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ABSTRACT

Massive migration of Muslims to the West in recent years has raised the question whether Shari'a*—Islamic law—should apply to Muslim couples living in these countries. The issue is particularly acute when it comes to family life and the possibility of using tort law in cases of harmful religious practices that are permitted by Muslim law but are contrary to Western liberal values. Using tort law as a soft solution, that is, taxing that practice rather than banning it by criminal sanctions, may be a balanced and efficient solution, at least in some cases. The Article demonstrates this view—tax, don't ban—through the case of tort compensation for* talaq *(repudiation; unilateral divorce against the wife's will) in different countries for a comparative look.*

This solution, which is used only in some countries, can serve almost anywhere in the world to help accommodate religious norms in a society that, in the name of multiculturalism, seeks not to exclude minority groups and immigrants by rejecting their customs and norms. Using tort law as a solution may allow a society that holds Western values to cope with religious laws that are incompatible with those values. Talaq *is merely a test case. The tort solution, which disincentivizes harmful but legitimate Islamic family practices in a Western country, can be adapted to other situations, such as bigamy, the refusal to grant a divorce in the Jewish community, and more.*

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TABLE OF CONTENTS

I. INTRODUCTION

The large migration of Muslims to the West[1] in recent years has raised questions concerning the role of religious law in general, and of *Shari'a* in particular: should Western states (and Muslim states whose laws are secular) apply *Shari'a* to Muslim couples living in the country? This question gained increased urgency in recent years, especially following the lecture of the Archbishop of Canterbury at the Royal Courts of Justice in 2008, entitled "Civil and Religious Law in England: A Religious Perspective," and the debate that ensued regarding applicability of Muslim law in one form or another in a Western state.[2]

The question is particularly acute when it comes to family life and the possibility of using tort law in cases of harmful religious practices that are permitted by Muslim law but are contrary to liberal values. A soft solution of taxing these practices without banning them through criminal sanctions may be a balanced and efficient solution, at least in some cases.

This Article discusses the possibility of using tort law to tax rather than ban certain practices in Muslim family life. The focus is on a test case derived from family law, but the Article generalizes the conclusion to a wide range of situations.

The Article focuses on the property rules of *Shari'a*, which were ostensibly agreed upon by the spouses, but clearly deprive one of the parties, usually the woman, of her rights. Often the agreement does not reflect a true consent of both parties, but rather a traditional document that is a condition for marriage in the Muslim community,

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1. *See, e.g.*, *The Future of the Global Muslim Population*, PEW RESEARCH GROUP (Jan. 27, 2011), http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/ [https://perma.cc/T27S-MLKL] (archived Sept. 12, 2016) (indicating that the number of Muslims in Europe has grown from 29.6 million in 1990 to 44.1 million in 2010); Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RESEARCH CENTER: FACT TANK (Jan. 6, 2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/ [https://perma.cc/25KG-YQRT] (archived Sept. 12, 2016) (showing a big increase in Muslim population in the U.S.); *Immigration and Ethnocultural Diversity in Canada*, STATISTICS CANADA, https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm#a2 (last visited Sept. 28, 2016) [https://perma.cc/8ZRR-5HC8] (archived Sept. 12, 2016) (describing how in 2011, just over 1 million individuals identified themselves as Muslim on the NHS in Canada. They represented 3.2 percent of the nation's total population, up from 2 percent recorded in the 2001 Census).

2. For the text of the Archbishop's lecture, see Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 ECCLESIASTICAL L.J. 262 (2008). On the debate see for example Bernard Jackson, *'Transformative Accommodation' and Religious Law*, 11 ECCLESIASTICAL L.J. 131 (2009). For a discussion on the question see generally *infra* Section V.A; MUSLIM FAMILY LAW IN WESTERN COURTS (Elisha Giunchi ed., 2014).

such that, without signing it, the couple cannot have a Muslim religious marriage. The *mahr* is a type of prenuptial agreement that grants the woman a relatively small, symbolic gift, usually in the amount of several thousand dollars, in the case of divorce. This final gift exhausts all her rights. This arrangement, which is not truly based on agreement but rather on accepted tradition, prevents the wife from obtaining her equal right in the common property, as she might under the family laws of the Western country where the couple live at the time of the divorce. This remains the case even if the couple has been living for many years in a state that does not observe Muslim laws.[3] Acceptance of the *mahr*, which is based on *Shari'a*, leaves the woman practically a pauper in cases of divorce, because, in the Muslim tradition, there is no alimony.[4] The question becomes even more acute if the divorce is done by means of *talaq* (unilateral divorce or repudiation). In this instance, the divorce is not agreed upon and not the result of a suit filed in the *Shari'a* court, but rather is against the wife's will and outside the court, in a unilateral move on the part of the husband.[5]

Application of religious norms by legal systems of the state is highly problematic in countries that have retained colonial-era practices. This is because these countries apply only a portion of religious law, that is, religious family law, which does not support individualism and fundamental human rights in the same way that liberal laws do.[6] In some countries, such as Israel, Lebanon, and India, religious laws constitute state law in matters of divorce, and therefore there is no separation between church and state in matters of marriage and divorce.[7] In other countries, such as the United States, religious laws constitute non-state law, but cases of divorce may be adjudicated before the private courts of various religions, with their judgments at times enforced by state courts. These private-religious courts have the authority to issue orders (e.g., that the husband should divorce his wife), but they lack the power to enforce them. In the present case, these private courts will confirm that *talaq* ends the marriage and prevents the woman from returning to her husband, who divorced her unilaterally.[8] Many Western societies still operate under a system in

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3. *See infra* Part II.
4. *See infra* Parts II and III.
5. *See infra* Part II.
6. *See generally* YÜKSEL SEZGIN, HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL, EGYPT AND INDIA (2013); ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, (Abdullahi An-Nai'm ed., 2002); PINHAS SHIFMAN, FAMILY LAW IN ISRAEL (1988); Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J.L. & RELIG. 57 (2010); Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279 (2009).
7. *See infra* Subsection III.B.2.
8. *See infra* Subsection III.B.3.

which churches have a formally established status in the state.[9] In some Arab-Muslim countries, religious law (*Shari'a*) is the state law that governs all areas of life.[10] In the United States, the situation is different, and there is separation between church and the state; similarly, in the United Kingdom, although there is no clear-cut separation, the society is a liberal one, and state courts are secular.[11]

The question of the application of religious norms by legal systems of the state gains poignancy with regard to issues of personal status. Increased migration in different countries, some of them involving Muslim migrants, has raised the question of pluralism and multicultural family law in non-Muslim countries.[12] The increasingly "deinstitutionalized" formation of family law in some countries is in conflict with the family-personal law, which is tied to the religious (state or non-state) law of Muslim immigrants.[13] Greater mobility of the population, combined with the increasing secularization of some Western nations, has brought Western law and *Shari'a* into more pronounced conflict.[14] Western secularization clashes with the Muslim law brought in by the immigrants,[15] leading to conflicts in a variety of situations.

An illustrative case is one in which the divorce is unilateral on the part of the husband—*talaq*—which causes emotional distress to the woman and damages her ability to remarry.[16] According to *Shari'a*, this is a legitimate, even if undesirable, act, enabling the husband to divorce his wife outside of a court of law and without having to file suit, by repeating three times, on different occasions, the statement "you are divorced."[17]

In the case of Muslim states where *Shari'a* is the law of the land, this is the end of the road as far as a woman who was divorced against her will is concerned. But if the divorce is conducted in a court of law, which is another of the husband's options and the proper course of action, the woman has a chance for an arrangement that better protects her rights, perhaps even for reconciliation or a genuine agreement between the parties regarding the divorce and the property.[18] In states where *Shari'a* is not the law of the land, or at least not the only law, the woman who was divorced against her will can go

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9. CHRISTIAN JOPPKE & JOHN TORPEY, LEGAL INTEGRATION OF ISLAM 17 (2013).
10. *See infra* Subsection III.B.1.
11. *See infra* Subsection III.B.3.
12. *See generally* ANDREA BÜCHLER, ISLAMIC LAW IN EUROPE? LEGAL PLURALISM AND ITS LIMITS IN EUROPEAN FAMILY LAWS (2013) (describing mostly the situation in European countries).
13. *Id.* at 2.
14. *Id.*
15. *Id.*
16. *See infra* Part IV.
17. *See infra* Part II.
18. *See infra* Subsection III.B.1.

to court in an attempt to obtain a division of the property in addition to the *mahr* or instead of it, although the *mahr* is supposed to settle the issue of compensation in all its forms.[19] In most cases, the legal debates in the civil courts of these countries concern immigrants who signed the *mahr* in a Muslim state and later immigrated to a Western country. In these cases, the husband insists on observing the *mahr*, whereas the wife seeks a division of property according to modern Western family law. The debate, therefore, involves mostly the authority and observance of the laws of other countries, which at times makes it possible to recognize religious norms even when they are contrary to modern law, even if the debate takes place in a country where church and state are separated.[20] The outcomes differ in various countries, depending, among other factors, on the degree of separation between church and state.[21]

In certain countries, a tort claim for *talaq* is recognized so that, although *talaq* is legitimate from the point of view of *Shari'a*, it has a civil price, and sometimes even a criminal one, as in the case of bigamy or polygamy.[22] Because *pecunia non olet* (money has no smell), and the woman receiving it has little concern regarding its source, compensation by way of tort law in practice divides the property by a different means and improves the economic condition of the woman. For some reason, other countries do not use this device. In Muslim countries where *Shari'a* rules in all domains of law, including tort law, a court would not rule that an act in family law according to *Shari'a* represents a tort according to *Shari'a*.[23] Therefore, this solution is viable only in Western countries and in Muslim countries where *Shari'a* does not hold absolute sway, or where it applies in personal law but not in civil law, as is the case in Israel, Lebanon, and India. Because in these countries tort law is not subordinated to family law, the compensation for damages is not at the expense of the *mahr* or of the division of property, but is a supplementary step aimed at improving the situation of the woman and at deterring husbands from unilateral divorce in the future. This is particularly important in Western and Muslim countries where *Shari'a* is supreme, where the woman does not have the option to divide the property fairly and must accept the symbolic compensation of the *mahr*. But the argument in this Article is that the tort compensation is important and applicable also in countries that do entitle women to a division of the property, because the two are separate remedies provided by different systems:

19. *See infra* Subsections III.B.2 and 3.
20. *See infra* Subsection III.B.3.
21. *See infra* Subsections III.B.4.
22. *See infra* Subsection IV.B.2.
23. *See infra* Subsection IV.B.1.

the tort compensation is for the emotional damage that *talaq* has caused, for which family law provides no compensation.

It may be possible to argue that tort law should not be applied if the parties agreed contractually on the *mahr*. This argument must be rejected, however, because the compensation is in a different domain (this is in addition to the argument that the agreement is not a genuine one on the part of the woman who signs the *mahr* agreement when she enters the marriage because in practice she has no choice). The tort mechanism that needs to be expanded to many other countries explains why it is possible to state that the divorce is valid from the point of view of religious family law but that, at the same time, a tort has been committed for which compensation must be paid.

To generalize, a country that chooses not to apply the rules of *Shari'a*, not even those that have been accepted by consent between the parties, does so for reasons of individualism and in order to protect the rights of people injured by the application of the religious norms, especially people who did not genuinely agree to these norms, even if they appear to have done so. The option to resort to tort law enables the legal system that chooses to honor the rules of *Shari'a* in cases such as *talaq* to approve the existence of *mahr* and at the same time ensure that women can achieve their rights in some form, not by way of family law but by way of tort law. This does not circumvent religious family law because it takes place on a separate track, which makes possible the exhaustion of rights of a different type, in this case, compensation for emotional damage as a result of the unilateral divorce. In such a case, the state can have it both ways: it does not have to confront head on *Shari'a* rules that have been accepted by agreement, and can still enable persons injured by the application of these religious laws to realize their rights indirectly but still legitimately. In this way, the state provides an indirect incentive not to commit injurious religious acts, even if they are legitimate from the point of view of religious law. It is a negative incentive of a financial nature that does not directly confront personal law. As such, it can serve as a subtle and soft solution to the delicate problem of accommodating religious norms in a society whose laws are not based on such religious norms, but which, in the name of multiculturalism, wishes not to exclude minority groups and immigrants by rejecting their customs and norms.[24]

The Article proceeds as follows: In Part II the reality of *talaq* (unilateral divorce) is discussed. In Part III the various comparative models for compensating women who were divorced against their will through religious family law and through civil-secular family law are described. The focus is on the dilemma between accepting the contractual arrangement of the *mahr*, according to which the woman

24. *See infra* Section V.A.

who was divorced against her will is left with a symbolic final compensation, and rejecting the arrangement in favor of a fair and equitable division of property according to Western civil-family law. Part IV focuses on the soft, intermediate solution of the civil-tort claim for the damages of *talaq* for a comparative look. This successful, balanced solution, which is used only in certain countries, can serve as a complementary solution almost anywhere in the world. Thus, a Muslim woman who was unilaterally divorced against her will is entitled to damages for her emotional distress, even if the property is distributed according to liberal family values. Part V generalizes and explains that *talaq* can serve as a test case for the deployment of religious laws such as *Shari'a* within the legal systems of Western countries. Recognition of the tort claim can serve as an intermediate path whereby countries that do not wish to directly confront a religious norm agreed upon by the parties can provide economic incentives not to commit certain acts and in this way fight against these norms indirectly and effectively. *Talaq* is merely an example. The model presented can be adapted to other situations, such as polygamy and the refusal to grant a divorce in the Jewish community, among others.

The use of tort law not only complements family law and compensates for what family law is incapable of doing, but also provides a convenient solution for states that choose not to confront religious norms through criminal law. Even if explicit offenses exist against *talaq* or polygamy, enforcement is scarce. In the tort track, the state hands the injured party—the woman—the reins to apply a type of private enforcement in the form of a disincentive to commit the undesired act.

II. *TALAQ*: UNILATERAL DIVORCE AGAINST THE WIFE'S WILL AND THE MECHANISM OF THE *MAHR*

A Muslim husband telling his wife in the presence of witnesses that he divorces her (*talaq*), is a legitimate act according to *Shari'a*.[25] There are several ways to dissolve a marriage under domestic Muslim law. One of them is *talaq*, which allows the husband to end a marriage

25. *See Qur'an* 2:226–27 (discussing Islamic rules of divorce); JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 106 (3d ed. 2002) (explaining that the most common form of divorce is the unilateral divorce of repudiation by the husband).

unilaterally,[26] by telling his wife three times that she is repudiated.[27] The repudiation is usually accomplished when a man utters an unequivocal phrase, such as "You are divorced," "My wife is divorced,"[28] "I divorce thee [name of the wife],"[29] or simply says the word "*talaq*."[30]

In some countries, the legislature retained this mode of dissolving a marriage, but specified clearly that, to exercise his right, the husband must obtain court authorization. This allows the wife to be heard in court and guarantees not only her rights, but also those of the couple's children.[31] In several countries, the court grants authorization to draw up a *talaq* only if the husband has submitted to the court clerk's office a fixed sum of money, in an amount determined by the court, covering the rights of the spouse.[32]

Talaq is an unequal and discriminatory practice because it is the husband's exclusive right; women do not have a comparable right to

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26. *See Qur'an* 2:229 (defining "*talaq*". The man is no longer married to a woman after he has pronounced divorce three times). *See, e.g.*, Moussa Abou Ramadan, *The Shari'a in Israel: Islamization, Israelization and the Invented Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E. L. 81, 110 (2005–2006) ("Marriage is made by consent and agreement of an adult and sane woman, and according to the Hanafi Law, a husband can dissolve the marriage without his wife's agreement. Most of the effort of the Hanafi religious scholars was spent on deciding the type of phrases that can lead to divorce. Even divorce by joking, divorce by coercion, and divorce by a drunkard can be valid divorces.") (citations omitted).

27. Martha C. Nussbaum, *International Human Rights Law in Practice: India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 44 (2001) (describing domestic laws in India).

28. Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT'L L. & POL'Y 1, 53 (2006) (describing domestic laws in Iraq, and referring to MAJEED HAMAD AL-NAJJAR, ISLAM JAFARI RULES OF PERSONAL STATUS AND RELATED RULES OF IRAQIAN LAW 109 (1978)).

29. Aleem v. Aleem, 947 A.2d 489, 490 (Md. 2008).

30. Martin Lau, *Pakistan*, 12 Y.B. ISLAMIC & MIDDLE E. L. 443, 454 n.8 (2006) ("The husband pronounces three times the word "talaq," which means repudiation, and thereby divorces his wife irrevocably."); Sylvia Tamale, *Law Reform and Women's Rights in Uganda*, 1 E. AFR. J. PEACE & HUM. RTS. 164, 173–74 (1993) ("[A] Muslim man may, at his will and without the intervention of the courts, divorce his wife by simply pronouncing the word *talaq* three times.").

