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- Case Studies of Reasonable Accommodation in Europe

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ISLAMIC FAMILY LAW AND LEGAL PLURALISM APPROACH : CASE STUDIES OF REASONABLE ACCOMMODATION IN EUROPE

Maria Francesca Cavalcanti¹

Résumé

L'intensification des flux migratoires vers l'Europe, impose une confrontation globale avec le monde islamique. Ceci conduit les systèmes juridiques à chercher des solutions aux éventuels conflits nés d'un pluralisme croissant : juridiques, ethniques, culturels, mais aussi religieux. La question se pose en Europe notamment en référence à la charia et à sa diffusion comme cadre juridique. Ceci oblige les juges à utiliser des techniques d'inclusion et de protection des différences, afin de parvenir à un compromis entre la demande de reconnaissance des éléments fondamentaux de l'identité culturelle et religieuse et les principes fondamentaux du système juridique. Afin de parvenir à une évaluation concrète de l'application des techniques d'aménagement raisonnable en référence au droit islamique de la famille en Europe, cet article analyse la jurisprudence relative à l'institut islamique du mahr (le cadeau que le marié doit faire à la mariée lors de la conclusion du contrat de mariage) par les juridictions néerlandaises, allemandes, françaises, danoises, norvégiennes et suédoises.

Mots-clés : pluralisme juridique — Accommodement raisonnable — Shari'a — droit de la famille islamique — mahr — minorité islamique — Shari'a en Europe — Loi comparative

Abstract

The intensification of migratory flows toward Europe, impose an overall confrontation with the Islamic world. This leads legal systems to seek solutions to possible conflicts arising from a growing pluralism: legal, ethnic, cultural as well as religious. The question stands in Europe namely with reference to the Shari'a and its diffusion as juridical framework. This requires judges to use techniques of inclusion and protection of differences, to achieve a composition between the request of recognition of

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fundamental elements of cultural and religious identity and the juridical system's fundamental principles. In order to achieve a concrete evaluation of the application of reasonable accommodation techniques with reference to Islamic family law in Europe, the jurisprudence on the Islamic institute of mahr (the gift which the bridegroom has to give to the bride when the contract of marriage is made) by the courts of The Netherlands, Germany, France, Denmark, Norway and Sweden is analysed.

Keywords: *Legal pluralism — Reasonable accommodation — Shari'a — Islamic family law — Mahr — Islamic minority — Shari'a in Europe — comparative law*

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Introduction

The intensification of migratory flows towards Europe, imposes an overall confrontation with the Islamic world. The demographic growth of the Islamic population in Europe is a fact that requires Governments to define social, economic and institutional policies that can manage the new dynamics induced by this phenomenon. This, also, leads legal systems to seek solutions to possible conflicts arising from a growing pluralism: legal, ethnic, cultural as well as religious. One of the most important challenges is represented by the identification of legal solutions aiming at overcoming conflicts arising from such complexity. The question stands in Europe namely with reference to the Shari'a and its diffusion as juridical framework.

In cases where the multicultural character of society appears more pronounced, there is an evolution of the principle of equality through the valorisation of the plurality of cultural and religious identities, identified as essential components of the human person and his or her fundamental rights. Indeed, an interpretation of the principle of equality in the substantive sense, together with the affirmation of the equal dignity of persons, can reasonably lead to the provision by the legal system of derogatory rights in favour of members of minorities.

The recognition and protection of the dignity of different cultural expressions within a democratic and pluralistic society is not only of social but also of constitutional significance.

However, this differentialist impulse produces conflicts and contrasts in the face of which democratic systems deal with the risk of undervaluing individual rights in the name of enhancing and promoting collective interests. The question arises in critical terms when the minority petitions for recognition and protection of rights in a collective form because its members belong to the same religious denomination. These circumstances are critical for a secular state, especially when it is particularly difficult to distinguish between religious and cultural practice.

In this context, the members of the Muslim community are increasingly asking judges to recognise institutions of family law considered essential in the Islamic legal tradition. The issue arises in particular in divorce cases, where

Muslim parties, and in particular women, are seeking a divorce decree that guarantees at the same time their fundamental rights and the Islamic tradition.

The principle of substantial equality and the democratic governance of a pluralist society may require judges to use techniques of inclusion and protection of differences, such as the reasonable accommodation, which is aimed at achieving a balance between the request of recognition of fundamental elements of cultural and religious identity and the juridical system's fundamental principles.

In order to achieve a concrete evaluation of the application of reasonable accommodation techniques in relation to Islamic family law in Europe, the jurisprudence on the Islamic institute of Mahr (the gift which the bridegroom has to give to the bride when the contract of marriage is made) by the courts of the Netherlands, Germany, France, Denmark, Norway and Sweden is analysed. This study aims to understand whether there is a place for some institutes of Islamic family law in European legal orders and which effects the legal pluralism has on these legal systems as well as on the integration of the Islamic minority and the protection of the most vulnerable individuals.

I. LEGAL PLURALISM AND RELIGIOUS PLURALISM

Social-democratic systems consider policies aimed at assimilating cultural minorities into the majority social body to be alien to their constitutional horizon². This is also the attitude expressed towards religious demands that have become increasingly pressing in the reality of secular systems, in which one of the most complex expressions of cultural pluralism concerns the religious dimension and the widespread presence of a multiplicity of religious communities with traditions, values and norms that also demand space in the public sphere.

This phenomenon leads one to turn to the controversial category of legal pluralism, which is a characteristic of constitutional systems that are open to

² Rolla, Giancarlo.2000. La tutela costituzionale delle identità culturali. In, *Lo sviluppo dei diritti fondamentali In Canada*, ed Giancarlo Rolla , 111-115. Milano: Giuffrè.

the plurality of cultures and religions and are therefore characterised by the presence of regulatory systems that are not directly attributable to the state legal system.

In this respect, legal anthropologists have formulated the concept of legal pluralism to represent the coexistence of rules, sanctions and organs of justice that are not formally part of the state system but, at the same time, are capable of acting in the same public space³.

In the new scenarios defined by globalisation, the crisis of the nation state and the increase in migration flows, the concept of legal pluralism has taken on relevance with regard to two circumstances in particular: a) at the internal level of states, with regard to the request by new and old minorities to obtain recognition not only of equal dignity with the majority component of the community, but also the affirmation of rules belonging to their own cultural tradition or religion to govern, at least in part, their lives; b) at the level outside states, patterns of behaviour that go beyond the borders of states to a transnational dimension have emerged. In this way, the norms of the state are supplemented by norms that escape the control of the legal system but which, at the same time, find recognition and application in relations between citizens. However, these rules do not have the characteristics of legal norms, nor do they have the effectiveness of legal norms. Consequently, it would seem more appropriate to refer to the concept of normative pluralism⁴, rather than legal pluralism⁵, in order to distinguish those rules that do not have strictly legal characteristics.

³ Griffiths, John.1986. What is Legal Pluralism?. In *Journal of Legal Pluralism*, 24: 1-55.

⁴ Scarciglia,Roberto, and Menski Werner. 2018. *Normative Pluralism and Religious Diversity:Challenges and Methodological Approaches*, Padova: Cedam; MacDonald, Roderick A.2002-2003.L'hypothèse du pluralisme juridique dans les sociétés démocratiques avancées. *Revue de droit de l'Université de Sherbrooke* 33(1-2): 133-152; Locchi, Maria Chiara.2016. Legal Pluralism in multicultural societies:new perspectives for comparative constitutional law. In *Le droit comparé*, ed Alabrian, Alexis, and Moroteaur, Olivier, 139-148, Aix-en-Provence:Presses Universitaires d'Aix-Marseille; Bottoni, Rossella,and Cristofori, Rinaldo, and Ferrari, Silvio. 2018. *Religious Rules, State Law, and Normative Pluralism. A Comparative Overview*, Berlin:Springer.

⁵ Falk Moore, Sally.1973. Law and social change: the semi-autonomous social field as an appropriate subject of study. In *Law and Society Review* 7 (4): 719-746; De Sousa Santos, Boaventura.1987. Law: A Map of Misreading. Toward a Postmodern Conception of Law. In *Journal of Law and Society* 14 (3):279-302; Merry, Sally Engle.1988. Legal Pluralism. In *Law and Society Review* 22 (5): 869-896; Starr, June, and Collier Jane F. 1989. *History and Power in the study of Law: New Directions in Legal Anthropology*, New York: Cornell University Press; Teubner, Gunther.1993. The Two Faces of Janus: Rethinking Legal Pluralism. In *Cardozo Law Review* 5 (13):1443-1465.

Multicultural societies represent fertile ground for testing the degree to which legal or normative pluralism finds official or unofficial expression.

The basic idea of the legal pluralism approach is that the legal phenomenon does not end with the official sources of law production under state control, but also includes all those legal and non-legal norms that actually govern the behaviour of individuals⁶.

