Mouez Khalfaoui
Justin Jones
(eds.)

Islamic Family Law in Europe and Islamic World: Current Situation and Challenges

Carl Grossmann
Verlag

Mouez Khalfaoui
Justin Jones
(eds.)

Islamic Family Law in Europe and Islamic World: Current Situation and Challenges

Edited by Mouez Khalfaoui & Justin Jones

Volume 8, Issue 1 (2020)
EJIMEL Special Issue

Islamic Family Law in Europe and Islamic World: Current Situation and Challenges

Carl Grossmann
Verlag

Published by:
The Center for Islamic and Middle Eastern Legal Studies (CIMELS),
University of Zurich,
Zurich, Switzerland

Suggested citation style:
Electronic Journal of Islamic and Middle Eastern Law
(EJIMEL), Vol. 8, Iss. 1 (2020), pages,
http://www.ejimel.uzh.ch

This work is the book edition of the EJIMEL Special Issue Electronic Journal of Islamic and Middle Eastern Law Vol. 1 Iss. 1 (2020), edited by Mouez Khalfaoui and Justin Jones (ISSN 2504 – 1940 Print, ISSN 1664 – 5707 Online).

The German National Library (*Deutsche Nationalbibliothek*) lists this work in the *Deutsche Nationalbibliografie*; detailed bibliographic data is available in the internet via http://dnb.d-nb.de.

DOI: 10.24921/2020.94115949

Print and digital edition produced and published by:
Carl Grossmann Publishers, Berlin
www.carlgrossmann.com

ISBN: 978-3-941159-48-8 (printed edition, hardbound)
ISBN: 978-3-941159-49-5 (e-Book, Open Access)

Introduction

Islamic family law is a major component of the body of stipulations, commands, and ethical guidance that collectively make up the *sharīʿa*, often known (somewhat misleadingly) in popular discourse as Islamic law. Indeed, in some ways, family law has emerged as the predominant domain of Islamic law as it exists in the modern world. In most Muslim majority countries, Islamic legal provisions have been omitted from most of their civil and criminal codes, with many of these laws having been secularised. This leaves family law as the only legal domain within which Islamic legal principles endure, with Islamic codes of personal status, and other legislation placing laws of family (e. g. pertaining to marriage, divorce etc.) under the jurisdiction of religious guidance.

This ongoing recognition of Islamic family law explains why family law has remained such an issue of debate both in Muslim majority states, and indeed outside of the Muslim world, for instance, among Muslim minorities in Europe. Additionally, family law is an issue with great importance for individual Muslims who wish to observe Islamic family laws in their private lives, according to their beliefs. From another perspective, questions of Islamic family law are important for non-Muslim states (European states), which have had to deal with issues relating to the recognition of these laws within their legal and political frameworks. As such, in both Muslim majority nations and those with Muslim minorities, Islamic family law is being intensively debated, and is being brought into conversation with new developments in local civil laws, international law, and human rights law. Along with this, there has been a change to the classical conception of Islamic law that sees law as a matter for the confessional group alone, with the questioning of principles of Islamic family law by non-Muslim stakeholders.

While the debate in Muslim-majority societies is mainly focused on the relations of classical Islamic family laws to modern laws and how to find a balance between them, the debate in Europe is currently focused on the questions of whether and to what extent Islamic family law can be incorporated within a secular framework. Nevertheless, despite the local differences, we often find similar features across these contexts. For instance, in both the Muslim world and Europe, we observe a parallel situation of Islamic religious authorities and scholars having different orientations ranging from ultra-conservative to liberal and permissive; and

on the other hand, we can see secular legal actors, also with their own different affiliations, engaging with similar questions.

The essays presented in this special issue also offer sustained consideration of issues arising from the interaction between the Islamic family laws being lived in Europe and the Muslim-majority world. These papers were all first presented at the international symposium *Islamic Family Law in Europe and the Islamic World*, held in Hannover in September 2019, organised by Professor Mouez Khalfaoui (University of Tuebingen) and Professor Justin Jones (Oxford University). The editors are very grateful to the Volkswagen Foundation for funding the symposium. All the papers included here, in different ways, discuss the dynamics of Muslim matrimonial laws (marriage, divorce and cognate issues), as they are debated and developing in thought and practice both in Muslim-majority states and among Muslims in European states. They examine the challenges in Islamic family law faced by all sides, as well as the solutions to these challenges that are at our disposal. The authors are drawn from a range of disciplines including law, Islamic studies, theology, social anthropology, and other social sciences. The list of contributors also very deliberately includes scholars from the Islamic world, as well as Europe; thus, there are authors based at universities in Germany, the UK, Austria, and Belgium, but also universities in Morocco, Tunisia, Qatar, and Turkey.

These papers remind us that interactions between Europe and the Muslim world around Islamic family law are happening as a result of a number of factors. For instance, the movement of Islamic laws into Europe via migration (both economic migration and refugee migration), and the mobility of laws associated with Private International Law, means that issues such as polygamous or child marriage have come into consideration within European legal systems. Likewise, similar issues are being evaluated by Islamic thinkers in both Europe and the Muslim world: more gender-just readings of marriage, guardianship, or inheritance laws, for example. At the same time, the nature of globalisation has led to exchanges of thought across the world, with ideas moving in all directions. It is facile to think of different Muslim populations around the world living in isolation from each other; instead, changing Muslim cultural norms in both Europe and the Muslim majority-world can mutually influence each other. This context of exchange, moreover, offers new opportunities for solving long-term legal problems, since solutions to problems in one place can be rallied to address equivalent difficulties arising in other places.

Taking up some of these questions, the contributions here present valuable insights into current debates on Islamic family law from several perspectives. The first section of papers consists of practical data gathered through fieldwork in Europe and Muslim-majority contexts regarding aspects of Islamic family law. First, Mouez Khalfaoui presents the results of a pilot quantitative survey on Islamic family law in Germany, which was conducted in 2018. The leading question of this research is to understand the interaction between secular and religious law and how Muslim Germans currently understand the classical conception of family law in the modern context. Second, Rajnaara Akhtar presents valuable comparative data about marriage in Qatar and the UK. She focuses on the role of the state in both countries, arguing that while in the UK Muslims can chose between *nikāḥ*-only marriages and combined civil and religious marriages, Muslims in Qatar have access to only one form of marriage, which is strictly controlled by the state. The remarks of Akhtar regarding marriage in the UK echo those of Islam Uddin, who in the next paper focuses on the consequences of these forms of marriage on family life, for instance on women who have faced numerous difficulties in obtaining divorce as a result of their *nikāḥ*-only marriage contracts.

The second selection of papers concentrates on theological issues of marriage and divorce. Two papers offer analysis of two challenging subjects: Ranya Jamil analyses legal opinions regarding marriage with the prior intention of divorce. This kind of marriage has both theological and legal consequences, challenging the genuine conception of marriage, which is built on the assumption of a permanent linkage, but nevertheless finding explication within the corpus of Islamic family law. Next, Abdessamad Belhaj focuses his contribution on the issue of intermarriage between Muslim women and non-Muslim men, and how this marriage is currently being debated within Muslim religious institutions. He explores in particular opinions against this type of marriage, and presents some cases that could be used to elaborate another perspective on this issue.

The third section of papers reflect the current legal and theological debate on aspects of Islamic family law. Within this section, there are two sub-categories: the legal debate in Europe on the one hand, and the legal debate in the Muslim world on the other. Christian F. Majer presents the legal debate on minor marriage in Germany. He discusses the prohibition of this kind of marriage in Germany in 2017 and its consequences on legal and societal debate.

The legal-theological debate on family law in the Muslim world is then discussed by Naila Silini, who explores the reform of inheritance law in Tunisia after 2014. Karima Nour Aissaoui then examines the current debate on the reform of the Mudawwana, the Moroccan personal status code. Both papers provide historical, political and legal data of these two reform programmes that are often compared with each other. In the following papers, Ahmet Temel explores the historical development and erosion of Muslim laws of family in Turkey with a particular focus on the muscular actions of the Turkish Republic, while Selma Öztürk deals with one special case study regarding intersexuality and the Islamic legal debate on it.

These diverse papers, individually and collectively, all offer insights into Islamic family law as it is developing across the world, and they all speak of the extent to which the global movement of Islamic principles, cultures, and modes of understanding are transforming long-standing assumptions and incurring new changes. We hope that the papers presented here can offer fruitful contribution to these debates.

Table of Content

Chapter One

Dynamics of Continuity and Change: Islamic Family Law in Europe

Mouez Khalfaoui

Prof Dr Mouez Khalfaoui, Chair of Islamic Law, Center for Islamic Theology, University of Tuebingen.

Table of Contents

Abstract

This paper presents the results of a pilot survey that was anonymous and quantitative in nature on how a group of Muslim citizens in Germany understands and applies the classical Islamic family law. This small survey was conducted 2018 in different places throughout Germany, mainly among young educated Muslims. The main questions addressed were related to identifying the role of a European context and its impact on German Muslims' understanding of marriage and divorce, gender roles, as well as matters pertaining to interfaith marriage, mediation, and the role of the secular law. The survey consists of 20 questions divided into three main thematic constellations: a) Marriage, b) family life, and c) divorce. The employed framework corresponds to a shift in research paradigms in modern Islamic theological studies: Rather than emphasising classical Islamic conceptions of family law as laid out in classical sources and regarding these as the exclusive representative argument of a so-called Muslim point of view, the current focus is rather on how Muslims actively comprehend these conceptions and see their role in their respective lived contexts.

The survey under consideration took as its starting point classical pre-modern Islamic concepts as they figure in classical Islamic literature[1] *as well as modern Western secular conceptions of family law. Both conceptions, i. e. the classical Islamic and contemporary conception of Islamic law, serve as two mirrors for understanding the current conception of marriage and divorce among the group of participants. This helps to understand any aspect of change or continuity within this conception.*[2]

I. Introduction

Islamic family law is one of the main components of sharīʿa law, and one of the few aspects that is still active and enjoys great importance in the life of many Muslims and Muslim societies as well, regardless of their degree of religiosity, ethnic or social backgrounds. The relation of this primordial part of Islamic law to Western legal conceptions is currently under intense debate, due to, firstly, international legal conventions, according to which Muslim states have to stick to international regulations and conventions in many cases rather than local norms,[3] and, secondly, to the existence, in Western societies, of numerous Muslim minorities who desire to apply some aspects of Islamic family law in their daily life. This undertaking is, to some extend, guaranteed by secular legal norms. Accordingly, any research on Islamic family law in this new Western context must not only

1 An abridged general conception of classical Islamic Sunni doctrine of family law can be found in Al-Ǧazīrī Abdurrahman, Al-Fiqh ʿalā al-Maḏāhib al-ʾArbaʿa (Islamic Law According to the Doctrine of the Four Sunni Schools of Law), Vol. 4, Beirut 2003, 7 – 241; Kecia Ali gives a critical summary of this doctrine in her article Marriage in Classical Islamic Jurisprudence: A Survey of Doctrine, in: Qurashi Asifa / Vogel Frank E. (eds.), The Islamic Marriage Contract. Case studies in Islamic Family Law, Cambridge, MA, 2008, 11 – 45.

2 "Continuity" in this paper refers to the fact that we address subjects upon whom the classical premodern conception of Islamic family law still maintains a strong influence and persists in playing a role in decisions concerning marriage and divorce. "Change" refers to those aspects in which premodern (classical) conceptions have lost their preponderance due to the introduction of new modern conceptions.

3 See as an example the debate on CEDAW in Tunisia, cf. Khalfaoui Mouez, Das islamische Erbrecht in Tunesien, Electronic Journal of Islamic and Middle Eastern Law, Vol. 1 (2013), 75 – 82.

focus on reading and interpreting Islamic classical legal texts; instead, it must also take into consideration how classical Islamic theories of family are being understood and implemented by Muslim citizens of Western states in their lived realities. In this paper, both the theory and practice of Islamic family law will be considered.

It goes without saying that current researches on Islamic family law that are conducted in Western societies, for instance in Europe, are evidently shadowed by negativity. Forced or arranged marriages involving minors, domestic violence, child custody, etc. regularly make headlines, and a large part of field research has concentrated on studying or presenting problematic cases related to divorce, domestic violence, child marriage or parallel justice, i. e. cases of resistance or infringing upon dominant or standardized legal concepts.[4] As such, data related to such problems are plentiful, yet there exists a considerable lack of research on the reasons and causes of such issues. Likewise, there is a dearth of information concerning how Muslims currently regard relevant classical conceptions of Islamic family laws. Do they prefer them to Western family law? How do they wish to reconcile them with modern secular contexts? Which conceptions in particular still wield influence or importance for them? And, lastly, how do Muslim citizens of European states regard Western conceptions of family?

Taking German Muslims as a case study, this paper concentrates mainly on the following questions: How do German Muslims consider the classical premodern Islamic conceptions of family law? How do they manage to utilize these concepts within Germany? And how do they hold these in relation to secular German legislations? I argue in this paper that living in Europe has a great impact on an individual's understanding of premodern Islamic family law, such that the majority of Muslims living in such a context desire a situation of compromise in which classical and modern law may coexist. First, I shall underline that the quantitative survey conducted in 2018 (February to June 2018) is not representative for all Muslim minorities in Germany, let alone for all of Europe. This is due to the small number of respondents (out of more than 700 questionnaire handed out,

4 The Practice of *Khulʿ* in Germany: Pragmatism versus Conservativism, Islamic Law and Society Vol. 26, No. 1 – 2, (2019), 83 – 110. Büchler Andrea, Islamic Family Law in Europe? From Dichotomies to Discourse – or: Beyond Cultural and Religious Identity in Family Law, International Journal of Law in Context, Vol. 8, No. 2 (2012), 196 – 210.

only 101 have been send back) and the minor geographical area the survey covers (the cities of Tuebingen, Stuttgart, Leipzig, Hamburg, Cologne, Frankfurt and Berlin).

The aim of the survey mentioned above was rather to identify potential areas of conflict and matters of discussion within the Islamic conception of family law in order to orientate theological research. Instead of approaching the target group exclusively from a religious perspective, we opted for a more general and open definition of belonging based on the principle of self-definition. Accordingly, everyone who deems her/himself a Muslim is considered as such. The study neither addressed the degree of religiosity nor specific points of religious, social, or ethnic affiliation. This approach thus offers a broad framework for religious affiliation as well as theological background of the target group. As such, the survey was conducted not only in mosques and Islamic places of worship, but also in non-religious sites such as universities, libraries, pubs, shops, and cafés, where Muslims interact with other.

Thus, in this paper the two categories of "continuity" and "change" are employed to qualify the interpretation of Islamic family law held by the group of German Muslim citizens under consideration in this paper. "Continuity" qualifies situations in which the classical conceptions of Islamic family law still have an impact on how Muslims approach marriage and divorce, whereas the term "change" qualifies situations in which the classical conception of Islamic family law is in a process of transformation or debate in the direction of new understandings. In this paper a great importance is devoted to those cases of clashes or interaction in which classical Islamic and modern secular conceptions challenge or confront one another. Thematically, the paper addresses the subject mainly from a theological point of view; nevertheless, it combines sociological methods and cultural literacy to address the complex subjects under consideration. Next, I will present some details concerning the target group and circumstances of the survey:

Out of a total number of 101 respondents, 55 % were female and 45 % male. All participants were Muslims. Only one participant was unemployed at the time the survey was taken; 40 were students and 37 were workers. The majority of the respondents were between twenty and forty years old; 47 were married, 46 unmarried, 2 engaged, 3 divorced, and 3 didn't specify any answer about their marital status. Therefore, the information gathered

through the survey may be interpreted as indicative of a dynamic young and educated group of Muslims.

The survey addressed three main issues of Islamic family law. The first related to marriage, i. e. how people elect to become engaged, how they choose a partner, and which criteria inform this choice. The second related to family life, i. e. how people understand gender roles within the family and which family model is preferred. The third topic was that of divorce; i. e. how people seek to solve their conjugal problems and whether the parents or other forms of mediation such as lawyers or imams should be involved. The scope of this paper is limited to presenting the most important aspects of the survey.

II. Marriage

The survey started from the widespread assumption that the general classical Islamic conception of marriage is a conservative one compared to modern Western conceptions. This assumption is based on its patriarchal character, in that males are privileged and are given authority over women and children as well as determine the name and religion of the resulting children.[5] Furthermore, in contrast to current secular European conceptions, the Islamic classical conception is thought to accept arranged marriage by representatives of the individuals in a couple, such that marriage is seen as a collective social and religious issue in which not only two people are involved. The survey was designed to verify how German Muslims think about these issues, and thus includes questions regarding the choice of the partner, which criteria are important for this choice, or whether a dowry still should be paid in a modern Western context.

74 out of 101 respondents saw marriage a very important aspect of one's life; 23 out of 101 wished to get married; and only 4 out of 101 saw marriage as not important. The majority of respondents (92 out of 101) stated their preference for being able to choose their partner through direct (individual) contact; 7

5 A general overview is given by Samia Bano, cf. Bano Samia (ed.), Gender and Justice in Family Law Disputes, Women, Mediation and Religious Arbitration, Waltham 2017, 1 – 21; Cesari Jocelyne / Casanova José (eds.), Islam, Gender and Democracy in Comparative Perspective, Oxford 2017, 1 – 10.

out of 101 would be satisfied if the parents chose the partner for them; and 2 out of 101 didn't specify any answer The responses related to these two questions could be understood as a first indication for the importance of marriage for the target group under consideration. On the other hand, these answers could be understood as a rejection of arranged marriage and rejection of the classical role of guardians and their involvement in the selection of a partner. Moreover, the majority of the respondents saw love (82 out of 101) and religion (84 out of 101) as the cornerstones of marital relations. Other criteria were listed as follows: 18 out of 101 saw the professional occupation as an important criterion for the choice of the partner; 28 out of 101 see the social status as a main criterion for this matter; 24 out of 101 saw the financial situation as the main criterion; while 28 out of 101 mentioned that other criteria (not listed) are important for the choice of the partner. The multiple choice questions regarding the choice of the partner show a diversity of understandings regarding the matter under consideration. Whether those criteria could be combined need further qualitative research for instance about the role of religion in this matter. Asked about the role of the parents and relatives in the process of marriage, 41 out of 101 respondents did not see any prohibition to marrying without the agreement of their parents; 19 out of 101 see it possible only for the men to marry without the acceptance of the parents; 24 out of 101 see this undertaken (without the agreement of the parents) impossible. This would be understood as a sign of a considerable change in the understanding of the classical Islamic conception of marriage, as this premodern conception does not see the individual acceptance as an obligatory condition for marriage, especially for women and minors.[6] Asked about the type of marriage they do prefer, i. e. a religious marriage performed at a mosque or a civil marriage contract, the majority of the participants (78 out of 101) see a combination between civil marriage and religious marriage as the best form of marriage; 27 out of 101 wish themselves only a secular civil marriage; 18 out of 101 wish themselves only a religious marriage; and 3 out of 101 wish themselves another form of marriage than religious of civil. The question about the role of religion in these cases needs to be deepened through qualitative researches. Notwithstanding, these responses imply that German Muslims do interact

6 On the challenging debate on minor marriage, cf. Baugh Carolyn, Minor Marriage in Early Islamic Law, Leiden 2017, 1 – 14.

with inherited classical Islamic concepts of marriage and are currently engaged in reflecting on its application in modern life. Indeed, the majority of respondents opted for a marriage between modern and classical conceptions of marriage. The outcome of such a combination would be a comfortable marital concept located somewhere between modernity and tradition. In addition to the aspects of interaction mentioned above, there are others that require a deeper level of analysis; namely, those of mixed or interfaith marriage.

Only 3 out of 101 participants desire to have a marriage with non-Muslims, 4 out of 101 respondents are or were in such a relation, 23 out of 101 find such a relation not problematic, 60 out of 101 find these relation problematic, 51 out of 101 see the problem in such a relation as a religious one, 11 out of 101 find this kind of linkage problematic due to other reasons which are not listed in the survey. The data gathered related to interfaith marriage shows a critical situation that needs to be understood not only from a religious perspective. As far as theological interpretation is concerned, the data above allows some remarks and suppositions.

First, a lack of acceptance of interfaith marriage could be regarded as an example for the manifestation of the continuity of a classical pre-modern Islamic conception of marriage and how it is still lasting on Muslim understanding of marriage in modern secular context. Noteworthy is that marrying outside of one's community is also a problematic for several Muslim communities who refuse it even between Muslims who belong to different social, religious or ethnic affiliations.[7] Taking into consideration the substantial difference between modern living contexts in plural societies and premodern societies, interreligious marriage need to be considered through new paradigms. For, in modern plural context, people from different cultural and religious backgrounds do interact with each other in their daily life and are expected to interact. Interreligious marriage would be seen in this regard as an outcome or a manifestation of this interaction. Certainly, interfaith marriage has always been a matter of discussion and tension within and between monotheistic religions[8],

7 An-Na'îm Abdullahi, Inter-Religious Marriages among Muslims: Negotiating Religious and Social Identity in Family and Community, New-Delhi 2005, at 10 ff.

8 This in contrast to non-monotheistic religions such as Hinduism where people are religiously free but socially not, cf. Gaborieau Marc, La tolérance des religions dominées dans l'Inde, article présenté pour le colloque de Nantes, Rennes 1999, at 451 – 460.

nevertheless discussing this issue in modern democratic societies characterised by religious and cultural pluralism needs new paradigms; and it presents new challenging questions not only because of the involvement of secular law. Accordingly, the modern living context in secular plural societies expects an open space for interaction between people from different backgrounds.

Though the position of premodern Islamic theology regarding interreligious marriage is known as relatively tolerant among monotheist religions,[9] this position is currently challenging both for Muslims and non-Muslims. The Qur'ānic verses related to this matter have been interpreted as strict regulations: while the marriage of Muslim men to non-Muslim women, according to the classical Islamic legal doctrine, is not prohibited i. e. generally tolerated, the marriage of Muslim women to non-Muslim men is forbidden.[10] There does however exist a difference between Sunni and Shi'i positions in this regard: While the Shi'i position prohibits the marriage to non-Muslims both for men and for women, the Sunni School of law has left the door open for men and closed for women.[11] Historically speaking, interfaith marriage has gained importance over the course of time as the position of legal scholars has become more and more rigid.[12] The Sunna of the Prophet Muhammad has proved that the eldest daughter of the prophet Muhammad, Zainab, was already married with a polytheist man from Mekka when her father received the divine message.[13] She converted to Islam but did not immediately divorce her husband, who was a known rival of the prophet Muhammad.[14] Abdullahi An-Na'īm and Yohanan Friedmann have qualified the issue of interfaith marriage not a religious but rather a social problem. The reason for the rigidity of the position of the legal scholars toward mixed marriage has to do with social suitability (*kafā'a*), which is a crucial requirement for accepting any kind of marriage even between Muslim communities.[15] In fact, *kafā'a* is based on a

9 Friedmann Yohanan, Tolerance and Coercion in Islam, Cambridge 2003, 160 – 193.
10 Qur'ān verses regarding interfaith marriage are 2:221, 60:10, 5:5.
11 For the Shia position see Friedmann, *supra* n. 9.
12 Friedmann, *supra* n. 9.
13 Friedmann, *supra* n. 9.
14 Friedmann, *supra* n. 9.
15 An-Na'īm, *supra* n. 6, at 9 – 28.

combination of religious, gender, ethnic, and social suitability depending on which of these conditions people may put for marriage relations.[16]

Returning now to the survey, the data concerning interfaith marriage may also reflect a situation of uncertainty, fear, and lack of clarity, it may also reflect a stand of religious understanding regarding the matter of interfaith marriage. Firstly, the majority of respondents see interfaith marriage as a problematic issue. Furthermore, these viewpoints reflect not only the lack of deep theological debate among Muslim intellectuals on this matter, but the fact that the context of a Western democratic society seems to have yet made an impact on these individuals and/or communities. Introducing the principle of suitability as a starting point for this discussion fundamentally changes our analysis. In contrast to the classical premodern Islamic conception, which is based on assumptions social and religious inequality between men and women, Muslim and non-Muslims, Arabs and non-Arabs, modern conceptions of human rights are supposed to be valid for every human being. Likewise, the legal doctrines of modern democratic states, which are valid also for Muslim citizens of those states, are based on absolute equality between all citizens regardless of their religious, cultural, or social affiliations. Accordingly, it is quite problematic that the majority of the respondents, citizens of a secular, modern democratic state, still regard interfaith marriage as problematic; this proves the need for deep interdisciplinary research as well as interreligious dialog regarding this matter. In this regard, it is worth noting how some contemporary Muslim scholars approach interfaith marriage. For instance, Khaled Abou al-Fadl, a prominent modern scholar, issued a *fatwā* in which he does not prohibit marriage between Muslim women and non-Muslim men, yet he does see such a liaison as problematic on other bases; for example, when it comes to the education of children and the identity of their religion.[17] This position does not end the debate on interfaith marriage in Islam[18]; rather, it opens it to new dimensions and challenging questions for

16 An-Na'īm, *supra* n. 6, at 9 – 28.

17 Al-Fadl Khaled Abou, The Search for Beauty, www.searchforbeauty.org/2016/05/01/on-christian-men-marrying-muslim-women-updated (last accessed 30 December 2019). Cf. the contribution of Belhaj in this volume.

18 See the contribution of Belhaj in this volume on Abu El-Fadl's position on interreligious marriage.

theologians, social, and legal specialist alike, not only from the Islamic faith but also from all other religious denominations.

III. Family Life

The second part of the survey conducted 2018 addressed questions relating to gender roles in family and how a couple should approach their daily family life. Specifically, we asked how the gender roles can or should be conceived with respect to work, household, children's education, etc. The majority of the responses in the survey pointed to an intensive interaction between modern Western and Islamic classical conceptions of family life and gender roles. As far as gender rights as involved, 44 out of 101 respondents see that both men and women have the same rights and duties within the family, 35 out of 101 see that they have different rights. 41 out of 101 respondents see that both parents have to decide together about the attribution of duties and rights regarding the household and family life. The majority of participants (59 out of 101) believe that both men and women must share and negotiate their roles within the family, and both should have equal right to work. Asked about specific area of responsibility, 43 out of 101 see women as the first responsible for household, while 19 out of 101 see men to be the first responsible for household. 45 out of 101 respondents see women as first responsible for raising children, while 35 out of 101 see men as the first responsible for that area. As for financial issues of the family, 45 out of 101 respondents see men as the first responsible for these matters, while only 9 out of 101 respondents see women as the first responsible for that area. From the gathered data about family life, we can draw that the majority of participants still see the men as mainly responsible for the financial aspects of the family, and allocate women a complementary role in this regard, whereas the majority of respondents allocate women more responsibility in regard of child raising and family life. Notwithstanding, the data gathered shows an estate of debate and reflection, since there exist a shift from an expected classical division of roles into a reflection and even a change. This limited data although not representative needs deeper qualitative research to analyse the reason of this change. In this stage of analysis, it is important to underline the fact that the Muslim religious classical conception of family is under consideration. It is

necessary whether and to which extent this conception is impacted by religion or culture and whether the current situation of interaction and change is due to religious reflexion or the impact of the life in modern societies. In summary, the topic of family life shows a situation of substantial change, of debate, and consideration that needs more substantial comparative research.

IV. Solving Family Problems and Divorce

The last part of the survey conducted 2018 by the chair of Islamic law at the University of Tuebingen addressed the subject of solving problems and mediation within the family and how the parties would potentially handle divorce.

Evidently, the classical pre-modern conception sees divorce as an exclusive right for men, who may make decisions concerning the household and marital relations, even without taking the position of the women into consideration.[19] The survey asked respondents how family problems should be solved, i. e. in private spheres or through external mediation. The majority of respondents (52 participants out of 101) believe that difficulties and problems should be negotiated within the family; for instance, between the couple themselves. 21 out of 101 agree that problems could be solved within the families of the partners. 50 out of 101 agree that people can look for help from other institutions, i. e. outside of the family, if problems could not be solved within the family. 37 out of 101 see imams as possible mediators in case of problems. The most revealing aspect in this area is that only 8 out of 101 respondents see mediation through state-sanctioned legal bodies as a possible solution for problems.

From the gathered data some general remarks could be drawn: On the one hand, it can be supposed that divorce and separation are still understood as personal matters that should be kept in private spheres; involving a lawyer or any stately institution may be understood as opening private family life to the public. Only 8 participants agreed to involve legal mediation institutions (lawyers) in mediation or divorce proceedings. This issue of

19 On divorce as an exclusive right of the men in classical conception see Ali, *supra* n. 1.

external mediation through official legal institutions has been studied intensively in the last years in Germany. As a case in point, Mathias Rohe and Mahmoud Jaraba understand this phenomenon not as an indication of parallel justice, as has been stated by Joachim Wagner[20], but rather as a sign of a lack of information regarding legal institutions among Muslims.[21] The rejection of legal official mediation is also due to the high costs of such an undertaking as well as the lack of information about the functioning of legal processes.

V. Conclusion

At the outset, it should be emphasized that this quantitative survey conducted in 2018 is not representative of all Muslims in Germany. It rather had the purpose of identifying possible areas of conflict in the whole conception of family law in order to better orientate research and reach reliable data about the current situation. The main focus of this fieldwork is rather a theological one. The data gathered doesn't emphasise any definitive consideration about the current situation, nevertheless it shows a situation of mutation, interaction or interchangeability both regarding the reflexion and the implementation of the classical family law in Germany. We aimed to study this subject exclusively through the way on how the target group (Muslim citizens of Germany) may understand this conception and how they want to implement it totally or partially in their daily life. Using the two categories of continuity and change mentioned in the beginning of this paper, the survey provides indications about the current standing of Islamic family law in Germany. The distinctive feature of this standing is a duality of continuity and change, which can be understood as an interaction between modernity and

20 Wagner Joachim, Richter ohne Gesetz. Islamische Paralleljustiz gefährdet unseren Rechtsstaat [Judges without Legislation. How Islamic Parallel Justice Endangers our Legal System], Berlin 2011.

21 Rohe Mathias / Jaraba Mahmoud, Paralleljustiz. Eine Studie im Auftrag des Landes Berlin, vertreten durch die Senatsverwaltung für Justiz und Verbraucherschutz (2015), www.berlin.de/sen/justv/assets/gesamtstudie-paralleljustiz.pdf (last accessed 21 March 2019), at 12 ff.

tradition. While continuity characterizes issues such as interfaith marriage, change does so for other aspects of marriage and family life.

Furthermore, the survey shows some areas of potential conflict, such as interfaith marriage and mediation. These two topics are too complex to be solved by theologians alone; they require interdisciplinary research that tackles all dimensions concerned. The question of interfaith marriage is becoming more and more problematic due to life in modern plural societies, and thus cannot be reconciled by Muslims alone; this question requires interreligious research paradigms from all religious groups. For Muslims, however, the problem would be solved through a new interpretation of classical texts and the use of progressive paradigms such as *maṣlaḥa* and *maqāṣid*.

