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Abstract

Legal provisions on interfaith marriages offer a privileged observation point on the interaction of different legal systems in a context of migrations, minorities, and law and religion. Even within the Muslim communities in Scotland, predominantly South Asian, multiple and fluid identities compete and seek different arrangements within a legal system that refuses to consider elements of Islamic law as law, or relevant to law. Impediments to marriage by disparity of faith can be a good case in point, and open up the debate on the boundaries of competing definitions of law.

This paper explores the adaptation and transmigration of Islamic regulations on interfaith marriages among the Muslim communities in Scotland. Islamic impediments to marriage by disparity of faith have somehow guaranteed the religious endogamic principle in Muslim-majority contexts; what happens when borders are crossed and South Asian communities find themselves in a Scottish context?

In order to follow this adaptation and transmigration, we need to embark on a journey through time and space. I suggest to depart from the single rule on interfaith marriages produced by modernity (I), follow a leisurely meander along the modern/classical divide (II), tour the welcoming highlands of Scots law (III), and observe how our modern rule has taken root in quite a distinct environment (IV), before landing with some super-hybrid final considerations (V).

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[1] This paper is based on the findings of a research project, undertaken in Scotland in the summer of 2010 within a fellowship scheme of the British Academy and Economic and Social Research Council, titled: "Invisible Barriers to Citizenship? Islamic Inter-Faith Marriages in Europe: The Case of Scotland". I feel truly indebted to the faculty and staff of the University of Edinburgh where I was based during the research, in particular Jo Shaw, Lisa Pilgram, and Elspeth Reid in the School of Law, Marilyn Booth of the Islamic and Middle Eastern Studies Center, and Hugh Goddard of the Waleed bin Talal Centre for the Study of Islam in the Contemporary World. I am also especially thankful to David Carey-Miller of the University of Aberdeen.

I. 'Modern' law and its single rule

A modern articulation of the regulations on interfaith marriages in Islam would probably read: "Interfaith marriages are prohibited, except in the case of a Muslim male marrying a Scriptural female (*kitābīyah*)."

Such an abridgement can serve as a good example of a larger legal phenomenon that affected classical Islamic law in its encounter with modernity. As WAEL HALLAQ aptly described it, modernizing the law in the age of nation-states meant to remold Islamic legal tradition into the structures of codification. The style and mentality of a single rule to be applied uniformly dispensed with what he called the "*ijtihād*ic plurality"[2] that both allowed for fluidity in the creation of the law, and for flexibility in its application.

This operation not only detached the single rule from the traditional dynamics of Islamic law production, but it also abstracted the product of legal reasoning. The abstraction consisted in selecting what had to be included in the abstract, single rule (a practice alien to classical Islamic jurisprudence) and severing this selection from the legal context and considerations that surrounded it (and were often conducive to such regulations). As a result of the abstraction, a change in the context or surrounding considerations (the relevance of which became a matter of contention) no longer has an immediate effect on the re-articulation of the rule.

The single rule produced by the modernizing effort had yet to pass the courtroom test, as has been pointed out with regard to the use of discretionary powers by judges.[3] The rule on interfaith marriages, however, has rarely been included in the family law codes of Muslim-majority countries. Judicial discretion had then to be channeled through the '*šarʿī* postulate' (a residual provision usually incorporated in modern codifications to direct the judge to resort to Islamic law in case of legislative gaps or interpretive dilemmas). Tunisian law and courtroom practice is quite instructive on the rule on interfaith marriages in this respect. In Tunisian law there is neither a provision banning interfaith marriages nor a *šarʿī* postulate, yet in 1966 the Court of Cassation voided a marriage of a Muslim woman to a non-Muslim man declaring it "an unpardonable crime"[4] and state authorities followed suit in 1973 by prohibiting the registration of such marriages.[5] There seem to be signs now of a timid change of heart by the Tunisian judiciary, but the overruling has not yet ossified.

II. Selection and abstraction in a single rule

The 'modern', single rule on interfaith marriages seems to be consonant with the classical theory and its interpretation of the relevant Qurʾānic verses, yet its brevity and abstraction

[2] WAEL B. HALLAQ, Sharīʿa: Theory, Practice, Transformations, Cambridge 2009, at 449.

[3] NAHDA YOUNIS SHEHADA, Justice Without Drama: Enacting Family Law in Gaza City Sharīʿa Court, Maastricht 2005; LYNN WELCHMAN, Beyond the Code: Muslim Family Law and the Shariʾa Judiciary in the Palestinian West Bank, The Hague 2000; LYNN WELCHMAN, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy, Amsterdam 2007.

[4] HAFIDHA CHEKIR, Le statut des femmes entre les textes et les résistances: le cas de la Tunisie, Tunis 2000, at 286, cit. in WELCHMAN 2007, supra n. 3, at 47.

[5] WELCHMAN 2007, supra n. 3, at 47.

from the background considerations on which the rule depends sensibly limit the possibilities of legal change and modulated application.

The 'modern', single rule ("Interfaith marriages are prohibited, except in the case of a Muslim male marrying a Scriptural female (*kitābīyah*)") appears to be a combination of the prohibition of interfaith marriages based on Q. 2:221 and the exception of permitted marriages with Scriptural women based on Q. 5:5.

