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BORDERS AND CROSSROADS: COMPARATIVE PERSPECTIVES ON MINORITIES AND CONFLICT OF LAWS

*Pascale Fournier**

INTRODUCTION

Millions of immigrants from Muslim countries have entered Western borders in the past decades, bringing with them specific religious traditions and social mores. In accordance with the conflict of laws¹ rules of many continental European legal systems, such as France and Germany, the courts of the host country apply the law of the parties' nationality (*lex patriae*) in matters relating to marriage and divorce. Under such regimes, Muslim parties involved in family law disputes may be subject to the law of their country of origin. This makes for striking results when applied to individuals who may have lived in a Western European country for decades but have not taken on the citizenship of that country, whether by choice or impossibility. Furthermore, it may generate questionable outcomes for immigrants who have chosen to leave their countries of origin specifically to avoid being judged against conservative interpretations of Islamic law.

In contrast, common law jurisdictions, such as Canada, apply the law of domicile (*lex domicilii*) in matters of personal status, regardless of the parties' nationality. This is often touted as a principled alternative to *lex patriae* continental solutions, as it allows newcomers and immigrants to benefit from Western legal systems' guarantees of gender equality.² The application of *lex patriae* is often denounced as hampering liberal divorce policies.³ Moreover, some scholars describe the *lex domicilii* model as more mindful of actual ties

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¹ Throughout this Essay, I refer to rules of conflict of laws, international private law, and private international law, formulations used in Canada, Germany, and France respectively.

² See Veronika Gaertner, *European Choice of Law Rules in Divorce (Rome III): An Examination of the Possible Connecting Factors in Divorce Matters Against the Background of Private International Law Developments*, 2 J. PRIVATE INT'L L. 99, 122 (2006).

³ FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 220 (Special ed. 2005).

between the litigants and the legal system applied,⁴ more respectful of the parties' will,⁵ and more efficient in terms of social integration mechanisms.⁶ Finally, this solution allows women to fare better or at least more predictably than in systems that apply the law of citizenship.⁷ To explore these propositions, the experiences of Muslim women navigating the process of Islamic marriage and divorce in Canada are presented, with a particular focus on the Islamic dower (*Mahr*) and the repudiation (*Talaq*) divorce. I review the academic literature and the case law, and present the experiences of divorced Muslim women in Canada whom I interviewed over the course of my fieldwork in three Canadian cities.⁸ At times, I bring these perspectives together in the person of "Leila," a fictional Muslim woman divorcing her husband, "Samir," to portray how these legal rules might play out.

I start with an overview of Islamic law pertaining to marriage and divorce, before presenting brief French and German case studies, which underline the absurdities created by the continental model of conflict of laws, in light of both countries' immigration policies. Subsequently, I examine whether the Canadian designation of the *lex domicilii* really does lead to more predictable and just results for Muslim women. In doing so, I try to outline how the institutions of Muslim marriage and divorce can be articulated in contractual terms, emphasizing that regardless of the legal traditions and laws applicable—that is, the "law in books"—individual agency and power bargains sometimes modify the expected results into the "law in action," blurring the lines between Western legal systems and Islamic institutions and norms. I argue that formal designation of Western law as the sole governing legal system, in the face of mass legal transplantation, may at times be rendered essentially meaningless.

⁴ BERNARD SCHNEIDER, *LE DOMICILE INTERNATIONAL* [THE INTERNATIONAL DOMICILE] 35–36 (1973) (Switz.); Thalia Kruger, *The Family: A State of the Art* 5 (RELIGARE, Working Paper No. 2, 2010), available at http://www.religareproject.eu/system/files/WP3_State_of_the_art_on_The_Family_e-version_0.pdf.

⁵ PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA 120 (Nicholas Rafferty et al. eds., 2d ed. 2003); Friedrich K. Juenger, *Marital Property and the Conflict of Laws: A Tale of Two [Countries]*, 81 COLUM. L. REV. 1061, 1071–72 (1981).

⁶ Leslie K. Thiele, *The German Marital Property System: Conflict of Laws in Dual-Nationality Marriage*, 12 CAL. W. INT'L L.J. 78, 105 (1982).

⁷ See Michael Bogdan & Eva Ryrstedt, *Marriage in Swedish Family Law and Swedish Conflicts of Law*, 29 FAM. L.Q. 675, 680–81 (1995). The law of *lex domicilii* is argued to be safer for women than *lex patriae*, which can lead to multiple applicable legal systems. See *id.*

⁸ See *infra* note 82 and accompanying text.

I. THE STARTING POINT: ISLAMIC FAMILY LAW

Let us consider for a moment the Islamic legal institutions as they stand before their travel to Western courts.⁹ Under Islamic law, marriage establishes a reciprocity system in which each party is assigned a set of contractual rights, each of which will confer a duty toward the other party. An Islamic marriage contract can only be concluded through the principles of offer (*ijab*) and acceptance (*qabul*) by the two principals or their proxies.¹⁰ Upon marriage, the husband acquires the right to the wife's obedience to him and the right to her sexual availability.¹¹ The wife acquires the right to her *Mahr*¹² and the right to maintenance.¹³ *Mahr* is the expression used in Islamic family law to describe the "payment that the wife is entitled to receive from the husband in consideration of the marriage."¹⁴

The three types of Islamic divorce, *Talaq*, *Khul*, and *Faskh*, determine the degree to which each party may initiate divorce and the different costs associated with such transaction. According to classical Islamic family law, women can initiate the *Khul* or *Faskh* divorces, but may not use the *Talaq*. The *Khul* divorce is introduced judicially and usually involves the return of the *Mahr* to the husband.¹⁵ The *Faskh* divorce is a fault-based divorce initiated by the wife before the court, and it is by nature limited to specific grounds.¹⁶ In the case of termination of marriage by *Faskh* divorce, the wife is entitled to *Mahr*.¹⁷ The *Talaq* divorce is a unilateral act, which dissolves the marriage contract through the declaration of the husband only. The law recognizes the power of the husband to divorce his wife by saying "*Talaq*" three times without any need for him to ask for the enforcement of his declaration by the

⁹ In past work, I emphasized that Islamic law institutions such as *Mahr* bear no uniformity in Islamic legal systems. See, e.g., PASCALE FOURNIER, MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION (2010). Indeed, I present here the classical form of Islamic divorce, but Sharia law has developed in the widely diverging contexts of forty-seven Muslim majority countries. Thus, one must bear in mind that the very place of departure of *Mahr* is inherently plural. *Id.* at 29.