The understanding of the people under consideration in the study shows that they are looking in two sets of directions regarding the conception of family and family life, as well as interfaith relations and life in modern pluralist society. On the one hand, they imbibe modern secular conceptions of family law and family life, which, to this extent, could be understood as the aim or objective of any change. On the other hand, they retain the influence of norms of the classical premodern Islamic conception of family law. Thus, it is legitimate to see the current Muslim understanding of family law as a situation between classical and modern conceptions. From the available data, it seems that the majority of participants see the role of the classical Islamic conception in the majority of the cases as a complementary one; while modern secular ones are seen to be the main and legitimate reference.

Chapter Two

Non-Legally Binding Muslim Marriages in England and Qatar: Circumventing the State

Rajnaara C. Akhtar

Rajnaara C. Akhtar is Senior Lecturer at Leicester De Montfort University, where her research focuses on marriage formalities and non-legally recognized religious-only marriages. She has undertaken empirical research on marriage in Qatar, and is Visiting Assistant Professor and Scholar in Residence at Georgetown University in Qatar (October 2018 to July 2020). She received her PhD from the University of Warwick in 2013, where her research focused on legal pluralism, family law, and family dispute resolution.

Table of Contents

Abstract

Marriage and relationship norms are changing globally. The state's role in administrating marriages and relationship breakdown is coming under mounting stress due to the increasing manifestation of differing relationship norms. In England, the state is grappling with non-legally binding marriages and non-formal relationships, including Muslim religious-only marriages and cohabitation respectively. In Qatar, on the other hand, the state carefully regulates marriages, including, in some instances, the question of who marries whom. However, the issue of non-legally binding "religious-only" marriages can be located in both of these very disparate legal systems. This paper explores the way in which couples in both countries are bypassing the

state to enter marriages based on their individual circumstances, and the situations in which non-legally binding marriages are a conscious choice.

I. Introduction

The *nikāḥ* marriage ceremony, in its myriad forms, is universally accepted as evidencing the commitment made by Muslim couples to each other, and sanctified in the eyes of God as a marriage.[1] However, the resultant legal rights ensuing from such marriages differ according to state laws and required legal formalities. In England,[2] the state usually requires certain formalities to be observed under the Marriage Act 1949 in order for a marriage to be legally valid. In Qatar, the Family Law Code 2006[3] similarly sets out the parameters for a legally recognised marriage. This paper shall set out the legal requirements for a valid marriage in both England and Qatar, and then discuss the legal outcomes for marriages conducted without adhering to these respective formalities. The focus on these two disparate legal systems is prompted by empirical research findings revealing comparable practices in the form of non-legally binding religious-only marriages – usually arising, however, due to differing underlying reasons. As a result, exploring the approaches of couples and their motives in choosing this marriage form in both settings provides a fascinating account of evolving global relationship practices between Muslims prompted by autonomous decision-making. The focus of discussion shall be on marriages that are conducted by undertaking a religious-only ceremony, which the state does not recognise in and of itself. In the case of England, this may be the declaration of a "non-qualifying ceremony",[4] and in the case of Qatar this may be a marriage only recognised by "other evidence" in certain circumstances under Article 10 of the Family Law 2006.

1 See further, Esposito John, Women in Muslim Family Law, Syracuse 1982.

2 All references to England and English law are understood to include Wales.

3 Law No. 22 of 2006 Promulgating "The Family Law" 22/2006. Hereafter referred to as "Family Law 2006".

4 Akhter v Khan [2018] EWFC 54, Attorney General v Akhtar and Khan [2020] EWCA Civ 122.

The paper shall begin by setting out the legal parameters for marriage recognition in England and Qatar, and then continue to discuss the issue of religious-only marriages and their manifestations as identified by empirical research findings in both settings. It will then assess the legal treatment of such marriages and the likely legal outcome.

II. Marriage Recognition in England and Qatar

Both England and Qatar have codified family laws, however the historical manifestation of these laws in each setting is significantly different. Marriage laws in England have been codified for centuries, with current laws dating back to 1753 and with newer renditions of the law responding to changing social settings. However, in recent times, the Marriage Act 1949 (as amended) has come under severe pressure and scrutiny for being out-dated and out of sync with contemporary relationship norms, expectations, and social realities.[5] The Qatar Family Law 2006, on the other hand, is the culmination of at least a decade's work modernising previous written codes and the family-law infrastructure, separating legal and religious interventions in dispute resolution, and it forms an integral part of the nation-building project in the Gulf region.[6] Both states' family law origins can be found in dominant religious traditions, with English family law harking back to canon law,[7] and Qatari family law seeking to uphold Islamic legal principles.[8]

5 See for example, Cretney Stephen, Family Law in the Twentieth Century, Oxford 2003; Probert Rebecca, A Uniform Marriage Law for England and Wales? Child and Family Law Quarterly (2018), 259 – 278; Akhtar Rajnaara / Nash Patrick / Probert Rebecca (eds.), Cohabitation and Religious Marriage; Status, Similarities and Solutions, Bristol University Press 2020.

6 Welchman Lynn, Women and Muslim Family Law in Arab States, Amsterdam 2007. For the development of family law in Muslim states and the Middle East region more generally, see An-Na'im Abdullahi (ed.), Islamic Family Law in a Changing World; A Global Resource Book, Zed 2003; Welchman Lynn, Introduction, in: Welchman Lynn (ed.), Women's Rights & Islamic Family Law, London/New York 2004; Mahmood Tahir, Statutes of Personal Law in Islamic Countries: History, Texts and Analysis, New Delhi 1995.

7 Probert Rebecca, Marriage Law and Practice in the Long Eighteenth Century: A Reassessment, Cambridge 2009.

Modern societies in both England and Qatar are making increasing demands on the state to provide adequate family-law infrastructure, including the need to respond to diverse and multi-cultural populations. In England and Wales, the last national census revealed that, out of an overall population of 56.1 million, 14 % were from a range of backgrounds including Asian, black, and mixed groups.[9] Currently, there are thought to be approximately 3.3 million Muslims in England and Wales.[10] The diversity in population is not limited to ethnic or religious groupings, however, and relationship norms differ across a wide spectrum of other factors including social class, age group, beliefs, economic activity, etc. Thus, any proposed marriage law reforms must respond to issues such as the rise in cohabitation,[11] the issue of religious-only marriage,[12] and demands for a wider range of wedding venues to be accepted for legally recognised ceremonies, amongst other things.[13] In Qatar, a much smaller population of 2.76 million[14] is possibly more diverse, with only 10.5 % being Qatari citizens: sixteen percent are other Arab, 22 % Indian, 12.5 % Nepali, 12.5 % Bangladeshi, 4 % Sri Lankan, 5 % Pakistani, and 17.5 % from other places.[15] A large part of the population is comprised of migrant labourers, resulting in a massive gender imbalance: just over two million of the population are male, but only approximately 709 000 female. This discrepancy compounds stresses upon the family-law infrastructure. Despite the vast majority being Muslim, the family courts are responding to applicants

8 Bou Shehab Mohamed, Qanun Al'Osra Alqatari (Qatari Family Law), PhD thesis (original in Arabic), University of Qatar 2017.

9 Office of National Statistics (ONS) Ethnicity Facts and Figures.

10 ONS, Freedom of Information: Muslim Population in the UK, 2 August 2018. Figures for England, Wales, and Scotland www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/muslimpopulationintheuk (last accessed 26 March 2020).

11 Cohabitants are the fastest-growing family type in England and Wales: ONS, Families and Households: 2017, available at www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017/pdf (last accessed 21 March 2020).

12 Akhtar et al., supra n. 5.

13 See blog post "Law Commission begins work on weddings reform" at www.lawcom.gov.uk/law-commission-begins-work-on-weddings-reform (last accessed 21 March 2020).

14 Qatar Planning and Statistics Authority, Qatar Monthly Statistics, March 2019 www.psa.gov.qa/en/pages/default.aspx (last accessed 21 March 2020).

15 See http://priyadsouza.com/ (accessed 1 May 2020). See also Harkness Geoff / Khaled Rana, Modern Traditionalism: Consanguineous Marriage in Qatar, Journal of Marriage and Family, Vol. 76 (June 2014), 587 – 603.

from a range of religious Schools of Thought, as well as a range of cultural norms and customs linked to marriage and divorce practices.[16] This makes overarching responses very challenging to achieve.

Calls for marriage law reform in England have been on-going in recent decades. The government has asked the Law Commission to undertake a review of weddings law, currently underway, in particular focussing on how and where people can marry.[17] At present, those wishing to marry can do so under the Marriage Act 1949 by complying with Section 25 or 49, referring to Anglican and civil marriages respectively. These require the publishing of banns or giving of notice, the issuing of a common licence, the ceremony taking place in a church or other approved/registered premises, in the presence of a person in Holy Orders or registrar/authorised person. In order for the marriage to be valid, the parties must not be within the prohibited degrees,[18] both parties must have capacity to marry, and the marriage must not contravene Section 11 of the Matrimonial Causes Act 1973, which details grounds for nullity.

A non-qualifying ceremony arises where there has been no attempt at all made by the couple to engage with the formalities required under the Marriage Act 1949.[19] Without any attempt to adhere to legal formalities, the question of the validity of the marriage and therefore the potential to set it aside as "void" does not arise. Where it is deemed to be a non-qualifying ceremony — previously called a "non-marriage" — then financial resolution, which allows a court to make a ruling on how the couple divide their assets upon the breakdown of the relationship, is not available. Crucially, such a financial ruling would be available where a marriage is held to be void rather than a non-marriage, and a void marriage can be found to have arisen where the couple engaged or attempted to engage with some of the legal formalities for a valid

16 Article 3 of the Family Law 2006 provides for the Ḥanbalī School of thought to be primarily adhered to but allows for other schools of thought to be consulted where appropriate. Article 4 extends the provision and allows for parties with different schools of thought and religions to have their own beliefs and principles upheld by the court.

17 See www.lawcom.gov.uk/projects/weddings (last accessed 19 March 2020).

18 Article 1, Marriage Act 1949.

19 Previous case law defined this as a "non-marriage" (see Shagroon v Sharbatly [2012] EWCA Civ 1507; Dukali Lamrani [2012] EWHC 1748 (Fam); El Gamal v Al-Maktoum [2011] EWCH 3763 [Fam]). The 2020 case of Attorney General v Akhter and Khan [2020] EWCA Civ 122 replaced this with the term "non-qualifying ceremony".

marriage but failed to comply with one or more of the requisite elements,[20] and where this failure to comply was done "knowingly and wilfully".[21] Muslim religious-only marriages, which do not engage with the statute law at all, can occur in a range of venues including wedding halls, the home, and even mosques.[22] Such ceremonies are most likely at risk of being categorised as non-qualifying ceremonies and therefore treated as mere cohabitation for legal purposes as, usually, no steps are taken at all to engage with legal formalities. This means there is no recourse to financial resolution through the courts, which can result in the financially vulnerable party being left in dire circumstances.[23] This outcome has been the key cause for calls for law reform to compel legal registration of all religious-only marriages in England. However, this assumes a certain level of homogeneity, disempowerment, and absence from decision-making amongst British Muslim women, which is not evidence-based and clearly erroneous. For example, in previous research engaging those in religious-only marriages, the findings demonstrated a simple lack of priority given to arranging a formal registration ceremony where the *nikāḥ* venue was not registered for marriage, while the more important cultural and religious celebrations were being planned.[24]

In Qatar, the Family Law 2006 is a comprehensive legislative endeavour, with 301 substantive Articles, covering all aspects of the family.[25] Marriage

20 Sections 25 and 49 of the Marriage Act.

21 Supra n. 20. Marriage Act 1949.

22 These were found to be the most oft-used venues for *nikāḥ* by a large survey of Muslim women conducted by True Vision (2017). The Truth about Muslim Marriages survey findings are at truevisiontv.com/films/details/295/the-truth-about-muslim-marriage (last accessed 26 March 2020). Hereafter referred to as True Vision Survey.

23 Akhtar Rajnaara, Modern Traditions in Muslim Marriage Practices: Exploring English Narratives, Oxford Journal of Law and Religion, Vol. 7, No. 3 (2018), 427 – 454, at 429 – 430. For further research on Muslim religious-only marriages, see Parveen Rehana, Religious-only marriages in the UK: Legal Positionings and Muslim Women's Experiences, Sociology of Islam, Vol. 6, No. 3 (2018) 316 – 337; Vora Vishal, Unregistered Muslim Marriages in England and Wales: The issue of Discrimination through "Non-Marriage" Declarations, in: Yasir Suleiman (ed.), Muslims in the UK and Europe II, Cambridge 2016, 129 – 141.

24 Akhtar Rajnaara, Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Compromising Rights, in Probert/Miles/Mody (eds.), Marriage Rites and Rights, Hart 2015, 167 – 192.

25 *supra* n. 8.

formalities are contained in Book 1 Part 2, Articles 9 to 48. The marriage is considered a contract "issued in accordance with the law".[26] Articles 11 to 13 set out the formalities required for a valid marriage. Article 11 outlines the two "pillars" for a valid marriage: "[t]he following two preconditions shall be prerequisite in a marriage contract: 1. Both parties shall satisfy such conditions required of them. 2. Offer and acceptance from both parties."[27] The conditions are contained within Article 12, and include competence of the parties, the validity of the offer and acceptance, a guardian and witnesses (two Muslim males); and that both parties consent.

Further legal parameters for these conditions include issues of affinity,[28] "matching" of the parties,[29] the *mahr* (dowry),[30] and marital property.[31] Procedurally, Article 18 requires medical certificates to be obtained to identify whether the parties are carriers of certain genetic and other diseases. Decisions to marry are expected to be made with full knowledge of any genetic risks, unsurprising for a state in which a large proportion of marriages occur between first- and second-degree relatives: in 2018, 556 first-degree (25%) relation marriages were recorded, 367 second-degree (17%), and 1,261 unrelated marriages (58%).[32] The usual formalities for marriage involve a religious ceremony taking place with an official present, who records the marriage as legally valid by completing the requisite paperwork, once he has assured himself of the consent of both parties. Thus, the religious and state formalities coalesce. For a marriage to be unregistered, the ceremony would usually take place in private without official engagement and usually without public knowledge.

Article 10 of the Family Law 2006 sets out that "Marriage shall be established by a formal contract issued in accordance with the law, as an exception, it may be proved by other Evidence as may be decided by the Judge." The

26 Article 10.

27 Article 11.

28 Articles 20 to 24.

29 Articles 31 to 35.

30 Articles 37 to 41. The *mahr* is a gift given by the groom to the bride at the time of marriage, and usually stipulated in the religious marriage contract.

31 Articles 42 to 48.

32 State of Qatar Planning and Statistics Authority, Vital Statistics Annual Bulletin, Marriage and Divorce 2018. www.psa.gov.qa/en/statistics/Statistical%20Releases/Population/MarriagesDivorces/2018/marriagedivorce_qatar_2018_AE.pdf (last accessed 26 March 2020).

use of "other Evidence" is exemplified in case 137/2010,[33] involving a Qatari man who married a Jordanian woman in Syria. The marriage was not registered with the state in Syria, and the husband failed to take the necessary steps to seek permission from the state Marriage Commission prior to marrying a non-Qatari citizen; a necessary prerequisite for any Qatari national wishing to marry out.[34] They subsequently had a child in 2006, but the husband later disowned the son. The wife pursued legal action in Qatar to protect the rights of her child as well as establishing her own rights. The case was primarily raised to confirm the status of the child as the legitimate offspring of the Qatari father. The recognition of the marriage was key to achieving this. The wife presented witnesses from the wedding ceremony in Syria, which the courts accepted as reliable evidence where these were not directly ascending or descending relatives. The court had also requested a DNA test to be carried out, however the father had failed to cooperate. The court decided that, based on the evidence presented, a marriage did exist and confirmed the legitimacy of the son. In this case, the wife herself did not benefit from the marriage but did, however, achieve her goal of protecting her son's birth rights. This case demonstrates Qatari family law erring on the side of recognition, by providing a flexible framework in which judges are able to take a range of evidences into account. As a result, marriages which are non-legally recognised can still obtain legal recognition through a judicial process.

III. Religious-only Marriages in England and Qatar

In England, religious-only marriages have been identified as problematic due to the lack of legal recognition that they attract. As stated above, this may result in poor outcomes on relationship breakdown for the financially vulnerable party, who is invariably the woman.[35] Such marriages are

33 Court of Cassation – Civil and Commercial Circle, Case No. 137/2010, Session 11/2011, Cassation No. 137 of 2010 – Civil.

34 Law Decree No. (21) of 1989 Regarding the Regulation of Marriage to Foreigners. Amended 17 March 2005.

35 See for example, Kazemi Shah, Untying the Knot: Muslim Women, Divorce and the Shariah, Nuffield Foundation 2001; Akhtar, supra n. 24, at 182; Vora Vishal, The Problem of Unregistered Muslim Marriages: Questions and Solutions, Family Law, Vol. 46 (2016),

thought to account for as much as 60 % of all Muslim marriages, making the issue both widespread and problematic.[36] Reform proposals have ranged from making such marriages illegal unless conducted following a legal ceremony of marriage,[37] to changing the way in which a marriage can be registered to simplify the process,[38] and to law reform to provide all cohabitees with legal protection which would encompass this relationship type.[39] While no up-to-date statistics are currently accessible, in 2009 the ONS recorded only 238 Muslim marriages in registered buildings.[40] The remainder of legally recognised marriages between Muslims occur necessarily as a "dual ceremony", where a (non-recognised) religious ceremony is preceded or followed by a valid civil ceremony.

The reasons for Muslim couples in England entering into a religious-only marriage vary, and empirical research conducted in 2015 found that, for many couples, the legal formalities are simply not a priority while they plan their non-legally recognised religious ceremony and celebrations.[41] The relatively small number of mosques registered for marriage also limits the availability of religious ceremonies being conducted in a form that attracts legal recognition. For most couples, a separate civil ceremony must be undertaken to ensure legal recognition, and this appears to be falling by the wayside.

95 – 98; O'Sullivan Kathryn / Jackson Leyla, Muslim Marriage (non) Recognition: Implications and Possible Solutions, Journal of Social Welfare and Family Law, Vol. 39, No. 1 (2017), 1 – 22, at 22; Akhtar Rajnaara, Modern Traditions in Muslim Marriage Practices, Exploring English Narratives, Oxford Journal of Law and Religion, Vol. 7, No. 3 (2018), 427 – 454.

36 True Vision Survey, *supra* n. 22.

37 For example, the *Register Our Marriage* campaign calls for compelled registration of all religious marriages.

38 Parveen Rehana, From Regulating Marriage Ceremonies to Recognising Marriage Ceremonies, in: Akhtar / Nash / Probert (eds.), *supra* n. 5.

39 Akhtar Rajnaara, Religious-Only Marriages and Cohabitation; Deciphering Differences, in: Akhtar / Nash / Probert (eds.), *supra* n. 5.

40 Muslim Marriage Working Group, Report of Working Group (2012), available at www.whatdotheyknow.com/request/179578/response/444442/attach/7/MMWG%20SUBMISSION%20AND%20FINAL%20REPORT%2011.10.12.pdf (last accessed 26 March 2020), at 3.

41 Akhtar, *supra* n. 24.

In response to an online survey[42] seeking to ascertain why civil registration did not occur, participants made statements including:

> "We don't feel the need to. The most important part was the Islamic ceremony."
>
> "We never thought it was important, can't see the need."
>
> "The right time has not arisen. We will do once [we] have children. Think I want to maintain maiden name or go 'double barrelled' and adopt both his surname but still keep mine."
>
> "No incentive to register. It doesn't change anything at all."
>
> "I did not feel the need to have civil ceremony as I felt the *nikāḥ* was sufficient to recognise that the marriage is a legal valid marriage in my own life."
>
> "Not really required for the purposes of Islam. I am fully aware that a *nikāḥ* registered in the UK is not binding in UK law but that is not important. However, I have told my wife we will have to register it later with the registry for tax purposes and also for UK inheritance law purposes."

Factors such as a cultural transition in younger generations also helps explain the changing practices. Younger couples are less likely to have a legally recognised marriage, opting instead for a religious-only ceremony which is reflective of the practices of their wider peer group—who may date, cohabit, or be engaged while younger, and not marry until they are older. The True Vision Survey conducted for a television documentary on Muslim marriages in 2016 found that, of the 900 people surveyed, those aged under 25 were the most likely to be in religious-only marriages:[43] 80% of the respondents in this age category who were married had entered into such a relationship. In a separate empirical study conducted by this author using the focus group method, young Muslims in particular were found resistant to being "forced" to legally marry.[44] However, this age group was also least likely to be aware of the legal consequences of non-recognition.[45]

42 Twenty participants in religious-only marriages responded. See further, Akhtar, *supra* n. 24.

43 True Vision Survey, supra n. 22.

44 Akhtar, *supra* n. 23, at 438.

45 Akhtar, *supra* n. 23, at 438.

Another reason for failing to enter into a legally recognised form of marriage is changing patterns of relationship behaviour, including the decline in transnational marriages, removing the requirement for state involvement for immigration purposes. Others may enter a religious-only marriage on the mistaken assumption that their religious ceremony has legal effect. This group is particularly vulnerable to adverse outcomes, as they expect legal protection and will often only become aware of their relationship status upon breakdown of the marriage. This confusion may arise due to marriage ceremonial norms in countries of origin, or due to being misled. Others may enter into a religious-only marriage on the promise of a valid civil marriage to follow, only to have this withheld by their spouse. This was the case in the recent English family court case of Akhter v Khan,[46] where Williams LJ held in the first-instance decision that Articles 8 and 12 of the European Convention of Human Rights were being contravened, and that this allowed a flexible approach to be taken to the interpretation of section 11 of the MCA..[47] However, this reasoning was considered dubious and upon appeal was overturned in the interests of maintaining "certainty" in the law.[48]

The incidence of religious-only marriages in Qatar is more inconspicuous. An unregistered religious-only marriage conforms to *Sharīʿa* principles in its formation, with offer/acceptance, consent, *mahr*, and witnesses.[49] However, the lack of engagement with state formalities usually places it outside of the realm of legally recognized marriages, with a possibility of obtaining recognition under Article 10 under certain circumstances. Very little evidence of such marriages exists in the public domain; however, both anecdotal evidence and empirical qualitative research conducted during 2018 and 2019[50] revealed that non-state registered religious-only marriages

46 [2018] EWFC 54. Appeal: Attorney General v Akhtar and Khan [2020] EWCA Civ 122.

47 *Supra* n. 46 [83].

48 Sandberg Russell, Farewell, 'Flexible' Fudge: The Position of Unregistered Religious Marriages Returns to Square One, Law & Religion UK Blog 2020, www.lawandreligionuk.com/2020/02/25/farewell-flexible-fudge-the-position-of-unregistered-religious-marriages-returns-to-square-one (last accessed 26 March 2020).

49 The requirement for these conditions may differ according to particular schools of thought.

50 Akhtar Rajnaara, Marriage law and practice in Qatar, [forthcoming 2020]. The research involved interviews with individual citizens and long-term residents in Qatar, family law practitioners, and family-law academics.

do occur, despite a legally recognised marriage taking the same ceremonial form as a religious marriage. Research interviews found that women who are divorced and have custody of children may enter unregistered marriages rather than legally recognised ones. The reason for this is Article 168 of the Family Law 2006, which states that when a mother has custody of her children "she must not be married to a husband who is a stranger to the Child [...] unless the Court decides otherwise for the Child's interest." Thus, unless she remarries someone from the family of her ex-husband, child custody may be compromised. This is likely to have a limited impact on Qatari women themselves since, as stated above, large numbers still marry first- or second-degree relatives.[51] Interviews and anecdotal evidence suggest that it may be a greater concern for non-Qatari women who are long term residents of Qatar and whose marriage partners may be more diverse. However, despite the position of the law and general opinion, research failed to locate any examples of women actually losing custody in such circumstances. Nonetheless, it is clearly a coercive factor in relationship behaviour. One participant in the study stated that she refused to remarry following her divorce as, when she was once approached for marriage, her ex-husband made it clear that he would take her son if she remarried. Despite divorcing while in her twenties and with a 4-year-old son, at the time of the interview her son was about to turn 18 and she had remained unmarried.

One female participant who was in a religious-only marriage had married in Egypt, and the marriage authorities in Qatar were aware of this; however, it had taken years for permission to be granted and the marriage to become legally recognised in Qatar. She had had a child in this time and produced the *nikāḥ* certificate to prove a marriage existed. This document is sufficient proof of marriage for institutions such as hospitals in Qatar. It is also something that can be used to prove the existence of a marriage under Article 10 of the Family Law 2006 for legal purposes if required. If no such evidence exists, the outcome for the woman (and the man where he can be identified) will be imprisonment for having a relationship and child out of wedlock under *zinā* laws.[52]

51 Cousins or other relatives.

52 Article 281, Law No. 11 of 2004 Issuing the Penal Code provides for imprisonment for *zinā* (unlawful sexual relations outside of marriage), up to a term of seven years.

For another female participant who was divorced with two children, despite losing custody of the children and having only visitation rights, when she remarried she refused to enter into a legally registered marriage because of concerns that her ex-husband would stop her access to her children. While he would have little grounds for doing so legally, she found the processes for ensuring access to be opaque and convoluted, resulting in her fear of being unable to navigate them if needed. In this case, an unregistered marriage enabled her to embark on a relationship while still having access to her children. She detailed her journey to the second marriage:

> "He took the opportunity to travel to [my home country] to meet my family [...]. We continued the friendship but my father already gave his blessings [...]. Then we agreed there would be no signed agreement but that we can do the *ḥalāl* marriage without the legal marriage."

This participant's religious marriage was something both of their families knew about, but which was not public knowledge and of which her ex-husband was also unaware. She went on to explain her motivations:

> "If I sign a paper and legally marry, then my ex can go against me and not give me access to the children. He could reduce visitation to about two hours a week [...]. We are not doing anything wrong in front of God but it should not be something that can be proven."

As for other positive outcomes in entering into the religious-only marriage, she said:

> "By the time it comes to the proper marriage, I would already know him properly."

She had been engaged in a non-legally binding marriage for 18 months at the time of interview, and as she grew more confident of her rights and with her new husband's support, they had applied for permission to officially marry.

A second category of religious-only marriages located in the empirical research findings was those between Qatari nationals and non-Qataris. Termed "marrying out",[53] empirical research found that some couples had entered religious-only marriages abroad before returning to Qatar to

53 Alharahsheh Sanna / Mohieddin Mohamed / Almeer Faras Khalid, Marrying Out: Trends and Patterns of Mixed Marriage amongst Qataris, International Journal of Social Science Studies, Vol. 3, No. 6 (2015), 211 – 225.

undergo a formal marriage recognition process. Under the law regulating marriage to foreigners,[54] Qatari nationals must apply to a Commission for permission to marry.[55] They are required to undergo an interview, during which they are asked for their reasons for wanting to marry out. Females are represented by a male guardian, whereas a male, whether Qatari or non-Qatari, must represent himself.

One participant, a non-Qatari seeking to marry a Qatari, described the interview:

> "During that interview, they will call her father or guardian and they will question me and they will question the father. Like, are you willing to assist her to live a life like she used to live in her family house? If she needs a driver you have to provide her a driver. You know, they will talk about the lifestyle."

He recognised that the process was intended to prepare the couple for the realities of being married across nationalities:

> "She will definitely suffer. Not being married to a Qatari. You know due to the lifestyle at least. Like it will impact her life."

Qatari citizens enjoy many state benefits upon marriage, and these are not fully available for those marrying out. For Qatari women in particular, marrying out has severe consequences, including a lack of citizenship for any children of the marriage. This unequal treatment of men and women, where Qatari men marrying out can pass on citizenship, has been an issue of great contention.[56]

Delays in the permission process mean that some couples wait years to marry. Those who choose to enter religious-only marriages during this waiting period will keep this a secret, as knowledge often leads to further delays in the process. One participant commented:

54 Law Decree No. (21) of 1989 Regarding the Regulation of Marriage to Foreigners. Amended 17 March 2005.

55 *Supra* n. 54.

56 See for example, Qatar Shadow Report submitted to Convention of the Elimination of Discrimination Against Women (CEDAW). Submitted by: Independent Group of Concerned Citizens (2014), available at tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/QAT/INT_CEDAW_NGO_QAT_16177_E.pdf (last accessed 28 March 2020), at 6 – 9.

> "I have a friend whom it took ten or twelve years to get approval as they had got married in the States while he was there studying."

Two of the participants of the study had waited over 12 months for permission to marry. For them the wait was not of concern, as it enabled time for the relationship to be tested adequately before a legal commitment was made. Thus, religious-only marriages can be used in a utilitarian way to navigate around personal wishes, state legal requirements, and legal provisions.

IV. Legal Outcomes of Non-recognition of Marriage in England and Qatar

In England, non-recognition of marriage means the couple are considered to be merely cohabiting, which attracts no legal rights under family law except limited right to child maintenance.[57] As outlined above, the category of "non-qualifying ceremony" for couples whose ceremony did not conform to any of the legal formalities required by the state results in a lack of access to financial resolution upon relationship breakdown. The rights that cohabitees can access are not easy to decipher, and "we have to go hunting in various corners of the law in search of rights, duties and other legal provisions that apply to these relationships."[58] Claims over property have to be pursued primarily using property law, through which rights are far more difficult and expensive to establish, placing it out of reach for most. The question for the courts here is merely who owns the property, and not any of the considerations around division of assets which arise upon breakdown of a legally recognised marriage.

This is particularly problematic where one or both parties may not realise that their marriage has no legal status and assumes that the law will protect them. In a legally recognised marriage there is little need to ensure assets are in joint names, while financial resolution means that

57 Barlow Anne et al., Cohabitation, Marriage and the Law: Social Change and Legal Reform in the Twenty-First Century, Hart 2005.

58 Miles Joanne, 'Cohabitants' in the Law of England & Wales: A Brief Introduction, in: Akhtar / Nash / Probert (eds.), *supra* n. 5.

financial needs should be met where funds and assets are available. For those who mistakenly believe they are legally married, financial planning is unlikely to take place. The least impact here may be where children are concerned, as the law will largely treat couples the same regardless of marital status and ensures child maintenance.[59] There is no longer any legal consequence of legitimacy or illegitimacy for children in the UK.