Q. 2:221, also known as the verse of interdiction, reads:[6]

> Do not marry unbelieving women (idolaters), until they believe: A slave woman who believes is better than an unbelieving woman, even though she allures you. Nor marry (your girls) to unbelievers until they believe: A man slave who believes is better than an unbeliever, even though he allures you.

This verse, considered an early Medinan revelation and traditionally interpreted as referring to polytheist Arabs (*mušrikāt* and *mušrikīn*) was later read in conjunction with Q. 5:5 as a general prohibition of interfaith marriages - Yusuf Ali's translation of *mušrikāt* and *mušrikīn* as 'unbelieving women and men' somehow captures this late reading while sidelining the etymon *širk*, which is the act of associating to God other Gods.

Q. 5:5, also known as the verse of permission, reads:

> This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time,— when ye give them their due dowers, and desire chastity, not lewdness, nor secret intrigues.

This verse, almost unanimously dated after the verse of interdiction (Q. 2:221) and traditionally connected to Muhammad's 'Last Pilgrimage' (*ḥaǧǧ al-widāʿ*), raises two main interpretative problems: one related to the definition of *muḥṣanāt* (YUSUF ALI's 'chaste women'), and the other to the gendering of the permission.

Qurʾānic interpretation of *muḥṣanāt* varies. Some read it as requiring the status of liberty, some chastity (defined here as lack of promiscuity and observance of ritual purity), and some both. However, none of these readings made it to the single rule. One could speculate that the disappearance of slavery on the one side, and the unwillingness or inability to verify compliance with chastity regulations on the other side, both played a role in the operation of (de-)selection and abstraction to the single rule.

Interpretation of the gendering of the permission, however, slightly varies according to the different theoretical approaches of the four *maḏāhib* (legal schools) of Sunni Islam.[7] I will only consider here the Ḥanafī perspective, as most Muslims in Scotland follow this school.

[6] For the purposes of this article, the rendering of Qur'ānic meanings is that of 'ABDALLĀH YŪSUF ALI.

A general remark is in order. Jurists seem to feel the need to provide further arguments to the gendering, rather than merely considering the Qurʾānic verse.

Jurists tend first to conflate the unequal position of spouses in marriage and the hierarchy of religions in articulating their arguments in favor of the gendering. A patriarchal reading of gender roles in marriage – which probably reaches its apex when the Ḥanafī jurist AL-SARAḤSĪ (d. 1096) equates it to enslavement (*riqq*) in his reference work *al-Mabsūṭ* – sets the stage for an outright refusal of subjecting a Muslim woman to the authority of a non-Muslim man. An *ad absurdum* argument takes it a step further: had the marriage of a Muslim woman to a non-Muslim man not been completely prohibited, the extreme lack of wedding adequacy (*kafāʾah*) – itself strongly gendered – would nonetheless afford grounds for dissolution of such marriage by the judge (*fasḫ*).

The gendering is also supported by an argument advanced by modern jurists on the basis of the combined reading of Q. 2:221 and 5:5 – an inescapable outcome of articulating the regulations on interfaith marriages in the modern, single rule. Modern jurists argue that the fact that Q. 2:221 repeats the prohibition verbatim for females (*mušrikāt*) and males (*mušrikīn*), whereas Q. 5:5 only mentions permission for females (*muḥṣanāt*) is a clear indication in favor of the gendering. This argument seems at best tenuous as the categories of *širk* and *iḥṣān*-cum-*ahl-al-kitāb* do not overlap, and Q. 5:5 is not traditionally framed as an instance of abrogation (*nasḫ*) of Q. 2:221. It becomes an issue of particularization (*taḫṣīṣ*) only in the minority view that the Christian woman (by saying that Jesus is God, or that he is one of three) commits *širk*, yet she is exempted from the prohibition of Q. 2:221 because she belongs to those who were given the Book of Q. 5:5 (*al-muḥṣanāt min al-laḏīna ʾūtū al-kitāb*).

The gendering of the permission is also connected by some modern jurists to the issue of filiation. Since the child is Muslim because the father is Muslim, marriage of a Muslim woman to a non-Muslim man is deemed inconceivable as it would produce non-Muslim offspring to a Muslim mother. This patriarchal reading of membership in the Muslim community by paternal descent only (thus generating a gendered (religious) endogamic rule for the Muslim woman) collides with the de-gendered rule of attribution to the child of religious affiliation according to a hierarchy of religions (the child will follow the religion of whichever parent belongs to the higher religion).[8] This latter rule is the one applied in Islamic law to the interfaith marriages between non-Muslims.

Beyond the Qurʾānic texts, classical Islamic law scholars further interconnect interfaith marriages with a broader contextual distinction of the territory where Islamic law applies (*dār al-islām*) and where it does not (*dār al-ḥarb*). Scholars differently qualify the marriage of a Muslim male with a Scriptural female (*kitābīyah*) that lives as a protected person in the *dār al-islām* (*ḏimmīyah*) from the one with a *kitābīyah* that lives in the *dār al-ḥarb* (*kitābīyah ḥarbīyah*). Mālikī and Šāfiʿī jurists, for instance, employ different degrees of reprehensibility (*karāhīyah*), whereas Ḥanbalī jurists do not attach any further qualification to that of permissibility (*ibāḥah*)

[7] For an outstanding overview of the gender bias in *tafsir* and *fiqh* literature on interfaith marriages, see: LEENA AZZAM, The Gendered Perception of Interfaith Marriages in Islamic Legal Discourse, LLM Thesis, The American University in Cairo 2015.

