it is where there is a decree of divorce by a foreign court of competent jurisdiction, as in *Harvey (or. Farnie) v. Farnie*, 8 App.Cas. 43). It is true that the Hammersmith Marriage case was at one time thought to establish the anomalous proposition that a Christian marriage in England could not be dissolved by the pronouncement of talaq, even when that would have been a valid dissolution by the law of the domicile. But none of the members of the Court of Appeal in [Russ \(or. Geffers\) v. Russ \[1964\] P. 315](#) considered that to be a sustainable proposition, or even a matter justifying the distinction of the two cases. Indeed, Donovan L.J. said, at p. 331:

"... only Swinfen Eady L.J. went to the length of holding that it was impossible in law for a Christian marriage contracted in England to be dissolved by Talaknama. This indeed had been the principal contention of the Solicitor-General, but no other judge in terms acceded to it ... the decision ought not, in my opinion, to be regarded as laying down ... that a Christian marriage in England cannot, in the eye of English law, ever be dissolved by Talaknama, notwithstanding that the law of the parties' domicile permits it."

It was, however, claimed on behalf of the wife that non-judicial divorce, not least one amounting to unilateral repudiation of an innocent partner, should be refused recognition if it purports to take place in England, it being contrary to public policy that the safeguards of the English matrimonial law should be thereby by-passed. But in my view this contention is inconsistent with [Har-Shefi v. Har-Shefi \[1953\] P. 161](#); see also *Mandel v. Mandel* [1955] V.L.R. 51, a reserved judgment of Lowe J. What Davies L.J. said in [Russ \(or. Geffers\) v. Russ \[1964\] P. 315, 335](#) about the relevance of the talaq taking place in this country was expressly directed to the exercise of the residual discretion. Nor, when it comes to considerations of public policy, can I close my eyes to the fact that a recent statutory *199 change in the law permits (albeit subject to certain conditions and safeguards in some circumstances) the repudiation of an innocent spouse. I confess that I share the misgiving implied by Lowe J. at the possible mischief that might accrue if the safeguards inherent in judicially pronounced divorce can be by-passed in this country. But courts of law have no means of judging the possible extent of any such mischief, or the repercussions of attempting to deal with them by judicial law-making. The court already has adequate power to refuse to recognise the legal rule of the domicile where it would cause injustice in a particular case. It seems to me to be 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.

If, as I think, it is immaterial that the marriage purported to be dissolved took place in England or that the purported divorce took place in England, I cannot see how the co-incidence of these two factors can make any material difference.

I respectfully agree with the view expressed in Dicey and Morris, *The Conflict of Laws*, 8th ed. (1967) at pp. 319-320:

"In spite of earlier dicta to the contrary, it is now clear that English courts will recognise non-judicial divorces obtained by mutual agreement between the spouses or unilaterally by one party to the marriage in accordance with a religious law (e.g., a Jewish ghet or a Mohammedan talak), provided the parties are domiciled in a country (e.g., Israel or Egypt) the territorial laws of which permit such a method. The recognition of such divorces is perfectly consistent with the status theory of divorce and with the paramount importance of domicile in questions of status. If the cause for divorce is immaterial so ought the method to be. It is

immaterial that the religious divorce takes place in England, provided of course that the parties are not domiciled in England." *Cheshire, Private International Law*, 8th ed. (1970) pp. 369-372, is to similar effect; see also *Graveson, The Conflict of Laws*, 6th ed. (1969) pp. 330-333.

In my view, therefore, the fact that there has been no judicial intervention or even presence is irrelevant if the purported divorce is effective by the law of the domicile to terminate the marriage in question, and it should be recognised as such, unless the result would be offensive to the conscience of the English court.

My conclusions, that the talaq was valid according to the law of the domicile and that there is no rule of English law which precludes its recognition by reason of its non-forensic character, make it unnecessary for me to consider an argument advanced to the effect that the office of the High Commissioner for Pakistan is to be accorded extra-territorial status and considered as part of Pakistan, so that the talaq was pronounced, or the arbitration council sat, in Pakistan. In [Varanand v. Varanand \(1964\) 108 S.J. 693](#), Scarman J. granted a declaration that a marriage between two Thais, celebrated in England, had been validly dissolved by an agreement signed by the parties at the Royal Thai Embassy in London relinquishing their status as husband and wife. There was no judicial pronouncement *200 or presence, but an expert in Thai law had given evidence that the certificate issued by the embassy would be accepted by the court in Thailand as evidence of a valid divorce. Scarman J. seems to have proceeded partly on the extra-territorial character of a foreign embassy: a divorce there, he said (*The Times*, July 25, 1964), "involved no sort of infringement of the royal prerogative of justice." But Scarman J. did not hear adversary argument on the point. As at present advised, there seems to me to be considerable difficulty, both in law and fact, in the way of this line of argument for the husband.