¹⁰ See JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 45 (3d ed. 2002).

¹¹ See *id.* at 98.

¹² MUHAMMAD JAWAD MAGHNIYYAH, THE FIVE SCHOOLS OF ISLAMIC LAW: AL-HANAFI, AL-HANBALI, AL-JA'FARI, AL-MALIKI, AL-SHAFI'I 311–12 (2003).

¹³ NASIR, *supra* note 10, at 98.

¹⁴ JOHN L. ESPOSITO WITH NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 23 (2d ed. 2001). *Mahr* is generally payable in part upon marriage (prompt *Mahr*), with the rest due upon divorce (deferred *Mahr*). See also WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 277 (2009).

¹⁵ DAWOUD EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 27–28 (1996).

¹⁶ *Id.* at 29–31.

¹⁷ *Id.* at 32.

court.¹⁸ What comes with this unlimited “freedom” of the husband to divorce at will is the (costly) obligation to pay *Mahr* in full as soon as the third *Talaq* has been pronounced.¹⁹

II. *LEX PATRIAE* AND CONTINENTAL PARADOXES

Islamic legal institutions regularly travel to Western countries through conflict of laws rules, for example when the foreign law of Islamic countries is designated as applicable to a legal dispute. This Part explores how France and Germany continue to apply the law of the individual’s citizenship, all the while pursuing respectively assimilationist- and *jus sanguinis*-inspired immigration policies. I end this Part by presenting a fictional script of “Leila,” a Muslim woman going through a divorce in Germany, to ponder the impacts of the continental European model.

A. *FRANCE: The République and Its Ordre Public*

In matters of family law and in relation to disputes over the status and capacity of persons, French courts must apply the laws of a foreigner’s country of citizenship. This regime stems from French private international law rules²⁰ and bilateral agreements concluded with various countries.²¹ This is only true insofar as applying the foreign legal system does not contravene French *ordre public*,²² but the onus for proving this infringement is considerably heavy.²³

¹⁸ *Id.* at 22–23.

¹⁹ JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 167 (1982); *see also* N.J. COULSON, A HISTORY OF ISLAMIC LAW 207–08 (1964); JUDITH E. TUCKER, WOMEN IN NINETEENTH-CENTURY EGYPT 54 (1985).

²⁰ I GÉRALD GOLDSTEIN & ÉTHEL GROFFIER, DROIT INTERNATIONAL PRIVÉ: THÉORIE GÉNÉRALE [PRIVATE INTERNATIONAL LAW: GENERAL THEORY] 67–68 (1998) (Can.); Ali Mezghani, *Le juge français et les institutions du droit musulman* [*The French Judge and the Institutions of Islamic Law*], 130 JOURNAL DU DROIT INTERNATIONAL [J. INT’L L.] 721, 733 (2003) (Fr.).

²¹ *See, e.g.*, Convention entre la République Française et le Royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire, May 27, 1983, Fr.-Morocco, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 1, 1983, p. 1643.

²² This can be roughly translated to “public policy” and refers to the fundamental principles of a given legal system. *See generally* Rémy Libchaber, *L’exception d’ordre public en droit international privé* [*The Exception of Ordre Public in Private International Law*], in L’ORDRE PUBLIC À LA FIN DU XX^E SIÈCLE [L’ORDRE PUBLIC AT THE END OF THE TWENTIETH CENTURY] 65 (Thierry Revet ed., 1996) (discussing generally the exception to *ordre public* in French private international law).

²³ Under French law, the threshold to render foreign law inapplicable is higher than the threshold to render domestic law unconscionable. YVON LOUSSOUARN ET AL., DROIT INTERNATIONAL PRIVÉ [PRIVATE INTERNATIONAL LAW] 359–60 (9th ed. 2007) (Fr.).

These rules must be analyzed in light of France's immigration policy and cultural context, specifically with respect to French neorepublican discourse and policies, according to which membership in the national community requires an absolute commitment to the Republic and to the core values of equality (*égalité*) and the separation of state and religion (*laïcité*).²⁴ This radical republican model highly discourages the formation of "communities" of immigrants.²⁵ Indeed, France does not allow the state to officially support any exemption or special representation for immigrant or national minorities. This opposition to religious and cultural difference is so strong that France formulated a reservation with respect to the right to cultural, religious, and linguistic autonomy protected by Article 27 of the International Covenant on Civil and Political Rights.²⁶ It is through this ideological prism that France manages one of the most numerically significant Muslim minorities in Western Europe. As a result, taking up the French nationality may very well be unappealing or difficult for newcomers and indeed, it is estimated that only half of the five million Muslims living in France have obtained French nationality.²⁷ Hence, faced with matters of private law involving Muslims who are living in France under the citizenship of a Muslim state, French judges have had to apply various Islamic legal institutions.

B. GERMANY: *The Plight of the Ausländer*

Let us now consider the German model, which displays some glaring similarities with France. Stipulations of both German international private

²⁴ Michael F. Leruth, *The Neorepublican Discourse on French National Identity*, FR. POL. & SOC'Y, Fall 1998, at 46, 49.

²⁵ William Safran, *State, Nation, National Identity, and Citizenship: France As a Test Case*, 12 INT'L POL. SCI. REV. 219, 221 (1991).

