EJIMEL

Electronic Journal of Islamic and Middle Eastern Law

Vol. 7 (2019)

ISSN 2504-1940 (Print)
ISSN 1664-5707 (Online)
www.ejimel.uzh.ch

University of Zurich[UZH]

EJIMEL Electronic Journal of Islamic and Middle Eastern Law

Vol. 7 (2019)

EJIMEL Vol. 7 (2019)

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. 7 (2019), pages, http://www.ejimel.uzh.ch

ISSN 2504-1940 (Print)
ISSN 1664-5707 (Online)

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Termination of Agreement under the UAE Law and Judicial Precedent

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Abstract

The article examines provisions related to the termination of contracts in the UAE Civil Transactions Law and illustrates how the UAE Courts interpret the rules laid down by this law. These provisions do not repeal any special law related to the same subject; they only relate to the subject of the contract in general. In order to express the meaning of termination, the UAE contract law uses the Arabic word faskh. *Based on the manner of termination, the UAE law provides four types of termination:*

1. *Termination by mutual agreement after the conclusion of the contract;*
2. *Termination by judicial decision;*
3. *Termination by prior agreement;*
4. *Termination by law;*

*Among these types, termination by judicial decision is regarded as a general rule applicable to all disputes occurring between individuals. However, in accordance with article 274 of the UAE Transactions Law, the effects of all types of terminations are the same on the contracting parties and the third party, except when a contract is terminated by mutual agreement after its conclusion (*iqala*). The effects of* iqala *on the third party vary from other types of termination.*

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I. Introduction

Sometimes the contracting parties or one of them may not meet all the requirements of the contract. This failure may be due to the act of both parties or one of them or the circumstances surrounding the parties. Failure to fulfill the right of others to contract leads to harm to the other party. Therefore, the law has not left this matter without giving some solution. As it provides a solution to eliminate the damage caused by the failure to meet the requirements of contracts, the fulfillment of the contract may be accompanied by the possibility of its dissolution. In general, the reasons for the dissolution of contracts are not related to the nature of the contracts in transactions.

The termination of the contract is not a recent subject but an ancient theme of the Romans in their era and applied in a narrow field. The contracts of the Romans were not accompanied by revocation, and there was no way for the contracting parties to demand that they be terminated. Therefore, the other party could only submit an application for the execution of the obligations of the contract.[1]

At present, the termination of contracts is significant and essential, and the study will highlight some of the greatness of the Arab countries' legislations, which do not order anything that might put someone in a tight and critical position, and do not prevent anything unless there is an alternative, so that the purpose of ordering or prohibiting in the form of legislation brings benefits to the people and prevents them from any harm in the present and the future. The provisions on the termination of contract in the UAE's laws and legislations have the same purpose. In this article, we shall study the nature of termination, reasons for termination, types of termination, and the effects of termination on the contracting parties and on the third party.

II. Definition of Termination

When a contract is valid and enforceable, it must be executed. The execution is the natural way for the termination of the contractual relationship and by that the contract dissolves. However, there are some matters that may lead to the dissolution of a contract before its execution or before the execution can be completed by the parties. These matters may occur during the conclusion of an agreement or in the future only. In immediate execution contracts (e.g., a sale contract), the termination of the agreement may occur during its conclusion; and in the United Arab Emirates, like other Arab countries, this is called *faskh*.[2]

In Arabic dictionaries, the word termination (*faskh*) has three meanings:
1. Weakness of wisdom and body;
2. Lack of knowledge, which refers to the weakness of wisdom;
3. Cast or take off (for example, I take off my clothes).[3]

1 For more details, see ELIAS NASSIF, Al mawsū'a al-Uqood al-Madania wa al-Tijariyah (Encyclopedia of Civil and Commercial Contracts), Dar Al-Nahda Al Arabiya, Beirut 1974, at 582-583.

2 In French law, it is called *résolution*. It should be noted that the UAE Civil Transactions law (like the Egyptian civil law) is under the influence of the French civil law.

3 AL ZUBAIDI, Taj Al Arus (Arabic), Vol. 7, Al Torath al-Arabi, Kuwait 1965, at 319; SA'ID AL SHARTUNI, Aqrab al-Mawarid (Arabic), Part 2, Ayatollah Marashi Najafi Library Publications, Qom 1983, at 926.

In addition, Ahmad bin Faris bin Zakariya in his book explains that the word *faskh* means breaking of a thing or object.[4]

However, as a legal term, *faskh* means revocation (of agreement), rescission (of sale), disaffirmance, repudiation, dissolution, countermand, annulment, recall, setting aside, reversal.[5] In the eyes of the UAE Law, *faskh* is a form of recompense (or sanction or penalty) for the infringement of performance of an obligation, such as misrepresentation and its existence of conditions, which empower the injured party to terminate the agreement. Article 190 of the UAE Civil Transactions Law states: "If the misrepresentation is made by a person other than the contracting parties, and the person to whom the misrepresentation was made proves that the other contracting party knew of the misrepresentation, it shall be permissible for him to cancel the contract".
Therefore, this case differs from the breach of agreement at the time of its formation. The necessary elements to form and create an agreement are described in Article 129 of the UAE Civil Transactions Law[6]. Lack of any of these elements makes the agreement void (*butlan al- aqd*).

III. Reasons for Termination

The basis of the agreement, essentially, is the consent of the parties that can be shown by offer and acceptance. However, sometimes the parties or one of them is unable to fulfill all requirements of the agreement. This may happen when failure is resulted from the parties or one of them or from the circumstances surrounding the parties. Non-fulfillment of the parties' right leads to damages to the innocent party. To compensate these damages and in certain circumstances, the law gives the right to the injured party to terminate the agreement but in the manner prescribed by the legislator.

IV. Types of Termination

According to Article 267 of the UAE Civil Transactions Law, an agreement may be terminated in several ways, namely by mutual consent or by an order of the court, or under a provision of the law.
Therefore, four types of termination can be detected in the UAE Law: termination by mutual agreement after the conclusion of the contract, termination by judicial decision, termination by prior agreement, and termination by law.

1. Termination by mutual agreement after the conclusion of the contract

The UAE Civil Transactions Law recognizes the right of cancellation of the contract by the parties' mutual consent after the contract's conclusion. Article 268 stipulates that "[t]he contract-

4 AHMAD BIN FARIS BIN ZAKARIYA, Mu'jam al-maqayis fi'l- luqah (Arabic), Dar al-fikr, Beirut, without date, at 846.
5 HARITH SULEIMAN FARUQI, Faruqi's Law Dictionary (Arabic-English), Librairie du Liban Publishers 2001, at 257.
6 Article 129: "The necessary elements for the making of a contract are**:** (a) that the two parties to the contract should agree upon the essential elements**;** (b) the subject matter of the contract must be something which is possible and defined or capable of being defined and permissible to be dealt in; and (c) there must be a lawful purpose for the obligations arising out of the contract." It should be noted here that the UAE Civil Transactions Code has been translated from Arabic into English. The following book is considered as a reliable English translation of this law: WHELAN JAMES / HALL MARJORIE J., The Civil Code of the United Arab Emirates: the law of civil transactions of the state of the United Arab Emirates. Translated from Arabic into English by James Whelan & Marjorie J. Hall. Graham & Trotman, London/Boston 1987.

ing parties may mutually cancel the contract by their mutual consent after entering into the contract". Hence, it is permissible that the parties revoke the agreement by mutual consent after the contract has been concluded and be restored to the position they were in before the contract was made. Such termination is valid and in the UAE, like in other Arab countries, it is called *iqala*. According to Article 270 of the UAE Civil Transactions Law "[r]evocation (al iqala) shall be by offer and acceptance in the session (majlis), and by receiving (back the thing contracted for) on condition that the subject matter of the contract is in existence and in the possession of the contracting party at the time of the revocation, and if part of it has been lost the revocation shall be valid as to the remainder to the extent of the amount of the consideration attributable to it."

The Dubai Court of Cassation, by referring to the articles 268, 269, and 270 of the same law, has deduced that these articles together show that the cancellation of contract by mutual consent of the parties (*iqala)* is an agreement by that the obligation arising from the contract between the parties will expire and consequently it causes dissolution of the contract as well as the expiration of the obligations (regardless whether they were executed and whether their execution was completed or not). And that the basic condition for the validity of the *iqala* is the consent of the contracting parties. To find out whether the consent of the contracting parties exists or not, which is a factual matter, the court has the power to gather and review the facts of the case.[7]

The nature of the *iqala* is a matter of dispute. There are three views on this issue: the first view takes *iqala* into account as a new agreement. The second view considers it as termination by agreement. Finally, the third view considers *iqala* to be a termination between the parties and a new agreement in respect to the third party.[8] The last one has been followed by the UAE Law.[9]

2. Termination by judicial decision

Principally, contract termination is made by judicial decision. As a general rule, this is applicable to all disputes between individuals. In other words, the judge is the one who determines the dispute between the opponents.[10] Article 272 of the UAE Civil Transactions Law provides that: "(1) In contracts binding on both parties, if one of the parties does not do what he is obliged to do under the contract, the other party may, after giving notice to the obligor, require that the contract be performed or canceled. (2) The judge may order the obligor to perform the contract forthwith or may defer (performance) to a specified time, and he may also order that the contract be canceled and compensation paid in any case if appropriate".

This article is similar to the Article 1184 of French Civil Law of 1804 which states that "[t]he resolutory condition is always implied in synallagmatic contracts, for the case where one of the two parties does not carry out his undertaking. In that case, the contract is not avoided as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfill the agreement when it is possible or to request its cancellation with

7 The decision is dated 26/02/2007 in Petition No. 275/2006, Commercial Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol. 1 (2007), at 23.

8 For more details see, ABD AL MAJID AL HAKIM, Al Mujez fi sharh al-qanun al-madani (Arabic), Part 1, Nadim Publisher, Baghdad 1974, at 440- 442.

9 Article 269 of the UAE Civil Transactions Law provides that "[s]o far as concerns the contracting parties revocation amounts to cancellation, and with regard to a third party amounts to a new contract".

10 In French law, this kind of termination is called *la résolution judiciaire*.

damages. Cancellation must be applied for in court, and the defendant may be granted time according to circumstances".[11]

a) Conditions of termination

In order for the court to make a decision on the termination of an agreement, the following conditions should be present:

First Condition: *Binding Contracts*
As the UAE Civil Transactions Law has provided, some contracts are binding, and some of them are not. Article 218 of the same law gives a definition of a non-binding contract: "(1) A contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of the court. (2) Each party may act unilaterally in canceling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favor that he has the option to cancel."
However, the binding contract is an agreement which none of the contracting parties may revoke, modify or rescind it except by mutual consent, order of the court or a law provision.[12] Therefore, termination of an agreement can only occur in binding agreements.

Second Condition: *One party's failure to fulfill any of its contractual obligations*
When one of the contracting parties has failed to perform his obligation, the other party has two options. The first option is to seek the execution of the obligor's obligation from the court; and the second option is to ask the court to terminate the agreement, provided that he has already sent a notice to the obligor. Article 272 of the UAE Civil Transactions Law clearly states that before referring the case to the court, the party who is seeking termination of the contract must send a notice to the obligor requiring the contract to be performed or canceled. However, the mere opening of a file for termination is in itself considered to be a notice to the defendant. However, it should be noted that giving notice before stating the claim of termination possesses practical importance since the judge can give a quick response to such a claim.[13]

Third Condition: *The party requesting termination to be performed or is prepared to carry out his obligation*
If the obligee does not fulfill his obligations or if he is not ready to perform, he has no right to claim for termination of the agreement. The reason being that in such a condition, he fails to perform his obligations. If one party seeks for termination of the contract, he needs to fulfill his obligations. For example, if a buyer wants to terminate the agreement, he must prove that he has paid the price or, at least, that he is willing and ready to pay the price. However, if a seller seeks for termination he must prove that he has fulfilled his obligations or he is ready to perform his obligations. In conclusion, if the buyer refuses to fulfill his obligation without any right he cannot resort to termination. The same rule is applicable to the seller.

[11] This article has been modified by the Order No. 2016-131 of February 10, 2016, art. 2.
[12] Article 267of the UAE Civil Transactions Law.
[13] AL SANHOURI, Al-Wasīṭ fī sharḥ al-qānūn al-madanī (Arabic), Vol. 4, Dar Ihya al-Turath al-Arabi, Beirut, without date, at 821.

Fourth Condition: *The party requesting termination is able to return the situation to its original if it is ruled to be terminated*
The effect of termination is that the two contracting parties shall be restored to the positions they were in before the contract was made. In case that this is not a possibility anymore, compensation shall be ordered. The contracting party who insists on the termination is required to be able to restore the situation to what it was before. However, if the contractor is unable to do that, he has no right to resort to the termination of the agreement. In this a situation, on the request of the obligee, the court may enforce the obligor to perform the agreement or may order him to pay compensation to the obligee. Furthermore, if a part of the subject matter of the contract has been delivered to the buyer and he sells it to another person or converts it from one condition to another condition (such as when the buyer buys some clothes but only receives part of the goods and changes them into dresses) he has no right to cancel the agreement.

Fifth Condition: *Sending notice to the other party*
The obligee must send a notice to the other party regarding his refusal of his obligations' fulfillment. This notice is essential as it is a requirement for filing a termination case.

Sixth Condition: *Obligee's request for termination of the agreement without its performance*
Certainly, if the obligee asks for the performance of the agreement the court takes this request into consideration as far as possible.

Seventh Condition: *The obligor remains in his position*
In determining the cancellation of the contract, the obligor is liable if the court considers that no action is being taken to fulfill his obligation. Therefore, he remains in his position. However, if he takes steps to fulfill his obligations, the judge has the discretionary power to decide on compensation for delay in performance, in case there is place for compensation.[14]

b) The discretionary power of the court

As we will explain later, in contrast to termination by prior agreement, termination by judicial decision does not limit the discretionary power of the judge. When the obligee asks for termination of an agreement as a result of the obligor's non-performance of the contractual obligation, the judge is not obliged to accept his request but he has a right to give time to the obligor to fulfill his obligation in soft conditions to enforce the payment of the compensation (where appropriate). However, if the obligee seeks the execution of the contract and the obligor is able to perform his obligations, the judge must accept this application but he can also decide on compensation (if it is considered necessary).

Where there has been partial performance of some aspects of a contract, the judge can restrict his judgement for compensation of the unperformed part of the contract, provided that the partial performance relates to the most important part of the obligation. Nevertheless, the judge can always accept the obligee's application for termination of the agreement and rule on the matter where appropriate.[15]

[14] For more details, see HASAN AHMAD ABD AL KHALIGH, Al wajize fi sharh Qanun al-moamelat al-madania (Arabic), Part 1, Dubai Police Academy 2007, at 223.
[15] Ahmad, *supra* n. 14, at 223.

