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Pluralistic Family Law in Syria: Bane or Blessing?

by Esther van Eijk*

Abstract

Family relations in Syria are governed by a plurality of personal status laws and courts. The different religious communities have the right to regulate their family relations according to their respective religious laws, most importantly in matters related to marriage and divorce. This plurality of laws creates a complex system of parallel and sometimes competing jurisdictions divided along denominational lines. This paper focuses on the merits and demerits of Syria's pluralistic family law. It aims to show, first, how the Muslim faith is given preference over other religions in the field of personal status law. This becomes especially apparent in conversion (to Islam) cases. The author describes some of the detrimental consequences that this asymmetrical plurality can have on the lives of individuals. The paper then focuses on the versatility of the family law system, in particular on legal practices involving the retro-active registration of (customary) marriages and proofs of paternity. This legal flexibility offers ample opportunities for legal practitioners to find creative solutions to help out unwed mothers and their illegitimate children, as the author exemplifies with a case study. By discussing these two different but equally important legal practices, stemming from the plurality of Syria's family legal system, the paper aims to show how this plurality can be used or work out in different ways, as a bane or a blessing in disguise.

I. Introduction

Family relations in Syria are governed by a variety of religious – or religiously-inspired – family or personal status laws.¹ The main law that regulates family relations, the 1953 Syrian Law of Personal Status² (hereafter SLPS), is predominantly based on Islamic legal sources, particularly Hanafi *fiqh* (Islamic jurisprudence). The Druze, Jewish and the various Christian communities³ follow their own laws in certain specified matters of personal status, most importantly

* Esther van Eijk is a postdoctoral researcher at Maastricht University, the Netherlands. In September 2013, she defended her Ph.D. thesis entitled "Family Law in Syria: A Plurality of Laws, Norms, and Legal Practices" at Leiden University, the Netherlands. This study is based on her Ph.D. fieldwork (including interviews and participant observation) conducted in March-April 2008, and October 2008-July 2009 in Syria. An earlier draft of this paper was presented at the conference "Islamic Family Law in Modern Europe and the Muslim World", Nijmegen, The Netherlands, June 2013.

¹ I use the terms "family law" and "personal status law" interchangeably.

² The Syrian Law of Personal Status (*qanun al-ahwal al-shakhsyya*), Law no. 59, was promulgated on 17 September 1953 and amended in 1975, 2003, and 2010.

³ There are no official statistics available on religion but according to estimates about 74 per cent of all Syrians are Sunni Muslims, and around 16 per cent are non-Sunni Muslims, such as Druze, Shi'a and 'Alawi; about 10 per cent of the population belongs to various Christian denominations. In addition, a few Jewish and Yazidi families still live in Syria (see Central Intelligence Agency, *The World Fact Book* (online edition, 2013-14), available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (last visited 11 April 2014); *International Religious Freedom Report* (2012), available online at: <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2012&dclid=208412> (last visited 11 April 2014).

marriage, divorce, and inheritance. That being said, the SLPS remains the general law, which means that it applies to *all* Syrians, irrespective of their religion. The various other personal status laws are considered special laws, as exemptions to the general law (Arts. 306-308 SLPS).⁴ This plurality in family law can sometimes lead to situations in which the different jurisdictions intersect, most importantly in the event of interfaith marriages. In these incidences, the SLPS and the *shar'iyya* courts, i.e. the courts competent to hear cases under the SLPS, also play a major role, particularly when one of the spouses has converted to Islam. An interfaith marriage can have detrimental effects on spousal as well as parent-child relationships, as will become evident in this paper.

The plurality that characterises Syrian family law is not only reflected in the mosaic of personal status laws and courts that are found in Syria today, but also in the incorporation or recognition of customary legal practices. The SLPS accommodates legal enforcement of extra-judicial customary practices, by allowing retro-active registration of (customary) marriage, unilateral divorce and proof of paternity.⁵ With that the state recognises and incorporates customary practices into its legal framework and thereby enhances legal plurality in the field of family law.

This paper focuses on the plurality and versatility of Syria's family law. In the first part of the paper I will examine how this plurality can work unfavourably for non-Muslims in situations of interfaith marriages and the consequences of these relationships for child custody. Secondly, I will discuss the versatility of the legal system and - in particular - that of the SLPS, by looking at how judges and other legal practitioners work with(in) the versatility of Syria's personal status law, in relation to children born out of wedlock.

