The Islamic Institution of Mahr and American Law

by, Richard Freeland

The estimated Muslim population of the United States varies from five to eight million, with the largest communities in California, New York and Chicago.[1] Muslims have always been a part of American society but it is only in the last few decades that there has emerged a culturally distinct body of American Muslims.[2] One of the most important ways in which Muslims now express their identity is in the courtroom, and since the 1970s there has been a steady growth in U.S. cases involving Muslims and Islamic law. This is partly due to immigration from countries that apply the shari'ah,[3] and also because second generation Muslims and converts are now more confidently asserting their legal rights. Issues that have arisen in the past include the validity of Islamic marriages and talaq divorces, underage marriages, child custody and the enforceability of marriage contract terms relating to the religious upbringing of children.[4]

One of the most interesting aspects of Islamic marriage contracts occasionally faced by U.S. courts is mahr. Most Muslims who marry according to Islamic custom, whether abroad or in the United States, negotiate a mahr provision as part of a nuptial

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[1] The population was 5.3 million in 1991. *See* Fareed Nu'man, *The Muslim Population of the United States*, (American Muslim Council, 1992) (January 19, 2002) *available at* http:www.islam101.com/history/population2_usa.html

[2] MUSLIMS ON THE AMERICANIZATION PATH? (Yvonne Y. Haddad & John L. Esposito eds., Oxford University 2000) (1998); JANE SMITH, ISLAM IN AMERICA, (Columbia University Press 1999); SULAYMAN NYANG, ISLAM IN THE UNITED STATES OF AMERICA, (ABC International 1999); THE MUSLIMS OF AMERICA (Yvonne Haddad ed., Oxford University Press 1991); YVONNE Y. HADDAD & JANE SMITH, MISSION TO AMERICA. FIVE ISLAMIC SECTARIAN COMMUNITIES IN NORTH AMERICA, (University of Florida Press 1993).

[3] The shari'ah is the holy law of Islam based on the Quran and Sunna. *See* JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW 1 (Oxford University Press 1964).

[4] LAWRENCE ROSEN, THE JUSTICE OF ISLAM: COMPARATIVE PERSPECTIVES ON ISLAMIC LAW AND SOCIETY (Oxford University Press 2000); ARABS IN AMERICA: BUILDING A NEW FUTURE, (Michael Suleiman, ed., Temple University Press 1999).

contract.[5] This usually consists of the husband's payment of money to the wife, which can range from a token sum of one dollar to millions of dollars. Sometimes the money is paid upon marriage, but often it is deferred until divorce.[6] Mahr does not have to be money but nearly always is.[7] Mahr is usually negotiated before marriage, but in instances where mahr is not agreed upon, a Muslim judge can determine the amount at a later date.[8] This property belongs to the wife, so it is not a bride price, and comparisons with western ideas of contractual consideration should be avoided. Modern literature prefers to interpret it as an effect of the marriage, and as a mark of respect from the man to the woman.[9] The term 'mahr' is frequently rendered into English as 'dower,' although this translation can be problematic and it is perhaps preferable to use mahr instead.[10] Although an American Muslim divorcee is at liberty to claim alimony under state law, the court also hears claims for enforcement of mahr as part of a divorce settlement.

U.S. courts treat mahr as part of an ante-nuptial agreement. For mahr to be enforceable, the agreement must meet the standards of state law applying to all ante-nuptial contracts. Three separate, but broadly similar, uniform laws govern the validity of ante-nuptial agreements.[11] Common requirements include full disclosure of financial status by both parties, and confirmation that the agreement was entered into voluntarily.[12] Individual states also prescribe additional regulations. For example, contracts are