3. Termination by prior agreement

Sometimes the parties forecast the non-performance of an obligation by one of them at the time of the contract's conclusion and agree on stipulating a clause in the agreement that in case of non-fulfillment by either one of the parties the agreement shall be canceled or considered to be canceled without the need of a judicial decision. Such a clause is valid under the UAE law. Article 271 of the UAE Transactions Law prescribes that **"**[i]t shall be permissible to agree that a contract shall be regarded as being canceled spontaneously (automatically) without the need for a judicial order failing performance of the obligations arising thereout, and such an agreement shall not dispense with notice unless the contracting parties have expressly agreed that it should be dispensed with." This type of termination is called *faskh al- itefaghi* or termination by agreement in the UAE law.[16]

It is established by the judgments of the Dubai Court of Cassation that:

> "[…] It is the principle in contracts giving priority to the Autonomie de la Volonte, i.e. autonomy of the will principle; thus, Pacta Sunt Servanda, i.e. the contract makes the law between the contracting parties, and, accordingly, none of the contracting parties may unilaterally rescind, amend or cancel the contract unless upon the consent of the other contracting party or by law in accordance with the provision of Article No. 267 of the Civil Transactions Law."[17]

The Court of Cassation has defined this kind of termination as follows:

> "[…] Termination by agreement means that the contract contains a cancellation by agreement clause stipulating the contract to be regarded as being cancelled automatically without the need for a court judgement when the obligations arising from the contract or one of them are not fulfilled. It is called 'explicit cancellation condition', and then the termination here is definitely compulsory when the breach of the contractual obligation occurs, and the contractor or the judge has no choice between cancellation and execution of the contract. Here the decision of the court shall discover the occurrence of cancellation and does not create the contract termination status."[18]

In addition, the same Court has emphasized that the law does not require specific words for the explicit cancellation condition.[19]

An agreement on termination has several forms and each form has a different effect. In the following, attention shall be drawn to some remarkable points.

Firstly, sometimes the parties agree that if one of them fails to fulfill his obligation the agreement will be deemed to have been terminated. On the one hand, such phrase only illustrates the uncertainty in the general rule of termination and it does not add anything to such a rule.

[16] In French law, it is called *la résolution conventionnelle*.

[17] The Decision is dated 18/11/2012 in Petition No. 347/2011 Real Estate Petition, see <https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en> (last accessed 14 May 2019).

[18] Union Supreme Court of Cassation, decision dated 17/03/2013 in Petition No. 576/2012 Commercial Petition, at 3.

[19] The Decision dated is 10/07/2008 in Petition No. 92/2008 Commercial Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol.1 (2008), at 1097.

On the other hand, if the condition occurs, it is hard to reach the conclusion that the parties have definitely intended to cancel the agreement. Therefore, the obligee is not exempted from the duty of sending a legal notice to the obligor and must open a termination file in the court. Also, the agreement does not deprive the judge of his discretionary power in relation to the termination of the contract. Moreover, the obligor has the right to prevent the termination of the agreement by the performance of his obligations.[20]

In a decision of the Dubai Court of Cassation, this matter has been explained as follows:

> "[…] It is established under the judgments of this court that the termination based on implicit termination clause established under the law for all contracts binding on both parties, as implied from Article No 272 of the Civil Transactions Law, grants the obligor the right to avoid the termination by fulfilling the debt before the rendering of a final judgment in the lawsuit, as long as it is not evident that the delayed fulfillment is alleged by the obligee. That is to say for affording a satisfactory answer to the claim for termination in such case, the other party to the contract should remain late in fulfilling the obligation thereof till the rendering of a final judgment for the termination. Further, the implicit termination clause does not necessitate the termination, even upon the occurrence of failure to fulfill the obligation, rather, it is subject to the estimation of the judge who is entitled to allow a period of time to the obligor in order to avoid the termination as stated above. The estimation of the judge in this regard is not subject to the supervision of the court of cassation as long as the judge based the judgment thereof on apposite grounds derived from the papers. Further, it is established that the obligor may, before the issuance of the final judgment, fulfill the obligation thereof and avoid the termination."[21]

Secondly, sometimes the parties agree on the contract to be terminated spontaneously. Such an agreement does not exempt the obligee to not give notice or to not open a file in the court. However, it deprives the judge of his discretionary power and he has no right to give time to the obligor.

Thirdly, sometimes the parties agree to the contract being terminated spontaneously without the need for a judicial order. This does not exempt the obligee to not send notice. In a situation where the obligor fails to fulfill his obligation, the obligee must send him a notice and afterwards, if the obligor does not perform his obligation, the agreement is automatically terminated without the need for a judicial order. However, if the obligor claims to fulfill his obligations, the dispute should be raised before the court. Here, the duty of the judge will be limited to this claim. Therefore, if he finds out that the obligor has not fulfilled his obligations, he shall decide on the agreement to be canceled. Such a decision has the nature of discovering the fact that the agreement was terminated and it is not therefore creating the status of termination.

Fourthly, sometimes the parties agree that the contract shall be terminated spontaneously without the need to send notice or without a court judgment. In this case, when the obligor is unable to fulfill his obligations, the agreement will be canceled without the need for sending a no-

[20] AL SANHOURI, *supra* n.13,at 831.

[21] Petition No. 403/2015 Real Estate Petition issued on 04/06/2016, at 3.

tice or obtaining a judgment from the court. This is the maximum requirement the cancelation of the agreement.[22] The UAE Courts in several decisions has declared that with regard to the agreement of termination of a contract without warning or notice, the judge takes away his discretion in the matter of cancellation. Nevertheless, this shall be subject to the Court's verification of the existence of terminatory conditions by the agreement and necessity of its application.[23] However, the Dubai Court of Cassation has stressed that:

> "[…] The provisions of articles 271 and 274 of the Civil Transactions Law stipulate that the contract is not considered to be automatically canceled when the obligations arising therefrom are not fulfilled unless the parties agree to that. And this condition must be set forth in a clear and unequivocal manner, indicating that the contract has been terminated definitely and automatically once the violation of the contract has been occurred, without the need for a court ruling when the obligation has not been fulfilled."[24]

As we can see, in the mentioned forms (except for the first one), the obligee has the right to ask for the performance of the agreement or for its termination. It does not prevent the obligee to request the performance of the agreement. Otherwise, the obligor will be at the mercy of the obligee; therefore, he can succeed in making the agreement to be terminated by refusing to perform his obligations if he wishes so. Also, we can reach the conclusion that based on the Article 271 of the UAE Transaction Law, termination by agreement leads to the deprivation of two guarantees, which the law provides for the obligor:

First guarantee (the option to choose between the execution of the contract or its termination): This guarantee is the option to choose between the execution of the contract or its termination. In the above form the agreement defiantly will be terminated without leaving the obligor and the judge the option of choosing between the performance of the contract and its termination. This option will remain for the obligee only.

Second guarantee (the necessity of referring the matter to the Court): The issue of termination of the contract does not require referral to the court unless the obligor raises a dispute about the performance of the agreement.

Indeed, deprivation of these two guarantees does not prevent the obligor to benefit from other protection such as the necessity of sending him a notice by the obligee.

In summarizing the condition of termination by prior agreement, we should emphasize that it is necessary that:
(i) the agreement is a binding contract. Hence, as we have mentioned before, termination of agreement can only occur in binding agreements;
(ii) one of the parties fails to fulfill the specific contractual obligation as described in the termination agreement;
(iii) the party requesting termination has performed or is willing to carry out his obligation;

[22] SANHOURI, *supra* n.13, at 832-835.

[23] For example, see the Union Supreme Court of Cassation, decision dated 29/10/2015 in Petition No. 533/2015 Commercial Petition.

[24] The decision dated 23/01/2011 in Petition No. 122/2010 Real Estate Petition, see <https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en> (last accessed 14 May 2019).

(iv) the party requesting termination is able to return the situation to its original if it is ruled to be terminated.

4. Termination by law

Part one of the article 273 of UAE Civil Transactions Law provides that "[i]n contracts binding on both parties, if force majeure supervenes, which makes the performance of the contract impossible, the corresponding obligation shall cease and the contract shall be automatically canceled." According to this article, if the performance of the subject matter of the contract becomes impossible and the impossibility is not related to the act of the obligor, the obligor's obligations shall be terminated. Such as when a subject matter of the contract has been destroyed by a natural disaster. Here, for example, if the contract is a sale agreement, the agreement shall be terminated by the law, and the seller must return the price if he has received it from the buyer. In relation to the obligation of the buyer it must be said that his obligation is to pay some amount of money. Such an obligation is a debt in the hands of the buyer. Therefore, it cannot be destroyed materially. Article 565 of the Civil Transactions Law states that "[i]f a specific time for the payment of the price is laid down in the contract and it is stipulated therein that if the purchaser does not pay the price within that time then there will be no sale, then, if he does not pay the price and the property is still in the hands of the seller, the sale shall be deemed to be canceled".[25]

In understanding the concept of Article 273 of the UAE Civil Transactions Law, we shall mention articles 386 and 472 of the same law. Article 386 provides that "[i]f it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation". In addition, Article 472 lays down that "[t]he right shall expire if the obligor proves that the performance of it has become impossible for him for an extraneous cause in which he played no part".

Thus, the conditions of termination by law (*infesakh*) in brief are:
i) the impossibility of performance of the agreement;
ii) the impossibility must be caused by the third party and due to reasons that are not attributable to the obligor;
iii) the impossibility must happen after the conclusion of the agreement;
iv) the impossibility must concern the entire performance of the contract and not a part of the contract only. However, the part 2 of Article 273 of UAE Civil Transactions Law prescribes that "[i]n the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware".

[25] For more details, see HASAN AHMAD ABD AL KHALIGH, Al wajize fi sharh Qanun al-moamelat al-madania (Arabic), Part 3, 2nd edition, Dubai Police Academy 2008, at 236.

V. Effects of Termination of Contract

In case the parties cancel the agreement or the agreement is canceled automatically, the cancellation of the agreement shall result in ceasing the effects of the contract by retroactive effect and the contract shall be regarded as not having existed before. In such a situation, the parties shall be reinstated to the positions that they were in before the contract was made. Article 274 of the UAE Civil Transactions Law provides that "[i]f the contract is canceled automatically or by the act of the parties, the two contracting parties shall be restored to the position they were in before the contract was made, and if that is not possible, compensation shall be ordered". This Article is similar to the Article 1183 French Civil Law of 1804 which stated: "The resolutory condition – when fulfilled – brings the revocation of the obligation and puts things back in the same condition as if the obligation had not existed"[26].

Below, we shall discuss the effects of cancellation on the parties and the third party.

1. The effect of cancelation on the parties

In accordance with the provision in article 274 of the UAE Civil Transactions Law, in case the contract is terminated by agreement or by a judgment of the court, the termination of the contract shall result in restoring the contracting parties to the positions they were in before the conclusion of the contract. If, for example, a sale agreement is terminated, the parties of contract shall be restored to the position they were in before the contract was made, i.e. the buyer is not considered to have ever owned the subject matter of the sale agreement, and the seller is not considered to have possessed the price. As a result, the buyer must return the subject matter with its profits that have resulted before the cancelation. If the subject matter of the sale agreement, for instance, is a farm, he must return the farm with its crops (if they exist). Otherwise, he must pay the price of the crops to the seller. Also, the seller must give back the price with the legal interest from the date of judicial claim. The root of such an obligation goes back to the *unjust enrichment doctrine*.[27]

In circumstances where it is not possible that one or both parties return the sale subject matter or the price, the court shall order compensation (as is mentioned in the article 274 of the UAE Civil Transactions Law). In its Decision No. 295 of 25/10/1998, the Dubai Court of Cassation emphasized that the content of article 274 is that when the contract is canceled by agreement or judgment, the result is the termination of the contract and it is considered to have never come into existence, and the parties return to the position in which they were before entering into the contract.[28] Therefore, all agreements, obligations, and undertakings included in the contract cease and come to an end. For example, if the parties have agreed in a contract on compensation or penalty for the violation of an obligation, the clauses shall lapse if the original obligation lapses by the termination of the contract.

[26] This Article has been totally modified by the Order No. 2016-131 of February 10, 2016, art. 2.

[27] Article 321 of the UAE Civil Transactions Law provides that "[a] recovery of property handed over without entitlement may be made if payment was made in satisfaction of a debt for which the cause had not existed, or for a debt of which the cause has ceased to exist after it had materialized".

[28] See Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, vol.1, 1998, at 706.

In this regard, the following two decisions of the Dubai Court of Cassation are worth mentioning. The first case is in respect of compensation:

> "[…] It is established that the provision of Article No. 274 of the Civil Transactions Law implies that in case the contract is terminated by agreement or by a judgment of the court, the contract shall be dissolved and considered null and void and the contracting parties shall be restored to the positions they were in before the conclusion of the contract. Hence, the agreements and undertakings included in the contract shall lapse accordingly, the compensation provided for under the contract shall not count, and if the compensation is deemed necessary, then it shall be determined by the judge in accordance with the general rules which impose the burden of proving the harm, the realization and the extent thereof on the obligor."[29]

The second decision concerns the penalty clause:

> "[…] It is established, as applicable under the judgments of this court, that the termination of the contract, in accordance with the provision of Article No. 274 of the Civil Transactions Law, shall result in restoring the contracting parties to the positions they were in before the conclusion of the contract; and if such restoration is deemed impossible, then the compensation shall be ruled with. The consequences of the impossibility shall be borne in this case by the obligor whose obligation is deemed to be impossible to fulfill in operation of the principle of bearing the consequences in contracts binding on both parties. If the original obligation lapses with the termination of the contract, the penal clause agreed upon under the contract shall lapse as well on the consideration that such clause is an obligation subsequent to / dependent on the original obligation. Thus, the compensation estimated thereunder shall not count."[30]

The last subject to be discussed here is the situation where one party does not return what he has obtained from the other party after the cancellation of the agreement. According to the Article 275 of the UAE Civil Transactions Law, with regard to the above mentioned situation, each party has the right to detain what he has received so long as the other party has not returned what he has received from the former, or has provided security for such return.[31]

[29] The decision dated 07/11/2010 in Petition No. 202/2010 Civil Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol.2, 2010, at 1482.

[30] The decision is dated 23/09/2012 in Petition No. 09/2012 Real Estate Petition, see <https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en> (last accessed 14 May 2019). Also in its other decision, the same court confirmed that: "It is established, as applicable under the judgments of this court, that the penal clause is an obligation dependent on the original obligation; since it is an agreement on a penalty for the violation of such obligation; thus, if the obligation lapses with the termination of the contract, the penal clause shall also lapse and the compensation estimated thereunder shall not count.", Judgment of the Dubai Court of Cassation dated 05/02/2012 in Petition No. 352/2011 Real Estate Petition, see <https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en> (last accessed 14 May 2019).

[31] Article 275: "If the contract is dissolved by reason of voidness or cancellation or through any other cause and each of the parties is obliged to return that which he has obtained, it shall be permissible for each of them to detain what he has received so long as the other party has not returned what he has received from the former, or provided security for such return."

2. The effect of cancelation on the third party

Article 274 of the UAE Civil Transactions Law applies to the rights of others as well as the parties to the contract. Therefore, for example, when it is said that the buyer is deemed to have never owned the subject matter after the termination of the sales contract, it means that the rights placed on the subject matter before cancelation ceases to exist, too. The seller recovers the subject matter of the sale free of any third-party rights. Accordingly, in a situation in which someone has sold a commodity to a person and he (the buyer) sells it or the property rights[32] placed on the commodity (such as usufruct or the right of easement) to a third party and subsequently the first contract is canceled by the parties, the seller recovers the subject matter of the sale from the first buyer free of any attached property rights.