31. *See, e.g.*, Marie-Claire Foblets, *Moroccan Women in Europe: Bargaining for Autonomy*, 64 WASH. & LEE L. REV. 1385, 1391–92 (2007) (presenting the new *Moudawana* in Morocco, which adds several options previously unavailable under the former Code); Elsje Bonthuys & Tshepo Mosikatsanat, *Law of Persons and Family Law*, 2000 ANN. SURV. S. AFR. L. 128, 131 (2000) (discussing Muslim Personal Law in South Africa).

32. *See* Foblets, *supra* note 31, at 1392 (referring to art. 83 of the Moroccan Family Code (2004) and explaining that the rights of the wife are specified in art. 84: balance of the *sadaq* or *dowry*, if any; maintenance owing for the legal waiting period; and a "Consolation Gift"). According to art. 85, the husband must also give an amount to cover child support payments. *Id.*

unilaterally end a marriage.[33] There are, however, a few forms of *talaq* that grant the wife a similar right, and some forms that enable the husband to unilaterally divorce his wife but offer her compensation within family law.[34] For example, in Morocco, there can be *talaq* by mutual consent;[35] *tamlik*, which means a *talaq* ensuing from a right to choose, assigned by a husband to his wife;[36] or *khol/khul'* , divorce by the wife in exchange for compensation to the husband.[37] But, as Marie-Claire Foblets explains, even in such cases, it is the will of the man that is taken into consideration in the first instance.[38] In other

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33. *See* Tamale, *supra* note 30, at 173–74 ("Sharia law permits dissolution of marriage where the marriage has irretrievably broken down. However, it is the method of effecting such dissolution which is discriminatory, as it is the unilateral right of the man. Thus, a Muslim man may, at his will and without the intervention of the courts, divorce his wife by simply pronouncing the word *talaq* three times. This has led to so many arbitrary divorces among the Muslim community as it permits men to discard their wives at will without giving women the corresponding right to divorce their husbands. A Muslim woman can only be granted a divorce from her husband when the latter is in agreement, i.e. through mutual consent. These double standards sanctioned by the legal regime only perpetuate the inferior status of women.").

34. Foblets, *supra* note 31, at 1392 (referring to art. 124 of the Moroccan Family Code and explaining that this is contrary to the situation under the former Moroccan Family Code).

35. *Id.* (referring to art. 114 of the Moroccan Family Code: "The spouses may mutually agree on the principle of ending their conjugal relationship with or without conditions, provided that the conditions do not contradict the provisions of this *Moudawana*, and do not harm the children's interests.").

36. *Id.* (referring to art. 89 of the Moroccan Family Code: "If the husband has assigned his right of repudiation to his wife, she can exercise this right by petitioning the court according to the [repudiation] provisions . . . ." Foblets explains that "[r]epudiation is granted to the wife by a clause inserted in the marriage contract, or possibly by the consent of the husband after the dispute has begun.").

37. *Id.* at 1392–93 (referring to art. 115 of the Moroccan Family Code: "The spouses may agree on divorce in exchange for compensation according to the provisions of [the divorce by mutual consent]"). Foblets explains that in this type of *talaq*, "[r]epudiation is made by the husband at the wife's request and in return for compensation." *Id.* at 1393.

38. *Id.* at 1393 ("The situation regarding divorce referred to as irrevocable breakdown is different in the new Moudawana. The new Code authorizes a woman who wishes to end the marriage to file a petition before the court for divorce for *chiqaq* . . . unofficial English translation: 'for irreconcilable differences' . . . . The court is obliged, in such cases, to grant and pronounce the divorce within a maximum of six months of the date of the petition, 'taking into account each spouse's responsibility for the cause of the separation when considering measures it will order the responsible party to take in favour of the other spouse.' Could this new provision be regarded as being, for women, what repudiation is for men? The answer to this question will have to come from practice. Some judges consider this form of divorce to be a variant of divorce for fault, in which case the courts have a discretionary power to evaluate the admissibility of the petition and to set an amount owing as compensation for the damages suffered by the husband because the wife is responsible for the break-up of the marriage. Such an interpretation clearly makes divorce more difficult for women. If it turns out that in practice this interpretation prevails, one would be obliged to conclude that the *shiqaq* does not constitute an equivalent of the *talaq*. In that case, this new form of divorce would be closer to a legal separation with compensation—a concept that nevertheless

countries, the wife may obtain rights similar to *talaq* by way of *talaq-i-tafwid/talaq-al-tafwid*, which is a delegated divorce. Finally, a husband may allow his wife to exercise *talaq*, and since the traditional female-initiated divorce is permissible only under certain strict conditions, this delegated form of *talaq* is a way of granting the same rights of divorce to both spouses.[39] Clauses concerning this type of divorce are regularly included in marriage contracts in some countries, including Egypt,[40] India,[41] Pakistan,[42] Bangladesh,[43] Morocco,[44] Nigeria,[45] and Indonesia.[46]

In countries such as Morocco, where *talaq* is revocable, the husband may take back his wife, but only with her express consent.[47] In Egypt, as in most legal traditions, there is a concept of triple *talaq*, and if the husband repudiates his wife only once, it is revocable, that is, it counts as *talaq* but it is not yet final,[48] and marital relations are merely suspended for the waiting period (*idda*), during which the wife is not permitted to marry another man.[49] This kind of divorce is

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does not exist in the Code—whenever the wife fails to convince the court of the sincerity of her request.") (internal citations omitted).

39. Bonthuys & Mosikatsanat, *supra* note 31, at 131 ("According to Muslim Personal Law a husband may dissolve a marriage by pronouncing a Talaq, while a wife may obtain similar rights by way of Talaq-I-Tafwid.").

40. *See* RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT: A STUDY BASED ON DECISIONS BY THE SHARI'A *COURTS* 1900–1955 106–07 (1997).

41. *See* Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 L. & SOC. INQUIRY 641, 641 (2008); Sylvia Vatuk, *Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law*, 42 MOD. ASIAN STUD. 489, 505 (2008).

42. *See* Muslim Family Law Ordinance, No. XIII of 1961, PAK. CODE http://www.refworld.org/docid/4c3f1e1c2.html [https://perma.cc/LN5P-AUEM] (archived Sept. 13, 2016).

43. *See* Muslim Marriage & Divorce Registration Act, (Act No. LII of 1974), § 6 [Bangl.] http://bdlaws.minlaw.gov.bd/sections_detail.php?id=476&sections_id=12227 [https://perma.cc/B75H-8H5S] (archived Sept. 13, 2016).

44. See Moroccan Family Code (Moudawana), art. 89 (Feb. 5, 2004), http://www.hrea.org/moudawana.html#24 [Morrocco].

45. *See* J. NORMAN D. ANDERSON, ISLAMIC LAW IN AFRICA 213 (2013) (explaining that delegated divorce exists also in Nigeria, but it is very rare. Divorce is more often initiated by the wife than by the husband, but usually by *khul'*, in which case it is the husband who is compensated (and the woman usually renounces her *mahr*).

46. *See* JOHN RICHARD BOWEN, ISLAM, LAW AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING 205 (2003) (explaining that the marriage contract in Indonesia may list certain actions that trigger *talaq* if the husband carries them out. The main difference is that it is not considered the woman's decision, although in practice she may initiate the divorce proceedings).

47. *See, e.g.*, Foblets, *supra* note 31, at 1392 (referring to art. 124 of the Moroccan Family Code).

48. *See* SHAHAM, *supra* note 40, at 101.

49. *Id.* at 101, 140–41 ("One of the legal effects of divorce (or of the husband's death) is the waiting period, during which the divorced woman is not permitted to marry another man. The purposes of this period are to enable the divorcing husband to consider calmly the implications of his act and perhaps retreat from it; to make sure that the

referred to as *talāq raj' i.*[50] It means the husband can take his wife back by saying so explicitly, or by his actions after such a divorce and before the end of the waiting period. If the waiting period has expired, the spouses can remarry by drafting a new marriage contract, including *mahr.*[51] After repudiating his wife for the third time, however, the divorce becomes irrevocable (*ṭ alaq ba' in*),[52] and the spouses cannot remarry until after the wife has been married to another man and their marriage has ended.[53] There is also suspended divorce (*ṭalāq mu' allaq*), which is dependent on a specific condition being met, for example, "If you buy this dress, you are divorced."[54]

If *talaq* is acknowledged by the civil court and is declared valid, and in any case of valid Muslim divorce, the court can order the husband to pay damages to his ex-wife from the *mahr* (referred to also as *mehr/meher/mahrieh*) (dower). The *mahr* is a gift from the husband to the wife for entering into the marriage and an integral component of every Islamic marriage contract, unless the woman expressly forfeits her right to it.[55] As a gift from the man to his wife, it is in theory hers as soon as the marriage contract comes into effect, but it often passes into her possession only when the marriage ends. The *mahr*'s amount

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divorcee (or the widow) is not pregnant (to prevent future difficulties in establishing the paternity of a baby born to her); and to demonstrate the high moral value of the marriage bond. A divorcee's duty to observe the waiting period is conditional upon her marriage having been consummated, while a widow has to observe the waiting period whether her marriage was consummated or not."). *See also, id.* ("The waiting period of a pregnant woman ends when she gives birth, while that of other women at the age of fertility lasts three menstrual periods. For minors or women above the climacteric (*sinn al-yas*, which is fifty five years according to the majority *Hanafi* view), the waiting period lasts three lunar months. It should be mentioned that if an older woman argues that she still menstruates, her version is accepted (i.e., her waiting period is calculated by menstrual cycles) unless her previous husband can establish the opposite. A widow's waiting period lasts four months and ten days.").

50. *Id.* at 101 ("If the divorce is revocable (*raj'i*), the husband has a right to return the divorcee to conjugal life during the waiting period against her will and without having to conclude a new marriage contract.").

51. *Id.*

52. *Id.* ("If the divorce is irrevocable (*ba'in*), in order to resume conjugal life with her the husband has to get his ex-wife's approval to conclude a new marriage with him, and to pay her a new dower.").

53. *Id.* ("Up to the third repudiation it is relatively simple for the husband to reclaim his divorced wife. Following the third divorce, however, the Qur'an instructs that the divorced wife must go through a process called *tahlil* to be permitted in marriage to her ex-husband: first, she has to consummate an intermediate marriage with another man, and only after she is divorced or widowed is she again permitted to her ex-husband. This mechanism was meant to deter a husband from hastily divorcing his wife.").

54. *Id.*

55. Regarding the question whether the *mahr* resembles alimony or prenuptial agreement, see Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1884 (2014) (distinguishing it from a dowry, "which in some cultures is brought by the bride to the marriage," and referring to RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) § 35.02[A] (2011)). *See also infra* Subsection III.B.3.

is usually determined by the husband's financial means and the wife's social status, and in this respect it arguably fulfills the same role as alimony, which is not part of traditional Islamic law.[56] In this case, the woman need not prove anything or bring any action to win the *mahr*.

III. COMPENSATION FOR REPUDIATED WIVES: BETWEEN RELIGIOUS AND LIBERAL-CIVIL FAMILY LAWS

A. *The Dilemma*

Consider the following situation: Adel, 45, and Fatma, 40, have been married for 23 years. They have five children. They married in Pakistan and immigrated to the United States five years ago. They have been living in conflict for a long time; it began as a feud between their families and has since become personal. Adel threatened Fatma several times that he would unilaterally divorce her outside the court, and one day he acted on his threat. He told her in the presence of witnesses that he is divorcing her (*talaq*), and repeated his statement on two other occasions in the following weeks. Thus, after a short waiting period, Fatma became a divorced woman in a conservative community and she has almost no chance of remarrying, given her age and her status as a divorcée. Fatma has no profession; she married at seventeen and never worked outside the home.

Following an inquiry she conducted at a local private *Shari'a* court, Fatma learned that Adel could indeed unilaterally divorce her without filing suit in the *Shari'a* or civil court, that it was impractical for her to return to him,[57] that he could not be coerced to take her back or to cancel the *talaq*, and that he could not be forced to appear before the *Shari'a* court for a proper hearing of the divorce. Fatma also found out that she was not entitled to alimony, but at most to the *mahr*, which amounted to $5,000. This did not cover even a small part of the harms she suffered as a result of the *talaq*. And indeed, in most cases, the sum of the *mahr* is symbolic.[58]

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56. *See Qur'an* 4:4–4:24.

57. *See Qur'an* 2:230 (explaining divorce procedures under Islamic law).

58. HUM. RTS. WATCH, UNEQUAL AND UNPROTECTED WOMEN'S RIGHTS UNDER LEBANESE PERSONAL STATUS LAWS 95–96 (Jan. 2015), http://www.hrw.org/sites/default/files/reports/lebanon0115_ForUpload.pdf (last visited Sept. 28, 2016) [https://perma.cc/8GQJ-2L57] (archived Sept. 9, 2016) ("Under the Sunni and Shia personal status laws [in Lebanon], when a marriage terminates—even when a husband decides to unilaterally divorce at will and without cause—the husband is only required to pay his wife a deferred mahr (the value of which is stipulated in the marriage contract), and maintenance for the first three-months after the divorce—referred to as the waiting period, in which the divorce is revocable by the husband. In practice, as reflected in 38 cases before Sunni and Ja'fari courts reviewed by Human Rights Watch, the amount to be paid during the waiting period does not exceed LBP100,000 ($60) per month. Given this, the spouses' agreement in the marriage contract on the deferred mahr

Fatma does not know whether the *mahr* will be recognized in civil courts in the United States because, under the laws of the state where they live, she is entitled to receive a much greater sum in the division of property according to the liberal-secular family law. But she knows that Adel will insist on paying, at most, the sum of the *mahr* because it represents the amount they had agreed in advance that he would pay in the event of any divorce, even a unilateral one. Fatma returned in disgrace to her parents' house.

This case involves a minority in a Western country, but poses a dilemma for the state, which must choose between the preservation of religious norms and customs that allow for practices such as *talaq* and providing relief to a vulnerable spouse at the cost of confrontation with certain religious practices and members of the minority community. The issue is whether it is possible to preserve the customs and practices of minority communities without allowing those practices to develop into socially harmful situations. If the state decides not to intervene in such cases, the *talaq* is acknowledged and only the *mahr* is paid. But this means abandoning the weak in the name of multiculturalism, an extreme and troublesome position with regard to individualism and women's rights.

The state could intervene through criminal law by deciding to criminalize religious practices that harm human rights, such as *talaq*, even if they are occasionally still permitted and legitimate under religious family laws. The intervention of criminal law is considered severe and invasive, however, and states hesitate to resort to it even where certain religious norms, such as bigamy or polygamy, or even *talaq* itself, are violations of state law.[59] Such severe intervention is reserved for much more serious cases, such as honor killing and perhaps even female genital mutilation. The state could also decide to drastically reduce the sovereignty of religious laws and courts in family matters, decide that *talaq* is not acknowledged, and distribute the

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sum is of great importance. However, women and lawyers interviewed by Human Rights Watch said that often women entering into marriage disregard the material aspect of the contract. The deferred mahr amount is in many cases a symbolic figure, for instance one lira, or one gold coin and does not reflect what spouses' believe would be adequate compensation in the case of divorce. In interviews with Human Rights Watch, nine women said that this was because they did not imagine their husbands would unilaterally divorce them, or that they did not want to put a price on their relationship with their husbands. Two of them added that they felt social pressure to not request an appropriate deferred mahr amount. Further, in many cases in which a wife needs to obtain a certification of divorce from a Sunni or Ja'fari court because her husband has divorced her outside of a court proceeding (for instance because she wants to remarry) women give up their financial rights. Human Rights Watch examined 29 judgments from the Sunni and Ja'fari courts in which the wife initiated the certification of divorce proceedings. In 18 of those cases, the wife forfeited her full pecuniary rights in exchange for certification of termination of the marriage.") (citations omitted).

59. *Infra* Subsection III.C.3.

property of Adel and Fatma according to liberal-secular family law, meaning that she will be awarded much more money than the *mahr*.