In Qatar, the consequences of a non-recognised marriage depend on its circumstances. Under Article 10, as set out above, a judge will consider "other evidence" that a marriage has taken place, thus enabling unregistered marriages to be legally recognised if needed, to protect any children of the relationship. This provides for flexibility in marriage recognition, as exemplified in case 137/2010. This flexibility is inherent in Muslim family law and necessary to protect children from being considered illegitimate, which has grave life-long consequences[60] quite unlike the lack of impact under English law. Thus, the Article 10 bias in favour of finding a marriage is unsurprising. This is further evidenced by the extreme leniency accepted where evidence is concerned, and in case 137/2010 "the legislator also permitted hearsay evidence in matters related to affinity."[61] Further to this, where evidence can be deduced to support both a claim for and against affinity, affinity is to be assumed. Judges are given a wide discretion with regards to evidence and decision-making on this issue. The case in question indicates the general predisposition of the family courts in Qatar to protect children, providing some security to women who are in religious-only marriages. However, the question still arises as to the extent of legal protections which would be available to women without children in such circumstances. In this case, the wife was not afforded any of the rights which would arise from a valid marriage to a Qatari, such as Qatari citizenship.

The circumstances in which unregistered marriages may arise in Qatar, then, are where a Qatari citizen is "marrying out" and undergoes a marriage ceremony abroad prior to the legally recognised Qatari marriage; or where a female is seeking to retain child custody or access to children. In the

59 For non-married couples, children are protected by Schedule 1 of the Children Act 1989.

60 The issue of child filiation in Muslim states is covered in detail in: Yassari Nadjma / Moller Lena-Maria / Najm Marie-Claude (eds.), Protection of Parentless Children; Towards a Social Definition of the Family in Muslim Jurisdictions, Asser 2019.

61 Case No. 137/2010, *supra* n. 33, at para. 6.

latter circumstances, the couple wishing to marry would usually not want legal recognition, as this can undermine other rights and processes. In the case of marrying out, it may undermine a couple's application to legally marry. In the case of a woman who is fearful that remarriage will result in a loss of child custody (under Article 168), she will only marry if there is no paper trail and therefore, in both cases, the marriage may be entered into outside the officially recognised framework.

Those research participants who were "marrying out" worried about the length of time the process of obtaining permission was likely to take. However, not all undertook unregistered marriages while awaiting permission to marry.[62] Of the participants, nine were in Qatari/non-Qatari mixed marriages, of whom five had entered into religious-only marriages abroad before returning to Qatar to undergo the formal process. Keeping the unregistered marriage unofficial was seen as key to obtaining permission to formally marry. However, such a marriage enabled couples to begin their intimate relationship. Thus, to an extent, this also overlaps with Muslim marriages in England where couples may be testing their relationships or informally entering them before taking steps to make them official. However, in the examples from Qatar, all participants fully engaged with the state legal process immediately or soon after. One participant expected delays to occur and stated that being unregistered removed the pressure of expectations that they would live together and have children straight away.

V. Conclusion

Non-legally recognised religious-only marriages clearly serve differing purposes depending on who is entering into them and the laws of the land in which they live. Research in England demonstrates that a set of complex and multi-layered issues must be taken into account when seeking to reform laws in response to religious-only marriages. Here, younger couples are less likely to be in legally recognised marriages; however, this behaviour is not unlike (non-Muslim) peers within their age group, who are similarly unlikely to formally marry. Thus, religious-only

62 Akhtar, *supra* n. 50.

marriages can provide an opportunity for couples to get to know one another prior to legal commitment. Such marriages become more problematic when one or both parties believe they have entered into a legally recognised marriage, or when one party withholds such a marriage following a religious ceremony. While this may not impact on married life, it serves to significantly disadvantage the economically dependent spouse in the event of relationship breakdown.

On the other hand, Muslims in Qatar, both citizens and residents, may utilise the religious-only marriage route to circumvent other legal processes which would be triggered either prior to (in the case of those wishing to "marry out") or following (in the case of women with custody of children) a legal marriage. In Qatar, these relationships are often a means for enabling couples to enter intimate marital relationships where other factors and processes may hinder such relationships, either completely or for a limited time. It is clear that couples who enter such marriages are exercising their right to marry, which is universally recognised as a basic human right.

In Qatar, the legal outcomes of recognition may not be in the couple's interests, but for reasons starkly different to those in England, where decisions are prompted by a range of differing factors, however, a lack of recognition is likely to be of detriment to only one party – the financially dependent one. Regardless of these disparities, the existence of religious-only marriages is indicative of shortcomings in the marriage laws of both states.

Chapter Three

Islamic Family Law: Imams, Mosques, and *Sharīʿa* Councils in the UK

Islam Uddin

Dr Islam Uddin, PhD Law, School of Law, Middlesex University.

Table of Contents

Abstract

This article explores the practice of Islamic family law in the UK. It draws on empirical data from a study examining marriage and divorce among British Muslims. The research involved in-depth interviews with British-Muslim women to gain a well-grounded understanding of the problems associated with Muslim marriage and divorce from their lived experiences. Furthermore, the study involved interviews with experts and professionals ranging from imams and sharīʿa council judges to solicitors and counsellors. Sharīʿa council hearings were also observed and their procedural documents analysed. The findings reveal the strong influence of religion and culture in establishing social norms, dictating the importance of nikāḥ in establishing the marriage and the need for Islamic divorce upon the breakdown of the marriage among the participants, conferring with practices found in other diasporic communities around the world. Imams, mosques, and sharīʿa councils play an important role in facilitating matrimonial practices among British Muslims, and their status and authority in the British Muslim community is an influencing factor affecting decisions made.

I. Introduction

Islamic family law (IFL) is that aspect of *sharīʿa* (Islamic law) that governs marriage, divorce, maintenance, child custody and inheritance.[1] Classical *fiqh* (jurisprudence) on IFL dates back to the eighth and ninth century[2] and the formation of many different schools of thoughts named after their founders; with four major schools among the Sunnis: Hanafi, Maliki, Shafiʿi and Ḥanbalī; and the Jaʿfari School, which is the principal Shiʿi legal school.[3] The mid-twentieth century saw the formation of many modern Muslim nation-states; some with colonial pasts and experience with civil law introduced reforms (often known as 'codes of personal status') to regulate marriage and divorce.[4] The phenomenon of Muslims living as minorities in a non-Muslim majority state can be traced back to the earliest Islamic history; living as a minority is now a common experience for the Muslim diaspora in the West.[5]

English law is a monolithic legal system, meaning there are no foreign or parallel systems of law, thus, matters pertaining to marriage, divorce, and children are exclusively legislated by civil law.[6] Legislation such as the Marriage Act 1949 and the Matrimonial Causes Act 1973 stipulates the conditions for a valid marriage and divorce. The validity of foreign or overseas marriages under English law follows the principle that the *lex loci celebrationis* or the law of the land where the marriage was celebrated governs the formal validity of the marriage.[7]

According to the 2011 census, the Muslim population in Britain is 2.7 million, predominately from a South Asian background, with large established communities in London, Birmingham, Leicester, Bradford, and

1 An-Naʿim Abdullahi Ahmed (ed.), Islamic Family Law in a Changing World: A Global Resource Book, London / New York 2002; Latif Nazia, Women, Islam and Human Rights, PhD, Newcastle 2002.

2 Hallaq Wael B, The Origins and Evolution of Islamic Law, Cambridge 2005.

3 Campo Juan Eduardo, Encyclopedia of Islam, New York 2009.

4 Esposito John L., Islam: The Straight Path, Oxford 2010.

5 Iner Derya / Yucel Salih (eds.), Muslim Identity Formation in Religiously Diverse Societies, Cambridge 2015.

6 Butler-Sloss Elizabeth / Hill Mark, Family Law: Current Conflicts and Their Resolution, in: Griffith-Jones Robin (ed.), Islam and English Law: Rights, Responsibilities, and the Place of Shariʿa, Cambridge 2013.

7 Hill Jonathan / Ní Shúilleabháin Máire, Clarkson & Hill's Conflict of Laws, Oxford 2016.

Manchester.[8] Many Muslims follow norms from their or their parents' country of origin, giving them a distinct ethno-religious identity.[9] Muslims increasingly feel a need for religious marriage (*nikāḥ*) and divorce (*ṭalāq*);[10] hence, many Muslims will marry and divorce according to the customary law of their country of origin.[11] However, there is resistance from some elements of society that argue *sharīʿa* law has no place in British society due to incompatibility with the principles of human right and equality, and discrimination against Muslim women; and therefore favour "one law for all citizens".[12] As a result, many debates and discussions have focused on imams, mosques, and *sharīʿa* councils; the authority they hold and the roles they play in facilitating religious marriage and divorce among the British Muslim community. Calls to make the civil registration of Muslim marriages compulsory, to penalise the celebrant i. e. the imam conducting the *nikāḥ* ceremony, and two recent government reviews of *sharīʿa* councils highlight the level of concerns of practices within the British Muslim community.

In light of such discussions, this article presents the findings of an empirical study of Islamic marriage and divorce among British Muslims. The study utilised a qualitative socio-legal methodological approach which involved in-depth interviews with twenty-seven British Muslim women, interviews with twelve experts or professionals such as imams, *sharīʿa* council judges, solicitors as well as and counsellors, and observation of *sharīʿa* council hearings and analysis of *sharīʿa* council procedural documents. The study was conducted in London during 2015 and 2017; as such the sample may not be representative of the British Muslim population. For the purposes of maintaining anonymity, the participants' identifications have been removed from the data collected and pseudonyms used to replace their real names in reporting the findings. The paper presents the empirical findings by firstly exploring issues related to marriage, and then discusses

8 ONS (Office for National Statistics), 2011 Census (2011).

9 Gilliat-Ray Sophie, The United Kingdom, in: Cesari Jocelyne (ed.), The Oxford Handbook of European Islam, Oxford 2014.

10 Curtis IV Edward E (ed.), Encyclopedia of Muslim-American History, London / New York 2010.

11 Ramadan Tariq, Western Muslims and the Future of Islam, Oxford 2004.

12 Cox Caroline, Sharia Law Is Blight on UK, Daily Express (1 Nov 2015); MacEoin Denis, Sharia Law or 'One Law for All'?, London 2009; Namazie Maryam et al., Sharia Law in Britain: A Threat to One Law for All & Equal Rights, London 2010.

divorce. The conclusion notes the significance of this study in relation to our understanding of Islamic family laws as practised among British Muslims and the authority of imams, mosques, and *sharīʿa* councils in influencing matrimonial practices.

II. Marriage

1. Marriage Ceremonies

This study found three forms of marriage ceremonies among the participants: *nikāḥ*-only marriage; a *nikāḥ* and a separate civil marriage; and overseas or foreign marriages. The overarching theme was the importance of *nikāḥ* in validating the marriage for the participants. This became apparent during the interview stage as any references made by the participants to marriage referred to their *nikāḥ*, and often further clarification was required from them, to ascertain as to whether they had any civil ceremonies. The solicitors interviewed appreciated the need for their clients to pursue a *nikāḥ* to meet religious requirements and to conform to Muslim community norms. This socio-religious norm is based on the notion that *nikāḥ* literally means 'to tie up together' and in Islamic family law refers to marriage, providing a social and legal relationship for making a family.[13] The imams and *sharīʿa* council judges strongly viewed that a Muslim is not married unless a *nikāḥ* ceremony takes place, and argued that religion dictates the socio-religious regulation of Muslim marriages and divorces. As one imam and a *sharīʿa* council judge explained:

> "Obviously, any Muslim has to get the Islamic marriage, it's a norm, I mean a Muslim cannot be married until they do the Islamic *nikāḥ*." (Imam #1)

> "Islam tells us how to marry and divorce." (*Sharīʿa* Council Judge #3)

The notion that *nikāḥ* is an absolute necessity, and forms a valid Islamic marriage has two effects: Firstly, many British Muslims may only opt for a *nikāḥ*-only ceremony, and this is problematic from a legal perspective as *nikāḥ*-only ceremonies conducted in the UK are seen as 'non-marriages'

13 Singh Rakesh Kumar, Textbook on Muslim Law, New Delhi 2011.

and afford no legal recognition, rights or protection and the couple are treated as cohabitees.[14] Secondly, the importance of *nikāḥ* supersedes the need for a civil marriage, which is then seen as a secondary issue or an afterthought. As one *sharīʿa* council judge explained:

> "Civil registration is for legal convenience, i. e. benefits and taxes. For Muslims, civil registry is not getting married but a pre-party to the *nikāḥ*, it carries no weight. The *nikāḥ* has weight in the eyes of God, faith and the community. The couple would not live together after civil registration." (*Sharīʿa* Council Judge #1)

Therefore, the reality that many Muslims view *nikāḥ* as the actual marital procedure that sanctifies their marital relationship is a contributing factor to as to why some British Muslims are lackadaisical in registering their marriages and in some cases why registration is avoided altogether. Empirical studies of other diasporic Muslim communities in North America and Australia show similar findings whereby the *nikāḥ* is sufficient for the Muslim community and *nikāḥ* is seen as the real marriage.[15] Nevertheless, many participants in this study did enter a civil marriage, especially those with trans-national marriages to access the legal rights of married citizens. Even so, the question remains: What role can imams, mosques, and *sharīʿa* councils play in enforcing the aforementioned norms, and what capacity do they have to change practices within the British Muslim community; especially as they are seen as an authority by Muslims, though these institutions are not state-endorsed or regulated.[16]

2. Conducting Nikāḥ

Imams as celebrants or officiates play a crucial role in conducting *nikāḥ* ceremonies. Imams are often the first outsiders that the family allow in

14 Probert Rebecca, The Evolving Concept of Non-Marriage, Child and Family Law Quarterly, Vol. 25 (2013), at 314.

15 Macfarlane Julie, Islamic Divorce in North America: A Shariʿa Path in a Secular Society, Oxford 2012; Black Ann, In the Shadow of Our Legal System: Shari'a in Australia, in: Rex J Ahdar / Nicholas Aroney (eds.), Shariʿa in the West, Oxford 2010.

16 Home Office, The Independent Review into the Application of Sharia Law in England and Wales (2018), www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review (last accessed 1 July 2019).

marriage negotiations, and therefore their position of influence can effect change. However, some have voiced concerns that imams 'fast track' *nikāḥ* marriages without any official administrative procedure[17]and that women are poorly informed about marriage and its stipulations.[18] One of the solicitors gave a case study from their client:

> "I went to the mosque and asked them to provide proof of my client's *nikāḥ*. The *maulana* (imam) said he had no record of the marriage, and if it occurred then the husband must have a copy of *nikāḥ-nama* [marriage contract]. I complained and said 'this is not right; you should have records of all marriages that take place in this mosque.' The mosque committee got scared and said that they would give me a copy of the *nikāḥ-nama*." (Solicitor #1)

For Muslims, the *nikāḥ* is seen as a moral imperative and binding 'legal' contract which legitimises sexual intercourse.[19] The *nikāḥ* contract is not a sacrament, but spiritually marriage is seen as worship.[20] As the *nikāḥ* is a contract, the two parties can stipulate conditions, for example, the Muslim Family Ordinance 1961 as introduced in Pakistan and Bangladesh, restricts polygamy and allows delegated divorce, by which the wife assumes the power to initiate divorce (*ṭalāq tafwid*). However, the reality identified in this study is that some British Muslims are not aware of these rights, or that imams override these clauses by omitting them from the contract. As one *sharīʿa* council judge explained:

> "People think it is distasteful to do a prenup [i. e. pre-nuptial] as if they are wishing the worse. One imam crossed out the *ṭalāq tafwid* part of the *nikāḥ* contract, yet the woman [i. e. bride] being married wanted the clause left in." (*Sharīʿa* Council Judge #1)

Imams and *sharīʿa* councils can play an active role to ensure the two parties are aware of their Islamic right and to add conditions to the *nikāḥ* contract. The authority of imams and *sharīʿa* councils to inhibit or resist norms and practices was demonstrated with regards to polygamy. The *sharīʿa* council exercised their right to avoid conducting polygamous marriages for legal and moral reasons; primarily on the grounds that the practice conflicted with English law and that it is open to abuse whereby the wives may be

17 Ramadan, *supra* n. 11.

18 Cesari Jocelyne (ed.), Muslims in the West after 9/11: Religion, Politics and Law, London / New York 2010.

19 Tucker Judith E., Women, Family, and Gender in Islamic Law, Cambridge 2008.

20 Gilliat-Ray Sophie, Muslims in Britain, Cambridge 2010.

left without legal redress. One imam expressed his personal preference to avoid conducting polygamous marriages:

> "To date, I have not conducted a polygamous marriage, but if asked I would avoid performing the *nikāḥ*, as many people who practice polygamy do so without justice." (Imam #1)

Similarly, the imams and *sharīʿa* councils are in a position to address the concerns around *nikāḥ*-only marriages, which leave Muslim women with little security and rights and vulnerable to exploitation within the marriage.[21] This study found the professionals interviewed agreed that a civil marriage provided legal rights and protection; however, some argued it did not fulfil the requirements of an Islamic marriage, as discussed in the next section.

3. Civil Marriage

Previous research shows that if Muslims want a civil marriage, they will marry twice, i. e. have separate religious and civil ceremonies; and Muslims are skilful navigators of managing dual identities.[22] Few mosques in the UK are registered to offer a dual ceremony, though this option is available to the Muslim community.[23] The majority of the participants had civil marriages, and in most cases, the *nikāḥ* ceremony proceeded the civil ceremony; with the only dual ceremonies being overseas marriages. Participants who married in the UK had separate civil and religious ceremonies. There were no dual ceremonies, which require a building registered for the solemnization of marriages, in accordance with the Marriage (Registration of Buildings) Act 1990, and the presence of a registrar or an authorised person. In most cases, the *nikāḥ* fulfilled the need for marriage for many participants, and the civil marriage was a secondary issue, as one participant explained:

---

21 Jaan Habiba, Equal and Free? 50 Muslim Women's Experiences of Marriage in Britain Today, Aurat Research Report (2014), www.secularism.org.uk/uploads/aurat-report-dec2014.pdf (last accessed 17 January 2020); Ramadan, *supra* n. 11.

22 Yilmaz Ihsan, The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England, Journal of Ethnic and Migration Studies, Vol. 28 (2002), 343 – 354, at 343.

23 Douglas Gillian et al., Social Cohesion and Religious Law: Marriage, Divorce and Religious Courts, Cardiff 2011.

> "The civil marriage to me is just a paper, so for me, it's all about the *nikāḥ*." (Henna)

In general, two main themes emerged from the interviews with the experts with regards to civil marriage. Firstly, the recommendation to get Muslim marriages registered, which the imams and the solicitors agreed upon, gave women legal rights and protection.

> "I personally advise people to register their marriage, because it is a safety net for women. Obviously, I'm not a lawyer, but the law protects women; it's actually Islamic in my opinion." (Imam #1)

> "Civil registration of marriages gives the couples access to the court; the spouses are protected financially." (Solicitor #2)

Secondly, the *sharīʿa* councils were adamant that a civil ceremony did not meet the requirement for an Islamic marriage; one of the *sharīʿa* council judges explained the reasons why:

> "There are four conditions of an Islamic marriage: 1) offer and acceptance, 2) two witnesses, 3) *walī amr* (guardian) and 4) *mahr*. In a civil registration, the first two points are present and the last two are absent. In the Hanafi *madhhab* [legal school], a woman does not need a guardian, but that still leaves the issue of the *mahr*." (*Sharīʿa* Council Judge #3)

Similarly, there is information available on religious forums that reinforce the requirement for a *walī* and the nomination of *mahr*, and even advice for Muslims in the West to avoid civil marriage offices in preferences to marriages at Islamic centres.[24] In contrast, other forums accept civil marriage to be legal and valid in the sight of *sharīʿa,* if the following conditions are met: a dower (*mahr*) is determined, the offer (i. e. proposal) and acceptance, and there are two witnesses to the contract.[25] Furthermore, the European Council of Fatwa and Research, a Dublin-based private foundation presided over by Islamic scholar Yūsuf al-Qaraḍāwī, accepts civil marriage to be valid according to *sharīʿa*, based on the condition that there is agreement between the couple and the presence of two witnesses; they contend the guardian is an issue of disagreement

24 Islamqa.info, 113867: Ruling on Civil Marriage (2017), islamqa.info/en/11386 (last accessed 17 September 2019).

25 Islamhelpline.net, Is Civil Marriage Accepted in Islam (2017), www.islamhelpline.net/node/615 (last accessed 17 September 2019).

among the schools of *fiqh* (jurisprudence) and therefore its absence does not invalidate the marriage.[26] Despite the aforementioned opinions, the general consensus among some British Muslims is that a *nikāḥ* ceremony is still required.

However, an examination of the *sharīʿa* council procedure showed that they still require a copy of the civil marriage certificate before they can provide the original *nikāḥ-nama* (Islamic marriage contract), until then, they only provide a photocopy. Furthermore, the *sharīʿa* council require non-EU nationals to have a civil marriage ceremony before applying for a *nikāḥ* ceremony. The *sharīʿa* council explained why they ask for proof of a civil marriage:

> "We ask for a copy of the civil registration, in order to avoid fake marriages and temporary marriages, we insist couples show real commitment before the original *nikāḥ* certificate is issued." (*Sharīʿa* Council Judge #1)

Therefore, the status of civil marriage is important in *nikāḥ* applications with the *sharīʿa* council, though they do not consider a civil ceremony to constitute an Islamic marriage.

III. Islamic Divorce

1. Divorce in the UK

Divorce according to Islamic family law can take many forms, *ṭalāq*, *tafwid*, *khula*, *mubaraḥ* and *faskh*. *Ṭalāq* refers to a husband's right to unilateral divorce, whereas *ṭalāq tafwid, khula* and *mubaraḥ* are means for the wife to be released from the marriage, and finally *faskh* or *tafrīq* is dissolution at the bequest of a *sharʿī* authority, such as an Islamic scholar.[27] The two most common forms of divorce are *ṭalāq* and *khula*, a key difference being that in the case of *ṭalāq* the husband must ensure full payment of the dower – and thus financially more advantageous for women, whereas with

26 Islam Online, Civil Marriage in the West [s. d.], archive.islamonline.net/?p=18385 (last accessed 17 September 2019).

27 Esposito John L. / DeLong-Bas Natana J., Women in Muslim Family Law, Syracuse ²2001; Arshad Raffia, Islamic Family Law, London 2010.

khula the wife requests a divorce and in turn may have to return the dower to the husband. Both processes of *ṭalāq* and *khula* from classical interpretations of IFL can be extra-judicial, thus, conflicting with English laws, which do not recognise any form of extrajudicial divorce.

Muslim communities in Britain, like other Western countries, may follow Islamic personal law in matters of family law, i. e. practice *sharīʿa* law in a personal capacity,[28] and communities may follow certain customs and traditions from their country of origin.[29] Thus, there are several factors which influence how British Muslims proceed with an Islamic divorce, such as their understanding of classical Islamic jurisprudence (*fiqh*), their adherence, if any to codified *sharīʿa* law from Muslim-majority countries, and the relevance of an English civil divorce with regard to the status of a religious divorce. In the UK, *sharīʿa* law operates in an unofficial capacity, and as such, there is no official authoritative regulatory body, which administers Islamic divorce among the British Muslim community.[30] Furthermore, religious divorces obtained in England are invalid under section 44 (1) of the Family Law Act 1986, which states that "no divorce obtained in the UK will be effective unless granted by a court of civil jurisdiction".

Participants with civil marriages invariably applied for a civil divorce and there was no aversion to applying to the civil court courts for the dissolution of their marriages. The divorce process signalled the irretrievable breakdown of the marriage and allowed space between the participants and their husband. Some participants pursued a civil divorce, against the wishes of their families. In these instances, the families chose to pursue an Islamic divorce first, however as the husbands refused to comply, participants felt the civil divorce process was the best option. One participant explained her situation:

> "I wanted the civil courts to deal with him. He was violent, and harassing me [after separation], stalking me at work. My family were stalling the civil divorce process,

28 An-Naʿim, *supra* n. 1; Black Ann / Esmaeili Hossein / Nadirsyah Hosen, Modern Perspectives on Islamic Law, Cheltenham 2013.

29 Ramadan, *supra* n. 11.

30 Bano Samia, Muslim Women and Shariʿah Councils: Transcending the Boundaries of Community and Law, Basingstoke 2012; Malik Maleiha, Minority Legal Orders in the UK: Minorities, Pluralism and the Law, London 2012.

> they wanted the Islamic divorce first, but he was not agreeing, so I chose the civil [divorce] path." (Inaya)

The state is aware that some people have a need for religious divorce alongside civil divorce; thus, guidelines for petitioning for a civil divorce make clear that civil proceedings may not dissolve the religious part of the marriage.[31] However, this, in turn, creates a further problem for British Muslims, especially where the husband may withhold the religious divorce, as was the case with many participants who attained a civil divorce certificate, and thus pursued an Islamic divorce.

2. Imams and Islamic Divorce

The importance of marriage and family has been persistent throughout Islamic history and Islamic societies.[32] The Qur'ān encourages reconciliation,[33] and the *ḥadīth*[34] tradition views divorce as the most detestable of permitted acts.[35] Nonetheless, the Qur'ān permits divorce, and recommend parties that decide to separate do so in an amicable manner.[36] This study found that the disputing parties would try to resolve marital problems themselves or involve family before turning to outsiders such as imams, as one imam explained:

> "People come to the imam or the mosque after they have tried to rectify the situation on their own. They would incorporate their family and trusted friends. The last resort would be the imam." (Imam #1)

Such reactions are due to the norm within the Muslim community, which views family disputes as a private matter. Participants' experiences of dispute resolution showed there was great emphasis on preserving family honour and avoiding shame by not disclosing family problems to others.

---

31 Crown, D008 Supporting Notes for Guidance on Completing a Divorce / Dissolution / (Judicial) Separation Petition, HM Courts & Tribunals Service 2014.

32 Gilliat-Ray, *supra* n. 20.

33 Qur'ān 4:35.

34 Prophetic narration of Muhammad.

35 Abu Dawūd S. I, Sunan Abu Dawud, transl. by Yaser Qadhi and Nasiruddin al-Khattab, Darussalam 2008.

36 Qur'ān 65:2.

However, in instances where the family were unable to resolve the dispute, they would then involve the imam from their local mosque. The experts explained that imams were called upon as they were qualified with *sharīʿa* knowledge, and respected within the Muslim community. Nonetheless, some participants explained that involving imams did not necessarily resolve marital issues:

> "We got the imam from the local mosque involved. The imam tried to mediate between us. My husband said he had no money, and that he was feeling stressed. It was a case where he was not going to give me a divorce." (Rahima)

> "My family called the imam from the mosque. He came and listened to my case, but he said that I was at fault, I was shocked, and he said that my husband was a good man. The mosque did not agree to give me an Islamic divorce." (Lubna)

These two cases demonstrate the extent of an imam's authority: firstly a limitation, by not granting *khula* without the husband's consent; and secondly, overriding powers to deny *khula* by dismissing the wife's request. However, each case of *khula* may present a different outcome depending on the circumstances, though one imam commented where the husband refuses to grant a religious divorce, there is a need for a greater authority in the form of a *sharīʿa* council:

> "Islamic divorce has two aspects. Mediation and the execution of divorce – the latter is a collective duty and requires a *sharīʿa* board. When the husband refuses to divorce a woman, where do they go, this is when they turn to a *sharīʿa* council." (Imam #2)

Thus one of the reasons *sharīʿa* councils emerged was due to *maṣlaḥa* (public interest),[37] which is discussed in the next section.

3. *Sharīʿa* Councils

Bano asserts that *sharīʿa* councils emerged from a diverse set of social, political, and religious developments in civil society, characterised by the state policy of multiculturalism, and the accommodation of cultural and

37 Shah-Kazemi Sonia Nurin, Untying the Knot: Muslim Women, Divorce, and the Shariah, London 2001.

religious differences.[38] There are many factors that contribute to the existence of *sharīʿa* councils in Britain, but none is more important than the fact that Muslim women turn to *sharīʿa* councils for their services, as one expert explained:

> "Ninety per cent of our cases are women-initiated divorce applications. Women come to us because they want verification that they are divorced because their husband pronounced divorce, or they have started the civil divorce proceedings and want the Islamic divorce. In other cases, women have no civil marriage and come to us [i. e. *sharīʿa* council] as they have nowhere else to go to get a divorce." (*Sharīʿa* Council judge #1)

Those opposed to *sharīʿa* councils argue that English law is best suited to protect women and that *sharīʿa* councils are operating as a parallel legal system, acting as courts.[39] Whereas others argue that *sharīʿa* councils know their legal limits, and operate within the law as legitimate mechanisms of alternative dispute resolution, seek no formal recognition from the state, and provide non-binding, non-judicial rulings.[40] The *sharīʿa* council's documentation such as its application forms and information sheets clearly demarcate their limitations with respects to civil law, for instance, they state that all civil marriages including overseas marriages require a civil divorce for dissolution, and refer clients to solicitors for civil divorce cases. In addition, the council explained that they do not adjudicate on matters concerning child arrangements and financial relief:

> "We deal with religious divorce and *mahr*. Anything else the parties have to go to family courts or small claim courts for settlement, we cannot deal with this." (*Sharīʿa* Council Judge #1)

There are concerns raised against *sharīʿa* councils and the perceived oppression of Muslim women with religiously sanctioned gender discrimination,[41] and the application of *sharīʿa* law which contradicts

38 Bano, *supra* n. 30.

39 Manea Elham, Women and Sharia Law: The Impact of Legal Pluralism in the UK, London 2016; Patel Pragna, Sharia Courts Have No Place in UK Family Law. Listen to Women Who Know, The Guardian (14 December 2016), www.theguardian.com/commentisfree/2016/dec/14/sharia-courts-family-law-women (last accessed 17 January 2020).

40 Bano, *supra* n. 30; Douglas, *supra* n. 23.

41 Cox Caroline, A Parallel World: Confronting the Abuse of Many Muslim Women in Britain Today, London 2015.

universal human rights.[42] However, Norton argues that religious tribunals support religious freedom, as they are a source of religious knowledge and guidance; and religious expertise is an important aspect of religious freedom.[43] Undoubtedly, the Islamic divorce process with the *sharīʿa* council differentiates between male and female-initiated divorce. Some argue that gendered roles and rights are part of the religious norm in some communities; Worell argues that gender roles regulate social interaction from people's tendency to judge others' behaviour to conformity with gendered roles.[44] An example of such behaviour was observed in one *sharīʿa* council hearing, where the client expected a male judge and duly complained when a female judge presided over the case:

> "The woman [client] did not initially respect the female judge; she was quite irate and argued that she wanted the previous male judge. Once explained that the female judge would preside over the case, the client then turned to the female judge and exclaimed that she should be more understanding and sympathetic to her case. The judge said 'I have to follow procedures'." (PO2)

The imams agreed there was more scope for improving the gender imbalance of *sharīʿa* councils by introducing female members on the *sharīʿa* board, i. e. at the decision-making level and dealing with cases with an awareness of the socio-economic reality of Muslim women in modern society:

> "*Sharīʿa* councils are male-dominated, yet their clients are mainly women. The board needs to be mixed to give balance; also they need to have an awareness of people's situation e. g. domestic violence and abuse." (Imam #1)

There are claims that Muslim women are coerced into using *sharīʿa* councils and forced to reconcile with abusive husbands,[45] and that Muslim women concede their civil rights, and agree to a weaker bargaining position using *sharīʿa* law.[46] Opposing such views, Grillo argues that Muslim women should not be seen as victims, though they may suffer discrimination and domestic violence; but, to emphasise their victimhood and to

42 *Supra* n. 39.