[8] IBN AL-QAYYIM says that *kitābī*s are superior to *mağūsī*s, and within *kitābī*s Christians are superior to Jews. Therefore, the child of a *kitābī(yah)* with a *mağūsī(yah)* is considered a *kitābī*, and the child of a Christian with a Jew is considered a Christian. IBN AL-QAYYIM, Aḥkām ahl al-ḏimmah, Dammām 1997, 2: 771.

of Q. 5:5. Ḥanafī jurists are the ones that show the most hostile attitude towards marriages in the *dār al-ḥarb* with a *kitābīyah ḥarbīyah* qualifying the marriage either as reprehensible (*makrūh*) and imposing further restrictions (like avoiding generating offspring through ʿ*azl*), or sheerly as forbidden (*ḥarām*) in open conflict to the un-contextualized permission of Q. 5:5.[9]

The 'classical' regulation of interfaith marriages was the logical outcome of a particular worldview in which the discourse of the dominant political elite placed the other (the woman, the non-Muslim) in a hierarchically subordinated position, and it served the purpose of maintaining that peculiar power-balance. The crystallization that led to what was to be known as classical Islamic law took place during the later Abbasid caliphate (through the 13th century AD), and just as the patriarchal approach of the jurists of the Abbasid times affected and keeps affecting the consideration of the woman in the law and her role in it,[10] so it does for the non-Muslim.[11] Modernity has a mixed record on the de-patriarchalization of Islamic law, as it has in more than one respect confirmed and strengthened the *Weltanschauung* of the jurists and the elites they originated from in the late Abbasid caliphate.[12]

The 'modern', single rule – while apparently solidly based on the mere Qurʾānic verses and discarding all the scholarly interpretations – is rather the product of a selection and abstraction that favored the patriarchal reading of classical jurists while avoiding all problematic references to their background considerations. The modern selection and abstraction, therefore, secures the patriarchal reading from critique or review. Gendered permission based on unequal relations between spouses and adverse qualification based on the hostility of the legal environment are the two areas in which the rule on interfaith marriages can be put to test in the Scottish context. If Scots law does not discriminate on the basis of gender or religious affiliation, do Islamic law impediments to marriage by disparity of faith still stand unaffected or can Muslim communities in Scotland reconsider them?

Before considering the Scottish context, let me mention here in passing that interfaith relationships and marriages that do not conform to our 'modern', single rule are likely to exacerbate social conflict even in a Muslim-majority setting. In Egypt, a heated debate on interfaith marriages followed the sectarian clashes of April 2011 in Imbābah (a lower-class Cairo neighborhood) between Muslims and Copts, which often occur over allegations of (a) love relationships beyond the 'modern', single rule, (b) conversions and reconversions to avoid application of confessional family law, or (c) construction of new churches. A few days after the clashes, on 3 May 2011, ʿAmr Ḥamzāwī, a political science professor championing liberalism in the country, appeared on the tv talk show *al-Qāhirah al-yawm* and, while explaining the key concepts of liberalism/democracy, on the freedom of choice he mentioned the necessity of introducing a two-track system in family law matters, in order to allow the citizen to freely choose between religious or civil marriage (civil marriage not being currently available in Egypt). The host, ʿAmr Adīb, interjected to ask Ḥamzāwī whether he was suggesting that a Christian (man) could marry a Muslim (woman). Ḥamzāwī replied that in

[9] IBN AL-QAYYIM, supra n. 8, at 2: 809.

[10] LEILA AHMED, Women and Gender in Islam: Historical Roots of a Modern Debate, New Haven 1992.

[11] YOHANAN FRIEDMANN, Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition, Cambridge 2003.

[12] LAMA ABU-ODEH, Modernizing Muslim Family Law: The Case of Egypt, Vanderbilt Journal of Transnational Law (37/2004), 1043-1146.

order to be in accordance with his principles, the principles of liberalism/democracy, he believed that an option had to be offered to the citizen, regardless of whether the majority of Egyptian society agreed or not. This was picked up and heavily criticized on the web and in the media. In particular, videos were extracted and circulated on the web under the titling: "Ḥamzāwī invites Muslim women to marry Christian men". Ḥamzāwī accurately denied that he was 'inviting' Muslim women to marry Christian men, but in his response to a column by ᶜUmar Ṭāhir[13] he added to his previous televised statement that such an option needs to be available "within limits that do not contravene confessional laws" (*fī ḥudūd lā tuḫālif al-šarāʾiʿ al-dīnīyah*).[14] This episode shows once more how delicate and sensitive the issue of the 'modern', single rule is, and seems to suggest that the latter has left the sheer realm of law proper to be assumed as an element of identity.

