

9 Understanding and Use of Islamic Family Law Rules in German Courts

The Example of the *Mahr*

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Introduction

This chapter will address the question of how domestic courts may accommodate foreign legal institutions within the scope of their own legal system. The example chosen is the Islamic dower (*mahr*), as it is the most prominent institution of Islamic family law adjudicated in German courts for over forty years.¹ For this purpose, the following questions will be raised: first, what is the *mahr*, and second, how is the *mahr* understood and interpreted by German courts?² These questions will be discussed by focusing on two aspects: first, the legal techniques at hand in order to fit the *mahr* into German law, and second, the ways parties argue their cases.

Generally speaking, the *mahr* is a legal institution of Islamic family law, consisting of an asset of monetary value that the husband gives his wife upon marriage.³ Usually the payment of the *mahr* is split into two halves: one part, the so-called proper dower, is due at the time the marriage is concluded, and the other part, the so-called deferred *mahr*, is due at the time the marriage is dissolved. It may also be that the full payment of the *mahr* is deferred to the time of the dissolution of the marriage. The *mahr* can appear in a domestic court essentially by two means. First, in cases involving foreigners, the rules of private international law may point to the application of a foreign law under which the *mahr* has been contracted. In these cases, the German courts have to apply the applicable law and decide on the *mahr* according to those foreign rules. There are many examples of such cases in German courts. However, the conflict of laws rule may also point to the application of German domestic law. These cases particularly concern parties who are citizens of different (Islamic) countries, so that, according to the German conflict of laws rules, the law of habitual residence (that is, German law) applies. Additionally, cases have occurred where German Muslims had agreed on a *mahr*, which the wife then claimed under the

provisions of German family law. As the *mahr* is foreign to German domestic law, courts often struggle to understand and appropriately accommodate it within their own legal framework.

The common thread running through the struggle to accommodate the *mahr* in a German setting is – in accordance with the German theory of functional approach (*funktionale Qualifikation*)⁴ imported from the field of private international law – the search for the function of the *mahr*. In doing so one must, as a first step, determine the function and aims of the foreign institution according to its native law (the law under which it has been contracted) in order to be able, in a second step, to accommodate it within similar legal instruments available under domestic law.

In the following, we will first discuss the function of the *mahr*. This will be done in great detail, which is necessary to get a proper understanding of the problems we encounter in the German court rulings on this matter. In these rulings, we will limit ourselves to an analysis of the judicature of the German Federal Supreme Court, with a focus on its legal techniques as well as the cultural and religious arguments put forward by the parties.

Function of the *Mahr*

When analysing the many purposes and aims that have been attributed to the *mahr*, two categories can be distinguished: material and immaterial functions.

IMMATERIAL FUNCTIONS

The *mahr* is said to be a token of the husband's respect for the wife and a sign of his commitment to marriage.⁵ It furthermore touches upon the idea of prestige, as the *mahr* is considered to correspond to the level of desirability of the wife and the financial potential of the husband.⁶ In addition, it is argued that a high *mahr* may deter the husband from a quick and thoughtless repudiation and prevent him from engaging in polygamy, since a new *mahr* is due for all subsequent marriages.⁷ These functions are meant to influence the behaviour of the parties to act in a specific manner or are expressions of a certain status of the wife and/or the husband. As such, the *mahr* is seen as a bargaining tool in the negotiations of spouses of Islamic origin.⁸

MATERIAL FUNCTIONS

Additionally, there are material or economic aspects to the *mahr*: it is supposed to ensure financial security when paid as a prompt *mahr* at the time of the conclusion of the marriage, by providing the wife with a certain degree of economic independence and enabling her to build up her own property.⁹ It has also been seen as a financial cushion after divorce, since in most Islamic countries, there is no substantial post-marital support for the wife.¹⁰ And finally, it has also been argued that the *mahr* is conceived to counterbalance the lesser inheritance rights of the wife in the case of the husband's death.¹¹ This last function is particularly raised in view of the husband's potential polygamous marriages, as the inheritance portion of the wife will have to be divided between all wives. In the words of Indian scholar Asaf Fyzee, in a nutshell, the *mahr* is 'a provision for a rainy day'.¹²

The *Mahr* in the Classical Works of the *Fuqaha*'

A look at the *fiqh* works of classical Islamic scholars, on the other hand, reveals that none of these functions of the *mahr* has been really discussed in depth. Instead, the *mahr* is dealt with as a contract of exchange, governed by the rules of the contract of sale.¹³ In this context, some have interpreted the *mahr* as being the counter value for the sexual submission of the wife in marriage.¹⁴ This interpretation has been taken up by some German courts to designate the *mahr* as the 'price for the sexuality of the wife'.¹⁵

Evaluation of the *Mahr*

In evaluating the aforementioned functions, it will be shown that the economic function of the *mahr* is predominant. As will be explained in the paragraphs below, the interpretation of the *mahr* as being the price for marital cohabitation is not sustainable. It is true that, in certain cases, the *mahr* has a symbolic value and that, in other cases, it has deterred husbands from thoughtless repudiation. However, today, the *mahr* is mostly a significant financial instrument of family law in Islamic countries.

THE *MAHR* AS A COUNTER VALUE FOR MARITAL COHABITATION?

If the *mahr* were to be considered the counter value for marital cohabitation, its implementation in German courts could become difficult in view of the principle of public policy. According to this principle, a foreign legal provision shall not be applicable if the result of its application is obviously incompatible with essential principles of German law. This is particularly the case when the foreign rule is incompatible with the German Basic Law, the *Grundgesetz*. Putting a monetary value on marital cohabitation would therefore be a matter of public policy. The reading of the *mahr* as such a monetary counter value is, however, the result of a misinterpretation of the *mahr*. Generally, the advocates of such a theory base their view on two arguments: first, the nature of the *mahr* as a contract of exchange and the application of the rules of the contract of sale on the *mahr* agreement; and second, the fact that the *mahr* is forfeited when a marriage is dissolved before its consummation. Both arguments are – as will be shown below – unsustainable.

First, the fact that the *mahr* is considered a contract of exchange governed by the rules of the contract of sale does not necessarily justify the conclusion that the *mahr* is a 'purchase price' for marital cohabitation. It is true that, in the literature, the agreement on *mahr* is called a reciprocal exchange contract (Arabic *mu'awada*), to which the rules of the sales contract are applicable.¹⁶ This has a specific background, however: Islamic law does not know any general theory of contract.¹⁷ General rules are derived from the regulations of model contracts, such as the contract of sale.¹⁸ Thus, the link to the sales contract does not reflect the nature of the *mahr* being a sales or leasing contract of female sexuality, but is derived from the structure of Islamic contract law.¹⁹ It highlights that the regulations of the sales contract can be applied as general rules to certain aspects of the *mahr*.²⁰ Accordingly, anything that can be the subject of a contract of sale can be chosen as the subject of the *mahr*. Additionally, the conditions of a valid purchase price must also be observed for the *mahr*: the *mahr* should have a monetary value, be determinable and its performance has to be possible and legal.