43 Norton Jane Calderwood, The Freedom of Religious Organizations, Oxford 2016.

44 Worell Judith (ed.), Encyclopedia of Women and Gender, London 2002.

45 Namazie, *supra* n. 12; Proudman Charlotte Rachael, Equal and Free? Evidence in Support of Baroness Cox's Arbitration and Mediation Services, Equality Bill, London 2012.

46 Manea, *supra* n. 39; Walker Tanya, Shari'a Councils and Muslim Women in Britain: Rethinking the Role of Power and Authority, Leiden 2016.

exceptionalise their situation does injustice to Muslim women's agency.[47] Bano contends Muslim women are aware of contested rulings of religious scholars, and their rights under civil law, and thus they are able to challenge their weak bargaining position in the marriage and during negotiations at the *sharīʿa* councils.[48] In this study, there was no evidence to suggest participants felt forced or compelled to use *sharīʿa* councils. The *sharīʿa* council commented on how the women who approach their services were empowered Muslim women with agency:

> "Luckily, the women who approach the *sharīʿa* council are confident, have control, agency, independence, and make demands. Whereas the concern is for women out in society who are vulnerable and suffering due to lack of access to knowledge and understanding of their Islamic rights. Men get annoyed that someone else can give a certificate of divorce, i. e. *faskh*." (*Sharīʿa* Council Judge #1)

For this function alone, *faskh*, *sharīʿa* councils provide an important role among the British Muslim community which the civil authorities are unable to provide i. e. religious divorce. Thus, in the current socio-legal reality, *sharīʿa* councils are here to stay for the foreseeable future.[49]

IV. Conclusion

A considerable number of British Muslims increasingly feel the need for religious marriage and divorce. The importance of *nikāḥ* among the participants superseded the need for civil marriage – viewed as a secondary issue. Imams as celebrants can play a proactive role and apply influence by informing the two parties about their Islamic rights, in particular, to inform Muslim women about the permissibility to enter clauses and conditions into the *nikāḥ* contract that provide them further rights for example *ṭalāq tafwid* which could alleviate some of the problems

47 Grillo Ralph, Muslim Families, Politics and the Law: An Overview (2015) www.academia.edu/14248204/Muslim_Families_Politics_and_the_Law_An_Overview (last accessed 1 July 2019).

48 Bano, *supra* n. 30.

49 Ali Shaheen Sardar, Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts, Child and Family Law Quarterly, Vol. 25 (2013), 113 – 137, at 113.

Muslim women face in the event of a marital breakdown. The religious and legal experts stressed the importance of civil marriage to provide Muslim women with legal rights and protections. Again, imams and Muslim institutions such as mosques and *sharīʿa* councils can play an active role in ensuring the two parties are informed of the legality of civil marriage, especially as imams are often the first outsiders that the family would allow in marriage negotiations and therefore their position and influence can affect change. Thus, there is an onus on Muslim community associations to ensure British Muslims are informed of the state legal protection offered when entering a legally binding marriage.

The problem of withheld religious divorce proved to be a major dilemma for participants in this study, and an examination of their experiences highlighted that the state is currently unable and unwilling to resolve the matter of religious divorce. However, in the long term, this is exacerbating problems for Muslim women with a civil divorce who must seek conclusion of the religious element of their divorce from other parties – often unregulated and working outside the legal system. *Sharīʿa* councils are one such forum that fills a void in state law by granting Muslim women Islamic divorce that conforms to the socio-religious norms of the Muslim community. *Sharīʿa* councils face much criticism of discrimination against Muslim women especially regarding the gender-differentiated application process and claims the wife faces a weaker bargaining position. Therefore, in the interim, *sharīʿa* councils that accept civil divorce as being sufficient and issue a *fatwā* [religious edict] or Islamic divorce certificate accordingly seemingly represent one option for Muslim women. However, the variance in services and standards between different *sharīʿa* councils within the UK and the calls to improve their codes of practice suggests that there is still a strong need to find solutions better than those at hand now.

Chapter Four

The Impact of One-sided *Fatāwā:* Studying the Example of *Fatāwā* on Marriage with the Intention of Getting Divorced

Ranya Jamil

Dr Ranya Jamil completed her PhD in Islamic Studies at the University of Vienna. She is currently a researcher at the Department for Islamic-Religious Studies, Friedrich Alexander University in Erlangen.

Table of Contents

Abstract

According to Islamic Jurisprudence, it is necessary for a muftī to be aware of the circumstances of the person who requests a fatwā in order to issue a customized fatwā which brings ease and comfort to that person while maintaining the religious standard.

However, it is a fact that in the Arab Muslim world, muftīs are generally male, while people who ask for fatāwā are both male and female. As such, the question arises: To what extent does the fact that muftīs are usually male affect the fatāwā being issued?

In this paper, one example of fatāwā will be presented and analyzed. This is the fatwā on the marriage with the intention of getting divorced after a certain period of time, which can have a negative impact on women especially. The aim of this paper is to show how important it is to consider the maqāṣid and the persons being involved when formulating a fatwā.

I. Marriage with the Intention of Getting Divorced – Its Meaning and Origin

The phenomenon of *iftā'* (the issuing of legal edicts, or *fatāwā*) has its roots back in the time of the Prophet Muhammad, when he used to give his companions answers to their questions and requests. It was and is still supposed to help Muslims find answers to their needs in order to live according to their Gods satisfaction. The purpose of a *fatwā* is to bring ease to a Muslim's daily life, but at the same time, it must work in accordance with God's will.[1] In order for a *muftī* to fulfil God's will he has to look at the *maqāṣid* (objectives) of the *sharīʿa* as they reflect the intentions behind the revelation. Hence, does a *fatwā* contradict the *maqāṣid* of the *sharīʿa* something must be wrong about it.[2]

When it comes to issuing a primary *fatwā*, it is necessary for the *muftī* not only to know the texts of Qurʾān and Sunna on the topic, but to also understand the circumstances of all the particular people involved in his *fatwā.* This is inevitable in order to ensure that a *fatwā* brings ease to the people and fulfils the *maqāṣid.*

This means, that when a *fatwā* is concerning women, the *muftī* cannot only consider the circumstances of the man asking for a *fatwā.* Both sides have to be examined in order to issue a *fatwā* that does not disregard the rights and needs of any of the individuals concerned. The unfortunate fact is, however, that *fatāwā* concerning women often have a very negative outcome on them, neither bringing ease nor working in accordance with the *maqāṣid* of the *sharīʿa* for the female part. This can be found among *fatāwā* throughout the Islamic history until today.

In this paper, I will explore one example of a *fatwā* that concerns women and has a negative outcome on them in order to show how some *maqāṣid* have been ignored in issuing *fatāwā* and without looking at all at the

1 Ibn ʿĀshūr Muhammad Aṭ-Ṭāhir, Tafsīr at-Taḥrīr wa at-Tanwīr, Tunis [s. d.], Vol. 6, at 66.

2 See for example Ibn ʿĀshūr, who stresses on the importance of looking at the *maqāṣid* when it comes to contemporary *ijtihad.* As he says it is not only important to know the original objective of God (*al-maqṣad al-aṣlī li-sh-sharīʿa*), but also to distinguish between it and secondary objectives and those that can change. Ibn ʿĀshūr Muhammad Aṭ-Ṭāhir, Maqāṣid ash-Sharīʿa al-Islāmiyya, Amman 2001, at 409.

circumstances of women. This is the *fatwā* on marriage with the intention of getting divorced, known as *az-zawāj biniyyat aṭ-ṭalāq.*

Marriage with the intention of getting divorced is not a new phenomenon. On the contrary, something similar has long been known as *zawāj al-mutʿa.* According to *zawāj al-mutʿa* a man and a woman get married for a limited period of time, which means they agree from the beginning to end their marriage after a specified period. However, according to Sunni Islam, *zawāj al-mutʿa* is not an acceptable way of marriage, but it was allowed at the beginnings of Islam, as it has been a common practice back then. This is based on a *ḥadīth* narrated both by al-Bukhārī and Muslim where Ali says: "The Prophet, peace be upon him, prohibited *mutʿat an-nisā'* (the joy of being with women) the day of Khaybar."[3]

However, when Muslim scholars talk about marriage with the intention of getting divorced, they do not mean *zawāj al-mutʿa* and they don't see them as equal. One reason is that *zawāj al-mutʿa* does not need witnesses and a *walī.* Also, in *zawāj al-mutʿa* both parties are aware of the time limitation.

Marriage with the intention of getting divorced means that a man marries a woman under normal circumstances, while fulfilling all necessary conditions. However, from the beginning he has the intention to end that marriage after a specified period, usually without informing his bride of his intentions. This type of marriage became popular among Muslims travelling to Europe or the US for studying or working with the intention to go back to their home countries after some time and create a family there.[4] However, also in former days this type of marriage occurred when men had to travel a lot or used to stay abroad for some time.[5]

There are different reasons why men may intend to end their marriage after a specific period of time:

3 Al-Mawsilī Abdullah, al-Ikthiyār li-taʿlīl al-Mukhtār, Damascus 2009, Vol. 3, at 58.

4 Unfortunately, there is no study that can confirm this, but a short look at internet forums and *iftā'*-homepages shows how busy this question keeps Muslims.

5 For example, Ibn Taymiyya has already been asked about a man who is travelling a lot and stays in every city only for a month or two, if it is allowed for him to get married for the time of his stay and divorce his wife once he leaves again. Ibn Taymiyya Ahmad, al-Fatāwā al-Kubrā, Beirut 1987, Vol. 3, at 100.

1) A man is afraid to enter non-permitted relationships, so he decides to marry a woman with the intention to divorce her later. While the wife may in some cases be told about that, in most cases the woman will not know her husband's intention;

2) A man marries a woman in order to obtain a visa to her country. In this case, he may or may not inform his wife about his intention. If they both agree on this together, they might decide to not live together or to not fulfil the marriage.

We will only discuss the first type in this paper.

Former scholars have already discussed something called the time-limited marriage (*az-zawāj al-mu'aqqat*).[6] This is a marriage contracted for a certain period of time, while both parties, as well as the witnesses and the *walī*, are aware of the limitation.

According to the majority of Sunni scholars, this type of marriage is not valid since the condition of time-limitation is itself an invalid one. Only a few particular scholars like Zufar from the Hanafi School said such a marriage is valid.[7] However, the Hanafi School responded to his opinion with the following argument: "Whoever puts a time limitation in his marriage contract has actually realized the meaning of *zawāj al-mut'a*, and when it comes to contracts, it is all about meanings."[8] In other words, the meaning of *zawāj al-mut'a* is that the man only intends to enjoy intercourse with his wife without intending to fulfil the meanings of marriage and its *maqāṣid.* In turn, this means that a time-limited marriage is equivalent to *zawāj al-mut'a,* hence it is invalid and forbidden.

II. Fatāwā on Marriage with the Intention of Getting Divorced

However, according to some scholars, marriage with the intention of getting divorced was treated differently from *zawāj al-mut'a,* because the limitation

6 Al-Mawṣilī Abdullah, *supra* n. 3, Vol. 3, at 60.

7 Ibn al-Hammam Kamāl, Fatḥ al-Qadīr, Beirut 2003, Vol. 3, at 240.

8 Ibn al-Hammam, *supra* n. 7, Vol. 3, at 241.

is not an official part of the marriage contract, but only an intention in the heart of the groom. As such, scholars looked at the marriage with the intention of getting divorced from both perspectives: on the one hand, whether it is allowed to have such an intention, and on the other hand, if such a contract that does not declare the intention to divorce is valid.

We will look first at the question whether marriage with the intention of getting divorced is allowed i. e. legal or not. This question is important from the angle of looking at the hereafter, as someone does not want to die while having committed a sin, which in this case would be to having lived in a sinful relationship.

1) The common opinion of the Hanafi, Shafiʿi and Maliki Schools is that marriage with the intention of getting divorced is legal.[9] Some of the scholars who allowed marriage with the intention of getting divorced include Imam Mālik, although he said that it is not "the nicest thing to do and is not a good habit".[10] Ibn Qudāma seems to agree with Imam Mālik on the legality, in his words: "[A husband's] intention doesn't harm [the contract]. And a man doesn't have to intend to keep his wife, so he can keep her if they agree, and if not he can divorce her."[11] However, his statement is not so clear. Read more closely, his statement gives the impression that he is actually talking about the validity of the contract and not about the legality of this intention.

An-Nawawī, quoting al-Qāḍī, says that there is a consensus among the scholars that marriage with the intention of divorce is permissible.[12]

As for contemporary scholars, both Ibn Bāz and Abdullah al-Jebreen classify it as a legal type of marriage, which means that a man is allowed to have the intention of ultimately getting divorced. However, they see the fear of the man of committing a sin as a condition for this legality.[13] But, both did not define this fear which makes it impossible to measure it in any way.

9 Manṣūr Ṣāleḥ, Az-Zawāj biniyyat aṭ-Ṭalāq, Riyadh 2007, at 43 – 46.

10 Al-Bājī Sulaymān, al-Muntaqā Sharḥ Muwaṭṭa' al-Imām Mālik, Beirut 1983, Vol. 3, at 335.

11 Ibn Qudāma Abdullah, Al-Mughnī, Beirut [s. d.], Vol. 7, at 573.

12 An-Nawawī Yaḥyā, Sharḥ Ṣaḥīḥ Muslim, Vol. 9, at 182.

13 Ibn Jebreen Abdullah, cms.ibn-jebreen.com/fatwa/home/view/10735#.XXdoSi17EWo (last accessed 12 September 2019); Bin Baz, www.binbaz.org.sa/mat/12712 (last accessed 12 September 2019).

Their explanation for marriage with the intention of divorce being permissible is that the contract is legal; and if a person's intention is not mentioned in the contract then the act itself is legal too. In addition, they argue that divorce is permissible, so the intention to get divorced must also be permissible. Furthermore, a man might initially intend to get divorced at a later date, but then ultimately may change his mind and stay married.

When you look at this opinion, you will find arguments like "modern circumstances call for such a way of marriage" among contemporary scholars, as there are students abroad or business men who are away from home for a long period of time, and such persons "are in need for someone who takes care of them, and fulfils their needs far without any prohibited practices."[14] In other words, the changing dynamics of marriage mean that practices such as the taking out of intentionally temporary marriages must be permissible.

2) A second opinion is that of al-Māwurdī and Ibn Taymiyya, who classified marriage with the intention of divorce as *makrūh.*[15]

3) A third group of scholars is represented by al-Awzāʿī who clearly states that this type of marriage is not legal. He says it is actually the same as *zawāj al-mutʿa.*[16] Likewise does the Ḥanbalī School not allow marriage with the intention of getting divorced.[17] However, there are particular Ḥanbalī scholars who, as we have seen, diverge from the wider Ḥanbalī opinion.

There are also some contemporary scholars who do not permit marriage with the intention of getting divorced. Among them are Muhammad Rashīd Riḍā[18], Ibn al-ʿUthaymīn[19] and Mustafa az-Zarqā'[20]. All consider that

14 Ar-Rawādiya, al-Ankiḥa al-Muʿāṣira, University of Mu'tah, Master Thesis 2007, at 55.

15 Al-Māwurdī Ali, al-Ḥāwī al-Kabīr, Beirut 1994, Vol. 9, at 333; Ibn Taymiyya, supra n. 5, Vol. 3, at 100.

16 An-Nawawī, *supra* n. 12, Vol. 9, at 182.

17 Ibn Manṣūr, *supra* n. 9, at 46.

18 Riḍā Rashīd, Tafsīr al-Manār, Kairo 1910, Vol. 5, at 17.

19 Ibn ʿUthaymīn Muhammad, binothaimeen.net/content/10695 (last access 13 September 2019).

20 Az-Zarqā' Muṣṭafa, Fatāwa az-Zarqā', Damascus 1999, at 277.

whoever goes into a marriage with the intention of getting divorced has committed a sin.

Their evidences are the following:

1) The analogy of limited marriage to *zawāj al-mutʿa:* They say that in practice the outcome is the same that means that in reality there is no difference; hence, marriage with the intention of getting divorced cannot be allowed.

2) It contradicts the *maqāṣid* of the *sharīʿa*, as some of the objectives of marriage are to have descendants and to create a solid long-lasting married life where both partners support and complete each other. These and other objectives cannot be reached through a marriage with the intention of getting divorced.[21]

3) Ibn al-ʿUthaymīn also quotes the famous *ḥadīth* "actions are according to intentions" to underline that intentions do matter and therefore it is not allowed for one party to intent divorce at the marriage.[22]

4) It is an act of deceit of the wife as she is unaware of his intentions and would not have agreed to marry him if she had known his intention. Cheating is not allowed in Islam as is well known from the *ḥadīth* "Whoever is cheating is not part of us."[23]

5) It should also not be ignored that divorce is not unconditionally allowed. Some Sunni scholars state that divorce is *makrūh* unless there is a need for it. This is because women should be prevented from any harm, but if a man gets divorced from his wife with no reason this is definitely harmful for her and so this is against the objectives of *sharīʿa.*[24]

In addition to the evidences that have been mentioned by the above scholars, the following *ḥadīth* can be cited: "Three signs when found in anyone, is a hypocrite even though he may fast and offer prayers and think that he is a Muslim: When he is trusted, he is dishonest, when he

21 Ibn ʿĀshūr Muhammad Ṭāhir, *supra* n. 2, at 439.

22 Ibn ʿUthaymīn Muhammad, binothaimeen.net/content/8152?q2الزواج=%20بنية%20الطلاق (last accessed 20 January 2020).

23 At-Tirmidhī Muhammad, al-Jāmiʿ al-Kabīr, Hadith n. 1325.

24 Ibn Qudāma, *supra* n. 11, Vol. 8, at 235; ash-Sharbīnī Muhammad, al-Iqnāʿ, Beirut 1994, Vol. 2, at 294.

talks, he lies, and when he makes a promise, he breaks it." This is a strong *ḥadīth* which carries weight for the question of marriage with the intention of getting divorced, since it entails deceit of a wife and violation of principles of marriage. So all three signs of hypocrisy can be found in a man who intends to get divorced at the moment of his marriage, and hypocrisy is known to be one of the biggest sins in Islam.

Looking at the argument by those scholars who allowed marriage with the intention of getting divorced by saying that this prevents men from sinful deeds, it might be useful to look at what the Prophet explicitly said in this matter: "O young men, whoever among you can afford, let him get married, for it is more effective in lowering the gaze and guarding one's chastity. And whoever cannot afford should fast, for it will be a shield for him."[25] Here, the Prophet gives men an important piece of advice. He is telling them to get married as soon as possible, and if not, then to fast, because this will be a shield protecting them from sinful deeds. But beyond marriage or fasting, he gave no third option, such as taking out an intentionally temporary marriage. The marriage he speaks of is the type of marriage that is known in Islam: a lasting marriage that is built on love and mercy, and not on cheating and egoism. Husband and wife are supposed to complete each other.[26]

Islamic scholars have also looked at the question of whether a marriage with the intention of getting divorced is valid or not. In the instance of somebody who has married a woman and intended to get divorced after some time, has that man entered an unlawful relationship or is the marriage valid? Two opinions raised in this matter:

First, the marriage contract is valid: This is the opinion of the majority of Sunni scholars, like the four schools of *fiqh*[27], Mustafa az-Zarqā'[28], Abdullah al-Jebreen[29], Ibn Bāz[30] and Ibn al-'Uthaymīn[31].

25 Al-Bukhārī Muhammad, Ṣaḥīḥ al-Bukhārī, Hadith n. 4779.

26 See for example Qur'ān 30:21: "And among His wonders is this: He creates for you mates out of your own kind. So that you might incline towards them, and He engenders love and tenderness between you: in this, behold, there are messages indeed for people who think!" (Translation by Muhammad Asad).

27 Al-Kāsānī 'Alā' ud-Dīn, Badā'i' aṣ-Ṣanā'i' fi tartīb ash-Sharā'i', Beirut 1997, Vol. 4, at 407; ash-Shāfi'ī Muhammad, al-'Umm, Almansoura 2001, Vol. 4, at 152; Ibn Qudāma, *supra* n. 11, Vol. 7, at 573.

28 Az-Zarqā', *supra* n. 20, at 277.

They give two reasons for this opinion:

As long as all conditions of the marriage contract are given, the contract itself is correct and valid. A judge can only judge the contract externally. As long as the intention is not part of the contract and is not spoken out aloud, the contract is valid and correct. An intention cannot invalidate a contract.

Also in line with that: The intention of divorce doesn't cancel the marriage, as a divorce only happens when one of the partners says that he or she wants to get divorced. Likewise, a man might initially intend to get divorced but later on changes his mind and stays married.

The other view is that the marriage contract is invalid: this is the opinion of al-Awzāʿī[32], Riḍā[33] and the Saudi Iftāʾ Council under Muftī Abdulaziz ʾĀl ash-Shaykh.[34] This, they argue, is because there is no difference between limited marriage or *zawāj al-mutʿa* and marriage with the intention of getting divorced.[35]

III. Conclusion

This paper has explored one example of *fatāwā* that has a severely negative impact on women. This *fatwā* resulted in women being suddenly left alone, sometimes even with children. It disunites families and brings hardship onto women, which ends in a society being disrupted. Such a *fatwā* also has negative impacts on men as it does not encourage stability, which is one of the *maqāṣid* of marriage in Islam. Even if those *fatāwā* allowing marriage with the intention of getting divorced are countered by contradictory *fatāwā*, the example still shows how often women's perspectives are being ignored when issuing one-sided *fatāwā*.

29 Ibn Jebreen Abdullah, *supra* n. 13.

30 Bin Bāz ʿAbdul-ʿAzīz, binbaz.org.sa/fatwas/25532حكم-الزواج-بنية-الطلاق/ (last accessed 14 September 2019).

31 Ibn ʿUthaymīn, *supra* n. 19.

32 Ibn ʿAbd al-Barr Yūsuf, al-Istidhkār, Abu Dhabi, Vol. 6, at 170.

33 Riḍā, *supra* n. 18, Vol. 5, at 17.

34 Az-Zūmān Ahmad, ar.islamway.net/article/77994/الزواج-بنية-الطلاق?__ref=search (last accessed 14 September 2019).

35 Ibn ʿAbd al-Barr, *supra* n. 32, Vol. 6, at 170; Az-Zūmān, *supra* n. 34.

This means that every single *fatwā* being issued that has disadvantages for women can reach many women and have an impact on them.

The example of marriage with the intention of getting divorced clearly shows what happens when the *maqāṣid* are not applied and when all parties involved are not taken into consideration. Some *fatāwā* only consider the man's situation and needs, and do not look at the impact on women. Some *fatāwā* look at the marriage contract but do not consider that the words of this contract have ramifications for individuals. It is looking at the contract alone and checking the fulfilment only of the contractual conditions of the marriage that led so many scholars to say that marriage with the intention of getting divorced is legal. Mālik also allowed the practice but said at the same time that it is not a good deed and no proper Muslim should actually do that. Still scholars quote him to underline their opinion that it is allowed, although this is questionable due to his statement.

This example of *fatwā* shows very clearly how important it is to consider the *maqāṣid* and all the persons being involved in a *fatwā.* It is necessary to look at the marriage contract from a more *maqāṣid*-driven view, and to concentrate not only on its contractual stipulations. The marriage contract is not a normal contract as such, because it has high social and personal purposes, which have to be considered in the first place. Eventually, taking this into account will lead to a more satisfied and stable society.[36]

36 See for example Abusulayman's paper on marital discord, in which he stresses on the importance of the consideration of the objectives of *sharīʿa:* Abusulayman Abdulhamid, Marital Discord Recapturing Human Dignity through the Higher Objectives of Islamic Law, London 2008.

Chapter Five

Discursive Consensus: Two Recent *Fatāwā* from Europe on Muslim Women Marrying Non-Muslim Men

Abdessamad Belhaj

Dr Abdessamad Belhaj holds a PhD in Islamic Studies (University Mohammad V, 2001) and a PhD in Social and Political Sciences (Catholic University of Louvain, 2008). Currently, he is a researcher and visiting lecturer at the Cath¬olic University of Louvain.

Table of Contents

Abstract

The question of Muslim women marrying non-Muslim men in Europe poses numerous challenges to Islamic law and ethics. Religious authorities continue to ban these marriages and recent evidence from collective bodies of fatwā suggests that to date there has been little attempt to revise this prohibition. The issue has grown in importance in light of public debates on integration, communitarianism and segregation in Europe. Whilst some research has been carried out on Muslim women marrying non-Muslim men, no single study exists which closely reads the current arguments used to justify it in a European context or attempted to investigate the ethical and social logic of the ban on this type of marriage. It is argued here that Muslim jurists and theologians re-invent the discursive consensus and tradition to sustain in-group moral economy.

I. Introduction

On 01 May 2016, Khaled Abou al-Fadl, the Omar and Azmeralda Alfi Distinguished Professor of Law at the UCLA School of Law,[1] wrote: "[It is] surprising to me [that] all schools of thought prohibited a Muslim woman from marrying a man who is a *kitābī* (among the people of the book). I am not aware of a single dissenting opinion on this, which is rather unusual for Islamic jurisprudence because Muslim jurists often disagreed on many issues, but this is not one of them".[2] What is striking about Abou al-Fadl's remark is less his unawareness of this consensus of Islamic legal schools than the way he felt *the probity of this consensus* and *the surprise* that it can induce in contemporary audiences.

In the West, civil laws allow any woman of any faith to marry any man of any faith, but among Muslim communities, in the case of Muslim women marrying non-Muslim men an obstacle persists. The normative discourse has little evolved on this matter. The first section of this paper will examine two recent *fatāwā* produced in Europe by Sunni Muslim councils of Islamic law: The European Council for Fatwa and Research (Dublin) and the Islamic Syrian Council (Istanbul) on whether Muslim women can marry a non-Muslim man or not. I pay particular attention to the context and the arguments of these *fatāwā.* The second section anthropologically accounts for the implications of these *fatāwā* within the current debates inside Islam on identity and alterity.

1 Khaled Abou al-Fadl is a leading authority on Islamic law, a Kuwaiti scholar of Egyptian origin, and living in the USA, who endorses reformist and critical views on Islamic law. His latest work is the co-edited Routledge Handbook of Islamic Law published in 2019.

2 Abou al-Fadl Khaled, Fatwa: On Christian Men Marrying Muslim Women (Updated), in: Abou al-Fadl Khaled, The Search for Beauty (last modified 4 October 2019), www.searchforbeauty.org/2016/05/01/on-christian-men-marrying-muslim-women-updated (last accessed 23 January 2020). The Qur'ānic verses are translated according to Arberry Arthur J., The Koran Interpreted, Oxford 1964, at 30 (for Qur'ān 2:221) and 100 (for Qur'ān 5:5).

II. *Fatwā* 115 (1/18) of The European Council for Fatwa and Research (published on 8 November 2018)

1. The *Fatwā*

Question: "I am a 20-year-old girl, and there is a young Christian man who wants to marry me. He is ready to fast and respect the duties of the Islamic religion. He has no problem in the future if our children become Muslims. I want to know the Islamic ruling on this marriage?"

Answer: "It is not permissible for a Muslim woman to marry a non-Muslim man *prima facie* and in any case, whether the non-Muslim man is from a monotheistic religion (Judaism or Christianity) or not. This ruling is maintained even if this person promises you that he will not harm you in your religion after marriage. This marriage is forbidden because when Allah Almighty permitted marriage of a Muslim with someone from a different religion, he only allowed the marriage of a Muslim man with a chaste Christian or Jewish woman as it is stated in Qur'ān 5:5: 'Today the good things are permitted to you, and the food of those who were given the Book is permitted to you, and permitted to them is your food; likewise believing women in wedlock, and in wedlock women of them who were given the Book before you.'

Another reason why the marriage of a Muslim woman with a non-Muslim man is forbidden is to protect the woman in her religion and preserve her from the influence of the husband, even unintentionally, on herself or on her children. That is so because of the husband's status as responsible and caring for the family, which makes him more likely to influence the wife and his children than the reverse.

As for the permission for a Muslim man to marry a chaste non-Muslim woman (of a monotheistic faith) it is justified by the fact that if he influences her, while respecting her as a wife, he would lead her to the right religion (Islam). It is also established that Islam also prohibits him from harming her or forcing her to leave her religion.

Most of the Muslim jurists argue for this ruling by Qur'ān 2:221, "Do not marry idolatresses, until they believe; a believing slavegirl is better than an idolatress, though you may admire her. And do not marry idolaters, until

they believe". The Muslim jurists also refer to the above mentioned verse in Qur'ān 5:5: 'Today the good things are permitted to you, and the food of those who were given the Book is permitted to you, and permitted to them is your food; Likewise believing women in wedlock, and in wedlock women of them who were given the Book before you', to permit marriage of Muslim men with chaste women of monotheistic faith, and forbade the marriage of a Muslim woman with a non-Muslim man. On this, a juristic consensus was reached."[3]

2. The Context

The ECFR occupies the centre of Islamic jurisprudence in Europe from the 1990s until now.[4] It was created in 1997 by the Federation of Islamic Organizations in Europe (close to the Muslim Brotherhood), and championed by Yūsuf al-Qaraḍāwī. The latter and the ECFR have been labelling their *fatāwā* for European Muslims as minority *fiqh*, claiming to chart the lenient way, moderation, and dispensation. According to Lena Larsen, the ECFR daily receives 23 to 26 questions and only a third of its members hail from Europe as the ECFR looks for legitimacy by relying on the authority of major Sunni scholars in the Muslim world, to claim control over development of law and ethics in Europe.[5]

3 Al-Majlis al-Urūbbī li-l-iftā' wa-l-buḥūth, Zawāj al-muslima min ghayr al-muslim, Al-Fatāwā (last modified 4 October 2019), www.e-cfr.org/fatwa/زواج-المسلمة-غير-مسلم (last accessed 23 January 2020).

4 Two volumes of high quality research were published in 2018 about the ECFR's *fatāwā* and al-Qaraḍāwī's jurisprudence: Larsen Lena, How Muftis Think: Islamic Legal Thought and Muslim Women in Western Europe, Leiden/Boston 2018; and Shaham Ron, Rethinking Islamic Legal Modernism: The Teaching of Yusuf al-Qaradawi, Leiden/Boston 2018. See also a recent account of the ECFR in: Duderija Adis / Rane Halim, Islam and Muslims in the West: Major Issues and Debates, Basingstoke, HS 2018, at 47 – 50. Earlier foundational research on the ECFR was carried out by Alexandre Caeiro. See Caeiro Alexandre, The Social Construction of Sharī'a: Bank Interest, Home Purchase, and Islamic Norms in the West, Die Welt des Islams, Vol. 44, No. 3 (August 2004), at 351 – 375; Caeiro Alexandre, The Power of European Fatwas: The Minority *Fiqh* Project and the Making of an Islamic Counterpublic, International Journal of Middle East Studies, Vol. 42, No. 3 (August 2010), at 435 – 449.