II. Conversions of Convenience

One's religion (*din*) or denomination (*ta'ifiyya*) into which one is born, is the determining feature in choosing which personal status law applies. It is not possible to have "no religion"; atheists do not exist in Syria, at least not according to the Civil Registry. For that reason it is not possible, for example, to contract a civil marriage; one has to marry either according to the provisions of the SLPS or one of the canonical laws.

The SLPS is the guiding law in most interfaith relations: when a non-Muslim woman marries a Muslim man, the SLPS will be applicable; when a Druze woman marries a Sunni Muslim man, the SLPS will also be applicable. A Christian or Jewish woman, i.e. a woman who belongs to the *ahl al-kitab* (the recognised monotheistic religions), can marry a Muslim man, but it is not possible for a non-Muslim man to marry a Muslim woman, for article 48.2 SLPS states that a marriage between a Muslim woman and a non-Muslim man is considered invalid (*batil*). If a non-Muslim man wants to marry a Muslim woman, he needs to convert to Islam. A Christian or Jewish woman who marries a Muslim man is not required to change her religion, but the children will automatically be considered Muslim and the wife cannot inherit from her

⁴ For a similar situation in Egypt, MAURITS BERGER (2005), *Sharia and public policy in Egyptian family law*, Groningen: Hefhaestus Publishers, 27 ff.

⁵ For a similar situation in Egypt, see BAUDOIN DUPRET (2007), "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification" in: *European Journal of Legal Studies* 1, available at: <http://www.ejls.eu/1/14UK.pdf> (last visited 22 April 2014).

husband, for article 264 sub b SLPS states that a non-Muslim cannot inherit from a Muslim. However, when a woman converts to Islam and the husband does not, the marriage will be considered invalid and will be dissolved due to article 48 paragraph two SLPS.⁶

For Christians, which make up around ten per cent of the population, it is very difficult to obtain a divorce and therefore men and women sometimes refer to drastic measures, most importantly converting to Islam in order to obtain a divorce. Maktabi maintains that these “conversions of convenience” by Christian men occur with the intention to avoid the long divorce proceedings of the Christian courts, and because the Islamic divorce rules “are more lenient”.⁷ The judges of the Christian courts are aware that this can happen. As a result, according to one of my interviewees, Christian court rulings can sometimes intentionally be more favourable to the husband; for example, by awarding the wife only a small amount of alimony after dissolution of the marriage. When a wife objects to such a ruling, the judges commonly tell her to accept the ruling because otherwise she runs the risk that her ex-husband converts to Islam and takes the children from her.⁸

What is important to note here is that, in case of conversion to Islam, the SLPS becomes the applicable law and the *shar‘iyya* courts are considered the competent courts.⁹ When one of the parents converts to Islam, the SLPS can also be invoked by the converted parent in order to claim full child custody. Some of my informants told me about cases where Christian men had converted to Islam and subsequently went to a *shar‘iyya* court to demand full custody over their children, i.e. physical custody (*hadana*) in addition to legal guardianship (*wilaya*). According to the SLPS, in line with Islamic legal doctrine, child custody can be divided into legal guardianship (*wilaya*) and nursing (*hadana*). The parents have shared custody over their children, but the father will always have sole legal guardianship (*wilaya*) over his children until they reach the age of eighteen years (Art. 162 SLPS), also when the parents divorce. The right to nurse a child (*hadana*) is the prerogative of the mother (Art. 139 SLPS). In the event of divorce, the mother may ask for the court to give her the right to nurse her children until the age of 15 for girls and 13 for boys (Art. 146 SLPS).

I heard of at least three court rulings, one of which I read myself, in which a *shar‘iyya* judge had awarded the converted father the exclusive nursing right. In this particular case the father had obtained the nursing right over his children, who were still in the age of *hadana*, as he was considered more suitable because he was a Muslim. The ruling said in so many words that his religion, i.e. Islam, is the better religion and for that reason he should raise the children.¹⁰ In

⁶ The Egyptian and Jordanian personal status laws, for example, also contain a similar provision to article 48.2 SLPS. Interestingly, in Lebanon, following the equality in personal status laws, mixed marriages across all religions and denominations are legally possible, meaning that a non-Muslim Lebanese man can marry a Lebanese Muslim woman (ANNE WEBER (2008), “Briser et suivre le norms: les couples islamo-chrétiens au Liban” in: BARBARA DRIESKENS (ed.), *Les métamorphoses du mariage au Moyen-Orient*, Beirut: Institut Français du Proche-Orient (IFPO), 13-31 (28)).