The legal bases of this rule are certain jurisprudential maxims such as "a person cannot transfer to other any right more than he has" or "who does not have a thing cannot give it to someone else". In order for such an effect to take place, it is necessary that the cancelation claim is indicated on the margin of the original registration of the sale contract, and the second transaction occurs after that indication in the margin of the original registration of the sale contract. This is the case for real properties. However, in movable properties, the basic rule of possession of the movable object is that evidence for its holder creates the necessary protection for the third party and limits the effect of the dissolution of the original contract as against others.[33] It means that if the subject matter of the sale is movable and the first buyer sells and delivers it to the second buyer, and then the first seller cancels the sale agreement, he cannot recover the subject matter from the second buyer who had a good intention. That is because he owned the subject matter by possession. Therefore, the seller shall reimburse the first buyer for compensation. On the other hand, if the second buyer did not receive the sale subject matter, or he had bad intention, it cannot be said that he owned the sale by possession. As a result, the subject matter returns to the seller and the second buyer must go back to the first buyer to recover his money.[34]

3. Effects of termination by mutual consent

In relation to termination by mutual consent after the agreement, it is interesting to know that the termination has no effect of returning the contracting parties to the position that they were in before the contract was made. To the third party, termination by mutual agreement after the conclusion of the contract has been recognized as a new agreement. Article 269 of the UAE Civil Transactions Law states that termination, as far as it concerns the rights of the contracting parties, amounts to rescission and, in regards to third parties' rights, to a new contract. Therefore, its effect on other than the parties is limited to the future. For example, if someone sells a house to another person and then the buyer enters into a mortgaged agreement with a third party and later on, the seller and the buyer terminate the contract based on mutual consent, the termination of the agreement would not have a retroactive effect on the mortgagee. That is because such *iqala* is counted to be a new agreement. Therefore the seller in the first agreement is considered to be the buyer in the termination agreement (*aqad al' iqala*) and the buyer in the first agreement is considered to be the seller in the termination agreement. The termination

[32] Article 109 of the UAE Civil Transactions Law states: "A property right is a direct power over a particular thing, given by law to a particular person".

[33] AHMAD, *supra* n. 14, at 277-278.

[34] AL SANHOURI, *supra* n. 13, at 828.

agreement entails that the house is returned to its old owner while it is loaded with the mortgagee's right.[35]

VI. Conclusion

In this study, we saw that the term of termination of contract means termination by agreement, by law, or by *iqala*. The study did not address the issue of termination of contracts by death of a contractor, by expiration of the contract, by execution (of contract) or by lack of leave in the suspended contract. In our research, the termination of the contract was described in its general concept, which consists of a single objective system. The research was based on the rules and regulations of the same concept in order to clarify the overall legislative idea in regards to termination.

Although termination can be divided into different main types, we have only discussed the kinds of termination that occur by mutual agreement of the contracting parties or by law or by judicial decision. Both UAE law and the judicial precedent show that in the comparison between termination by prior agreement and termination by judicial decision, the latter is regarded as a general rule applicable to all disputes between individuals. However, the effects of both types of terminations on the contracting parties and on the third party are the same.

[35] Ahmad, *supra* n. 14, at 263.

An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the *Moosa NO and Others v Harnaker and Others* Judgment

by Muneer Abduroaf[*]

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Abstract

Muslims have been living in South Africa for over 300 years. These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. An example of this would be where a testator or testatrix makes use of the South African common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise (Islamic will). This would ensure that his or her beneficiaries would inherit from his or her estate in terms of the Islamic law of succession. A potential problem could arise in the event where a beneficiary who inherits in terms of an Islamic will, renounces a benefit. Should the Islamic law or South African law consequences of renunciation apply? This paper critically analyses a recent South African High Court judgment where the issue of renunciation of a benefit in terms of an Islamic will was looked at.

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I. Introduction

Muslims have been living in South Africa for over 300 years.[1] These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. An example of this would be where a testator or testatrix makes use of the common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise.[2] This would ensure that his or her beneficiaries would inherit from his or her estate in terms of the Islamic law of succession. A potential problem could arise in the event where a beneficiary who inherits in terms of the above-mentioned will renounces a benefit. An example of this would be where a child of a testator renounces his or her benefits in terms of his last will and testament. The Western Cape Division of the High Court held that such benefits must be inherited by the surviving spouse or spouses in terms of s 2(C)(1) of the Wills Act 7 of 1953 (hereafter referred to as the Wills Act).[3] The High Court judgment was subsequently confirmed by the Constitutional Court on the 29 June 2018.[4] This paper aims to highlight some of the problems created as a result of the Constitutional Court judgment. It discusses the application of the Islamic law of succession within the South African context by way of introduction. It then analyses the *Moosa NO and Others v Harnaker and Others* judgment and concludes with recommendations as to a way forward.[5]

II. Application of the Islamic Law of Succession in South Africa

A South African Muslim is able to make use of the right to freedom of testation in order to apply the Islamic law of succession to his or her estate upon his or her demise. A basic clause in a will stating that the Islamic law of succession must be applied to his or her estate would suffice in this regard. This type of a will could be referred to as an Islamic will.[6] The clause would direct that an Islamic institution or an Islamic law expert should draft an Islamic distribution certificate which states who the lawful beneficiaries of the testator or testatrix are at the time of his or her demise. Islamic wills are generally accepted by the Master of the High Court for liquidation and distribution purposes.[7] It could be argued that this constitutes delegation of tes-

1 The first recorded Muslim arrived in South Africa in 1654. See MAHIDA EBRAHIM MOHAMED, History of Muslims in South Africa: A Chronology, Durban 1993, at 1.

2 South African law recognises the common law principle of freedom of testation. See JAMNECK JUANITA, Freedom of testation, in: Jamneck Juanita, et al., The Law of Succession in South Africa, Cape Town 2009, at 115, for a discussion on this issue.

3 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC), at para 39.

4 *Moosa NO and Others v Harnaker and Others* (CCT) 251/17.

5 *Moosa v Harnaker* (WCC), *supra* n. 3; and *Moosa v Harnaker* (CCT), *supra* n. 4.

6 ABDUROAF KHALID, Deceased Estates: Islamic Law Mode of Distribution, Highlands Estate 2017, at 210-215; and ABDUROAF MUNEER, The Impact of South African Law on the Islamic Law of Succession, Bellville 2018, at 205-207, for examples of Islamic wills.

7 In the *Moosa v Harnaker* judgment it was stated that "[t]he deceased in his Last Will and Testament ('the Will') dated 23 January 2011, expressly referred to his marriages to both women. In terms of the Will the deceased directed that his estate should devolve in terms of Islamic Law and that a certificate from the Muslim Judicial Council or any other recog-

tamentary powers, which is prohibited in terms of South African law.[8] It has been argued that the application of the Islamic wills has been incorporated into South African law by way of custom.[9] A further discussion on this issue is beyond the scope of this paper.

III. An Analysis of the *Moosa NO and Others v Harnaker and Others* Judgment

The facts of this case concerned a deceased Muslim (X) male who died testate on 9 June 2014. X was married to two wives when he died.[10] He married his first wife (Y) in terms of Islamic law on 10 March 1957. He subsequently married his second wife (Z) in terms of Islamic law on 31 May 1964. Y consented to the marriage between X and Z.[11] X subsequently married Y in terms of South African law during August 1982. Z consented to the civil marriage between X and Y.[12] A total of nine children were born of the two marriages. Four of these children were male and five were female. X's will was executed on 23 January 2011 and it stated that his estate must devolve in terms of Islamic law. It further stated that an Islamic distribution certificate issued by the Muslim Judicial Council (SA) or other judicial body shall be final and binding upon the executors of his will.[13] The Islamic distribution certificate was issued by the Muslim Judicial Council (SA) in terms of Al Quraan, sura 4 (11-12).[14] The Islamic distribution certificate stated

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nised Muslim Judicial Authority shall be final and binding on his executors.", see *Moosa v Harnaker* (WCC), *supra* n. 3, at para 5.

8 An example of an invalid delegation of testamentary power would be in a situation where the grantee thereof is given unlimited discretion. This could be referred to as a general power of appointment. An example of general power of appointment would be where X states in his will that the beneficiaries of his estate shall be decided by his daughter Y, see DE WAAL M. J./SCHOEMAN-MALAN M.C., Law of Succession, 5th ed., Cape Town 2015, at 49.

9 See ABDUROAF MUNEER, *supra* n. 6, at 125, where it was argued that the common law has been developed through custom and is now part of South African law. It should also be noted that the Islamic law expert who drafts the Islamic Distribution Certificate does not have unlimited power. He can only issue a certificate in terms of Islamic law.

10 *Moosa v Harnaker* (WCC) supra n. 3, at para 4.

11 M is married to X in terms of both Islamic law and the Marriage Act 25 of 1961. See *Moosa v Harnaker* (WCC), *supra* n. 3, at para 3.

12 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 3-7.

13 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 4-8. It should be noted that a clause in an Islamic will stating that Islamic law should apply could be problematic in the event where there are differences of opinions found within Islamic law. I am of the opinion that a testator or testatrix must state in his or her will which school of law must find application in this regard. This would also bring about legal certainty and prevent abuse by executors of estates who are trusted with administering Islamic wills.

14 See KHAN MUHAMMAD MUHSIN, The Noble Qur'an - English Translation of the Meanings and Commentary, New Delhi 1404H, sura 4 (11-12), where it states: "11. Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise. 12. In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing." These verses stipulate the inheritance of parents, children, surviving spouses, and uterine siblings.

that each widow must inherit 1/16 = 13/208, each son must inherit 7/52 = 28/208, and each daughter must inherit 7/104 = 14/208.[15]

The nine children renounced the benefits due to them in terms of the Islamic distribution certificate.[16] The nine children "[…] all agreed and expressed their intention in writing to renounce all their benefits accruing to them in terms of the Will read with the Islamic distribution certificate and stipulated that it be inherited in equal shares by the Second and Third Applicants [surviving spouses of the testator]. As a result of the renunciation, the Executor relied upon the provisions of s 2(C)(1) of the Wills Act." The executor considered both Y and Z to be surviving spouses for purposes of s 2(C)(1), and was of the opinion that the renounced benefits should vest in them equally.[17] The liquidation and distribution account recorded that Y and Z would each inherit an equal share of the renounced benefits. The liquidation and distribution account was accepted by the Master of the High Court.[18] The Registrar of Deeds was of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Y should vest in Y as she was recognised as a surviving spouse for purposes of s 2(C)(1) due to her civil marriage with the deceased. The Registrar of Deeds was, however, of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Z should vest in the descendants of the children of the repudiating descendants in terms of s 2(C)(2) as the Islamic marriage between X and Z was not recognised for purposes of s 2(C)(1).[19]

The disputed matter was referred to the Western Cape Division of the High Court where it was argued that s 2(C)(1) unfairly discriminates against Z on the grounds of religion and marital status.[20] The Court held that s 2(C)(1) is inconsistent with the Constitution as it does not include a husband or wife in a marriage that was solemnised in terms of Islamic law.[21] Section 2(C)(1) was declared invalid insofar as it does not include multiple widows married to a deceased husband in terms of Islamic law.[22] The order of invalidity was suspended subject to confirmation by the Constitutional Court as it required in terms of s 15(1) (a) of the Superior

15 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7. The fact that the daughters inherited half the shares of the sons in terms of the Islamic Distribution Certificate raises the question of discrimination based on sex or gender. This issue is beyond the scope of this case note. It should be noted that the South African Constitution prohibits discrimination based on sex or gender. See s 9 of the Constitution of the Republic of South Africa 1996, where it states that "(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."

16 The renouncement was reduced to writing. The children stated that they wanted the surviving spouses to inherit the renounced benefits in equal shares, see *Moosa v Harnaker* (WCC), *supra* n. 3, at para 8.

17 Section 2(C)(1) of the Wills Act states that "[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse."

18 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 9.

19 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 12-13. It could be argued that the renounced benefits should technically vest in Y as she was the surviving spouse in terms of s 2(C)(1) It should be noted that s 2(C)(2) is also subject to s 2(C)(1). See s 2(C)(2) of the Wills Act 7 of 1953 where it states that "[i]f a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates."

20 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 17.

21 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (a) (i).

22 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (a) (ii).

Courts Act 10 of 2013.[23] The order of the High Court was in essence confirmed by the Constitutional Court.[24]

The question that should be raised is whether relying on s 2(C)(1) of the Wills Act was the correct approach or whether the Islamic distribution certificate should have been referred back to the Muslim Judicial Council (SA) for an amendment in terms of Islamic law based on the renunciation.[25] Two situations must be distinguished with regard to the above. The first situation would be where the last will and testament of the testator or testatrix expressly states how his or her estate should be distributed without any reference to Islamic law. In this instance s2(C)(1) of the Wills Act would find application. This would be the case even if the consequences of the will are the same as Islamic law that would appear on the Islamic Distribution Certificate.[26] The second situation would be where the testator or testatrix states in his or her last will and testament that his or her estate must be distributed in terms of Islamic law and that an Islamic law expert or Islamic institution should draft an Islamic Distribution Certificate in this regard. This is what has transpired in the *Moosa v Harnaker* case, and is the focal question looked at in this paper.[27]

I am of the opinion that s 2(C)(1) of the Wills Act should not find application in the above instance. My argument is based on the fact that the testator stated in his last will and testament that his estate should be distributed in terms of Islamic law.[28] This would be the application of the common law right to freedom of testation. I am of the opinion that the Muslim Judicial Council (SA) should have been approached in regards to the renunciation of benefits and the Islamic Distribution Certificate should have been amended accordingly. The Islamic law doctrine of *takhaaruj* would then have found application.[29] The doctrine allows for renunciation of benefits in deceased estate. This could be done in favour of the surviving spouses. The doctrine of *takhaaruj* is broader than s 2(C)(1) as the children are not restricted in their renunciation in favour of the mother only. A child listed on the Islamic Distribution Certificate would, for example, be free to renounce his or her benefit in favour of any of the other persons listed on the Islamic Distribution Certificate. The doctrine of *takhaaruj* also allows for renunciation in favour of an asset inside or outside of the deceased estate. An example of this would be where a son

[23] *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (g). Section 15 (1) (a) of the Superior Courts Act states that "[w]henever the Supreme Court of Appeal, a Division of a High Court or any competent court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in terms of s 172 (2) (a) of the Constitution, that court, must in accordance with the rules, refer the order of constitutional invalidity to the Constitutional Court for confirmation."

[24] See *Moosa v Harnaker* supra n. 4.

[25] Section 2(C)(1) of the Wills Act 7 of 1953 states that that "[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse."

[26] Another question that should be looked at is whether the Islamic law consequences of renunciation should apply in the event where a testator or testatrix expressly states in his or her will that the Islamic law consequences should apply in the event where there is a renunciation by his or her child who he or she has bequeathed a testate benefit to. An example of this would be where a testator bequeaths 1/3 of his net estate in favour of his non-Muslim son. This son would not appear on the Islamic Distribution Certificate as is disqualified from inheriting in terms of the Islamic law of intestate succession. This question is beyond the scope of this paper as these are not the facts as found in the *Moosa v Harnaker* case. I am of the opinion that s 2(C)(1) would find application as the wording of the section does not allow for a difference consequence to the renunciation.

[27] *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7.

[28] *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7.

