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Mahr Agreements: Contracting in the
Shadow of Family Law (and Religious
Law)—A Comment on Oman's Article

By: Brain H. Bix

Introduction

In *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*,^[1]

(http://old.wakeforestlawreview.com/mahr-agreements-contracting-in-the-shadow-of-family-law-and-religious-law%e2%80%94comment-on-omans-article#_ftn1)

Nathan Oman uses Islamic marriage contracts as the basis for reflecting on the advantages of thinking about contract law in general terms, rather than as a series of different and unrelated transaction types subject to different rules and principles.^[2]

(http://old.wakeforestlawreview.com/mahr-agreements-contracting-in-the-shadow-of-family-law-and-religious-law%e2%80%94comment-on-omans-article#_ftn2)

In particular, Oman argues that seeing contracts as a series of different types of transactions can work against both good law and good outcomes in individual contract law cases, because the assumed narrative of a transaction type may be at odds with the precise context of the agreement before the courts. And this contextual problem, Oman argues, is exactly what has happened with the Islamic marriage contracts and *mahr* payment provisions.

If the mahr agreement is construed to supplant the state's default rules, as intended, the question is the same as would be applied to secular/conventional premarital agreements: is the outcome procedurally and substantively fair? That is, given disclosures and other procedures at the time of signing, and the parties' circumstances at the time of enforcement, would it be fair to leave the wife with only the mahr payment?

In this Commentary I will argue that the lessons of *mahr* agreements may be more complicated than Oman admits,

and that some of those lessons may work against Oman's general position on contract law. Part I offers a brief overview of *mahr* agreements; Part II looks at the place of premarital agreements in the larger context of contract law and family law; and Part III offers conclusions regarding how *mahr* agreements ought to be treated by the courts.

I. Mahr Agreements

As Oman points out, under Islamic law, marriage is a contract.[3] Part of that contract—the *mahr*—is an agreement of payment by the husband to the wife. As one commentator summarizes:

Mahr, meaning 'reward' (*ajr*) or 'nuptial gift' (also designated *sadaqa* or *faridah*), is the expression used in Islamic family law to describe the 'payment that the wife is entitled to receive from the husband in consideration of the marriage.' . . . *Mahr* is usually divided into two parts: that which is paid at the time of marriage is called prompt *mahr* (*muajjal*) and that which is paid only upon the dissolution of the marriage by death or divorce or other agreed events is called deferred *mahr* (*muwajjal*).[4]

The deferred payment is due if the husband divorces the wife by *talaq*, a unilateral form of divorce—of which all husbands have the right—that requires no showing of cause.[5] There are other forms of Islamic divorce; however, the wife has no comparable right to unilateral divorce without showing cause (unless that right is expressly granted to her by her husband).[6] There is some uncertainty about the wife's right to the deferred payment for the other forms of divorce, but the majority rule appears to be that she is not due payment if she initiates the divorce *and* her husband is not clearly at fault for the end of the marriage.[7]

Within Islamic practice, there is neither the right to alimony nor the right to equitable division of property at divorce; household possessions are divided strictly according to title to the property being divided.[8] The cultural understanding in most Islamic societies is that a divorced wife is to be supported by her extended family, not by her ex-husband. Thus, the *mahr* provisions in

Islamic countries can be essential for a wife who has little property under her own name. Some view the *mahr* as the means of support for the divorced wife, while others view it as a disincentive for a *talaq* divorce.[9] Of course, it could serve both functions.

II. Premarital Agreements: Contract Law or Family Law

Oman analyzes *mahr* agreements as a certain kind of contract and asks whether they ought to be treated under general contract principles, or under the special rules applicable to conventional premarital agreements. As Oman points out, a different set of rules and standards has developed for “premarital agreements”—agreements entered just before marriage—in which one or both prospective spouses waive some or all of their rights at divorce (regarding property division or alimony) or upon the death of the other spouse. It is important to note that premarital agreements are within the province of family courts who specialize in family law,[10] and family-court judges and lawyers often seem a little foggy on contract law principles.[11] The background with which these lawyers and judges analyze such agreements is not so much general contract principles; rather, their analyses often follow general family law and divorce principles.[12]

American divorce law starts with the idea that the finances between the divorcing spouses should be dealt with in a fair manner, using the tools of property division and alimony (and also child support). There are default rules for property division in every state, which often prescribe that an equal division, or something close to it, is the presumed outcome.[13] Against that background, agreements that seek to waive one party’s rights to an equitable division of property, or the right to alimony—and thus violate principles of fairness and public policy—are treated by most jurisdictions with great suspicion and reluctance.