⁷ RANIA MAKTABI (2010), “Gender, family law and citizenship in Syria” in: *Citizenship Studies* 14/5, 557-572 (562).

⁸ Personal communication with a senior Christian lawyer, November 2008, Damascus.

⁹ MAURITS BERGER (1997), “The legal system of family law in Syria” in: *Bulletin d’Études Orientales* 49, Damascus: Institut Français de Damas, 115–127 (124-125).

¹⁰ In Arabic: *dīnuhu huwa al-dīn al-aslah li-tarbiyyat al-awlad*.

other words, the Muslim father was given preference over the non-Muslim mother.¹¹ However, it can also happen the other way around, as the next section will demonstrate.

III. The Supremacy of Islam in Personal Status

In his study on the rights of Christian minorities in the Middle East, *Le droit des minorités*, Georges cites a case in which, although legally impossible following article 48.2 SLPS, a Muslim woman had married a Christian man.¹² When they wanted to register their two children at the Civil Registry, they were told they could not because the children were born of an invalid marriage. Georges maintains:

“Sur le conseil d’un juge, la femme a porté plainte devant le tribunal ‘charié’ en prétendant que l’époux lui avait menti sur sa vraie religion. Le tribunal avait déclaré leur mariage corrompu et il a reconnu les deux enfants comme appartenant à leur père. Le tribunal a ordonné en outre la separation immédiate entre le couple et l’inscription des enfants en tant que musulmans car c’est la logique de suivre ‘la religion la plus honnête des parents’.” (2012: 294)

Hence, the couple was forced to divorce because the SLPS did not recognise their union. Furthermore, they were forced to disguise the truth in order to get their marriage declared irregular instead of invalid, in order to obtain proof of paternity. Here too, the children followed the Muslim parent, in this case the mother, because Islam was considered the righteous religion.

The examples described above demonstrate how the Muslim faith is given preference over other faiths. When a non-Muslim father or mother converts to Islam, the religious identity of the converted parent automatically devolves upon the children. Here we see that, quoting Tadros from her article on non-Muslims in Egypt’s framework of personal status law: “the application of the content of the Muslim Personal Status Law is not gender specific, rather religion-specific.”¹³ The supremacy of the Muslim faith in personal status law, i.e. the supremacy of the SLPS and the *shar‘iyya* courts over the other laws and courts, is particularly evident when a non-Muslim woman converts to Islam. Because whereas the provisions of the SLPS, similar to other Middle Eastern personal status laws, normally privilege men over women, in the event of conversion of the wife or mother, the husband or father loses out to his Muslim (former) spouse. Thus, as an exception to the rule, when a non-Muslim woman converts to Islam, the woman is privileged over the man. In other words, in conversion cases,

¹¹ For other, similar examples in Syrian case law, see NAEL GEORGES (2012), *Le droit des minorités. Le cas de chrétiens en Orient arabe*, Aix-en-Provence: Presses Universitaires d’Aix-Marseille, 289 ff.

¹² Georges does not give any information on where or how the marriage was contracted, I suspect it was a *‘urfi* marriage, i.e. a customary marriage (see below).

It should also be noted that “legally impossible” marriages (such as a marriage between a Muslim woman and a Christian man) can be circumvented by contracting a civil marriage abroad, for example on Cyprus; a practice that is also common among mixed couples from Israel and Lebanon (cf. YÜKSEL SEZGIN (2013), *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*, Cambridge: Cambridge University Press, 106; LUBNA TARABEY (2013), *Family Law in Lebanon: Marriage and Divorce among the Druze*, London: I.B. Tauris, 100).

¹³ MARIZ TADROS (2009), “The Non-Muslim ‘Other’: Gender and Contestations of Hierarchy or Rights” in: *Hawwa: Journal of Women of the Middle East and the Islamic World* 7, 111-143 (130).

the “laws of patriarchy” are superseded by the “laws of religious affiliation”, in this case to the advantage of Islam and the SLPS.¹⁴