Second, it is true that under certain circumstances the *mahr* is forfeited when a marriage is dissolved before its consummation. Therefore, there is a connection between the *mahr* and marital cohabitation. These regulations, however, do not offer a consistent picture: whereas the wife is entitled to half of the *mahr* if her husband divorces her prior to consummation,²¹ this is not the case when the spouses die before consummation. In this case, the wife keeps her right to the full *mahr*, and that right will be inherited by her heirs.²² On the other hand, the

wife may refuse to comply with her marital duties as long as the *mahr* has not been given to her.²³ However, this right of retention is a unilateral right of the wife; the husband cannot refrain from paying the *mahr* because the marriage has not been consummated: he must pay the *mahr* prior to consummation.²⁴ Thus, there is no reciprocity in this right. If the *mahr* were really the counter value for marital cohabitation, its regulations would have to be much more stringent and comparable to the purchase price in a contract of sale. This is, however, not the case. The wife is still entitled to the *mahr*, even if she has not 'fulfilled her duty'. As a matter of fact, many of these regulations are explicable by their historical context. Very often, there would be a considerable gap between the time when the marriage was contracted and the time when the marriage was actually consummated. This was particularly the case when minors were married, or in marriages by proxy where the husband-to-be was absent. If, in the meantime, the marriage was dissolved by the husband, half of the *mahr* became due. Some argue that this amount was meant to compensate the girls for their reduced chances of remarriage. In other words, it constitutes some kind of damages awarded to the girl for the delay or the shortfall of a financial provider. Others argue that half of the *mahr* was due in order to compensate the husband for the expenses incurred in view of the marriage.²⁵

Finally, one has to consider the marriage, its consummation and the *mahr* as a unity. It is true that the consummation of the marriage is not a condition for its validity. However, marriage is considered to be the only legal framework within which sexual activities are allowed and even a duty. Thus, some authors hold that only by the consummation of marriage, the process of marrying is 'completed'.²⁶ Consequently, the reduction of the *mahr* in case of a repudiation before consummation is not so much linked to the concept of the *mahr* as the 'price for marital sexual cohabitation', but is rather connected to the not yet completed process of marrying.

THE MAHR AS AN ECONOMIC FACTOR

The predominance of the economic function of the *mahr* is very well illustrated by the immaterial functions attributed to it. All aforementioned immaterial functions will only materialize if the *mahr* is of a substantial financial value. What kind of prestige or seriousness would be expressed by a low *mahr*? How could a low *mahr* deter the husband from repudiating his wife or prevent him from entering into a second marriage? Furthermore, a look at the practice of *mahr* reveals its economic importance: in Iran, for example, 80 per cent of divorces are

khul' divorces, whereby, in the absence of legal or contractual grounds for divorce, the wife can gain the consent of her husband to divorce in return for some kind of consideration.²⁷ This consideration is usually a part or the whole of her *mahr*. According to a survey conducted by the magazine *zanān*, Iranian women often try to negotiate a high *mahr* in order to exit an unwanted marriage more easily while at the same time keeping some parts of the *mahr* for financial security.²⁸

New legislation in some Muslim countries also highlights the economic importance of the *mahr*. The regulations in Iran, Iraq and the United Arab Emirates illustrate this very well. In 1998, the Iranian legislator enacted a new law, the 'Act on the Adaptation of the Value of the *Mahr* to the Inflation Rate', according to which a *mahr* contracted in Iranian currency must be adjusted by the inflation rate at the time it is claimed (which, as we have seen, can be many years after the *mahr* had been agreed).²⁹ Under Iranian law, the agreement on the *mahr* figures in the standardized marriage contract as prompt *mahr*, meaning that it must be handed to the wife upon her request. In general, as long as the marriage is working and the couple lives happily together, hardly any woman claims her *mahr* during the marriage. In most cases, the *mahr* is claimed, like the deferred *mahr*, upon dissolution of the marriage, whereby the time gap between these two moments can be crucial, implying a substantial deflation of the monetary value. In order to secure the stability of the *mahr* and to ensure that women are not deprived of their rights, the amount of the *mahr* must be adapted to the inflation rate.

Based on similar grounds, in 1999, a decree was issued in Iraq,³⁰ ordering the value of the deferred *mahr*, expressed in Iraqi currency, to be adapted to its gold value at the time of the conclusion of the marriage.³¹ Earlier, in 1997, the United Arab Emirates enacted a federal law, the 'Act on the Limitation of the Amount of the *Mahr* in the Marriage Contract and the Expenses Incurring for Marriage', to limit the amount of the *mahr*.³² This law contrasts with the two previous laws in that it puts a ceiling on the amount of the *mahr*. Accordingly the prompt *mahr* is limited to 30,000 dirhams and the deferred *mahr* to 50,000 dirhams (roughly 6,000 and 10,000 euros, respectively). The explanatory memorandum³³ of the Emirati Personal Status Act³⁴ makes clear that this law was enacted to limit the extremely high marriage expenditure, which has led to a substantial age gap between the spouses, with Emirati men taking foreign wives and men incurring debts to afford the expenses of marriage.³⁵ This also points to the economic importance of the *mahr*.

To sum up, today, the primary – though not only – function of the *mahr* is to provide economic security for the wife.³⁶

German Case Law

With this background in mind, we now turn to German case law. So far, the German Federal Supreme Court (BGH) has decided on the matter on three occasions.³⁷ The case law will be analysed under the two abovementioned aspects of the court's legal techniques and the argumentation brought forward by the parties.

DECISION OF THE SUPREME COURT OF 28 JANUARY 1987³⁸

In this case, the parties had married in 1976 in Munich. The wife was a Muslim Palestinian with an Israeli passport. The husband was German. Both were students. They had a civil marriage first and, for the sake of the religious wedding, which took place afterwards, the husband converted to Islam. In the certification of their religious marriage, the spouses agreed on the payment of 100,000 Deutschmarks (DM) as a *mahr*. Four years later, in 1980, the parties were divorced by the judgement of a German court under the application of German law. Additionally, the husband, in the absence of the wife, pronounced an Islamic divorce in the mosque where they had married. In the certification of the religious divorce witnessed by the *imam*, the husband included in handwriting the sentence that there were no financial claims between the parties. The wife contested this and petitioned for the payment of the *mahr*. The Court of First Instance recognized the wife's claim as an agreement on post-marital maintenance and ordered the man to pay the dower of 100,000 DM.³⁹

The Court of Appeal overturned the judgement and rebutted the validity of the wife's claim. It argued that an agreement for the payment of a *mahr* that had been made in the course of a religious marriage was not valid, since religious marriages as such had no effect under German law. However, the Court conceded that even in the case that the agreement on the *mahr* was to be considered valid, it had to be qualified under German law as a stipulation of a marriage contract, that is, an agreement on the matrimonial property regime. These kinds of agreements had to be authenticated by a notary. Thus, it did not recognize the *mahr* because of the lack of these formalities.⁴⁰ The wife finally sought the revision of the decision at the Supreme Court.