III. The Scottish context

Scots law has always maintained a less holistic conception of marriage than the one found at common law. However, until 1920 husbands had extensive rights over their wives' property, first of property and administration then of administration only after 1881. In 1920, the Married Woman's Property (Scotland) Act 1920 provided for the general principle that marriage shall not of itself affect the respective rights of the spouses in relation to their property and their legal capacity.[15] This principle is now to be found in sect. 24 of the Family Law (Scotland) Act 1985. The previous year, however, another bill was passed which is of even higher significance to the present study: Law Reform (Husband and Wife) (Scotland) 1984.

The 1984 Law Reform established the prohibition of actions of adherence, whereby no spouse can be entitled to apply for a decree from any court in Scotland ordaining the other spouse to adhere (i.e., to live together and be sexually faithful to each other, sect. 2(1)). The reform also abolished curatory after marriage (sect. 3), the husband's right to choose the matrimonial home (sect. 4), and defined ante-nuptial onerous agreements (except gifts, sect. 5), husband's liability for wife's debts incurred before marriage by reason only of being her husband (sect. 6), the *praepositura* (sect. 7),[16] and husband's liability for wife's judicial expenses when neither a party nor *dominus litis* (sect. 8).[17]

Equal relations between spouses seem to have been the main goal and achievement of the Law Reform (Husband and Wife) (Scotland) 1984. From the absence in contemporary Scots Law of any reference to the legal entitlement of either spouse to force any decision on the other one

[13] ᶜUMAR ṬĀHIR, Ḥamzāwī wa-l-mutasalfanūn wa-l-muta'aqbaṭūn, al-Miṣrī al-yawm (Cairo, May 9, 2011), available at <http://www.almasryalyoum.com/news/details/207122>, last accessed April 29.

[14] ᶜAMR ḤAMZĀWĪ, al-Zawāǧ al-madanī, al-Šurūq (Cairo, May 11, 2011). The column, no longer available on the Shorouknews.com portal, is still available at <http://www.ahl-alquran.com/arabic/show_news.php?main_id=17498>, last accessed April 29.

[15] LILIAN EDWARDS & ANNE M. O. GRIFFITHS, Family Law, Edinburgh 2006, at 349.

[16] *Praepositura* in Scots Law was "the right of a wife to incur debts on behalf of her husband for food and household requirements, 'the managership of a married woman in domestic matters … entitling her to pledge her husband's credit for necessaries' (Sc. 1946 A. D. Gibb *Legal Terms* 66)" in Dictionary of the Scots Language, Edinburgh 2004, available at <http://www.dsl.ac.uk/entry/snd/praepositura>, last accessed April 29.

[17] A *dominus litis* is a party with a direct interest in the subject matter of the litigation (Sc. 1853 Session Cases (1853–54) 23).

may infer that any act involving, for instance, unreasonable impediment to practice one's religion will be deemed unlawful and treated as such irrespective of marriage between the two.

The non-Muslim husband cannot therefore legally interfere with his Muslim wife's religious practices under Scots law. The possibility of the husband to force his wife to neglect her religious duties is one of the main concerns often articulated as an argument to justify the gendered single rule. Whereas this may be plausible, even legally recognised, in jurisdictions where the husband retains powers over the wife, as in most of the legal systems where most non-Scottish Muslims in Scotland originate from, this would not be legally justifiable in Scotland.

Moreover, confessions in Scotland are not hierarchically ranked, and even the Church of Scotland has long challenged its own status as established church under UK law – a battle fought in the name of independence in matters spiritual and eventually won with the passing of the Church of Scotland Act 1921 by the Westminster Parliament. Muslim communities in Scotland are therefore entitled to the same rights as other confessions. They are neither hierarchically superior nor inferior to any other.

What legal arrangements does the Scottish legal system offer to its Muslim communities in matters of family law? The system adopts quite a liberal stance on the ways in which a marriage can be solemnized, but it then regulates the effects of marriage and its termination under general Scots law. However, Scottish courts also try to accommodate even elements traditionally classified as elements that affect the validity of a Muslim marriage (such as the *mahr* or dower) by recourse to the existing available legal categories of Scots law (be them within the law of marriage, liberalities, or other).

The Scottish legal system provides a hybrid solution for the law of marriage (religious or civil), according to the Marriage (Scotland) Act 1977.[18] The marriage may be solemnized by an authorized registrar (civil),[19] or by an approved celebrant (religious)[20] according to different forms, but it will be uniformly regulated by Scots law.

The solemnization of a religious marriage in Scotland is quite open to religious bodies that are not the 'traditional' or prescribed ones. Marriage can be solemnized by (i) a minister of the Church of Scotland,[21] (ii) a minister, clergyman, pastor or priest of a religious body prescribed by regulations made by the Secretary of State, or who, not being one of the foregoing, is recognized by a religious body so prescribed as entitled to solemnize marriages on its behalf,[22] (iii) a person who is registered under section 9 of the 1977 Act (defining the conditions for registration, basic requirements to qualify as celebrant, and a minimum appropriate form for the marriage ceremony),[23] or (iv) is temporarily authorized under section 12 of this Act.[24]

[18] As amended by the Marriage (Scotland) Act 2002. Marriage has also been partially reformed by the Family Law (Scotland) Act 2006.
[19] Sect. 8(1)(b) Marriage (Scotland) Act 1977.
[20] Sect. 8(1)(a) Marriage (Scotland) Act 1977.
[21] Sect. 8(1)(a)(i) Marriage (Scotland) Act 1977.
[22] Sect. 8(1)(a)(ii) Marriage (Scotland) Act 1977.
[23] Sect. 8(1)(a)(iii) Marriage (Scotland) Act 1977.
[24] Sect. 8(1)(a)(iv) Marriage (Scotland) Act 1977.