It can therefore be concluded that the plurality in personal status law does not entail equality of laws and jurisdictions of the different religious communities, as the SLPS and the *shar’iyya* courts have supremacy over the other laws and courts.¹⁵ This means that the already complex situation of legal plurality is only further complicated by the unequal position of non-Muslims vis-à-vis Muslims, but is sometimes also used by individuals to achieve a particular, personal goal – in this case divorce. As the Christian laws make it very difficult for Christians to obtain a divorce or a nullification of their marriage, conversion to Islam may seem an easy way out of one’s marriage. However, even if the marriage is dissolved by a *shar’iyya* court, it does not mean that the marriage is thereby also considered dissolved by a Christian court. The Christian courts will not recognise the “Muslim” divorce, for the marriage will continue to exist according to Christian doctrine. The “divorced” Christian spouse will still need to resort to his or her denomination court to ask for a separation or nullification of the marriage according to his/her canonical law, if he/she wants to remarry. *Shar’iyya* courts tend to accept these conversions without much scrutiny into the underlying motives or recognition of the jurisdiction of the other personal status courts.¹⁶ As a result, the unconverted spouse and children are faced with the sad legal consequences of, not only, a broken marriage but also possibly the loss of child custody.

Syrian family law is not just characterised by the plurality of existing personal status laws and courts, but the plurality or versatility also reveals itself in the fact that the SLPS allows for the recognition of customary legal practices.

IV. Recognition of Customary Legal Practices

Marriages between Muslims¹⁷, and those between a Muslim man and a non-Muslim woman, ought to be concluded in or through a *shar’iyya* court. However a significant number of marriages are contracted outside the court. So-called traditional or customary (i.e. ‘*urfi*) marriages are, for example, commonly found in the rural areas of Syria.¹⁸ The SLPS also considers these ‘*urfi* marriages valid, provided certain legal procedures are met, which makes them eligible for registration at the Civil Registry. However, in the event that a child is born or a pregnancy is apparent, the marriage will be recognised, regardless of whether the required procedures are met (Article 40.2 SLPS). When a couple has married the so-called ‘*urfi* way, and especially when a child is born from this union or when a pregnancy is apparent, the

¹⁴ TADROS 2009: 132 (supra n. 13).

¹⁵ For a more elaborate discussion (including examples) of this situation of, what I call “asymmetrical plurality”, see the first two chapters of my Ph.D. thesis (see VAN EIJK, supra asterisk footnote). See also BERGER 2005 (supra n. 4) on a similar situation in Egypt.

¹⁶ See VAN EIJK (supra asterisk footnote), (in particular chapter two).

¹⁷ It is important to note that the SLPS does not make a distinction between Sunni and Twelver Shi’i, Isma’ili or ‘Alawi Muslims. Conversely, in Lebanon each religious group has its own personal status law and courts, including the different Muslim communities (TADROS 2009: 114 (supra n. 13)).

¹⁸ ANNIKA RABO (2011), “Syrian Transnational Families and Family Law” in: ANNE HELLMUM et al. (eds.), *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads*, Farnham: Ashgate Publishers, 29-49 (34-35).

registration procedure of both the marriage and the filiation of the child will generally be settled promptly by the court.¹⁹

People have different reasons to conclude a 'urfi marriage, for example because such marriages are common in the community to which the spouses belong (e.g. in the countryside) or because the spouses belong to different (Muslim) sects, the couple marries against the family wishes or because it concerns a polygamous marriage, with or without the first wife's knowledge.²⁰ It is also possible that the man serves in the army and did not get (or does not want to ask for) permission from the army to marry²¹ or because the groom cannot meet the costs of a traditional wedding.²² Finally, a man can also agree to contract a 'urfi marriage to make sure the wife's illegitimate child receives a (his) family name. This latter example will be addressed in more detail below.

V. Nameless Children: Establishing and Providing Paternity

Couples do not only *ex post facto* register their 'urfi marriage but also their born and unborn children. The child's paternity is generally registered simultaneously with the 'urfi marriage before the court. Once a 'urfi marriage is registered, it will be considered a legally valid marriage. As a result, the regulations pertaining to paternity of children born during a valid marriage are applicable (Art. 49 SLPS). In line with the Islamic notion that the child belongs to the marriage bed (*al-walad li-l-firash*), the SLPS considers a child born during a valid marriage attributable to the husband (Art. 128 ff.). Hence, establishing the paternity of children born from a 'urfi marriage poses no serious problems. But what if there is no proof of marriage (or no marriage at all) and the father has disappeared or is unknown; such cases, although rare, do occur. The child will be considered illegitimate and a child born out of wedlock can only be affiliated to the mother. Since a mother cannot pass on her surname to her child, the child will be without a last name and thus without citizenship.²³ Without a surname, the child cannot get a government-issued identity card (*huwiya*) and will not be able to go to school, travel abroad or own property. This leaves an unwed mother with few options: she can either abandon her child as a foundling (*laqit*), i.e. a child of unknown parentage, at an orphanage or, if she wants to keep the child, try to find a man who is willing to marry her and recognise the child as his own.