²⁶ *International Covenant on Civil and Political Rights*, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, ch. IV, § 4, p. 6, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

²⁷ JONATHAN LAURENCE & JUSTIN VAISSE, INTEGRATING ISLAM: POLITICAL AND RELIGIOUS CHALLENGES IN CONTEMPORARY FRANCE 1 (2006). In 2005, the Muslim population of France was estimated at five million. Mayanthi L. Fernando, *Reconfiguring Freedom: Muslim Piety and the Limits of Secular Law and Public Discourse in France*, 37 AM. ETHNOLOGIST 19, 21 (2010); *Muslims in Europe: Country Guide*, BBC, <http://news.bbc.co.uk/2/hi/europe/4385768.stm#france> (last updated Dec. 23, 2005). Estimates vary, but studies show that the numbers could be as high as six million, making France the Western European country with one of the highest proportions of Muslims. See FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 21 n.7 (2009), available at http://pewforum.org/uploadedfiles/Orphan_Migrated_Content/Muslimpopulation.pdf.

law²⁸ and bilateral agreements²⁹ provide that it is not the law of domicile but rather the law of the parties' citizenship that is applicable in matters of family law. Here again, this general principle is subject to German "public policy."³⁰

These international private law rules must be considered with reference to Germany's immigration policy, which contributes significantly to the impacts the laws have on Muslim immigrants. Indeed, Germany has historically characterized itself as a nation based on common-blood descent that resists the integration of culturally different individuals and groups.³¹ The *Volk*-centered idea of German nationhood is based on the principle of citizenship by blood (*jus sanguinis*) and emphasizes the significance of ancestry. Accordingly, until 1999, a citizenship applicant had to provide evidence of at least one German ancestor to receive German citizenship, making it almost impossible for many foreigners (*ausländer*) to become citizens.³² In addition to struggling to obtain individual citizenship, German Muslims, not unlike their French counterparts, are denied collective recognition, having tried and failed to obtain the legal status of "public law corporation" for their religious communities since the early 1970s.³³ In this social context, immigrants are often discouraged, if not

²⁸ See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, BUNDESGESETZBLATT, Teil 1 [BGBL. I] p. 2494, ch. 2, § 3, arts. 13–14 (Ger.); GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 306 (Michael Jewell trans., 4th ed. 2006); Mathias Rohe, *On the Applicability of Islamic Rules in Germany and Europe*, 3 EUR. Y.B. MINORITY ISSUES 181, 184 (2003–2004).

²⁹ For instance, Iran and Germany have ratified a treaty that ensures the application of Iranian personal status law for Iranian citizens in Germany and vice versa for German citizens residing in Iran. See *Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien* [Settlement Agreement Between the German Reich and the Empire of Persia], Feb. 17, 1929, *reprinted in* BGBL. I at 829 (Ger.).

³⁰ The application of foreign law runs contrary to public policy when its application has effects that "[are] obviously incompatible with, for example, the main principles of German law." Rohe, *supra* note 28, at 185. This notion includes human rights enshrined in the Basic Law for the Federal Republic of Germany. See GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDESETZ] [GG] [BASIC LAW], May 23, 1949 BGBL. I at art. 3 (Ger.).

³¹ See ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 82 (1992).

³² Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 15, 1999, BGBL. III at 102, § 40a (Ger.); *see also* GG at art 116. Germany's citizenship policy has thus been described as "one of the most restrictive in the EU." Simon Green, *Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany*, 39 INT'L MIGRATION REV. 921, 922 (2005). Even with the 1993 and 1999 amendments to Germany's Nationality Act, which made possible the process of naturalization on the basis of long-term residency or of birth in Germany, German law maintains great hostility towards double citizenship, and imposes stricter conditions than most European countries on the legal status of the parents of the children applying for German citizenship. Marc Morjé Howard, *The Causes and Consequences of Germany's New Citizenship Law*, 17 GER. POL. 41, 53 (2008).

³³ Mathias Rohe, *The Legal Treatment of Muslims in Germany*, in THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE 83, 87 (Roberta Aluffi B.-P. & Giovanna Zincone eds., 2004). The "public law corporation" constitutional status provides entitlements such as the right to levy taxes from members of the

precluded, from acquiring German citizenship, making the application of the law of their countries of nationality almost inevitable. Moreover, as Dr. Christina Jones-Pauly suggests, because many residents “are not aware of the rule that their own foreign law applies to [them as] foreigners, it can come as a rude shock for some when they have marital disputes.”³⁴

In a past article,³⁵ I depicted the fictional couple of “Samir” and “Leila,” gathering inspiration from case law, novels, and my personal encounters to illustrate how Muslim parties play out the contradictions in the adjudication of *Mahr* and strategize upon them. I now allude to one of these fictional characters to illustrate possible impacts of continental European conflict of laws.

*C. Leila, the German-Iranian “Foreign Bride”*³⁶

Leila has been married to Samir for fifteen years. Although of Iranian origin and citizenship, she lives in Kreuzberg, a Turkish Muslim section of Berlin. She rarely goes out or makes contact with her German neighbors. When she does go out, she is more hesitant than her sons and her husband. At home, men often gather to talk about politics, the war in Afghanistan, the disastrous state of Iraq, and the integration of Turkey into the European Union, while women cook, assist, and clean—mute shadows, outsiders. In recent years, Leila has been exposed to the new wave of feminist critiques coming from German women of Muslim background, such as Seyran Ateş’ *Great Journey Into Fire*³⁷ and Necla Kelek’s *The Foreign Bride*.³⁸ In their works,

community and to organize a parish, among others. *Id.*; see also Pascale Fournier & Jens Pierre Urban, *La régulation des morts par le droit allemand: L’au-delà comporte-t-il des privilégiés?* [*The Regulation of the Dead by German Law: The Beyond Has Privileges?*], in LES CARRÉS DE L’ISLAM EN EUROPE [THE SQUARE OF ISLAM IN EUROPE] 13 (Atmane Aggoun ed., 2010) (discussing the possibility of German Muslim communities managing their own funeral rites and cemeteries and the resulting discursive and subjective implications).

³⁴ Christina Jones-Pauly, *Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law*, in THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 299, 300 (Asifa Quaraishi & Frank E. Vogel eds., 2008).

³⁵ Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 INT’L J.L. POL’Y & FAM. 1 (2010) [hereinafter Fournier, *Flirting with God*]. A French translation of the article has appeared as *Courtiser Dieu devant les tribunaux occidentaux*, 25 CAN. J.L. & SOC’Y 167 (2010).

³⁶ This script is partly based on a 1980 German decision from the Higher Regional Court of Bremen and the autobiography of Necla Kelek. See NECLA KELEK, DIE FREMDE BRAUT: EIN BERICHT AUS DEM INNEREN DES TÜRKISCHEN LEBENS IN DEUTSCHLAND [THE FOREIGN BRIDE: A REPORT FROM THE INNER LIFE OF TURKISH IN GERMANY] (2005) (Ger.).