What arguments did the parties make, and how did the Supreme Court respond? The husband argued that he had not been aware of the fact that he was committing himself legally and binding himself when signing the agreement. He argued that he had believed the agreement to be just a 'formality' without legal effects, that is, some kind of folklor-

istic addition to the wedding. The wife, on the other hand, argued that both had meant the agreement to be binding and that the husband had been fully aware of this, since extensive negotiations on the *mahr* had been conducted between him and her father beforehand. In evaluating these arguments, the Supreme Court held, first, that the reservation of the husband would only be legally relevant if the wife had been aware of it. A secret reservation on the binding character of the commitment is not relevant under German law. Second, if the husband really had not been serious about this commitment, he would have had to contest the agreement for error within the legal time frame, which had already expired. Finally, the court held that a person who, for the sake of a religious marriage, had converted to another religion, could not claim to not have been aware of the effects of such marriage, and in particular that a *mahr* was due in a Muslim marriage.

As far as the validity of the *mahr* agreement was concerned, the Supreme Court held that, although the religious marriage did not have any effect under German law, this did not affect the validity of the *mahr*. It suffices that the religious marriage was valid under considerations of religious/Islamic law as perceived under the law applicable to Muslim Israelis. As there was no obstacle to the validity of the marriage, the agreement on the *mahr* had to be considered valid. The court did not consider the aspect of public policy or raise the question as to whether the *mahr* did or did not exist in German law. It considered it a valid agreement and went on to its interpretation.

The Supreme Court, however, did not decide on the categorization of the *mahr* within domestic family law. The Court objected to both interpretations of the lower courts, since it held that the lower courts had failed to consider the intention of the parties when agreeing on the *mahr*. However, it gave some indications as to how this intention had to be sought. Within the framework of German rules governing the interpretation of contracts, due respect was to be awarded to the principle of good faith and good morals. Furthermore, the circumstances of the case, such as the duration of the marriage, had to be considered to discover the real intention of the parties. As a result, the Supreme Court recommitted the case to the Court of Appeal for further investigations. The parties finally settled the case outside the court.

DECISION OF THE SUPREME COURT OF 14 OCTOBER 1998⁴¹

In the second case, the parties, a German woman and a Syrian man, had married in 1976 in Germany. The husband later acquired German citizenship. Before their civil marriage, the parties concluded a German

marriage contract which was authenticated according to German law. In the marriage contract, the husband agreed to pay his future wife a *mahr* of 20,000 DM; 10,000 on the conclusion of the marriage and 10,000 if the husband's behaviour entitled the wife to ask for the dissolution of the marriage. The marriage contract explicitly enunciated the cases in which the wife would be entitled to ask for the dissolution of the marriage. Those cases included the grounds for divorce under German law.

In 1995, the couple was divorced by a German court. The wife remarried two months later and sued her ex-husband for the payment of the *mahr* shortly afterwards. He refused to pay either the prompt *mahr* he had not honoured at the time of marriage or the deferred *mahr* due at the time of divorce. The Court of First Instance ruled that the woman had forgone her right to the prompt *mahr* since she had not claimed it, but ordered the ex-husband to pay the deferred *mahr*, which was due at the moment of the divorce.⁴² The ex-husband objected, but the decision was upheld on appeal. The Court of Appeal did not try to fit the agreement on the *mahr* into any of the German categories of family law. The court rather considered the agreement to be an independent acknowledgement of debt (German *Schuldversprechen*), which, under German law, was valid and had to be honoured.⁴³ The Court of Appeal looked at the terms of the agreement and concluded that the parties had intended the wife to be able to claim the deferred *mahr* if she had a reason under the marriage contract to get a divorce. Since this held true, the wife was entitled to 10,000 DM.

The husband petitioned for revision at the Supreme Court. The Supreme Court rejected the assumption that the *mahr* was an independent acknowledgement of debt, since this kind of agreement does not mention the reason for the payment. In the case of the *mahr*, however, the reason, that is, the *mahr*, was explicitly mentioned. Again, the Supreme Court criticized the lower courts for not taking into account the intentions of the parties. In particular, the Supreme Court criticized the lower courts for failing to consider whether the agreement on the deferred *mahr* was intended to be a post-marital claim. This was of particular importance, as the wife had re-married soon after her divorce and post-marital maintenance is only due as long as the ex-wife does not have a new spouse.

DECISION OF THE SUPREME COURT OF 9 DECEMBER 2009⁴⁴

The third and most recent case involved an Iranian couple who had married in 1992 in Tehran with a *mahr* of 15 million Iranian rials payable at any time at the demand of the wife. In 1993, the spouses left

Iran and settled in Germany, where both acquired German citizenship. The couple divorced in 2006 in Germany, according to German law. Later on, the wife petitioned for the payment of the *mahr*. One of the main problems in this case was the characterization of the *mahr* and its submission to one of the available conflict of laws rules.⁴⁵ This choice and the resulting law applicable had a considerable effect on the outcome of the trial. The wife argued that the *mahr* had to be governed by Iranian law and, in application of Iranian law, the amount that was due had to be adapted to the inflation rate, according to the aforementioned 'Act on the Adaptation of the Value of the *Mahr* to the Inflation Rate'. As a result, the sum of 15 million Iranian rials would amount to approximately 15,000 euros, whereas without such adaptation, the counter value of 15 million rials would be only 1,500 euros, thus ten times less.

The husband, on the other hand, argued that the *mahr* had been agreed in Iran under the presumption that the spouses were to live there. Now that they had changed their domicile, this change of circumstances defeated his reasons for agreeing on a *mahr*. As the circumstances had changed, the *mahr* agreement had to be considered void. According to him, the applicable law was German law. As this law did not know any such institution as the *mahr*, there was no legal basis for its award. In any event, when applying German law, Iranian law was to be considered in so far as the wife had forfeited her right to the *mahr*, because it was she who had petitioned for the divorce. Her petition for divorce was thus to be seen as a request for a *khul'*, in which she had to waive her right to the *mahr*. The husband also argued that the function of the *mahr* was to deter husbands from divorcing their wives. In the case that the wife herself had petitioned for divorce, she had forgone this protection herself and could thus not claim for a *mahr*.

The Court of First Instance decided in favour of the husband. It argued that the main function of the *mahr* was the financial protection of the wife in case of divorce. Since the parties had moved to Germany and had got a divorce under German law, the wife had profited from the post-marital protection awarded to her under German law, which had improved her financial post-marital position considerably as compared to Iranian law, which hardly knows any post-marital financial claim. The *mahr* had thus lost its *raison d'être*. However, in contradiction to its own arguments, it upheld that the agreement on the *mahr* as a contractual obligation had to be fulfilled, even if only with its counter value at the time of the claim, which was 1,500 euros.⁴⁶

The Court of Appeal overturned the case by choosing a different characterization of the *mahr* under the conflict of laws rules. In

doing so, it submitted the case to Iranian law and adapted the sum of 15 million rials to the Iranian inflation rate, awarding the wife a sum of roughly 15,000 euros.⁴⁷ The Court of Appeal did not address the question of whether she had lost her claim because she had petitioned for divorce, that is, the question of whether the fact that the wife had asked for divorce led automatically to the loss of the *mahr*.