¹⁹ JESSICA CARLISLE (2008), "From Behind the Door: A Damascus Court copes with an alleged out of Court marriage" in: BARBARA DRIESKENS (ed.), *Les métamorphoses du mariage au Moyen-Orient*, Beirut: Institut Français du Proche-Orient (IFPO), 59-74.

²⁰ As of late, 'urfi marriages have become subject of much debate in many Muslim countries, in particular Egypt and the Gulf (cf. FRANCES HASSO (2011), *Consuming Desires: Family Crisis and the State in the Middle East*, Stanford: Stanford University Press; NADIA SONNEVELD (2012), "Rethinking the Difference Between Formal and Informal Marriages in Egypt" in: MAAIKE VOORHOEVE (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, London: I.B. Tauris, 77-107).

²¹ cf. CARLISLE (supra n. 19).

²² cf. HASSO; SONNEVELD (supra n. 20).

²³ Syria's Nationality Act (Law no. 276, 24 November 1969) stipulates that – as a rule – a child acquires nationality through the father (article 3 sub a). In exceptional cases, however, for example when a child is born to a Syrian national mother and the father is unknown, the mother can pass on her nationality to the child, provided the child was born on Syrian soil (article 3 sub b).

If she opts for the latter option, the “new” husband/father cannot legally adopt the child, for the SLPS does not recognise adoption. Adoption (*tabanni*) is prohibited in Islamic law²⁴ and therefore not recognised by Syrian legislation. It is interesting to note that when Syria ratified the Convention on the Rights of the Child (CRC) on 15 July 1993, it did so with reservations to articles 14, 20, and 21; the latter article relates to the right of adoption.²⁵ Syria explained its reservation to article 21 CRC by stating that the article contravened “the principles of the Islamic shari’ah which prevail in the country but also with the provisions of national legislation for which Islamic legislation constitutes one of the principal sources”.²⁶ Interestingly, Syria lifted the reservation to article 21 (and 20) CRC in 2007.²⁷ Syria states in its combined *Third and Fourth Periodic Report* that it retains its reservation to article 14 CRC concerning the right to freedom of thought, conscience and religion in relation to the subject of adoption. It states that

“[t]he reasons for this reservation are related to the religious teachings of Islam. The religion provides for the system of *kafalah* (guardianship) and placement in foster families, on condition that the filiation of the children concerned is not altered to prevent them from enjoying the right to know who their natural parents are (if their identity subsequently comes to light) and to rejoin them.” (CRC 2009, par. 171)²⁸

If adoption is not permissible, what options does a newlywed couple have to pass on the “father”’s surname to the “adoptive” child? Some lawyers find creative ways to provide an illegitimate child with a paternal name and, in consequence, an identity. These lawyers find a man who is willing to be the “fictitious” father to the child, which means he will agree to sign and register a fabricated ‘*urfi*’ marriage contract. As they register the ‘*urfi*’ marriage, they simultaneously register the child with the father’s last name. Following the registration, the “husband/father” and mother usually agree upon contracting a *mukhala’a* divorce (i.e. a divorce by mutual consent), which dismisses the “husband” from any marital or post-divorce financial obligations. Several legal steps thus have to be taken to give mother and child a new chance on life.

But why are men willing to go through such a rigmarole, what is in it for them? My informants said that men were usually willing to cooperate because of philanthropic reasons or because they did not have children of their own. Lawyer Nawal, an experienced family lawyer, told me

²⁴ The prohibition is based on two verses of the *Qur’an* (33:5 and 37), which state that giving one’s name to someone “who does not belong within his ‘natural’ descentance” is forbidden (ERIC CHAUMONT (2004), “Tabann(in)” in: PERI BEARMAN et al. (eds.), *Encyclopaedia of Islam*, Vol. XII Suppl., Second Edition, Leiden: Brill, 768-769). Having an adopted child in the family is deemed problematic because it might infringe on the inheritance rights of the “natural” family members and it might lead to moral corruption because the adopted child is not religiously prohibited in marriage to his/her close family members, see MORGAN CLARKE (2009), *Islam and New Kinship: Reproductive Technology and the Shariah in Lebanon*, New York: Berghahn Books, 72-73.