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[5] There is dispute amongst Muslim jurists as to whether mahr is essential to a marriage contract.
[6] JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 81, (Graham & Trotman 1986).
[7] *Id.* at 80.
[8] M. AFZAL WANI, THE ISLAMIC INSTITUTION OF MAHR: A STUDY OF ITS PHILOSOPHY, WORKINGS AND RELATED LEGISLATIONS IN THE CONTEMPORARY WORLD 71-72 (Upright Study Home 1996).
[9] DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 178-179 (Sweet & Maxwell 1998).
[10] *Id.* Dower under the common law was a husband's contribution to the wife on marriage. However, as married women could not own property until the late nineteenth century it was only on her husband's death that she was entitled to any dower – usually a life interest in the husband's estate.

voidable in Colorado and Connecticut if they are substantively unfair at the time of enforcement. Some states also require separate lawyers for both sides and a written document. One peculiarity of ante-nuptial contracts, and a characteristic that distinguishes them from other contracts, is that they will not be enforced if they tend to encourage divorce or separation by only providing for settlement in the event of a divorce.[13]

In the 1985 case of *Aziz v. Aziz*,[14] a New York court enforced a deferred mahr of $5,000 because the terms of the contract complied with New York's General Obligations Law.[15] The court rejected the husband's claim that it was a matrimonial action.[16] However, the clarity of the decision was obscured by the judge's remark that the provision was enforceable, even though the agreement was part of a religious ceremony.[17] In the event it did not affect the enforcement of the mahr, the comment does illustrate two points. First, the judge did not consider, even superficially, the nature of Islamic matrimonial culture. Had the court done so it would not have jumped to the questionable conclusion that an Islamic marriage is a 'religious' agreement. Contrary to many assumptions about the 'religious' character of Islamic law, the marriage contract is a civil agreement without sacramental associations. American and English marriage

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[11] Uniform Probate Code (UPC) (1993); Uniform Premarital Agreement Act (UPAA) (1983); Uniform Marital Property Act (UMPA) (1983). UMPA has only been adopted in Wisconsin, while UPAA is used in 29 states.
[12] Uniform Probate Code; Uniform Premarital Agreement Act; Uniform Marital Property Act.
[13] This is strikingly illustrated in *In re* The Marriage of Noghrey, 215 Cal.Rptr. 153, 169 Cal.App.3d 326 (1985), when a Californian court refused to enforce a Jewish ketubah agreement as an ante-nuptial contract because it encouraged separation or divorce. Not all states are so strict now, and some jurisdictions will enforce agreements that only provide for property distribution in the event of divorce.
[14] Aziz v. Aziz, 488 N.Y.S.2d 123 (1985).
[15] Gen. Oblig. §5-701(a)(3).
[16] Aziz v. Aziz, 488 N.Y.S.2d 123 (1985).
[17] *Id.* Under the First Amendment, courts must be neutral in regard to all religious matters. *See* Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *Iowa L. Rev.* 1, 1 (1998).

customs are more religious in character despite the supposedly secular nature of their legal systems. And second, the court referred to a 1983 case, *Avitzur v. Avitzur*, in which the New York Court of Appeals enforced a Jewish Ketubah that required a husband to appear before the rabbinical tribunal to obtain a religious divorce.[18] The New York court instinctively interpreted the Islamic marriage contract in these familiar terms.

In *Dajani v. Dajani*,[19] a California court also failed to properly examine Islamic marriage customs when considering the enforceability of mahr. A Jordanian wife was denied deferred mahr because the court heard expert testimony that a wife forfeited mahr if she initiated the separation. The court did not hear an alternative interpretation of Islamic law: that the wife should only be denied dower if she has no reason for divorce, and even then does not necessarily lose all of it.[20] The court also referred to mahr as 'dowry,' which is wholly inaccurate because in old English law, dowry was the wife's contribution to the marriage.[21] On appeal the wife again failed to recover the mahr, but the court of appeal's rationale was different. In applying the conventional rules of ante-nuptial agreements, the contract was seen to contravene public policy because it only provided for a settlement in the event of divorce or separation.[22]

Chaudhary v. Ali[23] is an unusual example of a husband seeking to enforce a provision of the marriage contract, as a single lump-sum payment which would free him from future alimony obligations. The Virginia Court of Appeals refused to enforce the 'nikah nama,' covering spousal support, as it failed to comply with Virginia's laws on