The husband challenged the decision at the Supreme Court and won the case. The Supreme Court first decided the question of the characterization of the *mahr*. His decision led to the applicability of German law. Within German law, the Supreme Court recognized the validity of the *mahr* agreement as a valid contractual commitment that had to be honoured by the husband. It refused, however, an adaptation to the inflation rate according to Iranian law, since that law was not applicable. Again, the Supreme Court emphasized that the intention of the parties was to be consulted in order to understand the nature of their agreement. *Obiter dictum*, the Supreme Court rebutted the argument that the wife had lost her claim to the *mahr*, because it was she who had petitioned for divorce. However, as in this case, the amount of the *mahr* was not considerable, the Supreme Court did not find it necessary to expand more on the nature of the *mahr* agreement or any problem which might occur under German law, in particular the embedding of the *mahr* within the institution of German family law. This question still remains open.

Evaluation of the Cases

THE ARGUMENTS OF THE PARTIES

In evaluating the legal and cultural argumentation of the parties, one can distinguish three layers of argumentation. First, the legal and the cultural religious arguments are intermixed and these aspects are highlighted according to the position taken. The religious background and motivation for concluding such an agreement is evident. The legal basis for the award of the *mahr* in German courts, however, remains the contractual agreement by the spouses. The basis on which German courts approach such agreements is from the perspective of contract law, hence the general rules for the conclusion of contracts and the principle of freedom of contract in family law in particular. The cultural and religious arguments are then put forward by the parties to underpin their respective positions: the wife claims that the *mahr* is her religious right, even outside the socio-legal and religious framework within which

the agreement was made in the first place. The husband equally raises the cultural and socio-legal aspect of the *mahr* when claiming that, in another legal and social setting than the one under which the *mahr* was conceived, the *mahr* loses its *raison d'être* and therefore should no longer be upheld and honoured.

The question of whether the *mahr* is contrary to public policy and good morals also falls within the ambit of this layer. Men often argue that the *mahr*, in its presumed concept as counter value for marital cohabitation, infringes the rule of domestic public policy. Women, on the other hand, emphasize that the *mahr* is an instrument of empowerment in a family law system which is intrinsically patriarchal: considering the *mahr* as an equalizer of the bargaining powers of the spouses, the *mahr* must, therefore, pass the barrier of public policy. The social, cultural and religious backgrounds of *mahr* agreements are thus picked up when convenient and dropped when they fail to strengthen the individual position of the party.

Second, one can observe a mixing of the applicable domestic and displaced foreign law. Both spouses try to import that from the foreign, Islamic-based family law which is favourable to them. This is quite visible in the 2009 case, where the wife attempts to have the amount of the *mahr* raised through the application of the Iranian 'Act on the Adaptation of the Value of the *Mahr* to the Inflation Rate', whereas the husband, while rebutting the application of that act, pleads within the application of German law for the taking into account of the *khul'* rules under Iranian law to see the wife lose her right to the *mahr*.

Finally, there is a mixture of foreign and domestic procedural law. Whereas Iranian procedural law accords different rights and duties to the spouses, depending on who petitioned for the divorce, German procedural law is gender-neutral. Accordingly, German divorce law generally does not take into account who demanded the divorce first or whether that party is at fault. Under Iranian and Islamic-based family laws in general, on the other side, the legal implications of a divorce differ according to the gender of the plaintiff: whereas the husband does not need any reasons to petition for divorce, the wife has to argue her case on the basis of legal or contractual divorce grounds. In both cases, the wife is entitled to her *mahr* and any post-marital claim, as far as available. If, however, the husband does not apply for divorce or the wife is unable to prove her divorce grounds, she can only base her divorce petition on a *khul'* divorce, in which she has to forego to a certain extent her right to the *mahr* and/or other financial entitlements. By blending German procedural and Iranian substantive law, the husband attempted to suppress the wife's claim to the *mahr*.⁴⁸

THE ARGUMENTS OF THE SUPREME COURT

None of the three decisions of the Supreme Court explicitly gives an answer to the question of how to accommodate the *mahr* in German law. In fact, the decisions are all formulated very prudently. A first basic statement is the acknowledgement of the validity of *mahr* agreements in general. Thus, the Supreme Court dismissed the argument that *mahr* agreements must be void, since the institution as such is alien to German law, or that *mahr* agreements are contrary to public policy, like some lower courts had argued before.⁴⁹ Instead, the Court established the validity of *mahr* agreements as a contractual agreement between spouses, covered by the principle of freedom of contract in family law. As such, the *mahr* agreement needs to fulfil the basic requirements of a contractual agreement, that is, the consent of the parties and the absence of duress and error. Furthermore, the Court rightly considered the *mahr* to be a specific feature of marriage law, which presupposes a valid marriage.

The question of whether a religious marriage *alone* would suffice as grounds for claiming the *mahr* was not directly answered. It is, however, hardly conceivable that a purely religious ceremony, which according to German law is not considered a valid marriage, may be legitimate grounds for a *mahr* claim.⁵⁰ Even if one considers the 1987 case where the court had based its decision on the validity of the religious marriage, the court kept in mind that the parties had also had a civil marriage in Germany. One must thus conclude that a *mahr* agreement will only be honoured if the parties are considered validly married under German law.

The question as to the nature of the *mahr* agreement and its categorization under German law was, however, not answered by the Supreme Court. Instead, the Supreme Court stated that the *mahr* agreement had to be interpreted according to the intention of the spouses while contracting the *mahr*. The Supreme Court thus suggests that each *mahr* agreement has to be considered in each individual case on its own merits. In doing so, due account must also be taken of the underlying concept of the institution of the *mahr* under its native law.

Testing the *Mahr* in German Family Law Categories

To categorize the *mahr* agreement within German law, the courts thus need to interpret the intention of the parties while simultaneously bearing in mind the functions and nature of the *mahr* in its native law. The

categories that can then be used are either the agreement on post-marital maintenance or the agreement on the matrimonial property regime.

CAN THE *MAHR* BE INTERPRETED AS AN AGREEMENT ON MAINTENANCE?

Under German Law, spouses may contractually agree on their reciprocal post-marital maintenance duties and derogate from statutory law.⁵¹ Interpreting the *mahr* agreement as a maintenance agreement⁵² allows the court to make use of all adjustment instruments offered by German law: accordingly, if the marriage was of short duration, the court can adapt the amount of the *mahr* on the basis of the German rules on maintenance⁵³ and in accordance with the theory of change of circumstances, according to which a change in the economic, legal and business realities underlying a contractual agreement can invalidate or modify the terms of a contract. Moreover, a very high *mahr* can be adapted to the financial capability of the husband⁵⁴ and a very low *mahr* can be raised according to the needs of the divorcee.⁵⁵ Interpreting the *mahr* as a maintenance agreement, however, generally does not match the intention of the parties.⁵⁶ If, at the time of the marriage and the agreement on the *mahr*, the parties had the intention to move to Germany or if one of the parties was a German citizen, it is doubtful whether, with the acceptance of the *mahr*, the wife intended to waive her maintenance rights awarded to her under German law. But even if both parties are of foreign origin, such an intention is difficult to presume,⁵⁷ since in Islamic countries, the *mahr* and the maintenance claims stand next to each other. Thus, *mahr* is hardly interpretable as an equivalent of maintenance.