Intervention by criminal law or curtailing the sovereignty of religious laws and courts are extreme solutions that may harm multiculturalism and the delicate balance between cultural practices and the law. A compromise solution that balances individualism with multiculturalism can be achieved by creating financial disincentives for the undesirable conduct through private civil law; in other words, using civil actions to claim damages for the harms created by religious practices by taxing rather than banning the cultural practice. In this way both values are upheld: *talaq* and the *mahr* are acknowledged, but the poor financial outcomes of applying the *mahr* are circumvented. Thus, in practice, *talaq* is recognized, but the sting is removed from the *mahr* and Fatma can receive compensation for the divorce in a different form, from a different legal source, which is the harm caused by *talaq* itself, in a compensation awarded for a tort claim filed separately against Adel. Note that tort law improves her financial situation, and perhaps it is of no concern to her whether she gets the money from the distribution of property or as tort damages. But the difference is important because tort compensation, in this case, is only for emotional distress, that is, non-monetary compensation, and it does not replace family law remedies. It is a separate path, and compensation for the non-monetary damages should be additional to the money given under family law, whether it is only the *mahr* according to religious values or the full distribution of property according to liberal values.

But matters are somewhat more complex, as discussed below. In some countries, similarly to all family law, both *talaq* and tort law are part of state law. In other countries only *talaq*, as part of family law, represents state law. These are countries where religious law controls only the personal relations between spouses. In most countries, not only Western liberal ones but Muslim ones as well, *Shari'a* is not the law in any legal domain—civil-secular law is. It is necessary to check how various countries relate to *talaq* in the presence of *mahr*. Given this situation, Section B of this Part examines the differences between various countries in the area of family law. Does the law in these countries choose, in a case such as Adel and Fatma's, to apply the *mahr* in a case of *talaq*, even if this means that Fatma's rights are greatly infringed upon after the divorce? Or does the law reject the *mahr* even if the parties ostensibly agreed to it, and divide the property according to liberal-secular family law? The first option compromises individualism and the human rights of the woman; the second option is consistent with these principles, but compromises on multiculturalism and does not assist in the integration of minorities and immigrants into the primarily Western society. Tort action for compensation can change the picture and serve as a soft, complementary, and intermediary solution.

B. *Compensation by Shari'a Family Law (Mahr) vs. Division of Property According to Liberal-Civil Family Law*

1. Countries governed by *Shari'a* alone

In countries that are governed exclusively by *Shari'a*, as several states in the Persian Gulf are, *talaq* is permitted and the court can order the husband to pay damages to his ex-wife from the *mahr*.[60] In these Islamic countries there is no civil alternative to a religious agreement with a *mahr* provision, and therefore this may be the only compensation possible for a repudiated and, in most cases, relatively poor woman.[61]

2. Countries governed by *Shari'a* in personal status only

In countries that are governed by *Shari'a* in matters of marriage and divorce only, as in Israel,[62] *talaq* is also permitted. Therefore, in these countries, in cases of *talaq*, as in all cases of divorce, the *mahr* applies.

Shari'a courts in Israel are state courts. Although they prefer to order a divorce following a claim filed with the court and agreed to by both parties, they must acknowledge that, according to *Shari'a*, the husband's act is valid, even if it was carried out outside the court, and even if it was unilateral.[63]

In India the practice of *talaq* is acknowledged as well, and Muslim husbands can divorce their wives unilaterally by simply pronouncing the "talaq" three times.[64] Indian women who have been repudiated are entitled to claim only the dowry that they brought into the marriage, and they are not entitled to further maintenance.[65]

Lebanon is another country where "denominational jurisdictions have authority (concerning matters of): marriage contract, its conditions and marital obligations as well as the validity or non-

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60. *See, e.g.*, CONST. OF SAUDI ARABI, art. 1 http://www.servat.unibe.ch/icl/sa00000_.html [https://perma.cc/SF6C-VBGX] (archived Sept. 13, 2016) ("The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution . . . .").

61. Falsafi, *supra* note 55, at 1917.

62. *See supra* Part I. *See also, e.g.*, Abou Ramadan, *supra* note 26, at 110 ("With regard to divorce, which is also within the exclusive jurisdiction of the *Shari'a* Courts . . . .").

63. I'iad Zahalka, CEO, Israeli *Shari'a* Courts, Lecture at a Sha'arei Mishpat Law College Conference on *Shari'a* and Church Courts, Hod Ha'Sharon, Israel (Sept. 16, 2009) (I'iad Zahalka is now a judge in the Israeli *Shari'a* court).

64. Nussbaum, *supra* note 27, at 44.

65. *Id.*

validity of the marriage . . . ."[66] In Lebanon, divorce laws among both *Shia* and *Sunni* Muslims are personal status laws, according to which only the husband has the absolute, inalienable right to terminate a marriage unilaterally, without cause, and outside a court of law.[67] Under Druze law, however, although husbands also have an absolute right to unilaterally terminate a marriage at will and without cause, they must do so in court.[68] If the court finds that a Druze husband used *talaq* without legitimate cause, it can award damages to the wife, taking into consideration both material and moral harm.[69] Thus, for *Shia* and *Sunni* Muslims in Lebanon, the situation is similar to that in India, whereas, for the Druze, compensation may be offered under

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66. Article 2 of the April 3, 1951 Lebanese Law on Personal Status. *See* GIHANE TABET, WOMEN IN PERSONAL STATUS LAWS: IRAQ, JORDAN, LEBANON, PALESTINE, SYRIA, 1, 3 (2005), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Women_in_Personal_Status_Laws.pdf (last visited Sept. 28, 2016) [https://perma.cc/44EV-4ZHA] (archived Sept. 13, 2016).

67. BASHIR AL-BILANI, PERSONAL STATUS LAWS IN LEBANON 123–24 (1982) (Arabic), mentioned in HUM. RTS. WATCH, *supra* note 58, at 52. *See also* AL-BILANI, *supra* note 67, at II, 3, 41–42 ("Marriage is a contract under Shia, Sunni, and Druze personal status laws in Lebanon and it can be terminated by divorce. Rules regulating the termination of marriage, particularly in the Sunni and Shia confessions, discriminate against women by limiting their ability to end their marriages. Men, on the other hand, have a unilateral, unlimited right to pronounce a divorce, with or without cause, and outside of any judicial proceeding. [Fn 65: While a man under Sunni and Shia personal status laws can divorce without the intervention of any religious or judicial authorities he does so without the religious court's certification. Absent this certification there is no binding court decision that obliges the man to pay the deferred mahr and the three months maintenance during the waiting period . . .].").

68. *Id.* ("Under Druze law, men also have an absolute right to unilaterally terminate a divorce at will and without cause but must do so in a court. Druze women can also be compensated if a judge finds that her husband is divorcing her absent a legitimate reason. Additionally, Druze men and women can terminate their marriage before a Druze court if the spouses mutually consent to a divorce. Severance is also grounds for divorce for Druze women. Shia personal status law does not recognize severance, making Shia women's access to divorce without the power to divorce written into her marriage contract even more limited than that of Druze and Sunni women. In these cases, Shia women seeking divorce can only seek relief from a Ja'fari religious authority, outside the court, which can divorce her on behalf of her husband—a practice known as 'sovereign divorce.' The process is lengthy, and two lawyers who spoke to Human Rights Watch said that it may take up to two years to receive the order, with no guarantee that a religious court will then verify it and the woman will obtain a divorce . . . . Additionally, Druze men and women can terminate their marriage before a Druze court if the spouses mutually consent to a divorce. Under Shia and Sunni personal status laws a husband can revoke a divorce within the waiting period . . . without his wife's consent and without the need to conclude a new marriage. After this period or if the husband has pronounced it three times divorce becomes irrevocable and the marital bond is severed . . . Druze women also have circumscribed access to divorce and may risk losing their pecuniary rights while Druze men can obtain a divorce, with or without cause, by petitioning a Druze judge and receiving a divorce judgment."). The Druze are an Arabic-speaking esoteric ethnoreligious group, originating in Western Asia, and live in Israel mostly in the north of the country.

69. Druze Personal Status Law, art. 49, mentioned in HUM. RTS. WATCH, *supra* note 58, at 3, 41–42, 96.

family law. The compensation awarded by family courts in Lebanon is relatively high: it ranges from LBP (Lebanese pound) 5 million to LBP 50 million (approximately $3,300–$33,300).[70]

3. Countries governed by secular law and not *Shari'a*

In countries that are not governed by *Shari'a,* but honor religious practices (some Muslim and some Western countries), there are different solutions to the dilemma within state family law. Some of these solutions allow limited damages, for example, out of the *mahr*, and some do not acknowledge the *mahr* and allow women to file a plea for the division of property according to liberal family law values.

In some of these countries (e.g., Tunisia[71] and Iraq[72]), divorce without the other spouse's consent is permitted, but a judicial recognition of the repudiation is required.[73] The court can order the husband to pay damages to his ex-wife from the *mahr*.[74]

In some countries that are not governed by *Shari'a* (e.g., Jordan[75] and Syria[76]), the legislature has introduced an article in personal status laws to compensate women for the husband's abuse of his unilateral right to divorce: *talaq ta'asufi*.[77] Some scholars opposed this

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70. HUM. RTS. WATCH, *supra* note 58, at 96.

71. Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149 (1994).

72. Stigall, *supra* note 28, at 53 (explaining that although *talaq* is acknowledged in Iraq, under Iraqi law judicial recognition of the repudiation is still required. Under art. 39(1) of the Iraqi Law of Personal Status, 1959, "He who desires to repudiate his . . . wife must commence proceedings in the *Shari'a* court to demand that this be effected, and must seek a judgment accordingly. If he cannot reach a court at that time, he must register the divorce during the 'idda' period.").

73. Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287 (2011).

74. *See generally* SHAHAM, *supra* note 40, at 27–41 (noting, among others, that there is a difference between the sum received at the time of the marriage (prompt dower) and the sum due to the wife upon divorce (deferred dower). If the husband divorces his wife before the consummation of the marriage, the wife is only due half her dowry. Regarding Algeria, see for example Family Law of 1984 (*De la dissolution du marriage*), Title II, art. 52 [Alg.] ("If the judge considers that the husband has abused his right to talaq, he awards to the wife the right to damages and interest for the harm she has suffered.")).

75. Abou Ramadan, *supra* note 26, at 111 (referring to art. 134 of the Jordanian Law of Personal Status of 1976 ("If the husband repudiates his wife in an arbitrary manner, e.g. without a reasonable cause, and she applies to the judge for compensation, the judge shall order for her against her ex-husband the compensation deemed by the judge to be fair, provided that it shall not be in excess of the equivalent of the maintenance due to her for a year.").

76. *Id.* (referring to art. 117 of the Syrian Law of Personal Status of 1953 (amended 1975); NASIR, *supra* note 25, at 135–36).

77. Abou Ramadan, *supra* note 26, at 111–12 n.105 ("The article is based on the idea of abuse of rights. The man has unilateral right to divorce, but he should not abuse this right. When one exercises his rights he cannot be responsible for harm caused to

mechanism of compensation.[78] In Israel, the *Shari'a* Court of Appeals has refused to follow this practice.[79]

In some U.S. states, *talaq* that was performed in other countries is acknowledged because of the contractual nature of marriage and divorce in the country of origin.[80] In these cases, the *mahr* is viewed as a type of prenuptial agreement[81] and compensation for *talaq* (or for divorce in general) is calculated only according to the *mahr*, not according to liberal values of division of property. The reason is that, if the *mahr* is a prenuptial agreement, it means that the parties agreed that, in case of divorce, the settlement specified in the *mahr* overrides any other matrimonial settlements. A similar situation exists in Germany.[82]

The issue remains controversial. Scholars have pointed out the differences between *mahr* and prenuptial agreements.[83] One of the main differences between the two is that Islamic marriage does not

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another ('*nemimen laedit qui suo jure utitur*'). But the theory of abuse of rights relativizes one's exercise of one's rights and limits these rights, particularly when the rights are used to harm a third party. This concept was developed by the French civil doctrine; *see* FRANCOIS TERRE, PHILIPPE SIMLER YVES LEQUETTE, DROIT CIVIL LES OBLIGATIONS 661-66 (1993). Some scholars tried to anchor this theory in Islamic law. *See* MAHHMOUD FATHY, LA NOTION DE L'ABUS DES DROITS DANS LA JURISPRUDENCE MUSULMANE (1912).").

78. Abou Ramadan, *supra* note 26, at 111 n.104 (referring to MUHAMMAD ABU ZAHRA, AL-AHWAL AL-SHAKHSIYYA 285–86 (1957)).

79. *Id.* at 112 (referring to A 259/2003 of 1/27/2004, and explaining that "[t]he *Shari'a* Court of Appeals in Israel refused to follow this line of thinking for two reasons. The first was that this rule of *talaq ta'asufi* has no accepted *shari'a* basis. The second is that [as mentioned above] a Muslim woman can sue her husband in civil court and the man could be prosecuted by the state").

80. Falsafi, *supra* note 55, at 1890.

81. *See, e.g.*, Zawahiri v. Alwattar, 2008-Ohio-3473U, 2008 WL 2698679, at *5 (Ct. App. July 10, 2008).

82. German law does not specifically regulate Islamic marriage and divorce, but the law of a foreign country may be applied, e.g., when a wife claims her *mahr*. In 2009, the *Bundesgerichtshof* ruled that the *mahr* qualifies as effects of marriage. In a case in 2009, a wife claimed her *mahr* payment (*Morgengabe*) as agreed in her marriage, which was contracted in Iran. The couple was married in Iran in 1992 and divorced in Germany in 2006, according to German law. The wife requested the money owed to her under Iranian law, including an increase in accordance with the inflation of Iranian currency. The husband wanted the divorce to take place completely in accordance with German law and claimed that if Iranian law applied, the *mahr* or another sum, which both parties agree upon, should be returned to him whenever the wife initiates divorce proceedings. *See* BGH Dec. 9, 2009, XII ZR 107/08, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7ca0a3ba880fd171dbccee324c6c2287&nr=51052&pos=24&anz=26 [https://perma.cc/VCL3-YLRU] (archived Sept. 28, 2016) (Ger.).

83. *See* Falsafi, *supra* note 55, at 1916–18 (outlining the similarities and differences between *mahr* and prenuptial agreements, and adding that "[h]ampered by their limited understanding of the nature of the mahr, and based on the definition of a premarital agreement in the Uniform Premarital Agreement Act as a contract 'made in contemplation of marriage and to be effective upon marriage,' many courts reflexively analogize the mahr to a premarital agreement") (citations omitted).

mirror the Western narrative, which mistakenly views marriage either as a sacrament or as a simple civil union, while the *mahr* is considered simply a gift or prize to the bride in exchange for her agreement to marry, and it is not a vehicle for apportioning property and resources at the time of divorce.[84] Therefore, "since the mahr is not designed to address the division of the marital estate, she [the woman] is often left at the time of divorce only with the gift she received for entering into the marriage."[85]

Another difference is that the *mahr*, as the Islamic marriage contract, provides fewer rights to the woman to obtain a divorce under Islamic law. One way for a Muslim wife to grant a divorce is *al khala,* which is an offer by the wife to renounce her *mahr*.[86] Furthermore, the *mahr* is not a voluntary contract like a prenuptial agreement, but a mandatory part of an Islamic marriage contract, and Muslim parties cannot marry without a *mahr* provision.[87] Because the *mahr* is simply

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84. *Id.* at 1916–17 (explaining that "any financial agreement negotiated between a couple in the West as part of their marital arrangement entails an extra, voluntary step and, as such, is assumed to center around the bargaining away of certain rights. Thus, legal protections (crafted around pre-marital statutes and under the common law) mandate specific acts, such as the disclosure of the parties' assets or the requirement that an attorney be present at the time the agreement is executed. By contrast, an Islamic marriage is centered on a simple contract, which embodies certain mandatory terms as a pre-requisite for matrimony and is null and void without the necessary bargaining over the mahr provision. Muslims, who are quite familiar with the customary haggling over the mahr, are not under the slightest misconception that the negotiation represents in any remote way an extraordinary or unanticipated bargaining away of their rights . . . [a]ny expectation over assets a Muslim husband or wife may have do not stem from the marriage contract, but rather from Islamic property law.") (citations omitted). *See also* Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 600 (2010); BHALA, *supra* note 55, at § 35.02[A]. Falsafi further explains the potentially problematic consequences of the groundless comparison: "[A] potentially even more damaging fate may befall the wife if the court mischaracterizes the mahr as a prenuptial agreement and then upholds it as the parties' sole agreement for the comprehensive division of all their marital property, often placing the wife in a dramatically weaker position than if the allocation of assets was adjudicated under a civil regime. While many state prenuptial statutes contain default rules giving the wife rights in property titled in the husband's name if a civil prenuptial agreement is silent on marital property, Islamic law does not give the wife any rights in property titled in her husband's name . . . ." Falsafi, *supra* note 55, at 1919 (citing *Aleem*, 947 A.2d at 491). At the same time, Falsafi notes that "[s]ome lower court decisions indicate that, in an effort to reach a just outcome, courts are willing to treat factually similar cases very differently and strike down a mahr provision on public policy grounds if drawing the parallel with a prenuptial agreement will deprive the wife of any meaningful amount of community property, but uphold the validity of the mahr as a premarital agreement in the absence of a significant marital estate, so that the wife may derive some financial benefit from the union." *Id.* referring to In re Marriage of Shaban, 105 Cal. Rptr. 2d 863, 865, 870 (Cal. Ct. App. 2001)).