In relation to the demands for recognition made by the Islamic minority, the relationship between legal pluralism and religious and cultural pluralism must also be investigated. In this regard, the classification proposed by Griffiths based on the degree of openness of the state system towards other systems operating within its territory is particularly useful⁷:

a) Weak legal pluralism: legal pluralism is dominated by the state system through mechanisms that bring back to unity the normative system that remains under the hegemony of the state;

b) Strong legal pluralism: Legal pluralism does not suffer from the domination of the state system. Not all legal norms are attributable to the state. As a result, different regulatory systems operate within the same territory and state legal institutions do not have a monopoly on the function of producing and enforcing rules⁸.

Vanderlinden and Touraine⁹ also make a useful distinction between:

a) Objective legal pluralism: focusing on the role of the social group to which an individual belongs, on its institutional, procedural and normative functions, on the relationship between the rules produced by the social group and the state legal system, on the possibility of recognising the existence on the same territory of as many legal systems as there are social groups and within what limits;

⁶ Rinella, Angelo.2020. *La Shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, 1st edition, 77, Bologna: Il Mulino.

⁷ Griffiths, John.1986. What is Legal Pluralism?. *Journal of Legal Pluralism*, 24: 1-55.

⁸ This concept is based on the idea of the plurality of rule-making centres within the same community. This is the formulation of legal pluralism as legal polycentricity affirmed, for example, by Petersen, Hanne, and Zahle, Henrik. 1995. *Legal Pluricentricity: Consequences of Pluralism in Law*. Dartmouth:Aldershot.

⁹ Vanderlinden, Jaques.1972. Le pluralism Juridique. Essai de synthèse. In *Le pluralism Juridique*, ed Glissen, Jhon and Vanderlinden Jaques, 19-22. Bruxelles:Bruylant; Touraine, Alain.1997. *Pourrons-nous vivre ensemble? Égaux et différents*, Paris:Fayard.

b) Subjective legal pluralism: this takes the individual as its point of reference. Starting from the assumption that each individual belongs, with a varying degree of integration, to different groups and communities, it is necessary to take into account the choice that each individual can make about the forum or system of law that he considers most useful for regulating certain aspects of his life¹⁰.

Each individual therefore has to navigate between competing and often conflicting systems of rules and face the dilemma of choosing and mediating between the rules, procedures and institutions of the different regulatory systems to which he or she refers¹¹.

The question that arises is how this complexity can be composed. From this perspective, if we look at the multicultural societies of contemporary Western states, we must distinguish between ethnic or religious communities rooted in the territory of a state with solid traditions, albeit minorities, and those groups of foreigners who have immigrated to Europe in alternating phases, and who refer to a plurality of traditional and religious norms that are not officially recognised, to positive legal norms of their country of origin and to the norms of international law on foreigners, refugees and asylum seekers¹².

In the first case, one can speak of actual normative systems embedded in that particular community. In the second case, rather than normative systems, it is individuals who draw norms of behaviour from a plurality of normative systems, some of which are outside the control of the institutions of the existing order, that are relevant. In addition to domestic law and the sources of international law on fundamental rights, there is the influence, even if unofficial, of traditional and religious norms to which members of minorities spontaneously conform and which constitute minority legal orders¹³.

¹⁰ Vanderlinden, Jaques. 1989. Return to legal Pluralism: Twenty Years later. *Journal of Legal Pluralism and Unofficial Law*, 21 (28): 149-158.

¹¹ Rinella, Angelo. 2020. *La Shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, 1st edition, 77, Bologna: Il Mulino.

¹² Rinella, Angelo. 2018. Pluralismo giuridico e giurisdizioni religiose alternative. *Diritto pubblico comparator ed Europeo* 4:1005-1019.

¹³ Parolari, Paola. 2019. Legal Policentricity, intergiuridicità e dimensioni intersistemiche dell'interpretazione giudiziale. Riflessioni a partire dal caso inglese Akhter v Khan. *Diritto pubblico comparator ed Europeo* 40 (3):2109-2121.

In this context, some religious communities living in territories governed by systems alien to their tradition call for mediation and accommodation between the norms of the state legal order and the traditional, cultural and religious norms of the minority legal order.

The topic has three critical aspects:

- (a) the compatibility of the particular regulatory system with the general one;
- (b) the identification of suitable instruments to ensure a proper coexistence between the two systems;
- (c) the need to balance the rights and expectations of minority groups with the rights of individuals torn between the desire for integration and the need to preserve their cultural and religious identity.

II. FORMS OF PROTECTION OF RELIGIOUS CLAIMS: THE TECHNIQUE OF REASONABLE ACCOMMODATION

In the context of a multicultural society, the instruments and techniques of legal protection of rights need to be reinterpreted in order to be attuned to the multicultural reality.

Societies and communities can no longer be governed by the majority principle, but must combine this principle with the recognition of pluralism and the autonomy of groups and individuals¹⁴. The need to allow distinct cultural identities to coexist can encourage the tendency of legal systems to undermine the axiom that the law is the same for everyone. The principle of 'one law for all' does not hold up in the face of the emergence of cultural and religious elements, and goes beyond an attitude of formal neutrality to seek spaces for the effective protection and promotion of the right to diversity.

The presence of minorities, such as the Muslims, who find in the religious factor their own element of identity, together with the growing demand by these communities for recognition of the institutions of religious law, has led

¹⁴ Rolla, Giancarlo. 2009. *Libertà religiosa e laicità. Profili di diritto costituzionale*, 46, Napoli: Jovene.

Western legal systems to rethink the role of the state's neutrality towards religion, seeking solutions of inclusion and protection of differences.

The plurality of traditions and religions that characterises European society today calls for an interpretation of the principle of equality that makes room for the right to cultural and religious difference.

Religious denominations, which can be understood as *nomoi groups*¹⁵, give themselves rules and principles capable of giving rise to a normative system that contributes in a fundamental way to determining the identity of the community and its members and to regulating certain fundamental aspects of their lives. This is particularly the case with regard to questions concerning legal relations between private individuals, relating to aspects of life, such as the family, which are particularly relevant to denominational identity.

It is up to the state to manage the balance between the principle of equality and the protection of the right to difference of minor religious communities, through the recognition of areas of the system in which general and abstract provisions can leave room for special regulatory provisions, depended according to the identity traits of the addressees. Or seek forms of collaboration between the State and religious communities in relation to the resolution of disputes between private individuals concerning matters that are particularly relevant to the religious identity of that community.

In the context of these forms of cooperation, in European countries with a significant presence of Islamic communities, the jurisprudence of the courts has become more open to interpreting the provisions in force in such a way as to incorporate, within the limits allowed by the legal system, certain rules of religious law invoked by parties of the Islamic faith.

The realisation of conditions of substantive equality and the settlement of differences is increasingly entrusted to the courts, which, by adopting an approach that takes into account legal pluralism and cultural and religious pluralism, tend to value and protect the specific features of the social groups in which individuals form their personalities. This is achieved by derogating from general rules in the face of differential treatment in favour of certain groups or

¹⁵ Shachar, Ayelet.2000. The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority. *Harvard Civil Rights-Civil Law Review*, 35 (2): 387-426; Benhabib, Seyla.2002. *The Claims of Culture: Equality and Diversity in the Global era*, Princeton: Princeton University Press.

individuals, justified by the need to avoid discrimination in practice and to enhance difference.

In this context, the judiciary can take a further step: when the violation of religious freedom is the result of general legal provisions, an interpretation consistent with the principle of equality in the substantive sense requires judges to resort to hermeneutical techniques of inclusion and protection of differences. This is the technique of reasonable accommodation.

This is a method, found mainly in common law systems¹⁶, which makes it possible to give concrete application to the recognition of identity differences in society and to give dignity of legal protection to minority groups, achieving a balance between claims to identity and the fundamental principles of the legal system. Where a court is confronted with subjective legal situations that are constitutionally protected and, at the same time, compressed or limited by the application of provisions addressed to the generality of citizens, the technique of reasonable accommodation enables it to introduce an exception to the general rule for the individual case.

This technique makes it possible to relieve certain individuals or groups of individuals, characterised by a distinct cultural identity recognised and protected by the Constitution, of the rule of general application¹⁷. This exception stems from the judge's assessment of the distorting effects on the principle of equality that would result from an aseptic and non-contextualised application of the rule in a pluralistic and multicultural society.

Jurisdiction sensitive to cultural identity can be a privileged avenue for resolving intercultural conflicts and interpreting fundamental rights and freedoms in a way that balances antithetical views.

Certainly, the acceptance of these forms of reasonable accommodation can exist when the derogation from the general rule, which yields in the face of

¹⁶ This jurisprudential orientation has been established in particular by the US Supreme Court and the Canadian Supreme Court: Supreme Court of United States (United States), 28.06.1971, *Lemon v Kurtzman*, 403 U.S. 602 (1971); 20.02.1980, *Committee for Public Education and Religious Liberty v Regan*, 444 U.S. 646 (1980); Supreme Court of Canada, 17.12.1985, *Ontario (Human Rights Commission) and Teresa O'Malley v Simpson Sears Ltd*, [1985] 2 SCR 536.