CAN THE *MAHR* BE INTERPRETED AS AN AGREEMENT ON THE MATRIMONIAL PROPERTY REGIME?

As with maintenance, the statutory provisions on the matrimonial property regime may be modified by the spouses. These modifications must be inserted in a marriage contract (German *Ehevertrag*) that needs official notarization.⁵⁸ The German matrimonial property regime is the separation of property with an equalization of surplus (*Zugewinnausgleich*) after the dissolution of marriage. In principle, each spouse owns and administers his or her property independently.⁵⁹ Upon termination of the marriage, however, the accrued gains, that is, the additions to the assets of each of the spouses achieved during the marriage, are equalized. This means that the spouse with the higher surplus has to pay the partner with the smaller increase one half of the excess.⁶⁰

In Muslim countries, on the other hand, the concept of matrimonial property is generally ignored.⁶¹ Based on the general freedom of the wife to own and administer her assets independently, the properties of the spouses are completely separated: each spouse remains the owner of his or her assets before, during and after marriage. If the *mahr* were to be understood as an agreement on the matrimonial property regime under German law, one could read it as a modification or supplementation to the statutory regime, whereby the parties exclude the equalization of surplus and install a regime of separation of goods with the *mahr* being a lump sum to be paid to the wife upon divorce.⁶²

However, this interpretation is hardly arguable, since in most cases, it will not match the intention of the parties. If both parties are Muslims living and marrying in Germany and additionally contracting a *mahr*, this agreement might be made out of respect for their religious background rather than as an expression of their intention to exclude the regime of surplus upon divorce.⁶³ This is even more so when one of the spouses is German and the other is of foreign origin. Finally, when the parties are both foreigners who married in their country of origin, then such an interpretation is still improbable, as there is hardly any awareness on the part of the parties regarding the possibilities for arranging for other forms of matrimonial property regime in Muslim countries.⁶⁴ Therefore, here again, this interpretation does not fit.

Evaluation and Conclusion

Although the guiding principles developed by the Supreme Court to come to a true determination of the meaning of the *mahr* are certainly valuable, their implementation reveals difficulties. There is no doubt that the intention of the parties must be sought to understand what they had in mind when contracting the *mahr* to translate their perception into German law. Such a translation is, however, not easy, as the intention of the parties is hardly detectable. In most cases, the spouses agreed on a *mahr* without mentioning further reasons or giving explicit explanation as to its relation to maintenance or matrimonial property regime. They simply contracted the *mahr* because in their view, it was an integral part of the act of marrying. This becomes quite apparent when looking at the arguments and ways parties argue and negotiate their cases. Legal, social and religious arguments and explanations are used at will to strengthen the respective positions.

The recourse to the national law of the countries of origin of the spouses may also bring major obstacles. For example, the question

arises as to how far the rules of the displaced law must be consulted. What is to be done in mixed marriages between citizens of different Muslim countries that have different regulations on the *mahr*? The problem is quite apparent in cases involving, for example, Emirati and Iranian couples: shall the court be more lenient towards Emirati law, which limits the amount of the *mahr*, or Iranian law, which adapts the sum to the inflation rate, and thus raises its amount? A change in the amount of the *mahr* in terms of reduction or increase must then also be compatible with German interpretation rules, that is, by analogy to similar situations under German law. And finally, what about the many cases where the parties are German Muslims and no underlying law of origin is detectable? One can think of the many Turkish cases, since Turkish family law, as a reception of Swiss family law, does not regulate the *mahr* anymore.

The way out of these kinds of evaluative problems is to abandon the fitting of the *mahr* into the existing categories of German family law; that is, the maintenance and matrimonial property regime. As the Supreme Court sees it, the *mahr* is a valid agreement and German law generally accepts that the spouses make agreements on their financial obligations.⁶⁵ If one considered the agreement on the *mahr* as a specific kind of family law contract unknown to statutory law, but still valid under the concept of freedom of contract, it could exist next to the established German categories. Liberating the *mahr* from the exigencies of German family law categories would also release the court to a considerable extent from exploring the ratio of a non-applicable law or from making sense of the cultural and religious arguments put forward by the parties for the sake of fitting the *mahr* into preconceived categories that are not suitable.⁶⁶ The court would have to judge the agreement alongside the claims for maintenance and matrimonial property issues and navigate through its own familiar legal notions.

Nevertheless, the *mahr* must be contextualized within the setting of German family law and the available family law instruments to make sure that none of the spouses is disadvantaged. If the award of the *mahr* would stand as a contract *sui generis* next to the statutory rules of a valid maintenance claim and the equalization of surplus as regulated under German matrimonial property law, it would have a significant effect on their respective amounts: the payment of the *mahr* to the wife would increase her assets and thus influence the amount of surplus that would have to be equalized. Additionally, a substantial *mahr* would decrease the wife's need for post-marital maintenance, so that, here again, a fair financial balance is achieved between the parties. It must, after all, be borne in mind that the *mahr* is conceived to provide a certain economic

security for the wife in systems which hardly know any financial (post-) marital solidarity between the spouses. It is a tool to protect the wife in specific legal surroundings. Whenever this situation changes to the benefit of the wife, her need to be protected will diminish.⁶⁷ This is also why the *mahr* must be accounted for within the new legal context in which it is being evaluated. However, this does not change its character as an independent contract *sui generis* and the fact that the parties must honour their contractual obligation. Only when giving the *mahr* a place of its own, a fair distribution of the financial burden of the ex-spouses will be achieved and due respect given to the *mahr* agreement to finally bring legal certainty to the appraisal of the *mahr* under German law.