Until the 1970s, almost all states treated divorce-focused premarital agreements as unenforceable as contrary to public policy. Today, all states treat at least some premarital agreements as enforceable in principle, though

many states impose some sort of substantive fairness inquiry.[14] The Uniform Premarital Agreement Act (“UPAA”) came on the scene relatively late, in 1983.[15] There are two things to note about the UPAA. First, it is significantly more favorable to the enforcement of premarital agreements than was the law in most states, and that is presently the law in almost every state that has not adopted the UPAA. Second, though about half the states have adopted some version of the UPAA, a significant portion of those adopting states have modified it in ways that limit the pro-enforcement effect (e.g., by adding a fairness inquiry).[16]

Thus, though Oman writes that the UPAA “creates requirements that are meant to act as a prophylaxis against inconsiderately bargaining away one’s rights in divorce,”[17] the UPAA tends toward enforcement, especially when compared to the legal standards in most of the states that have not adopted the UPAA. The “prophylaxis” of the UPAA (in its unmodified form) does not extend much beyond a writing requirement and financial disclosure, and—contrary to Oman’s claim[18]—a failure of financial disclosure, on its own, is *not* sufficient to invalidate an agreement. In one important way, the UPAA makes premarital agreements *more* enforceable than conventional agreements. To avoid enforcement of a conventional agreement, it is sufficient to show that the agreement is unconscionable;[19] under the UPAA, unconscionability must be combined with a failure of financial disclosure.[20] Many states, that have either not adopted the UPAA or have modified their version of the UPAA, impose duties of substantive and procedural fairness far above those imposed on conventional commercial agreements.[21]

III. The Proper Analysis of Mahr Agreements

Oman indirectly raises an interesting and important question: are there circumstances when agreements between those about to be married should not be tested under the standards of premarital agreements? Certainly, when one prospective spouse sells the other a book or

car on the eve of their marriage, we would assume that the normal sale of goods rules from Article 2 of the Uniform Commercial Code apply, not the UPAA or any other standard for premarital agreements. It is only when the parties' agreement has the purpose or effect of waiving a spouse's statutory or equitable rights at divorce (or upon the other spouse's death) that the rules of premarital agreements generally apply.[22]

There is a significant argument to be made—and Oman makes it—that a *mahr* agreement between prospective spouses, like the sale of a book or car between prospective spouses, should not invoke the special rules applicable to premarital agreements.[23] If courts often *do* apply the rules of premarital agreements to *mahr* agreements, it is usually because a party seeking to enforce the *mahr* provisions, or to oppose enforcement, has argued that the agreement had the effect of waiving one spouse's rights at divorce. Only in such circumstances would the standards and protective measures—of the UPAA or other premarital agreement rules—be appropriate. If both parties agree that the *mahr* provision is merely a promise of payment (made enforceable, if at all, because of the consideration from the other party's agreeing to marry[24]), then Oman is certainly correct that the application of premarital agreement law is inappropriate. Of course, if both parties agree on the significance of the *mahr* agreement, they likely would not be in court in the first place.

If one or both parties argue that the *mahr* agreement had the purpose or effect of supplanting state laws about the division of property and alimony, then the rules of premarital agreements are properly applicable. As Oman rightly points out, the initial inquiry is thus an interpretive one: is the *mahr* payment to the wife (if due) meant to supplement or supplant the financial rules of civil divorce?[25] Although, as the article also observes, many Islamic couples about to marry will have no opinions on that topic one way or the other, especially if they marry in another country where the background financial rules on divorce are quite different.[26] But, in the United States, where the default rules of financial settlement upon

divorce are considered to reflect the state's strong public policy, silence or an absence of considered intention will (and should) be held to be insufficient grounds for supplanting or opting out of the state's default rules.

If the *mahr* agreement is construed to supplant the state's default rules, as intended, the question is the same as would be applied to secular/conventional premarital agreements: is the outcome procedurally and substantively fair? That is, given disclosures and other procedures at the time of signing, and the parties' circumstances at the time of enforcement, would it be fair to leave the wife with only the *mahr* payment?[27]

Oman at times seems to assume that parties to *mahr* agreements always know the nature of the promise and the only issue we need to concern ourselves with is coercion. Yet, consider *Obaidi v. Qayoum*,[28] in which the prospective husband was informed about the *mahr* agreement only fifteen minutes before he was told to sign it, and it was in Farsi, a language he did not speak. The agreement's significance was explained to him only after he signed it. After a thirteen-month marriage, the wife filed for divorce and sought to enforce the agreement's promise of a \$20,000 payment upon divorce. The court held that "under neutral principles of contract law," there was no "meeting of the minds" on the essential terms of the agreement.[29] This is, at best, a very doubtful understanding of contract law,[30] but an unsurprising one for a family court, both relating to the court's efforts to do justice between the parties as it saw the matter and relating to the court's inexpert handling of contract law doctrine.