¹⁷ Beaman, Lori G. 2012. *Reasonable Accommodation. Managing Religious Diversity*, Vancouver: University of British Columbia Press.

identity rights, does not produce a violation of other fundamental rights or the denial of principles and values that are fundamental to the legal system.

The technique of reasonable accommodation, as mentioned, has been widely used in common law countries, where it is easy to use thanks to the flexibility of the legal system and the *stare decisis* legal doctrine. In view of the need to resolve cultural conflicts, this technique has also been used by the courts of civil law systems, where, however, the court's decision only has a limited effect on the parties involved. The derogation therefore operates on a case-by-case basis with an effect targeted at the situation to be corrected and balanced. More effective would therefore be the intervention of the legislator who, by introducing a derogation from the general rules, would produce effects *erga omnes*.

Before proceeding to the analysis of the cases in which some European courts have used the technique of reasonable accommodation to solve family law disputes in which the Islamic parties have invoked the recognition of institutions of religious law, it seems appropriate to reflect briefly on what is meant by Islam and Shari'a in the European context.

III. SHARI'A IN EUROPE

Being a Muslim in Europe undoubtedly raises important questions and challenges concerning the need to reconcile one's religious identity with participation in Europe's secular society. However, this challenge also involves legal systems and the attitude they should adopt towards a highly diversified religious minority with a strong identity, which is endowed with considerable power to expand in a context already characterised by pluralism and multiculturalism, such as that of many Western countries.

The Islamic communities in Europe do not therefore present a homogeneous physiognomy, but despite their ethnic, cultural and linguistic diversity, they find their unitary origin in the one faith, albeit with different interpretations. We are therefore faced with a highly diversified religious minority with a strong identity, which, although it is willing to integrate, assumes certain elements qualifying its religious identity as inalienable,

essentially linked to the regulation of family ties and relations between individuals.

In order to understand the articulated expressions of Shari'a in Western legal systems, it is necessary to start from a definition of Shari'a that can be related to its application in Western, or more specifically European, countries. This already complex problem includes many others: what do Muslims living in the West mean when they invoke the application of Shari'a? What are the subjects and issues on which Islamic minorities invoke the application of Shari'a? Is Shari'a compatible with the value system of European countries? ¹⁸.

In this sense, the signals coming from European and national institutions appear contradictory. For example, the ruling of the European Court of Human Rights in the case *Refah Partisi v. Turkey* in 2003¹⁹, in which the Court affirmed the clear divergence between Shari'a and the European Convention on Human Rights, stands in contrast to the statements of the Archbishop of Canterbury Rowan Williams²⁰ and Lord Phillips, Chief of Justice of England and Wales²¹, that Shari'a does not automatically contradict Western legal and political values.

Islam is a religion with strong legal connotations, since its legal apparatus is an integral part of its doctrinal core and vice versa. Consequently, it is not possible to fully understand its meaning unless read in the light of its theological premise, which is also its fundamental norm. In the Islamic tradition, Shari'a is the revealed law of divine origin that regulates human life in all its aspects. In legal terms, therefore, Shari'a consists of the set of fundamental rules dictated by God. It is a law that is addressed to the faithful, to whom it shows the right path revealed to man so that he may attain salvation. At the same time, it indicates the set of religious rules governing the practices and rites of the Islamic religion²².

¹⁸ Berger, Maurits S. 2013. Applying Shari'a in the West. In *Applying Shari'a in the West. Fact, Fears and Future of Islamic Rules on Family Relation in the West*, ed Berger, Maurits S. , Leiden: Leiden University Press.

¹⁹ ECHR, 13.03.2003, *Refah Partisi (The Welfare Party) and Others v Turkey* [GC], 41340/98, 41342/98, 41343/98 et al.

²⁰ William, Rowan.2010. Civil and Religious Law in England: A Religious Perspective. In *Shari'a in the West*, ed Ahdar, Rex, and Aroney, Nicholas, Oxford: Oxford University Press: 293-308.

²¹ Phillips, Nicholas.2010. Equality before the Law. In *Shari'a in the West*, ed Ahdar, Rex, and Aroney, Nicholas, Oxford: Oxford University Press: 309-318.

²² Calder, Norman. 1997. Shari'a. In *The Encyclopedia of Islam*, XI, Leiden:Brill: 321.

The legal rules that constitute the main body of Shari'a are the precepts contained in the Qur'an and Sunna. Islamic law, briefly, presents two types of rules: those arising from the Qur'an and the Sunna, *fiqh*, and those arising from the interpretation or independent reasoning of legal scholars, *ijtihad*²³. To the framework of the sources are added the *Igma'*, those rules around which the consensus of legal doctrine has formed, and the *Qiyas*, that set of rules deduced through analogical reasoning from other sources²⁴.

The *fiqh* in particular contains the legal knowledge of the different categories of human actions: compulsory acts, prohibited acts, advised acts, discouraged acts and free acts.

In real life, Muslim jurists are questioned by the faithful about the religious legitimacy of certain practices or behaviours, on which they give legal opinions whose authority is predominantly moral. Since the first century of Islam, legal scholars have established legal schools and branches. There are currently four main Sunni legal schools: the Hanafi school, the Maliki school, the Shafi'i school and the Hanbali school²⁵. Each of these schools offers partially different interpretations of Shari'a precepts, especially in matters of family law.

The plurality of expressions and interpretations of the Shari'a takes on an even greater degree with reference to Islamic communities living within non-Islamic legal system. It was Bassam Tibi, an internationally renowned Islamologist, who forged the expression 'Euro Islam', coined to highlight the need to support the development of a European Islam among Muslim immigrants living in Europe. He envisaged a path that would lead Europe's Muslim minorities to revise certain traits of their tradition in order to bring them closer to the values and principles of contemporary Europe, with particular reference to human rights, the rule of law, gender equality and democracy²⁶.

In the 1990s, in a context of social and religious tensions caused by the presence of Islamic minorities in Western legal systems, *the fiqh al-aqalliyyat*

²³ Weiss, Bernard G. 1998. *The Spirit of Islamic Law*, 2nd Edition, Athens (GA)-London: University of Georgia Press

²⁴ Kamali, Mohammad Hashim. 2008. *Shari'ha Law: An Introduction*. London: One World Publication; Hallaq, Wael B. 2011. *An Introduction to Islamic Law*, Cambridge: Cambridge University Press.

²⁵ Kamali, Mohammad Hashim. 2008. *Shari'ha Law: An Introduction*. London: One World Publication; Hallaq, Wael B. 2011. *An Introduction to Islamic Law*, Cambridge: Cambridge University Press.

²⁶ Tibi, Bassam. 2008. *Political Islam. World Politics and Europe*. New York: Routledge.

al-Muslema has emerged. This is an interpretation of religious law that particularly addresses the condition of those Muslims who reside in a territory governed by non-Muslim laws and who find themselves in the condition of a religious minority but still wish to live fully according to the Shari'a in harmony with the social context in which they are placed.²⁷

Islamic religious law, therefore, does not seem to be a homogeneous and unitary body of law. The variables involved in defining the meaning are different.

The result is a phenomenon of multiple legal pluralism: not only is the European state legal system flanked and overlapped, mainly in matters of family law, by a religious legal system to which citizens of the Muslim faith spontaneously turn; but within the same system of religious norms there is a plurality of legal solutions applicable to the same question. An internal pluralism dictated not only by the different Islamic legal schools, but also by cases of hybridisation between Islamic and secular law that often occur in multicultural contexts²⁸.

The fact that Shari'a has a plurality of expressions and interpretations within it makes the problem of compatibility between the fundamental principles of European legal systems and the Islamic legal model even more critical, making a response to the confrontation between Western legal traditions and the religiously inspired norms that permeate the lives of Muslims inevitable.

Generally speaking, Muslims settled in Europe, and in the West in general, aspire to lead their lives in accordance with the Shari'a by restricting its practical application to four areas: the religious sphere relating to the precepts of fasting, burial, prayer, clothing and funeral rites; the rules on financial transactions and in particular on the prohibition of charging interest and usury; social relations, with particular attention to relations with non-believers; but above all family law, with particular regard to marriage and divorce.

²⁷ Saeed, Abdullah. 2013. Reflection on the Development of the Discourse of Fiqh for Minorities and Some of the Challenges It Faces. *Applying Shari'a in the West*. Facts, Fears and the Future of Islamic Rules on Family Relations in the West, ed. Berger, Maurits S., Leiden:Leiden University Press:241-255; Fishman, Shammai. 2006. Fiqh al-Aqalliyat: A Legal Theory for Muslim Minorities. In *Center on Islam, Democracy and the Future of Muslim World*, Paper n. 2.

²⁸ Yilmaz,Ihsan.2005. *Muslim Laws, Politics and Society in Modern Nation State*, London:Routledge.