Notes

- 1 The first legal opinions on the *mahr* were commissioned by German courts in the late 1960s and early 1970s, see Murad Ferid, Gerhard Kegel, and Konrad Zweigert (eds.), *Gutachten zum internationalen und ausländischen Privatrecht 1965 und 1966*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1968, legal opinion No. 15, pp. 150-166 (Iraqi law), and Murad Ferid, Gerhard Kegel, and Konrad Zweigert (eds.), *Gutachten zum internationalen und ausländischen Privatrecht 1970*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1971, legal opinion No. 38, pp. 374-386 (Jordanian law). The first judgements date from 1979 and 1980, see Court of Appeal (hereinafter: OLG) Bremen, decision of 9 August 1979, *Zeitschrift für das gesamte Familienrecht*, 1980, pp. 606-607; Court of First Instance (hereinafter: LG) Cologne, decision of 27 October 1980, in: Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1980*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1982, case No. 83, pp. 248-249.
- 2 For an account of the *mahr*, particularly in **Canadian and North American** courts, see Pascale Fournier, 'Flirting with God in Western Secular Courts: Mahr in the West', *International Journal of Law, Policy and the Family*, 2010 (Vol. 24, No. 1), pp. 67-94; Pascale Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation*, Aldershot: Ashgate, 2010; Lindsey Blenkhorn, 'Islamic marriage contracts in American Courts: interpreting mahr agreements as pre-nuptials and their effect on Muslim women', *Southern California Law Review*, 2002-2003 (Vol. 76, No. 1), pp. 189-233; Richard Freeland, 'The Islamic Institution of Mahr and American Law', *Gonzaga Journal of International Law*, 2000-2001 (Vol. 4), www.gonzagajil.org/content/view/85/26; on the *mahr* in **European** courts, see Rubya Mehdi and Jørgen S. Nielsen (eds.), *Embedding Mahr (Islamic dower) in the European Legal System*, Copenhagen: DJØF Publishing, 2011; on the *mahr* in **English** courts, see Mohamed Jindani, 'The Concept of mahr (dower) in Islamic Law: The need of Statutory Recognition by English Law', *Yearbook of Islamic and Middle Eastern Law*, 2004-2005 (Vol. 11), pp. 219-227; on the *mahr* in **Spanish** courts, see Ma Del Pilar Diago Diago, 'La dot isla-

- mique à l'épreuve du conflit de civilisations, sous l'angle du droit international privé espagnol', *Annales de Droit de Louvain*, 2001, pp. 407-442; on the *mahr* in **Belgian** courts, see Moustapha El Karouni, 'La dot: une institution contraire à l'ordre public international belge?' *Revue trimestrielle de droit familial*, 2002, (No. 3), pp. 403-423; on the *mahr* in **Swedish** courts, see Mosa Sayed, 'The Muslim Dower (*Mahr*) in Europe – with Special Reference to Sweden' in: Katharina Boele-Woelki and Tone Sverdrup (eds.), *European Challenges in Contemporary Family Law*, Antwerp: Intersentia, 2008, pp. 187-208; on the *mahr* in **Danish** courts, see Rubya Mehdi, 'Danish Law and the Practice of *mahr* among Muslim Pakistanis in Denmark' in: Rubya Mehdi (ed.), *Integration & Retsudvikling*, Copenhagen: Jurist-og Økonomforbundets Forlag, 2007, pp. 101-118; on the *mahr* in **Italian** courts, see Lorenzo di Ascanio, 'Il Mahr tra diritto musulmano e contesto non islamico', *Rivista di diritto internazionale privato e processuale*, 2009, pp. 387-406.
- 3 See. O. Spies, 'MAHR' in: C.E. Bosworth *et al.* (eds.), *Encyclopaedia of Islam*, ed. Vol. 6, Leiden: E.J. Brill, 1991, pp. 78-80.
 - 4 See German Federal Supreme Court (hereinafter: BGH), decision of 22 March 1967, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 1967 (Vol. 47), pp. 324-339; see also Jan Kropholler, *Internationales Privatrecht*, Tübingen: Mohr Siebeck, 2006, p. 127.
 - 5 Seyyed Hoseyn Safā'i and Asadollāh Emāmī, *Hoqūq-e khānevāde* [Family Law], Vol. 1, Tehran: Enteshārāte dāneshgāh-e tehrān, 2002, p. 166; Majid Enayat, 'Länderbericht Iran' in: A. Bergmann, M. Ferid, and D. Henrich (eds.), *Internationales Ehe- und Kindschaftsrecht*, Frankfurt/Main: Verlag für Standesamtswesen, 2004, p. 51; Hassan Hamidian, 'Jurisdiction of Family Courts in Iran' in: Jürgen Basedow and Nadjma Yassari (eds.), *Iranian Family and Succession Laws and their Application in German Courts*, Tübingen: Mohr Siebeck, 2004, p. 89; Djilali Tchouar, 'Régime juridique de la dot en droit algérien', *Revue Algérienne*, 1996 (Vol. 34, No. 4), p. 580: '[...] expression de la franchise, de la détermination et la preuve d'attachement de l'homme qui se lie légalement à la femme. L'homme par l'intermédiaire de la dot manifeste son intention réelle en vue de fonder un foyer solide et d'affronter un acte aussi sérieux que grave'; Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law*, London: I.B. Tauris, 2nd ed. 2000, p. 74, describes the *mahr* as 'yardstick' of the families' 'sincerity'.
 - 6 Susanne Dahlgren, 'Women's *adah* versus "women's law": the contesting issue of *mahr* in Aden, Yemen', *Égypte/Monde arabe*, 2005 (No. 1), side note 4, <http://ema.revues.org/index1045.html>.
 - 7 John L. Esposito, *Women in Muslim Family Law*, Syracuse: Syracuse University Press, 2001, 2nd ed., p. 23; Mir-Hosseini, *Marriage*, p. 73; Annelies Moors, *Women, Property and Islam*, Cambridge: Cambridge University Press, 1995, p. 147; Katherine Spencer, 'Mahr as Contract: internal Pluralism and external perspectives', *Oñati Socio-Legal Series*, 2011 (Vol. 1, No. 2), p. 3.
 - 8 See Pascale Fournier, 'In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment', *Osgoode Hall Law Journal*, 2006, pp. 649-677; Mir-Hosseini, *Marriage*, pp. 72-83.