5 Larsen, *supra* n. 4, at 88 – 96.

Similarly to other juristic deliberative bodies of *fiqh* in the Muslim World, the ECFR pursues Sunni orthodox consensus at the expense of autonomy and difference of opinion. Yet, on financial transactions and even rituals, the ECFR exhibits some eclecticism, typical of juristic councils whose members come with various Sunni juristic backgrounds from the Muslim World, including jurists of Salafi creed. Most of its founders as well as the current authorities of the ECFR were not born or raised in Europe. Knowing that most of the members of the ECFR actually live in Muslim countries seriously prevents any transition toward a foundation of a European *fiqh.* Since the latter implies that *fatwā* producers should experience similar conditions to the *fatwā* receivers to grasp the context and the challenges at stake, minority *fiqh* is not expected to effectively help Muslims integrate into the Western societies unless the authorities and the normative discourse are local.

3. The Argument

It is significant to remember that the ECFR's *fatwā* displays legal and ethical aspects. The young woman who asked the question suffers from this double nature of Islamic norms: they are lived as ethical dilemmas, but arbitrated as legal problems by Islamic law, via the authority of the Muslim jurists. To put it differently, the woman faces an ethical problem (is it good to marry a Christian man?), but hopes that the ECFR accommodates Islamic law to allow her to marry the Christian man. For this purpose, she argued by the ethical virtue of the latter (he is ready to fast, etc.).

The answer was decisive: This marriage is forbidden, no matter what the circumstances. Even more so, law defines ethics, and so the virtue of the Christian man is, thus, nullified. Such strong position (*surprisingly powerful*, Abou al-Fadl would say) needs a well-built argument. The *fatwā* immediately called in the highest authority in Islamic law to 'silence' the ethical dilemma: divine authority. Now, there is more to the ethical dilemma: that of the equality between men and women. If marriage of a Muslim man with a Christian woman is allowed, she believes she should be able to marry the Chrisman man. To cut the long story short, the *fatwā* wants to counter two arguments with one: Allah forbids the marriage of a Muslim woman with a Christian man and allows a Muslim man to marry a Christian woman.

Qur'ān 5:5 is quoted to turn silence over whether Muslim women can marry Christian men (since it speaks of the permission for Muslim men to marry women of the people of the book) to be a ban. (So, absence of law is taken for an outlawing). However, silence raises doubts, and the *muftīs* of the ECFR needed another argument. So here comes the protective argument: "[...] to protect the woman in her religion and preserve her from the influence of the husband". This shift from the divine authority to reasoning by protection could be motivated, as well, by the need to put in some 'rational argument' (taken into account that the Muslim woman lives in Europe and wants to be persuaded). The ECFR's perception of marriage is patriarchal-authoritative, and against all odds, and regardless of the type of relationship this woman envisions with her 'Christian husband', the ECFR perpetuates the husband's authority "as responsible and caring for the family". Thus, the ECFR loses contact with European social realities.

Having missed the target, the ECFR, with the patriarchal-authoritative argument in the background, now wants to return to the unresolved problem of inequality between men and women in inter-faith marriage. This seems to disturb the whole reasoning. The ECFR argues that permission for men is conditioned by chastity (*virtue matters in the case of Christian women, not men*). Yet, it reverses the argument by insisting that *law includes ethics* (respecting the Christian wife). This reversed argument, one can imagine, could only increase the bitterness of the questioner. The ECFR adds that influence is guaranteed to be in favour of Islam if a Muslim man marries a Christian woman (also assuming a patriarchal-authoritative family desired in Europe). It is also central to note how the ECFR speaks of Islam as *the Right Religion*.

Sensing inconsistency (which could undermine any argument), the ECFR's *muftīs* needed an even stronger argument (for *ijmāʿ* on the meaning of a verse or a *ḥadīth* is considered to be more authoritative than just the verse or the *ḥadīth* in Islamic legal theory). Thus, in the line of thought of the ECFR as "most of the Muslim jurists", Qur'ān 5:5 and Qur'ān 2:221 should strengthen each other to assemble a decisive answer. The consensus device was needed as the *muftīs* grew impatient, and perhaps also bored to be repetitive, and declared the final verdict: "On this ruling, a consensus was reached". Yet, we were told at the beginning of the

paragraph that "most of the Muslim jurists" are not *all the Muslim jurists*, as the term consensus would imply in Islamic legal theory.[6]

III. *Fatwā* 20 by the Islamic Syrian Council: The Ruling on Marrying People of the Book in Non-Muslim Countries

1. The *Fatwā*

Question: "A number of young people travel to Europe and other countries for work or asylum, and some of them marry people from those countries. Problems that lead to divorce often occur, and the laws of those countries stipulate that the mother should obtain the child's custody, which makes children grow up in another religion. Is it permissible for a Muslim to marry in these countries from non-Muslim women? We also hope that you would explain the Islamic ruling on the marriage of Muslim women to men of the people of the book, may Allah reward you."

Answer: "As for the Muslim woman, it is not permissible for her to marry a non-Muslim man at all even if he is from the people of the book, and no matter how respectful of her religion he is, for God said in Qur'ān 2:221: 'Do not marry idolatresses, until they believe; a believing slavegirl is better than an idolatress, though you may admire her. And do not marry idolaters, until they believe. A believing slave is better than an idolater, though you may admire him. Those call unto the Fire; and God calls unto Paradise, and pardon, by His leave, and He makes clear His signs to the people; haply they will remember.'

6 Consensus can be used to silence reformist views. On this case, Shaham wrote that "in 1970s, the Sudanese Islamist Hasan al-Turabi voiced an alternative opinion on that matter, i. e. that such a convert wife may remain with her husband. Turabi was consequently attacked by a number of the participants, including al-Qaraḍāwī , on the ground that he violated the decided juristic and practical consensus of the Muslim community. He concludes that the scholarly consensus prohibits a new marriage (between a Muslim female and a non-Muslim male) but not the continuation of an existing one, as in our case". Shaham, *supra* n. 4, at 125 – 126.

Aṭ-Ṭabarī (may Allah have mercy on him) said: "Allah has forbidden Muslim women to marry a polytheist, whoever is this polytheist and whatever type of polytheism he endorses". The Muslim jurists unanimously agreed that it is prohibited for a Muslim woman to marry a non-Muslim person, whether he believes in a monotheist religion or not, lives in a Muslim country or not. And God knows best."[7]

2. The Context

No research has been conducted so far on the Islamic Syrian Council. The latter was formed by 40 Islamic Syrian associations, which met in Istanbul in mid-April 2014 including Syrian Sunni scholars, activists and associations in a joint effort to give a Sunni religious voice for the Syrians abroad. The Council claims to be a "[…] central Syrian legitimate reference body, seeking to gather the word of scholars, preachers and representatives of legitimate entities, guide the Syrian people, find religiously legitimate solutions to their problems and issues, and preserve their identity and the course of their revolution and enable Syrian religious scholars to play their leading role in society."[8]

This *fatwā* was signed by 22 Syrian Sunni scholars including the well known Muḥammad az-Zuḥaylī, Usāma ar-Rifāʿī and Muwaffaq al-ʿUmr.

3. The Argument

The questioner first inquires about inter-faith marriage between Muslim men and non-Muslim women. The questioner seems to have taken position against this type of marriage justifying his ethical stance by the awaited consequences, namely that the child's custody which he assumes to be given to non-Muslim mothers, turns children away from Islam. Then, the questioner specifically asks about the ruling on a Muslim woman marrying a Jewish or a Christian man. The way the question was asked implies that

7 Al-Majlis al-Islāmī al-Sūrī, Ḥukm al-zawāj min ahl al-kitāb fī bilād ghayr al-muslimīn, fatāwā wa-aḥkām (last modified 4 October 2019), sy-sic.com/?p=7211 (last accessed 23 January 2020). The Qurʾānic verse is translated according Arberry, *supra* n. 2, at 30.

8 Al-Majlis al-Islāmī al-Sūrī, al-Taʾsīs, ʿAn al-Majlis (last modified 4 October 2019), sy-sic.com/?page_id=2330 (last accessed 23 January 2020).

the questioner had little doubt about the ruling, but needed a detailed and authoritative discourse to refer to it in his own community of Syrians living in Europe.

The answer mirrors the negative position towards interfaith marriage embedded in the question and, at the same time, echoes the ECFR's answer: It is forbidden, in all cases, for a Muslim woman to marry a non-Muslim man no matter what because God's authority made it clear in Qur'ān 2:221. Even so, uncertainty shadowed the "clear meaning" of the verse, and the Syrian council had a hermeneutic hesitation: Idolater (*mushrik*) does not mean Christian or Jew, neither in Qur'ānic vocabulary nor in the common usage today. Radical Islamists also call moderate Muslims idolaters (*mushrikun*) for example, a largely condemned accusation. It is also theologically and historically inaccurate to call Christians and Jews idolaters (*mushrikūn*). Having its back to the wall, the Syrian Council called in the highest Sunni authority in the field of Qur'ānic exegesis, aṭ-Ṭabarī who died in 923. Yet, aṭ-Ṭabarī himself was inconsistent as he was decisive on the general meaning of male *shirk* to mean non-Muslims while feminine *shirk* does not include Jewish and Christian women.[9] So, aṭ-Ṭabarī's authority did not give this verse the one and definitive meaning, as it was hoped for. The Syrian scholars, similarly to the ECFR, needed to cut the debate short and referred to the consensus of jurists to forbid this type of marriage, specifying that the religion or the place of living of the non-Muslim husband do not change the ban ruling. Concluding with 'God who knows best' serves to reiterate God's authority while framing the Council's decision as a religious ultimate effort to find and provide the right answer.

IV. Anthropological Implications

These two *fatāwā* have revealed several *mechanisms at work in the dominant normative discourse and practice within Muslim communities today, and which* impede on the secularization of Muslim communities. First, the Muslim clerics, whose authority is contested primarily by social realities and by

9 Al-Ṭabarī, Jāmiʿ al-bayān ʿan taʾwīl āy al-Qurʾān, ed. ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī, al-Jīza 2001, Vol. III, at 714 – 718.

modernity and secularism, take Islamic family law as a device to reassert their authority. Thus, by hiding behind a divine authority or the consensus of the jurists of the past, the cleric protects his traditional authority from competing authorities, especially from modernist intellectuals, and particularly from Muslim feminists, who voice their support for the marriage of Muslim women with non-Muslim men.

Furthermore, the *muftīs* studied above, are desperate to save the remains of homogeneity in a heterogeneous world. Islamic modern ideologies and theologies, which frame the interpretation of Islamic norms, constructed an ideal and homogenous Muslim family. We might call it the coherence obsession, perceived as a way to counter the ever-changing family structures and marriage in the Muslim world and Europe. Muslim families who migrate to Europe undergo transformations, fragmentation, breakups, divorce, problems with their children, etc. Some of the norms, which might have kept balance in the families in the Muslim countries, tend to vanish or weaken in European contexts, where women acquire autonomy and children are not subjects of control. Some questioners also express the fear of being autonomous and hence the recourse to *muftīs*.

Another factor, which contributes to this hard-line position on inter-faith marriage, is the groupthink mind-set. Accordingly, identity is perceived through opposition to alterity (Christians and Jews = the West). There are two aspects to note here. On the one hand, the ban is a form of endogamy through which the group protects itself from the infiltration and invasion of the others (the clerics stand as a guarantee of the group's identity); the female body is a forbidden sanctuary to strangers. On the other hand, the anti-Western attitude, which has its roots in culture and history, makes opposition to Western norms on family as an identity marker of the Islamic family.

One of the most significant current discussions in the anthropology of Islam is the debate between the constructivist narrative of interpretive frameworks and the discursive tradition approaches. The former maintains that "the ideas, feelings, practices, interpretations, and discourses of Muslims are to be studied as *Islams* since there is no single real or essentialist Islam based in religious texts, Islamic history and the practices of exemplary individuals. These diverse kinds of Islam are produced in society, and

embodied by individuals from various backgrounds".[10] Conversely, the discursive approach, championed by Talal Asad, claims that Islam is a discursive tradition that "[…] includes and relates itself to the founding texts of the Quran and *hadith.* This heterogeneous tradition has a past that articulates with present conditions, practices and institutions and instructs Muslims of the purposes and proper performance of practices."[11]

Timothy P. Daniels offered a reconciliatory account about how Islamic law should be understood. Daniels proposes a synthesis that views "Islamic texts as embodied with knowledge from which particular Muslims and collectivities construct diverse mental representations".[12] This approach could do justice to the importance of religious texts for believers in Islam, which makes Muslims today singular among religious believers.[13] Daniels puts it as follows:

> "Recognizing that the Quran and hadith and related textual sources embody knowledge is especially relevant to the study of *sharia*, because Muslims, directly or indirectly, look to these sources as a basis for the understandings of divine directives. Second, Muslims drawing upon knowledge embedded in religious texts, form diverse mental representations, cultural models, and embodied practices, producing a variety of local Islams."[14]

Sharīʿa claims are certainly mental representations of a traditional knowledge embedded with specific norms (us and them, authority, resources, etc.) as they are; at the same time, local productions of particular contexts and social agents. There is, however, a third variable to be taken into account in understanding the relevance of *sharīʿa* claims today: that of moral economy. The latter answers the question of "why", ignored by the two major narratives in the anthropology of Islam as well as by Daniels' synthesis. *Sharīʿa* claims are norms believed to keep the group together, both from the perspective of some members of the community and from that of the religious authorities. This discursive consensus, *surprisingly powerful*, hides a group competition (with the

10 Daniels Timothy P., Introduction: Sharia Dynamics and the Anthropology of Islam, in: Timothy P. Daniels (ed.), Sharia Dynamics Islamic Law and Sociopolitical Processes, Cham 2017, 1 – 27, at 2.

11 Daniels, *supra* n. 10, at 3.

12 Daniels, *supra* n. 10, at 3.

13 Daniels, *supra* n. 10, at 4.

14 Daniels, *supra* n. 10, at 4.

Christians, the Jews, etc.) on social and cultural levels. Thus, allowing men to marry Christian women strengthens the group with goods and children, while women are forbidden to marry non-Muslim men to keep all resources inside the community.

V. Conclusions

Increasingly, Muslim women contest to be a currency of exchange or a resource for the community and the ban on marrying non-Muslim men has been challenged (in 2017 Tunisia left the ban).[15] Perhaps, to challenge the "surprisingly powerful" discursive consensus, women are also needed as *muftīs*, within the current bodies of *fatwā* or outside. More generally, in the European contexts, producing and teaching Islamic law, in normative terms, needs to be centred on the legal rule: A *fatwā* changes as time and place change – *ikhtilāf al-fatwā bi-ikhtilāf az-zamān wa-l-makān.* This also implies that only a local religious leadership, whose link and commitment to social cohesion and modernity are prioritized, has the chance to generate and diffuse this ever-changing *fatwā.*

As a final point, clashes between Islamic norms and secular laws in Europe systematically show that the problem does not lie within the Islamic law *per se*, but in the collective and discursive appropriation of these norms by the group. This appropriation (or the need for it) makes the transition from religious law to religious ethics difficult, and the confusion reigns as ethical matters are taken for legal ones. A sustainable solution could be to move from Islamic family law to Islamic ethics, and embrace modern social norms as autonomous and conscientious subjects.

15 Avon Dominique / Saïdi Amar, The Religious Prohibition of Marriage between Muslim Women and non-Muslim Men, Quaderni di diritto e politica ecclesiastica, Vol. 22, No. 1 (April 2019), at 85–109.

Chapter Six

Marriage between Minors under German Law

Christian F. Majer

Prof Dr Christian F. Majer, University of Public Administration, Ludwigsburg.

Table of Contents

Abstract

Subject of the issue is the treatment of marriages between minors in German law. It is described how the marriage between minors is regulated in German family law, but especially concerning foreign marriages after migration to Germany. The arguments to this topic are discussed and especially the judgement of the federal court that regards the law as unconstitutional is criticized.

I. Introduction

Marriage between minors is very common around the world, although one can see a decline in numbers in southern Asia. UNICEF estimates the number to be 12 million marriages worldwide every year.[1] The minor party is usually the female, sometimes both; the marriage causes many problems

1 www.unicef.de/informieren/aktuelles/presse/2018/weniger-kinderehen-weltweit/160678 (last accessed 25 March 2019).

for them such as risks to their health due to pregnancy, handicaps their development in school and education, and often leads to domestic violence.[2] The paper discusses the legal aspects, not the cultural ones, especially the treatment under German private international law. Strong migration of countries where marriages between minors are legal in exceptional cases leads to an increase of the numbers. Civil wars like in Syria and increasing poverty of the refugees in the camps like in Turkey, in Libanon or in Jordan cause many cases, as poverty is one of the main reasons to lead a young daughter to marriage. The main question is how to treat a foreign marriage after migration to Germany.

II. Marriage between Minors under German Family Law

Marriage between minors is illegal under German family law (§ 1303 German civil law code).[3] The consequences are different for minors under 16 years of age and minors over 16 years of age. In the first case, the marriage is invalid; in the second case, it is valid but can be annulled by the court. That changed in 2017 with the law to fight child marriage. Before then, the marriage was always valid (and could be annulled by the court),[4] but it was forbidden for the registrars to contribute to these marriages (a marriage in Germany is only valid if it is registered with the Registrar's Office). An exception existed for minors over 16 years of age: They were allowed to marry with the permission of the court. The permission was granted if the wish to marry was serious and free from any influence from the family, and the relationship between the bridegroom and bride had a stable foundation; they had to have the mental maturity to be married.[5] Sexual maturity was not sufficient.

2 www.dsw.org/5-fragen-5-antworten-zu-kinderehen (last accessed 27 March 2019.

3 www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html (last accessed 20 January 2020).

4 Cf. Erbarth Alexander, in: Münchener Kommentar zum BGB, § 200 FamFG, marginal n. 33.

5 Cf. Wellenhofer Marina, in: Münchener Kommentar zum BGB, § 1579, marginal n. 6 ff.

III. Marriage between Minors in Foreign Countries according to their Law

1. Situation before the "Law to Fight Child Marriage"

Marriages in foreign countries according to their law are much more discussed and problematic. Especially with the strong migration of refugees in 2015 and 2016, many of these cases occupied German jurisprudence and administration. At that time, the measure to judge these marriages was what is known as the *ordre public*. The marriage was legal if the law of both the bridegroom and the bride regarded it as legal (Art. 13 EGBGB).[6] In exceptional cases, the foreign law was not accepted if it was contrary to the basic principles of German law (Art. 6 EGBGB).[7] The decisive aspect is not the law but the result of its application. It was discussed whether there is an age limit for the recognition of foreign law.[8] The legal consequences of the non-application of foreign law were uncertain: Finally, the Court of Appeal of Bamberg decided in the case of a Syrian man aged 21 and a girl aged 14 that the consequences must be taken from foreign law. And, according to applicable Syrian law, the marriage (with the exception of marriages between Muslim women and non-Muslim men) can only be contested (if it is consummated). According to this judgment, it is uncertain whether German authorities can challenge a marriage according to Syrian law. They would likely have completely refrained from annulments. After this case, there was a large discussion in public and the media. The legislator therefore decided to change the law.

2. Regulations of the "Law to Fight Child Marriage"

The "Law to Fight Child Marriage" states that a marriage in foreign countries according to foreign law is null and void if one member of the couple (the bridegroom or bride) is under 16 years of age and must be annulled if one

6 *Supra* n. 3.

7 *Supra* n. 6.

8 Cf. *Rohe Mathias*, Das islamische Recht, München [3]2011, at 356; Majer Christian F., Anerkennung einer ausländischen Minderjährigenehe, NZFam (2016), 1019 – 1022, at 1019, 1021.

party is over 16 and under 18, with exception of exceptional hardship (deadly diseases or threat to commit suicide; in the case of a European citizen, also other circumstances due to the European principle of freedom of movement that possibly demands that marriages from other countries in the European Union be recognised). However, this will only take place if the couple takes up a habitual residence in Germany and one of them is a minor at that time. In many cases, the bride married as a minor and came to Germany as an adult – the law will then not be applicable and the marriage is valid.

The law was heavily attacked by public associations and legal science.[9] It was criticised that the law produces limping marriages, meaning that they are valid in one country and null and void in another. It was also criticised that there were no exceptions for cases where one party is under 16 years of age. Most of the critics are concerned about the consequences: the party under 16 years of age (usually the female) has no rights to alimony or distribution of surplus. The Federal Court even regarded the law as unconstitutional and therefore submitted it to the Constitutional Court, which now has to decide.

3. Problems of the Legal Revision and Discussion

a. Alimony and other Consequences of Marriage

One of the biggest problems of the law is the absence of regulations concerning alimony and other legal consequences of marriage. While they are provided in the case of annulment of marriage (i. e. for people 16 – 18 years of age) according to § 1318 BGB,[10] there are no such regulations for void marriages, i. e. according to the law if one member of the couple is under 16 years of age. The practical relevance is very low as both parties usually live on social benefits after coming to Germany. Furthermore, legal rights exist for a woman in the case of motherhood according § 1615 l

9 Cf. *Coester-Waltjen Dagmar*, Minderjährigenehen – wider den "gesetzgeberischen Furor", IPRax, Vol. 2 (2019), 127 – 132, at 127 ff.; Frank Rainer, Ausländische Minderjährigenehen auf dem Prüfstand des Kinderehebekämpfungsgesetzes: insbesondere zur Heilungswirkung nach Art. 229 § 44 Abs. 4 EGBGB und zur Rückwirkungsproblematik, StAZ, Vol. 7 (2018), 1 – 5, at 1 ff.; *Schwab Dieter,* Die verbotene Kinderehe, FamRZ, Vol. 17 (2017), 1369 – 1374, at 1369 ff.

10 *Supra* n. 3.

BGB.[11] But the problems nevertheless exist. For this, we have to take a look at the reason behind the law. Marriages between minors under 16 years of age should not be void by the courts because that would be a heavy burden for the minors at that age. Therefore, the legislator wanted to avoid lawsuits and, consequently, these marriages should be null and void. It is thus possible to apply these regulations by analogy.[12] Problematic is the case of an unknown minor marriage: If the couple separates after 20 years of living together, there is no alimony or distribution of the surplus for the whole time; the analogy cannot help here for the time is the beginning of habitual residence is Germany. But the same problems exist on a non-marriage due to error concerning formal requirement in foreign countries.

There is also criticism of the fact that children born in the marriage are illegitimate because, according to § 1592 BGB,[13] the father is the husband in a marriage. However, this paragraph regards him as the father because of presumed paternity and does not require a valid marriage. The practical relevance also is very low: The father can acknowledge paternity with the agreement of the mother, § 1592 Nr. 2 BGB (without this, he can claim paternity in court, § 1592 Nr. 3 BGB)".[14,15]

b. Welfare of the Child

The Federal Court also criticised the fact that the law disregards the welfare of the child by declaring marriages as null and void without exception when one member of the couple is under 16 years of age.[16] However, this is not true: If the marriage is void, the minor is under the guardianship of the welfare office or another legal guardian. The guardian has to decide whether it is in the welfare of the child to meet the husband. It can sometimes be useful to allow them to meet (if both of them want to meet!) as they may have no other contact persons in Germany and it would be traumatic to

11 *Supra* n. 10.

12 Cf. Weller Marc-Philippe / Thomale Chris / Hategan Ioana / Werner Jan Lukas, FamRZ (2018), 1289 – 1298, at 1295; Majer Christian F., Das Kinderehenbekämpfungsgesetz im Kreuzfeuer der Kritik, NZFam (2019), 659 – 662, at 659.

13 *Supra* n. 3.

14 *Supra* n. 3.

15 Cf. Majer, supra n. 12, at 659, 662.

16 Cf. Löhnig Martin, Ist Art. 13 III Nr. 1 EGBGB verfassungswidrig?, NZFam, Vol. 2 (2019), 65 – 72, at 65.

be separated. However, simultaneous efforts should be made to enable education, especially for the girl, as it is very difficult for her to manage during pregnancy and motherhood.

c. Fundamental Right

The Federal Court claims that the law violates the fundamental rights of the couple to live together as a married couple. This argument ignores the fact that it is not necessary to be married to live together. Furthermore, the Federal Court ignores the fundamental rights of the minors to sexual self-determination and sexual development.[17] These demand that the minor be protected from pregnancy and motherhood. In addition, despite the marriage being void, it is possible to apply some of the legal consequences of the marriage that the constitutional court demanded in the case of a non-marriage due to formal error. It is thus possible to apply the legal regulations concerning alimony and heritage, despite the marriage being null and void, without any obligation to live in a sexual partnership. This obligation is the most problematic aspect of marriage between minors. It cannot be implemented under German law or by the man as rape is also a crime within a valid marriage in Germany and these regulations are, without any doubt also applicable to foreigners that live in Germany. However, in this case, according to their own cultural and religious traditions, many of them believe it is their duty to have a sexual partnership together, even if they do not want to.

d. Punishment of the Abuse of Children according to § 176 German Criminal Code[18]

Furthermore, the relationship between the law and the punishment of child abuse (i. e. one person is under 14 years of age) is not clear. The regulations of the German Criminal Code state that it is always a crime to have sexual relations with a person under 14 years of age. According to § 3 of the German Criminal Code,[19] this law is applicable to all cases that occur in Germany without any difference between Germans and foreigners. In the

17 Cf. *Di Fabio Udo,* in: Maunz Theodor / Dürig Günter (eds.), Grundgesetz Kommentar, München 2019, GG Art. 2, marginal n. 202.

18 www.gesetze-im-internet.de/englisch_stgb (last accessed 20 January 2020).

19 *Supra* n. 18.

past, the leading opinion in German legal science was that marriages where one party was under 14 years of age were not valid.[20] With the decision by the court of Bamberg, there is no longer consensus here as the legal consequences are now uncertain. Without the law, these marriages will be accepted in administration and it is not likely that the regulation forbidding sexual relations will be accepted by the couple and then prosecuted. The sexual abuse of children that is prohibited by law would probably be accepted.

e. International Public Law

The German Federal Court and several legal experts claim that the law, with its rigid regulation, violates the UN Convention on the Rights of the Child, which demands that the welfare of the child has to be decisive in each individual case. Apart from the fact that rigid regulations to protect the child are common in most nations (this argumentation would be applicable to any rigid regulation, i. e. also to § 1303 German Civil Code[21] and § 176 German Criminal Code[22]) and that there is the possibility of living together without being married (if the guardian allows this), it must be examined whether this regulation is applicable.

Art. 16 CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) may be a *lex specialis* for this; the regulation demands:

> "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."[23]

Although the age at which these regulations should be applicable is not defined, it is clearly demanded that there must be a regulation concerning the nullity of child marriage. The previous legal situation in Germany did not have this, according to the Court of Appeal of Bamberg.

20 Cf. Erbarth, supra n. 4.

21 *Supra* n. 3.

22 *Supra* n. 18.

23 Cf. *Nehls* Benedikt, Zur Frage der Anwendung des Ordre-Public bei Minderjährigenehen, ZJS (2016), www.zjs-online.com/dat/artikel/2016_5_1051.pdf (last accessed 20 January 2020), 657 – 662, at 662 [translation by the author].

IV. Result

The German "Law to Fight Child Marriage" has several problems and contradictions. Nevertheless, it was necessary to protect children's fundamental rights. Its problems can be solved by means of interpretation and analogy. It does not violate fundamental rights, contrary to the statement by the Federal Court. Without the law, there would be no protection of children against sexual abuse in marriage. And of course the interests and the welfare of the child is the decisive point to regard the issue, not any political attitude towards immigration or Islam.

Finally, allow me to report on one practical case that shows that the law is not against the will of the child in every case. A 15-year-old Afghan girl was married to a 17-year-old Afghan man when coming to Germany. After hearing that their marriage is not valid, she immediately separated from her husband. She now attends school and meets with her friends, just like other girls her age usually do here.

Chapter Seven

The Imprint of *Sharīʿa* on the Tunisian Family Code: Is it Possible to Reconcile the Irreconcilable?

Naila Silini Radhoui

Naila Sellini Radhoui is a University Professor at the University of Sousse, President of the Research Unit: Legislation on the Personal Status; and President of FACT: Arab Forum for Citizenship in Transition, Tunis. She holds a Doctorate in the field of Qur'ānic exegesis. She is member of the advisory board of several national and international organization and academic institutions.

This article has been translated from French by Emily Pollak, and revised by the author herself.

Table of Contents

Abstract

This article argues that the Tunisian Personal Status Code of 1956 represents a form of division of roles between Bourguiba and his modernist allies and the scholars of the orthodox conservative Institution of az-Zeitouna. While Bourguiba took over the subjects of the prohibition of polygamy and the registration of divorce under the jurisdiction of the civil courts, the traditional religious institution i. e. the ulamā of az-Zeitouna assumed the right to legislate in the field of inheritance, based on the sharīʿa. This divergence led to the interrogation on whether choosing a code that is moulded to accommodate the spirit of modern times and at the same time the precepts of classical sharīʿa would be capable of reconciling the irreconcilable, the legal norm and the religious norm? Can such a code

reach egalitarianism? These questions will help to better understand the characteristics of Tunisian personal status (CPS) of 1956 and respond to the ambiguous nature of this code.

I. Introduction

The Tunisian Code of Personal Status (CPS) of 1956, as a major achievement in the field of women and family rights in the Arab World in the new era, is still a milestone in the debate on gender equality, women rights and human rights in this region. This constitutional text distinguishes itself from classical *sharīʿa* laws in several aspects and defies traditional religious authority. It goes without saying that this code of laws provided (and still provides) a model for other Arab women, due to the universal principles embodied in its laws, which are oriented toward a balance between positive laws and classical Islamic jurisprudence. It is mainly from this angle that this undertaking of the former Tunisian president Bourguiba[1] should be understood; it was nothing else than "an attempt to build in Arab-Muslim lands a rational legal type of state", to "conform to the canons of Western modernity".[2] It is within the context of this thorny attempt that we address the question of the *sharīʿa* imprint on the Tunisian family code. This attempt is complicated by the confrontation between the principle of guardianship (*wilāya*) enacted by *fuqahā* (juridical scholars), which has been incarnated in the Arab thought for generations, and the lines of thought taken up by enlightened intellectuals. This latter group was/is of the conviction that Arab modernism cannot achieve its goals without both a modern approach to the Qurʾān and an analysis of the Tunisian cultural heritage that is carried out using the tools of contemporary thought.