In fact, the impact with the host country's legal system mainly concerns family law, although, as several studies²⁹ show, the application of Shari'a, where allowed, tends to adapt to the legal, political, social and historical context of each Western system, thus offering a far from homogeneous image. Nevertheless, in European countries there is a perception of an irreducible contrast with Western political and legal values, especially for those precepts of the Shari'a that intervene in the sphere of the person of the Muslim believer and whose excessively traditional interpretation could impose discriminatory practices. In fact, Islamic communities that are rooted and integrated into society in many European countries are demanding recognition of their religious and cultural rights. Muslim citizens aspire, therefore, to obtain that certain aspects of their lives, in particular concerning family relations, which are at the heart of the Shari'a, can be regulated according to it.

In this context, there is an inevitable paradox to which the legal system must find a solution: religious freedom implies a free profession of faith, the free exercise of worship and that no one can be forced to behave in a manner contrary to their faith or conscience³⁰. At the same time, religious freedom is limited by constitutional orders. And here is the paradox: the demand that a Muslim denies his religious principles, or renounces religious practices that do not violate the fundamental principles of the legal system but are not recognised by it, is a violation of religious freedom itself.

This is why contemporary European legal systems cannot avoid seeking legal techniques that, in the sense of reasonable accommodation, can reconcile

²⁹ Büchler, Andrea.2011.*Islamic Law in Europe? Legal Pluralism and its limits in European Family Law*, London: Palgrave; Griffith-Jones, Robin. 2013.*Islam and English Law: Rights, Responsibilities and the Place of Shari'a*, Cambridge: Cambridge University Press; Bano, Samia.2011. *Islamic Dispute Resolution and Family Law*, London: Palgrave; MacFarlane Julie. 2012. *Islamic Divorce in North America: A Shari'a Path in a Secular Society*, Oxford: Oxford University Press; Christofferson, Lisbet, and Nielsen, Jorgen S.2010. *Shari'a as Discourse: Legal Traditions and the Encounter with Europe*, Burlington:Ashgate; Rohe, Mathias.2007.*Muslim Minorities and the Law in Europe: Chances and Challenges*, New Delhi: Global Media Publications.

³⁰ ECHR, article 9: «1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others».

the identity claims of Muslim communities with the protection of the individual rights of their members and the fundamental principles of the legal system.

In this context, the task of balancing these elements increasingly falls to judges, who are called upon by parties of the Islamic faith to assess the legitimacy of institutions of Islamic law and to render decisions based on reasonable accommodation.

In order to evaluate the effectiveness of this technique and to identify the legal tool box used by judges in considering normative sources of a religious nature, the case law produced on the institution of Islamic family law, the Mahr, by the courts of some European civil law countries, will be analysed below.

IV. CASE STUDIES OF REASONABLE ACCOMMODATION IN EUROPE: THE CASE OF MAHR

«A multifaith, multicultural, multiracial society makes special demands on its judges. It poses challenges in court that require an immediate, well-informed response as soon as they arise. With its complex and ever-changing mosaics, however, it also requires of its judges a much deeper understanding of the characteristics of the different people who come before the courts, of their aspirations and their anxieties, than was ever thought to be necessary when the people of this country were drawn largely from the same cultural, racial and religious background»³¹.

Increasingly, judges are called upon to exercise the cultural sensitivity that enables them to reach reasonable decisions based on balancing rights and accommodating differences. In such cases, the judges' interpretation according to the parameters of reasonable accommodation must, however, be anchored in constitutional or legislative provisions that can legitimise the exception to the rule.

In order to evaluate the effectiveness of the application of the reasonable accommodation technique by some European courts, to identify the legal tool box used by judges in the interpretation of a religious institution and to

³¹ Judicial Studies Board of England and Wales, *Equal treatment Bench Book*, August 1999:1.

understand the interactions between civil and Islamic law, the jurisprudence of France, Germany, the Netherlands, Sweden, Norway and Denmark on the legal institution of the Mahr, as it is the most prominent institution of Islamic family law adjudicated in the selected Courts, was analysed. These are countries that, in addition to belonging to civil law systems, share the presence of well-established Islamic communities that have made the courts one of the privileged places in which to put forward requests for recognition of their identity.

To this end, two questions must first be answered: What is the Mahr? And how is the Mahr interpreted and incorporated into the secular order?

Islamic marriage establishes a system of reciprocity in which each party is granted a series of contractual rights and obligations³². The contractual nature of marriage makes it binding on the spouses, but it is also subject to dissolution by the will of the spouses or the occurrence of other events, such as the conversion of one of the spouses to another faith³³. Among the fundamental elements of marriage is the Mahr³⁴.

Literally, Mahr means reward, *ajr*, or nuptial gift, also designated as *sadaqa* or *faridah*, broadly describes the payment a wife is entitled to receive from her husband in consideration of marriage³⁵. An agreement is negotiated with the Mahr, which then becomes an integral part of the marriage contract, concerning a sum of money that represents the gift that the groom must give to the bride when the marriage contract is made and which becomes the property of the wife. The payment of the Mahr is generally divided into two parts: one part of the sum is paid at the time of the marriage, is what might be termed prompt Mahr, *muajjal*, while the remainder of the sum, what might be termed, deferred Mahr, *muwajjal*, is paid in the event of dissolution of the marriage by death, divorce or other events contractually stipulated by the parties. The spouses are also allowed to provide for the payment of the Mahr

³² Jamal, Fareen L.2012. Enforcing Mahr in Canadian Court. *Ontario Bar Association*, 24 (3): 1-13.

³³ Thompson, Emily L., and, Yunus, Soniya F.2007. Choice of Law or Choice of Culture: How western Nations treat the Islamic marriage contract in domestic Courts. *Winsconsin International Law Journal*, 25 (2):362

³⁴ According to the Maliki jurisprudential school, Mahr is a precondition for contracting a valid marriage. The other Sunni and Shi'a schools of jurisprudence perceive the Mahr as an effect of marriage.

³⁵ Esposito, John L., and, DeLong-Bas, Natana J.2002. *Women in Muslim Family Law*, 2nd edition, Syracuse NY: Syracuse U.P.; Spies, Otto.1991. Mahr. In *Encyclopedia of Islam*, 6, eds, Clifford E. Bosworth et al., Leiden:Brill:78-80.

in a single instalment in the event of the dissolution of the marriage, or at any time at the wife's request³⁶.

Islamic law further distinguishes between specified Mahr, *Mahr musamma*, and proper Mahr, *Mahr al-mithl*. Specified Mahr is the amount of Mahr that the contracting parties agreed upon when signing the marriage contract and is specified in the marriage agreement. If the Mahr is not specified in a marriage contract, a judge, *qadi*, may determine the value of Mahr. Proper Mahr is set according to what is locally appropriate for a woman of equal social status³⁷, her education or other skills. Normally the monetary value of the Mahr is set to what another female family member or close relative has received prior and what is commonly accepted as appropriate for a woman of similar social status³⁸. It should be pointed out that nowadays, especially in the European context, the Mahr is often established in a purely symbolic value.

Under Islamic law, the Mahr does not constitute an agreement on the arrangement of the couple's economic relations in the event of the husband's divorce or death, which in a sense offsets the regulation of the economic consequences of divorce and inheritance in favour of women. From a strictly legal point of view, the Mahr is not a matrimonial right. It is not a right derived from the marriage, but is a right *in personam*, enforceable by the wife or widow against the husband or his heirs. In a strict contractual sense, the right is not derived from the marriage, but from a contractual agreement between two consenting adults³⁹. Always by a juridical point of view, Islamic law sees spouses as a separate legal entity. As consequences, the Mahr becomes the unilateral property of the bride over which she normally may dispose freely. This contradicts the widely misconception that the Mahr is equal to the "brideprice".

Moreover, the Mahr must be paid directly to the woman and not to her father or other legal guardian, which also seems to contradict the qualification

³⁶ Yassari, Nadjma.2013. Understanding and Use of Islamic Family Law Rules in German Courts. The Example of Mahr. In *Applying Shari'a in the West*, ed., Berger, Maurits S. Leiden:Leiden U.P.: 165-187

³⁷ A woman's social status may be determined by her social class, her legal status, as not previously married, a divorcee or a widow.

³⁸ Jansen Fredriksen, Katja.2011. Mahr (dower) as Bargaining Tool in a European Context: A Comparison of Dutch and Norwegian Judicial Decisions. In *Embedding Mahr (Islamic dower) in the European Legal System*, eds Mehdi, Rubya, and, Nielsen, Jorgen S., Copenhagen: DJOF:147-190.

³⁹ Yassari, Nadjma.2013. Understanding and Use of Islamic Family Law Rules in German Courts. The Example of Mahr. In *Applying Shari'a in the West*, ed., Berger, Maurits S., Leiden:Leiden U.P.: 165-187

of dowry that is often attributed to this institution by Western doctrine. The Mahr has several functions that can be distinguished into material or immaterial functions. In the legal sense, only the material functions can have relevance for the European courts, although the immaterial functions may have relevance for the purpose of understanding the real intention and will of the parties.