- 9 Lisa Wynn, 'Marriage Contracts and Women's Rights in Saudi Arabia: Mahr, Shurut and Knowledge Distribution' in: A. Quraishi and F.E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, Cambridge: Harvard University Press, 2008, p. 206.
- 10 Mir-Hosseini, *Marriage*, p. 73; Moors, *Women*, p. 147.
- 11 Safā'i and Emāmī, *Hoqūq-e khānevāde*, p. 166; Hossein Safā'i, 'Le Mariage et le Divorce en Droit Iranien' in: Jürgen Basedow and Nadjma Yassari (eds.), *Iranian Family and Succession Laws and their Application in German Courts*, Tübingen: Mohr Siebeck, 2004, p. 75. For a critical view, see Nadjma Yassari, 'The Reform of the Spousal Share under Iranian Succession Law: an Example of the Transformability of Islamic Law', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2009 (Vol. 73), p. 999.
- 12 Asaf Fyzee, *Outlines of Muhammadan Law*, Delhi: Oxford University Press, 1993, p. 133.
- 13 Yvon Linant de Bellefonds, *Traité de droit musulman comparé*, Vol. 2, Paris: Mouton & Co, 1965, p. 25.
- 14 With a summary of the Maliki literature: Georges-Henri Bousquet, *L'Éthique sexuelle de l'Islam*, Paris: Maisonneuve & Larose, 1966, p. 108; for Shi'i law, see Hassan Emamy, *L'institution juridique du mahr (dot) en droit musulman du rite chiite*, Lausanne: Imprimerie C. Risold, 1933, p. 13 ff; Seyyed Hasan Emāmī, *Hoqūq-e madanī* [Civil Law], Vol. 4, Tehran: Ketābforūshī-ye eslāmiyye, 2005, p. 442. Modern authors are not unanimous about this interpretation, see Jamal J.A. Nasir, *The Islamic Law of Personal Status*, Leiden: Brill, 3rd ed. 2009, p. 83: 'It [the dower] has not been enjoined as a consideration like a price or a wage'; similarly Emāmī, *Hoqūq-e madanī*, p. 442, and Chafik Chehata, *Droit musulman – Applications au Proche-Orient*, Paris: Dalloz, 1970, pp. 80-81; but see also Colin Imber, 'Women, Marriage, and Property: Mahr in the Behcetü'l-Fetāvā of Yenîşehirlî Abdullah' in: M.C. Zilfi (ed.), *Women in the Ottoman Empire – Middle Eastern Women in the Early Modern Era*, Leiden: Brill, 1997, p. 88: 'By the payment of mahr the husband acquires ownership of his wife's sexual parts'.
- 15 See I.G Cologne, decision of 27 October 1980, in: Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1980*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1982, case No. 83, pp. 248-249, and more recently, OLG Hamburg, decision of 21 May 2003, *Zeitschrift für das gesamte Familienrecht*, 2004, pp. 459-461, basing its views mainly on a book by anthropologist Shahla Haeri, *Law of Desire – Temporary Marriage in Shi'i Iran*, Syracuse: Syracuse University Press, 1989.
- 16 Emāmī, *Hoqūq-e madanī*, p. 459; Nāser Kātūziyān, *Hoqūq-e madanī: khānevāde* [Civil Law: Family Law], Vol. 1, Tehran: Enteshārāt-e bahman bornā, 1999, side note 84; Linant de Bellefonds, *Traité*, p. 24, with an overview of the sources of the Sunni schools of law.
- 17 Hilmar Krüger, 'Vermögensrechtliches Privatrecht und Shari'a am Beispiel der Vereinigten Arabischen Emirate', *Zeitschrift für Vergleichende Rechtswissenschaft*, 1998 (Vol. 97), p. 366; Yvon Linant de Bellefonds, 'L'autonomie de la volonté en droit musulman', *Revue algérienne, tunisienne et marocaine de légis-*

- lation et de jurisprudence, 1958 (Vol. 74), p. 88; Chafik Chehata, 'Le contrat en droit musulman', *Zeitschrift für vergleichende Rechtswissenschaft*, 1968 (Vol. 70), p. 81; M. Abdel-Gawad, 'L'autonomie de la volonté en droit musulman', *L'Égypte contemporaine*, 1963 (No. 54), p. 105; M. E. Hamid, 'Islamic Law of Contract or Contracts?' *Journal of Islamic and Comparative Law*, 1969 (Vol. 3), p. 1; for a deferring opinion, see Hassan Amin, *Remedies for Breach of Contract in Islamic and Iranian Law*, Glasgow: Royston, 1984, p. 11.
- 18 Susan Rayner, *The Theory of Contracts in Islamic Law*, London: Graham & Trotman, 1991, pp. 87-88; 'Abd El-Wahab Ahmed El-Hassan, 'Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law', *Arab Law Quarterly*, 1985-1986 (Vol. 1, No. 1), p. 51; Noel J. Coulson, *Commercial Law in the Gulf States – The Islamic Legal Tradition*, London: Graham & Trotman, 1984, p. 27; Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law*, London: Graham & Trotman, 2nd ed. 1992, p. 63. The Ottoman Civil Code, the *majallat alahkām al-ʿadliya*, which contains 1851 articles, dedicated over 300 articles to the contract of sale (Articles 101-403).
 - 19 Cf. also Linant de Bellefonds, *Traité*, p. 200, who calls this hypothesis 'fondamentalement fausse'.
 - 20 Bousquet, *L'Éthique*, p. 109.
 - 21 Based on the Qur'an sura 2, verse 237, and reflected for example in Article 1092 of the Iranian Civil Code (CC).
 - 22 Linant de Bellefonds, *Traité*, p. 226.
 - 23 See also Article 1085 Iranian CC.
 - 24 See on this issue in detail Mohammad Javād Maghniye, *Ahvāle shakhsiye – tarjome va tabyīn-e jozʿ-e dovom-e al-fiqh ʿalā al-madhāhib al-khamsa* [Personal Status in the Five Islamic Schools of Law], trans. M. Jabbāri and H.M. Sarāʿi, Tehran: Enteshārāt-e qaqnūs, 2000, pp. 77-78; Kātūziyān, *Hoqūq-e madani*, side note 95, see on this point also Nadjma Yassari, 'Zwei Bemerkungen zur islamischen Brautgabe', *Das Standesamt*, 2009, p. 367.
 - 25 See the hadith to this end in Abu 'Abdullah Malik ibn Anas, *Al-Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law*, trans. A. A. Bewley, London: Kegan Paul International, 1989, hadith No. 11, 28.3, pp. 210-211.
 - 26 Mona Siddiqui, 'Mahr: Legal Obligation or Rightful Demand?' *Journal of Islamic Studies*, 1995 (Vol. 6, No. 1), p. 17; Werner Diem, *Ein arabisches Rechtsgutachten zum Eherecht aus dem 11.-12. Jahrhundert*, Wiesbaden: Harrassowitz, 2007, p. 29, footnote 36; similarly Nawel Gafsia, *L'invention coloniale du mariage musulman – Le cas tunisien*, Paris: L.G.D.J., 2008, p. 48.
 - 27 Eighty percent of divorces in Iran are petitioned by women on the basis of *khulʿ*, Hasan Hamidiyān, 'Farāz va neshībā-ye mehriye be nerkh-e rüz' [The Dower Adapted to the Daily Exchange Rate], in: Hasan Hamidiyān (ed.), *Majmūʿe-ye maqālāt-e hoqūq-e khānevāde*, Tehran: Hāmūn, 2008, p. 211.
 - 28 Nāzanin Shāhroknī, 'Darbāre-ye tasvīb-e t-arh-e mohāsebe-ye mehriye be nerkh-e rüz' [On the Calculation of the Dower], *Zanān* 1997-98 (No. 33), p. 64.
 - 29 *Official Gazette*, 1997 (No. 15278); Executory Decree of Article 1082 Iranian CC, *Official Gazette*, 1998 (No. 15497).
 - 30 Decree No. 127/1999 of 24 July 1999, *Official Gazette*, 1999 (No. 3785), p. 462.