[29] See AL SUBAA'EE MUSTAFAA, Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyyah, vol. 2, part 3, 3rd ed., Beirut 2000, at 177-178; and AL ZUḤAYLEE WAHBA, Al Fiqh Al Islaamee Wa Adillatuhoo, vol 8, 3rd ed., Damascus 1989, at 440-442.

renounces his right to inherit a share in estate in favour of the surviving spouse, in exchange for a car.[30] It should be noted that there would be nothing preventing the son in this example from renouncing his share in the estate in favour of the surviving spouse for no exchange at all. The children in the *Moosa v Harnaker* case could therefore have renounced their rights in the estate in favour of the surviving spouses based on the doctrine. The Islamic Distribution Certificate would then have reflected this. There would then have been no need for s 2(C) (1) of the Wills Act to apply.

It could be argued that once an Islamic Distribution Certificate is issued and lodged with the Master of the High Court, s 2(C) (1) of the Wills Act should find application (as in the instance of *Moosa v Harnaker*), whereas the Islamic law consequences should apply in the event where the certificate has not yet been lodged. This type of a situation could lead to a friction between the rules applicable in terms of Islamic law and South African law. An example of this would be where a son of the testator wishes to renounce a benefit in favour of the testator's father. This type of renunciation would be possible in terms of Islamic law in terms of the doctrine of *takhaaruj*, but it would not be possible in terms of s 2(C) (1) of the Wills Act. The renounced benefit should go to the surviving spouse in terms of s 2(C) (1) of the Wills Act, whereas it should go to the father in terms of the doctrine of *takhaaruj*. This situation could also lead to an abuse of power. If, for example, the testator of a deceased estate is aware that the son of the testator wants to renounce a benefit, he or she could then request the Islamic Distribution Certificate and lodge it prior to the renunciation. This would then ensure that the renounced benefit would be inherited by the surviving spouse in terms of s 2(C)(1) of the Wills Act. He or she could, for example, also accept the renunciation document of a son in favour of the daughter of the deceased, but not inform the Islamic law expert of the renunciation. He would then subsequently lodge the renouncement document at the Masters Office. This would mean that the renouncement would now be in terms of s 2(C)(1) of the Wills Act and not in terms of Islamic law. This creates a huge problem with legal certainty as it would not be clear as to how the estate of the deceased would devolve.

IV. Conclusion

This paper has highlighted some of the problems with the *Moosa v Harnaker* judgment with regard to s 2(C)(1) of the Wills Act. The research has shown that the consequences of renunciation by a descendant of a deceased testator in terms of South African law are not the same as those in terms of Islamic law. It has also shown that the application of s 2(C)(1) of the Wills Act could be quite problematic in the instance where a testator or testatrix states in his last will and testament that Islamic law should find application to the distribution of his estate and that an Islamic Distribution Certificate issued by an Islamic law expert would be binding in this regard. The precedent set by the *Moosa v Harnaker* judgment would lead one to believe that the Master of the High Court would most likely not accept a request to amend an Islamic Distribution Certificate in the event where a descendant who is named in such a certificate renounces the benefit subsequent to the lodging of the certificate at the Master of the High Court. My recommendation in this regard would be that executors of Islamic wills should discuss issues regarding renunciation and related matters with the Islamic law experts or institutions like the Muslim Judicial Council (SA) prior to lodging it with the Master of the High Court. This would

[30] See AL SUBAA'EE, *supra* n. 29, at 177-178; and AL ZUḤAYLEE, *supra* n. 29, at 440-442.

ensure that Islamic law consequences would find application in this regard, and it would ensure that the testator's right to freedom of testation is given effect.

Certification of Islamic Marriages in Nigeria: Realities, Challenges, and Solutions

by Halima Doma-Kutigi[*]

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Abstract

The Nigerian Constitution guarantees the rights to have a family life, and freedom of religion. To this end, it recognizes three forms of marriage, namely customary marriage, Islamic marriage, and statutory marriage. While statutory marriage is required to be registered by law, there is no law necessitating the registration of customary or Islamic marriages. Yet in recent times, statutory marriage has gained popularity amongst Nigerians regardless of cultural or religious affiliations. This development is linked to modernization, the requirement to prove marriage for official transactions, and a perceived protection that documentation from the marriage registry offers against socio-legal challenges such as guardianship of children, increase in interfaith marriages, immigration, protection against arbitrary divorce, etc. Thus, it is now common to find couples who may have contracted customary or Islamic marriage combining it with statutory marriage thereby giving rise to a multi-tiered or double-decker marriage which seems to have emerged as a fourth type of marriage in Nigeria.

Drawing on current literature and empirical research using qualitative methods, this study examines the systems of marriage in Nigeria while placing the spotlight on Islamic marriages that are accompanied by statutory marriage. The pattern of marriage registration among the Muslim community is investigated in order to understand its possible link with the growing popularity of multi-tiered marriage among Muslims in Nigeria. The study then reflects on the legal implication by probing potential conflict situations between certain provisions of the Marriage Act and basic ideals of Islamic law. It concludes by calling for the compulsory registration of all types of marriages in Nigeria within a unified system.

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I. Introduction

The sanctity of marriage is a well-established standard globally, and matrimonial relationships are universally recognized and respected as a necessary prerequisite for the establishment of a legitimate family. Marriage is a social institution which is guided by the socio-cultural and religious norms in every society. Where a nation is populated by people of different ethnicities and religions, the recognition and application of different systems of law will naturally be required pertaining to their respective customs, and this reflects mostly in the forms of their ceremonies including marriage.[1]

Nowhere does this ring truer than in Nigeria, Africa's most populous country with an estimated population of 184 million people.[2] It is also one of the most ethnically diverse countries in the world with well over 250 ethno-linguistic groups, some of which are larger than many sovereign states in Africa[3]. Roughly half of the population in the country is Muslim, followed by a large percentage of Christians, and a minority population of traditional religious practitioners and atheists.[4] Following the multiethnic and multi religious nature of the country, the Nigerian Constitution[5] sanctions three types of marriages, namely statutory marriage, customary marriage, and Islamic marriage; which are acknowledged as distinct and separate from each other.[6]

In recent times, statutory marriage has gained popularity amongst Nigerians regardless of cultural or religious affiliations due to the protection it offers against socio-legal challenges such as the need to prove marriage for purposes of official transactions, increase in interfaith marriages, immigration, long distance marriages, protection against arbitrary divorce, etc.[7] Thus, it is now common to find couples who may have contracted customary or Islamic marriage applying to contract statutory marriage, thereby engaging in multi-tiered contracts by combining marriages under different systems of law,[8] and thus subjecting the regulation of their family life to multiple systems of law.

Following the enumerated problems above, this study sets to examine the ensuing questions:

i. What is the pattern of registration of Muslim marriages in Nigeria; and which instruments are available to generate documents for marriages conducted under traditional Islamic marriages in order to make them accepted within other traditions and societies?

ii. What is the rate of Muslim couples that engage in multi-tiered marriages, and what are their reasons for doing so?

1 AGBEDE ISAAC OLUWOLE, Themes on Conflict of Laws, Lagos 1989, at 6-7.
2 National Population Commission, Nigeria, <www.population.gov.ng> (last accessed 11 March 2019).
3 World Directory of Minorities and Indigenous Peoples <www.minorityrights.org> (last accessed 8 March 2019).
4 See *supra* n. 3; see also AN-NA'IM ABDULLAHI AHMED (ed.), Islamic Family Law in a changing World: A Global Resource Book, London 2002, at 299.
5 Constitution of the Federal Republic of Nigeria 1999.
6 Accordingly the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto are in the Federal Exclusive Legislative List.
7 RIFATU ABDULHAMID/IMAM ABDULRAHIM SANUSI, Challenges and Negative Effects of Divorce Among Muslim Women in Northern Nigeria, Journal of Arts & Humanities, Vol. 5, No. 11 (2016), 13-25.
8 Marriage Act, Cap 212 LFN 1990.

iii. How does 1 and 2 above impact on rights and duties of the parties in marriage, divorce, and inheritance?

II. Literature Review

1. Definition of Marriage

Marriage is defined in Black's Law Dictionary as the legal union of one man and one woman as husband and wife.[9] Lord Penzance also defined marriage in *Hyde v Hyde* as "[…] the voluntary union for life of one man and one woman to the exclusion of all others".[10] For a long time, this definition was commonly accepted in many parts of the world; however, it now seems to be obsolete. Notably, those who contract marriage for short term objectives in order to achieve a particular purpose, and same-sex marriage cannot fall under the definition of marriage by Lord Penzance. Furthermore, although the definition by Lord Penzance is similar to the one under the Nigerian Marriage Act,[11] it must clearly be stated that this definition does not strictly speaking hold true because it fails to accommodate customary or Islamic marriages, which are polygamous in nature.

Nwogugu describes marriage as "[…] a universal institution which is recognised and respected all over the world as a social institution founded on, and governed by the social and religious norms of society".[12] This clearly implies that any marital union must and should be socially approved, but the acceptable process and medium of social approval has become a contentious issue in pluralistic societies like Nigeria. This view covers an aspect of the study.

2. Sources of Family Law in Nigeria

Tobi identifies the sources of Nigerian family law as: the Nigerian Constitution of Nigeria; customary laws that have been in existence from ancient time; Islamic law that is universally applicable among Muslims; and received English law brought into the country by the British colonialists. Other sources include international law, case law, and legislation.[13]

He acknowledges that though Nigeria is now independent, the state's legal system is modeled after the British legal system, and the body of English laws imposed by the colonial masters still plays a major role in our system of law.[14] Accordingly, family law in Nigeria is a subset of the legal system, and thus shares the same sources, development with the general legal system in the country. The author further narrates that before the British came into Nigeria, the natives had different systems of law governing their affairs, including marriage, and besides the system operating under the traditional customary law which is indigenous to the people, there were also rules of Islamic law. He noted that Islamic law is not indigenous to any tribe and is especially practiced in the areas presently within the northern region and some south-western

9 BLACK H.C., Black's Law Dictionary with Pronunciations, 6th ed., St. Paul 1990, at 972.

10 (1866) L.R.1 PD. 130, at 133.

11 See Section 27 of the Marriage Act Cap. M6, Laws of the Federation of Nigeria, 2004; See also Sections 33(1) and 39 of the same Act.

12 NWOGUGU E. I., Family Law in Nigeria (Revised Edition), Ibadan 1996, at 5.

13 TOBI NIKI, Sources of Nigerian Law, Lagos 1996, pp 25-74.

14 See TOBI, *supra* n. 13, at 34.

parts of Nigeria; but by virtue of Section 2 of the Native Courts Ordinance 1914, Islamic law was categorized as customary law in Nigeria.[15] This development has always been a subject of debate. While some authors like Eniola[16] and Adaramola[17] consider customary law in Nigeria as consisting of both native law and Islamic law, others like Tobi,[18] Ambali[19] and Yakubu[20] argue that Islamic law operates as a distinct system from customary law. Ambali suggests that the classification of Islamic law as a form of customary law in Nigeria reflects an unaccommodating approach to Islamic law, and concludes that notwithstanding challenges to the application of Islamic law in the country, it still endures as a system of law and is accordingly recognized by Section 275 of the Constitution of the Federal Republic of Nigeria 1999. Citing the decision in the case of *Khairie Zaidan v Fatimah Khalil Mohssen*, he further concludes that Islamic law is the personal law of Muslims in Nigeria and it operates as a distinct legal system.[21]

3. Systems of Marriage in Nigeria

Nnamani identifies three systems of marriage in Nigeria: statutory or registry marriage, customary marriage, and Islamic marriage.[22] These three forms of marriage are fully recognised as distinct and separate from each other by Nigerian Law.[23] The laws regulating marriage in Nigeria are the Marriage Act, which regulates statutory marriage; customary law (of the various ethnic groups in Nigeria), which regulates customary marriage; and Islamic law, which regulates Islamic marriage.

a) Statutory marriage: This form of marriage is contracted under the Marriage Act, a federal enactment designed for the celebration of voluntary union between a man and a woman to the exclusion of all others during the continuance of the marriage.[24] This type of marriage, which is also referred to in Nigeria as "registry marriage" or "marriage under the Act", is monogamous in nature; thus, parties to this union must not have been previously married to any other person. Furthermore, a party cannot during the lifetime of the other party to the marriage purport to marry some other person, whether under customary law or under the statute unless this marriage has been validly dissolved by a court of competent jurisdiction. Thus, Section 33(1) of the Marriage Act provides that: "No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person to whom such marriage is had." Also, the marriage must not be between parties related by blood or marriage.

Christians in Nigeria go through statutory marriage in the Marriage Registry before proceeding to church for solemnization. However, they do not need to go to the Registry if their church is recognized as a *licensed place of worship*. The licenses for churches to conduct marriages are

15 See TOBI, *supra* n. 13, at 136.
16 EMIOLA AKINTUNDE, The Principles of African Customary Law, Ogbomosho 2005.
17 ADARAMOLA FUNSO, Jurisprudence, London, 2008.
18 TOBI, *supra* n. 13.
19 AMBALI M. A., The Practice of the Muslim Family Law in Nigeria, 2nd ed., Zaria 2003.
20 YAKUBU J. A., Within and Without: The Relevance and Potency of the Law beyond our Frontiers, Ibadan 2006.
21 (1973) 11 SC 1, at 27.
22 EMMANUEL NNAMANI, Misconceptions and Inadvertences Affecting the Customary Courts System in Nigeria, NJI Law Journal 2017, at 1323-24.
23 EMMANUEL, *supra* n. 22.
24 Cap M6 LFN 2004.

obtained from the Ministry of Interior to enable it for the conduction of statutory marriages after the fulfillment of certain requirements.

b) Customary marriage: This is essentially marriage contracted and regulated under the native laws and customs of the various communities in Nigeria. It is the commonest form of marriage in Nigeria and it is recognized under the law as a legitimate matrimonial union. There is no single uniform system of customary law prevailing throughout Nigeria, and so customary laws differ from one locality to another. However, under indigenous or native customary laws of Nigeria, marriage is essentially a union of a man and a woman for the duration of their lives, involving a wider association between two families or sets of families. Thus, customary marriage is conducted as proof to the community that the couple is actually husband and wife; to guarantee the children's parentage; and generally upholding customary values.[25]

From the foregoing, it is clear that ample allowance and incentive is provided under customary law for polygamy given that there is no limit to the number of wives a man can marry under customary law. The basic requirements of a valid customary law marriage are: capacity,[26] consent of the parties and their families, bride price, and the celebration of marriage through a ceremony. The prohibition of marriage between people related by blood or marriage often exists under customary marriages.

c) Islamic marriage: This marriage is conducted according to the tenets of Islamic law. It is also not limited to one man and one woman provided he is capable of meeting the requirements and conditions stipulated under Islamic law. For a valid Islamic marriage, the following conditions must be satisfied: there must be a clear proposal and acceptance, witnesses, bride price, and guardian.