As for intangible functions, these can be divided into religious, prestigious, social and protective functions. The Mahr represents a sign of respect expressed by the husband towards his wife, as well as a sign of his commitment to the marriage⁴⁰. It also symbolises the desirability of the wife and the economic capacity of the husband⁴¹. In addition to these immaterial functions, there is also the discouragement of the husband from exercising repudiation, in which case he would be obliged to pay, and from entering into a polygamous marriage, since the Mahr would be due in each marriage and for an amount not inferior to the first one⁴².

Beside these immaterial functions, the Mahr also has economic and protective function as it reassures the wife of an income in case of repudiation or widowhood. If the Mahr is paid at the time of the conclusion of the marriage contract, it is assumed that this institution is intended to provide a certain financial security for the woman, guaranteeing her economic independence from her husband⁴³. In cases where the agreement provides for deferred Mahr, i.e. the payment of the Mahr in whole or in part at the time of the dissolution of the marriage or the death of the husband, the Mahr assumes the purpose of providing a financial buffer or compensation for the lesser economic rights generally accorded to women. It is a provision for a rainy day⁴⁴.

⁴⁰ Mir-Hosseini, Ziba.2001. *Marriage on Trial: A Study of Islamic Family Law*, 2nd edition, London: IB Tauris:74.

⁴¹ Dahlgren, Susan.2005. Women's adah versus women's law: The contesting issue of Mahr in Aden, Yemen. *Égypte.Monde Arabe*, 1: 125-144.

⁴² Esposito, John L., and, DeLong-Bas, Natana J.2002. *Women in Muslim Family Law*, 2nd edition, Syracuse NY: Syracuse U.P.; Spies, Otto.1991. Mahr. In eds, Clifford E. Bosworth et al., *Encyclopedia of Islam*, 6, Leiden:Brill: 23.

⁴³ Wynn, Lisa.2008. Marriage Contracts and Women's Rights in Saudi Arabia: Mahr, Shurut and Knowledge Distribution. In *The Islamic Marriage Contract: Case studies in Islamic Family Law*, eds,Quraishi, Asifa, and, Vogel, Frank, Cambridge: Harvard U.P.: 206-240.

⁴⁴ Fyze, Asaf A.A.2009.*Outlines of Muhammadan Law*, 5th Edition, Delhi: Oxford University Press:133.

As succession rights for women are limited in the Islamic law, the spouses can by contracting a high-deferred Mahr guarantee the wife a similar lifestyle upon her husband's death as she was used to during the marriage. As the deferred Mahr is payable before all other debts, it will not pass to the other heirs of the deceased as a part of the inheritance⁴⁵.

Finally, the discipline of the deferred Mahr differs according to the type of divorce in which it is involved, although Islamic legal schools have different interpretations of it.

The Mahr comes to the attention of the courts of European countries by two possible routes. The first is that of private international law. As is well known, private international law consists of the set of rules and principles that make it possible to regulate legal relations between private individuals when they present elements of extraneity with respect to state law, by referring them to the law of another state. Consequently, a legal relationship arising abroad does not cease to exist because the parties cross the border. Where the foreign rule applicable under the rules of private international law is the rule of a state in which Shari'a is part of the legal system, the rule of Islamic law may be directly applied in the legal system of a European state to resolve a given dispute, provided that the court finds no incompatibility with public order or with the fundamental principles of the legal system⁴⁶.

The second way in which the institution of the Mahr may become relevant before a civil court of a European order is at the express request of the parties, in the absence, therefore, of the possibility of applying the rules of private international law. In this case, the recognition of the Mahr will depend, therefore, on its compatibility with the "host" legal system and on the sensitivity of the judge towards the recognition of cultural, traditional or religious demands, taking into account the religious freedom that characterises all the constitutions of the states of the European continent.

⁴⁵ Jansen Fredriksen, Katja.2011. Mahr (dower) as Bargaining Tool in a European Context: A Comparison of Dutch and Norwegian Judicial Decisions. In eds Mehdi, Rubya, and, Nielsen, Jorgen S., *Embedding Mahr (Islamic dower) in the European Legal System*, Copenhagen: DJOF:147-190.

⁴⁶ Michaels, Rafael.2006. EU Law as Private International Law? Reconceptualising the Country of Origin Principles as Vested rights Theory. *Journal of Private International Law*, 5: 195-240; Beltrame de Moura, Aline, and, Nunes Amaral, Adrian Mohamed.2020. L'ordre public and the European Private International Law: Shari'a effects on the European family Law. In *European Union and its values: freedom, solidarity, democracy*, eds Klos, Agnieszka, and, Misiuna, Jan, and, Pachocka, Marta, at al., Warsaw:PECSA: 41-49.

In approaching issues of faith and culture, the courts of the countries examined have captured the Mahr in three different ways which can be defined, according to a classification proposed by Pascal Fournier for the analysis of the cases decided by the Canadian and American courts as⁴⁷:

- a) the Legal Pluralism Approach, which views Mahr as central to cultural and religious recognition;
- b) the Formal Equality Approach, which translates the Mahr in an institution of the secular legal order which can be considered closer to it but only by a formal point of view
- c) the Substantive Equality Approach, which translates the Mahr in an institution of the secular legal order which can be considered closer to it by the aim and functions point of view.

A. The Legal Pluralism Approach: the multiculturalist understanding of Mahr

This approach recognises the presence of normative systems that are not all directly attributable to the state but which are capable of acting in the same public space. According to this approach, management is not defined solely in a top-down manner, but emerges from the accommodation of differences arising from different types of human interaction⁴⁸. In this sense, the state, in this case through its courts, recognises norms of a cultural or religious nature while at the same time reconciling them with the fundamental principles of the legal system. In this particular case, the question arises as to how jurisprudence gives relevance to and recognises the interactions between Islamic law, rooted in the practice of the Muslim minority, and secular law⁴⁹.

Through this approach, the jurist explores and analyses the different manifestations of non-state law, identifying them as a living element of the

⁴⁷ Fournier, Pascal. 2009. Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a comparative Dialogue. In *Constituting Equality: Gender Equality and Comparative Constitutional Rights*, ed, Williams, Susan H. Cambridge: Cambridge University Press: 157-172; Fournier, Pascal. 2016. *Muslim Marriage in Western Court. Lost in Transplantation*, 2nd edition, London: Routledge.

⁴⁸ Jutras, Danie. 2001. The Legal Dimension of Everyday Life. *Canadian Journal of Law and Society*, 16:45-65.

⁴⁹ Fournier, Pascal. 2016. *Muslim Marriage in Western Court. Lost in Transplantation*, 2nd edition, London: Routledge: 11.

system and considering Islamic law, although limited to this specific institution and not in its entirety, as part of the system according to a multicultural vision.

In this context, some courts have valued Islamic law in the light of the principle of multiculturalism, while others have rejected its application and denied any possibility of interaction between the two normative systems. In other cases, secular law and Islamic law have been merged to create hybrid solutions that are new to both legal systems.

- The enforcement of Mahr as an Islamic custom or element of Islamic law in application of the principle of multiculturalism:

In 1980 the Oberlandesgericht in Bremen applied Islamic law in a divorce case of a couple of Iranian origin⁵⁰. Since under Iranian law the wife had no rights to her husband's property or to maintenance, the Mahr was used by the Court as a substitute for the maintenance obligation, as an institution whose function was to provide the wife with a livelihood following the divorce. The Court therefore decided to apply the Mahr as provided for in Islamic law, on the basis of the original intention of the parties⁵¹.

In a case dating back to 2003⁵², the judges of the Court of Maastricht were asked to decide on the divorce of a couple of Moroccan origin on the basis of a mutual agreement concluded under Dutch law. The couple had also agreed that the wife would retain the right to the payment of the Mahr, as stipulated in the Moroccan marriage contract. In the Court's opinion, the agreement concluded between the parties did not meet the requirements of Dutch law with regard to marriage agreements, and Dutch law could not therefore be applied automatically. The judges therefore considered it necessary to investigate the original will of the parties, taking the view that it corresponded to the legal provisions of Art. 2 § 3 of the Mudawwana, the Moroccan Personal Status Code, according to which the Mahr must be paid once the marriage has been

⁵⁰ OLG Bremen (Germany), 03.07.1980, *FamRZ* 606/1980.

⁵¹ In the same sense: Kammergericht Berlin (Germany), 296/1988 which attempted to transfer the Mahr of the Iranian legal system to the German one, emphasising the characteristics of Islamic law as an autonomous legal system.

⁵² Rb. Maastricht (the Netherlands), 16.04.2003, 72204/2003.

consummated. As the husband had not contested either the validity of the marriage or its consummation, the Court ordered him to pay the Mahr⁵³.

More recently, the same reasoning was followed by the Court of Amsterdam in 2014⁵⁴. In the course of this divorce proceeding between a couple of Pakistani origin, the wife had made a request for the payment of a Mahr worth € 1,071, as agreed in the certificate of marriage celebrated according to Islamic tradition. She argued that the Mahr was her exclusive right and an essential condition of marriage under Islamic law. Her husband objected, stating that the agreement could not be considered valid under Dutch law and that, in any case, it was necessary to adjust the amount according to his real economic capacity. In the Court's opinion, the parties had in fact agreed on the payment of the Mahr at the time of the celebration of the marriage, so that, in order to respect the real and original will of the parties, it must be assessed according to the law to which the parties referred when it arose, namely Islamic law. The court therefore ordered the man to pay the Mahr as provided for in Islamic law⁵⁵.