Some Muslim clerics in Scotland did register under sect. 9 of the 1977 Act, and can therefore solemnize marriages. The requirement of an appropriate form for the marriage ceremony is satisfied if it includes, and is in no way inconsistent with (a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses, that they accept each other as husband and wife; and (b) a declaration by the celebrant, after the declaration just mentioned, that the parties are then husband and wife.[25] Islamic law does not stipulate for the conclusion of a valid marriage either a celebrant (even if in practice the presence of a religious figure is often sought), or the declaration of such celebrant that the parties are husband and wife. Yet, both requirements could be easily accommodated in the conclusion of an Islamic marriage.

Registering under sect. 9 of the 1977 Act, however, will prevent a Muslim cleric from solemnizing an Islamic marriage without a marriage schedule, since that would be considered an offence in Scotland.[26]

Upon verification of lack of legal impediments, a marriage schedule is issued by a district registrar including date and place of the solemnization.[27] If an approved celebrant solemnizes a marriage without a marriage schedule ((a)in respect of the marriage, (b) issued in accordance with this act, (c) being available to him at the time of the marriage ceremony), he shall be guilty of an offence and shall be liable of (i) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 2 years or to both; (ii) on summary conviction, to a fine not exceeding Level 3 on the standard scale (GBP 1,000)[28] or to imprisonment for a term not exceeding 3 months or to both.[29]

If Muslim clerics want to be free to perform un-registered *nikāḥ* (the most common term for Islamic marriage used in Scotland by South Asian Muslims and Muslims of South Asian descent), then they cannot be registered and solemnize marriages to be valid under Scots Law.

The only other open option of an irregular marriage at common law, the marriage by cohabitation with habit and repute, has been recently abolished in 2006.[30] The abolishment is prospective, and does not affect marriages by cohabitation with habit and repute that ended before the commencement of the law (4 May 2006), those that began before but ended after the commencement, and those that began before and continue after commencement.[31] The Court of Session, Scotland's supreme civil court, in an Outer House decision in 2005 granted a declarator of marriage by cohabitation with habit and repute even to a pursuer who had apparently refused to enter into an un-registered *nikāḥ* with the defender, but was yet considered his wife at common law. From the proceedings it is difficult to conclude whether the Court would have reached the same decision, had the pursuer accepted to contract a *nikāḥ*, or rather the Court granted the declarator precisely because she refused to do so. Among the arguments brought to justify her repeated refusals of the *nikāḥ* marriage proposals, the pursuer mentioned that "she felt that she would be trapped if she were to convert to Islam" [18], but the

[25] Sect. 9(3) Marriage (Scotland) Act 1977.
[26] Sect. 24(1)(c) Marriage (Scotland) Act 1977.
[27] Sect. 6 Marriage (Scotland) Act 1977.
[28] Sect. 289G, Criminal Procedure (Scotland) Act 1975, as substituted by the Criminal Justice Act 1991.
[29] Sect. 24(1) Marriage (Scotland) Act 1977.
[30] Sect. 3 of the Family Law (Scotland) Act 2006.
[31] EDWARDS & GRIFFITHS, supra n. 15, at 341.

defender maintained that "he would not have required the pursuer to convert to Islam before he married her. He wanted to get married whether she was willing to convert or not. He was even willing to become a Sunni Muslim or, as he put it, to take a Christian oath just to be married to her" [30].[32] Even though the defender's affiliation is not known, both parties' account is consistent with the outright rejection of interfaith marriages in Ǧaʿfarī law (the main Shiʿi *maḏhab*).

Does Scots law set impediments to marriage by disparity of faith for the validity of marriage? In its early days Roman Catholic canon law was the law that regulated marriages in Scotland. Early Roman Catholic canon law itself was an adaptation of the Roman law of marriage, which through the lack of *connubium* recognized a number of what we would now call impediments to marriage based on status (mainly citizenship, social class, freedom). It is here worthwhile to underscore that also Islamic law classifies some impediments to marriage under the heading of lack of wedding adequacy (or status: *kafāʾah*). During the early Middle Ages, canon law rejected all the status-based impediments of Roman law, including the late Roman law impediment by disparity of cult between Christians and Jews. In the late Middle Ages, however, marriages between Christians and Jews were declared null according to canon law, just as some marriages between Christians and 'heretics' (canonists held different opinions on the ones that should have been considered valid and those null). Quite unsurprisingly, the Reformation in Scotland disregarded all the status-based impediments of late medieval canon law, including those by disparity of cult, and there has been no turnaround on the point ever since. Other impediments to marriage have been debated in Scots law ever since the 1560 Reformation (e.g.: impotency, relationship, and identity of sex), but not the ones based on status (even if some of the Scotsmen I interviewed referred to the fact that conversions to Catholicism or marriages with Catholics were socially looked down on through the early 20th century).[33]