85. Falsafi, *supra* note 55, at 1919 (citing *Aleem* 947 A.2d at 491).

86. *Id.* at 1918 (referring also to BHALA, *supra* note 55, at § 35.01–35.02[A]).

87. *Id.* at 1917.

a gift for entering the marriage, it is payable at any time during the life of the marriage, even if the spouses never divorce; this is different from a prenuptial agreement, which mostly anticipates the division of resources and assets in the event of a divorce, and therefore the *mahr* lacks the procedural safeguards that exist in most prenuptial statutes, including sanctions against the party who breaches it.[88]

Naturally, a Muslim couple married in the United States in a civil marriage need not sign a *mahr*, as they would in Muslim countries in which *Shari'a* is not dominant.[89] But many Muslim immigrants who were married before coming to the United States may not have had the option of a civil marriage and may not have been able to avoid the *mahr* provision. Should American civil courts, therefore, have the authority to recognize *mahr* in these cases and order husbands to pay *mahr* to their repudiated wives in general, especially in cases where it contradicts some spousal rights?[90]

Muslim husbands claim that U.S. courts must recognize the foreign divorce, and that women's claims for any marital property must be limited to what would be available to them in their country of origin,[91] that is, *mahr,* and not division of property according to Western laws. Although the U.S. Constitution requires that states give the judgments of sister states full faith and credit,[92] U.S. recognition of foreign acts is a matter of comity.[93] U.S. courts have uniformly refused to recognize *talaq*, considering it to be a violation of state and federal constitutional provisions of equal protection and due process, despite the presence of an *ex ante* marriage contract conforming to the requirements of Islamic law.[94]

Husbands also argue that their wives have no claim on marital property beyond the sum specified as the *mahr*, and in at least one case

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88. *Id.*

89. *Id.* at 1917–18 (explaining, however, that the couple is "often under enormous pressure to solemnize their bond in accordance with religious procedure – otherwise their union would be deemed illegitimate with grave social implications . . . . By contrast, no one in the United States is obligated to enter into a prenuptial agreement and in the process potentially forgo the benefits of civil family law protections.").

90. *Id.* at 1920–21 ("The strategy of evaluating *mahr* provisions as premarital agreements becomes even riskier in disputes where the marriage took place abroad. In these decisions, courts face greater pressure to either enforce *mahr* provisions as premarital agreements (as part of a foreign divorce order), to the great financial detriment of women, or to strike down the foreign divorce orders and confront charges of defective comity analysis."). *See also* Rajni K. Sekhri, Note, *Aleem v. Aleem: A Divorce from the Proper Comity Standard—Lowering the Bar That Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 689–90 (2009) (criticizing the "defective comity analysis" in court ruling).

91. Falsafi, *supra* note 55, at 1921 (discussing Chaudry v. Chaudry, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978)).

92. U.S. CONST. art. IV, § 1.

93. Falsafi, *supra* note 55, at 1921.

94. *Id.* at 1920, 1922.

this argument was successful: the New Jersey appellate division reversed the trial court and applied Pakistani law—which, for the major tenets of family law, is based on *Shari'a*—refusing to divide the property according to New Jersey law, despite the fact that the couple had spent several years in the United States.[95] In other cases, courts were willing to order the division of the property in cases of *talaq*, awarding more than the *mahr*, and stating that embracing the *talaq* would be contrary to public policy.[96] Other countries have also stated that *talaq* is contrary to public policy, including England[97] and Canada.[98]

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95. *Chaudry*, 388 A.2d at 1004 (explaining that according to Pakistani law, the wife was not entitled to alimony or support upon a divorce). The court held that the husband's ongoing domicile in New Jersey constituted an insufficient nexus to New Jersey for the courts to award the wife equitable division of property. *Id.* at 1006. In this case, the couple married in Pakistan in an Islamic ceremony, then moved to the United States. A few years later the wife moved back to Pakistan with her children, thinking that her husband would permanently join her. But after a few years the husband informed the wife by mail that he had filed divorce papers with the Pakistani consulate in New York City. Although the divorce—*talaq*—was confirmed by Pakistani courts, the wife instituted a separate maintenance action in New Jersey. The court concluded that the wife "is not entitled to equitable distribution by reason of the [antinuptial] agreement" and limited her to a payment of $ 1,500. *Id.*

96. *See, e.g.*, Maklad v. Maklad, FA000443796S, 2001 WL 51662 (Conn. Super. Ct. Jan. 3, 2001) (declining to recognize the validity of unilateral divorce, where the husband had divorced the wife according to religious custom, then had sought a decree in Egypt merely to grant civil recognition to the religious divorce); *Aleem*, 947 A.2d at 491. In *Aleem*, A couple had married in Pakistan but lived and worked in the U.S. for twenty years. There was a dispute as to the division of the husband's pension. After the wife initiated divorce proceedings, the husband obtained a *talaq* at the Pakistani embassy in Washington, D.C. The court compared the Pakistani marriage contract to a premarital agreement, but rejected the husband's claim that payment of the *mahr*, in the amount of $2,500, was all that was "due the wife, as opposed to the one half of almost two million dollars that she might be entitled to under Maryland law." *Id.* at 493 n.5, 494. The court explained that the Pakistani marriage contract could not be equated with a valid premarital agreement because Pakistani Muslim-family law and Maryland law differed on how property is divided if there is no agreement: the former would not award the wife property that is not in her name whereas the latter would. *Id.* at 491. The court struck down the *mahr* arrangement on technical grounds, referred to the comity issue, and refused to recognize Pakistan *talaq* laws, because such a unilateral step is contrary to Maryland public policy. *See also* Falsafi, *supra* note 55, at 1923–27 (discussing this case as well as two additional judgments with factual parallels and different outcomes: In Zawahiri v. Alwattar, 2008-Ohio-3473, 2008 WL 2698679 at *4 (Ohio Ct. App. 2008) the court made the analogy between the *mahr* and a premarital agreement, whereas in Odatalla v. Odatalla, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002), the court saw the *mahr* as a pure and simple contract).

97. *See, e.g.*, Sulaiman v. Juffali, [2002] 2 FCR 427 (Fam.) (U.K.) (the court refused to recognize the validity of a triple *talaq* performed in England, despite the fact that it was valid in Saudi Arabia, where the parties were domiciled, because there were other proceedings for divorce in England).

98. Divorce Act, R.S.S 1985, c D-3.4 (Can.) ("A divorce granted . . . pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily

To sum up, some U.S. courts have recognized *mahr* provisions as a type of prenuptial agreement,[99] and others have refused to enforce *mahr* agreements, regarding them as premarital contracts bargaining away a wife's claim to marital property.[100] One of the problems in this regard is that under the Free Exercise Clause of the First Amendment to the Constitution, there is a question as to whether the resolution of a religious dispute in civil court interferes with the defendant's constitutional right to freely exercise his religion, given the fact that "Congress shall make no law respecting an establishment of religion," and the Free Exercise Clause forbids the passage of laws which "prohibit[] the free exercise thereof."[101]

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resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for divorce."). *See* Bhatti v. Canada (Minister of Citizenship & Immigration), 2003 CarswellNat 4866 (2003) (Can.) (WL) (recognizing the validity of a *talaq* divorce obtained out of the country, but suggesting that the divorce would not necessarily have been valid if enacted in Canada); Siddiqi v. Canada, 2001 CarswellNat 4374 (Imm. & Refugee Board, App. Div. 2001) (Can.) (WL) (declining to recognize a *talaq* divorce obtained largely to circumvent civil proceedings in Canada).

99. Falsafi, *supra* note 55, at 1920 (referring to Akileh v. Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996), and explaining that "in *Akileh v. Elchahal*, where the marital estate was insignificant, but the parties had stipulated to a $50,000 mahr provision, the court, confronted with perhaps an even vaguer marriage contract than the one in *Shaban*, readily ruled that the mahr constituted an enforceable prenuptial agreement, entitling the wife to the $50,000 she demanded under the terms of the document. The court's sympathies were particularly aroused in this case because the wife sought divorce after she contracted genital warts from her husband a year after the marriage, which condition he had failed to disclose prior to their union. Similarly, in *Afghahi v. Ghafoorian* [Afghahi v. Ghafoorian, No. 1481-09-4, 2010 WL 1189383, at 1 n.1, 4 (Va. Ct. App. Mar. 30, 2010)], where the couple had no other assets, the court held that the marriage contract constituted a premarital agreement and enforced payment under the mahr provision.") (citations omitted).

100. Falsafi, *supra* note 55, at 1918, 1918 n.199 ("Ignoring these glaring distinctions between a *mahr* and a prenuptial agreement can lead to some unwelcome results in the lower courts. The most obvious risk of analogizing the *mahr* to a premarital agreement is that it could easily be struck down on technical grounds because it is negotiated simply according to community customs without attention to common law and statutory standards that must be met when executing a legally binding prenuptial agreement. Consequently, when a *mahr* agreement is struck down because it was not entered into in a timely manner or because the parties failed to consult a lawyer or properly disclose their assets, the wife is deprived of the benefit of her contractual bargain, even though none of these steps were a pre-requisite at the time she executed the *mahr*. *See, e.g.*, Ahmed v. Ahmed, 261 S.W.3d 190, 194 (Tex. App. 2008). In Ahmed, the parties entered into their civil marriage six months prior to executing an Islamic marriage contract, which stipulated that the husband pay a deferred mahr of $ 50,000 to the wife. *Id.* at 192–93. The Texas Court of Appeals evaluated the mahr provision as a premarital agreement and held that it was invalid because it was entered into after the civil ceremony, rather than made in contemplation of marriage. *Id.* at 194. Yet Muslims living in non-Muslim jurisdictions very frequently enter into both civil and religious arrangements with no particular attention to the order of these events. Since under Islamic law, the mahr constitutes an agreement by the husband to give a gift to the prospective bride, the timing of the civil ceremony should be irrelevant.").

101. Falsafi, *supra* note 55, at 1883–84 (explaining that "[m]any of the lower courts' decisions focus on the third prong of the *Lemon* [v. Kurtzman, 403 U.S. 602, 612–13

There are different approaches to the question of whether civil-secular courts can and should interfere in religious disputes and rule in matters like *mahr* following *talaq*, or whether this infringes on the First Amendment.[102] Scholars have argued that many U.S. courts unnecessarily choose to abstain from hearing any kind of religious dispute,[103] and that maybe it is time to restore the Supreme Court's distinction between religious beliefs, which are protected by the First Amendment to a great extent, and religious acts (such as *talaq* or refusal to divorce in the Jewish community), which are less protected by the First Amendment and where more room for judicial intervention exists.[104]

(1971)] test and struggle with how they may resolve a religious dispute without 'entanglement in questions of religious doctrine.' The Supreme Court offers two options for overcoming this dilemma. First, under the deference approach, courts, when reviewing internal church disputes, may defer to the holdings of the highest authority within the religious institution where the disagreement arose. Second, pursuant to the neutral-principles approach, civil courts may resolve religious disputes using secular legal rules circumventing the need to rely on theological standards. While the Supreme Court may have intended that the two standards operate harmoniously, [the article] examines whether the deference and neutral-principles approaches give rise to conflicting guidelines and cause considerable confusion and inconsistency in the lower courts.") (citation omitted).

102. Falsafi, *supra* note 55, *passim* (presenting several approaches being followed, such as the deference and the neutral-principles approaches, together with what is referred to as a desirable approach. *See, e.g.*, *id.* at 1890–91).

103. *Id.* at 1884 (adding that "some scholars view the slightest cleavage in what they refer to as the Court's church autonomy doctrine with alarm.").

104. *Id.* at 1898 (adding that "Smith does not change the law regarding government action that impedes religious belief as opposed to religious acts. The majority confirmed that, most importantly, 'the free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires,' but that the same blanket protection does not extend to religious conduct. [Emp't Div., Dep't of Human Res. of Or. v.] Smith, 494 U.S. 872, 877 (1990). In other words, Smith, where applicable, restores the distinction made in earlier Supreme Court decisions preceding Sherbert (such as Reynolds) pursuant to which the First Amendment gives far greater protection to religious belief than to religious conduct. Third, the Smith decision leaves in place higher levels of protection for hybrid rights involving 'the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . or the rights of parents.' Smith, 494 U.S. at 881.") (citations omitted).

4. Summary

Table 1: Decision chart regarding whether the *mahr* is recognized as part of religious family law (*Shari'a*), or whether the property is divided according to liberal-secular family law.

Is *Shari'a* the state law?	**Is *mahr* or property division applied?**
Shari'a is state law in all areas of law (Saudi Arabia and several Persian Gulf countries)	*Mahr*
Shari'a is state law only in the area of personal status of Muslim couples (Israel, Lebanon, and India)	*Mahr*
Shari'a is not state law (Western countries, and Muslim countries such as Tunisia, Iraq, Jordan, and Syria)	In some of these countries the *mahr* is recognized and considered a type of prenuptial agreement, although some believe that the two differ in their essence; in other countries it is not recognized because it conflicts with public policy or for some other reason, such as conflict with the First Amendment to the U.S. Constitution.

Thus, in countries where the result of *talaq* is only *mahr*, and especially if the amount is small or symbolic, women are harmed and justice is not served. Arguments that this is a contractual agreement that should not be interfered with ignore the background of *mahr*. The problem is twofold: no equitable division of the property is carried out, and the woman is not entitled to compensation for the harm caused by *talaq*, unlike the case of a woman who is divorced in a *Shari'a* court, where a judicial ruling is issued. Even in countries where the result of *talaq* is rejection of *mahr*, and the property is divided according to the liberal-civil family law, the woman is still not compensated for the harms of the unilateral divorce, and justice is served, at most, in the area of the division of property.

IV. TORT LAW AS A DESIRABLE AND COMPLEMENTARY BUT INDEPENDENT SOFT SOLUTION

This Part introduces an important, potentially decisive way of solving the problems presented above: civil tort claims for harm caused to the women by unilateral divorce. It examines whether such an action for compensation is possible in various types of countries (as far as

dominance of *Shari'a* is concerned), and describes the situation in one country where claims of this type have been accepted for more than three decades. Next, from a normative point of view, this Part proposes recognizing such tort actions in some of these types of countries and explains their importance, not only for the specific cases of *talaq* in combination with *mahr*, but also in general, in the matter of an effective (and indirect) struggle against harmful religious practices.

A. *The Situation*

Extending the example above, although *talaq* is a legitimate practice under religious family law, it seriously harms Fatma's rights and breaches her autonomy. Fatma cannot return to her married life. She decides to resort to tort law to change the oppressive result of religious family law. She brings a civil action for a practice that is legitimate under religious family laws, arguing that the practice harms her, as the vulnerable spouse. She asks the court to award her damages for the emotional non-monetary and economic monetary harm caused by being unilaterally repudiated, including shame and the loss of chances to remarry in the highly conservative society where she lives.[105]

Fatma knows that even if she obtains a large financial compensation, this does not change her status and she will not revert to being married. But the compensation can help her get on her feet. From her point of view, this is a separate process from any possible action in family law, where she will receive a *mahr* in the sum of $5,000, or succeed in forcing a division of property according to Western family law. The tort action provides compensation for the severe harm she suffered as a result of the unilateral divorce *per se*; family law does not provide such compensation.

In filing the claim Fatma also knows that a civil judgment for ordering damages of this type may deter other husbands from taking such action. She is thinking mainly of Salma, her friend, who is in a similar situation, because her husband, Mustafa, is threatening to divorce her unilaterally and marry a younger woman. Can a tort action of this sort be filed in every country? And what is the relation between the tort action and *mahr* on one hand, and the tort action and the division of property according to secular family law on the other? These questions are answered below.

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105. *See, e.g.*, CA 11035/07 Clalit Health Services v. Avitan, Pador 2011(76) PD 137 (2011) (Isr.), § 5 (acknowledging non-pecuniary damage of lost chance of inability to remarry in torts); File No. 24760/08 FamF (Jer.) Sh. B. R. v. R. R. (Mar. 25, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (recognizing the loss of chance to remarry as a non-pecuniary harm in a case in which the defendant did not disclose to his ex-wife, the plaintiff, his impotence, and after the divorce her chances of remarrying as a divorced woman have diminished).