³⁷ SEYRAN ATEŞ, GROÖE REISE INS FEUER: DIE GESCHICHTE EINER DEUTSCHEN TÜRKIN [GREAT JOURNEY INTO FIRE: THE STORY OF A GERMAN TURK] (2008) (Ger.).

both authors address the everyday violence of arranged marriages as well as the oppressive and sexist behavior of Muslim men in Germany. Leila was powerfully seduced by their critique and the promising and asserting voice they developed. She saw herself as the “Foreign Bride,” this young Muslim woman imported to Germany as a bride, who lead a fully insular and subservient life as a wife and a mother. This book represented an ultimatum for Leila: she would either embrace women’s rights (and other Western, German conceptions of freedom) or remain forever a “foreign bride” whose equality is constantly jeopardized. Leila opted for the former. She left Samir, her sons, her home—with perfect irresponsibility.³⁹

Faced with the impossibility of surviving with very limited economic resources, Leila reached the courthouse, confident that alimony and division-of-property laws in Germany would guarantee her generous benefits. How wrong were her predictions! Leila soon realized that, as a non-German citizen, Iranian Islamic law would apply to her case! Under Iranian Islamic law, she had no claim to post-divorce alimony or to a share of the matrimonial property; the court held that *Mahr* constituted a substitute for post-divorce maintenance and division of the surplus of marital profits. Furthermore, because Leila was the one seeking the divorce, the court held that she had given up her right to deferred *Mahr* and was obligated to pay back the “prompt *Mahr*” she had been given at her wedding. Leila felt trapped in a complex and seemingly incomprehensible reality. Would Leila have divorced Samir had she known that she would obtain *Mahr* and only *Mahr* upon divorce? Was Leila fooled into thinking that she, too, could embrace German conceptions of freedom, as the book so delightfully suggested? Is Leila forever condemned, by virtue of the application of international private law rules in Germany, to represent the tragic “Foreign Bride” that she so desperately hoped to escape?

For some, these continental applications of the *lex patriae* are inevitably hurtful to women.⁴⁰ Indeed, save discharging the heavy onus of demonstrating

³⁸ KELEK, *supra* note 36. In her book, Kelek strongly criticizes both the “fundamentalist Muslim society” for perpetuating a culture of female slavery and the liberal German society, which in her opinion has adopted a hands-off approach based on tolerance. *See id.*

³⁹ I borrow this expression from Ralph Ellison’s *Invisible Man*, in which he argues that irresponsibility is, for subordinated groups, a consequence of their invisibility. RALPH ELLISON, *INVISIBLE MAN* (1952).

⁴⁰ I have composed a series of fictional scripts of “Leilas” from Germany, France, Canada, and the United States to illustrate that enforcement (and non-enforcement) of *Mahr* can be at times disempowering and at others empowering to Muslim women. One of my scripts was based on a French case and envisioned Leila using the French *ordre public* exception to her advantage. Fournier, *Flirting with God*, *supra* note 35, at 90; *see also* Cour d’appel [CA] [regional court of appeal] Douai, 1e civ., Apr. 4, 1978, Bull. civ. I, No. 137, 110

that “public policy” is contravened, women may well be “abandoned” by Western states to conservative interpretations of Islamic law, through the combined operation of harsh immigration policies in France and Germany and the strict application of the *lex patriae* principle. Are immigrants who are willing to integrate into Western notions of the family prevented from doing so? Given that domicile, unlike nationality, does not depend on the approval of the state and can be established by the mere will of the parties,⁴¹ be they foreigners or nationals,⁴² should it not be systematically preferred to the *lex patriae*, as a principled humanitarian alternative? I now turn to the Canadian example to explore this proposition.

III. *LEX DOMICILII* AND THE CANADIAN ENTANGLEMENT

By virtue of Canadian conflict of laws rules, the principle of *lex domicilii* governs the validity and the effects of marriages.⁴³ Moreover, for the core issues of the enactment of divorce and its possible grounds, over which the Parliament has jurisdiction, Canadian choice of law rules go as far as making the principle of *lex fori* (federal Canadian law) systematically applicable, regardless of domicile and citizenship.⁴⁴ This apparently rigid and predictable system leads to puzzling results; at times, Canadian judges used “the secular”

(Fr.). The present Essay similarly addresses the plural and contradictory outcomes legal migrations can produce.

⁴¹ I JANET WALKER & JEAN-GABRIEL CASTEL, CANADIAN CONFLICT OF LAWS § 4.7, at 4–5 (6th ed. 2011).

⁴² PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA, *supra* note 5, at 133.

⁴³ *See id.* at 119. In asserting jurisdiction over these aspects of marriage, the various provinces render their legislative regimes applicable to immigrants as soon as they acquire domicile in the province. Even Quebec, which applies civil law and in which private international law has strong continental inclinations, applies the principle of *lex domicilii* to matters of personal status and the effects of marriage. Civil Code of Québec, S.Q. 1991, c. 64, arts. 3083, 3088, 3089 (Can.). Quebec courts apply the principle of *lex patriae* only in extremely rare instances. *See* CLAUDE EMANUELLI, DROIT INTERNATIONAL PRIVÉ QUÉBÉCOIS [QUEBEC PRIVATE INTERNATIONAL LAW] 59 (2d ed. 2006) (Can.). Article 3123 of the Civil Code of Québec applies to the spouses’ matrimonial property the law of the “domicile at the time of their marriage,” a connecting factor that seems inspired by the *lex patriae* solution and may amount to the same result in the case of Muslim immigrants. Civil Code of Québec, art. 3123. That being said, there are strong indications from the Québec Court of Appeal that this provision addresses an insignificant part of Quebec matrimonial property: “matrimonial regime[s]” covered by Articles 431 through 447 of the Civil Code, and not the “family patrimony” regime of Articles 414 through 426. *See* H.O. c. C.B., 2001 CarswellQue 2770, paras. 57–59 (Can. Que. C.A.) (WL); G.B. c. C.C., [2001] R.J.Q. 1435 (Can. Que. C.A.). Thus, most of matrimonial property would be governed by the principle of *lex domicilii* as per Article 3089 of the Civil Code. Civil Code of Québec, art. 3089.