- 31 Lynn Welchman, *Women and Muslim Family Laws in Arab States – A Comparative Overview of Textual Development and Advocacy*, Amsterdam: Amsterdam University Press, 2007, p. 91.
- 32 Law No. 21/1997, *Official Gazette*, 1997 (No. 312); see also Hilmar Krüger, 'Das Recht der Eheschließung in den Vereinigten Arabischen Emiraten', *Das Standesamt*, 1999, p. 67.
- 33 *Official Gazette*, 2005 (No. 439), pp. 119-478.
- 34 Federal Law on the Personal Status, Law No. 28/2005, *Official Gazette*, 2005 (No. 439), pp. 9-118; see Hilmar Krüger, 'Grundzüge des Privatrechts der Vereinigten Arabischen Emirate' in: H.-G. Ebert and Th. Hanstein (eds.), *Beiträge zum islamischen Recht*, Vol. 6, Frankfurt on the Main: Lang, 2007, pp. 121-134.
- 35 *Official Gazette*, 2005 (No. 439), pp. 179 et seq.
- 36 This view has also been acknowledged by German courts, see most recently BGH, decision of 9 December 2009, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 2010 (Vol. 183), pp. 287-299.
- 37 The cases in the lower courts are much more numerous, for a concise account of these cases, see Christina Jones-Pauly, 'Marriage contracts of Muslims in the diaspora: Problems in the recognition of mahr contracts in German Law' in: A. Quraishi and F.E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, Cambridge: Harvard University Press, 2008, pp. 299-330.
- 38 BGH, decision of 28 January 1987, *Zeitschrift für das gesamte Familienrecht*, 1987, pp. 463-464.
- 39 District Court (hereinafter: AG) of Memmingen, decision of 12 December 1984, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1985, pp. 230-231.
- 40 OLG Munich, decision of 26 November 1985, in: Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1985*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1987, case No. 67, pp. 177-183.
- 41 BGH, decision of 14 October 1998, *Zeitschrift für das gesamte Familienrecht*, 1999, pp. 217-218.
- 42 AG Obernburg, decision of 30 August 1996, reference No. F 224/96 (unpublished).
- 43 OLG Bamberg, decision of 13 February 1997, reference No. 2 UF 257/96 (unpublished).
- 44 BGH, decision of 9 December 2009, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 2010 (Vol. 183), pp. 287-299.
- 45 For a detailed analysis of this judgement, see Nadjma Yassari, 'Die islamische Brautgabe im deutschen Kollisions- und Sachrecht. Anmerkung zu BGH, 9.12.2009 – XII ZR 107/08', *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, pp. 63-68.
- 46 AG Hamburg-Barmbek, decision of 16 November 2006, reference No. 891 F 21/06 (unpublished).
- 47 OLG Hamburg, decision of 29 May 2008, reference No. 10 UF 83/06 (unpublished).

- 48 For a criticism of this approach, see Yassari, 'Zwei Bemerkungen', 2009, pp. 370-371.
- 49 See I.G. Cologne, decision of 27 October 1980, in Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1980*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1982, case No. 83, p. 248-249. This judgement was overturned in appeal, OLG Cologne, decision of 29 October 1981, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1983, pp. 73-74.
- 50 In Germany, civil marriage is obligatory (Article 1310 I German Civil Code (BGB)).
- 51 Article 1585c BGB. Since 1 January 2008, the provisions of Article 1585c BGB have been amended insofar as agreements on post-marital maintenance are subject to formal requirements and must be certificated by a notary, see Article 1585c BGB new version of 21 December 2007, *Federal Official Gazette* 1, p. 3189. The validity of the *mahr* agreement would then depend on the fulfilment of this formality.
- 52 This interpretation was chosen for example by the Court of First Instance (hereinafter: KG) Berlin, decision of 12 November 1979, *Zeitschrift für das gesamte Familienrecht*, 1980, pp. 470-471; AG Memmingen, decision of 11 January 1984, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1984, p. 219; AG Memmingen, decision of 12 December 1984, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1985, pp. 230-231; KG Berlin, decision of 11 September 1987, *Zeitschrift für das gesamte Familienrecht*, 1988, p. 296; OLG Frankfurt, decision of 26 May 1989, *Streit*, 1989, pp. 110-111; AG Kerpen, decision of 29 January 1999, *Zeitschrift für das gesamte Familienrecht*, 1999, pp. 1429-1430; AG Aachen, decision of 7 February 2000, in: Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 2000*, Tübingen: J.C.B. Mohr (Paul Siebeck), 2002, case No. 67, pp. 140-142; AG Fürth, decision of 10 April 2002, *Familie, Partnerschaft, Recht*, 2002, pp. 450-451; OLG Saarbrücken, decision of 9 March 2005, *Neue Juristische Wochenschrift – Rechtsprechungs-Report*, 2005, pp. 1306-1308; on this issue see also Wolfgang Wurmnest, 'Die Brautgabe im Bürgerlichen Recht', *Zeitschrift für das gesamte Familienrecht*, 2005, p. 1880.
- 53 Article 1579 BGB.
- 54 Article 1581 BGB.
- 55 Article 1577 BGB.
- 56 Wurmnest, 'Die Brautgabe', 2005, p. 1880.
- 57 OLG Hamm, decision of 30 June 1981, *Zeitschrift für das gesamte Familienrecht*, 1981, pp. 875-877.
- 58 Articles 1408, 1410, 1558 BGB.
- 59 There are generally no common goods. However, in order to secure the common household and the material existence of the family, a spouse can only dispose of household objects and the whole of his or her assets with the consent of the other (Articles 1365-1369 BGB). Most married couples live under the statutory matrimonial property regime.
- 60 Article 1378 BGB.

- 61 On matrimonial property law in Islamic countries, see Sami A. Aldeeb Abu-Sahlieh, 'Les régimes matrimoniaux en droit arabe et musulman' in: A. Bonomi and M. Steiner (eds.), *Les régimes matrimoniaux en droit comparé et en droit international privé*, Genf: Droz, 2006, pp. 279-305.
- 62 This interpretation was chosen for example by OLG Bremen, decision of 9 August 1979, *Zeitschrift für das gesamte Familienrecht*, 1980, pp. 606-607; OLG Cologne, decision of 29 October 1981, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1983, pp. 73-74; OLG Munich, decision of 26 November 1985, in: Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1985*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1987, case No. 67, pp. 177-183.
- 63 In this sense also OLG Stuttgart, decision of 29 January 2008, *Zeitschrift für das gesamte Familienrecht*, 2008, pp. 1756-1758.
- 64 For a detailed analysis of this issue, see Yassari, 'Die islamische Brautgabe', 2009, p. 67.
- 65 On freedom of contract in German family law, see Sibylle Hofer, Dieter Schwab, and Dieter Henrich (eds.), *From Status to Contract? Die Bedeutung des Vertrages im europäischen Familienrecht*, Bielefeld: Giesecking, 2005; Meo-Micaela Hahne, 'Vertragsfreiheit im Familienrecht' in: Dieter Schwab and Meo-Micaela Hahne (eds.), *Familienrecht im Brennpunkt*, Bielefeld: Giesecking, 2004, pp. 181-202.
- 66 On the dangers of multiculturalism for women, see Susan Moller Okin, 'Is Multiculturalism bad for women?' in: Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (eds.), *Is Multiculturalism bad for women/Susan Moller Okin with Respondents*, Princeton: Princeton University Press, 1999, pp. 8-24, who argues that the multiculturalist accommodation and the consideration of cultural elements from minority groups can be disadvantageous for the individual.
- 67 In a case in the early 1980s, the Court of First Instance held that an agreement on a *mahr* was not enforceable under German law, as its function of safeguarding the wife financially was perfectly fulfilled by the instruments of German family law, LG Cologne, decision of 27 October 1980, in: Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1980*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1982, case No. 83, pp. 248-249.