In the same vein, in a single-page judgment delivered in 1978⁵⁶, the French Cour de Cassation qualified the institution of the Mahr as an element of the Islamic tradition. Applying private international law, the Court recognised the Mahr as an essential element of the Islamic marriage contract, the execution of which in French law is not contrary to public order⁵⁷.

The court in Malmö in 1993⁵⁸ also recognised the Mahr as an element of Islamic law: the court gave the wife the right to Mahr in accordance with Israeli Muslim family law, and saw this as not contrary to Swedish public policy, but rather as a kind of maintenance after divorce, as establish by Shari'a⁵⁹.

⁵³ In the same sense: Rb. Arnhem (the Netherlands), 7.02.1985, *NIPR*, 271/1986.

⁵⁴ Rb. Amsterdam (the Netherlands), 01.10.2014, 76/2014.

⁵⁵ Recently this approach was followed Rb. Rotterdam (The Netherlands), 14.04.2020, *ECLI:NL:RBROT:2020:3468* although the court rejected request for enforcement of the Mahr because the husband had provided evidence that payment had already been made.

⁵⁶ Cour de Cassation (France), 04.04.1978, 000137/1987.

⁵⁷ In the same sense Cour de Cassation (France), 22.02.2005, 03-14.961

⁵⁸ Malmö Tingsrätt (Sweden), 10.02.1992, *Mr S. v Mrs S: T137-92*, *RH* 1993:116

⁵⁹ Recognized the Mahr as element of Islamic law also: Halmstads Tingsrätt (Sweden), 24.10.2002, *Mrs M. v Mr A.: T952-99* and *RH* 2005: 66

- The enforcement of Mahr with a hybrid result between religious and secular law:

Another particularly interesting case is the one dealt with by the Hamburg Court in 1983⁶⁰ At the time of her marriage, the plaintiff had received a symbolic Mahr consisting of a Qur'an and a cane sugar candy and, at the time of her divorce, was suing to obtain the sum of € 75,000 as deferred Mahr. However, she did not have any written documents to prove her claim. The Court of Hamburg recognised a woman's right to Mahr, qualifying it as an institution of Islamic family law. In order to determine the amount, however, the judges used the same criterion as for the calculation of alimony in German law, thus achieving a hybrid result between Islamic and German law, which is completely new to both legal systems. This orientation, while demonstrating an initial commitment of German jurisprudence to recognising and protecting the cultural and religious differences of the parties, has remained isolated in German jurisprudence.

This approach was also used by the Court of 's-Hertogenbosch, in the Netherlands, in an interesting ruling in 2006: in 1997, a Dutch couple of Moroccan origin had married according to Islamic tradition at the Moroccan Consulate in the Netherlands. Three years after the marriage, the Maastricht Court granted them a divorce under Dutch law. In the context of these proceedings, the wife also requested the payment of the Mahr as stipulated in the marriage contract concluded under Islamic law. The Court rejected the wife's request, stating that the divorce had been decided on the basis of Dutch law and, pursuant to it, the woman had already obtained payment of a maintenance obligation from her husband, which fulfils the same function as the Mahr. The Court recognised the Mahr as an institution of Islamic law which, however, if taken out of its context and placed in the Dutch legal system, would lead to an unfair result in the circumstances of this particular case.

- Non-recognition of the Mahr on the ground that it is contrary to the law:

⁶⁰ AG Hamburg (Germany), 19.12.1980, IPRAX 1983, 64-65

There also have been pronouncements that, while assessing the Mahr on the basis of Islamic tradition, have rejected its validity as being contrary to the legal system.

This is the case of a decision taken by the Court of Appeal of Lyon in 1998⁶¹: the parties of Indian origin were married in 1969 in Karikal, a former French colony, stipulating an Islamic marriage contract that provided for the payment of the Mahr. Shortly after the marriage, the couple moved to France where they obtained a divorce in 1990. The Court held that the Mahr could not be considered valid under French law, as it represented the price of the woman's purchase and as such was contrary to public order⁶². However, the Court of Cassation modified the decision by recognising the application of the Mahr as provided for by Islamic law⁶³.

- Concluding remarks on The Legal Pluralism Approach:

The cases discussed and characterised by the use of the Legal Pluralism approach have the merit of emphasising the particularities of the Mahr institution, underlining the judges' commitment to understanding the functions and reasons attributed to the institution by the minority legal order. Among the paths followed by the judges, probably the most effective seems to be the one aimed at achieving a hybrid result between religious and secular law that achieves a result that respects the minority legal order, the rights and wishes of the parties and the legal order of the state. This is the approach that seems most likely to apply the technique of reasonable accommodation correctly. The cases in which the recognition of the Mahr is refused on the grounds that it is contrary to public order also denote the commitment of judges to openness towards an alternative legal order, although they denote the critical nature of this approach: the risk that judges, although open to the minority legal order, do not have sufficient knowledge of it. However, the merit of this approach is evident: «The legal pluralist perspective invites legal subjects to imagine themselves as legal agents to discover the constitutive potential of their own

⁶¹ Cour d'appel de Lyon, 2.12.2002, 2001/02390.

⁶² In the same sense Cour d'Appel de Douai (France), 07.04.1976, 76/1976.

⁶³ Cour de Cassation (France), 22.02.2005, 03-14.961

actions. The practice of legal pluralism is, consequently, foundation building. We teach ourselves to examine our own interactions, and to learn about law, first and foremost, from ourselves»⁶⁴.

B. The Formal Equality Approach: a secular translation of Mahr

The approach inspired by the principle of equality in the formal sense presupposes that law is identified as an autonomous entity separate from society. The fundamental element of this approach is the individual, who is left free to pursue his or her own interests within a system that minimally interferes with his or her choices⁶⁵. What is important is the affirmation of the principle of equality between all individuals, according to the principle of one law for all, irrespective of whether this equality is also realised in substance. In the assessment of requests for recognition of certain institutions of Islamic law such as the Mahr, what is important is the contractual freedom of individuals, which the state ensures the execution of as long as they are translated into a secular institution and not contrary to public order, regardless of the cultural and moral elements that characterise the institution and thus influence the real will of the parties.

Elements characterising this approach are: a) the qualification of the Mahr on the basis of the internal regulation of contracts, irrespective of the ethnicity, culture or religion of the parties; b) the judges consider the legal system as lacking a representative space for the minority; c) a completely secular interpretation of the Mahr. In this context, the Mahr has been recognised by the jurisprudence of the secular courts as: a) a contractual obligation; b) a condition or contractual effect deriving from the marriage relationship.

- The Mahr as a contractual obligation:

In a divorce case between a Tunisian national and a German national from 1988, the Court of Hamm interpreted the Mahr as a claim arising from a

⁶⁴ MacDonald, Roderik A. 2012. *Pluralistic Human Rights? Universal Human Wrongs?* Dordrecht:Springer:70.

⁶⁵ Fournier, Pascal. 2009. Transit and Translation: Islamic Legal Transplant in North America and Europe. In *Journal of Comparative Law*, 4 (1):1-38.

contractual obligation, rejecting its qualification as a maintenance obligation⁶⁶. The intention of the parties being clear, the Court executed the Mahr separately from family law matters, qualifying it as a contractual obligation⁶⁷.

The German Supreme Court came to the same conclusion in a case from 2009⁶⁸, although it did not specify the place of the Mahr within the framework of contract law, a question which is still open. Still referring to the general rules of the contract, the German Supreme Court held that whenever the Mahr has to be assessed under German law, it can only be validated as a contractual agreement, as there are no legal rules on it under German law. The concept of freedom of contract leaves ample room for the acknowledgement of such agreements⁶⁹. When interpreting the Mahr agreement, the court must enquire as to the real intention of the parties and not stick to the literal wording of the expression used. Finally, the interpretation has to be done in accordance with the principles of good faith in the performance of contracts⁷⁰.

Also in Dutch case law, there was no qualification of the Mahr, which was assessed in the light of the context in which it was embedded. Thus, rather than the individual element, it was the entire matrimonial agreement of which the Mahr was part that was taken into consideration and which was qualified as a simple civil law contract, detached from the context of family law⁷¹. Accordingly, requiring performance of the Mahr is no different from requiring performance of any other contract⁷².

The Swedish Court of Göteborg, rejected an application for recognition of the Mahr by applying Swedish law⁷³. During the divorce proceeding, the Court found that the husband had been successful in showing that the marriage contract and an additional document authorizing the wife to follow through

⁶⁶ Hamm FamRZ (Germany); 516/1988.

⁶⁷ In the same sense: Amtsgericht Buende (Germany), 25.03.2004, 845/2004; OLG Düsseldorf (Germany), 12.08.1992, FamRZ 188/1993; OLG Cologne (Germany), 21.04.1993, NJW-RR, 201/1993.