Scottish courts (just like courts elsewhere in non-Muslim contexts) are developing an interesting case law trying to accommodate requests from Muslim parties on elements of the Islamic marriage such as the dower (*mahr*); but it is clear that the logic applied is that of subsuming new facts (the *mahr*) into existing legal categories (variably a nuptial gift, an ante-nuptial marriage contract, a sheer act of liberality..).[34] Parties try, for instance, to induce courts in framing *mahr* in one or the other category in order to achieve their goals rather than considering it within its own legal environment, as a recent study has shown.[35] And the legal profession assists; John Fotheringham, child and family law specialist in a large Scottish law firm, wittingly framed it as: "Scottish solicitors can serve their Muslim clients by being sensitively and creatively aware of what can be done within existing structures of Scots law".[36]

[32] Sheikh v. Sheikh [2005] CSOH, 25.

[33] For a thorough analysis of impediments to marriage in Scots law in a historical and comparative perspective, see JOHN RANDALL TRAHAN, Impediments to Marriage in Scotland and Louisiana: an Historical-Comparative Investigation, in: Vernon Palmer & Elspeth Reid (Eds.), Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland, Edinburgh Studies in Law, Edinburgh 2009, 173-207.

[34] RUBYA MEHDI & JØRGEN S. NIELSEN (Eds.), Embedding Mahr (Islamic Dower) in the European Legal System, Copenhagen 2011.

[35] PASCALE FOURNIER, Muslim Marriage in Western Courts: Lost in Transplantation, Farnham 2010.

[36] JOHN FOTHERINGHAM, When Muslims look to Shari'ah principles, the law of Scotland can be quite accommodating, The Scotsman, Edinburgh, August 24 2008, available at <http://news.scotsman.com/scotland/John--Fotheringham--When.4422319.jp>, last accessed April 29.

Recourse to expert advice is at times requested, at times rejected by courts,[37] allowing for even wider freedom in the framing of the different elements of Muslim marriage. For example, the English Court of Appeal[38] and the Scottish Court of Session[39] recently took two conflicting decisions on the validity of a Muslim marriage by telephone based on the same expert advice.

The strategy of Western courts to accommodate elements of Muslim marriage within the 'acceptable' framework of existing legal categories unavoidably produces a piecemeal, super-hybrid outcome that is neither the classical solution, nor the modern one.

Can Islamic impediments to marriage by disparity of faith be recognized by Scottish courts within Scots law? Since Scots law no longer recognizes impediments based on status (including by disparity of cult), it is unlikely to see a case filed in front of a Scottish court for an interfaith marriage that does not conform to our 'modern', single rule. It is hence moot to delve into standing requirements for such a dispute. The only case in which an Islamic impediment to marriage by disparity of faith is likely to appear in front of a Scottish court is the case of the wife who converts to Islam and wants to terminate her marriage with her non-Muslim husband. One such case could be framed in quite a varied number of ways, but all revolving around the grounds for divorce and the ensuing financial provisions. A group of contemporary Islamic scholars is advancing a partially different view from the single-rule approach to the consequences of the conversion to Islam of a woman who is in wedlock with a non-Muslim man, and the debate it may generate needs to be analyzed a bit further.

The discussion on the accommodation of voluntary jurisdictions in the various forms of Muslim arbitration tribunals (MATs) or Šarīʿah councils in Scotland is of secondary importance for matters of impediments to marriage.[40] Even in an unlikely request of an opinion on such an issue, the body would most probably be able to issue only an advisory opinion, not an award final and binding on parties.[41]

IV. The single rule in Scotland

One of the main objectives of the research project was to investigate the interplay between the 'modern', single rule on interfaith marriages in Islamic law and the Scottish legal context. The abstraction of the single rule has de-contextualized the regulations on interfaith marriages; is the rule now immune from the context, or would a re-contextualization affect its content (and application)?

Interviews were conducted to that end with a diversified range of figures from Muslim communities in different regions of Scotland. Qualitative methods were applied, considering the extremely narrow research question of the possible re-contextualization by Muslim

[37] Cfr. WERNER MENSKI, Law, religion and culture in multicultural Britain, in: Rubya Mehdi, Hanne Peterson, Erik R. Sand and Gordon R. Woodman (Eds.), Law and Religion in Multicultural Societies, Copenhagen 2008, 43-62, at 45.
[38] EWCA Civ 198 [2009] 2 WLR 185.
[39] MRA v. NRK [2011] CSOH, 101.
[40] See the AHRC/ESRC-sponsored report on religious courts and bodies in England and Wales: GILLIAN DOUGLAS ET AL., Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts, Cardiff University, June 2011, available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>, last accessed April 29.
[41] Sect. 11 ff. Arbitration (Scotland) Act 2010.

communities in Scotland of the legal impediments to marriage by disparity of faith in Islamic law. The research covered major cities with large Muslim communities as well smaller urban centers (namely Glasgow, Edinburgh, Aberdeen, Dundee and Inverness), and included active participants in the legal debates with the Muslim communities (mainly scholars, local imams, women active in faith-based NGOs, and community leaders).