The claim for maintenance

As I have indicated, I dealt with this part of the case in an interim judgment. The relevant portion was as follows:

"It is now not really disputed, and in any event I hold, first, that the High Court has no jurisdiction to order that the wife is entitled to maintenance either in the sum of £5 as ordered by the magistrates, or any other sum, as from August 11, 1967, or any other date, in proceedings such as these. Second, the magistrates' court order is not in any event automatically terminated by divorce: see [Wood v. Wood \[1957\] P. 254](#). Third, therefore, the jurisdiction of the magistrates as to either (a) variation of maintenance, or (b) enforcement of arrears, is not directly affected by the decision of this court whether or not this marriage has been validly terminated by talaq, since that question has little, if any, bearing on the factual situation which is relevant to the deliberation of the justices. Fourth, the order of £5 per week of December 9, 1966, continues until it is varied, though it may be varied retrospectively at least to the date of the husband's summons for variation.

"It follows, in my view, that the magistrates can and should resume consideration of the complaints that they had before them on January 5, 1968, without awaiting the decision of this court on the main issue, and should exercise their discretion on those matters of complaint before them. All questions of maintenance and enforcement are entirely in the judicial discretion of the magistrates on these matters being properly brought before them.

"I said that the jurisdiction of the magistrates is not *directly* affected by the decision of this court whether or not the marriage was terminated by talaq. That is true. But the way they *ultimately* exercise their discretion as to quantum of maintenance, or enforcement of arrears, may be *indirectly* affected by the decision of this court. The reason for that is this. It is common ground that if the marriage has been validly terminated by talaq, that sum [the dower] is payable. The payment, or non-payment, of such a sum might well have an effect on how the magistrates exercise their discretion on the two matters to which I have referred. But that question does not arise until any such payment is actually made. The justices can engage on the investigation of the complaints before them on the assumption that the wife has not obtained any such sum, nor the husband parted with it. If and when it is paid, that might be a reason for varying any order that the *201 justices might have made in the meantime on the assumption, as is the fact, that it has not been paid."

The residual discretion

Some of the main authorities on this matter are collected in [Cheni \(or. Rodriguez\) v. Cheni \[1965\] P. 85](#), 98-99. This is the part of the case that I have found most difficult of determination. I can well understand that the wife, who has satisfied an English court that she has been gravely wronged by the husband, should feel resentment that he should be able to cast her off at his will, and that she should wish to see her matrimonial status vindicated. It has also been argued on her behalf 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.

There are, however, five factors which in the end incline me to think that the judicial discretion should not be exercised to refuse recognition to the otherwise applicable rule of foreign law. First, I think that, as Scarman J. said in [Varanand v. Varanand, 108 S.J. 693](#): "the court's discretion to refuse recognition to foreign status is one to be most sparingly exercised." Secondly, if the marriage is in any event to be dissolved, I can see no purpose in postponing its dissolution. Thirdly, I am satisfied that the husband intends to return to Pakistan: I think that the courts there would recognise the talaq as validly terminating the marriage, take no notice of the exercise by an English court of a residual discretion to depart from accepted rules of private international law, and refuse to enforce any English order for ancillary relief: see *Jatoi v. Jatoi*, P.L.D. 1967 Sup.Ct. 580. Fourthly, 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, 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. Lastly, the rule of foreign law under which the husband has proceeded has the authority of the holy scriptures of the common faith of himself and the wife.

Conclusion

I therefore give judgment for the husband on that part of the prayer of his amended answer that prays that the court may declare that the talaq divorce was valid; and for the wife on that part of the prayer of her petition that claims the sum of £788 13s. 5d. by way of dower.

Representation

Solicitors: Bell, Krish & Co., Farnham; Smallpeice & Merriman, Guildford; Queen's Proctor.

Order accordingly. No order as to costs. (D. R. E.)

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