B. *The Possible Use of Tort Law*

1. Countries governed by *Shari'a* alone

In countries that are governed strictly by *Shari'a*, and where *talaq* is permitted, *talaq* is unlikely to be considered a tort. Tort action for *talaq* would therefore be impossible in these countries.

2. Countries governed by *Shari'a* in personal status only

A tort action for *talaq* is relevant in Israel because of the special situation in this country where only marriage and divorce are adjudicated according to the religious family law.[106] Theoretically, the same is true with regard to India and Lebanon. *Talaq* is permitted according to Israeli family law, but it is nevertheless considered a tort and an offense. Although there is no corresponding tort of *talaq*, the action is possible by means of general torts.

There are two ways of bringing a tort action for damages from *talaq* in Israel. Indeed, the recognized tort actions are based on a mix of tort and criminal laws. Article 181 of the Penalty Law of 1977[107] holds that a husband who repudiates his wife without her consent and without the intervention of an authorized court is subject to five years of imprisonment.[108] Israeli tort legislation acknowledges a tort of breach of statutory duty, which is a legislated obligation, in a way that resembles the American tort of negligence *per se*.[109] In certain cases, Israeli law allows damaged parties to bring a tort action based on infringement of criminal sections using the general tort of breach of statutory duty, described in section 63 of the Tort Ordinance.[110] Civil actions for *talaq* based on these grounds have been acknowledged by the Israeli Supreme Court.[111] The other alternative is to use the tort of negligence.[112] Note that in Israel there is no clear distinction between

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106. *See, e.g.*, Blecher-Prigat & Shmueli, *supra* note 6, at 280.

107. Israeli Penal Law, 5737–1977, SH No. 864, art. 181 (Isr.).

108. Abou Ramadan, *supra* note 26, at 111 ("Though the wording of the clause is general and theoretically applies to all the different religious communities in Israel, in practice it is intended for Muslims, since classical Muslim law acknowledges unilateral divorce. The High Court of Justice interpreted the term 'in spite of the woman' to mean that the divorce is made against her will . . . [D]ivorce of the wife by coercion and without a court judgment is considered a criminal offense.") (citing TP 775/79 State of Israel v. Diab Issawi, PM 1980(2) 381 (1980) (Isr.)).

109. *See, e.g.*, Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) (discussing negligence *per se*); GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 158–79 (4th ed. 2004) (discussing negligence *per se*).

110. Civil Wrongs Ordinance § 63, 5728-1968, 2 LSI 12 (1968) (Isr.).

111. *See, e.g.*, CA 245/81 Sultan v. Sultan PD 38(3) 169 (1984) (Isr.); CA 1730/92 Masarwa v. Masarwa *Dinim Elyon* 38, 369 (1995) (Isr.). *See also* Abou Ramadan, *supra* note 26, at 111–12.

112. Civil Wrongs Ordinance, §§35–36, 5732–1972, 2 LSI 12 (1972) (Isr.).

intentional and unintentional torts, and therefore the tort of negligence is also relevant in intentional acts.[113]

The harms may be both monetary and non-monetary (non-pecuniary). The divorced woman often finds herself with no source of sustenance, because in some countries alimony is not granted after divorce (this is the situation in the case of classic Muslim law[114]), only child support.[115] In conservative societies it may also be difficult for her to remarry.[116] Therefore, she can apply for mostly non-monetary damages such as shame and suffering and emotional distress for being divorced against her will.[117]

Tort law provides the harmed woman with a secondary remedy of damages,[118] but cannot grant the primary remedy of status: damages cannot make her married again. Even if her husband wishes to remarry her, perhaps in exchange for renouncing the claim and cancelling the damages, this is not practical because *Shari'a* requires that she first marry another man and that he then divorce her before she can remarry her first husband.[119]

However, in filing a tort claim the woman has the burden of proving the husband's fault (in this case, breach of statutory obligation or violation of the duty of care in the case of the tort of negligence). By contrast, in the case of compensation based on an agreement such as *mahr*, there is no need to prove fault. (Note that Western family law also seeks to avoid the question of fault-based liability and prefers to grant a no-fault divorce.) Thus, the burden in a tort action is greater than in an action based on family law, at least as far as having to prove fault is concerned. This means that if the *mahr* is sufficiently large, or if it is not recognized and the property is divided according to Western

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113. *See, e.g.*, CA 2034/98 Amin v. Amin 53(5) IsrSC 69 (1999) (Isr.) (translation available at http://elyon1.court.gov.il/files_eng/98/340/020/q07/98020340.q07.htm [https://perma.cc/W3MF-DL5N] (archived Sept. 28, 2016)) (Section 13 to Justice Englard's judgment).

114. *See Qur'an* 4:4–4:24.

115. Regarding Israel, see for example, The Family Amendment (Maintenance) Law 1959, SH No. 726 §§ 2, 3, 3A (Isr.); MOSHE CHIGIER, HUSBAND AND WIFE IN ISRAELI LAW 99–104, 191–93 (1985) ("[T]hough the divorcee does not get maintenance formally, she gets it informally in the form of payment for her services to the children . . . ."); TALIA EINHORN, PRIVATE INTERNATIONAL LAW IN ISRAEL 50 (2009).

116. *Cf.* FamF (Nz) 9371-08/09 N.S. v. M.H.S. (not published, 23.3.2012) (Isr.) (arguing that the social stigma surrounding divorce causes women severe emotional distress); File No. 49212-02/12 FamA (Nz) Doe v. Roe (7.16.2002), § 2, Nevo Legal Database (by subscription, in Hebrew) (Isr.) (acknowledging that divorce causes shame, sorrow, and suffering, affecting the prospects of remarriage). *See also* Falsafi, *supra* note 55, at 1910.

117. *See, e.g.*, Sultan v. Sultan, *supra* note 111 (ruling in favor of a woman receiving damages for being divorced against her will); CA (TA) 1059/94 Jaber v. Jaber, PM 1994(1) 458 (1994) (Isr.) (ruling in favor of a woman receiving damages for being divorced against her will).

118. *See supra* note 108 and accompanying text.

119. *See Qur'an* 2:230 (explaining divorce procedures under Islamic law).

family law to the satisfaction of the woman, it may not be worthwhile for her to take tort action against her husband and have to prove the harm caused by *talaq,* especially if the tort compensation is not expected to be high. The choice, however, must be the woman's, and the tort mechanism should be available to her.

It appears that a tort action would also be relevant in India, even though a solution seems to exist there in compensation based on criminal law. Section 125 of the Indian Uniform Criminal Procedure Code forbids a man "of adequate means" to permit various close relatives, including an ex-wife, to remain in a state of "destitution and vagrancy."[120] Martha Nussbaum explains that many women divorced under Muslim law in India have been able to win grants of maintenance under this Criminal Code Section, and that recognition of ex-wives as relations under this section was introduced explicitly for the purpose of compensating repudiated women.[121] But this section seems unable to solve all the cases of compensation needed for repudiated women, and there is a need for a tort action, such as the one acknowledged in principle in Israeli law.

Regarding tort actions for *talaq* in Israel, Abou Ramadan criticizes the "integration between the criminal order and the interpretations of the High Court of Justice regarding the tortious aspects of divorce [in that they] have emptied the institution of divorce of its content."[122] One can assume that Abou Ramadan would criticize the Indian law as well, on the same grounds; however, the issue should be considered differently. Implementing the tort solution may separate the right to divorce into the two dimensions: status in religious family law and damages in torts (in the Israeli case) or under criminal law (in the Indian case). In this way, the laws do not collide, and the tort mechanism provides a solution that, although not optimal from the point of view of human rights, offers the best option available. This solution does not abolish the institution of *talaq*, which remains a valid practice according to the law of these countries, but it carries a price tag.

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120. Nussbaum, *supra* note 27, at 44 (explaining that this was an addition to the Section that was amended in 1973). Code of Criminal Procedure, 1973, No. 2, Acts of Parliament 1973, (India) https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf (last visited Sept. 28, 2016) [https://perma.cc/7MBY-8AH4] (archived Sept. 9, 2016).

121. Code of Criminal Procedure, *supra* note 120 (explaining that members of the Muslim League objected to this on grounds of free religious exercise).

122. Abou Ramadan, *supra* note 26, at 110.

3. Countries governed by secular law and not *Shari'a*: A case of legal pluralism

Tort action for *talaq* is probably impossible in Muslim countries that are not governed by *Shari'a* and would be dismissed because *talaq* was carried out in court. There *should* be room for a complementary tort action, however, at least when the damages paid from the *mahr* do not cover the actual harm. A defense may be raised against such action, based on the fact that the court approved the procedure and it is therefore final and cannot be considered a tort.

It is reasonable to assume that, in Western countries that recognize *talaq* and *mahr*, the situation will be similar. As we have seen, in many American civil courts, compensation is not available following *talaq* if the *mahr* contains no compensation for the repudiated woman; at most, compensation is limited to the sum of the *mahr*. Not acknowledging a tort action for damages due to the harm resulting from *talaq* confronts individualism and contradicts the rights of the repudiated woman.[123] As noted, given the differences between *mahr* and the Western prenuptial agreement, it is difficult to argue that the woman in practice agreed, in the regular consensual sense, to be left without adequate compensation in the case of *talaq*, especially if she has lived long enough in a country espousing Western values.

Because it is not always possible to achieve adequate (rather than symbolic) compensation in cases of *talaq* in American civil courts (owing to the collision of religious and secular laws and constitutional problems),[124] the need to provide a different mechanism, namely a

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123. *Cf. id.* at 1890, 1920 ("In the religious divorce cases, however, any concern about whether judicial review of religious decisions violates the Religion Clauses needs to be balanced against a converse worry regarding whether the denial of judicial review could result in loss of other compelling interests, such as gender equality. Courts' abstention from adjudicating religious family law decisions may implicitly put the government in the position of rubber-stamping religious decisions (especially religious arbitral awards), which often times may be grounded in theological rules granting women substantially fewer rights, or at least vastly different rights, than men . . . . [C]losing the courts' doors to parties who are seeking a hearing in a neutral, non-biased, civil forum would handicap the neutral-principles approach and take the courts back to a strict non-justiciability regime . . . . While the courts' concern for the wives' welfare in these cases is admirable, the inconsistency, which results from comparing the mahr to a premarital agreement, weakens the value (and predictability) of the mahr decisions in guarding against gender discrimination.").

124. Falsafi, *supra* note 55, at 1914–27 (discussing the issue of whether parties to religious contracts should have recourse to civil courts to resolve potential disagreements, and examining whether civil courts have any meaningful authority under the Religion Clauses of the Constitution to resolve religious disputes, suggesting, within the context of religious divorce cases, that courts do have real power pursuant to the neutral-principles approach to substantively review certain religious disputes. Falsafi also criticizes civil courts, arguing that "[t]he mahr decisions show that when lower courts do not understand the precise nature of a religious provision, they often

civil-tort action, is becoming an urgent one. In the current situation, many repudiated women cannot be awarded damages, although the repudiation caused them enormous emotional distress and they are incapable of achieving any economic security.

Why are women outside of Israel not using the mechanism of civil tort claim? Is it conservatism and a fear of approaching the court because of pressure within the community? Such pressure is liable to cause women to abstain even from demanding the *mahr*.[125] At the same time, many women do not hesitate to turn to the court to demand the division of property according to liberal family law. It is possible, therefore, that there is not sufficient awareness of the tort option, and that the background of the women's attorneys, in family law, makes them less familiar with the tort option. It is also possible that women fear the counter-argument that if *mahr* is recognized by the civil court, it is valid and therefore cannot be considered a tort. The answer to this counter-argument is that two radically different aspects of the problem are involved. The *mahr* represents a prenuptial agreement (according to some approaches) or a gift granted for entering marriage (according to others), whereas tort laws compensate for harm caused by a certain conduct, even if that conduct happens to be legitimate from the point of view of family law. This is how the matter is handled in Israel, and to some extent in Lebanon and India: the conduct is considered legitimate according to family law, but the husband who performs it must pay a price for it to his ex-wife for the harm caused by the unilateral divorce. There is no dissonance in this case, but a conscious decision that the religious act of *talaq* is valid from the point of view of family law and creates a status of divorce, and even triggers *mahr*, but this does not mean that no harm was caused and that civil-private law (torts) cannot be applied to claim compensation.

This is clearly a case of legal pluralism. Legal pluralism is a law and society issue that deals with a collision of two sets of laws. The rich literature on legal pluralism traditionally dealt with intra-national collisions between rules and cultures (offering a polycentric or polymorphic concept of law in highlighting the substantial social impact of non-statal—and not only statal—normative regimes and

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choose a secular tool that bears very little resemblance to the religious article, handicapping the judiciary's ability to reach a holding that reflects the parties' intent . . . . This Article's findings suggest, however, that the reason the lower courts render inconsistent decisions, is not because the Supreme Court's directive in *Jones* [v. Wolf, 443 U.S. 595 (1979)] is inherently flawed, but rather because lower courts interpret *Jones* too narrowly, leaving little room to understand the nature of the religious provision underpinning the dispute. Thus handicapped, courts are often unable to identify an appropriate civil legal tool to analogize to the religious article . . . . the *Jones* majority categorically recognized the state's 'obvious and legitimate interest' in providing a 'civil forum' where religious disputes could be resolved conclusively." *Id.* at 1915).

125. HUM. RTS. WATCH, *supra* note 58, at 95.

exploring the role played by various private bodies in creating them).[126] The modern literature on legal pluralism deals, for example, with collisions of international and national rules and cultures,[127] and with legal pluralism concerning multiculturalism and soft law.[128]

In the present case, a new angle of legal pluralism is explored—that of a collision between two national branches of law, both in cases in which each branch is an agent of the state and in cases in which only one is, the other being a private non-state agent. Indeed, in the present case the colliding laws are civil law and religious family law, being the religious practice, although valid according to Muslim law, concurrently considered a tort and in some countries also a criminal offense.[129]

As noted above, in the Israeli case, explicit legislation allows personal status to be controlled by religious law in order to preserve the status quo, and, at the same time, considers certain types of conduct, which are valid from the point of view of religious personal law, such as polygamy and *talaq*, as criminal offenses. This legal dichotomy distinguishes between matters of status and compensation and regards a right as legitimate from the point of view of religious

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126. *See, e.g.*, LON L. FULLER. THE MORALITY OF LAW (rev. ed., 1969); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); John Griffiths, *What Is Legal Pluralism*, 24 J. LEGAL PLURALISM 56 (1986).

127. *See, e.g.*, Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141 (2010); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009); Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 387 (2008); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1160 (2007); Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 BROOK. J. INT'L L. 1 (2007); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 978 (2004); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT. L. 999 (Michelle Everson, trans., 2004); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003); Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

128. *See, e.g.*, Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 96 MINN. L. REV. 706, 740 (2010); MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL (2010).

129. *See* Benjamin Shmueli, *Civil Actions for Acts that Are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision Between Two Sets of Law*, 46 VAND. J. TRANSNAT'L L. 823 (2013) [hereinafter Shmueli 2013]. Indeed, being the religious family law conflicts with tort or criminal law is a case of legal pluralism. The family arena can and should be adjudicated not only under family law but also under other avenues—avenues which support a sensitive and balanced solution to the abovementioned dilemma. *See generally* LEGAL PLURALISM AND SHARI'A LAW (Adam Possamai et al. eds., 2014).

family law, but subjects it to sanctions and disincentives under criminal and tort law.

Acting in the spirit of legal pluralism may result in separating the right to marry into two dimensions: status and damages. According to this view, *talaq* is a tort and may be contrary to public policy, but civil courts should not (and actually cannot) declare *talaq* invalid or ban courts from recognizing Muslim law. Civil courts should not grant sweeping recognition to *talaq*, with no other possible remedy for the harmed woman (and *mahr* cannot be considered as compensation for the harm resulting from *talaq*). Rather, they should award damages without changing the marital status. Legal pluralism makes it possible for the state to help oppressed women without seriously harming religious practice. This right exists in Muslim law, but there is a price associated with it, which makes for a successful pluralistic compromise between colliding values, even if the religious right is incomplete in practice.