Oman at one point implies that defenses of duress and undue influence are not available for the plaintiff when the courts treat the *mahr* as a premarital agreement.[31] There is no basis for that conclusion. Courts applying the UPAA (and other standards particular to premarital agreements) treat contract defenses, like duress and undue influence, as still applicable, except when expressly displaced. And generally there is no displacement, the premarital agreement rules are in fact

more protective of parties than conventional contract law, with the exception of the UPAA's strange provision on unconscionability, discussed earlier.[32] Additionally, the UPAA has an express provision allowing a party to avoid enforcement of premarital agreements if "that party did not execute the agreement voluntarily,"[33] a requirement that some courts have read broadly and in a way that is far more protective of parties than conventional contract law's narrowly construed doctrinal defenses of duress and undue influence.[34]

What is ironic is that Oman's ultimate recommendation seems to be for *more* context. He argues that such attention to context is consistent with applying only general contract principles,[35] but the argument could easily be viewed instead as supporting *specialized* rules based on transaction types, with a new category being created for *mahr* agreements.[36]

Conclusion

Oman has shown us that there are real disadvantages in looking at contracts through the lens of narrow transaction types, especially when individual agreements might fit poorly with the assumed narrative of that transaction type. However, the example Oman uses—*mahr* agreements treated within the category of premarital agreements—gives only partial support for his thesis. The vast majority of those agreements should not be treated as premarital agreements, not because they do not fit some ascribed narrative, but because *mahr* provisions generally ought not to be understood as waiving the recipient spouse's rights at divorce (regarding property division and alimony). However, when one or both parties claims that the *mahr* agreement *does* waive divorce rights, then that party *should* have the burden of showing both that this reading of the *mahr* agreement is reasonable *and* that any such waiver is consistent with the procedural and substantive fairness safeguards created by state law to protect those who might otherwise make such waivers in an inconsiderate way.

[1]. 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 (2010).

[2]. For another set of thoughtful reflections that is similarly hostile to narrowing contract law principles to “context” or transaction types, see generally Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 Wake Forest L. Rev. 607 (2010) (arguing that there is little evidence that courts can use context to improve contract law).

My own inclination is to be more skeptical of general contract law theories and principles, and to be sympathetic to more parochial theories and more specialized doctrines. See, e.g., Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 Ratio Juris 194 (2008); Brian H. Bix, *Some Reflections on Contract Law Theory*, 1 Problema 143 (2007), available at <http://www.juridicas.unam.mx/publica/librev/rev/filotder/cont/1/pr/pr6.pdf>, and (in modified form) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892783. But that is a debate for another time.

3. Oman, *supra* note 1, at 589.

[4]. Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 Int'l J.L. Pol'y & Fam. 67, 69 (2010). The Islamic world is quite large, and different practices and understandings arise in different areas. See, e.g., Asifa Quraishi & Frank E. Vogel, *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (2008) (containing separate chapters chronicling the practice of the Islamic marriage contract in Saudi Arabia, Iran, Malaysia, and Egypt).

5. Oman, *supra* note 1, at 592.

6. See *id.* at 591–92.

[7]. See, e.g., Pascale Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* 20–23 (2010).

[8]. See Oman, *supra* note 1, at 596–97.

[9]. *Id.* at 592, 601–02.

[10]. The enforceability of premarital agreements is determined as part of the divorce litigation, which is usually under the jurisdiction of a specialized family court. See, e.g., Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 Wm. & Mary J. Women & L. 349, 352–53 (2007) (discussing treatment by courts and state legislatures of premarital agreements in the United States).

[11]. See, e.g., *In re Marriage of Obaidi*, 226 P.3d 787, 791 (Wash. Ct. App. 2010) (holding that “a valid contract requires a meeting of the minds on the essential terms”—a principle not present in contract law); see *infra* text accompanying note 28.