It is emphasized that Islamic law and customary law marriages are in no way inferior in status to marriage contracted under the Act. Instructive in this regard is the Supreme Court case of *Jadesimi v. Okotie Eboh,* where it was decided that "[…] the status of being married under Islamic law or customary law is well recognized in this country and such marriages should not be accorded any status that is inferior to that of marriage conducted under the marriage act."[27]

d) Multi-tiered/double-decker marriage: According to Imam-Tamim, a fourth type of marriage subsists in Nigeria, which is a hybrid form of marriage where a single couple combines marriages under different systems of law.[28] This practice of contracting multi-tiered marriage by the same couple is what Onokah termes "double-decker marriage", and which she defines as "[…] involving the celebration by the same couple of a marriage under one system and their subsequent marriage under another system".[29] The author posits that the Nigerian Marriage Act has given validity to this practice by enabling those who are married under customary law to marry each other under statute law. The accommodation of a multi-tiered marriage contract

[25] ONOKAH M. C., Family Law, Ibadan 2003, at 144-146.

[26] The parties to the marriage must be of marriageable age. Although no custom expressly states any age for marriage, the Child's Right Act provides that 18years is the minimum age for any marriage.

[27] (1996) 2NWLR (Pt 429) 128, at 142.

[28] IMAM-TAMIM MUHAMMAD KAMALDEEN, A doctrinal review of literature on multi-tiered marriage in Nigerian family law, presented at the Postgraduate Colloquium on Innovation in Postgraduate Research, Organised by Goal Centre, Islamic Science University Malaysia (USIM) on 10 June 2015.

[29] ONOKAH, *supra* n. 25, at 143.

under Nigerian family law can also be deduced from the provision of section 35 of the Marriage Act 1914 which provides to the effect that couples are not allowed to conduct any other form of marriage(s) after the celebration of marriage under the Act either with themselves or with a third party. Any such marriage conducted is pronounced null and void and punishments are provided in sections 47 and 48 of the Marriage Act 1914. The Act however permits "customary law" marriage as far as it is between the same couple married under the Act. As at 1914, the term customary law was intended to include Islamic law.[30]

Many Nigerians conduct statutory marriage mainly for its perceived "legality", monogamous security, the official purpose that the certificate serves, urbanization, status symbol, etc.[31] There is also a general impression that couples who engage in several forms of marriage are somehow "more married" and thus are entitled to greater protection than those who enter into traditional marriage.

4. Issues and Implications of Multi-Tiered Marriages under Nigerian Family Law

Imam-Tamim examines the legal predicaments that could arise in respect of marital causes between multi-tiered marriage couples by particularly relating to the question of which distinct system of family law governs a relationship.[32] Each of the different systems of family law has its own peculiar understanding of marriage rules and application. He identifies the potential conflict incidents including ownership of matrimonial property acquired during the subsistence of such marriage, termination of the marriage between the parties, guardianship and custody of children born of a marriage, etc.

In addressing the legal predicaments, Kolajo notes that ordinarily where customary law conflicts with a statute the provision of the statute shall prevail.[33] However, such provision can be deemed to enjoy prevalence over customary law where the statute expressly makes provision to that effect. Tonwe and Edu also support Kolajo's position on the determinant factor for the superiority of statute over the customary law.[34]

In contributing to the debate, Onokah streamlines two theories that guide the courts in resolving the conflict of law issue that may arise in the multi-tiered marriage.[35] These are the coexistence theory and the conversion theory. The conversion theory states that the customary marriage merges (converts) into the statutory marriage, and that dissolution of the statutory marriage brings an end to the marital relation between the parties. On the other hand, the coexistence theory advances that both marriages co-exist and thus in the event of dissolution separate actions must be taken in order to dissolve both marriages: in the case of the statutory marriage a decree of divorce issued by a High Court, and in case of a customary law marriage by an extra-judicial act of refund of bride price or by judicial divorce by a customary court. This view is supported in the case of *Ohochukwu v Ohochukwu* where the question arose whether the English Court had jurisdiction to dissolve the two forms of marriages between the parties. Wrangham J. granted a decree nisi dissolving the subsequent English marriage and stated

30 This intention was conveyed in Section 2 of the Native Court Ordinance 1914.
31 ONOKAH, *supra* n. 25, at 147-151.
32 IMAM-TAMIM, *supra* n. 28.
33 KOLAJO A. A., Customary Law in Nigeria through Cases. Revised Edition, Ibadan 2005.
34 TONWE S. O./EDU O. K., Customary Law in Nigeria, Lagos 2017.
35 ONOKAH, *supra* n. 25, at 153.

that, "[…] the Nigerian marriage must be regarded as polygamous marriage over which the court does not exercise jurisdiction."[36]

Although these theories seem to have aided the courts to some extent, it appears that the debates have still not been settled because the differences between all the systems of marriages are so significant that it is incomprehensible for one form to be subsumed under another.

Perhaps the only treatise on Islamic family law in Nigeria that pointedly addresses multi-tiered marriage is authored by Ambali. He examines the implication of contracting this kind of marriage from the Islamic law perspective with a focus on its effect on succession, and observes that although Islamic law recognizes monogamous marriage (which is the essence of the Marriage Act), the converse is the situation in the Marriage Act which shuts Islamic law out of the lives of the Muslims who enter into statutory marriage contracts.[37] Thus, Section 36 (1) of the Marriage Ordinance 1958 is to the effect that when a person who was subject to Islamic law marries under the Ordinance and dies intestate, his legacy will be distributed in accordance with common law. This provision was applied in *Adesubokan v Yinusa* where it was held that a Muslim who contracted marriage under Islamic law but wrote a will in accordance with the Wills Act must be deemed to be governed by common law.[38]

Ambali further reasons that the laws of marriage and succession constitute part of a Muslim's faith, which is not supposed to be varied by human whims and caprices; therefore, any Muslim who marries under the Marriage Act in Nigeria rejects the injunctions of Allah regarding marriage and succession since forcing oneself to monogamy when there are circumstances that require a man to take additional wives amounts to making something unlawful (*haram*) for himself which Allah has made lawful (*halal*) for him. Moreover, a Muslim never dies intestate as the manner of distributing a Muslim deceased's property is clearly explained by Islamic law; therefore, a Muslim who marries under the Marriage Act has subjugated the rules of succession in Islamic law for the rules of succession under common law, which is applied through the administration of estates laws of various states in Nigeria.[39]

It is observed that the issues presented by the author are legitimate; however, his discourse in the treatise is limited to the issue of succession. Nevertheless, this is the only treatise on Islamic family law in Nigeria that pointedly addresses this issue.

5. Registration of Marriage in Nigeria

Boparai notes that of all forms of marriages recognized in Nigeria, it is only the statutory marriage (under the Act) that is automatically registered with certificates issued to the parties.[40] This observation deserves some comment. There is no principle of law which requires the recording of a customary law or Islamic marriage; therefore, proof of such marriage involves many more difficulties than a proof of statutory marriages. Although the preliminaries leading to marriage and the marriage itself are marked by public ceremonies, which serve as evidence

36 (1960) 1 All ER 253.

37 AMBALI, *supra* n. 19.

38 (1973) 3 UILR 22 or (1971) NNLR 77.

39 AMBALI, *supra* n. 19.

40 BOPARAI HARINDER, The Customary and Statutory Law of Marriage, The Rabel Journal of Comparative and International Private Law, Vol. 46.3 (1982), 530-557, at 548.

of the marriage, the value of such evidence is lessened because it places reliance on the memory of witnesses who may eventually be unreliable or even dead.[41]

Thus, over time efforts have been made around the country to provide for the registration of customary law marriages. To this end, the local government laws in most states of the federation have authorized local authorities to make by-laws for the registration of customary law marriages within their respective jurisdictions. For example, the Registration of Marriages Adoptive By-Laws Orders, which are applied in Lagos, Ogun, Oyo, Ondo and Bendel States, require a customary law (which includes Islamic law) husband to register the marriage in the relevant local government office within one month of its celebration.[42] It also states that any person may on the payment of the appropriate fees inspect or make copies of the contents of the marriage register. The records, however, may be extremely unreliable because the registrar can only record such particulars as are supplied to him. Many of the by-laws do not stipulate any penalty for non-compliance of the requirements, thereby reinforcing the belief held by many people that registration is not necessary.

This is the general position in the predominantly Muslim northern part of the country. Many Muslims believe that in an Islamic marriage, paper work is not necessary and registration is not a pre-condition for marriage. However, Imam-Tamim points out that there are no provisions in the Qur´an or Sunnah relating to registration of marriage, nor are there any prohibitory provisions. [43] Therefore, it has been argued that the purpose for which Muslims conduct multi-tiered marriage is to protect against modern challenges and perceived injustices faced by unregistered marriages and, as such the obligation to register marriage is important as it is for the benefit (*maslahah*) and protection of the society at large. The emerging trend now indicates that Muslim couples are becoming more aware about the need for marriage registration owing in most cases to the official purpose that marriage certificate will serve. Hence, in most urban cities in the North the cleric (imam) or mosques, which conduct the *nikah*, will register the marriage and give the couple a corresponding certificate. The question that arises here is how much recognition is given to such certificates in Nigeria and abroad, especially when compared to the certificate issued for statutory marriage? This issue is addressed in the ensuing parts of the article.

All the texts reviewed above attempted to examine the nature and types of family law in Nigeria and the emerging trend of couples engaging in multi-tiered marriage. It is however noted that most of the literature reviewed were narrow in scope in the sense that they were only limited to statutory law and customary law marriages leaving out Islamic law marriage. It is also observed that multi-tiered marriages portend certain legal problems, and though scholars and jurists of family law in Nigeria acknowledge this fact, very few of them have engaged in detailed analysis of the problems that could be caused by this type of marriage arrangement. Most of the reviewed literature discussed multi-tiered marriages involving customary marriage and statutory marriage, without looking into the Islamic/statutory model of such marriage. Thus, the literature reviewed above are narrow in scope as they exclude the practice of

41 BOPARAI, *supra* n. 40, at 553.

42 Western Region of Nigeria Legal Notice (in Western Region Gazette), No. 4 of 1957; see also Laws of Eastern Nigeria, 1963, Cap. 79, ss. 84, 90; and Laws of Northern Nigeria, 1963, Cap. 77, s. 38.

43 IMAM-TAMIM, *supra* n. 28.

multi-tiered marriage involving couples who have combined both Islamic marriage and statutory marriage, and this is the gap which the present research seeks to fill.

III. Methodology

This is a qualitative study that employs both doctrinal and non-doctrinal methods of legal research. For the doctrinal method, the study reviews the library and online based literature available on the types, processes, and registration patterns of marriages in Nigeria with particular emphasis on Islamic marriages. For the non-doctrinal method, targeted participants were selected through convenience and purposive sampling methods. Key informants were also used based on their role in the community, and knowledge about the research interest. The research was conducted in Abuja because of its metropolitan nature, and the residents are a typical representation of the heterogeneous nature of Nigerian society.

In-depth interview was conducted on targeted participants who were selected through convenience and purposive sampling methods. Furthermore, key informants such as imams, marriage registrars, court staff, qadis, etc. were interviewed based on their role in the community, or knowledge about the research interest. Information was also collected from the marriage registry in Abuja, the Federal Capital Territory. Thus, 50 married Muslims participated in the study from different societal classes, ranging from the educated to the uneducated and also from the working to the non-working class. Their age range was between 21 to 60 years. This age group was considered appropriate for the study given that most of the marriages in Nigeria occur between the aforesaid ranges. More women than men were interviewed (30 women and 20 men) because it is generally believed women are more affected by lack of registration of marriages. Ten key informants including imams, marriage registrars, court staff, lawyers, qadis, etc. also shared their practical knowledge and experience on the research interest.

IV. Findings and Discussions

1. What are the Factors that Couples Consider when Deciding what Type of Marriage to Contract?

This study found that the three types of marriage persisting in Nigeria – statutory, Islamic and customary marriage – are all legally recognized, although they differ considerably in character and consequences. Nevertheless, individuals decide on a preferred type of marriage based on factors such as traditional beliefs, religion and level of exposure of both the couples and their families. According to a respondent:

> "When it comes to marriage, you should know that Nigerians as most Africans will always exhibit their traditional or religious beliefs. All we know is that if you are from a Muslim family, you do *nikah* and if you are from a Christian family, you go to church for marriage blessings. Those that are more enlightened from the south also go to the registry afterwards. Even if you do not practice any faith, in our society, you have to be associated with one. I lived with a certain family for several years and although I never saw them go to church or mosque during this period, I concluded that they are Muslims when they sent me an invita-

tion to their daughter's wedding, and I saw the word '*nikah*' on the wedding card." (49-year-old female business woman)

This study also found that all Muslims go through the Islamic marriage ceremony, known as *nikah* or *fatiha*. All the respondents in Abuja consider the *nikah* as the only way they can marry legitimately. Furthermore, most of them said that they expect their marriage to be regulated by Islamic family law. A respondent rationalized that:

"Islam is a complete way of life, it dictates how we live from the time we are born till the day we die. Therefore, a Muslim will be going against the dictates of his religion if he decides to celebrate any other form of marriage besides *nikah*."(43-year-old male teacher)

An imam (who also happens to be a qadi) interviewed in the course of this study briefly summarized the *nikah* procedure as follows:

"*Nikah* is a very brief and straightforward procedure that requires the following compulsory ingredients: offer and acceptance, presence of the bride's and groom's guardians, witnesses, and dowry. On the main wedding day, the intending couples and their families meet at the wedding venue (usually the bride's house, mosque or hall). Soon after this, the *nikah* is commenced. There are usually two guardians present at the place, representing the two parties. The amount of *mehar* (dowry), a compulsory amount of money to be given to the bride by the groom is also decided. After this, the officiating imam asks the bride's guardian (*waliy*) in the presence of everybody three times whether the bride accepts the groom as her husband with the decided amount of dowry. After her consent, the groom's guardian is asked three times, whether the groom accepts the bride as his wife with the decided amount of dowry. After his consent, the *fatiha* (the wedding prayer) is recited. This is followed by the recital of the *khutba*, a religious discourse. Blessings are showered upon the bride and the groom for a prosperous married life. The marriage is then announced".

The Imam further explained that to validate the full recognition of Islamic marriage, the Shariah Court of Appeal is established by the Nigerian Constitution to decide in accordance to Islamic law any question of Islamic personal law regarding marriage or relating to family relationships; any question of Islamic personal law regarding succession where the deceased person is a Muslim; and in the case where all parties to the proceeding are Muslims and request the court that hears the case in the first instance to determine that case in accordance with Islamic personal law.

From the above discussion, it is clear that in Nigeria Islamic marriage is a legal marriage that protects all in it. Thus whether or not it is registered, the law fully recognizes it and nobody is disenfranchised in any way on the basis of having conducted an Islamic marriage rather than a statutory marriage.

2. Pattern of Registration of Muslim Marriage

The study found that there is no uniform law for the registration for all forms of marriages in Nigeria. While statutory marriage comes with registration, couples who contract either customary or Islamic marriage have to take further steps to register the marriage. Thus, very few couples register the *nikah* immediately, and most do not bother to register the *nikah* unless the

need arises for them to do so in the future. Out of the 50 respondents in the study, 19 of them (38%) registered their *nikah* immediately after the ceremony, and at the venue; notably, those that gave this response all got married after the year 2000. This indicates that registration of Islamic Marriage is a fairly recent phenomenon in Nigeria.