⁴⁴ J.G. Castel, *Canadian Private International Law Rules Relating to Domestic Relations*, 5 MCGILL L.J. 1, 15 (1958–1959); EMANUELLI, *supra* note 43, at 292. This rule is argued to make for more judicial certainty. *See* PETER NORTH, PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS 68–70 (1993).

to render highly “religious” outcomes and invoked “the religious” to produce “secular” outcomes. Part III.A presents examples of judicial recognition and incorporation of Islamic law into divorces governed by Canadian law. Part III.B goes beyond the locus of the state to inquire into how the parties themselves perceive and respond to the interaction between secular and religious law. I aim to show that designating Canadian law as applicable does not necessarily make it impermeable to religious law.

A. *Canadian Judicial Incorporation of Islamic Law*

Islamic legal institutions regularly penetrate the Canadian legal system. This Subpart reviews Canadian case law which, while applying domestic law, has at times recognized and enforced *Mahr*, whether by virtue of its exceptional religious status or non-exceptional contractual status, and at other times refused to enforce *Mahr* precisely because of this religious character. I aim to demonstrate that in applying domestic law, Canadian courts offer neither purely secular adjudication nor constancy in their treatment of Islamic legal institutions.

In *Nathoo v. Nathoo*⁴⁵ and *N.M.M. v. N.S.M.*,⁴⁶ two cases of the British Columbia Supreme Court, *Mahr* is represented as the religious and cultural expression of the Muslim minority group, one that Canadian society must respect in the name of multiculturalism.⁴⁷ *Nathoo*'s Samir and Leila⁴⁸ were both raised in and live within the culture and traditions of the Muslim Ismaili community in Vancouver.⁴⁹ When this married couple divorced, both spouses claimed an order for divorce pursuant to Canada's federal Divorce Act⁵⁰ and a division of family assets arising from their marriage pursuant to the Province of British Columbia's Family Relations Act.⁵¹ Instead of considering the enforcement of *Mahr* as part of family assets, the court began the analysis of *Mahr* as a separate “marriage agreement” under Section 48 of the Family Relations Act.⁵² Expressing a clear commitment to legal pluralism and multiculturalism, Justice Dorgan introduced his interpretation of Section 48 of

⁴⁵ *Nathoo v. Nathoo*, 1996 CarswellBC 2769 (Can. B.C.) (WL).

⁴⁶ *N.M.M. v. N.S.M.*, [2004] 26 B.C.L.R. 4th 80 (Can. B.C.).

⁴⁷ *N.M.M.*, 26 B.C.L.R. 4th, paras. 26–32; *Nathoo*, 1996 CarswellBC 2769, para. 25.

⁴⁸ The names of the parties have been changed.

⁴⁹ *Nathoo*, 1996 CarswellBC 2769, para. 7.

⁵⁰ Divorce Act, R.S.C. 1985, c. L-3 (Can.).

⁵¹ Family Relations Act, R.S.B.C. 1996, c. 128 (Can.).

⁵² *Nathoo*, 1996 CarswellBC 2769, para. 23.

the Act as one that is “respectful of traditions which define various groups who live in a multi-cultural community.”⁵³ The voice of the Muslim community, it was expected, would give meaning to *Mahr* as a marriage agreement: Samir and Leila, who “[b]oth attend Mosque regularly and adhere to the tenets of their faith,”⁵⁴ agreed on the amount of the *Mahr*, said the court, “after taking advice from elders within their community.”⁵⁵ Having thus redefined the issue of *Mahr* as a unique and autonomous domain guided by sacred religious principles, Justice Dorgan granted Leila the *Mahr* originally agreed upon in addition to the awards resulting from the reapportionment of family assets.⁵⁶

If strictly Canadian family law applied, a “marriage agreement” would supplant the marital equitable regime; if solely Islamic family law had applied, Leila would get *Mahr* and nothing else, besides maintenance during the short *iddah* period.⁵⁷ To reach such an unusual outcome—the enforcement of *Mahr* plus the readjusted division of property under the statutory regime—the court had to frame the issue as a minority rights one: religion is an exceptional field, it generates its own conception of the good life, and fairness is only an extension of this particularized vision.⁵⁸ The court held that the same contractual principles that governed other secular contracts were not to govern Muslim marriage agreements, and that under such exceptional treatment the *Mahr* agreement in question would be valid.

Interestingly, four years later, in *Amlani v. Hirani*,⁵⁹ the British Columbia Supreme Court dissociated itself from *Nathoo* in reviewing *Mahr* as a secular contract. The court decided that in analyzing the validity of *Mahr*, it no longer should inquire into whether the terms of the marriage agreement reflected a religious intention.⁶⁰ It simply requires an offer and its acceptance, and does not involve the question of whether it is deemed essential or merely incidental to the (Islamic) marriage contract. In *Amlani*, the court described *Mahr* as a

⁵³ *Id.* para. 25.

⁵⁴ *Id.* para. 8.

⁵⁵ *Id.* para. 24.

⁵⁶ *Id.* para. 27. This conception of *Mahr* as an exceptional penalty and a valid marriage agreement distinct from the statutory division of family assets was similarly developed by the British Columbia Supreme Court. *N.M.M.*, 26 B.C.L.R. 4th, paras. 28–29.

⁵⁷ See M. AFZAL WANI, *THE ISLAMIC LAW ON MAINTENANCE OF WOMEN, CHILDREN PARENTS & OTHER RELATIVES: CLASSICAL PRINCIPLES AND MODERN LEGISLATIONS IN INDIA AND MUSLIM COUNTRIES* 195 (1995).

⁵⁸ See *Nathoo*, 1996 CarswellBC 2769, paras. 24–26.

⁵⁹ *Amlani v. Hirani*, [2000] 194 D.L.R. 4th 543 (Can. B.C.).

⁶⁰ *Id.* paras. 15–16.

simple contract rather than a cultural tradition.⁶¹ Nevertheless, it is enforceable and it influences the outcome of the adjudication over (secular) Canadian law.

By contrast, in *Kaddoura v. Hammoud*,⁶² the Ontario Court of Justice refused to recognize *Mahr* on the basis of the authenticity and purity of Islamic law. Consequently, the court failed to enforce it as a “domestic contract” under the Ontario Family Law Act.⁶³ Far from seeing *Mahr* as the expression of religious freedom that should be accommodated, the court declared the agreement unenforceable precisely because of the religious dimension of *Mahr*:

Because *Mahr* is a religious matter, the resolution of any dispute relating to it or the consequences of failing to honour the obligation are also religious in their content and context. . . . Many such promises go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.⁶⁴

On this basis, the court refused to recognize *Mahr*, stating “I don’t think, even if I had received clear and complete Islamic doctrine from these experts, that I could, *as if applying foreign law*, apply such religious doctrine to a civil resolution of this dispute.”⁶⁵

It is interesting to note that the court did grant the application for divorce—but not Leila’s claim for deferred *Mahr*—even though the marriage was concluded pursuant to the Muslim faith, and had its roots in the Quran.