1 The Tunisian Code of personal Status is attributed to the former president of Tunisia Habib Bourguiba (1903 – 2000) who initiated it. This code represents till nowadays a prototype for other activists of human and women rights in the Islamic world. This code has been developed and amended in the last decades.

2 Stora Benjamin, Review Camau Michel, Tunisie au présent. Une modernité au dessus de tout soupçon? Vingtième Siècle. Revue d'histoire Année (1988), 144 – 145, at 145 (books.openedition.org/iremam/2546) (26 March 2020).

II. A Few Preliminary Remarks

Any analysis of the ambivalence contained in the Tunisian Code of Personal Status firstly requires some initial remarks. First, Habib Bourguiba's 1956 initiative can in no way be compared to the laws imposed by the former Turkish nationalist president Kemal Atatürk (1881 – 1938), who did not take much time to implement radical change in the existing regime towards a break with historical and traditional religious references. In the Turkish case, this change resulted in the removal of the religious reference of Islamic law, which was replaced by a completely different legislation drawn exclusively from the Swiss civil codes. Bourguiba had great admiration for the Turkish leader; he was not only affected by his innovative and revolutionary ideas, but even fascinated by his personality and leadership as well. Despite this admiration, the Code of Personal Status in Tunisia anchors itself in continuity with earlier Islamic tradition far more than did the overhauls of family law in Turkey. It is within this context that we must read the communiqué of the Tunisian Ministry of Justice which in 1956 accompanied the promulgation of the Code of Personal Status. This stated, with neither equivocation nor ambiguity, that the provisions contained in this Code were drawn from the principles of Islamic law and the fundamental precepts of Islam. In fact, this communiqué was a faithful translation of the true face of the Tunisian Code of Personal Status. Indeed, the Code tends to be aligned with the general spirit maintained within an Islamic frame of reference; it does not seek in any way to distance itself from historical references nor to break away from its Islamic roots. Proof of this lies in clear traces of Islamic law affixed within the Code. Even innovations introduced by modernist legislators, whose number has been steadily increasing ever since, seem to be far from offending the fundamental precepts of the Islamic religion.

Second, the Maliki and Ḥanafi scholars of the Bey court of that time reacted virulently to Bourguiba's initiative, even anticipating the bill that the modernist politicians intended to promulgate. The Bey appointed Sheikh Mohamed Abdelaziz Djaït (1886 – 1970), who was already occupying the post of Minister of Justice in July 1947, to form a commission composed of magistrates from both the *sharīʿa* court (*maḥākim sharʿiyya*) and the civil court, i. e. sheikhs and lawyers. The commission was tasked with drafting a code of Islamic family law, based on Maliki and Hanafi jurisprudence. Thus, on 2 September 1948, a so-called *Sharīʿa code* was enacted and

published in the Tunisian Official Gazette on 16 July 1949. In effect, Bourguiba found himself being forced to confront both the sheikhs of Zeitouna and the Beylical authority, who were united against this modernist project. In reality, Bourguiba had little time to act quickly and take advantage of the circumstances and opportunities that were barely available to him. It was in this turbulent context that he set out to realise his modernization project.

The remarks listed above allow us to conclude that the Tunisian Code of Personal Status of 1956 has had to face several obstacles, especially on the part of religious and conservative actors firmly implanted within Tunisian society. Furthermore, Bourguiba had no other choice but to collaborate with these individuals and continue along the same approach laid out by the *beys* through involving them in these societal projects.

The Code of Personal Status was enacted following the Beylical Decree of 13 August 1956, promulgating the Code of Personal Status (JORT N° 66 17 August 1956). The preamble emphasizes the fact that the CPS was the first legal text signed by Bourguiba following independence; he did so jointly with Mohamed Lamine Pacha Bey prior to the transition from monarchy to republic. A circular from the Ministry of Justice dated 3 August 1956, the occasion of the promulgation of the CPS, states the following:

> "Reflection on the elaboration of a personal status code has been going on for a long time, but for various reasons the question did not move from reflection to action until 1948, thanks to Sheikh Mohamed Abdelaziz Djaït ... The project only came into being after the advent of independence ... The Ministry of Justice has therefore thought of reviving the project ... To do so, judges have been appointed, who prepared a new code in a modern mould in harmony with the times and not going against the precepts of the Muslim religion ... No wonder that we managed to set up a code that satisfies everyone, This is because we have drawn from the pure and constantly renewed sources of the Muslim region, without restricting ourselves to a specific school of law or to the opinion of a specific category of jurisconsults."

This sort of preamble indicates that the political will of the times was to protect the provisions of the code from any possible recourse that would have considered them contradictory to religious law, as well as to demonstrate that they had been devised through the method of innovation (*ijtihād*). Was Bourguiba therefore anxious for these new legal texts to be published with theological support from contemporary Māliki scholars? Moreover, did he intend, by involving Sheikh Djaït in the

preamble, to overcome the disagreements that had stemmed from the religious authorities represented by the Beylical court?

Noteworthy is that the adoption of Maliki jurisprudence as a matter of principle for the CPS has not prevented the legislature from drawing on other Muslim schools of law such as Ḥanafism or Shiʿism which, in fact, sought to limit discrimination between the two sexes in many aspects. Although the Code of Personal Status entered into force on 1 January 1957, it only became an applicable law after nine months, on 27 September 1957, the date of the unification of the judiciary. Mohammed Bouguerra remarks that the CPS was conceived only for Muslim citizens of Tunisia, he argues:

> "And throughout this period, only Tunisian Muslims were subject to the provisions of the Personal Status Code. Article 3 of the decree promulgating the said code provided a transitional status for Tunisian nationals of the Jewish community, which lasted until 27 September 1957 and allowed them to remain, throughout this period, governed by the provisions of Mosaic law and subject to the rabbinic courts in matters of personal status. Only those who expressed the wish to come under the aegis of the Code of Personal Status would have this code applicable to them. However, in order to do so, they had to make an express request in accordance with the requirements of article 5 of the above-mentioned decree."[3]

As for the Tunisians, who were

> "[…] subject, in matters of personal status, to the French courts of Tunisia, which applied to them French substantive law, their submission to the Personal Status Code could not have taken place until 9 July 1957, the date on which the Franco-Tunisian Convention which was signed abolished the French courts in Tunisia."[4]

Thus, it can be said that the general character of these codes oscillates between rupture from and continuity with the typical model developed out of *fiqh*, based on the predominant male authority. Although several provisions are repealed by other codes that draw on positive law, such as the raising of the age of consent to marriage, the abolition of repudiation, and the right to adoption, the provisions pertaining to women has retained the traditional model, particularly in certain areas governed by male privileges. Much work undertaken during those years and since has

3 Bouguerra Mohamed, Le code du statut personnel, un code laïc?, www.juragentium.org/topics/med/tunis/fr/bouguerr.htm (26 March 2020).

4 Bouguerra, *supra* n. 4.

focussed on the discriminatory aspects that still remain in the general spirit of this code. However, throughout the years, a modernist current has been strengthened and has led to the orientation of the code towards more equality, non-discrimination and freedom. This trend has focussed on four issues: inheritance, adoption, filiation, and marriage between a Muslim woman and a non-Muslim man. Therefore, establishing a study on the ambivalent nature of the CPS leads us to an expansive and complex subject. Now we turn to the element of inheritance, which has become a focus of the debate on the reform of the CPS in recent years.

III. The Imprint of *Sharīʿa* in the CPS: Inheritance as a Case Study

Any researcher would be able to detect a sort of division of influences in the CPS. Bourguiba and his modernist allies were responsible for the prohibition of polygamy and the registration of divorce under the jurisdiction of the civil courts in 1956, while the traditional institution of the Zeitouna claimed the right to legislate in the field of inheritance based on *sharīʿa* principles. Thus, the Tunisian Code of Personal Status of 1956 is hardly different from the legislations concerning personal law which are in effect in other Arab countries. Yet, according to testimonies, Bourguiba was aware that the subject of inheritance would be an obstacle to the achievement of equality between women and men. As a case in point, the former president Béji Caïd Essebsi (passed away in 2019), then a young lawyer, recalls that Bourguiba had summoned him in the spring of 1956 to brief him on the CPS project. Essebsi claims that Bourguiba felt it was necessary to enact laws supporting gender equality without delay to prevent the project from failing.[5] This is precisely what transpired with regard to inheritance law. Indeed, the sheikhs of the Zeitouna had designed their laws from a purely theological angle. Essebsi reports that they avoided raising the issue of

5 Béji Caïd Essebsi, who became president of Tunisia 2014 saw the context of the revolution of 2011 as an opportune moment to achieve what Bourguiba was not able to do and launched a complain aiming to amend the existing inheritance law in order to achieve equality between men and women. He relied on existing popular support for a more egalitarian legislation.

inheritance, or replied that it was still under review whenever Bourguiba expressed his concerns. Bourguiba contracted Parkinson's disease in 1973, and the file on the revision of the law on inheritance was definitively closed. It is only from the 1990 s onwards that renewed calls for the revision of these laws drawn from the premodern Islamic *fiqh* emerged. Such is the genesis of the Code of Personal Status, a genesis that testifies to the political capacity of Bourguiba and his associates, imbued with the spirit of positive laws that aspire to full equality between men and women. However, the legitimate questions still persist: how does the CPS differ from the provisions of Islamic legal codes? Would a code that is able to simultaneously accommodate the spirit of modernity and *sharīʿa* precepts be able to reconcile seemingly irreconcilable modern legal conceptions and the classical religious norms? Could it engender an egalitarian code? These questions will make it possible to better identify the characteristics of Tunisian personal status and to respond to the ambiguous nature of the CPS.

In reality, the spirit of classical Islamic law informs over all codes of personal status. It is present in the various concepts that have been laid out. The drafters took up a legal lexicon that is detached from *sharīʿa* and injected it into the legal vocabulary they employed. This resulted in an obstruction that caused an uncomfortable ambiguity which, in turn, stifled personal status, especially since this ambiguity was marked by a tension between the traditionalist patriarchal model and the aspiration to full equality between men and women.

> "The imprint of classical Muslim law appears, first of all, through the style used by the drafters of our code. Sometimes archaic, complex and esoteric to the point of being incomprehensible, the style with which some articles were written is reminiscent of the style commonly used by Muslim jurisconsults."[6]

We need only to cite a few examples to prove this, such as Article 146, which concerns the division of the shares of the heirs borne by a woman who leaves her husband, mother, sister, and grandfather. This case is known in classical jurisprudence as *al-akdaria.* The Tunisian Code adopts this case and injects it into Article 146. In fact, this article focuses principally on a legal aspect that the elders refer to as فرع. – *farʿ:*

6 Bouguerra, *supra* n. 4.

> "If a woman dies, leaving as joint heirs a husband, a mother, a first or consanguineous sister and a grandfather, the husband shall take one half, the mother one third, the sister one half, the grandfather one sixth, the shares of the sister and the grandfather shall be united and divided according to the rule attributing to the heir of the male sex the double share of a woman."[7]

Could this accommodation to *sharīʿa's* precepts inhibit this code's capacity to engender development and modernity? Does it negate the merit attributed to Bourguiba and his associates? The Act of 19 June 1959 can thus be described as the first promotion of equality of women with men with respect to inheritance. According to the provisions of this law, the legislature added article 143 bis to the CPS, on the theory of "return" (الردّ) which stipulates in its final paragraph that,

> "[t]he daughter or daughters, the granddaughter or granddaughters of the paternal lineage to infinity, benefit from the return of the surplus, even in the presence of agnate heirs by themselves, from the category of brothers, paternal uncles and their descendants, as well as from the treasure."

Therefore, following 19 June 1959, in the case of open succession, the daughter (or daughters), in the absence of a brother, inherits the rest of the estate in addition to their share, in accordance with the right of return. The daughter thus dispossesses (total dispossession: *hajb/hirmân*) the agnate heirs who, since the promulgation of the law, no longer inherit shares of the estate.

These entities are as follows, according to their relationship to the deceased: father – paternal grandfather – grandson on the son's side – brother – consanguine brother – son of brother – son of consanguine brother – uncle – consanguine uncle – first cousin – descendant of consanguine brother – in addition to the treasury. In short, the daughter – if she is the only daughter – inherits the entire estate of her mother or father, i. e. she inherits half of the estate's assets. In the case of several daughters, they

7 Original text: الفصل 146 من المجلّة
إذا تركت المرأة زوجا وأما وأختا شقيقة أو لأب وجدا فللزوج النصف وللأم الثلث وللأخت النصف وللجد السدس لكن يجمع ما ينوب الأخت والجد ويقسم بينهما للذكر مثل حظ الأنثيين
The reference for this article is the *akdaria:*
وإذا كان زوج وأم وأخت وجد ، فللزوج النصف ، وللأم الثلث ، وللأخت النصف ، وللجد السدس) ثم يقسم سدس الجد ونصف الأخت بينهما ، على ثلاثة أسهم ; للجد سهمان ، وللأخت سهم ، فتصح الفريضة من سبعة وعشرين سهما ، للزوج تسعة أسهم ، وللأم ستة ، وللجد ثمانية ، وللأخت أربعة

inherit two-thirds of these assets. The remainder shall be returned to her (or them) after having given the rightful heirs their share, distributed in proportion to their shares.

These entities are according to their relationship to the deceased: mother – father – grandfather – grandmother.[8]

Tunisian law has also established compulsory legacy: a bequest that the law imposes on the estate of the deceased person and which it has made compulsory to execute, even if the deceased had not made the bequest. Thus, in certain cases, the law grants a share to certain individuals who are not heirs. These cases must comply with the conditions laid out in Articles 191 and 192 of the CPS, as amended by Act No. 77 of 19 June 1959. Legacies, now a branch of inheritance, are therefore obligatory for legatees who would not previously have inherited any shares of the estate, such as the male or female descendant of the daughter, or for heirs preceded by another heir such as the descendant of the son or the daughter of the son, if there is a male who dispossess them (a total dispossession) from inheritance.

Examples of improvements in the context of compulsory bequests include the case of grandsons who do not take a share of the estate in the form of a compulsory bequest in the absence of the uncle who would have dispossessed them from the inheritance, but rather inherit shares from their grandfather as agnates.[9] Here it is important to note that, contrary to the inheritance rule according to which the daughter's descendant has no share as a uterine relative, in the case of compulsory bequest, if the daughter died before her testator, all her descendants will be entitled to a compulsory bequest proportional to their mother's share, provided they do not exceed one-third.

Thus, the law seeks to reconcile compulsory legacies with the obligation not to dispose of more than a third of one's patrimony according to one's will (see art. 179 of the CPS).

On the other hand, the compulsory legacy has no standing if the grandfather transfers to them a property via a will during his lifetime, or offers them the equivalent of the compulsory legacy. Here again, a distinction must be made

8 See wrcati.cawtar.org/index.php?a=d&faq=178 (last accessed 10 March 2020).

9 See Arrêt de la Cour de Cassation Civile N° 50749 du 24/02/1998.

between compulsory bequests and what was known as *tanzīl*, inheritance by substitution or representation. This concept is connected with the *fiqh* codes that consider the *tanzīl* to be a kind of legacy deducted before the distribution of estates, which means that its prior regulation affects all heirs. But the *tanzīl* is no longer in effect since the promulgation of the CPS on 1 January 1957. Contracts concluded in this way are no longer feasible and are considered to be fundamentally invalid, since the aforementioned Code has substituted it for Art. 191 of the CPS, which covers the compulsory legacy for grandsons.[10] Thus, within the application of the rules governing compulsory legacies, the provisions of Art. 87 must be applied, which stipulates:

> "The burdens on the estate shall be paid in order of priority as follows: (a) burdens borne by the real property making up the estate; (b) funeral and burial expenses; (c) certain claims against the deceased; (d) valid and enforceable legacies; (e) inheritance."

It should be noted that legacy in this article comes before inheritance, whether it (the legacy) be compulsory or voluntary. This article confirms what is cited in art. 191:

> "[T]he children, whether boys or girls, of a person who dies before or at the same time as their forefather, shall receive a compulsory bequest equivalent to the share of the estate that their father or mother would have received if they had remained alive."

However, heirs may transfer to the legatee the whole of their father's or mother's share, provided that the surplus exceeding one-third of the succession constitutes a valid bestowal for the person who consents to it and is entitled to bequeath his estate. In this regard, it should be further noted that when the legatee is an only grandson or an only granddaughter – and here the law regards the grandson and the granddaughter as equals – he alone inherits the legacy; yet, if the compulsory legacy is in favour of several grandsons, it is divided according to the rule attributing "to the male heir a share double of that attributed to a female heir". This rule shows that compulsory legacy counts as inheritance even if the law considers it to be part of a testament. In fact, compulsory legacy by bequest corresponds to the deceased heir's share of the inheritance shared between his children according to inheritance law, which makes the son's or the son's descendant's share double the share of

10 See Arrêt de la Cour de Cassation Civile N° 56816 du 11/03/1997.

the daughter or the son's daughter. Finally, in the event of legal concourse, compulsory bequest takes precedence over voluntary bequest. In this case, bequest must first be executed. However, if the legacy is less than one-third of the inheritance, the remainder of that third will revert to the legatee by voluntary bequest. As for the surplus of the third party, it is subject to the general rules of legacies; the surplus is executed only in the case of the legatee who consents to it and is entitled to bequeath it. These are the most important issues that have characterized inheritance law in the CPS. But despite efforts made to reduce gender inequalities, its content remains below the expectations held by Tunisian society today, hence the call for its revision despite the fact that its approaches are revolutionary in comparison to Arab countries.

We have raised the issue of inheritance since whenever the possibility of reconsidering certain articles of the Tunisian Code of Personal Status arises; the problem of inheritance is the subject of controversy animated by individuals and different sensibilities. Moreover, whenever concepts relevant to the concerns of civil society and the modern state, such as equality and freedom, are discussed, the issue of inheritance also resurfaces. Thus, each time the question of how to apportion inheritance is raised, individuals of differing sensibilities have seized upon it, taking positions that challenge one another; some are in favour of it, others are against it, and still others go so far as to accuse all those who dare to question it of impiety. It appears as if the apportioning of inheritance has become a corollary of faith, as if faith was displayed through recognition of the current law and an avoidance of questioning.

In this context, many questions arise: how to explain the sensitivity of the gender issue whenever the question of inheritance is debated. Why questions of faith and piousness have become important in this regard? This is the reasoning we have been accustomed to rely upon in the face of any reading that tends to restrict equality between men and women to laws and provisions. And, if we are to overcome this obstacle, we must have the courage to turn these assumptions around and work to deepen the general debate about religiosity and piousness. We must strive to do this with a unified commitment to the adoption of a sincere attitude that, beyond any ideology, would strengthen our determination to help one another contribute to forming a better society.

Indeed, we believe that the question of inheritance is a living example, among many others, which should be the subject of careful examination so that a new approach can be initiated in this field, one that would release our societies from the straitjacket of the appearance of an innovative reading, but which is quite simply rigged, and which feeds, in man, a pathological fear of his fellow 'enemy'. We are well aware that this is a rather complex subject, given that this method of apportioning inheritance is a system that has remained closed for fifteen centuries. Furthermore, it should be underlined that orthodox religious scholars have become more and more powerful these days; many among them became aggressive toward any desire to revise laws. This attitude reflects the confusion and anxiety of Tunisians who have discovered that the new Tunisian Constitution of 2014 could in no way meet societal expectations and evolutionary imperatives, and that the Code of Personal Status (CPS) of 1956, has become an obstacle against the will of Tunisian women, who are reaching toward equality with men – full equality without conditions or exceptions. No one can deny that Bourguiba consciously left loopholes in the articles of the CPS in the 1950 s, in the hope that they might inspire future generations to emancipate themselves from the tutelage of the *faqīh* and a mentality that is subject to traditional references.

In this regard, we believe it is legitimate to reconsider the current apportionment of estates in Tunisian inheritance law. Our main concern is to be able to contribute to restoring the individual freedom to bestow property as (s)he see it, and to judge for her/himself whom is more deserving of being entrusted with it, regardless of any religious, tribal or cultural considerations.

Chapter Eight

Between State Law and Religious Law: Islamic Family Law in Turkey

Ahmet Temel

Ahmet Temel, PhD in Religious Studies at UC Santa Barbara, currently Assistant Professor at Istanbul University, The Department of Islamic Law.

Table of Contents

Abstract

This paper considers the history of Islamic family law and its current applications in Turkey. As the heir of the last Muslim empire, the Ottoman Empire, the Republic of Turkey chose an abrupt revolution in its legal system; in 1926, it cut all ties to Islamic law, which was the main law of the land during the Ottoman Empire. Secularization of the law was not uncommon among modern nation states including those, which had Muslim majority populations. However, most of these Muslim majority states allowed Islamic law to govern the private law area, especially family laws. By contrast, the young Republic of Turkey did not allow this to happen and adopted the Swiss civil code including family law with limited revisions. Despite this rushed revolution, practices emanating from Islamic family legal norms did not cease among the people and continued until now. This created a dichotomy in the lives of people between applying Islamic family law and abiding by the secular civil code, which has caused several multi-dimensional legal problems in the areas of marriage and divorce, as well as their legal consequences in the areas of financial support and child custody. For the first time in republican history, in 2017, the government authorized muftīs to solemnize marriages. This is seen as the only direct authority given

to muftīs in a legal matter, which indirectly opens a door for applying Islamic family law in modern legal life in Turkey. In addition, family mediation will soon have some presence in the legal system. There is no direct reference, however, to Islamic family law in government official documents congruent with these recent developments. There also is significant potential for incorporating the principles of family mediation and arbitration (taḥkīm) based on Islamic legal principles. This paper first gives a brief history of Islamic family law in Turkey as well as its effect on the civil codes and applications and then evaluates these recent changes. These are preceded by a brief note on the constitutional and legal frameworks currently in force in Turkey.

I. Turkey's Constitutional and Legal Framework

Leiden University Press published a book consisting of twelve different papers examining *sharīʿa* in twelve different countries.[1] All papers shared the same title as "*Shariʿa* and National Law in X", with only one exception: The title of the chapter examining Turkey is "Islam and National Law in Turkey". The reason is explained as follows:

> "The main reason is that the secularі[z]ation of the law was largely complete after the declaration of the Republic and the abolishment of the constitutional clause that identified the state's religion as Islam. The rules of shariʿa have not played any role since this process was completed about ninety years ago."[2]

For the argument of the demise of *sharīʿa*, the Republic of Turkey probably is one of the first countries among Muslim majority countries that will come to mind as an excellent example. With its radical and abrupt break from Islamic identity and change to a coercive-secularist identity during its very foundational stages, anti-Islamic rules and regulations such as the ban on *ḥijāb* that have lasted until recently, and its long lasting desire to be

1 Otto Jan Michiel, Shariʿa Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and the Present, Leiden 2010.

2 Koçak Mustafa, Islam and National Law in Turkey, in: Jan Michiel Otto (ed.), Shariʿa Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and the Present, openaccess.leidenuniv.nl/bitstream/handle/1887/21170/file221087.pdf?sequence=1 (last accessed 17 January 2020), Leiden 2010, 231 – 272, at 268.

known as a part of the Western world rather than the 'backward' Muslim world in founding figures' understanding, Turkey stands as the main example of *sharīʿa*-phobic Muslim majority states.

However, even if there was a significant power to shape the legal system at the hands of the founding fathers of the Republic, these were not able to change the society top–down. Many topics of family law continued to be applied and some of them are still being applied according to Islamic law among the people. At first, since the education of judges and jurists of the time included elements of Islamic law, while the center of their education was the continental European law, they were also taking Islamic law into account. Yet, over time, the courts abandoned Islamic law completely and refrained from making any reference to it in their judgments. This created a gap between people and the applications of court decisions, which aimed to follow state law. The majority of people have been inclined to follow state instructions in order not to face legal difficulties, but they have been giving more importance to Islamic rules governing the family. To the present day, this gap is still there. Despite its long lasting administrative power, the ruling party, in spite of its Islamic inclinations, tends to refrain from making even the slightest reference to Islamic law for any legal topic. On the other hand, it seems that there is a growing public demand for more public appearance of Islam including the realm of laws.

The rest of the paper will investigate this gap by first looking at the historical background of Islamic family law in Turkey, then at the recent developments regarding Islamic family law.

II. Historical Background

1. An Overview of Ottoman Family Law

Ottoman Empire recognized *sharīʿa* as the main law of the land. Even though there were some codes announced by sultans on certain topics, mostly on taxes and punishments; *qāḍīs* were supposed to apply Islamic law, the

Hanafi School of Islamic law, to be more specific, in the court.[3] In addition to applying Islamic law in courts, the culture and the custom of the people were mostly governed by Islamic law. Since Islamic law is not only practiced law in courts, but also a body of normative rules that a Muslim should abide by in his personal and public life, it is not surprising that family issues such as wedding ceremony, ethics in family etc. were governed by Islamic law among Muslims outside of the courts as well.

Pre-modern Ottoman law was mostly based on *sharīʿa* that is the law of jurists. Learned jurists used to decide what law is and to resolve legal matters based on the abundant Ḥanafī legal literature. There was not a codified text to derive law from. The judge was the one who used to issue judgments. There was not even a court house, mostly the house of the judge and sometimes a mosque used to serve as a court house until 1837.[4] However, beginning with the 16th century, a certain degree of evolution from jurist's law to code-based law began to take shape.[5]

The role of state in legislation was a continuous debate in the early Islamic legal history and the jurists strongly dismissed the state authority in legislation during that time. The state's role was restricted to appointing *qāḍīs* (judges). In principle, this appointment should have been regardless of the school of the judges and the judge would issue his judgments independently based on *ijtihād*. Yet, especially after the flourishing of certain schools of law in certain regions, this appointment became an indirect means of state intervention in the overall legal structure. The recent research has demonstrated that Ottoman state tried to keep family law under its control through the power of the *qāḍī*. Historical data can be traced back even before the Ottomans and proves the demand to give the authority to solemnize the marriage to the *qāḍīs*.[6]

3 In regions where the majority of the population belongs to another school of law, the state used to appoint a vice-*qāḍī* belonging to the same school to take care of their cases.

4 Ortayli Ilber, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı [Kadıs as Legal and Administrative Figures in the Ottoman State], Istanbul 2016, at 60.

5 Aydin Mehmet Akif, Islam Hukukunun Osmanlı Devleti'nde Kanun Hukukuna Doğru Geçirdiği Evrim, Türk Hukuk Araştırmaları, Vol. 1 (2006), 11 – 21, at 11.

6 Jaeschke Gotthard, Türkiye'de İmam Nikahı,in: Ahmet Memcu (ed.), Sabri Şakir Ansay'ın Hatırasına Armağan, Ankara 1964, 11 – 31, at 12.

2. *Tanẓīmāt* and Codification

Before the codification of the *Majalla*, two different suggestions were competing between adopting European laws and codifying *sharīʿa* in modernizing the legal system. After *tanẓīmāt*, adopting European, mostly French laws and legal systems and establishing new courts in addition to *sharīʿa* courts were occupying increasingly more space in the legal sphere. In 1840, 1851 and 1858 new penal codes were adopted from France.[7] The new Commercial Code of 1850 was based on French Commercial Codes. The code for commercial maritime laws of 1863 was also based on multiple European codes.[8] In 1867, the jurisdiction of *sharīʿa* courts was restricted to family, inheritance, endowments, and punishments for personal crimes. In 1870 *niẓāmiyya* courts were founded and the dual legal system was established officially. In 1876 *niẓāmiyya* courts have taken over all legal jurisdiction except *sharīʿa* personal laws. When there was a strong need for a new legal code for the law of contracts and property, along the same dichotomy, a group of bureaucrats led by Ali Pasha suggested adopting the French code at least for mixed courts, while a group of jurists led by Ahmed Cevdet Pasha suggested making a code based on *sharīʿa*. Consequently, the second group's suggestion was accepted. It is important to observe that adopting a European code was already a major option before the foundation of the Turkish Republic as a means of modernization and Europeanization.

Majalla was codified by a group of jurists in 1876 within nine years. It consisted of 1872 articles including 100 general maxims in the introduction. It covered the law of contracts, property and trial laws.[9] However, it did not contain codes on family law, which was a topic of criticism then.

3. First Islamic Family Code: *Hukuk-i Aile Kararnamesi*

Family law was added to this code with the last attempt of codification based on *sharīʿa* entitled *Hukuk-i Aile Kararnamesi* in the Ottoman history

7 Hanioğlu Şükrü, A Brief History of the Late Ottoman Empire, Princeton, NJ 2008, at 74.
8 Öztürk Osman, Osmanlılarda Tanzimat Sonrası Yapılan Adli ve Hukuki Çalışmalar, İslam Medeniyeti (1973), 34 – 35, at 35.
9 Aydın Mehmet Akif, Mecelle-i Ahkam-i Adliyye, DIA, Vol. 28 (2003), 231 – 235, at 436.

in 1917. This code included 127 articles on family law including 60 articles regulating family laws of Christians and Jews in addition to Muslims. This family law code lasted only for 1 year, 9 months and 11 days and was then abolished in 19 June 1919.

Majalla was a codification of Hanafi law, however, in *Hukuk-i Aile Kararnamesi* (*HAK*) other schools of law also were taken into account, especially for marriage and divorce matters.

By adopting the Swiss code in 1926, *Majalla* was completely abolished and became a topic of historical investigation for Turkey, even though *Majalla* survived in some other countries as a source of law. In 1924, *sharīʿa* courts were completely abolished.[10]

It seems that after abolishing the *HAK*, the main idea was to still codify Islamic Family Law instead of borrowing concepts from a foreign country. There were some attempts to the extent that a body of law already was established. Under the leadership of Seyyid Bey, a representative and high officer in the ministry of justice, a commission actually offered a new code to be accepted in 1923. He had *sharīʿa* courts in mind as family courts, but the government abolished those courts.

Despite the fact that *sharīʿa* courts were abolished in 1924, two more commissions of which one was led by famous scholar Omer Nasuhi Bilmen were set to prepare family law codes according to Islamic family law.

A Europeanizing ideology with coercive secularism of the founding fathers of Turkish Republic was the main reason for adopting European laws instead of building on the nearly a half-century old ongoing codification attempts based on *sharīʿa*. The statements of Mahmut Esat Bozkurt,[11] the Turkish supremacist minister of justice at that time, reveal the underlying mind-set behind the adoption of foreign laws when he convinced Mustafa Kemal Atatürk: "Only a radical break with tradition would allow society to be

10 Akgündüz Ahmet, İslam Hukukunun Osmanlı Devleti'nde Tatbiki: Şer'iyye Mahkemeleri ve Şer'i Siciller, Islam Hukuku Araştırmaları Dergisi, Vol. XIV (2009), 13 – 48, at 17 – 18.