The research also found that Islamic marriages do not have to take place in a registered venue. However an authorized Muslim cleric known as imam can conduct the *nikah* usually in the bride's father's house, mosque, or an Islamic Centre. Out of the 50 respondents in this study, 27 (54%) said that their marriage was conducted at home while the remaining 23 marriages (46%) were at the mosque or the Islamic Centre. It was further found that out of the marriages conducted in the mosque, 15 were immediately registered in the marriage record book at the mosque, while only 3 of the marriages conducted at the bride's home were registered through the officiating imam.

The findings above indicate that there is no specific or compulsory system of registration for Muslim marriage; however, the venue of the marriage influences the chances of registration. Thus, Muslim weddings are more inclined to be registered when conducted in a mosque, rather than at home. The registration done by the mosques is also a fairly recent development. According to an imam:

> "It is modernization that has brought about the need for registration of marriages. In my experience of over 20 years as an Imam in this mosque, it was only a few years ago that we decided to start registering marriage and issuing certificates to the couples, and we had to do this because people started asking for certificate for one reason or the other. I understand that even the Al Noor Mosque, National Mosque and NASFAT[44] Mosque are also registering all the marriages they conduct, and they also give certificates to the couples. I don't think that the smaller mosques are doing this yet."(60-year-old male imam)

It can be deduced from the above comment that the high rate of unregistered Muslim marriages is now a matter of concern to Muslim scholars who worry that this may adversely affect Muslim integration into broader modern society. Thus, mosques and Islamic societies have gradually begun to register Islamic marriages conducted under their auspices and also issue marriage certificates; however, this is not done systematically as there is no uniform format and each mosque has its distinct style of registration and certification.

Upon further research, the study also uncovered the difference in the level of education between those who had registered their *nikah* and those that had not done so. Those who had registered their marriages were more educated than those with unregistered marriages. Similarly, there is a marked difference between rural and urban lifestyles in Nigeria. Those that reside and work in urban areas are more likely to register their marriages. As one respondent stated:

> "In this day and age, any married person must have some document to show as evidence of the marriage. You might need such certificates to travel or conduct certain administrative

[44] Nasrul-lahi-li Fathi Society of Nigeria (NASFAT) is a Nigerian Muslim association with over one million members.

> procedures. I remember being posted to Enugu during my NYSC[45] in 2015. Then, I had just gotten married and my husband was in Kaduna, so I applied for redeployment to Kaduna. The Officer in charge of redeployment asked me to attach my marriage certificate to my application but I explained that I had none, and the mosque where I conducted the *nikah* did not register the marriage. I was then advised to go to the High Court and fill a declaration of marriage form as proof of marriage which I then presented to the NYSC. Some of my colleagues with similar problem collected theirs from the Shariah Court of Appeal." (29-year-old female lawyer)

A divergent view was expressed by another participant whose highest level of education is secondary school. She said:

> "What do I need a marriage certificate for? Anyone or any authority that needs proof that I am married should just go and ask my family head who was my guardian during the *nikah*. The imam who conducted the *nikah* and the witnesses who attended are also alive to testify." (33-year-old housewife)

From the foregoing comments by the lawyer respondent, it is clear that even the courts recognize that most Islamic marriages are not registered and yet people require marriage certificates to pursue some administrative processes such as NYSC documentation, school documentation, certain transactions in banks, to process travel documents, etc. Hence, alternative arrangements have been made by the courts in the form of "marriage declaration" and "affidavit of marriage" which serve as proof of marriage in the absence of a civil marriage certificate. A nagging problem with this arrangement is that it is prone to abuse since unlike the civil marriage registry the courts do not have a standard procedure to verify the claim of the person making the declaration of marriage. A court staff opined that:

> "In this office, we issue affidavits of change of name and declaration of marriage every day. Some say they were asked to bring it by their school or work, or some will tell you it is for visa application. We just give them, even though you can't be sure if they are saying the truth or not. But it is an affidavit… So they pay the necessary fees, produce their photographs, we administer the oath and give them the documents." (50-year-old male commissioner for oath at High Court of the Federal Capital Territory, Abuja)

Another finding of this study is that whereas all marriage certificates issued either by the mosques or courts in form of marriage affidavits or declarations are generally accepted everywhere and for every purpose within Nigeria. The same weight is not attached to such documents abroad and thus they are not automatically accepted as evidence of marital status for international transactions and documentation. For instance, to qualify for a marriage-based visa to join a spouse abroad, most countries would require a certificate of a *legal* marriage. A legal marriage in this sense is one that is officially recognized by the government in the country or state where you were married. This usually means that an official record of the marriage was made or can be obtained from some government office. Therefore, a copy of the civil mar-

[45] The National Youth Service Corps (NYSC) is a scheme set up by the Nigerian government to involve Nigerian graduates in nation building and the development of the country. Graduates of tertiary institutions are required to take part in the National Youth Service Corps program for one year. This is known as national service year.

riage certificate is required, and the only way to obtain this in Nigeria is through the Marriage Registry.

3. How Common is Multi-tiered Marriage Amongst Muslims in Nigeria?

This research established that all Muslims couples in Nigeria conduct *nikah*; however, some still proceed to also contract a statutory marriage in the marriage registry. The study could not find reliable statistics on what proportion of Muslims who get married in Nigeria have both a *nikah* and a civil marriage. In this study 7 out of the 50 (14%) respondents fell into this group. Furthermore, the data collected from the Abuja Marriage Registry revealed that out of a yearly average of 2000 marriages conducted by the Registry; about 40 (2%) involve Muslim/Muslim couples, while 55 (2.75%) involved Muslim/Christian interfaith couples. Commenting on this, a staff of the Abuja Municipal Area Council (AMAC) Marriage Registry said:

> "I have been working in this registry for over 20 years, and in the past you will rarely find any Muslim couple coming for registry marriage. But due to modernization and the changing times, we see them now. However, I noticed that they make this request only when the need arises. Some will say it is for visa, or they are relocating abroad and they need civil certificates. One man even told me that only registry marriage is recognised by the law in Britain. We also have Muslims who want to go into interfaith marriage coming for statutory/registry marriage to prove their love and give the women a sense of security. This is because the women always insist that they want to avoid polygamy, and guard against arbitrary divorce." (53-year-old male AMAC Marriage Registry staff)

The foregoing remarks have thrown light into some of the reasons why Muslim couples go into statutory marriage (legal protection, monogamous security, the official purpose that the certificate serves, etc.), which they all felt that marriage by *nikah* alone could not cover. Some women want to strengthen their legal position by ensuring that they get married under the Act. The non-codification of the Islamic law marriage among the regime of federal legislations inevitably induces some Nigerians to look on it as a mere conventional ceremony and the Act marriage as one with legal force even though this is wrong. Furthermore, the need to setback the potentially polygamous nature of the initial Islamic law marriage is quite common among the educated female class.

Thus, it is noticed that while the legal status of Islamic marriage is not in doubt, the issue of documentation for the purpose of verification can only be addressed at present by the Marriage Registry due to the reliability and objectivity of the Registry Record. This clearly goes to show that the present position as regards to registration of Muslim marriages in Nigeria is unsatisfactory.

An interesting finding of this study is that although the Marriage Act recognizes marriages conducted in *licensed places of worship*, which the Marriage Registry is mandated to register and certify, no single mosque in Abuja including the National Mosque is a licensed place of worship though many churches are. Our research was however unable to find an explanation as to why no mosque in Abuja has approached the relevant authorities for this license.

4. Legal Implications of Islamic/Statutory Multi-tiered Marriage in Nigeria

Multi-tiered marriages accept that each system of family law has its own understanding of marriage rules and has its own independent application. This is bound to have certain legal and social implications especially relating to how rules applicable under the distinct and respective systems of family law should be applied to the parties. Thus, several provisions of the Marriage Act are found to be inconsistent with the rules of Islamic law which may create problems for the couple in future.

One of the issues that could come up in a marriage governed by multiple regimes is determination of status and quantum of ownership of matrimonial property. While the Marriage Act recognizes the right of the wife to claim a part of the matrimonial property, Islamic law leans toward individual ownership of property.

Polygamy is also a problem as the Marriage Act recognizes only monogamy; thus, any Muslim who marries under the Marriage Act in Nigeria confines himself to monogamy. A respondent to this study shares his dilemma:

> "I am from Okene but I lived in Lagos for many years before relocating to Abuja. I met and married my wife in 2002 through an Islamic ceremony in Lagos. Although both of us are Muslims, she insisted that we should also go for statutory marriage and I obliged because I loved her and many people in Lagos do this. Our problem started when she heard I was planning to marry a second wife. Now she keeps warning me that I cannot take another wife and if I do she would take me to court and claim all my property and children. I thought of divorcing her through talaq, but I was advised against it by a brother who reminded me that even if I divorce her islamically, she would still remain my wife according to statutory law. Honestly, I feel trapped and regret conducting the statutory marriage." (50-year-old male civil servant)

Another problematic aspect in respect of this kind of marriage arises from the termination of the marriage. Dissolution of statutory marriage is based on a petition by a party to the marriage stating that the marriage has broken down irretrievably.[46] On the other hand, dissolution of an Islamic law marriage can occur extra-judicially or by the order of the Shariah Court (judicial divorce). Notably, the majority of divorces of Islamic law marriages occur through the non-judicial unilateral action of one of the spouses, or by the mutual consent of both spouses.

Succession[47] also presents a problem in the sense that when a Muslim marries under the Act and dies intestate his legacy will be distributed in accordance with common law, which is applied through the administration of estates laws of various states in Nigeria. This was the Court's decision in *Adesubokan v Yinusa*.[48] although a Muslim never dies intestate as the manner of distribution of his property is clearly established in the Koran.

Guardianship and custody of children born of a multi-tiered marriage are common issues that may arise regarding how to determine the appropriate party to get custody or guardianship of

[46] Section 15(1) of the Matrimonial Causes Act.
[47] Section 36 (1) of the Marriage Ordinance 1958.
[48] See, *supra* n. 38.

the infant. While the issue of guardianship is well established under Islamic law, the Marriage Act relies on the concept of the best interest of a child to determine custody.

Interestingly, even with the potential challenges that may arise as discussed above 43 of the study respondents including some of those who also married in the Registry expressed that they expect their marriage to be regulated by Islamic law.

V. Conclusion

Different social, cultural and legal factors contribute to the type of marriage that Nigerians choose to celebrate. It has been established that all Muslims recognize *nikah* as the principal form of marriage. Nevertheless, modernization has contributed reasonably to the increase in the practice of multi-tiered marriage in the contemporary Nigerian society. However, responses from the interviews in this study suggest that many Muslims who enter a multi-tiered marriage do so out of necessity due to the absence or weak model of registration of Islamic marriages in the country. Consequently, despite its susceptibility to create legal problems that could affect the couples and even confuse the courts the number of Muslims engaged in a multi-tiered marriage is gradually rising and will continue to grow unless a better arrangement is made to adapt to this particular requirement of a modern globalized world.

Accordingly, it is suggested that there is a need for the government to create a unified, efficient and compulsory system for the registration of all types of marriages in Nigeria, which should be adopted throughout the country within the responsibility of the Registry of Marriages. All marriage certificates should also be issued by the same authority, and marriages celebrated outside the country should also be registrable. The existence of such a system will not only help to solve the problems arising from this study, but it will also generate reliable data that can be used to plan better policies and programs for the development of the country.

Marriage in Iran: Women Caught Between Shi'i and State Law

by Ladan Rahbari[*]

Table of Contents

Abstract

This study investigates juristic Shi'i guidelines as well as philosophical and legal perspectives on marriage in the Iranian contemporary context where specific interpretations of Twelver Shi'a are encoded in civil law. The study discusses three important factors that contribute to the legal and juristic complexity of Shi'i marriage: (i) length of marriage, including discussions on permanent and temporary marriage; (ii) registration of marriage and the problem of unregistered marriages; and (iii) age of marriage and the issue of child marriage. All three factors have been significantly present in the social, public and political debates on marriage and reproduction as well as in women's and children's rights movements in Iran. I outline some of the potential social implications and harmful effects of the existing problematic discourses of temporary, child and unregistered marriages. After discussing the three factors and the diversity of marriage practices, the study contextualizes the existing diversities within the broader Shi'i political and religious discourses.

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I. Introduction

Marriage is often described as an important social and economic institution in Islam. Interpretations of Islamic perspectives have shown that existing traditions encourage halal heterosexual relationships, and denounce the practice of celibacy as an unwelcome practice, if not a dishonorable one.[1] Despite the fact that celibacy is neither condemned nor desacralized, and is not considered a sin either, it is heterosexual marriage that gets promoted as the true Islamic way of life. To prove this point, two famous quotations by the Prophet are often used as testimonies. The Prophet of Islam has famously stated, "whoever marries has completed half of their religion"[2] and "marriage is my Sunnah".[3] Islamic perspectives on the importance of heterosexual marriage go hand-in-hand with the religion's attitude towards procreation.[4] Not only satisfying sexual intimacy, but also procreation is promoted in Islamic narratives as a reason for practicing halal heterosexual marriages.[5] Heteronormative perspectives of family that are built around marriage of a man and a woman or women as well as reproduction are currently mainstream in most Muslim majority contexts.

Due to the widespread social acceptance of the importance of the mainstream Muslim family model as well as the integration of Islamic juristic rulings in state laws in many Muslim contexts, Islamic family institution is shaped at the intersection of religious, political and legal discourses. This means that based on the variety of such existing discourses in Muslim contexts, and due to different relationships between religious authorities and the states in power in these countries, a variety of approaches towards marriage and reproduction have emerged.[6] Despite the great diversity in the Middle Eastern region in terms of marriage patterns, one commonly and widely shared value is marriage itself, which remains fundamental to social identity – especially that of women – and the pressure to marry persists.[7] To better understand the variety of social and religious approaches towards marriage, it is important to make a distinction, as Ziba Mir-Hosseini has argued, between Islam as a faith that consists of religious values and principles, and Islam as an organized religion that includes institutions, laws, and regulated practices.[8] Keeping this distinction in mind, this study focuses on the variety of Twelver Shi'i marriage practices in

1 RIZVI SAYED MOHAMMAD, Marriage and Morals in Islam, Al-Islam 1990; HATHOUT HASSAN, Islamic Views on Some Reproductive Issues, in: Teebi Ahmad S. / Talaat Farag I. (eds.), Genetic Disorders among Arab Populations, New York 1997; ZAREAN MANSOUREH / BARZEGAR KHADIJEH, Marriage in Islam, Christianity, and Judaism, Religious Inquiries, Vol. 5 (2016).

2 ANON, Hadith: Whoever Marries, Completes Half of Their Religion, Shi'i Hadith Library, Hadithlib, n.d., available at <http://bit.ly/2Wjwg6phadithofmarriage> (last accessed 21 August 2019).

3 ANON, What Is the Meaning of "Marriage Is My Sunnah"?, Islam Quest, 2013, available at <http://www.islamquest.net/fa/archive/question/fa23334> (last accessed 21 August 2019).

4 ATIGHETCHI DARIUSCH, The Position of Islamic Tradition on Contraception Medicine, Medicine and Law, Vol. 13 (1994).

5 IUPUI, Marriage in Islam, 2019, available at <http://www.iupui.edu/~msaiupui/marr.html> (last accessed 21 August 2019); SAYFUDDINM MURAD / MUHAMETOV ABDULLAH, Love and Sex in Islam, Bloomington 2011; SACHEDINA ZULIE, Islam, Procreation and the Law, International Family Planning Perspectives, Vol. 16 (1990), 107–111.