This is not to say that a civil court in the United States or Jordan that approves the *mahr* in practice approves it as a proper mechanism that conforms to the values of modern society. There are various reasons for recognizing the *mahr*, including regarding it (probably mistakenly) as a prenuptial agreement signed willingly by the wife, or as a gesture of comity. Other courts have rejected the *mahr* for public policy and other reasons. Thus, the courts that accepted it did not vindicate the values on which it is based. Such vindication could have made it impossible to impose criminal or tort sanctions. It is not an equitable or reasonable tool, but part of a system characterized by extreme inequality to the detriment of the woman; *talaq* and the *mahr* only make the situation worse from the point of view of the woman.

The dichotomy inherent in legal pluralism is manifest in the recognition of the *mahr* for specific local reasons, together with the option of imposing sanctions, in another domain, against the perpetrator of *talaq*. It should be possible to impose tort sanctions in the case of a unilateral divorce that caused harm, even in countries where the property is divided according to civil family law, and the *mahr* is not recognized.

Returning to the earlier example, it seems that the conduct of Adel can be considered "extreme and outrageous" (according to the American standard for Intentional Infliction of Emotional Distress), and, as such, an intentional tort, even in jurisdictions with not particularly rigid standards. Indeed, *talaq* should trigger compensation, either by tort law, as a reflection of a balanced solution, or by civil family law, if the latter succeeds in providing adequate, rather than symbolic compensation for repudiated women. *Talaq* should be considered as contrary to public policy. Western civil courts should not necessarily declare *talaq* invalid or decide not to recognize *Shari'a*, but monetary-pecuniary sanctions should be imposed on it. Indeed, the religious practice of *talaq* should not be banned, but rather

taxed. Civil courts should award adequate damages without changing the marital status.

If the *mahr* provides adequate amounts of money in cases of *talaq*, similar to the amount that the woman would have received as an outcome of the division of property, the woman may choose not to file an independent tort action for the actual harm she suffered. This is a balanced solution, similar to the tort action, and even faster because the woman need not go through a separate procedure and prove her harm. Nevertheless, even in these cases, she should not be barred from filing a tort claim because the compensation from the tort action is of a different nature than that of family law. It is reasonable to assume, however, that because the proof in the case of the *mahr* is easier, if the *mahr* is high enough the woman may be well-advised to avoid filing a tort claim.

But, if the *mahr* does not provide an adequate amount of money in cases of *talaq*, a tort action for the harm should be especially appropriate, because *mahr* does not compensate the woman for the emotional distress caused by *talaq*. Any other solution may harm the delicate balance between uniform laws and diverse cultures. Reliance on religious tribunals alone, acting as arbitrators in these cases, does not solve the problem because in most countries, both Muslim and Western, the women are left without adequate funds in cases of *talaq*.[130]

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130. *Cf.* Falsafi, *supra* note 55, at 1934–37 ("Religious arbitration, which has historically found a very receptive home in the United States, has become the foremost battleground for championing the cause of legal pluralism and religious sovereignty. However, as this Article details, while it is hard to find fault in the basic idea that parties should be permitted to structure their relationships and adjudicate their disputes based on shared values, religious arbitration poses a number of unusual problems that renders its execution somewhat challenging. The greatest difficulty presented by religious arbitration involves potential clashes between a number of religious laws and standards and certain civil protections, including many concerned with gender equality. Courts' abilities to deal with this conflict have been limited by two constraints. First, the Supreme Court's interpretation of the FAA [Federal Arbitration Act], directing the judiciary to defer to arbitration decisions, has prompted courts readily to accede to the holdings of religious arbitral bodies without paying much attention to the underlying substantive issues that characterized the original dispute. Second, a misreading of constitutional guidelines, including those set forth in Jones, has convinced some lower courts that going beyond procedural review of religious arbitral awards will result in Establishment Clause violations by impermissibly entangling the courts in doctrinal analysis . . . . The third serious challenge religious arbitration poses concerns pressures contracting parties may feel from their communities to subscribe to the authority of religious forums . . . . As the survey of religious divorce cases reveals, mapping the boundaries of the judiciary's authority over religious forums is not just a matter of academic interest, but is vital to everyday concerns because so many Americans use religion as an anchor for their personal relationships. As a result, if Supreme Court guidelines are misinterpreted to deny parties to a religious agreement recourse to the civil judiciary, or if deference to religious arbitration becomes automatic in all circumstances, women's economic welfare, their ability to retain some form of custody of their children, and even their right to remarry can be significantly impacted. It is crucial,

C. *Can Tort Law Indirectly Affect Personal Status?*

When there cannot be a direct change in marital status following the civil action, as there is in the case of *talaq*, the state can help oppressed women without seriously harming the religious practice. This right exists in *Shari'a*, but it carries a price tag, which makes for a successful pluralistic compromise between colliding values, even if the religious right is incomplete in practice.

Acknowledging tort actions for *talaq* may result in a separation of the right to be married into two dimensions: status and damages. This separation seems feasible. It may be possible to argue that such a separation is not only a reflection of legal pluralism but also creates *harmony* between religious family law, which addresses the status aspect, and tort law, which addresses the damages. The separation appears to eliminate the conflict between the two dimensions and creates a more liberal and democratic society[131] by harmonizing two disciplines of law. Because tort law is not expected to affect marital status, the separation of the right into two aspects offers a new and liberal solution: recourse to civil-tort law, with the understanding that only religious family law can change personal status.

This solution, however, does *not* result in real harmony. To understand why, a review of the theoretical issues concerning the award of damages in cases in which a woman is divorced against her will is necessary. The tort action solution appears to have developed in stages.[132] At first, Muslim women in Israel recognized that religious family law represented a dead end and sought a solution in a different, liberal discipline of law. The second stage was referring to tort law. Indeed, tort law provided the answer to an ongoing problem. But the tort solution was not based on solid theoretical ground. Although tort laws have existed all along, the solution was not created by the legislature *ex ante* in order to complement family law.[133]

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therefore, to continue to evaluate the boundaries between religious autonomy and other civil liberties. Perhaps, the lessons learned from this ongoing American experiment could even help countries searching for new constitutional models or those simply looking to undertake similar reform.").

131. For a general criticism of a wrongful look at *Shari'a* as a threat to human rights, see Asifa Quraishi, *What if Sharia Weren't the Enemy? Rethinking International Women's Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173 (2011); Asifa Quraishi-Landes, *Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms*, 57 N.Y. L. SCH. L. REV. 245 (2013).

132. *Cf. generally* Oren Perez, *The Institutionalization of Inconsistency: From Fluid Concepts to Random Walk*, *in* PARADOXES AND INCONSISTENCIES IN LAW 119 (Oren Perez & Gunther Teubner eds., 2006) (expanding on the idea of vagueness and vague notions in law, some of them developed in an evolutionary way, and which can be constructive in finding ways to cope with complex realities).

133. A similar process appears to have taken place in the area of civil actions for refusal by Jewish husbands to divorce their wives. *See, e.g.*, Benjamin Shmueli, *What*

Does the awarding of damages in tort law affect, even indirectly, marital status in religious family law? In theory, tort law is used here as a second option, not as a decisive solution to the problem, and it does not make *Shari'a* more liberal or more modern. Thus, tort law provides a solution that is not optimal, because the harmful norm is not banned, only taxed in practice. Nevertheless, tort law contributes to harmony between the laws and the courts, offering the best option available under the circumstances.

Reality is somewhat more complex, however. The awarding of damages in tort law does affect, if only indirectly, marital status by causing tension between Western liberal tort law and *Shari'a*, with the former imposing its values on the latter. For example, a Muslim husband may act differently if he knows that divorcing his wife against the wife's will carries a price tag, either civil (damages) or criminal (fine or imprisonment) in nature. Tort law may, thus, deter some husbands and direct their behavior. Recall the case of Mustafa and Salma, described above.[134] Salma's friend Fatma, who had been divorced against her will, cannot revert to her status of a married woman by suing her husband, Adel; Fatma knows, however, that suing Adel may deter Mustafa from divorcing Salma against her will.

Tort law can thus affect religious family law *de facto*, even if indirectly, and only in the long term; it can also make religious state or non-state law generally more compatible with human rights, because, as a result, fewer husbands will divorce their wives against their will.[135] This is especially true if the damages awarded are sufficiently high to achieve optimal deterrence.

Note that there are cases in which tort law can affect family status directly, more than it does in the matter of *talaq*, as, for example, in the case of tort claims for refusal of Jewish husbands to divorce their wives. In this case, the tort or contract action against the husband can result in him eventually divorcing his wife in order not to have to pay the compensation, where the wife renounces the compensation she was awarded in civil court in exchange for the divorce. This is often the case when the reason for the refusal is an attempt to extort money for the

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Have Calabresi & Melamed Got to Do With Family Affairs? Women Using Tort Law in Order to Defeat Jewish and Shari'a Law, 25 BERKELEY J. GENDER L. & JUST. 125 (2010) [hereinafter Shmueli 2010]; Shmueli 2013, *supra* note 129.

134. *See supra* Section IV.A.

135. As noted, it is possible to envision a situation in which a husband who divorced his wife against her will would try to remarry her, but here *Shari'a* places a serious obstacle: he cannot remarry his divorced wife unless she first marries another man and divorces him. *See Qur'an* 2:230.

divorce (according to Jewish law, husbands cannot be coerced into divorcing their wives).[136]

D. *Compensation in Tort Law as a Remedy for Breach of Autonomy*

A very important value that tort claims compensate for is harm to autonomy. Unlike civil family law, which divides the property in an equitable manner, tort law compensates for the humiliation and degradation caused by harm to the woman's autonomy.[137] Not only was she unilaterally repudiated in a degrading and humiliating way, but she also had no means of even expressing her opinion on the matter; no judge heard her opinion or ruled in her case. The non-institutional form of *talaq* seriously harms the woman's autonomy, which is sufficient to order her husband to pay compensation for it. As noted, the form and result of *talaq* and *mahr* together compound the already unequal and inferior status of the woman.

It is possible to argue that the autonomy of the husband is also harmed if the sting is removed from the religiously legitimate act he performed, and in practice makes it quite difficult for him to carry it out because of its civil price. But, it is important to bear in mind that the husband *has* a choice, which means that he has autonomy, even if it is limited to some degree, compared with the complete lack of autonomy of the woman. His choice is between the "fast track" of *talaq* (which saves him filing a divorce action in *Shari'a* court, litigation, hiring a lawyer, and proving grounds for divorce), and the "standard track" of filing such an action, with all that it implies. Unlike criminal or family laws, which do not recognize religious norms such as *talaq*, tort laws do not explicitly forbid performing the act. Rather, the financial disincentive means that the husband is faced with two alternatives. The first is to divorce his wife unilaterally, on the fast track, in which case he must pay some sort of a price. He can purchase

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136. *See* Shmueli 2013, *supra* note 129, at 854; Benjamin Shmueli, *Post Judgment Bargaining (With a Conversation with the Honorable Judge Prof. Guido Calabresi)*, 50 WAKE FOREST L. REV. 1181 (2015).

137. For the legal importance of harm to autonomy from various points of view, see generally CA 2781/93 Da'aka v. Carmel Hospital 53(4) IsrSC 526 (1999) (Isr.) (Israeli ruling that recognized, for the first time anywhere in the world, harm to autonomy as a basis for separate compensation under tort law, without a necessary connection to other types of harm); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 167, 217–18 (1993) (explaining that when there is no effective range of choices in the market, and a substantial repertoire of valuation options cannot be ensured, and freedom or autonomy cannot be achieved); Tsilly Dagan & Talia Fischer, *The State and the Market – A Parable: On the State's Commodifying Effects,* 3 PUB. REASON 44, 54 (2011) (discussing "the autonomy critique" concerning issues of commodification of rights, and focusing on the "resulting deprivation of choice, and its adverse effect on the choosing subject's choice-making capacity"); Nili Karako-Eyal, *Has Non-U.S. Case Law Recognized a Legally Protected Autonomy Right?*, 10 MINN. J.L. SCI. & TECH. 671 (2009) (presenting breach of autonomy as a key parameter in different issues, mostly tort, in non-U.S. countries).

his comfort at the expense of his wife if he compensates her for the severe harm she sustains. Indeed, after choosing this mode of behavior he has no choices left. If the husband does not want to pay the price, or cannot, the second option is that he can opt for the regular institutionalized way, allowing his wife to make her voice heard. Do not forget, however, that this situation is still a difficult and unequal one for women according to many religious legal systems, including *Shari'a*.[138] Therefore, no restriction is imposed here on the right to divorce, but only on the mode of its execution.

E. *Summary: Is Tort Action Possible, or Only the Application of Civil or Religious Family Laws?*

Table 2: Decision chart regarding whether a tort claim for the damages of *talaq* is possible, or whether there is only a choice between applying the *mahr*, as part of religious Muslim law, and dividing the property according to secular-liberal family law

Is *Shari'a* state law?	**Is a tort claim for the damages of *talaq* allowed?**
Yes, in all areas of law (e.g., Saudi Arabia and several Persian Gulf states)	No. Only the *mahr* is applied.

138. Harm to autonomy is relevant especially when there is inequality between the parties, including economic inequality. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 100 (1983) (presenting an aspect of the absence of choice that focuses on extreme monetary gaps between the parties, which can make the poorer and weaker sectors commodify their personal resources; this can create a serious distributive problem and make the transaction involuntary); Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification, in* RETHINKING COMMODIFICATION 11 (Martha M. Ertman & Joan C. Williams eds., 2005) ("Unequal distributions of wealth, make the poorest in society, with little to offer in the market place, more likely to commodify themselves—their bodies for sex, their reproductive capabilities, their babies, and parental rights.").

Is *Shari'a* state law?	**Is a tort claim for the damages of *talaq* allowed?**
Yes, but only in the area of personal status, in this case for Muslim couples (e.g., Israel, Lebanon, and India)	Yes, a tort claim should be possible in parallel with the *mahr*. In Israel, a separation is enacted between the legitimacy of *talaq* as part of *Shari'a*, as state law, and the possibility of filing a claim for harm caused by *talaq* based on secular tort law, which is also state law. It should also be allowed in India and Lebanon (the Druze in Lebanon enjoy an arrangement through family law that may be adequate without the need to resort to torts).
No (Western countries, as well as certain Muslim countries, such as Tunisia, Iraq, Jordan, and Syria)	Yes, a tort claim should be possible in parallel with the *mahr* or in parallel with the division of property according to secular family law. **In countries that recognize *mahr* for being an agreement between the spouses**, tort law provides a separate and independent track for compensating for the harm caused by *talaq*, which, even if legally recognized and agreed upon by the spouses, is still a severe harm to the woman's autonomy and compensation should be allowable for it. Moreover, it is still appropriate to allow tort claims even **in countries where the property is divided according to liberal family law** and the woman receives a symbolic amount for her divorce, as in the case of classic *talaq*, and despite the fact that, in these countries, religious norms and minority groups enjoy less consideration.

V. GENERALIZATION

A. *Tort Law Provides an Indirect Disincentive to Act According to Religiously Legitimate but Otherwise Harmful Norms in the Family Arena*

In his 2008 talk, the Archbishop of Canterbury hinted that *Shari'a* should be incorporated in one form or another into state law. But, incorporating *Shari'a* in Western countries raises problems in many

instances. Taxing instead of banning is a solution that does not directly confront oppressive religious practices but enables tort law to act in the private arena and indirectly deters members of the religious communities from acts opposed to public policy. It is also a balanced solution: the religious practice remains valid and is not challenged, but a price is attached to it, making it, in practice, less effective. This solution may be applicable not only in cases of *talaq* and *mahr*, but in other cases as well, particularly where oppressive religious norms are allowed but not officially recognized by state law.

There is extensive scholarship on Muslim law and *Shari'a* in Western countries, from a variety of aspects, including family law, *talaq*, and the application of the *mahr* in the case of immigrants to the West who had married in Muslim countries. But there is almost no literature on the theoretical basis for tort actions for the emotional and monetary harms caused by *talaq*. Furthermore, there is not enough literature on the possible indirect *de facto* deterrent effect of tort law on religious family law, causing husbands to avoid using a legitimate *Shari'a* practice. This is a common dilemma and a unique point of contact between Western laws and Muslim law, especially at a time of ongoing debate on the integration of the latter into the former, and given the large migration of Muslims to Western countries in recent years.

Admittedly, the literature has addressed Islamic family law in Western society in general. The scholarship does not unanimously try to integrate *Shari'a* into state law, and does not always offer new models and ways of thinking. Some scholars criticize solutions in which Western values are imposed on religious communities and offer different solutions. The literature pointed out several problems and criticized the integration of religious law in general and of *Shari'a* in particular into state law. There have been demands for aggressive imposition of secular, Western state laws over religious law and rules. After presenting these works below, this Part shows that the tort solution proposed here does not appear to be affected by these problems, but on the contrary, helps solve them.