The data seem to suggest that there is a language divide that affects the debate. On the one hand, those who speak Arabic – either because it is the language they use or because they received religious training – are aware and participate in a debate on interfaith marriages from a very specific angle, that of the so-called *islām al-zawǧah* case. This is the case of the conversion to Islam of a woman who is married to a non-Muslim (who does not convert, neither wishes to do so); will she be requested to divorce her husband when embracing Islam? Or, else, be instructed to refuse conjugal relations with her husband, based on some reports of Muḥammad's injunction on his daughter Zaynab regarding her marriage to Abū al-ʿĀṣ? The debate is open, and scholars are divided on the answers to give to such questions. On the other hand, non-Arabic speakers (the majority of Muslims in Scotland) seem to be less involved in the debate and more inclined to perpetuate the single rule developed by modernity on grounds of its supposedly higher traditional legitimacy.

The language divide can be explained in terms of ability to participate in the wider rather than in the local debate, and the absence of a debate that could be properly considered local. The peculiarities of the Scottish context thus become quite irrelevant, as even the Arabic-speakers depend on the larger Muslim communities in England or overseas.

Effects of the conversion to Islam of a woman married to a non-Muslim (*islām al-zawǧah*) have attracted the attention of a group of Muslim scholars who intend to develop a 'new' body of Islamic law based on the special conditions of Muslim communities who live as minorities (especially in the West). However, these attempts to develop 'new' rules tailored on the needs of Muslim living in non-Muslim majority contexts seem to have met with tepid reception so far. Arabic being the main language used for this 'jurisprudence for minorities' (*fiqh al-aqallīyāt*), it should come to no surprise that references to the debate on the *islām al-zawǧah* case were made exclusively by Arabic-speaking members of the Muslim communities in Scotland.

It is worth mentioning here that advocates and supporters of *fiqh al-aqallīyāt* engaged directly with the classical Islamic regulations on interfaith marriages in the second issue of *al-Mağallah al-ʿilmīyah* of the European Council for Fatwa and Research (ECFR) in 2003; the issue was entirely dedicated to the status of the marriage of a woman who converts to Islam while her husband does not. Among the contributors featured most of the well-established (and sometime discussed) Muslim legal scholars, from ʿABDALLĀH AL-ǦUDAYʿ to ʿABDALLĀH AL-ZUBAYR, from FAYṢAL MAWLAWĪ to MUḤAMMAD ABŪ FĀRIS, from NIHĀT ʿABD AL-QUDDŪS to YŪSUF AL-QARAḌĀWĪ.[42] The grounds for re-consideration of the *islām al-zawǧah* case mentioned in the general presentation of the issue could even warrant a re-consideration of the classical regulations on interfaith marriages beyond the *islām al-zawǧah* case.[43]

[42] See the discussion in: DINA TAHA, Muslim Minorities in the West: Between Fiqh of Minorities and Integration, in Electronic Journal of Islamic and Middle Eastern Law (1/2013), 1-36, at 25-28.

[43] FAYṢAL MAWLAWĪ, Taqdīm, al-Mağallah al-ʿilmīyah (2/2003), 9-10.

In its final decision, however, the ECFR adopted quite a conservative reading while recognizing to the woman who converted to Islam after consummation of marriage the right to wait (for an indefinite period of time) for the conversion of the husband.[44] The line closes with the unclear stipulation that, when the husband converts, there will be no need for a renewal of the marriage. Relations between the spouses during this indefinite period during which the woman waits for the conversion of her husband is addressed further down in the decision, where the opening statement leaves no room to doubt that all schools agree that the wife cannot remain with her husband after the termination of the waiting period (*ʿiddah*). The Council, however, also mentions a minority view that the wife can remain with her husband with full marriage rights and duties, provided he does not prejudice her in her religion and she harbors hopes that he will eventually convert. Not unsurprisingly, the issue of the religious affiliation of the offspring is not addressed.

Indeed, according to the ECFR *fatwá*, if the wife wishes to maintain her marriage after her conversion to Islam (against the consensus of Muslim scholars to the contrary), she either has to suspend conjugal relations with her husband until his conversion (in line with Zaynab's episode), or follow the other minority view of full marriage rights and duties. This view finds support in two traditions, the first attributed to ʿUmar and the second to ʿAlī – ʿAlī's decision in this latter tradition is based on the consideration that the husband enjoys protection (literally: *ʿahd*, a contract, short for: *ʿahd al-ḏimmah*, contract of protection), i.e. he is a *ḏimmī*. A condition that certainly does not hold in Scotland.

V. A Hybrid Legal Solution?

It is rare to find another area of Islamic law where the consensus of scholars seems to be more widespread than on interfaith marriages. Despite the inconsistent practice of the early days of Islam,[45] during the 3rd century AH (9th AD) an articulated system of impediments to marriage by disparity of faith somehow stabilized around a series of considerations revolving around certain arrangements of unequal relations between spouses, a hierarchized system of religious communities, and an horizon of territories ruled by Islamic law and others not. Modernity uprooted such a system from its environment, and transformed it into a single rule through selection and abstraction. The end-result is a rigid formulation unable to interact either with the legal environment that produced the system (and hence grasping its own gist), or with the different conditions that an unknown and not-necessarily-unfriendly legal environment may offer.