This deeply contradictory treatment of *Mahr* by Canadian courts shows that the secular Canadian law of residence at times drastically refuses and at times wholly embraces Islamic legal norms, either as contracts or as religious artifacts. As a result, Canadian conflict of laws rules⁶⁶ do not offer secular adjudication, nor do they give more predictability than the civil law

⁶¹ *Id.*

⁶² *Kaddoura v. Hammoud*, [1998] 168 D.L.R. 4th 503 (Can. Ont. Gen. Div.).

⁶³ *Id.* paras. 23–24; *see* Family Law Act, R.S.O. 1990, c. F.3 (Can.).

⁶⁴ *Kaddoura*, 168 D.L.R. 4th, para. 25.

⁶⁵ *Id.* para. 27 (emphasis added).

⁶⁶ Even though this Essay has focused on Canadian law, a similar argument can be made with regard to other common law jurisdictions that apply the principle of *lex domicilii* to disputes of personal status, such as the United States. *See, e.g.*, FOURNIER, *supra* note 9, at 74–75 (analyzing the incorporation of Islamic legal institutions into California and Florida family laws).

jurisdictions of continental Europe. Given this state of affairs, it is not surprising that husbands and wives strategize and play out these contradictions in the reception of religious norms in all kinds of ways, some of which are depicted in the next Subpart.

B. *Bargaining in the Secular/Religious Interstices*

In this Subpart, I go beyond judicial treatment of Islamic norms and the locus of the state, and focus on the ways in which the parties themselves navigate across the secular-religious divide.⁶⁷ My aim is to move away from religious “gendered images”⁶⁸ or “symbolic roles” and portray women as entering conflicting and multiple worlds of negotiation, as “bargaining with patriarchy.”⁶⁹

In this endeavor, one must bear in mind the internal plural bargaining implications of Islamic law in general and *Mahr* in particular. In past work, I have outlined that, far from being static and unitary, *Mahr* endows wife and husband with diverging economic advantages in various circumstances.⁷⁰ According to classical Islamic family law, women can initiate the *Khul* or *Faskh* divorce, but may not use the *Talaq* divorce.⁷¹ Each scenario carries with it not only different options for a woman exercising her right to divorce, but also different implications as to her ability to keep the *Mahr*. The apparent potential for extortion of the *Talaq* divorce has long been recognized in religious and secular texts on Islamic divorce.⁷² However, the formally unequal rule of *Talaq* will, in practice, play out differently depending on the amount attached to *Mahr* in the marriage contract. Indeed, if *Mahr* is very high,

⁶⁷ I draw inspiration from the epistemology of “Critical Legal Pluralism” and focus my work on Muslim women’s “transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity.” Martha-Marie Kleinhans & Roderick A. Macdonald, *What is Critical Legal Pluralism?*, 12 CAN. J.L. & SOC’Y 25, 38 (1997).

⁶⁸ Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 591 (2008). “[I]dealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of ‘authentic’ group identity.” *Id.*

⁶⁹ Deniz Kandiyoti, *Bargaining with Patriarchy*, 2 GENDER & SOC’Y 274 (1988). These bargaining processes “exert a powerful influence on the shaping of women’s gendered subjectivity and determine the nature of gender ideology in different contexts. They also influence both the potential for and specific forms of women’s active or passive resistance in the face of their oppression.” *Id.* at 275. This is how I conceptualize Muslim women’s oppression and agency.

⁷⁰ FOURNIER, *supra* note 9, at 24–29.

⁷¹ See *supra* Part I.

⁷² See, e.g., J. Schacht, *Talak*, in 10 THE ENCYCLOPAEDIA OF ISLAM 151, 151–52 (P.J. Bearman et al. eds., New ed. 2000).

chances are the husband will hesitate before repudiating his wife.⁷³ In most cases, this will be a source of security for wives who do not want divorce. Inversely, for those who do want a divorce, high *Mahr* can be disconcerting: it will only be at the price of behaving in a disgraceful manner that the wife will obtain a *Talaq* from her husband.⁷⁴ Judith Tucker, in analyzing peasant women in nineteenth-century Egypt, affirms, “many women who wanted a divorce preferred that their husbands repudiate them” because of “the material advantages of *Ṭalāq*.”⁷⁵

Given this internally plural point of departure, it is not surprising to see *Talaq* and *Mahr* come up as bargaining tools, raising distributional issues across the frontier between secular and religious law. For example, they often come into play regarding (secular) division of assets. In the British Columbia Supreme Court case *Elkaswani v. Elkaswani*,⁷⁶ a husband divorced his wife under Islamic law.⁷⁷ The husband had previously transferred the property of the matrimonial home to his brother; upon petition for civil divorce, he came close to arguing successfully that the home should not be subject to the statutory division of property because the transfer of property was done in accordance with the Islamic legal norm, according to which the wife has no right to division of property.⁷⁸ After conceding that, “[w]hile Canadian law must govern the outcome of these proceedings, the actions of the parties cannot be considered based solely on Canadian cultural values,”⁷⁹ and that the husband and his brother had indeed acted in conformity with “Islamic precepts,”⁸⁰ the court decided that because the property transfer aimed at depriving the wife of her matrimonial claim, the house should nevertheless fall under the statutory division of assets.⁸¹ These passages seem to indicate that the strategy of invoking religious obligations to circumvent the civil regime could have worked.

⁷³ Homa Hoodfar, *Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities*, in 1 *SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES: SPECIAL DOSSIER* 121, 131 (Homa Hoodfar et al. eds., 1996).

⁷⁴ TUCKER, *supra* note 19, at 55.

⁷⁵ *Id.*

⁷⁶ *Elkaswani v. Elkaswani*, 2004 CarswellBC 798 (Can. B.C.) (WL).

⁷⁷ *See id.* para. 57.