6 SACHEDINA, *supra* n. 5; BOONSTRA HEATHER, Islam, Women and Family Planning: A Primer, The Guttmacher Report on Public Policy, Vol. 4 (2001), 4–7.

7 TREMAYNE SORAYA, Modernity and Early Marriage in Iran: A View from Within, Journal of Middle East Women's Studies, Vol. 2 (2006), 65–94.

8 MIR-HOSSEINI ZIBA, Muslim Women's Quest for Equality: Between Islamic Law and Feminism, Critical Inquiry, Vol. 32 (2006), 629–645.

the context of Islamic Republic of Iran and the legal measures taken by the state to facilitate or control them.

The study aims to investigate Shi'i guidelines, philosophical and legal perspectives on temporary marriage in the Iranian context where specific interpretations of Twelver Shi'a are encoded into the law. While there are many other factors affecting practices of marriage in Iran, this study will centralize three important factors that contribute to philosophical, legal and juristic complexity of marriage: (i) length of marriage; (ii) registration of marriage; and (iii) age of marriage. It should be noted that this research does not have claims of comprehensive coverage of all the problematic aspects of Shi'i marriage in Iran. Additionally, while comparisons are sometimes made between the pre- and post-Islamic Revolution Iran, the focus of this study is on the philosophical, juristic and legal discourses of marriage that have become prevalent after the Iranian Revolution in 1979. In the following section, the paper first briefly outlines the consequences of the establishment of a Shi'i state of Iran for conditions of marriage, especially for women. Then, the research shifts its focus towards highlighting various issues regarding marriage in Iran's Twelver Shi'i and state discourses.

II. The Institution of Marriage After the Islamic Revolution: A Brief Overview

Establishment of a Shi'i state in Iran in 1979 resulted in many dramatic transformations in the areas of gender, family and marriage politics among other societal and political issues. The Iranian law after the Revolution has codified religious guidelines and created a body of regulations that should be followed by the people,[9] sometimes regardless of their religious beliefs.[10] The codified religious rulings and the state mandates are a source of legal authority in the land and are separate from rulings by religious institutions that produce up-to-date religious guidelines for personal everyday issues. This means that opposite to the popular belief in the Western world, political and some semi-democratic institutions play an important role in delineating the status and role of religion in the Iranian society.[11] The state regulations and manipulations of reproduction regimes after the revolution have been highly relied on the state's changing views on population growth either as a comparative advantage or as a developmental socio-economic burden.[12] Based on these changing views, in different periods, pronatalist and antinatalist policies have been promoted by the state. While not all the post-revolutionary regulations on family and marriage have brought about equally problematic social consequences,[13] some state policies

9 OSANLOO AREZOO, What a Focus on "Family" Means in the Islamic Republic of Iran, in: Voorhoeve Maaike (ed.), Family Law in Islam: Divorce, Marriage and Women in the Muslim World, London/New York 2012.

10 This is the case for many laws, but the most notorious one is the compulsory hijab law that obliges all women over the Shi'i age of puberty to cover their bodies and hair in public spaces regardless of their religion.

11 ROY OLIVIER, The Crisis of Religious Legitimacy in Iran, Middle East Journal, Vol. 53 (1999), 201–216.

12 ABBASI MOHAMMAD JALAL et al., Revolution, War and Modernization: Population Policy and Fertility Change in Iran, Journal of Population Research, Vol. 19 (2002), 25–46.

13 AFARY JANET, Sexual Politics in Modern Iran, New York 2009.

can be considered deteriorations from the progress made in areas of social equality, especially those that were made in the realms of protection of women's rights in the family.[14]

Despite some legal deteriorations, as both Valentine Moghadam and Ziba Mir-Hosseini have argued,[15] the status of women has been improving in many social aspects since the late 1980s, partly due to the efforts of modernizing Muslim women in and around the government; and partly because of the quiet and firm determination by many urban women to continue their education and seek jobs despite the patriarchal attitudes dominating the job market and economic sector.[16] New marriage laws, however, brought about many complexities, some of which were caused by new regulations on the age of marriage, length of marriage, and legal transformations that introduced different legitimized or legalized ways of registering marriages.

In the contemporary Iranian society, perceptions and beliefs on religion and family range from Muslim traditionalism to highly secular tendencies. The existing groups include (but are not limited to) Muslim traditionalists who resist change and promote minimalist version of shari'a, Islamic fundamentalists who want to return to an earlier and purer version of shari'a, as well as secular fundamentalists who deny that religious law could have any value at all.[17] These highly different attitudes are also reflected in diversities of marriage styles and sexual behavior.

This study focuses on three important factors that contribute to the social, legal and juristic complexities of Shi'i marriage in Iran. These three factors are: (i) length of marriage: juristically legitimate and legally encoded into two categories of permanent and temporary marriage; (ii) registration of marriage: which includes privately and nationally registered marriages as well as unregistered marriages; and (iii) age of marriage: a legal and juristic topic of great contemporary relevance, especially due to the alarming rates of child marriage in the country. All three factors have been significantly present in the social, public and political debates on marriage and family as well as in women and children's rights activism in the history of Iran after its establishment as a nation-state, but more specifically after the Islamic Revolution in 1979. These three factors are discussed separately in the following three sections (III–V).

III. Length of Marriage: Temporary and Permanent Marriages

There are two types of marriage provided by the Iranian Civil Code: permanent and temporary marriages.[18] A permanent marriage is equivalent to the globally practiced form of a legally binding conjugal contract based on a relationship that is often assumed to be life-long or at least long-term. This marriage does not have an end-date and continues as long as the partners agree to maintain the relationship. The practice of temporary marriage on the other hand has historically been referred to a legal form of marriage between a man and a woman for a short and predefined

14 MOGHADAM VALENTINE, Revolution, Religion, and Gender Politics: Iran and Afghanistan Compared, Journal of Women's History, Vol. 10 (1999), 172–195.

15 MOGHADAM, *supra* n. 14; MIR-HOSSEINI ZIBA, Women and Politics in Post-Khomeini Iran, in: Afshar Haleh (ed.), Women and Politics in the Third World, London/New York 1996.

16 MOGHADAM, *supra* n. 14.

17 MIR-HOSSEINI, *supra* n. 8.

18 BERNARDI ALBERT, Iran: Family Law after the Islamic Revolution, Journal of Family Law, Vol. 25 (1986), 151–154.

period for which the woman is compensated. While the practice has long been outlawed in Sunni traditions of Islam, it is still considered legitimate in (most) Shi'i jurisprudence and is predominantly practiced in Shi'i contexts, including Iran.[19] While the dominant majority of Shi'i scholars legitimize temporary marriage and it is legal in Iran, there is a small minority among Shi'i scholars who rule it out because they find it neither compatible with social needs in the contemporary societies, nor with the common law,[20] and thus is not juristically justifiable.[21]

In Iran, permanent and temporary marriages have many similarities. Both forms of marriage are based in a form of exchange between the man – as the financial provider and head of the family unit – and the woman who bears the responsibility of providing exclusive sex to her husband in return to financial protection. In discussing the legal structure of temporary marriage, Shi'i jurists employ the analogy of rent, as opposed to the analogy of sale that is sometimes used for permanent marriage.[22] In both forms of marriage, if any children are born, they are eligible to inherit from their parents. In both forms of marriage, *idda*[23] regulations apply to the woman. There are also differences between the two types of marriage. While inheritance from the spouse is the natural result of a permanent marriage, in temporary marriage, the couples do not inherit from each other.[24] Also, a notable difference is that a permanent marriage requires a divorce while a temporary marriage automatically expires after the pre-defined period of marriage has passed. Temporary marriage is thus a marriage "without there being any need for the formalities of divorce"[25] as explained by Shi'i *mujtahid*.[26]

In contemporary Twelver Shi'a Islam in Iran, temporary marriage stays a legal and religious conjugal union between an unmarried woman and a married or unmarried Muslim man (due to laws that sanction polygamy), which is contracted for a fixed time period in return for a set amount of money that the woman receives.[27] The practice of temporary marriage is not only sanctioned, but also encouraged in Shi'i discourses. This is because any form of extramarital sexual relationship is prohibited by Islamic law and is culturally interdicted.[28] Temporary marriage is, in this context, promoted as a halal alternative and an Islamically-sanctioned way to avoid premarital, extramarital and other "illegitimate" sexual relationships. It is thus considered a sanctified way of indulging earthly sexual desires without having to step outside of religious moral guidelines.[29]

19 HAERI SHAHLA, Law of Desire: Temporary Marriage in Shi'i Iran, New York 2014.

20 In Farsi *orf* and in Arabic *urf*, which refers to mainstream social norms and widely accepted practices.

21 SAANEI, Rulings and Conditions of Temporary Marriage, n.d., available at <http://saanei.org/index.php?view=01,02,09,3295,0> (last accessed 19 August 2019).

22 MIR-HOSSEINI ZIBA, Mut'a Marriage in Iran: Law and Social Practice, paper presented at Register Amsterdam, Informal Marriages and Dutch Law, 2003.

23 This is the period after a divorce during which women should abstain from marrying another man. *Idda* only applies to women and in Shi'a, this period is three lunar months.

24 SAADAT ASADI LEILA, Critique of Laws on Marriage Registration, Women's Strategic Studies, Vol. 10 (2008), 103–130.

25 SOBHANI AYATOLLAH JA'FAR, Doctrines of Shi'i Islam: A Compendium of Imami Beliefs and Practices, translated and edited by Shah Kazemi Reza, London 2013.

26 *Mujtahid* are religious scholars with juristic authority.

27 ABBASI-SHAVAZI MOHAMMAD JALAL et al., The "Iranian Art Revolution": Infertility, Assisted Reproductive Technology, and Third-Party Donation in the Islamic Republic of Iran, Journal of Middle East Women's Studies, Vol. 4 (2008), 1–28.

28 RAHBARI LADAN, Premarital Dating Relationships in Iran, in: Shehan Constance L. (ed.), The Wiley Blackwell Encyclopedia of Family Studies, Chisester 2016.

29 MILANI FARZANEH, Veils and Words: The Emerging Voices of Iranian Women Writers, Syracuse 1992.

Temporary marriage was prescribed by the state after the Islamic Revolution, during and after the Iran–Iraq War.[30] It was seen as both a legal solution for widows of men who lost their lives in the war and an outlet for the strict regulations that made dating impossible.[31] After the revolution, the state's promotion of temporary marriage grew gradually. Recently, temporary marriage has been advocated for mostly by conservatives who continue to present it either as a solution for women in vulnerable socio-economic conditions to be protected by men, or as a reaction to the moral panic on Iranian youth's lifestyle. It is seen as a way to hinder un-Islamic relationships that – as it is portrayed by the conservative political and religious forces – have become increasingly more prominent among young Iranians.[32] Despite the continuous promotion of temporary marriage, it remains a largely unpopular practice among young Iranians, and for this, it is often practiced in secrecy.[33]

Since the objective of a temporary marriage is sexual enjoyment, and often involves monetary exchange, temporary wives are often associated with prostitution and do not enjoy the social prestige women seek in a marital relationship, as it often takes place in secrecy and is not a well-respected form of marriage in the Iranian society.[34] Temporary marriage is also largely considered a tool used by permanently married men to expand their sexual experience, while the same opportunity does not exist for married women. The practice of temporary marriage is connected to problematic issues including unregistered marriages and specially, child/early marriages in Iran, as young women have been reported to be one of most prominent groups who are negatively affected by temporary (and sometimes unregistered) marriage.[35] Temporary marriage is, for instance, sometimes used to legitimize early marriage with the approval of the parents.[36] It is conceivable that in countries such as Iran, where the search for equal rights for women in and out of the family continues,[37] young girls and young women would be one of the most vulnerable groups affected by non-egalitarian conditions. I return to the issue of age of marriage in section 5. In the next section, I discuss diverse forms of marriage registration, and the problem of unregistered (temporary or permanent) marriages.

30 The war between the countries Iran and Iraq was an armed conflict that began on 22 September 1980 after Iraq invaded Iran, and ended on 20 August 1988, when after eight years of conflict, Iran accepted the UN-brokered ceasefire.

31 AFARY, supra n. 13.

32 ANON, Chastity House: A Place Like a Brothel, Setare, 2016, available at <https://setare.com/fa/news/5884/> (last accessed 21 August 2019); SHOJAEI MITRA, Temporary Marriage: The Legal Substitute for Un-Islamic Relationships, 2009, available at <https://p.dw.com/p/Ky9I> (last accessed 21 August 2019).

33 KHALAJ FARIDEH et al., Associations between Family Factors and Premarital Heterosexual Relationships among Female College Students in Tehran, International Perspectives on Sexual and Reproductive Health, Vol. 37 (2011); BARARI MOSTAFA et al., Temporary Marriage: Attitude and Tendency in Iran, Journal of Divorce & Remarriage, Vol. 53 (2012), 533–542.

34 TREMAYNE, *supra* n. 7.

35 BAHRAMI KUROSH, Children Are the Most Prominent Victims of Temporary Marriage, 2018, available at <https://iranwire.com/fa/features/25199> (last accessed 19 August 2019).

36 TREMAYNE, *supra* n. 7.

37 BOE MARIANNE, Family Law in Contemporary Iran: Women's Rights Activism and Shari'a, London/New York 2015.

IV. Marriage Registration: Private and Nationally Registered and Unregistered Marriages

In Iran, permanent marriages take place only after a compulsory submission of an application by the couple, followed by an official process that includes blood tests and possible vaccinations. If the application is approved, registration of the marriage by a legal authority and entering the marriage information in the birth certificates of both spouses will become compulsory. This law illustrates the integration of legal and religious guidelines and shows that while an Islamic marriage does not require registration to be juristically valid, it does require registration to be considered lawful. As such, unregistered marriages are religiously valid and as long as proof or witnesses of marriage exist, they are not considered indecent behaviour (and are thus not punishable by law like pre-marital relationships); however, they are considered illegal and do not enjoy legal protection. Practicing marriage without registering it in a notary has legal repercussions including a fine and possible jail time for the male partner[38] and a similar penalty for any person(s) marrying the couple without having state authority.[39] To this end, the law gives the male partner twenty days to register the marriage (and a divorce) after the religious ceremony takes place. This has to be done at an official registration authority.

The existence of such strict rules, however, does not mean that unregistered marriages do not take place. The problem of unregistered marriages in Iran is widely understudied and most national statistics published by the government of Iran do not include it in their databases.[40] Additionally, unregistered marriages have connections to other problematic practices such as early or child marriage (to be discussed in the next section); where the practice of early marriag is more prevalent, such marriages often go unregistered as well.[41] Unregistered marriages can have severe social and legal consequences, especially for women, since their rights to fair treatment and financial support are not protected.

While the law is very clear in that registering permanent marriages is compulsory and failing to do so is subject to legal punishment, it is much less coherent and clear in its approach towards registration of temporary marriages. As a general rule, temporary marriages are often considered the Iranian equivalent of common law or unregistered marriages.[42] This is however not completely accurate. While for a permanent marriage there are two possibilities of unregistered (illegal) and registered (legal) marriages, in the case of temporary marriage, there are two legal possibilities. Temporary marriage can be legally practiced with a private registration. In this form, a religious authority (not a legal one) marries the couple and enters their information in a marriage booklet that he stamps.[43] This private registration is not equivalent to a legal document and does not enter a database but is proof of a religiously legitimate relationship. The booklet

38 ANON, Do You Know Unregistered Marriage Is Illegal?, Mizan Online, 2016, available at <http://bit.ly/2VPJGYt> (last accessed 21 August 2019).