[12]. This phenomenon is equally true on the scholarly side. Most discussions of premarital agreements are by family law scholars and practitioners and appear in contexts in which the likely audience is other family law scholars and practitioners. There are exceptions, to be sure: Melvin Eisenberg offers a few pages on premarital agreements as part of a general argument in his article on bounded rationality and the regulation of contract law. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211, 254–58 (1995). And some contract law casebooks contain a brief note relating to such agreements. E.g., Charles L. Knapp et al., *Problems in Contract Law* 555 (6th ed. 2007) (giving a one-paragraph summary of undue influence issues raised by premarital agreements).

[13]. See, e.g., Ira Mark Ellman et al., *Family Law* 317–501 (5th ed. 2010) (discussing property division and alimony upon divorce).

[14]. For an overview of the history and current doctrinal treatment of premarital agreements, see Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 Wm. & Mary L. Rev. 145 (1998).

[15]. Unif. Premarital Agreement Act, 9C U.L.A. 35 (2001).

[16]. On the UPAA and its shortcomings, see for example, Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. Legis. 127 (1993). The Uniform Law Commission is currently working on a proposed uniform law that would cover both premarital and marital agreements, and that would supersede the UPAA. See Memorandum from Barabra Atwood, Chair, Uniform Premarital and Marital Agreements Act Drafting Committee to the Uniform Premarital and Marital Agreements Act Drafting Committee, the ABA advisors, and Observers (Nov. 12, 2010), available at http://www.law.upenn.edu/bll/archives/ulc/pmaa/2010nov_meeting.pdf.

[17]. Oman, *supra* note 1, at 581.

[18]. *Id.* at 595.

[19]. U.C.C. § 2-302 (2007); Restatement (Second) of Contracts § 208 (1981).

[20]. Oman reads the failure of disclosure and unconscionability as being alternative grounds for avoiding enforcement. Oman, *supra* note 1, at 595. However, the UPAA requires that *both* be shown to avoid enforcement. Unif. Premarital Agreement Act § 6(a)(2), 9C U.L.A. 48–49 (2001).

[21]. See, e.g., *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn. 1989) (providing an example of a non-UPAA state's special requirements of substantive and procedural fairness imposed on premarital agreements).

[22]. Oman, *supra* note 1, at 581.

[23]. See *id.* at 580–81.

[24]. Another potential rationale for enforceability would be if the promise was relied on in a way that injustice could only be avoided by the enforcement of the promise. See Restatement (Second) of Contracts § 90(1) (1981).

[25]. See Oman, *supra* note 1, at 580.

[26]. See *id.* at 602.

[27]. The court's willingness in the case Oman discusses, *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978), to let an affluent husband get away with paying his wife only \$1500 (no other property and no alimony) under the *mahr*, which the court construed as a premarital agreement, is highly unusual. See e.g., *Shaban v. Shaban*, 105 Cal. Rptr. 2d 863, 865, 867 (Ct. App. 2001) (affirming trial court holding that the *mahr* was not a contract and therefore not a valid premarital agreement under California state law).

[28]. *In re Marriage of Obaidi*, 226 P.3d 787 (Wash. Ct. App. 2010).

[29]. See *id.* at 791–92.

[30]. There is no requirement in contract law of a “meeting of the minds.” If both parties sign a contract, not knowing its significance, or disagreeing about its significance, they will nonetheless be held to the contract, subject only to defenses like misrepresentation and duress. See, e.g., *Ray v. William G. Eurice & Bros.*, 93 A.2d 272, 277–78 (Md. 1952) (rejecting a requirement of a “meeting of minds” and holding the parties to the objective meaning of the contract terms).

[31]. Oman, *supra* note 1, at 603 (“The general law of contract provides *better tools* for policing abuse than does the UPAA.” (emphasis added)); see *id.* at 603–04 (discussing the defenses of duress and undue influence). Compare *id.* at 605 (stating that “[t]here is nothing about the law of premarital agreements that forecloses the application of such doctrines”), with *id.* at 603 (stating that the “the general law of contract provides *better tools* for policing abuse than does the UPAA.”) (emphasis added).

[32]. See *supra* note 20 and accompanying text.

[33]. Unif. Premarital Agreement Act § 6(a)(1), 9C U.L.A.

48 (2010).

[34]. This point can be raised against Oman's claim that "the supposedly nuanced and context-sensitive law of premarital agreements provides no doctrinal tools for policing the sorts of abuse that are likely to arise in *mahr* contracts." Oman, *supra* note 1, at 605. The "voluntariness" test of the UPAA, as applied by some courts, would likely work as well or better than the awkward contract law tools of duress and undue influence.

[35]. Oman, *supra* note 1, at 605–06.

[36]. *Id.* at 600–01.