11 Not to be confused with Mahmut Esat Efendi who was the head of codifying committee for *Hukuk-i Aile Kararnemesi*. Mahmut Esat Efendi (1855 – 1917) was a member of parliament for the city of Isparta and educated in Islamic law, while Mahmut Esat Bozkurt (1892 – 1943) was among the main actors in adopting European codes for the legal system of the new Republic.

refashioned in the image of the new Republic."[12] Kemalist revolutions were not merely aiming at revolutionizing; they also aimed at a complete destruction of what had been there before based on religion.[13]

4. The Effect of Islamic Law on the Family Law of 1926 Turkish Civil Code

After the attempts to codify family law based on Islamic law, the new Republic instead chose the transplantation of Swiss code. However, the influence of Islamic family law was somewhat present in the new code.

One of the obvious articles was the one on milk-kinship. In the article number 92, milk-kinship is accepted as one of the impediments of marriage contract. Despite the fact that this code passed in the national assembly, the government removed it from the code without any decision made by the assembly again. This is hard to fathom for any democratic state, but it did happen. The excuse brought forward was, ironically, aimed at correcting the grammatical and editorial mistakes in the code.

Certain rulings rooted in Islamic family law,[14] yet some of them shared by Western cultures as well remained in the code:

1) Separation of spouses' property was the rule in 1926 code;[15] while in the Swiss code spouses are subject to the provisions governing participation in acquired property provided they have not agreed otherwise in a marital agreement.[16]

2) Grounds for divorce were adultery, life threatening or psychologically destructive behaviour, criminal behaviour, abandonment, mental illness,

12 Oktem Kerem, Angry Nation, London / New York 2011, at 29.

13 Mango Andrew, Ataturk: The Biography of the Founder of Modern Turkey, Woodstock, NY, 2000, 296 – 312.

14 Some studies also tried to reveal these articles rooted in Islamic law, but some mistakes occurred. An author, for instance, in such a study says that a 180 days limit for paternity claims was set up due to Islamic law, but it is actually mentioned in the Swiss code article 262 also. See Yildirim Seval, Aftermath of a Revolution: A Case Study of Turkish Family Law, Pace International Law Review, Vol. 17 (2005), 347 – 371, at 362.

15 Türk Kanun-ı Medenisi (TKM), [Turkish Civil Code of 1926], Article 146.

16 Swiss Civil Code of 1907, Articles 181; and 196 – 198.

and irreparable damage to the marriage union;[17] while in the Swiss code the grounds for divorce were living apart for two years and irretrievable breakdown.[18]

3) The authority within the household is given to men in the 1926 code;[19] while in the Swiss code, even though a head of household is mentioned, the gender of that person is not specified.[20]

4) Women are not allowed to re-marry after the dissolution of the previous marriage for 300 days;[21] while in the Swiss code the time span of 300 days is mentioned only for deciding paternity.[22]

III. Recent Developments and Debates

1. Marriage Solemnization: Authority to *Muftīs*

An attempt to bridge the gap between law and social reality after the transplantation of Swiss code was made by passing four legislations in 1932, 1934, 1945, and 1950 in order to legitimize informal and underage marriages.[23] The same problem with under age marriage created big uproar recently. Around 4000 men were jailed in the last decade with the accusation of underage marriage. The government attempted to pass a law to legalize these marriages and free those men, but the opposing party ran a campaign arguing that in doing so the government will open the door for legalizing underage marriage and child molestation. The attempt was withdrawn. However, there is still a considerable demand to pass this legislation.

Another important and constant problem has been the legal status of religious marriages. After all temporary solutions for about 90 years, the

17 TKM, Articles 129 – 134.
18 Swiss Civil Code of 1907, Articles 114 – 115.
19 TKM, Article 152.
20 Swiss Civil Code of 1907, Articles 331 – 333.
21 TKM, Article 95.
22 Swiss Civil Code of 1907, Article 262.
23 UNESCO, The Reception of Foreign Law in Turkey, International Social Science Bulletin, Vol. 9, No. 1 (1957), 76 – 87, at 77.

state decided to legalize these marriages by appointing religious officers as marriage officers. The draft amendment to the Population Services Law (2006) was adopted in the Turkish Grand National Assembly on October 19, 2017 as numbered law 7039 and entered into force upon its publication in the Official Gazette dated 3 November 2017. Thus, with the secular civil law taken from Switzerland in 1926, for the first time in 91 years, during which there was not even a reference made to Islamic law or any religious authority, an open authority was granted to the *muftīs* even if it was evaluated within the scope of a civil servant. This situation can be seen as a relatively minor result of the process of increasing public visibility of religion, which started in the 2000s. But it signifies a turning point in the history of the secular Republic of Turkey.

If we take a closer look at the amendment, the second paragraph of Article 22 of the relevant law reads as follows:

> "Marriage officer; in places where there is a municipality, is the mayor or the officer to be assigned to this work; is the *muhtars* in the villages. The Ministry may give the authority and duties of solemnizing marriage contract to the Directorates of Provincial Population and Citizenship, to the Population Directorates and the Foreign Representative Offices, and **to the Provincial and District Mufti offices.** In the event that one of the spouses is foreign, the civil marriage officers and the population managers are authorized to marry."

The amendment to the law consists of the addition of four bold words. However, the change that these four words would bring about was enough to wick hot debates at that time. Even though this amendment is interpreted as legalizing religious marriage, the government carefully described it as authorizing *muftī* as any other officer in solemnizing "civil marriage".[24] Furthermore, the will that made this change not only showed an intense emphasis on provincial and district *muftī* offices being a state institution, but also made an effort in order not to provoke possible secular reactions with the statement that the relevant authority **could be** given by the Ministry of Interior. It means, a new minister of internal affairs to be appointed by a new president who wants to maintain a 91-year secular tradition will be able to easily lift this mandate. But still, this

24 Hürriyet Daily News: Article Allowing muftis to Perform Marriages Passes in Turkish Parliament (19 October 2017), www.hurriyetdailynews.com/article-allowing-muftis-to-perform-marriages-passes-in-turkish-parliament-121108 (last accessed 17 January 2020).

relatively small step for other Muslim majority countries is actually a significant step for Turkey whose history proves its coercive secular identity.

The Republican Party took the amendment to the constitutional court for cancellation with the claim that it contradicts the secular principles of the constitution. The court rejected the application on the grounds that it does not legislate a new form of marriage; rather it facilitates the civil marriage solemnization processes.[25]

2. The Presidency of Religious Affairs on Family

A large survey entitled as *The Research on the Religious Life in Turkey*, conducted by the PRA with a group of 21632 people in 2014, demonstrated that 93.2 % people identified themselves as religious to the extent that they try to shape their lives according to the Islamic norms.[26] Upward of eighty-seven percent (87.1 %) of the respondents said that they train their children based on religious values and 68.9 % of them said that the first priority in selecting their spouse is religiosity. According to another survey conducted by the Turkish Statistical Institute (TSI) showed that 98.2 % of all marriages were contracted according to Islamic laws and accompanied by religious ceremony.[27] These statistics sufficiently demonstrate the effect of religious norms on family institutions. Religious questions directed to religious authorities and to the PRA also prove that point. As an example, I will take the Office of Family and Religious Guidance.

The Presidency Religious Affairs established the *Family Commission* within the Office of Religious Guidance in 2002, and it gradually turned into an independent office with the title *The Office of Family and Religious Guidance* in 2014. In the present time, PRA established these offices in all 81 cities and 304 districts. There, 2801 trained consultants (1859 of whom are female) respond to the questions and disputes both face to face and through telephone calls.

25 Anayasa Mahkemesi Kararı, kararlaryeni.anayasa.gov.tr/Karar/Content/594d6ee8-d368 – 4bfe-b19 f-2832f2c979cb?excludeGerekce=False&wordsOnly=False (last accessed 17 January 2020).

26 DİB, Türkiye'de Dini Hayat Araştırması, Ankara 2014, at 33.

27 Türkiye İstatistik Kurumu, Aile Yapısı Araştırması (2016), www.tuik.gov.tr/PreHaberBultenleri.do?id=21869 (last accessed 10 September 2019).

Chart 1: Question/Dispute Topics Directed to Offices of Family and Religious Guidance[28]

	2014	2015	2016	2017	2018
Marriage – Nikah – Divorce	2527	3629	1677	3814	5332
Family	2041	2545	1117	2830	4313
Health	481	929	153	799	1393
Children	142	631	291	730	984
Women	76	315	119	359	570
Youth	45	284	153	413	743
Social Situation	315	259	169	388	677

Some examples for Q and A's:

> **Q:** "I got married to a man and we broke up but he will not divorce me. Now, I have another marriage proposal from another man. What can I do?"
> **A:** "In order not to face this kind of problems, we advise to youth to be patient and sober and not to make any *nikāḥ* contract until they reach the proper time for marriage. As for the solution, one can be appointed as an arbitrator and he can separate the couple for valid reasons."[29]

> **Q:** "When we got married, *mahr* was not mentioned. My husband did not mention either. Does that affect our contract? What should we do?"
> **A:** "*Mahr* is not a mandatory condition for *nikāḥ*. It is a right of the women. Not mentioning it during the ceremony does not invalidate your *nikāḥ* contract."[30]

> **Q:** "We are senior students at the University. We decided to stay together at the same apartment. In order not to fall in sin, we want to make a *nikāḥ* contract. Could you solemnize this contract?"
> **A:** "We strongly disprove a religious marriage contract without a civil contract for possible adverse legal consequences. Therefore, we do not solemnize a religious marriage contract without a prior civil contract."[31]

All these statistics prove the fact that there is a huge demand among people in Turkey for more room to pursue religious norms governing their family life and matrimonial issues. They also seek to solve their marital problems in accord with Islamic norms.

28 I acknowledge the officers in the center of Family and Religious Guidance for providing these statistics.
29 OFRG, Personal Records, Nr. 1518, İzmir March 2009.
30 OFRG, Personal Records, Nr. 2086, Manisa June 2009.
31 OFRG, Personal Records, Nr. 1999, İzmir December 2007.

IV. Conclusion: Bridging the Gap

Family law in Turkey has diverged considerably from the Turkish populations' social reality. This created a gap and constant provisional amendments to the family code. On the other hand, the coercive secularism still claimed as the state ideology, despite inclinations toward softer secularism due to the Islamic inclinations of the country's current leadership, is still powerful and unchallenged. This does not enable the authorities to issue rulings in accord with the social reality of the people that is deeply affected by religious norms. Giving authority to *muftīs* for solemnizing marriage was one of the steps made toward bridging this gap. Another possible way to narrow the gap even further might be using arbitrational models in family law matters more efficiently. Family mediation, which will be put into practice in Turkey in the near future, will likely provide an important space by including the *med-arb*[32] model of Islamic family law to resolve conflicts within Turkish families. Instead of transplanting the exact family mediation model of Europe, this type of mediation will help people to solve their problems more efficiently and decrease the tension between social reality and state law.

32 *Med-Arb* is an alternative dispute resolution model combining mediation and arbitration. Despite having different types of applications in present time, in Islamic family law the first phase is on mediation aiming at reconciliation between the couple in order to perpetuate the marriage, while the second phase is on arbitration where the mediator becomes the arbitrator for the matters remained unresolved after the mediation phase and makes binding decisions on those matters.

Chapter Nine

The Current Debate on the Moroccan Family Code *Mudawwanat al-Usra* in Morocco

Karima Nour-Aissaoui

Karima Nour Aissaoui is a professor of Comparative Religion at Abdelmalek Essaâdi University in Tetouan, Morocco. She holds a PhD in Comparative Religion. She is President of the Enlightenment Center for the Alliance of Civilizations, Social, and Cultural Development in Fez, Morocco, and member of several national and international academic and cultural advisory boards.

Table of Contents

Abstract

The Mudawwana (*Moroccan family code*) *entered into application in February 2004. Fifteen years after its implementation, this legislation has attracted a growing level of criticism from civil society* (*feminist movements, human rights associations, etc.*). *The beginnings of reforming the Mudawwana are being felt, offering an urgently needed correction to its shortcomings. But the sensitivity of this thorny subject entails a need for consensus among various components of society. This article will consider the current state of discussion concerning the Mudawwana, while at the same time drawing up, in detail, the most glaring problems entailed by this personal status code in*

terms of its understanding and interpretation of laws, and also highlighting the most important demands of feminist movements.

I. Introduction

Following many centuries of women's voices being marginalised, and their role in traditional society being reduced, in most cases, to roles of procreation, child-rearing, and domestic labour, women's standing has undergone many changes in the modern era. Equality between men and women has become a value shared by those who believe in a world from which all distinctions of race, age, and sex, must be banished. Parallel with what is unfolding elsewhere, and in Europe in particular, Morocco has been engaged in a slow and cautious legal process aiming to reform the family legislation since its independence in 1956. As far as I am concerned, this process had been gone through three phases: the first one was in 1958, the second one in 1993, and the last one was in 2004.

This paper is an attempt to review the current legal system with regards to the status of women in Morocco during the undergone protectorate in 1912, then of the first and second phases, before focusing on the 2004 reform which, despite its importance, once again sparked controversy. The demands of civil society and the usefulness of the evaluation of the family code after twenty-five years of its application both contribute to a likely and comprehensive revision in the near future.

II. The Status of Women in Morocco: Historical Overview

Since the advent of Islam in Morocco (*al-Maghreb al-Aqsa*) in 680 CE during the rule of the Umayyad dynasty in Damascus, successive dynasties have all opted for the application of Islamic law (*sharīʿa*) to govern, in accordance with the letter and spirit of the law, public and private life in Muslim society. With the emergence of the Maliki rite, one of the four major rites of Sunni Islam, and its gradual establishment in the Maghreb and

Andalusia, particularly around 1048, the *ulamā* made this rite their exclusive reference in jurisprudence, including the code of personal status.

According to Asmaa Mazouz, "private life in precolonial Morocco was dominated by the Mālikite School both in social and legal, and especially family life."[1] She adds that this field "[h]as been dominated not only by the Malikite School but also by its legal doctrine. Its elements were first religious … Nevertheless, the spirit and the philosophy of marriage were inspired by the Coran and the Sunna as they are interpreted by the Prophet Muhammad and his disciples."[2]

However, it should be noted that all the legal concepts concerning conjugal life (marriage, repudiation, etc.) were not yet recorded in a precise and accessible compendium that could be consulted or compiled in a clearly defined canon. Furthermore, this expansive raw material was, in accordance with long-standing Islamic tradition, scattered throughout several works, namely the *Mudawwana* by its author Sahnoun (776 – 854), and comments on *al-Mukhtaṣar fī al-Fiqh* [*Handbook of Jurisprudence*] by Shaykh Khalīl Ibn Isḥāq.

According to the current commentators of the Arabic *Handbook of Jurisprudence*, "[t]he students in Africa used to memorize it by heart, … while teachers had in their disposition the commentaries, of which some are very important and have become very famous."[3]

Not to mention, of course, the *Muwaṭṭa* of Imam Malik Ibn Anas, this is a principal reference of prophetic tradition in the Mālikite School.

Taking into account this set of circumstances, as well as the sensitivity with which personal status was treated by various societal actors, a well-founded justification for the Sultan's extreme caution in appointing the body of magistrates can be easily made before 1912. In each decree issued, it expressly proclaims that the judge is bound to follow the Mālikite School to the letter.

1 Mazouz Asmaa: La réception du code marocain de la famille de 2004 par le droit international privé français: le mariage et ses effets, thèse dirigée par M Nord Nicolas, soutenue le 16 Décembre 2014, Université de Strasbourg, at 24 f.

2 *supra* n. 1.

3 Précis de jurisprudence musulmane suivant le rite Malékite par sidi Khalil, published by the care of the Asian society, Paris 1858.

III. Islamic Family Law in Modernity

Mohamed Chafi holds that during the period of the protectorate (1912 – 1956), Islamic law retained a certain autonomy, as well as exclusive jurisdiction for matters relating particularly to personal status. This concession of legal sovereignty was presented as a consequence of the commitments made by the French authorities in 1912 with regard to the Islamic religion and religious institutions.[4]

But France, as a sign of allegiance to its colonial policy, imposed the standard customary law, commonly known as the *Berber Dhahir* (royal decree), on the Amazigh tribes.

IV. The 1958 Code of Personal Status

After its independence on 2 March 1956, Morocco abolished Berber customary law and, like other Arab and Islamic countries such as Jordan, Syria, and Tunisia, found it absolutely necessary to classify the rules of Islamic jurisprudence by topic to make them accessible to the judiciary. The idea was that a comprehensive body of work would quickly lead to the promulgation of a code of personal status in 1958 under the reign of.

The king Mohammed V pointed out the following to the commission that was put together in 1957 to draw up the code of personal status:

> "Everyone knows that our legislation and our legal literature are rich in the extreme, so that we absolutely do not need to borrow from the legislation of other nations. Nevertheless, the genuine richness of the sources has been weakened by sterile interpretations and corrupted by certain rites that have been repeated for centuries, until they become interpreted as being part and parcel of it. This is why our duty consists of going back to the richness that we had in the *shari'a*, and to work to revitalise it, by incorporating it into a series of precise articles that has the form of a code."[5]

4 Chafi Mohamed, Family Law in Morocco, Traditionalism and Modernity, Marrakech 2018, at 5.

5 Royal speech in Arabic. See, a series of legal texts: The Speech of the Late King Mohammed V in Front of the Members of the Personal Status Code Committee on October 19, 1957, No. 21 (2012), at 3.

It must be noted that the work of this commission was curtailed, from the outset, by the royal directives which reflected the prevailing common consciousness in the aftermath of decolonisation. Harith al-Dabbagh rightly points out that "[t]he family law, in its broad sense, the personal status, will be protected from the movement of modernization. In the majority of Arab states, this domain, separated from the civil code, has proven to be impermeable to foreign legal institutions."[6]

Despite the fact that, at first glance, this code appears to have been formed with a modern eye, it has clearly been adapted in accordance with the Mālikite School. This signifies that, in reality, a father will always retain control over his offspring, allowing him to marry off his daughter whenever he desires.[7] According to Nouria Ouali, women were considered to be minors indefinitely; they remained under the authority of a father, a brother, an uncle, or a husband, who were obliged to support them.[8] However, a tentative step was taken by the legislature through the legalization of the age of marriage at 15 years for girls and 18 years for boys, as well as the institutionalization of polygamy and repudiation.

From the moment of dissemination, the Moroccan personal status code elicited immediate reactions from a number of stakeholders. Yet the claims made were, as can be seen, disorganized and not yet supported by political parties; even attempts in 1961, 1968, and 1982 to partially amend a few articles were all doomed to failure. Mohamed Chafi declares that the absence of reforms in family matters at this time in Morocco's history can be explained by the conflict between ongoing influence of historical provisions on public opinion, and the demands of modernity.[9] We can already observe the emergence of two contradictory currents: a traditionalist current of thought that was considerably attached to the Islamic tradition and its invariable principles; and a modernist current,

6 Al-Dabbagh Harith, Le droit comparé comme instrument de modernisation: L'exemple des codifications civiles des états arabes du moyen orient, Revue de droit de l'université de Sherbrooke, Vol. 43 (2013), 387 – 441, at 396.

7 Mergue Bérinice, La moudawana: Les dessous d'une réforme sans précédent, Les Cahiers de l'Orient, Vol. 102, No. 2 (2011), 15 – 30, at 17.

8 Ouali Nouria, Les réformes au Maroc. Enjeux et stratégies du mouvement des femmes, Nouvelles questions féministes, éditions Antipodes, Vol. 27, No. 3 (2008), 28 – 41, at 31.

9 Chafi Mohamed, Droit de la famille au Maroc, traditionalisme et modernité, *supra* n. 4, at 10.

aware that the demands of modern life were imposing needs that Islamic law could not always satisfy.

The reluctance of the late Mohammed V towards the reform of personal status in the middle of the twentieth century reflected the substantial weight carried by the traditionalist current that was firmly embedded in Moroccan society. When the late King Hassan II, renowned for his open-mindedness, acceded to the throne in 1961, he could not overcome the stagnation that gripped the revision of the code of personal status. When he appointed a royal commission in 1981 to revise the code, its efforts, which lasted several years, came to nothing, as the reform project never ended up being published.[10]

However, several contemporary factors continued to encourage the reform of the code of personal status in the 1980 s to the 1990 s. Firstly, the women's movement has not ceased growing in importance and influence due to the formation of various associations: the Democratic Association of Moroccan Women (ADFM) in 1985, the Union of Women's Action (UAF) in 1987, the Moroccan Women's Association (AMDF) in 1992 and the League of Women's Rights (LDDF) in 1993.[11] Civil society therefore has learned to diversify their field of activity and to organise gender equality programmes such as the *Spring of Equality* in 2001, which addressed the media, or a petition which garnered one million signatures appealing for gender equality in Morocco. Secondly, Morocco was no longer strategically isolated from an international context, including human rights conventions or the fight against all forms of discrimination against women.

V. The Reform of the Moroccan Family Code in 1993

Faced with the intensity of growing pressure from civil society, first and foremost from the burgeoning women's movement, the much-anticipated 1993 reform was soon to see the light of day. This was the year when King Hasan II took the decision to reform family law. His main objective was to

10 Chafi, *supra* n. 4, at 11.

11 Naciri Rabéa, Le mouvement des femmes au Maroc, Nouvelles questions féministes, Antipodes, Vol. 33, No. 2 (2014), 43 – 64, at 53.

ease tensions that could lead to a crisis in Moroccan society. Shortly afterwards, it became clear that the 1993 reform was too limited and therefore fell far short of meeting expectations that were held by a section of Moroccan society and that were increasingly influential on public opinion. The amendments concerned particularly the Articles 5, 12, 41, 48, 99, 102, 119, and 148. The legislature failed to categorically abolish repudiation, polygamy, or matrimonial guardianship, which affirmed the persistence of gender inequality in the social milieu. Although this revision was limited in terms of substance, it was crucial from the point of view of the removal of the sense of the inviolable nature of the text of the code as it stood.[12]

VI. The 2004 *Mudawwana*

Before we turn to the subject of the new family code (2004), known as the *Mudawwana*, it is useful to consider the context in which its well-known reform was produced, as well as the long-term process of development. There is consensus that, with few exceptions, since the adoption of the limited reform of 1993, a sense of disappointment has been shared by civil society, and particularly by the women's movement. This feeling has continued to grow in proportion to the negative impact this reform has had on women. However, the women's movement was quickly to engage in a long-term struggle to bring about real reform in the area of women's rights. Several factors initially contributed to the success of this fight, including:

- The coming into power of "the government of change (*Hukumat at-Tanāwub*)" in 1998 and the increasing importance granted to the status of women in the governmental programme;
- The launch of a National Plan for the Integration of Women in Development (PANFID) prepared by Saïd Saadi from the party of Party of Progress and Socialism (PPS), the Secretary of State for Social Protection, Family and Children, in collaboration with women's

12 Rhiwi Leïla, transversals, science, culture (26 November 2006), grit-transversales.org/auteurecba.html?id_auteur=67 (last accessed 10 March 2020).

associations and human rights organizations.[13] This ambitious plan proposed a number of priorities of judicial measures; namely, the raising of the marital age, the abolition of guardianship, the implementation of judicial divorce, regulation of polygamy, and the division of property acquired during marriage;[14]

- The desire of King Mohammed VI, following his accession to the throne on 23 July 1999, to reform Moroccan society, repeatedly affirming his support for the concept of gender equality as well as his commitment to the process of democratic transition.

However, despite all these factors conduced to emancipate women, the publication of PANFID raised an unprecedented debate, which, in turn, led to the division of Moroccan society into two factions in an unequal position. On the one hand, the conservative faction, led by the Islamist movement, advocated the shielding of women from the reforms under the pretext that this plan had a Western undercurrent and thus risked betraying the fundamental principles of Islam. On the other hand, a small minority were straightforward advocates for expanding the rights of women.

The confrontation between these two factions was crystallized through the organization of two major demonstrations on 12 March 2000: one in Casablanca in opposition of the plan, led by Islamic movements and associations, and the other in Rabat, in support of the plan, composed mainly of left-wing parties and civil society actors.[15] What is apparently obvious in this historical moment is the undeniable power of Islamist ideology. The immediate result of this new set of circumstances would be the blocking of the plan. In order to overcome this impasse, the former Prime Minister Driss Jettou had to resort to royal arbitration, which is described by Mohamed Chafi claims as a political game in Morocco that is allowed for the circumvention of the constraints imposed by constitutional legality.[16] We must not forget that the right to amend the *Mudawwana* constitutes a royal prerogative. In his speech dated from 20

13 Chafi, *supra* n. 4, at 13.

14 Rhiwi Leïla, Reform of the Family Code, Case of Morocco, Identity Gaps, Vol. 105 (2004), at 50.

15 assabah.ma/18920.html (last accessed 29 March 2020) :
عبدالله الكوزي، " بانوراما الصيف: أرقام لها مغزى"، جريدة الصباح، عدد 29 يوليو 2011، (تم الولوج يوم 02 أبريل 2020).

16 Chafi, *supra* n. 4, at 14 f.

August 1992, which corresponds to the promulgation of the new constitution, King Hassan II recalled the following:

> "This matter falls under my responsibilities. This responsibility rests with me, because as the King of Morocco, it is my duty as the Commander of the Faithful (*Amir el mu'minūn*) who has the competence to interpret religion and to implement it."[17]

The intervention by King Mohammed VI in April 2001 lead to the formation of a Royal Consultative Commission (*al-Lajna al-Istikhariyya*), chaired by the jurist Driss Dahak and included, in addition to *ulamā*, female and male academics whose sole mission was the development of a new family code. However, it seems that the Royal Commission to which the king had entrusted this very delicate mission was unable to find the necessary consensus for a draft, despite more than two years of efforts under the leadership of two chairpersons. In his speech delivered at the opening of the autumn session of parliament on Friday 10 October 2003, King Mohammed VI revived the project of reforming the *Mudawwana* by announcing his determination to carry out a thorough reform of the family code. According to Abderrahim Lamchichi, he outlined the following:

> "The major orientations of a new project that should improve in a substantial way the status of Moroccan women and their place in the society by giving them new rights: a strong restriction of the practices of repudiation and of polygamy, the implementation of mutual consent for marriage, the affirmation of new prerogatives for women in case of divorce, the standardization of the marriage age for men and women, and even the dissolution of male guardianship."[18]

However, it should be understood that the king's firm will to reform the family code cannot go so far as to authorize what God has forbidden, nor prohibit what He has authorized.[19] One could say that the *Mudawwana* as a whole tends to create a compromise between Islamic law in its Maliki incarnation, and certain modernist values extolled by Europe.

> "[I]t is necessary to take inspiration from the light of a tolerant Islam that honors human beings and brings justice, equality and harmonious cohabitation, and to rest on the homogeneity of the Malikite school as well as on *ijtihad*, to make Islam a religion that

17 Ouali, *supra* n. 7, at 33.

18 Lamchichi Abderrahim, Promesse royale en faveur d'une réforme audacieuse du statut de la femme, Confluences Méditerranée, Vol. 48 (hiver, 2003 – 2004), 175 – 185, at 177.

19 Discours de S.M. le roi Mohammed VI lors de l'ouverture de la 2ème année législative de la 7ème législature.

> can be adaptable to all places and in any epoch, and to elaborate a modern family code with a perfect compliance with the spirit of our tolerant religion."[20]

The promulgation of the *Mudawwana* took place on 3 February 2004. In addition to the fact that this transition from the code of personal status (its former appointment) to the family code was not meaningless, this same code, unlike the previous amendments of the personal status code, followed an ordinary legislative path and was voted in unanimously by parliament. According to Leïla Rhiwi, by submitting the family code to parliament, the law has been definitively "humanized". This is an institutional step forward: this code became a law like any other law and can no longer escape the classical system.[21]

VII. New Provisions and Advances

It is undeniable that through the adoption of this code, Morocco has taken a decisive step towards not only improving the status of women, but enshrining equality between spouses in the shared responsibility of the family. Article 4 defines marriage as:

> "Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue and the creation of a stable family, under the supervision of both spouses according to the provisions of this *Mudawwana.*"[22]

In short, the family is no longer a matter for the husband, but is rather the responsibility of both spouses, according to *Mudawwana*, particularly with the abolition of parental guardianship (*wilāya*) in the arrangement of marriage for women of full legal capacity (*al-Ahliyya*), and the submission of repudiation or divorce, exercised by both husband and wife in the family tribunal.

20 Discours, *supra* n. 17.

21 Rhiwi Leïla, Réforme du code de la famille, cas du Maroc, *supra* n. 13, at 52.

22 Article 4, 2004 the Moroccan Family law, translated by Human Rights Education Associates (HREA).

Turning to the protection of the rights of the child, the new family code includes provisions containing international agreements on the rights of the child. Also listed are a number of measures that contribute greatly to the protection of the child, such as granting the wife the right to retain custody of the child, under certain conditions, even after getting remarried or moving to a neighbourhood or a city far from that of her husband. The focus on the child has been well discussed in the Preamble of the family code which says:

> "Children are essential part of the family. This Code has given them special interest as it has provided them with a special article on the rights which parents have to fulfil with respect to them, inspired by the provisions of the Shari'a, the national law and the regional and international conventions. The text of the code specifically determines these rights, including the right to religious orientation, the record in civil registration, the right to education and the right to refrain from harmful violence. In case of spouses' separation, all these responsibilities and obligations will be shared among them, as reflected in the provisions on custody of children. In the case of the death of one or both spouses, such responsibilities and obligations shall be transferred to the guardian and legal guardian. For the disabled child, the Family Code provides him/her, in addition to the rights mentioned above, the right to have special care such as having regard to the specific nature of his disability, in particular as regards education and qualification adapted for social inclusion. It is important to note that this article places the responsibility on the State to take all necessary measures to protect and support children."[23]

However, after fifteen years of application, the family code has become subject to numerous evaluations. Zhour Lhor, lawyer and former member of the Royal Commission that worked on the family code amendments, pointed out in a meeting in parliament the complexity of applying some of the legal requirements, as well as confusion concerning the legislation itself in terms of comprehension and interpretation. She also brought attention to the following elements:

- The controversy surrounding the second paragraph of Article 16, as it has been used contrary to its purpose by encouraging underage marriage and polygamy;
- The debate around Article 20, which grants the judge the authority to give marriage for boys and girls before marital age;

23 Ben Hounet Yazid / Cheikh Mériam / Benchahda Laïla / Rupert Nouri, Le droit de la famille au Maroc et son application au sein de la section des affaires familiales du tribunal de première instance de Rabat, Centre Jacques-Berque 2017, at 26.

- The discussion concerning Article 49 on the distribution of property between spouses after getting divorced;
- The countless problems that concern alimony, parental filiation, and the protection of children.