[18] Avitzur v. Avitzur, 446 N.E.2d 136 (1983).
[19] *See In re* Marriage of Dajani, 251 Cal.Rptr. 871 (1988).
[20] *See generally* NASIR, *supra*, note 6 at 81; PEARL AND MENSKI, *supra*, note 9. (The circumstances in which a wife forfeits mahr is a complex area of the shari'ah).
[21] Dowry is not part of Islamic law, and has actually been outlawed and criminalized in South Asia. *See* PEARL AND MENSKI, *supra*, note 9.
[22] *In re* Marriage of Dajani, 251 Cal.Rptr. 871, 872-73 (1988).

ante-nuptial contracts. The court decided that the term was not negotiable, required no disclosure of assets, and the wife received no legal advice prior to agreement. These safeguards were expected even though the agreement was made in Pakistan, and it was unlikely that a party living in Pakistan would obtain legal advice from an American lawyer. There was also no discussion of matrimonial culture in Muslim countries, where disclosure of assets is not expected.

Deferred mahr of $50,000 was awarded in the 1996 case of *Akileh v. Elchahal*.[24] This Muslim couple married in Florida in 1991, and upon separation, the wife made a claim for mahr. The court denied the wife's initial claim for mahr[25] citing lack of consideration. The court reasoned that there was no 'meeting of minds' due to different opinions between the parties of what mahr meant.[26] For example, the husband believed that his wife forfeited mahr by demanding a divorce.[27] However, on appeal this was overturned because the uncertainty that existed was not sufficient to invalidate the entire contract.[28] What is notable about this case is that the marriage contract and ceremony were both completed in the United States, like *Aziz v. Aziz*, which was also a successful application to enforce mahr.[29] In the two cases when mahr was not awarded, *Dajani v. Dajani* and *Chaudhary v. Ali*, the marriage contracts were completed abroad. None of the judges actually discussed this issue but it does appear that courts are less likely to enforce mahr if the terms were negotiated in a foreign country.

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[23] Chaudhary v. Ali, No. 0956-94-4, 1994 Va.App. LEXIS 759.
[24] Akileh v. Elchahal, 666 So.2d 246 (1996).
[25] Mahr was referred to as 'sadaq' in this case, which is a synonym for mahr. This is another case where mahr was incorrectly translated as 'dowry.' See PEARL AND MENSKI, *supra*, note 9-10 and accompanying text.
[26] See Akileh v. Elchahal, 666 So.2d 246, 247 (1996).
[27] *Id.* at 248.
[28] Akileh v. Elchahal, 666 So.2d 246, 248-49 (1996).
[29] Aziz v. Aziz, 488 N.Y.S.2d 123 (1985).

There are no reported examples of mahr terms negotiated in a foreign country being enforced in U.S. courts, but a contract agreed to in America may still fail to comply with state law on ante-nuptial agreements. In *Habibi-Fahnrich v. Fahnrich*,[30] a New York court refused to award the wife mahr because the contract was too vague to satisfy New York's General Obligations Law. Mahr was defined in the contract as "a ring advanced and half the husband's possessions postponed." The court decided that the reference to "half" the husband's possessions was not clear and specific enough to be enforceable as a contractual term. "Postponed" was also regarded as ambiguous, but the court did not seek expert evidence on what deferred mahr means in Islamic law. Most Muslim jurists would agree that mahr was payable to the wife upon divorce.

In all these mahr cases, U.S. courts have assumed that they should interpret the contract as an ante-nuptial agreement. To some extent, this is a positive step because it permits some Muslim women to recover property that they would expect to recover under Islamic custom and law. However, problems arise if the terms do not comply with state regulation on ante-nuptial contracts, which is a factor many Muslims would not consider when framing the agreement. There are some elements of American ante-nuptial contracts that are clearly at odds with Muslim practice. For example, refusal to enforce mahr terms because they tend to encourage separation by only providing for settlement in the event of divorce.[31] This disregards many important principles in Islamic culture: in particular those that place emphasis on the promotion and preservation of marital ties. Additionally, there is no tradition in Islam requiring disclosure of assets or seeking legal advice prior to matrimony.