⁷⁸ *Id.* paras. 56–58.

⁷⁹ *Id.* para. 5.

⁸⁰ *Id.* para. 57.

⁸¹ *Id.* para. 60.

Likewise, the husband of one of the participants interviewed over the course of my fieldwork⁸² proved adept at invoking both religious and civil legal doctrines:

Well, here he used the civil, you know, provisions for a division of property, you know, 50/50 division of property So when it was convenient for him, he invoked the civil system, when it was convenient for him, you know, he invoked . . . the religious system. It is quite uncanny how he used both systems to his advantage.⁸³

In *Kaddoura v. Hammoud*, the court later filed additional reasons for its decision granting husband's petition for divorce, in which it acknowledged the possibility for husbands to exploit the contradictory treatment of *Mahr* to gain financially from the wife:

While I drew a boundary between a debt enforceable in civil law and the obligation of the mahr, it nonetheless seems to me somewhat offensive and dishonourable on the part of Mr. Kaddoura, to knowingly participate in the wedding customs and practices of his Muslim community, including the mahr which he clearly knew included a "written" or deferred amount of \$30,000, and then eschew those customs and practices when they worked to his financial detriment.⁸⁴

Furthermore, beyond this conventional bargaining over monetary matters, I have found that the very granting of the *Talaq* by the husband and its interactions with the civil divorce petition constitute another fertile bargaining terrain. Because a Canadian judge cannot grant a religious divorce, women generally must approach a Muslim leader or court (an imam or *qadi*, respectively) to have religious recognition of their civil status.⁸⁵ Otherwise, the

⁸² My current research project, entitled "Jewish and Muslim Women Negotiating Divorce in Western Europe and Canada," examines the ways in which religious women navigate in the interplay between legal systems and religious norms in various multidimensional social and legal contexts. It does so through formal interviews with Jewish and Muslim women in Canada, France, Germany, and the United Kingdom. This Essay is based on my fieldwork with Muslim women in Canada, specifically in Toronto, Montreal, and Ottawa.

⁸³ Interview with Participant No. 5, Female Muslim Study Participant, in Can. Due to a confidentiality agreement, the participant's name and the location and date of the interview cannot be revealed.

⁸⁴ *Kaddoura v. Hammoud*, 1999 CarswellOnt 191, para. 6 (Can. Ont. Gen. Div.) (WL) (providing additional reasons to the Dec. 3, 1998 decision).

⁸⁵ However, there is no uniformity in how North American Muslim authorities consider and interact with secular authorities. See Julie Macfarlane, *Practicing an 'Islamic Imagination': Islamic Divorce in North America*, in *DEBATING SHARIA: ISLAM, GENDER POLITICS AND FAMILY LAW ARBITRATION* (Anna Korteweg & Jennifer Selby eds., forthcoming 2011) (manuscript at 33, 42).

husband can withhold the *Talaq*, which he has the sole power to issue.⁸⁶ Muslim women in Canada can be adversely affected when they are divorced civilly but not religiously. Without a religious divorce, they cannot remarry within their faith. Because a Muslim woman can essentially ask for and receive a civil divorce without the husband's consent, the withholding of the religious divorce then represents a negotiation instrument for the husband, as noted in the Quebec Superior Court case *S.I. c. E.E.*:⁸⁷

It was clear that for Mr. E., the granting or not of a religious divorce was an important bargaining tool: he knew a religious divorce was important for Ms. I. not only for religious reasons, but also for civil reasons, as it would affect her civil status in Country A, where all her family lives, i.e. father, siblings, cousins, etc., whom she had not seen for many years.⁸⁸

Most interestingly, the religious status of the woman in *S.I. c. E.E.*, while ignored by Canadian law, still had civil effects in other jurisdictions and affected her dealings with her country of origin. One of my interview participants attested to this phenomenon:

[E]very time I wanted to get my Persian passport, I either had to show my divorce paper or my husband had to sign the application, because a woman cannot leave a country like Iran or a Muslim country without her husband's permission. So when you go to apply for a passport, you either have to say I'm single or divorced and prove that you are divorced, or your husband has to sign the form for you.⁸⁹

Thus, what Canadian authorities may consider as strictly religious matters can have repercussions on the very civil status of Muslim women, further blurring the line between law and religion. Finally, in *S.I. c. E.E.*, the husband changed his mind about granting a religious divorce during the proceedings—perhaps to show the court his good faith—and performed the triple *Talaq* in front of the court, though it was necessary for him to register it at his country's consulate.⁹⁰ His promise to register the divorce then formed part of the

⁸⁶ DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 280 (3d ed. 1998).

⁸⁷ *S.I. c. E.E.*, 2005 CarswellQue 8765 (Can. Que. Super. Ct.).

⁸⁸ *Id.* para. 65.

⁸⁹ Interview with Participant No. 7, Female Muslim Study Participant, in Can. Due to a confidentiality agreement, the participant's name and the location and date of the interview cannot be revealed.

⁹⁰ *S.I. c. E.E.*, 2005 CarswellQue 8765, para. 66. The name of the country has been removed from the judgment to protect the parties' identities.

judgment,⁹¹ creating a puzzling mix of civil and religious commitments and bargaining chips.

Interestingly, rather than having the religious divorce refused, one of my study participants went through the reverse scenario. Her husband divorced her by pronouncing the *Talaq*, and later remarried, despite the absence of a civil divorce:

[H]e remarried, and we had had no civil divorce. He had pronounced, you know, “I will divorce you” three times, Islamically, supposedly in January and by Easter, that’s in April the same year, he married. He got married to another woman while he was still married to me. . . . He wanted me to be his second wife, so I said: “What? First of all, how can you be married? You are not divorced, you know, we are not legally divorced. You cannot be legally married!” He said: “Oh no, no, no! I am Islamically married and according to Islam, I can have more than one wife.”⁹²

The Divorce Act required that the spouses live separately for at least one year before the divorce petition.⁹³ This requirement, which does not exist in Islamic law, provides husbands with opportunities to circumvent the civil regime by repudiating their wives long before a civil divorce becomes available.