Jamal Nasir argued that, despite the differences between Western liberal societal-civil law and Islamic law, *Shari'a* laws also defend women's rights, and that Muslim women have far greater power and more rights than are commonly perceived and enjoy full autonomy as far as their property is concerned.[139]

Abdullahi An-Nai'm claimed that, although *Shari'a* law has historically held in different states, some of these states have often

139. JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION 1–2 (2d ed. 1994).

implemented secular law as well.[140] She noted that family law that is governed by *Shari'a* is resistant to change because it is one of the ways in which Muslims identify themselves.[141]

John Esposito attacked the notion that the authority that dictates what constitutes fundamental human rights is well-established.[142] Some refer to a secular, Western, liberal authority, but Esposito argued that it is not necessarily clear why Western liberal societies should have a monopoly on defining human rights. To achieve Western ideals without having to answer this enormous question, it is useful to resort to Islamic reasoning and rationales in order to change Islamic law.[143] Esposito advocated methods for reforming modern law and argued that legal reform would be effective only to the degree that it is accepted by the Muslim community.[144] Therefore, reforms must use Islamic rationales that can be seen as advancing Islamic law rather than intruding upon it.[145]

Andrea Büchler presented an array of ideas for dealing with the conflict between *Shari'a* and Western law in secular Western nations.[146] According to her, there are conflicts in places such as Europe, where people often have an almost automatic negative reaction to what they perceive as political arguments based on religion.[147] Büchler explored the distinction between culture and religion: if *Shari'a* is a religious mechanism but is mostly a cultural phenomenon, the state should not treat it neutrally. She made the case for pluralism, arguing for the adoption of multiple legal systems and mentioning some of the dangers. She argued further that the way to deal with the conflict between *Shari'a* and Western laws, which has become more pronounced with growing mobility and immigration on the one hand and the increasing secularization of some Western nations on the other, is to "reincorporate religion into its civil and social structures, making religion part of the modern secular society it understands and proclaims itself to be."[148] According to Büchler, legal pluralism is a plausible outcome, given the decrease in normative societal consensus.[149] Nevertheless, no single idea can relieve a universal tension between Western and *Shari'a* systems because

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140. ISLAMIC FAMILY LAW IN A CHANGING WORLD, *supra* note 6, at 17 (explaining that family law has traditionally been governed by *Shari'a* while most other aspects of civil law have been governed by state law).

141. *Id.* at 17–18.

142. JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW (2d ed. 2001).

143. *Id.* at 127.

144. *Id.*

145. *Id.*

146. BÜCHLER, *supra* note 12, at 7.

147. *Id.* at 11.

148. *Id.* at 7.

149. *Id.* at 19.

Western systems are themselves diverse.[150] Büchler presented different theories based on which it is possible to adopt legal pluralism.[151] One theory is that the only real law is that made by the state.[152] In this sense, the normative values of the people of the state, at least in a democracy, create that law.[153] If one adopts this view and believes that the legal fabric should incorporate *all* regulations, the state should recognize the existence of different regulatory norms (private family law, in this instance).[154] As demonstrated above in relation to *talaq* and *mahr*, and unlike in cases such as the burqas in France, a balanced pluralistic solution is possible with the assistance of civil tort law and the division of the right into status and damages, which does not require a sharp and clear determination of which set of laws governs.

Christian Joppke and John Torpey presented several examples of how Western countries have responded to Islam and analyzed the barriers to conflict resolution. Some of these barriers include secularization (and therefore reduced respect for religion generally), the religious establishment, and the incorporation of church functions into the state.[155] The authors argued that the Western legal system

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150. *Id.* at 21 (explaining that different ideas of state identity have significant effects on the ability to achieve pluralistic resolutions). French secularization relegates religion to an entirely private sphere and exerts strong pressure for assimilation. *Id.* at 21, 24. In Germany, by contrast, identity is built upon common ethnicity. *Id.* at 21. Pluralism centers on the question of whether to apply foreign or domestic family laws. It cannot be ignored that law affects culture. *Id.* at 27. Some countries try to address the conflict by treating residents of a country differently from those who are there temporarily. *Id.* at 36–38. In our case, when Muslim couples reside in a Western state, this solution does not apply. *Cf.* JOPPKE & TORPEY, *supra* note 9, at 17–25 (discussing the differences between Germany, France, Canada, and the United States) The authors explain that in Germany, the right to religious practice is well protected, but the church establishment prevents Islamic institutions from obtaining legal, public status as corporations. *Id.* at 19. France adopted almost the opposite approach. France, a declared secular nation, with no religious establishment, made the wearing of burqas illegal in 2010, a move often seen as restricting individual religious practice. France considered the wearing of burqas "a sign of subjugation [and] of debasement," and thus incompatible with its liberal ideals. *Id.* at 21. Some attempted to impose liberal values on Islamic practices by arguing that the practice of wearing burqas was anthropologic and cultural, not actually religious. *Id.* at 25. The approach in Canada has been different. Canada stems from a "founding nation," it retains a watered-down establishment and has a multiculturalism policy that actively attempts to accommodate Islam. The result, however, has created much conflict as Muslims seek to implement *Shari'a* in Canada in private matters. *Id.* at 85–86. In contrast, the United States has neither an official multicultural policy nor an establishment. Instead, it applied its Free Exercise Clause of the First Amendment to facilitate Muslim integration. Because religion is held to be a non-legal matter, politics has not reached the level it might have owing to negative public sentiment following the September 11, 2001, attacks. *Id.* at 87.

151. BÜCHLER, *supra* note 12, at 74.

152. *Id.*

153. *Id.*

154. *Id.*

155. JOPPKE & TORPEY, *supra* note 9.

should withdraw from ruling on substantive issues in order to avoid stepping on the toes of religion, and noted that the state cannot treat conflicts created by Muslim immigration neutrally.[156]

According to Melanie Reed, many of the tensions between Western and Islamic legal systems have to do with the belief, in many Islamic legal systems, that rights are inherently coupled with moral obligations and thus cannot be granted by the state.[157] Reed objected to the notion that Western ideals should displace the values or rights of other societies.[158] She argued that generally the evolution of human rights happens internally—within Muslim society in this case—not through external pressure,[159] especially given the fact that, at times, there is nothing fundamentally at odds between *Shari'a* and Western understandings of human rights.[160] Some have argued that the belief that *Shari'a* is the basis for family law in different legal systems is a farce, and that family law is based on other, state-made principles, which means that liberal change is accomplished by affecting the political human agents through which state power flows.[161] According to Reed, a liberal society should not seek to impose its moral values on other societies, because imposition itself is inconsistent with the moral values of a liberal society.[162] A reluctance to impose moral values does not ignore the important conflict between Western and Islamic ideals, however. [163] The Islamic world values group rights more than individual rights, whereas Western societies tend to take the opposite approach. [164] Islamic societies tend to believe that the individuals' obligations to other individuals take precedence over individual

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156. *Id.* at 3.

157. Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari'a in a Modern World*, 19 AM. U. INT'L L. REV. 485, 492–93 (2003).

158. *Id.* at 486.

159. *Id.*

160. ISLAMIC FAMILY LAW IN A CHANGING WORLD, *supra* note 6, at xii, 3 (arguing also that instituting liberal changes in Muslim countries requires motivating people inside the country, not imposing external pressure directly. This source relates to Western influence on Muslim countries, and the author mentions that Islamic law derives its authority from the state, not from the understanding of *Shari'a* jurisprudence, allowing Islamic countries to inch closer to other legal systems. Islamic countries have chosen, through the state, to abide by international obligations and treaties. All Islamic societies now live under "constitutional" systems that require respect for a certain level of rights. Even if the countries do not act according to these principles, they have expressed that these principles bind them. Acting according to *Shari'a*, by contrast, would require virtual political and economic isolation from the rest of the world. It seems that these arguments may also be relevant to our proposal of how to influence Muslims living in Western countries).

161. *Id.*

162. Reed, *supra* note 157, at 491 ("A government that allows public morals to inform positive laws adheres more closely to international law notions of human rights than a government that imposes morality from above.").

163. *Id.* at 487–88.

164. *Id.* at 487–89.

rights.[165] In Islamic cultures, rights are inherently interconnected with these obligations such that states cannot grant or take away rights.[166] Such a system precludes a "full realization of individual rights."[167] Therefore, Reed argued that many of the tensions between Western and Islamic legal systems (the tension discussed in the present Article being one of them) have to do with the belief of Islamic legal systems that the state cannot grant rights and that rights are inherently coupled with moral obligations, whereas Western societies tend to focus much more on individualization. These two ideals may be incompatible in some areas.

Mohammad Fadel addressed the possible conflict between cultures and laws, and presented methods for reconciling Western law with Muslim law by creating remedies that may have a higher chance of appearing neutral to adherents of *Shari'a*.[168]

The literature has also dealt with Islamic family law in Western society regarding specific issues such as Islamic divorce law,[169] as well as aspects of the Islamic marriage contract (*mahr*),[170] and unilateral divorce (*talaq*).[171] Nathan Oman suggested that a greater focus on the context of contractual relations, like *mahr*, may be used to pluralistically apply Western contract law to *Shari'a* contracts.[172]

But the dilemma of a possible clash between Western and Muslim cultures has not yet been addressed from the point of view of intra-familial civil actions. It appears that the intersection of laws and cultures in this regard is unique, and the use of tort law may reflect a balanced, if not perfect, compromise. One can generalize and learn from this balanced and delicate way of coping with religious life, especially minorities and immigrants in Western and Muslim countries where *Shari'a* is not dominant.

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165. *Id.* at 493.

166. *Id.* at 494.

167. *Id.* at 504.

168. *See generally* Mohammad Fadel, *Islamic Law and American Law: Between Concordance and Dissonance*, 57 N.Y. L. SCH. L. REV. 231 (2012–13).

169. *See, e.g.*, AHMED SHUKRI, MUSLIM LAW OF MARRIAGE AND DIVORCE (2009); JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA (2012); INTERPRETING DIVORCE LAWS IN ISLAM (Rubia Mehdi et al. eds., 2012); Mohammad H. Fadel, Political Liberalism, Islamic Family Law, and Family Law Pluralism, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION 164 (Joel A. Nichols ed., 2012).

170. See, e.g., THE ISLAMIC MARRIAGE CONTRACT (Asifa Quraishi & Frank E. Vogel Eds., 2008); Emily L. Thompson & F. Soniya Yunus, Choice of Laws *or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 373–74 (2007) (offering a survey of the difficulties that Muslims face in Western courts, specifically with regard to *mahr* and *talaq*).

171. *See, e.g.*, Katayoun Alidadi, *The Western Judicial Answer to Islamic Talaq: Peeking Through the Gate of Conflict of Laws*, 5 UCLA J. ISLAMIC & NEAR E. L. 1, 6–18 (2006) (comparing Belgian and U.S. approaches to recognition of *talaq*).

172. Oman, *supra* note 84, 599–605.

In contrast to what emerges from some of the critiques described above, tort action rarely results in a change in status. As explained, tort action can have a true effect indirectly, in the future. Therefore, these critiques are less strong than in other issues (e.g., banning burqas in France or tort or contract actions for refusing to divorce in Jewish law). The tort action solution is preferable to inaction because it does not directly harm the right itself. In this case, awarding damages instead of banning the act is an appropriate solution to the dilemma, consistent with the spirit of legal pluralism.

The dividing line between culture and religion is not always sharp and clear. Protection of culture is important,[173] and the question is whether secular-civil law should take up this duty. Büchler defined cultural identity as the sense of belonging to a community and the safety associated with such belonging.[174] Because religious beliefs affect culture, it is not always clear where culture ends and religion begins.[175] Should tort law be independent in considering these cases? Should it overrule religious family law in case of conflict between the two? Or is it a question of reaching some harmony between the two disciplines of law, so that liberal civil law puts the finishing touches on non-liberal religious family law by supplying remedies in the form of damages only, whereas religious family law still has exclusivity in determining status (married or divorced)?

In a global sense, and from a general perspective, tort law fills a vacuum. It functions as a state control, distinct from religious state or non-state control, but in a way that harmonizes with the other forms of control and does not breach the legal status quo. This is legal pluralism: Muslim husbands can still divorce their wives against their will, but, given the secondary remedy, which consists of damages that may be awarded for this act, the act may cost money and therefore tort law may provide a disincentive for committing it. Because *Shari'a* courts, at least in Israel, agree that this conduct is not prohibited (although not desirable either), they do not challenge secular tort law on this point, and each discipline handles its own matters.

The tort solution appears to be a good compromise. It is true that the religious right is left incomplete (or less effective) and weakened because of the threat of exposure to a fine, imprisonment, or tort liability; in other words, exercising the right has a price attached to it. Is it correct to impose liberal values and, in this way, harm religious values, norms, and practices? Liberal values assist oppressed women against their powerful husbands, but the freedom of religion is itself an independent and important value, not only in countries where it is

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173. BÜCHLER, *supra* note 12, at 13.

174. *Id.*

175. *Id.* at 17. *Cf.* JOPPKE & TORPEY, *supra* note 9, at 5 (distinguishing religion from culture and arguing that religion can be dealt with neutrally, but culture cannot).

a right granted by the state but also in countries where it is a private right, protected by the state. Indeed, freedom of religion is a protected value in countries that maintain a strict separation between church and state.[176] It is also important to mention that Muslim women entering a religious marriage know in advance that their husbands have the religious authority to divorce them against their wills. Clearly, this is not a necessary step in Muslim marriage, and every woman hopes it will not happen to her. But in some societies, even if she lives in a Western country, she has no choice but to marry according to *Shari'a*, for cultural reasons. Note also that by acknowledging tort actions for *talaq*, especially when family law leaves the woman with only the *mahr*, liberal law also compromises its values. The reason for this is that, by the court awarding a symbolic sum and not directly confronting the religious practice, this harmful practice is not abolished and may continue, although for a price. Thus, the law may convey the message that liberal society accepts these harms and does not try to abolish them, but merely taxes them.

Still, it is better than declaring *talaq* invalid. This appears to be the best compromise that can be achieved. Any other solution may not be efficient and may be harmful in a different way. Divorcing a wife against her will is a tort and may be contrary to public policy, but Western civil courts should not declare *talaq* invalid, as they sometimes do,[177] or generally ban courts from recognizing *Shari'a* in general,[178] nor should they grant sweeping recognition to *talaq*, with no possible remedy for the harmed woman. Rather, they should award damages, without changing the marital status, even if the property was distributed according to liberal family values, because *talaq* has been acknowledged and the woman is emotionally harmed. Any other solution may damage the delicate balance between laws and cultures, human rights, and freedom of religion.

Using the tort mechanism does not create *harmony* between *Shari'a* and tort law, but merely a *compromise*. Even if this compromise partially harms religious law, it appears balanced, and the harm may be inevitable in an era of human rights. This is especially true in countries where religious family law is a state agent, but it is true also in countries where religious family law is not a state agent, but where secular law respects religious law and courts operate as arbitrators, preserving the separation of church and state. The presumption is that *Shari'a* cannot be changed and made more liberal,

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176. *Id.* at 17.

177. *See, e.g.*, Shikoh v. Murff, 257 F.2d 306, 309 (2d Cir. 1958) (declining to recognize the validity of unilateral divorce, where a Muslim man carried out the divorce inside New York rather than in a foreign country).

178. *See, e.g.*, 5 Kan. Law & Prac., Code of Civ. Proc. Anno. § 60-5101 (5th ed.) (attesting to a movement in several states to constitutionally or statutorily ban courts from recognizing *Shari'a*).

so *talaq* remains legitimate according to *Shari'a*, and so does the *mahr*, even if the outcome of *talaq* and *mahr* combined is often a humiliated and harmed woman, with no remedy in religious family laws. The tort action does not directly change marital status, and it retains some distinction between the laws and the courts.

This Article examined one interaction between civil and religious family laws. It presented a desirable model of the type and extent of tort law intervention in the family arena. Tort action may be leveraged to obtain the primary remedy regarding status, and in this way shape religious family law along liberal lines by directing spouses in different countries to reconsider their harmful acts. Tort law conveys the message that, when the outcome of religious-family law is not compatible with individualism and liberal human rights with regard to status, it seeks to eliminate harmful practices by awarding damages, even at the cost of some confrontation with religious family laws and courts, within certain limits; this is a relatively gentle confrontation, however, because the state does not abolish the religious practices, but rather only uses civil means to induce powerful members of the minority sector not to act in ways that are harmful to their spouses.