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[30] Habibi-Fahnrich v. Fahnrich, No. 46186/93 1995 WL 507388 (N.Y.Supp., 1995).
[31] As occurred in *In re* Marriage of Dajani, 251 Cal.Rptr. 871 (1988).

The approach of U.S. courts contrasts with the attitude of English judges to mahr terms. In the 1965 case of *Shahnaz v. Rizwan*, deferred mahr was enforced as part of a contract in consideration of marriage at a time when ante-nuptial agreements were not enforceable.[32] The judge stated:

> In my judgment, it is quite different in essence from maintenance as understood in English or 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 … 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.

In a strict contractual sense, the right is not derived from the marriage but from a contractual agreement, to which the shari'ah marriage is only relevant as consideration. Subsequent cases have relied upon this decision,[33] and the relative absence of reported case law means that English courts are probably using the rationale in *Shahnaz v. Rizwan*.[34] This obviates the problem that ante-nuptials are still rarely enforceable in England.[35] The difference between the American and English approaches is that the consideration in *Shahnaz v. Rizwan* was the promise to marry under Islamic law rather than under western state law. That, after all, was the real basis for the agreement in the first place. According to this reasoning, the rules of ante-nuptial contracts, which may not have been considered by the parties, need not be met.

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[32] Shahnaz v. Rizwan, 1965 1 Q.B. 391. This was the first English case on mahr, and relied on precedents in which English courts had enforced Greek dower. The court also stated: "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."

[33] See Qureshi v. Qureshi [1971] 2 W.L.R. 518.

[34] PEARL AND MENSKI, *supra*, note 9 at 233.

[35] Paul Milligan, *Pre-nuptials Beware*, FAMILY LAW, July 1999 at 483; Nicholas Wilson, *Ancillary Relief Reform: Response of Judges of the Family Division to Government Proposals*, FAMILY LAW, March 1999 at 159.

To some extent the historical peculiarities of English law at the time compelled the court to decide *Shahnaz v. Rizwan* in the way it did.[36] If U.S. courts prefer to rely on ante-nuptial agreements as a model for enforceability then they could at least accommodate some of the distinctively Islamic features of the marriage contract. English law has managed to do so, and is more rigid than U.S. law on many aspects of matrimonial law.[37] Expert testimony from both sides should be admitted to account for the diversity of Islamic law, and the courts should beware of constructing terms according to Christian or Jewish custom. Judges should understand that marriage, under Islamic law, is not a 'religious' matter that may invoke constitutional issues. Also, courts need not be so strict in demanding that Muslims seek legal advice on their marriage contract or give full disclosure if the union was arranged abroad. Finally, the policy that ante-nuptial contracts are unenforceable if they encourage separation should not be applied to Muslim marriage contracts because Islam is not a religion that supports separation.[38]

[36] Because the couple in Shahnaz v. Rizwan had been married in India their marriage was not recognized under English law at the time as it was 'potentially polygamous.' This obliged the High Court to enforce the mahr as a contractual right because there was no basis for a matrimonial action.

[37] Marriages in England must comply with the Marriage Act 1949. In the United States, courts have been willing to recognize Muslim marriages under wider circumstances. *See, e.g.,* Aghili v. Saadatnejadi 958 SW.2d 784 (1997) (local Imam could solemnize an American marriage in Tennessee); Ohio v. Phelps, 100 Ohio App.3d 187 (1995) (Islamic marriage in Ohio was treated as a common law marriage); Re The Marriage of Fereshteh R and Speros Vryonis, Jr, 202 Cal.App.3d 712 (1988) (court considered whether an Islamic ceremony constituted a marriage under California law).

[38] Shi'a law does permit temporary marriages called mut'a, but Sunni Islam does not. *See* PEARL AND MENSKI, *supra*, note 9 at 143.