That being said, the results of this sometimes-vicious bargaining process are not always so straightforwardly oppressive to women. One study participant related how her husband, whom she had divorced civilly (although he never attended court and did not recognize the legitimacy of the divorce), continued to withhold the religious divorce. However, she had no desire to remarry, and the lack of religious divorce thus gave him no negotiating power:

He said, “Well, I will never divorce you. You will never get married.” I said, “First of all, I am not planning on getting married and if I do find somebody that I care for, I will go with [him].” I don’t care. I mean, according to Muslim religion I cannot [be in that relationship]. If I go with somebody, my punishment is stoning to death, so it’s a serious offense I think. If I have a boyfriend or something, I think he would divorce me because that would bother

⁹¹ *Id.* paras. 117–18.

⁹² Interview with Participant No. 5, Female Muslim Study Participant, in Can. Due to a confidentiality agreement, the participant’s name and the location and date of the interview cannot be revealed.

⁹³ Divorce Act, R.S.C. 1985, c. L-3, § 8(1)–8(2)(a) (Can.). However, in cases of adultery or cruel treatment, this requirement does not apply. *Id.* § 8(2)(b).

him that because he still claims that he is in love with me and he still thinks that is the biggest sin you can commit, so to prevent me from committing a big sin, I think he would divorce me.⁹⁴

Should her priorities change, however, she could find herself in a position where she must test her theory of how much her former husband values her religious well-being.⁹⁵

Upon divorce, a Canadian Muslim woman is faced with a puzzling dilemma, which only highlights the complex relationship between the secular and religious spheres: under the (secular) family law regime, she may divorce her husband without his consent, whereas under Islamic (religious) law, circumstances may dictate that she remain involuntarily married to him. For example, Participant No. 7 wanted her husband to pronounce the *Talaq*. However, his failure to do so did not detract from her enjoying membership in the communities of her choosing. This situation contrasts markedly with the position of Participant No. 5, whose husband pronounced the *Talaq* suddenly, remarried (religiously) without notice, and withheld the civil divorce until he could manipulate both the religious and civil systems.

CONCLUSION

In this Essay, I have presented the continental European paradox of having a restrictive naturalization policy yet emphasizing the principle of *lex patriae*. Although common law jurisdictions such as Canada might have appeared to apply domestic (secular) laws, I have demonstrated that the religious penetrates the secular through several unexpected channels. The case law, the literature, and my interviews with Muslim Canadian women illustrate the manifold ways in which Muslim marriages and divorces are translated into the Canadian legal order, without direct application of foreign legal systems through conflict of laws. This belies the assumption that applying the principle of *lex domicilii* allows immigrants to integrate better and allows women to fare better than under foreign Islamic legal systems. By understanding women's agency—how

⁹⁴ Interview with Participant No. 7, Female Muslim Study Participant, in Can. Due to a confidentiality agreement, the participant's name and the location and date of the interview cannot be revealed.

⁹⁵ The Parliament of Canada has provided women like our participant with one more (secular) tool to force the (religious) divorce; allowing women to file an affidavit with the court concerning any barriers to their religious remarriage, such as withholding of the *Talaq* divorce. Divorce act, § 21.1(2). The Divorce Act further allows the court to dismiss applications made pursuant to the act by the withholding spouse. *Id.* § 21.1(3)(c). This provision highlights the irreversible intertwinement of the Canadian religious and secular spheres and the resulting myriad bargaining chips available to husbands and wives.

they use the law as it lives out in the real world—this Essay has examined how Muslim women navigate in the interstices of legal systems and religious norms and circumvent Western conflict of laws doctrines.

As recognized by Justice Abella of the Supreme Court of Canada, acknowledging the organic interplay between religion and civil law does not amount to “an unwarranted secular trespass into religious fields, nor does it amount to judicial sanction of the vagaries of an individual’s religion. In deciding cases involving freedom of religion, the courts cannot ignore religion.”⁹⁶ I would broaden this statement and argue that religion can never be stripped out of any of the disputes I have presented, whether freedom of religion is invoked or not. Furthermore, I agree with Prakash Shah that religion is an inherently plural concept, which can be invoked and understood in ways that are utterly foreign to Western observers’ understanding of it.⁹⁷ Thus, the research agenda must extend beyond the indeterminacy of adjudication⁹⁸ to account for the indeterminacy of religion and the multiple ways in which it can be invoked in Western courts. In this context, the idea of eschewing doctrinal consistency in favor of party autonomy and *optio juris*, as put forward by Marie-Claire Foblets,⁹⁹ can have some appeal, for example to contextualize conflict of laws rules and adapt them to plural, complex situations. However, as I have attempted to demonstrate, the very idea of applying coherently only one legal system, whether designated by conflict of laws doctrines or chosen by the parties, is proving more and more to be a fantasy.¹⁰⁰ Can one escape this

⁹⁶ Marcovitz v. Bruker, [2007] 3 S.C.R. 607, para. 18 (Can.).

⁹⁷ See, e.g., Prakash Shah, *Religion in a Super-Diverse Legal Environment: Thoughts on the British Scene*, in LAW AND RELIGION IN MULTICULTURAL SOCIETIES 63 (Rubya Mehdi et al. eds., 2008); Prakash Shah, *Thinking Beyond Religion: Legal Pluralism in Britain’s South Asian Diaspora*, 8 AUSTL. J. ASIAN L. 237 (2006).

⁹⁸ For a discussion of the indeterminacy of adjudication, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

⁹⁹ Marie-Claire Foblets, *Migrant Women Caught Between Islamic Family Law and Women’s Rights. The Search for the Appropriate ‘Connecting Factor’ in International Family Law*, 7 MAASTRICHT J. EUR. & COMP. L. 11, 29–33 (2000).

¹⁰⁰ I extend this proposition to legal systems chosen by the courts on an ad hoc basis as well. Juenger criticizes the principle of *lex patriae* and proposes, instead of the classical *lex domicilii* alternative, a “substantive approach” that selects the connecting factor in light of the fairness of the foreseen result. See JUENGER, *supra* note 3, at 220. This approach is often touted as an alternative to the *lex domicilii–lex patriae* dilemma. See Symeon C. Symeonides, *General Report*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 3, 25 (Symeon C. Symeonides ed., 2000). In my opinion, this approach does not set aside the entanglement I routinely come across in my work and which I tried to outline in this Essay.

entanglement? Perhaps secularism should recognize its own religious shadow, and vice versa, so that a new fruitful paradigm can emerge.