⁶⁸ BGH (Germany), 9.12.2009, XI ZR 107/08.

⁶⁹ Yassari, Nadjma. 2011. The Islamic Mahr in German Courts: Characterization in Private International Law and Accommodation in German National Family Law. In *Embedding Mahr (Islamic dower) in the European Legal System*, eds Mehdi, Rubya, and, Nielsen, Jorgen S., Copenhagen: DJOF:102-122.

⁷⁰ BGB (Germany), 28.01.1987, FamRZ 463-466/1987; OLG Hamburg, 21.05.2003, FamRZ 450-461/2004.

⁷¹ Rb. 's-Gravenhage (the Netherlands), 10.07.1989, NIPR 399/1989, n.88/1440.

⁷² Kt. Beetsterswaag (the Netherlands), 07.08.1990, NIPR 446/1990, n.189/90; Rb. Rotterdam (the Netherlands), 20.07.2000, NIPR 10/2001; HR (the Netherlands), 10.02.2006, NIPR 94/2006, n.CO4/340HR.

⁷³ Göteborgs Tingsrätt, T 10691-06.

with a divorce contained a clause which nullified the right to Mahr should the wife initiate the divorce. This ruling appears to be difficult to classify, since, on the one hand, the Court gave relevance only to the letter of the agreement proposed in Court, and, on the other hand, this agreement appears to be consistent with certain more restrictive interpretations of the Islamic rules on the Mahr. However, it seems that in the intentions of the judges, contract law reasons prevailed rather than consideration of Islamic law.

- Recognition of the Mahr as a condition or effect of marriage:

In a 1997 judgment, the French Court of Cassation considered the Mahr as a contractual condition of marriage⁷⁴. On this occasion the Court of Cassation stated that both parties had expressed their intention to adopt the regime of separation of property and the payment of the Mahr. From this it could be inferred that the parties had expressed a concrete intention in this regard, which was also confirmed by the provision of the Mahr. The Court did not, therefore, make an actual assessment of the Mahr, but regarded it rather as a condition of the marriage from which the property regime chosen by the parties can be deduced.

According to an orientation of German jurisprudence⁷⁵, the Mahr is to be considered as an effect of the marriage, whereby the economic claim arising from the Mahr is a direct consequence of the marriage, referring to the articulated classification made by German law between personal and economic obligations arising from the marriage. The problem with this approach is that, as already mentioned, the Mahr comprises both material and immaterial effects that are difficult to classify under German law.

- Concluding remarks on The Formal Equality Approach:

In adjudicating Mahr the Formal Equality Approach propose a secular conception or translation of this religious institution. Deprived of his traditional function and religious meaning, the Mahr becomes a western contract that is

⁷⁴ Cour de Cassation (France), 2.12.1997, 343/97.

⁷⁵ OLG Cologne (Germany), 23.03.2006, *FamRZ* 1380/2006.

enforceable or not regardless of the concrete effect of that translation. Although this approach represents an attempt to solve a problem related to the foreignness of the institution of the Mahr to the secular legal system and to offer a solution to the parties in line with the principle of equality in a substantial sense, it ends up distorting the institution. In fact, although it may be considered correct to state that the Mahr is closely linked to the marriage contract and constitutes an agreement, its existence does not derive from a free act of will, since it is an essential element of Islamic marriage. Moreover, since it is an institution closely linked to marriage, it should be assessed within the framework of family law.

C. The Substantive Equality Approach: an attempt at a concrete understanding of the Mahr

According to this approach, the application of apparently neutral rules, without taking into account the circumstances of the concrete case, including the cultural and religious identity of the parties, the community context in which they live, while respecting the principle of equality in a formal sense, could produce inequality in substance in the individual case. The approach inspired by the principle of equality in a substantive sense starts from the concept of legal pluralism, adding to the protection of the interests of the group, the protection of the interests of individuals living within the group⁷⁶, departing from the Formal Equality Approach which does not take into account the substantive consequences of the application of a concept of equality which is presumed to be universal⁷⁷.

Characteristic elements of this approach are: a) an interpretation of the Mahr in the context of family law, the proper place for this institution; b) an interpretation of the Mahr that produces a hybrid result somewhere between secular and religious law; c) attempts to translate the Mahr into an element of secular law that, in the opinion of the judges, is as close as possible to the original function of the Mahr and can produce a result in line with the principle

⁷⁶ Okin, Susan M. et al. 1999. *Is Multiculturalism Bad for Women?*. Princeton: Princeton University Press

⁷⁷ Fournier, Pascal. 2009. Transit and Translation: Islamic Legal Transplant in North America and Europe. In *Journal of Comparative Law*, 4 (1):30.

of equality in a substantive sense. In application of this approach, the Mahr is therefore placed in the sphere of family law, in view of its function in Islamic law, and regarded as: a) a maintenance obligation; b) an element of the matrimonial property regime; c) a gift; d) rejected as unjust enrichment or contrary to the principle of equity.

- The Mahr as maintenance obligation or alimony:

In 1983, the Oberlandesgericht Köln (Higher Regional Court, Cologne), in the course of divorce proceedings, examined a marriage agreement between an Iranian woman and a German man involving the payment of a Mahr of the approximately value of € 21,000⁷⁸. The Court held that the Mahr, as an institution under Islamic law intended to provide a means of support for the wife after the divorce, was in conformity with German law only in so far as its implementation complied with the standards of equity laid down therein. In order to avoid an inequitable result the judges considered the Mahr as part of the husband's maintenance obligation to his wife under German law and calibrated according to the economic capacity of the parties, and this despite the fact that the German institution does not comply with all the elements of the Mahr according to Islamic law⁷⁹.

In 1986 in Norway the Mahr was qualified as a post-divorce maintenance in a case decided by the Eidsivating Court of Appeal. However, in this case it was the lawyer of the wife who qualified the Mahr in this sense. However, the Court, applying Norwegian law, decided to reject the wife's application considering the low income of the husband⁸⁰.

The majority of Dutch jurisprudence has also placed the Mahr in the context of family law, within the framework of the regulation of maintenance obligations. The basic reason why this institution is qualified in this sense lies in the circumstance that Islamic law does not provide for a regulation of the maintenance of the wife by the husband, so the Mahr would seem to be

⁷⁸ OLG Köln, 28.01.2003, *IPRax* 73/1983.

⁷⁹ Translate the Mahr in alimony obligation also KG Berlin (Germany), 12.11.1979, *FamRZ* 470/1980; AG Hamburg (Germany) 19.12.1980, *IPRax* 63/1980; AG Kerpen (Germany), 29.01.1999, *FamRZ* 29/1999, OLG Frankfurt a. M. (Germany), 11.01.2011, 04199/2011, AG Rüsselsheim, *FamG*, *BeckRS* 2011-04198.

⁸⁰ Eidsivating Court of Appeal, 10.12.1986, *LE-1986-447*.

intended to fill this gap. This approach was followed in particular by the Court of Utrecht in 2008 when it ruled on a divorce case involving a couple of Iranian origin, in which the wife had requested payment of the Mahr agreed upon at the time of the marriage for a total value of approximately € 38,000⁸¹. In this case, the Court qualified the Mahr in the same way as a maintenance obligation since the marriage contract concluded under Islamic law did not provide for any specific provision regarding the maintenance of the wife after the divorce, therefore, the Mahr was attributed the function of a lump-sum contribution to the maintenance of the former spouse agreed between the parties at the time of the marriage⁸².

In spite of the fact that through this qualification the jurisprudence attempts to adapt an Islamic institution to the Dutch legal system, the qualification of the Mahr as a maintenance obligation brings with it two concrete criticisms. The first concerns the failure to respect the original will of the parties which is not considered in the light of the cultural and religious context within which the obligation arose. Secondly, the consideration of the Mahr in this sense entails the risk for the wife of receiving a merely symbolic contribution.

- The Mahr as an element of the matrimonial property regime:

German law, like that of other European countries, gives spouses the possibility of derogating from the general rules on matrimonial property regimes by means of a specific agreement that meets the requirements of the law. According to part of the case law, the respect accorded to the autonomy of the parties in this matter should also be accorded to the institution of the

⁸¹ Rb Utrecht (The Netherlands), 10.12.2008, *LJN: BH3018*.

⁸² In this sense also Rb. Utrecht (the Netherlands), 30.01.2008, *LJN: BC2923*, Hof 's-Gravenhage (the Netherlands), 17.12.2008, *LJN: BG9476/JPF 2009.50*; Rb. 's-Gravenhage (the Netherlands), 23.02.2006, *LJN: 23946*; Rb. 's-Gravenhage (the Netherlands), 10.02.1999, *NIPR, 143/1999*; Rb. 's-Gravenhage (the Netherlands), 24.01.2006, *NIPR 69/1996*; Rb. 's-Gravenhage (the Netherlands), 17.12.2008, *LJN: BG9476/JPF 2009.50*, Rb. Maastricht, 72204/2003, GH Arnhem-Leeuwarden (the Netherlands), 1109/2013, Rb. Rotterdam (the Netherlands), 22.02.2010, *BN 1643/2010*.