The hybridity of the modern single rule is therefore magnified by its application in a context like the Scottish one, where the law guarantees equality of spouses, religious communities are not ordered in ranks, and Islamic law does not govern the system. If one argued from a conservative standpoint that, based on the last remark (i.e.: Islamic law does not govern the Scottish legal system), the legal category of *dār al-ḥarb* should apply, then all the provisions regarding interfaith marriages in the *dār al-ḥarb* should apply (not the ones developed for the *dār al-islām*).

[44] Qarār 3/8, ECFR, 8th Ordinary Session, Sevilla 18-22 July 2001, in al-Maǧallah al-ʿilmīyah (2/2003), 445-446.
[45] FRIEDMANN, supra n. 11.

This selective approach to the classical regulations generates a super-hybrid solution that is neither the classical, nor a new one (in fact it is, but it is not purported as such). The authority of the super-hybrid solution seems to be strengthened by the oblivion of the contextualization-cum-localization of the classical solutions; regulations for a *šarīʿah*-ruled context are extended to a non-*šarīʿah*-ruled one – disregarding the provisions set out for the latter context. One could speculate that this 'extension' of the regulations developed for a *šarīʿah*-ruled context mirrors a certain conception of the migratory phenomena that might change as newer generations progressively lessen their ties with the 'homelands' of their ancestors.

Impediments to marriage by disparity of faith fall out of the purview of contemporary legal systems – so adamantly committed to the principle of territoriality of the law, and its professed religious-blindness. These restrictions fall in a blind spot of Scots law and court system, but it would amount to mystification to discard them as irrelevant to law, especially when reasoning in terms of multiculturalism[46] and citizenship theories.[47]

When introducing the distinction between multiculturalism and plural monoculturalism, AMARTYA SEN points precisely at a case of rejection of an interfaith relationship for an immigrants' daughter and considers it an overt act of separateness embedded in plural monoculturalism rather than multiculturalism.[48] Our single rule seems to prove also SUSAN MOLLER OKIN's point,[49] if the patriarchal roots of both the modern articulation and the classical crystallization are not revisited. The bases for the gendered, hierarchical single rule appear much less monolithic when stripped of the patriarchal readings of the classical jurists of the 13th century AD and those of the abridging jurists belonging to the new elites of the modern nation-states.

The interaction between state law and confessional law generates conflicts precisely when the two systems refuse to give the same appreciation to a certain element. It is in those circumstances that the socio-legal arrangement model can be put to test. If a Muslim cleric registered as a celebrant under Scots law refuses to marry a Muslim woman to a non-Muslim man, it is dubious whether Scottish authorities would (and could) intervene. Could they revoke the authorization based on the application of a gender-discriminatory wedding practice? On what evidence? The broad wording of sect. 10(1)(d)(iii or iv) of the Marriage (Scotland) Act 1977 would seem to allow the removal of such a celebrant's name from the register. Would (and could) the same Scottish authorities prevent the same celebrant from marrying a Muslim man to a non-Muslim woman in compliance with classical Islamic (Ḥanafī) law? The hypothesis seems quite remote since it would entail enforcement of a religious discrimination practice. Today even more than in the past, and on lesser and lesser grounds, the victim of the 'modern', single rule is the Muslim woman, who is forced to choose between her faith and her prospective or current partner.

[46] CHARLES TAYLOR, Multiculturalism and "The Politics of Recognition": An Essay, Princeton 1992; BHIKHU C. PAREKH, Rethinking Multiculturalism: Cultural Diversity and Political Theory, Cambridge 2000; SUSAN MOLLER OKIN, Is multiculturalism bad for women?, Princeton 1999.

[47] WILL KYMLICKA, Multicultural Citizenship: A Liberal Theory of Minority Rights, Oxford 1995.

[48] AMARTYA SEN, Identity and Violence: The Illusion of Destiny, New York 2007, at 157.

[49] OKIN, supra n. 46.

In reverse order, the same conflict between state law and confessional law can be observed in the current debate in Egypt over the second marriage of the Copt. The Coptic (Orthodox) Church allows for divorce in a very limited number of cases, but Egyptian state courts divorce Copts with much more liberality, considering divorce a constitutional right of the citizen according to the Islamic understanding of marriage and divorce. If state courts manage to force the termination of all legal consequences of the marriage, they cannot force the Church to acknowledge the termination of the marriage. The issue is further complicated by the absence of a non-confessional family law system by which the state-divorced Copt can actually lead a life without further, harsh legal consequences. The Supreme Administrative Court has tried to force the Church to remarry the court-divorced Copt, but to no avail so far. Here again the legal confrontation seems to have escalated to the point where the Coptic canon law rule has turned into a symbol of identity (and resistance).

The strong claim to authenticity advanced in favor of the modern, single rule on interfaith marriages needs to be revisited in light of the latter's super-hybrid nature. Considering the context in which the various considerations of classical law were articulated, the dynamics of selection and abstraction that unfolded with modernity, and the conditions of the new contexts in which these rules are to be applied challenges the simplistic claim to authenticity and opens new avenues for re-engagement with the issues – including discussions on interfaith marriage regulations, which are conventionally dismissed as barred by the overwhelming consensus reached on their final arrangement.