39 Since the man is the head of the family, he is responsible for the registration of marriage. There is no punishment foreseen for the woman; SAADAT ASADI, *supra* n. 24.

40 Veiled and Wed: Enforced Hijab Laws, Early Marriages, and Girl Children in the Islamic Republic of Iran, Submission to the UN Committee on the Rights of the Child, 71st Pre Sessional Working Group, Justice for Iran Publications 2015.

41 Justice for Iran, *supra* n. 40.

42 MIR-HOSSEINI, *supra* n. 22

43 ANON, Legal Temporary Marriage, Donyaye Eghtesad, 2012, available at <http://bit.ly/2LYA49e> (last accessed 21 August 2019).

can however be partially used as a legal proof of marriage and can stand as evidence in a court of law.

The second legal possibility is registering the temporary marriage, which could be performed just like the official registration of a permanent marriage. The registration of temporary marriage can happen if the couple agrees upon it (although they do not have to) and might happen if it is a required condition set by one of the spouses and accepted by the other. Registration of the temporary marriage does, however, become legally compulsory if the temporary wife gets pregnant,[44] and the same legal punishments (as in permanent marriage, discussed above) will apply to the husband if he fails to do so accordingly. A temporary marriage without legally binding private or national registration is considered a valid Shi'i marriage, but the couple does not enjoy any legal rights based on unregistered marriage claims. There is no legal punishment for unregistered temporary marriages if they have been conducted correctly according to the Shi'i doctrine. While it seems that the issue of accidental pregnancy during a temporary marriage is resolved by enforcing compulsory registration, in practice, if the temporary marriage is not registered, it creates a long and hard legal process for the woman to prove her legitimate relationship claims,[45] and otherwise she is prone to harsh social stigmatization and legal issues as the child could be considered out of wedlock if the man does not confirm her claims of marriage.

Annelies Moors has defined unregistered marriages as marriages that "are not registered according to the law of the country where they are concluded".[46] If we accept this definition, based on the above discussion on the legality of privately registered temporary marriages in Iran, they will not be considered unregistered marriages since registration is not a legal requirement. Privately registered marriages have some of the characteristics of an unregistered marriage. For instance, since the marriage information is not entered in the birth certificate, it can be kept a secret, from legal authorities or even from a permanent wife. While there might be personal gains for both men and women, and social advantages in being able to practice a secret temporary marriage, the law in this case, clearly favours a man's right to temporarily marry, over a permanent wife's right to a monogamous conjugal union as well as her right to know about her husband's sexual partners. While a permanently married man can only marry a second permanent wife after receiving an official permission from his first wife and an Islamic court, he can marry a temporary wife without an official permission.[47] This means that while the law obliges men to consult their first permanent wife to temporarily or permanently remarry, there are no legal measures foreseen to actually hinder men's temporary marriage without consulting their first permanent wife.

44 ALISHAHI ABOLFAZL / ESKANDARI FARZANEH, Investigating Juristic and Legal Consequences of Not Registering Marriage by Official Registration Authorities, Fiqh and Family Law, Vol. 23 (2018).

45 ANON, What Does the Law Say About Pregnancy from a Temporary Marriage?, Pendaar Group, n.d., available at <http://bit.ly/2VSRzw8> (last accessed 21 August 2019).

46 MOORS ANNELIES, Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands, in: Berger Maurits S. (ed.), Applying Shari´a in the West: Facts, Fears and the Future of Islamic, Rules on Family Relations in the West, Leiden 2013.

47 ANON, Rulings of Mujtahid over Man's Remarriage Without Wife's Permission, Hadana, 2016, available at <http://bit.ly/2QibXkn> (last accessed 21 August 2019).

V. Age of Marriage: Early or Child Marriage

Child (or early) marriage is a marriage where either or both the bride and groom (but in reality, most predominantly the bride) is/are under the legal age of eighteen, which is the age limit for protection under the 1989 Convention on the Rights of the Child.[48] Child marriage is often considered a global issue and a widespread harmful practice that affects great numbers of girls and is practiced for a variety of different reasons in the world.[49] Research on the child marriage phenomenon in Iran show that the most common reasons behind child marriage and forced marriage include the social prestige awarded to girls who marry young, poverty in the girl's family, lack of child support persons/institutions, as well as some cultural traditions and tribal customs.[50] Child marriage is also sanctioned by some religious discourses. While the religious possibility is hardly ever the reason behind child marriage, it is a significant facilitator that both adjusts the moral tone and affects legal possibilities.

According to most Shi'i scholars, a girl is eligible to marry at eight years and nine months and a boy at fourteen years and seven months, when they are supposed to have reached puberty and can reproduce.[51] Despite this, there are some Shi'i *mujtahid* who oppose the majority Shi'i ruling on the age of marriage and advocate for eliminating child marriage because of the harm it causes to the child's life as well as to the religion.[52] While after the Islamic Revolution in Iran, the minimum age of marriage was dropped to the age approved by shari'a law (nine and fifteen), in August 2003, and under pressure from the female members of the Iranian parliament, the age of marriage was raised to thirteen for girls; however, a clause was added stating that earlier marriage is allowed if the girl's guardian and an Islamic court approve the girl's readiness for marriage. This clause has in fact made the application of the law regarding the minimum age of marriage arbitrary.[53]

Statistically speaking, in terms of child marriage, despite the installation of regulations such as decreasing the legal age of marriage, the average age of marriage for both men and women has gradually risen after the Islamic Revolution: Between the years 1976 and 2016, the average age of marriage has increased gradually and steadily from 24 to 27 for men and from 19 to 23 for women. The average age of marriage, however, does not reflect the diversities of attitudes in different provinces of Iran. Child marriages are reported to be most common in the country's religious regions where strict patriarchal social attitudes might be dominant, especially in some areas in Sistan and Baluchestan, Kurdistan, Khuzestan and Khorasan provinces.[54] Additionally, the average age does not reflect the starting age of marriage and can be misleading because of the patterns of age distribution. This seems to be the case in Iran, since UNICEF's report in 2015

48 TREMAYNE, *supra* n. 7.

49 MONTAZERI SIMIN et al., Determinants of Early Marriage from Married Girls' Perspectives in Iranian Setting: A Qualitative Study, Journal of Environmental and Public Health (2016).

50 Suuntaus Project, Violence against Women and Honour-Related Violence in Iran, Finnish Immigration Service and The European Refugee Fund, 2015, available at <http://bit.ly/2TANoAG> (last accessed 21 August 2019).

51 TREMAYNE, *supra* n. 7.

52 ANON, Grand Ayatollah Speaks out against Child Marriage, Radio Farda, 2019, available at <https://en.radiofarda.com/a/iran-grand-ayatollah-speaks-put-against-child-marriage/29762095.html> (last accessed 21 August 2019).

53 TREMAYNE, *supra* n. 7.

54 Suuntaus Project, *supra* n. 50.

shows that 3 percent of Iranian children marry by the age of 15, and 17 percent marry by the age of 18.[55] According to the latest official statistics inside Iran, more than 29'000 marriages were registered in 2016 that have taken place between brides who were younger than 15 and boys/men of different age groups.[56] The largest age group of men who married girls under 15 years was the 20–24 age groups, making up over 16'900 registered marriages out of all marriages; this was followed by the age groups 25–29, making up over 7'000 registered marriages.[57] Furthermore, because of the issue of unregistered marriages that – as previously discussed – takes place in connection to child marriage, these reported statistics usually do not include information on unregistered and temporary marriages.

The practice of child marriage could bear more severe consequences when coupled with other factors such as temporary and unregistered marriages. Besides the hindering effects on the child's social development, education and possible harmful effects on the child's sexual, physical and mental health among many other negative consequences, early temporary marriage may result in lasting social stigmatization as well. Because of the persisting social value of virginity for permanent marriages,[58] women and girls with previous temporary or permanent marriage history are viewed as "damaged goods" in many social settings, and their future social life – in a context where marriage is still an important source of social status – is put in serious peril. Early pregnancies, losing their spouse and financial support (especially when there is a great age gap between spouses) as well as other legal and social issues attached to unregistered and temporary marriages are among the many problematic aspects of child marriage. Another largely unresolved and ignored problem in both legal and juristic perspectives on child marriage is the issue of consent that needs further exploration (that is beyond the capacity of this paper). Consent connects to another problematic practice, namely forced marriages, and there seems to be a lack of attention to identifying and scrutinizing consent to both marry and have sexual relationship in relation to the age of marriage. In both legal and juristic discourses, it seems that the consent of the legal guardian of a child is automatically considered equivalent to the child's consent, while in many cases, the child's life course, future, social status and image are shaped by a choice that they have had no say in.

VI. Discussion and Some Concluding Remarks

This study investigated Shi'i guidelines and some philosophical and legal perspectives on temporary marriage in the Iranian context where specific interpretations of Twelver Shi'a are encoded in the law. As I showed in the three lines of discussion on length, registration and age of marriage, a combination of juristic (*fiqhi*)[59] rulings, based on Shi'i jurists' interpretation of shari'a and state legal regulations form the legitimate and lawful ways marriage can be practiced. These legal and *fiqhi* frameworks are, as shown in the three sections, not always compatible with each

55 Suuntaus Project, *supra* n. 50.

56 ANON, A Look at the Conditions of Marriage in 2016, Mehrkhane, 2016, available at <http://bit.ly/2WnP9Fy> (last accessed 21 August 2019).

57 ANON, *supra* n. 56.

58 RAHBARI, supra n. 28.

59 *Fiqhi* is the adjective form of *fiqh*. *Fiqh* is the human attempt, usually by designated scholars, to understand divine law (shari'a). Whereas shari'a is immutable, *fiqh* is changeable, ANON, Fiqh, Oxford Islamic Studie Online, n.d., available at <http://www.oxfordislamicstudies.com/article/opr/t125/e659> (last accessed 21 August 2019).

other. In the case of length of marriage, there is relatively high similarity between the civil law and the religious guidelines, but while registering a marriage or having a religious authority perform the marriage is not necessary in Shi'a *fiqh*, the law prohibits and punishes those who perform permanent unregistered marriages without the involvement of a religious and legal authority. In the case of age of marriage, the law puts some limitations on practice of early marriage – in the form that is sanctioned by a majority Shi'i *fiqh* – but still leaves enough room for the possibility of practicing child marriage. Additionally, as seen in different cases, Shi'i *fiqh* – which is often portrayed as a homogenous body of religious guidelines by the state – entails diversities and interpretative variations. The rulings can differ based on the scholars' understandings of shari'a as well as their notions of common law. Common law is specifically important in the contemporary model of Twelver Shi'i *fiqh*, where jurisprudence draws on social relevance and implication of their interpretations and rulings.[60] On the other hand, the history of Iran after the Revolution has shown that the *fiqhi* and state regulations work as both competing and moderating factors. The integration of Islamic shari'a and the governmental entities in Iran introduces both limitations and possibilities of positive change as the state both facilitates and controls practices of marriage.[61]

This study discussed some of the potential implications of problematic discourses of temporary, child and unregistered marriages. To understand these issues more contextually, it is important to keep in mind that there are several methodological issues in the study of marriage diversity in Iran. First, the lack of qualitative, statistical and demographic data on child and early marriage, unregistered marriages, and privately registered temporary marriages is a significant issue in researching practices and diversities of marriage in Iran. Additionally, I would like to emphasize that Twelver Shi'i perspectives on marriage in Iran are affected by multiple socio-political, juristic and legal discourses outside of those centralized in this paper. For instance, polygamy is accepted and legally sanctioned in Iran. The legal conditions of polygamy and the lack of any restrictions on the number of temporary wives a man can simultaneously marry inevitably complicate the distribution of sexual and social justice in marriage. Another important and unresolved issue that has recently arisen – despite existing opposition by rights and civil society activists – is the bill that passed in the Iranian parliament in 2013 that allowed for marriage between an adopted female child and the adoptive father. While the Shi'i jurisprudence and legal frameworks in Iran have allowed the marriage between the adoptee and the adoptive father to facilitate conditions and terms of adoption, it is believed by some legal and religious groups that performing temporary marriage with the adoptee is not in the child's best interest. As these examples show, the problematic aspects of marriage require attention to multiple discourses and are affected by many different underlying factors, beyond the three issues that were focused upon in this article.

Furthermore, Iranian people's resilience and resistance to state enforced regulations that are considered unjust have been well-documented.[62] In fact, in the case of child and temporary marriage

60 SHAKERI RUHOLLAH / ABDOLI MARZIEH, Necessity of Islamic Governance with a Focus on Governance-Centered Social Fiqh, Islamic Revolution Researches (Scientific Association of Islamic Revolution In Iran), Vol 4 (2015).

61 JAFARI ALIAKBAR / MACLARAN PAULINE, Escaping into the World of Make-up Routines in Iran, The Sociological Review, Vol. 62 (2014), 359–382.

62 COHEN JARED, Iran's Young Opposition: Youth in Post-Revolutionary Iran, SAIS Review of International Affairs, Vol. 26 (2006), 3–16.

it is safe to say that both practices are highly unpopular and looked down upon by a majority of Iranians regardless of the region they live in.[63] On the other hand, as new studies in the Iranian contemporary context show, despite the legal and social pressure to marry, unregistered and non-religious forms of cohabitation can be traced in Iran.[64] This means that, perhaps inevitably, by putting an exclusive focus on legal and juristic perspectives on marriage, many significant cultural and social nuances have been lost in the discussion.

Additionally, the interaction between religion, morality, and sexuality are well-documented in studies on desire and marriage discourses in Iran.[65] While these topics were beyond the thematic focus of this paper, I believe that they are necessary to complement and complicate marriage as a social, legal and (non-)religious institution. It is also my conviction that it is the gravity of social and legal consequences of child marriage, unregistered marriage and temporary marriage, not their popularity or statistical significance, that make it crucial for us to highlight the contemporary religious and political discourses around them. This means that no matter how little or statistically insignificant some of these issues may seem to be, juristic and legal loopholes have to be scrutinized. What is at stake here is not only the well-being, status and protection of vulnerable populations as well as guaranteeing the right to love or sex or a fulfilling marital life, but the standpoints and the imagery of a belief system and its followers. Only by highlighting the harmful effects of religious fundamentalism on Muslim communities on local, regional and global levels can we stimulate the process that includes (self)critique, rethinking mainstream moral frameworks, and eventually, positive reform.

Acknowledgements

This study is part of my ongoing research project on gender, sexuality and religious morality and is made possible by the financial support of Research Foundation Flanders (FWO).

63 Suuntaus Project, *supra* n. 50.

64 MAHBOOBI ELAHEH, "White Marriage" in Contemporary Iran, Imperial Journal of Interdisciplinary Research, Vol. 2 (2016), 1283–1288.

65 GHORASHI ZOHREH et al., Religious Teachings and Sexuality of Women Living in Rafsanjan: A Qualiattive Inquiry, International Journal of Reproductive Biomedicine, Vol. 15 (2017), 771–778.