However, the demands made by civil society are much more radical; one such example is the memorandum drawn up in 2011 by the Federation of the Democratic League for Women's Rights (FLDDF), in which the Federation specifically called for the reformulation of texts and the deletion of articles that undermine women's dignity. This latter campaign was aimed at adapting the code to go in line with international conventions and to lift reservations from international agreements, which is ratified by Morocco such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), particularly Article 16 on marriage and family life, and to the 2011 Constitution. Other demands concern the prohibition and criminalization of the marriage of minors under 18 years of age; the definitive prohibition of polygamy; the protection of the rights of natural children; the criminalization of the expulsion of a wife from the marital home; the consolidation of a wife's right to custody in post-divorce; and the shared duty of alimony when both spouses have the necessary resources.

VIII. Conclusion

There is little doubt that the process of reforming the family code in Morocco is a lengthy one. The 2004 reform did not meet the expectations of civil society, and there continues to exist an enormous gap between the improvements of women's living reality and their legal status, which in some cases remain far from any change. It is ultimately the Commander of the Faithful's (*Amir al-Mu'minīn*) full right to establish equality through the adoption of the values of universal human rights without excessive impact on the principles of Islamic law.

In some cases, the text of the family code may seem effective and sufficient for protecting the rights of women and children, but the implementation of this code is a challenge due to the conservative mentality of judicial authority overseeing the family issues. If women get married under the

custom of the *Fātiḥa* chapter of the Qur'ān, their rights and their children's are difficult to prove in front of the judge in the family tribunal, but thanks to the forensic medicine which is used to prove filiation still possible. Although the family code stipulated clearly that the age of marriage is 18 for girls, there are many cases of minors marriage because the judge has a legal discretion to give permission for minors to get married under certain conditions.

What is very critical is the increasing number of divorce compared to the number of marriage, which is considered as a threat to the Moroccan family. This statement indicated some observations: first, the current family code fails to provide social security for the family. Secondly, it is obvious that the consequence of divorce is the social disintegration of abandoned children. All these reasons are enough to amend the family code.

Chapter Ten

Intersexuality (*khunthā*): The Third Gender in Islamic and German Legal Conceptions

Selma Öztürk-Pinar

Selma Oeztuerk Pinar studied Law at the University of Hanover. She currently is a PhD candidate at the University of Tübingen. She also lectures International Law of Human Rights and the Case Law of the European Court of Human Rights at the Ankara Yıldırım Beyazıt University.

Table of Contents

Abstract

Intersexuality becomes more and more important for the world population. People born with both biological sexes – male and female – need more attention in their daily life. Some of them decide to undergo a sexual reassignment surgery, others decide to live in their body with both genders. There are many obstacles preventing them from being fully accepted by the society they live in. On the one hand the social difficulties are crucial, on the other hand the medical side of this problem is also very problematic, because the probability of choosing the 'wrong' gender is very high. The consequences are often irreversible. Many countries, like Germany, have started to regulate intersexuality in their laws. Even in religious debates, like in the Islamic law, intersexuality is widely discussed. In this paper intersexuality is explained from the medical side, the religious Islamic side and lastly from the legal side as far as German law is concerned.

> "Intersexuality is not a disease ... I'm not even gonna say it's an abnormality. I simply say it's a variation."[1]

I. Introduction

Intersexuality is a gender-related issue that brings many legal and social problems with it. This phenomenon is – regardless of the cultural and religious background of any society – mostly ignored. Although the number of intersexed new-borns is not very low,[2] there is a lack of sensibility for intersexed persons. It is generally a taboo topic, because some parents feel shame on the unclear gender of their child and try to conceal this "defect". In many situations, it is problematic for the parents when asked about the gender of their new-born to explain that their child is neither a girl nor a boy. But it would be wrong to say that these persons are "without a sex". They have "more" than "less" sex. Societies do not broach the issue of intersexuality in daily life, so that many people do not really know enough about this issue. Intersexed persons have many problems in the society because they are not accepted as "normal" individuals. They need a social and cultural space for their difference. Another problem is that intersexuality as a biological phenomenon lacks on legal regulation because the law does not define a third gender. In some countries, intersexed individuals are ignored because of their 'gender'.[3] In other countries, they are fully accepted as a third gender

1 Interview by Sharon Preves with Jana, an intersex man. Preves Sharon, Intersex and Identity: The Contested Self, New Brunswick, NJ, 2003, at 117.

2 The number of intersexed persons all over the world is not clear and very difficult to determine. The only information is the birth register of every country or the information we can take from hospitals immediately after birth. According to the UN, the number of intersexed individuals is estimated just over 1 % of the world's population. Statistically, one intersex child results from 1 500 to 2 000 births per year across the world, www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf (last accessed 20 January 2020).

3 Most of the European Countries do not have regulations for the third gender. Persons concerned need more international and regional protection. The European Commission prepares the extensive paper *Trans- and Intersex Equality Rights in Europe – A Comparative Analysis*, ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf (last accessed 20 January 2020).

within the law system.[4] Many of them have to keep their 'gender' secret from others and are afraid of conflicts in their life. However, gender is an essential and indispensable issue since many rights and obligations in daily life depend on the gender of a human being. Much is linked to the sex, for example, identity papers, marriage, military service, lineage right and even international rules and regulations, etc. Even the citizenship of a human being that marks a person as being fully human depends on the gender. Intersexuality does not only cause a social or legal discussion nor is it a new phenomenon; it is indeed a very old and well-established issue that also has a basis in the religion of Islam. There is a wide and very detailed discussion in the classical Islamic sources how to handle intersexed people. Even in Muslim countries like Pakistan[5] and Malaysia[6], the issue of intersexuality is of high importance and regulated in law. Nevertheless, the practice in Islamic countries has the same basic medical problems as in non-Muslim countries. On the other hand, being an intersex is a fundamental right and must be recognized as such a right that needs to be protected by (domestic and international) law.[7] It is necessary to make intersex a legal issue. The legal ignorance of intersexed people is the kind of omission that leads to discrimination. But what does intersexuality really mean? How does (modern) medicine treat intersexual persons and solve the problem of 'mixed-genders'? What possibilities do we have to lift the social stigma? How does the German law regulate intersexuality currently to make these people easier to socialize? And, what is the Islamic religious view to intersexuality?

4 Many Supreme Courts of countries have recognized the third gender in their decisions, like Australia in 2014, Nepal in 2007, Pakistan in 2009 or Bangladesh in 2013: www.dw.com/de/viele-länder-kennen-drittes-geschlecht/a-41291875 (last accessed 20 January 2020).

5 With a decision of the Pakistan's Supreme Court in December 2009, the third gender was accepted by the legal system of Pakistan, see, www.icj.org/sogicasebook/khaki-v-rawalpindi-supreme-court-of-pakistan-12-december-2009 (last accessed 20 January 2020).

6 There is also a legal gender recognition in Malaysia. The National Fatwa Council allows the surgery of *khunthā:* features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/appendix_2.html (last accessed 20 January 2020).

7 The Council of Europe Commissioner for Human Rights published an issue paper called Human Rights and Intersexed People, book.coe.int/en/commissioner-for-human-rights/6683-pdf-human-rights-and-intersex-people.html (last accessed 20 January 2020).

II. The Medical Side of View to Intersexuality

1. Definition of Intersexuality (DSD)[8]

Intersexed persons are those born with both male and female biological features simultaneously. *Differences/Disorder of Sex Development* (*DSD*)[9] is defined as a congenital condition in which the development of chromosomal, gonadal, or anatomical sex is atypical. Some cases of DSD are associated with obvious genital ambiguity at birth, while in other cases the external genitalia are typically male or typically female but their respective internal anatomy is discordant.[10] Two types of DSD shows the complexity of this 'defect' very well: *Congenital Adrenal Hyperplasia* (CAH), where virilization in XX (female) individuals occurs and *Androgen Insensitivity Syndrome* (AIS), where undervirilization of XY (male) individual occurs. In the case of CAH, the imbalance of hormones before birth may cause some girls to have ambiguous genitalia.[11] Boys with AIS – a genetic disorder – have an external anatomical appearance developed like a girl.[12] Today, with the modern development in medicine, we know more about intersexuality than in former times. There are different criteria that are important and must be considered, particularly not only the external genitals but also the internal features: These are the chromosomes, gonadal, hormonal and psychological conditions of an intersexed person. With a medical intervention, it is possible to assign the gender of an intersexed person to one of the both genders preferred. This

8 The terminology regarding DSD has been set in the Consensus Statement on management of intersex disorders in Chicago 2005. It was recommended to use the term DSD instead of using words like "intersexuality" or "hermaphroditism".

9 There are three main groups of DSD. Disorders associated with gonadal dysgenesis, disorders associated with undervirilization of chromosome 46, XY individuals; and conditions associated with prenatal, possibly also postnatal, virilisation of chromosome 46, XX subjects. One concrete example for DSD is the *Turner-Syndrome*. It is a genetic condition in which a female is partly or completely missing an X chromosome.

10 Warne Garry L / Raza Jamal, Disorder of SE Development, their Presentation and Management in Different Cultures, Reviews in Endocrine and Metabolic Disorder, Vol. 9, Nr. 3 (2008), at 227 – 236.

11 Schauer Nicola, Was ist Intersex? Interdisziplinäre Betrachtung zu Entstehung, Diagnostik und Behandlung von Intergeschlechtlichkeit unter spezieller Berücksichtigung des andrenogenitalen Syndroms, diploma thesis, Graz 2017, at 6 – 7.

12 Schauer, *supra* n. 11.

surgical intervention to change or assign the gender of intersexed persons (predominantly new-borns) is called *Sex Assignment Surgery* (SAS)[13]. Since the 1950s, the surgical intervention was possible and began to be conducted, whereas in the 1970s the surgery already became a standard procedure. Thus, this kind of intervention brings many risks and is not undisputed.

2. Difference between Intersexuality and Transsexuality

Intersexuality should not be confused with transsexuality. Both are (medically) completely different and need a different approach. Transsexual persons are those who are born with typical male or female anatomies but their gender identity is opposite to the sex the person had or was identified as having at birth[14]. Transsexual people may or may not undergo surgery and hormone therapy to obtain a physical appearance typical of the gender they identify as. Comparing with people who have intersexed conditions where their anatomy is not considered typically male or female; the transsexual has a clear sex, but wants to live as a person of the opposite sex ("wrong body").

III. Outline of the Problem from the Medical and Ethical Side

The SAS of intersexed persons triggers a discussion within feminist circles, social scientists and lawyers. There is a moral dilemma of such a surgery that corrects the gender of a person 'with both into one'. The most important and difficult thing is to find the 'right or true' gender for the intersexual person. This is not easy, because there are many factors that influence the 'mixed gender' of the affected person. It is necessary to have a holistic view to determine the correct gender of the person concerned.

13 Richter-Appelt Hertha, Geschlechtsidentität und -dysphorie, Aus Politik und Zeitgeschichte, Vol. 62, Nr. 20 – 21 (2012), 22 – 28, at 23.

14 Tolino Serena, Transgenderism, Transsexuality and Sex; Reassignment Surgery in Contemporary Sunni Fatwas, Journal of Arabic and Islamic Studies (2017), 223 – 246, at 225.

The urgency of early surgery is questionable.[15] Before a surgical intervention is carried out, the benefits and harms of such a surgery, as well as the child's well-being, its rights and best interest must be kept in mind. During conventional SAS procedures based on the "nurture-based theory"[16] the healthy psychosexual development is largely dependent on the clear manifestation of the genitals. Decisions on the choice of gender according to conventional SAS and "nurture-based theory" are usually made based on the predominant appearance of the external genitalia as one of two genders. Another (ethical) problem is that in cases of DSD new-borns the assignment of a female gender is preferred – not because of the dominancy of female features. The reason for proposing the female sex is, firstly, that the fertility potential is seen higher in DSD new-borns with female gonads compare to male ones. Secondly, the male genitalia are more difficult to reconstruct via surgery than the female form. Consequently, 'natural' factors are disregarded and technical advantages weigh more than actual problems. There is a problem with ethics of medical mismanagement such as the risk to assign 'wrong' gender of the DSD new-born with the surgery. However, the consequences of a SAS are devastating, permanent and irreversible. Fact is, that no one can determine the 'right' gender but only the child. The practice of early SAS ignores the possibility that the child might, one day, have different ideas of 'normal life' and would want to choose a different course of treatment. The theory that new-borns who are raised with normalized genitalia will accept their assigned gender if the sex of rearing had been consistent, has remained unclear and unsupported by any studies. Another problem is parents making the decision for their child. Of course, parents are those who care for the well-being of their child the most while at the same time parents are not always able to know what is best for their child – especially in the case presented. The permission for such a surgery is given by the parents, although they cannot know how the child feels and which sex the child will feel closer to. *Only and exclusively*, the DSD individual should decide over the surgery of his/her own gender. There is

15 In former times, the American Academy of Paediatrics (AAP) held the opinion that the surgery needs to be carried out as early as possible in the child's life, usually before the age of two, to ensure a healthy psychosexual development.

16 Mohamed Mohd Salim / Noor Siti Nurani Mohd, Islamic Bioethical Deliberation on the Issue of Newborns with Disorders of Sex Development, Science and Engineering Ethics, Vol. 27, No. 5 (2014), at 857 – 870.

always the risk of some intersexed individuals rejecting their previous sex assignment.

IV. Islamic Perspective of Intersexuality

1. General View

The reason why intersexuality is such a crucial issue in Islamic law lies in the fact that many parts of the life of a Muslim depend on his or her gender. In classical Islamic conceptions men and women have very different roles, duties, responsibilities and accountabilities, as they differ in anatomy, physiology, and psychology. Many aspects of Islamic rituals, rights, or obligations are highly gender oriented, like prayer, *ʿaura* (the parts of the body that need to be covered under specific circumstances), marriage roles and obligations, bathing rituals for the deceased, and the portion of wealth that can be inherited.[17] In classical Islamic legal conceptions, marriage, family structures and lineage are also basic components. These all depend on the gender of the individuals who are building the society. In an unclear situation like intersex the person needs to integrate into the social system and law in order for him or her to have a good and easy life and be able to perform his or her duties as a Muslim.

2. Definition of Intersex in Islamic Jurisprudence (khunthā)

In the Islamic jurisprudence, an intersexed person is called *khunthā.* The Islamic jurisprudence defines a *khunthā* as a person of intermediate sex who normally either has the external reproductive organs of both male and female or an opening passage instead.[18] From the perspective of the classical Islamic jurisprudence, there are two kinds of *khunthā: khunthā ghayr mushkil/wāḍiḥ* and *khunthā mushkil.* The first category of *khunthā* is the **non-problematic or discernible** where we have a clear determination

17 See Uddin Mohi, Inheritance of Hermaphrodite (*Khuntha*) under the Muslim Law: An Overview, BEIJING Law Review, Vol. 8, No. 8 (2017), 226 – 237, at 226.

18 Ibn Qudāma, Abdallah ibn Ahmad al-Mughnī, Vol. 6, Riyadh 1985, at 221.

of the sex by looking to the dominant signs of "maleness" or "femaleness".[19] The *khunthā mushkil* is the **problematic or intractable** kind where the person cannot easily be categorized as male or female. This second category of *khunthā* is also the main topic of this paper.

3. Transsexuality from the Islamic Perspective

From the perspective of traditional Muslim scholars, transsexuality is regarded as sinful and is prohibited (*ḥarām*)[20], the reason being that God has created humans in one of the two gender clearly. To change the biological and anatomical undisputed gender is an intervention to God's creation. In line with that is the *ḥadīth* of the Prophet Muhammad, where men are forbidden from dressing and acting like women, and vice visa.[21]

4. Legal Basis for Intersexuality in the Qur'ān

In the Qur'ān as the primary source of the Islamic religion, gender is recognized only as male or female. God has created human being as male or female descended from Adam and Eve (*Sūrat an-Nisā'* 4:1). A third gender is generally not recognized by the Qur'ān.[22] The widest known legal basis in the Qur'ān is the verse in which God says:

> "To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males. Or

19 Zainuddin Ani Amelia / Mahdy Zaleha Abdullah, The Islamic Perspective of Gender Related Issues in the Management of Patients with Disorder of Sex Development, Archives of Sexual Behavior, Vol. 46, No. 2 (2017), 353 – 360, at 353.

20 There is a legal controversy about the legal statute of transgender people in Sunni *fatāwā* according to the sources Qur'ān and Sunna and in the contemporary *fatāwā*. More about the *fatāwā* of Ayatollah Khomeini and Sheikh al-Tantāwī see Alipour Mohammad, Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantāwī's Fatwas, International Journal of Transgenderism, Vol. 18, Nr. 1 (2017), 91 – 103.

21 Narrated Ibn Abbas: Allah's Apostle cursed those men who are in the similitude (assume the manners) of women and those women who are in the similitude of men, see Sahih Bukhari, Vol. 7, Book 72, Nr. 773.

22 What does not mean that Islam or the Qur'ān do not tackle this issue.

> He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent." (42:49 – 50)[23]

This verse is seen as an explanation as to why God created intersexed people in their 'own nature'.

5. Intersexuality in the Sunna of the Prophet and in the Islamic Jurisprudence (fiqh)

The treatment of intersexed persons is also mentioned in a *ḥadīth* of the Prophet. The measure to clarify the gender of an intersexed in the *ḥadīth* (recounted by Ibn Abbas) is to look at the urinating – i. e. the functioning – organ and see penis or vagina as the main factors for determining between the male and female sex.[24] In addition the *ḥadīth* of the Prophet Abu Ḥanīfa explained that a *khunthā* is a male if it urinates from the penis while a female urinates from the vagina. But if it urinates from both genitals, its sex is determined on the basis of which of the two organs exits the urine first. If both excrete simultaneously, Abu Ḥanīfa refrained from commenting, but Abu Yusuf and ash-Shaybānī – his disciples – held that from whichever of them it urinates more, would determine the sex of a *khunthā.* If the predominance of maleness or femaleness cannot be determined during infancy, Hanafi jurists postponed their judgement until the infant reached puberty. Al-Kasānī held that if a *khunthā*, upon reaching puberty, grows a beard and is able to penetrate women, he is a male, but if it is going to have large breasts, menstruates, and can be pregnant, she is a female.[25]

Ḥanbaliyya concurred with Ḥanafiyya criteria of urinating organ and quantity of the urine produced by any of the organs for distinguishing the *khunthā* in infancy. But they also look for the secretion of semen, menses,

23 Online Qur'ān translation: quran.com/42 (last accessed 20 January 2020).

24 General overview to the Islamic *fiqh* perspective by Duman Hilâl, İslam Hukukunda Hünsa (Çift cinsiyetliler), Cumhuriyet Üniversitesi Ilahiyat Fakültesi Dergisi, Vol. 6, Nr. 1 (2002), 296 – 318, at 302.

25 Kasānī Alauddin Abu Bakr b. Mas'ūd l-Hanefi, Bedaiu s-Sanai fi Tartibi sh-Sharia, Beirut 1997.

and growth of beard and breasts as indicators for determining the sex of an adult.[26]

Imam Mālik held that a *khunthā* is primarily a male but God has created him with extra genitalia. Nevertheless, the majority of Mālikiyya agree with Abu Ḥanīfa[27].

Shafi'iyya added more criteria. If it urinates from both genitalia, we should see from which of them it starts first and then from which it stops first, and which of the two drops more urine. If the starting and ending of urination are simultaneous, then the standard is the amount of the urine which any of the organs excrete.[28]

6. Islamic Ethical Problem

From the perspective of the classical Islamic Jurisprudence, it is not allowed to live in-between without a choice, because many rituals, rights and religious obligations depend on the gender of a person. Therefore, it is not a question of *whether* the surgery has to be carry out, it is only a question of *when*, and which means are employed to find the right time for the SAS.[29] The most significant aspect is to take care of the child's rights and best interest.

The decision if a SAS is really necessary (which of the two genders shall be preferred) is not only a medical issue but also an Islamic, ethical question, that may be considered in the lights of the *maqāṣid ash-sharīʿa. Maqāṣid ash-sharīʿa* is the objectives and the rationale of the *sharīʿa.* This entails an understanding that *sharīʿa* aims at protecting and preserving public interests (*maṣlaḥa*).[30] The *maqāṣid ash-sharīʿa* has demonstrated flexibility, dynamism, and creativity in various social policies. Islamic scholars have commonly considered the all-pervasive value and objective of the *sharīʿa* – which is, to all intents and purposes, synonymous with empathy.

26 Ibn Qudāma, *supra* n. 18, at 652.

27 Al-Qarāfī Ahmad ibn Idris, Al-Dhakhirah, Beirut 1998, at 24.

28 Al-Nawawī Ahmad ibn Sharafī, Al-Majmūʿ, Madinah 1991, at 181.

29 Shah Haneef Sayed Sikandar/ Haji Abd Majid Mahmood Zuhdi, Medical Management of Infant Intersex; The Juridico-ethical Dilemma of Contemporary Islamic Response, Zygon, Vol. 50, Nr. 4 (2015), 809 – 829, at 817.

30 Mohamed / Noor, *supra* n. 18, at 8.

Maṣlaḥa and *maqāṣid* are sometimes used interchangeably: *Maṣlaḥa* is one of the juristic devices that has always been used in Islamic legal theory to promote public benefit and prevent social evils or corruption. There are three categories or norms of *maṣlaḥa*, namely, *dharūriyya* (the norm of necessity), *hajjiyya* (the norm of needs or convenience) and *tahṣīniyya* (the norm of enhancement).[31] In our case, the position of *maṣlaḥa* will depend on the circumstances surrounding the intention to conduct SAS and the health status of the new-born with DSD. Here, we have a case of *maṣlaḥa dharūriyya.*

V. German Law

1. Overview and Historical Background

Germany does not have a history of denying the rights of intersexed persons as countries like Australia or United States do;[32] intersexuality had a legal foundation in the German past. For instance, in the General State Laws of the Prussian States from 1794 (Allgemeines Landrecht für die preußischen Staaten, abbr. ALG) a regulation for hermaphrodites ('Zwitter-Paragraph') existed, where the parents could decide to what kind of sex the child is educated, but the child could decide at the age of 18, within which gender he/she wanted to live after. This regulation did not recognize a third sex category next to male or female, though. After the introduction of the BGB (Bürgerliches Gesetzbuch, i. e. German Civil Code) on 1. 1. 1900 the ALG was unfounded and meaningless. The new substantive law did only require a binary gender order until the new judgement of the Federal Constitution Court (BVerfG, i. e. Bundesverfassungsgericht) from 10. October 2017.[33] With this actual judgment, Germany is the first EU country to introduce a third gender in law.

31 Mohamed / Noor, *supra* n. 18, at 8.

32 See Kennedy Aileen, Fixed in Birth: Medical and Legal Erasures of Intersex Variations, UNSW Law Journal, Vol. 39, Nr. 2 (2016), 813 – 842.

33 BvR 2019/16; Neue Juristische Wochenzeitschrift (2017), at 273. BvR is an abbreviation. The register symbol BvR is used by the Federal Constitutional Court for proceedings on constitutional complaints pursuant to Art. 93 para. 1 No. 4a and on municipal con-

2. Legal Statue before the Decision of the Federal Constitution Court

In German law, there was no legal regulation for a third sex in the past. When a child is born in Germany,[34] it is registered in the birth register (Geburtenregister). According to § 21 I Nr. 3 of the Personal Status Law (Personenstandsgesetz), the sex of the new-born must be registered. This binary gender order was a problem for parents of intersexed new-borns, who could not decide immediately after birth to which gender they should categorize their child.[35] The Internal Committee of the German Parliament (Innenausschuss des Deutschen Bundestages) brought forward a law initiative to change the current personal regulations. The reason for this endeavour was the proposal of the German Ethics Council (Deutscher Ethikrat)[36] from 14. 1. 2012 that brought forward a paper on intersexuality. The result was § 22 III PStG (Personenstandsgesetz) a. F. (alte Fassung, i. e. old version) that made an exception of the binary gender order. If a new-born could not be assigned to one of the two alternative genders – male or female – the birth could be registered without a specification of the new-born's gender. The only option was to leave the gender entry blank (so called "negative registration"). This regulation was a step forward compared to the situation before, but brought many – mainly social – problems for the parents. It lacks a clear allocation of the child in the categories male or female. In July 2014, an adult intersexed person lodged an appeal from the negative registration until now to a *positive designation* (*registration*) of the sex in the Personal Statute Law, concretely the amendment of § 22 III PStG a. F. The Court of First Instance (Amtsgericht Hannover)[37] rejected the coveted entry in § 22 III a. F. The remedies were exhausted by following decisions of higher courts, firstly the Higher

stitutional complaints pursuant to Art. 93 para. 1 No. 4b GG. See, www.gerichtsaktenzeichen.de/?s=Bvr&submit=Suche (last accessed 25 January 2020).

34 An estimated 80 000 to 120 000 people in Germany identify as intersex.

35 Vӧlzmann Berit, Postgender im Recht? Zur Kategorie "Geschlecht" im Personenstandsrecht, Juristische Zeitung, Vol. 74, Nr. 8 (2019), 381 – 390, at 383; Berndt-Benecke Uta, Die weitere Geschlechtskategorie im Geburtenregister, NVwZ, Vol. 5 (2019), 286 – 290, at 288.

36 Statement of the German Ethics Council from 14. 2. 2012, Bundestagsdrucksache 17/12192, at 11.

37 AG Hannover, decision from 13. 10. 2014 – 85 III 105/14.

Regional Court (OLG Celle)[38] and secondly, the Federal Court of Justice (BGH)[39], that followed the decision of the first instance.

3. Legal Statute after the Decision of the Federal Constitution Court

The Federal Constitution Court has decided that § 22 III PStG a. F. was incompatible with the Grundgesetz (GG), the Basic Law for the Federal Republic of Germany, as long as there is – according to § 21 Nr. 3 PStG – an obligation to certificate the gender in the birth register simultaneously. The Court held that the previous regulation was an intervention to the person's individual rights (general personality right in Article 2 GG) and an offense against the prohibition of discrimination in Article 3 GG. The Court argues that the negative registration leads to the situation that intersexed persons feel "genderless" or "sexless".[40] To meet the desire of intersexed people, the law needs to provide registrants with the possibility for a positive regulation.

As a result of its own argumentation, the Federal Constitution Court called the lawmakers to enact legislation and either introduce a third category or dispense with gender altogether in official documents until 31. 12. 2018. Under the new law adopted in December, intersexed individuals (not only new-borns) now have the legal right to identify themselves as a third gender, in a third category classified as '*divers*', which roughly translates to 'miscellaneous' or 'other'.[41] Parents are allowed to register their new-borns who are neither male nor female as '*divers*'. Intersex people will be able to

38 OLG Celle, decision from 21. 1. 2015 – 17 W/28/14, § 22 III PStG: Eintragung Intersexueller ins Geburtenregister, FamRZ, Vol. 23 (2015), 2096, at 2096.

39 Gössl Lilian, BGH, decision from 22. 6. 2016 – XII ZB 52/15, NJW (2017), 3643 – 3648, at 3643.

40 The Federal Constitution Court assumes that approximately 160 000 people in Germany live with a gender variation, of which maximal one third has an interest to change the gender. For the total population of 83 million people in Germany this corresponds to 0.06 % of the total population. See paragraph 10 in the following decision: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html (last accessed 20 January 2020).

41 Transsexual people who are biologically clearly male or female are not covered by this judgement. There is no reliable information about the number of transsexual people in Germany, varying between 10 000 and 200 000, the latter representing only 0.24 % of the total population.

register themselves as '*divers*' on birth certificates, passports, and driving licenses, turning down many unnecessary hurdles in everyday life. The only requirement for the registration of new-borns is a doctor's certificate to mark the baby under the new category whereas adults registered as male or female before need a medical certificate to change their gender.

4. Implementation of the Decision of the Federal Constitution Court

With the "Act amending the information to be entered in the birth register"[42] the lawmakers implement the decision on time. The regulation that has now entered into force is short and has only four articles. These are very brief summaries:

Article 1 of the new amending act has a two-staged construction. Primarily, according to § 22 III PStG new version, the sex of a new-born who cannot assign to the male or female gender can be kept off without an information or alternatively be entered with an information as '*divers*'. This is more a right for the parents than for the intersexed new-born. The word '*divers*' is a collective name and gives the individual concerned the possibility to sexual identification later. The second stage of Article 1 is for those who missed the registration at birth: This possibility is particularly for intersexed infants and adults, whose gender identity could not be determined at birth, thus having a 'wrong' registration as male or female[43]. To make the procedure much easier, § 45 b III 1 PStG provides a presentation of an actual medical certificate that does not need a detailed diagnosis of the patient,[44] but must prove the DSD as is defined in the Consensus conference. If a person takes hormones to change the gender, he/she does not fall into the category of § 22 III PStG. For those, who were determined at birth, the medical certificate is not necessary.[45]

42 Bundesgesetzblatt (BGBl.) I (2018), at 2635.

43 According to a survey in the eleven biggest cities in Germany, the number of intersex persons, who have applied for an entry is just 20 in each city. There were also no parents, who have their new-born registered (as at mid-April 2019). www.aerzteblatt.de/nachrichten/102938/Zahl-der-Menschen-mit-drittem-Geschlecht-geringer-als-angenommen (last accessed 20 January 2020).

44 Bundestagsdrucksache 19/4669, at 11.

45 The circular of the Federal Ministry of the Interior, Construction and Home to this subject can be retrieved at www.personenstandsrecht.de/SharedDocs/kurzmeldungen/

VI. Conclusion

Although the group of people affected with intersexuality is not very large, there is a necessity for a correct treatment of intersexed persons because intersexuality is in its origin an absolute fundamental human right. The treatment of intersexed individuals must be handled carefully; otherwise, there is a danger for discrimination.

To be able to assess this issue we need a holistic view to all aspects of intersexuality, particularly the individual, and the medical and psychological situation of an intersexed. Before taking a wrong decision for a surgery, it would be better to wait and see whether there is a tendency or clear decision for one or the other gender. And instead of leaving the decision for a surgery to the parents, every intersex should decide for him/herself. In both Islamic and in German Law intersexuality is an ethical matter which is not easy to respond to. Germany – as the first country in the EU – starts to solve the problem of intersexuality on the legal level. According to the regulations in Islamic law, many Muslim countries like Malaysia or Pakistan offer solutions, too.

Finally, intersexuality in a secular understanding is a fundamental right, whereas in the religious context of Islam it is not an absolute 'eternal' human right, but (only) a temporary human right that exists until the uncertainty is solved. Thus, it is more the fundamental right of a child until puberty instead of an adult's. Regardless how the regulation in Islamic or German legal concept is carried out, intersex persons need more attention. On the one hand, they have to demand more attention; on the other hand, we need to draw the public's interest to this subject. Nevertheless, intersexed people are human beings with a dignity who deserve a worthy life.

Webs/PERS/DE/rundschreiben/2019/0122-aenderung-geburtenregister.html (last accessed 20 January 2020).

Index