Mahr, which should be classified according to the rules governing matrimonial property regimes⁸³.

Dutch jurisprudence has also considered the Mahr as part of the marital property to be assessed according to the matrimonial property regime. In 2008, the Dutch Supreme Court ruled on a case involving a Dutch couple of Turkish origin, in which the husband claimed reimbursement of the Mahr paid to his wife on their wedding day⁸⁴. The Supreme Court, before which the wife emphasised the religious significance of the Mahr according to the tradition of Islamic law, rejected the woman's request to keep the Mahr, confirming its previous rulings and placing it within the spouses' matrimonial property regime. This orientation was last confirmed by the Court of Appeal of Arnhem and Leeuwarden in 2021⁸⁵.

Although reasonable from the point of view of secular law, such pronouncements do not take due account of the context in which the Mahr is agreed upon, nor its original function under the will of the parties⁸⁶.

- The Mahr as morning gift:

In 2005 the High Court of Copenhagen passed a verdict on the question of Mahr under the Danish law⁸⁷. The High Court concluded that Mahr is a gift according to Danish law and hence must meet the same requirements to be valid, consequently, the Mahr must be contained in a prenuptial agreement in order to be valid⁸⁸. The parties were married in 1988 in Denmark in an Islamic Culture Centre; both parties were of Pakistani origin. In the Islamic marriage contract it was stated that the husband had to pay to the wife 25,000 Danish kroner (DKK) as Mahr. The parties were separated in 2001 and they disagreed

⁸³ OLG Bremen (Germany), 09.08.1979, *FamRZ* 756/1979; OLG Hamm (Germany) 262/2015; OLG Cologne, 29.10.1981.

⁸⁴ Hoge Raad (The Netherlands), 08.02.2008, *LJN BC3841*.

⁸⁵ Court of Appeal of Arnhem and Leeuwarden (the Netherlands), 04.05.2021, *ECLI:GHARL:2021:4341*.

⁸⁶ In this sense also Court of appeal 's-Gravenhage (the Netherlands), 19.04.2006, 1279-H-05, 5/2007, *ECLI:NL:GHSGR:2006:AY5780*.

⁸⁷ High Court of Copenhagen (Danmark), *U.2005.2314 Ø*.

⁸⁸ Christensen, Camilla. 2011. Mahr in Danish Law. In eds Mehdi, Rubya, and, Nielsen, Jorgen S., *Embedding Mahr (Islamic dower) in the European Legal System*, Copenhagen: DJOF:203-217.

whether the husband had already paid the Mahr to the wife, according to the marriage contract. The wife, in particular asked to the Court to recognize the Mahr as a compensation according to the Danish Law⁸⁹, because the Mahr is an amount that secures the woman in case of divorce. The husband affirmed that the wife forfeited her claim of Mahr when she initiated the divorce and, in any case, is in conflict with Danish law, because is a bride price. The High Court determined that the Mahr is considered a gift according to Danish legislation, and therefore a prenuptial agreement is needed to ensure the validity of the gift, unless the gift is proportionated to the financial situation of the person giving it. The Court found that the amount of the gift in this case was disproportionate to the financial situation of the husband, hence a prenuptial agreement would have been required to ensure the payment of Mahr. The parties had not signed a prenuptial agreement, and so the obligation to pay the gift was declared invalid.

Even this attempt to translate the Mahr into a secular institution that could reflect its functions in accordance with the state legal system seems to betray the real function of the Mahr and above all the real will of the parties.

- Rejection of the Mahr as unjust enrichment or contrary to the principle of equity:

In translating the Mahr into an element of secular family law, the courts have in some cases also held to reject the execution of the Mahr because in the concrete case its recognition would be contrary to the principle of equity. In a case dating back to 1998, the Court of Appeal in Celle, Germany, rejected the execution of the Mahr as an unjustified enrichment by the wife⁹⁰. In this case, the woman had already been awarded a maintenance contribution, so further awarding of the Mahr would have placed an undue burden on her husband.

At the same time, the Court in The Hague, in a divorce case involving a couple of Egyptian origin, rejected the wife's request for payment of the Mahr

⁸⁹ The High Court of Copenhagen in the case TFA.1998.360E qualified the Mahr as a form of compensation, ma ha rigettato la richiesta della moglie ritenendo che la stessa non avesse addotto prove sufficienti che avesse diritto a tale compensazione.

⁹⁰ OLG Celle (Germany), *FamRZ* 374/1998.

on the grounds that at the time of the divorce the husband did not have the economic capacity to meet the agreement made at the time of the marriage⁹¹.

- Concluding remarks on The Substantive Equality Approach:

In adjudicating Mahr this approach attempts to achieve a substantial reconciliation of the requirements of the Islamic model with those of the legal system. However, although it is successful in avoiding distortions in practice, e.g. by preventing the Mahr and the maintenance obligation from becoming a duplication of each other, thus achieving an unequal result, in most cases such a transplantation fails. Above all, there is a distortion of the real functions of the Mahr and the will of the parties.

Conclusion

The case law examined shows that European legal systems cannot avoid confrontation with minority legal systems in order to guarantee a correct balance between individual rights, collective rights and the fundamental principles of the system, with a view to reasonable accommodation and in order to achieve a result in line with the principle of equality in the substantive sense.

From the approach adopted by the courts of the countries examined with respect to the problem of the recognition of the Islamic institution of the Mahr, it seems possible to deduce a certain awareness on the part of the jurisprudence of the fact that the state legal order coexists and competes with the Islamic minority legal order. The interaction between the two systems is determined by the behaviour of the members of the minority who naturally move between the plane of secular law and the plane of traditional and religious law. In this sense, members of the minority turn to the courts for mediation between traditional and secular norms by implementing different and changing strategies to manage the legal complexity in which they are

⁹¹ Rb. 's Gravenhage, 24.01.1996, *NIPR*, 69/1996.

immersed. In this context, forms of contamination and interaction are inevitable, regardless of official recognition of the informal legal system.

However, from the analysis of the cases, another fundamental problem seems to emerge, represented by the inadequacy of the legal framework offered by the various legal systems to meet the particular needs of members of religious minorities in general, and of the Islamic minority in particular.

In fact, one would expect that in the face of a change in society in a multicultural and pluralistic direction, the legislator would assume the responsibility of adapting the legislative instruments to the new social needs. However, judges seem to have taken on this responsibility, in contradiction with the binary logic of a rigid distinction between the application and the creation of law. This leads the judiciary to be one of the key institutions of pluralist society. This is especially true for those minority groups who, finding resistance and difficulties in political representation, have brought their demands for recognition into the courtroom, which has become not only a place of resolution but also of expression. This leads us to question the suitability of judges to take on this responsibility, to intervene through their pronouncements in a process of social transformation, often forced to translate institutions unknown to them, with the sole aim of obtaining a result of substantial justice in favour of a vulnerable subject, otherwise ignored by the majority legal system.

In spite of the resistance of the legal system and its political component, one can clearly perceive the effort made by jurisprudence to seek solutions that can combine the requirements of national law with the cultural and religious requirements of the parties. This effort expresses the need to harmonise the plurality of sources of law applicable to specific cases in order to prevent gaps in protection in the spirit of reasonable accommodation.

However, this effort, useful as it may be, is often insufficient as well as uncertain, since it is left to the discretion of the judges themselves who, as shown by the French case law examined, are under no obligation to take account of minority demands, nor to interpret the rules through the technique of reasonable accommodation. In the other cases examined, on the other hand, one finds, albeit to varying degrees, a certain openness of the European legal systems examined towards accepting and understanding minority requests,

which also demonstrates a certain flexibility and willingness towards legal pluralism on the part of the courts.

Of the approaches examined, and whose problems and merits have already been discussed, the one that appears to be most effective in terms of reasonable accommodation appears to be the Legal Pluralism Approach, which, however, needs the counterbalance offered by the Substantive Equality Approach, especially as regards the specific assessment of the issues underlying the concrete case, in an attempt to avoid the distorting effects of legal pluralism.

In all legal systems, however, the technique of reasonable accommodation applied through the hermeneutic activity of the courts brings with it a number of problems. In the first place, judges are not sufficiently equipped in terms of legal culture to be able to fully understand the meaning of the institutions of Islamic origin, with the consequence that, even in the attempt to give acceptance to the demands of identity, they cannot always understand them fully. This leads to different attempts, even within the same legal system, to transplant or translate institutions of Islamic law into categories of secular civil law, with results that are not always satisfactory in terms of legal certainty, the parties' expectations of justice and consistency of results.

In spite of these difficulties, it is necessary to proceed along the path of legal pluralism and reasonable accommodation, seeking solutions that make it possible to combine individual rights, collective rights and the fundamental principles of the legal system. The aim is still to consider, especially in the context of family relations, individuals no longer as abstract subjects but as persons, to assess not only the case concretely but above all the individual concretely.