If so, using tort actions may reduce the harmful religious phenomena for the benefit of individualism and human rights by providing a disincentive to powerful persons—usually the husbands—to commit harmful religious practices, knowing that, although these practices are not banned in family law, they have a significant cost in tort law. This is the general lesson that can be drawn from this case study.

Should this be the role of tort law? The starting point and the key presumption is that the common good[179] in the present case dictates that the state should provide maximum protection against abuse of religious rights without—insofar as possible—directly confronting communities by invalidating their religious practices. Such confrontation can indeed be made through public law; private law (and tort law within it), however, operates in some circumstances and tries to make the best of the problematic situation, for the benefit of individualism and human rights. The challenge, therefore, is to achieve a balance between the need to protect the religious sphere, especially that of minorities, from government intervention, and the need to ensure that the religious practices in the family arena do not become a tool for oppression.

The true challenge is to carry out this move within the boundaries of private law, without resorting to dramatic action within public law, which might outlaw certain religious laws or reduce the leeway of

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179. *See, e.g.*, Martin Rhonheimer, *The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls's 'Political Liberalism' Revisited*, 50 AM. J. JURIS. 1 (2005).

religious courts operating in some of the countries by virtue of law, as state agents, and in others as private courts, within an arbitration framework.[180] Naturally, measures in private and public law can also be taken in parallel, and there is no need to choose one or the other, but a gentle solution that avoids direct confrontation is more likely in the area of private (tort) law, as shown here, and, in some cases, in contract law.[181]

To generalize the above analysis, this Article proposes the use of civil, private, and secular legal tools—and not only the tools of family laws—for handling intra-family cases, in order to gently shape religious norms in Western liberal societies.[182] Indeed, it is not a trivial matter that the family issues are being adjudicated not only under family law, but also under other laws. A pluralistic legal system requires multiple venues so that not only family litigation but also tort and contract actions can gently help bridge Western norms and conservative religious practices, shape these practices, and indirectly bring about change for the welfare and protection of vulnerable parties, without seriously harming tradition, identity, and cultural diversity.

The long-term effects of such a solution are subject to speculation. Could frequent use of tort action affect the content of religious law over time? Will there be a real deterrent for Muslim husbands like Mustafa to act according to their religious laws because of the "threat" of the price exacted by tort law? Do the different normative systems within a single-state apparatus operate with relatively little friction and not affect one another at all?

B. *Using a Soft Law Solution: Tort Law as a Type of Alternative for Criminalizing Religious Intra-Familial Norms*

In some countries, religious norms that harm one's spouse are considered criminal offenses. For example, criminal legislation regarding *talaq* was mentioned above.[183] Similar legislation also exists against bigamy and polygamy.[184] In other countries there is no such legislation because the law does not want to ban religious behavior

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180. For different models and proposals to handle oppressive religious norms in the public law arena, see AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001). *See also* HUM. RTS. WATCH, *supra* note 58, at 12 (Human Rights Watch organization trying to change women's status in Lebanon: "Reform discriminatory provisions governing women and men's access to divorce in Shia and Sunni personal status laws including by . . . abolishing a Muslim husband's unilateral right to divorce at will outside a courtroom").

181. As in the case of refusal to divorce under Jewish law, in which women refused a divorce bring both tort and contract actions. *See generally* Shmueli 2013, *supra* note 129.

182. *Cf.* LEGAL PLURALISM AND SHARI'A LAW, *supra* note 129.

183. *See supra* Subsection IV.B.2.

184. *See, e.g.*, Penal Law, 5737-1977, SH No. 864, art. 176 (Isr.).

using its heaviest instrument: criminal law. But, even in countries where such offenses are on the books, it is difficult to find instances of indictments for practicing religious norms. This is because the state avoids direct confrontation through the criminal justice mechanism with members of religious communities who behave in accordance with the norms of their religion. It seems that in such cases it would be convenient for the state to impose the burden of creating a negative incentive against these acts on the shoulders of those injured most directly thereby: the less powerful spouses, who are generally the wives. As noted above,[185] the same dichotomy is at the basis of the old status quo in Israel, dating back to Ottoman rule and later to the British Mandate (which had to accommodate various religions), namely that these actions are permitted by personal religious law but constitute a criminal offense. Because there is almost no enforcement of these laws at the criminal level, the woman plaintiff "does the job" for the state: a financial disincentive is provided, use of the cumbersome criminal law is avoided, there is no criminal tagging, and the burden of taking action is on the woman. It is possible to argue about the justification of this move and whether or not it is a form of privatization, but that is a discussion beyond the scope of this Article. Given that the same may be happening not only in Israel but elsewhere, tort actions for *talaq* should be considered favorably in other countries, as proposed in this Article. This is certainly preferable to the current situation in which, on the one hand, there are not enough incentives to prevent performing *talaq* in accordance with family law, and, on the other hand, criminal offenses are either not legislated or, if legislated, are not enforced.

The coexistence of the two tracks—the criminal (even if not sufficiently applicable) and the tortious—creates disincentives for acting according to harmful religious norms. One side of the coin is that anyone who wishes to perform these acts must take into account that, even if they are not prohibited under family law, they have a civil and criminal price. The other side of the coin is the rationale behind the options available beyond family law. Whoever wishes to perform these religious acts must understand that, even if his religion allows him to do so, and even if the law of the state does not prohibit it, the law expresses its displeasure with these norms, because weighed in the balance is not only the religious freedom of the perpetrator of the act, but also the severe harm caused to those who suffer from it. Even if religion allows the use of certain norms, the state still has a duty to suppress them in practice because they trample the rights of other members of the same community. It is legitimate to fight these norms indirectly. Taxing rather than banning the religious practice is a form

185. *See supra* Subsection IV.B.2.

of legal pluralism, and it is both balanced and efficient under the circumstances.

If one can accept this understanding of the offense of divorcing a woman against her will or of polygamy, which has been enacted in many countries despite the fact that the norms are permitted under religious personal law, and despite the fact that some states recognize their legitimacy (including states where there is a separation of church and state), there is no reason not to accept this understanding also with regard to civil claims. The reason to accept civil actions may even be stronger, because such actions are less harmful to the community as a whole and to the individual (the husband) than using the criminal law system.

C. Does the Use of Tort Law Create a Distributional Problem?

It is possible to argue against using tort law to exact a toll for practicing harmful religious norms (*talaq*, polygamy, or refusal to divorce) from the standpoint of distributive justice. One may argue that, if the sanction is monetary and not criminal (say, imprisonment), rich husbands may be able to pay the tax and not be deterred to perform these acts, whereas poorer ones have no choice and must renounce them or be imprisoned. This is a correct argument, although it can be made with reference to the criminal process as well, which often results in a fine and not in imprisonment. Moreover, some rich husbands will be deterred by monetary sanctions because negative financial incentives, such as fines and tort compensation, have a deterrent effect on the rich as well. Finally, despite a possible distributive problem, the outcome is by orders of magnitude preferable to the current situation, where all the women are oppressed and there is no way of helping even a portion of them.

It is hoped that the effect caused by a tort claim will be intense and will have a broad social impact on all husbands, including the rich ones, who consider resorting to religiously acceptable norms that severely harm their wives' rights. Recall that usually these husbands have the alternative of acting through the *Shari'a* court (although their choices are narrowed when it is possible to initiate a tort action against them), whereas the women have no choices at all, and their autonomy is severely harmed.

D. Is There Justification for Tort Law to Divide the Property Differently than Was Decided Based on Family Law?

In practice, every tort claim filed in the course of a divorce conflict divides the property differently than has been ordered based on family law. It is possible to argue that tort law interferes with a different set of laws and inappropriately changes the situation within that system. But this is not to say that therefore the claim ought not to be filed as

long as independent tortious grounds exist for it. This is the situation in cases of other torts, some of which interact with family law more than others.[186]

Indeed, all civil actions against spouses or ex-spouses relate in some way to family *affairs*, but not all of them relate to family *law*. For example, tort actions for violence, libel, slander, and abuse do not create a conflict of laws and jurisdictions, although the damages awarded can provide a bargaining chip for divorce, and in this way affect family *law* indirectly.[187] But not all civil actions that produce this type of interaction create a conflict between the laws and the courts. For example, civil actions for child abduction or violations of visitation rights *rely* on findings and decisions based on family law, after which tort or contract law determines whether the violator is a tortfeasor or has breached a contract.[188] These actions *assist* family law in enforcing decisions and provide an incentive to spouses or ex-spouses to adhere to judicial decisions.[189] They complement family law where it lacks the appropriate means to handle damages that occurred because of a violation of family law agreements and judgments.

For example, a parent whose child has been abducted can go to court based on private international law to demand the return of the child, and even ask for reimbursement of some of the expenses. But, he cannot achieve full compensation under family or international law for the financial and emotional harm that the abduction caused him. This he can accomplish only under tort or contract law.[190] Similarly, a parent who violates the visitation agreement with the other parent, or the agreement ordered by the court, is open to a court action to change the arrangement, and even to an action of contempt of court, which can result in a jail sentence or a fine to be paid to the state treasury (rather than to the damaged party). But, if the harmed parent wishes to receive compensation for his damages, he must turn to tort law.[191] In these cases, tort law is complementary: it intervenes in family law precisely where it can provide assistance, and where family law is helpless. Naturally, the more complex intra-familial actions are those in which there is a serious clash between family and civil law and between the jurisdictions (between religious and civil courts), or where civil-secular rules threaten to undermine religious autonomy. But it is not appropriate to distinguish between the various categories of intra-

186. *See* Shmueli 2010, *supra* note 133, 141–55.

187. *Id.* at 141.

188. *Id.* at 142–44.

189. *Id.*

190. *See* Rhona Schuz & Benjamin Shmueli, *Between Tort Law, Contract Law, and Child Law: How to Compensate the Left-Behind Parent in International Child Abduction Cases*, 23 COLUM. J. GENDER & L. 65, 128 (2012) (presenting a few models for compensating the left-behind parent in cases of child abduction).

191. *See generally*, Shmueli 2010, *supra* note 133, at 143.

familial tort actions. Tort law must apply in all cases in which harm that can be compensated occurs. In the case of *talaq*, which is used in this Article as a test case, and in other cases where there is a problematic interaction between tort and religious family laws, tort compensation can be viewed as an act that balances the harsh outcomes of religious family law with the requirements of secular individualism.[192] But the tort claim should be allowed on principle, even according to other approaches, as long as the tort track is independent and it is possible to identify a tortious breach of obligation that creates a harm.

VI. CONCLUSION

Some religious practices, such as *talaq,* are at times valid according to religious family law, but at the same time seriously harm individualism and the rights of the wife in a system that is already iniquitous and places the woman in a position of inferiority.

The present Article analyzed civil actions for *talaq* in cases where *mahr* leaves the repudiated wife with a small amount of money. Its uncompromising point of view is that a Muslim woman who was unilaterally divorced against her will is entitled to damages for her emotional distress, regardless of whether the property is divided according to liberal family values. The Article is a case study for a strategy to create financial incentives that indirectly defeat harmful religious practices. The main question was whether a Western state or a Muslim country that honors *Shari'a,* but whose laws are secular in nature, should tolerate religious practices by a minority community—migrants or citizens—resulting in the powerful members of the community causing harm to the weaker members. Often the individuals involved are immigrants in Western countries who bring religious norms that are unacceptable in liberal eyes. Should the state, in the name of multiculturalism, grant cultural autonomy to these minorities and tolerate harmful practices? Or should the state intervene aggressively, in the name of individualism and of the human rights of the injured party, and outlaw the religious practices that come into direct conflict with Western norms? Alternatively, is there a third way, involving financial disincentives imposed by the state on the powerful members of the group intended to stifle these practices without banning them?

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192. *Cf.* Yifat Bitton, *Feminine Matters, Feminist Analysis and the Dangerous Gap Between Them - A Response to Yehiel Kaplan and Ronen Perry*, 28 TEL AVIV U.L. REV. (EIUNEI MISHPAT) 871 (2005) (discussing tort litigation against a recalcitrant husband from a feminist perspective and addressing attempts to fight religious family law with tort law).

The answer provided by this Article is that family issues can and should be adjudicated not only under family law but also by other means that support a sensitive and balanced solution to the dilemmas mentioned above. The rationale is that neither deference to religious systems that harm vulnerable spouses nor abolishing religious norms in the name of individualism and liberalism are balanced solutions. These options, which fall outside of family law, advance in some form the status of women in an iniquitous system of religious family laws in which their status is inferior to that of men. Because religious norms change very slowly, if at all, the law must enable additional tracks, especially those that do not directly confront religious norms to the point of banning them, as criminal and civil family law do by assuming the authority to rule differently from religious courts. Tort law precisely meets these criteria. Indeed, tort law seeks to impose a civil price tag on harmful practices, providing a negative incentive to act according to their religious norms. It does so without changing family law *de facto*, and by softening to some degree the harsh results of criminal law.

The literature and case law have dealt mainly with the application of the *mahr* as sole payment for a repudiated Muslim woman versus the ability to divide the property according to Western liberal values. The possibility of a tort action for the damages created by *talaq* has not been adequately analyzed or theoretically supported. Nevertheless, this option has immense potential to both support individualism and women's rights without directly confronting the religious norms of minorities by enabling the woman to use the private law system of the state to be compensated for her harms and to create a disincentive for potential wrongdoers to act in the same manner.

Although a Muslim husband who repudiates his wife acts legitimately under *Shari'a*, tort law provides the woman with a secondary remedy: damages awarded in a secular court. Tort cannot grant the wife the primary remedy of status, that is, to declare the act null and void so that she remains married. The compensation reflects a civil law that regards practices recognized as legitimate and acceptable under religious law as tortious. Although the outcome of a tort action cannot change the woman's marital status, religious family law may be affected in practice, not in the case at hand, but in cases that follow in its wake.

Tort actions for *talaq* are a common practice in Israel. In countries that are governed solely by *Shari'a*, *talaq* is not considered a tort. In countries that are not governed by *Shari'a*, but that honor its practices (some Muslim and Western countries), there are solutions within state family law, some of them enabling limited damages to be paid out of the *mahr*. But there should also be room for a complementary tort action, especially in cases in which the division of property according to liberal values is impossible and the *mahr* is low, even if *talaq* was either performed in court or acknowledged by the court.

The test case presented in this Article addresses the ongoing debate over the question of religious law becoming part of state law in Western countries, showing how the state can confront harmful religious practices in a sensitive way without abolishing these practices.

To generalize, the analysis can fit different types of civil actions against practices that are valid under religious family law but at the same time seriously harm the rights of the more vulnerable spouse in a minority group. The analysis shows that secular courts can serve as a bridge between tradition and modernity by becoming involved in religious disputes in order to protect vulnerable spouses, using solutions other than those available in family law.

There are a few causes of action and remedies available to the civil courts to help oppressed spouses in their fight against practices that are legitimate according to religious law;[193] tort law is one of them. This is true both in countries where there is separation of state and religion (where there is civil marriage and divorce, and where religious courts are private), as well as in countries where there is no such separation and religious courts are operated by the state.[194]

This proposed balanced solution is based on the knowledge that a price must be paid for following legitimate but harmful religious practices. This is in contrast to extremist positions of state non-intervention on one hand and direct confrontation with the religious practices and norms on the other. An important aspect of religious life in the modern state is the preservation of multiculturalism with regard to religious practices, together with the protection for the vulnerable parties in the family arena. The proposed solution may show the way to implementing in a balanced manner the desire of the Archbishop of Canterbury and allow a society that holds Western values to cope with religious laws that are incompatible with these values. Tort law is not a complete solution; at times, the state needs to intervene more intensively, using other tools and sanctions. But there are times when taxing the harmful religious practice rather than banning it is the most balanced and efficient solution.

This middle-of-the-road strategy can fit not only circumstances of *talaq* and *mahr* but also other cases, such as bigamy and polygamy among Muslims and refusal to divorce among Jews, because tort law offers a global soft solution. A solution in the spirit of legal pluralism, which does not directly confront oppressive religious practices but enables tort law to act in the private arena and indirectly deter

193. *Cf.* Talia Einhorn, *Jewish Divorce in the International Arena*, *in* PRIVATE LAW IN THE INTERNATIONAL ARENA—LIBER AMICORUM KURT SIEHR 135, 153 (Jürgen Basedow et al. eds., 2000).

194. *Id.*

members of the relevant communities from acting, may be successful and balanced in other cases as well.

In western societies, divorcing a woman against her will, polygamy, genital mutilation, and honor killing are all criminal offenses. But each society must draw its own red lines and determine in which cases it is sufficient to tax with monetary compensation in a torts procedure, and in which cases it is not willing to compromise and opts to impose criminal liability.

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