²⁵ Article 14 relates to “freedom of thought, conscience and religion”; article 20 relates to “children deprived of their family environment”.

²⁶ COMMITTEE ON THE RIGHTS OF CHILDREN (1995), *Initial Report: Syrian Arab Republic*, 22 September 1995, UN Doc. CRC/C/28/Add.2. (par. 124).

²⁷ Decree no. 12 of February 2007, see COMMITTEE ON THE RIGHTS OF CHILDREN (2009), *Third and Fourth Periodic Report: Syrian Arab Republic*, 4 March 2009, UN Doc. CRC/C/SYR/3-4 (par. 171).

²⁸ The position of foundlings (or children of unknown parentage) and the corresponding system of fostering (*kafala*) are regulated by a separate law, i.e. the Law of Custody of Foundlings, Law no. 107 of 4 May 1970.

of one such example: an arranged marriage between a young man and a young mother with a child born out of wedlock.

Alaa, a 32 year old Muslim woman from a poor Damascus suburb, was mother of a four-year-old daughter, Farah. Farah was born from a secret ‘urfi marriage between Alaa and a Lebanese man. At the time, Alaa lived and worked together with her brother in Lebanon to support their family back home in Damascus. In Lebanon she fell victim to sexual abuse by some family members. She eloped with a man and contracted a ‘urfi marriage with him in Beirut. After some time, it turned out that the husband had used a false identity card for the marriage.²⁹ The husband disappeared, leaving Alaa pregnant and unmarried. She found relief in a women’s shelter where she gave birth to Farah. Some people in Damascus, who regularly provide assistance to women like Alaa, arranged a marriage for her with Muhammad, who was three years her junior. They registered a (pre-dated) ‘urfi marriage contract, as well as the proof of paternity of Farah in a Damascus *shar‘iyya* court.

However, in this particular case Muhammad and Alaa did not divorce. Beyond all expectations, Muhammad and Alaa actually fell in love. The marriage was not just marriage on paper, for Alaa fell pregnant shortly after the registration process. But Alaa’s brother disrupted their marital bliss by instituting legal proceedings against the newlyweds. The brother claimed the marriage and (accordingly) the proof of paternity had to be annulled. He argued that he was Alaa’s legal guardian (*wali*) and that Muhammad was not Farah’s real father, which meant he (the brother) was the lawful legal guardian to the girl.³⁰

According to lawyer Nawal, the brother’s main goal was to get custody over his niece. Her defence was that the brother’s claim was inadmissible. He was not Alaa’s legal guardian and therefore he had no right or legitimate interest to take legal action against Muhammad and Alaa. I accompanied lawyer Nawal to the *shar‘iyya* court on the day she was scheduled to submit her defence. Lawyer Nawal was the only one present at the court hearing, the brother (plaintiff) did not appear before the judge. She asked the judge to dismiss the case because the brother did not take the matter seriously. The judge suggested to wait and see whether the plaintiff would make an appearance later that day.³¹ If he did not, the court would decide the following day to summon him again or dismiss the case all together.³²

Lawyer Nawal told me that the absence of Alaa’s brother was beneficial to the case. She had intentionally not submitted her written defence because if the brother would decide to come to court, he would be able to read her defence and know what her defence strategy was. She hoped that Alaa’s brother would be half-hearted about pursuing his claim against his sister,

²⁹ The lawyer assumed that the Lebanese husband was non-Muslim, because he used a false identity card that belonged to a Sunni Muslim.

³⁰ Personal communication with lawyer Nawal, 18 February 2009.

³¹ A writ of summons (*tabligh*) only specifies the day, not an exact time.

³² Damascus *shar‘iyya* court, 10 March 2009.

which would make the judge more lenient towards Alaa and more likely to dismiss the claim. Besides his claim for annulment of proof of marriage and paternity, the brother considered initiating criminal proceedings against Alaa on the grounds of illicit sexual behaviour (*zina*).³³ If *zina* could be proved in court, Farah would be a bastard child (*ghayr shar'i*), as well as her (Alaa's) unborn child. This would of course put Alaa and her daughter in a difficult position. Lawyer Nawal hoped that if the annulment claim would be dismissed, the brother would be discouraged to commence criminal charges.

Upon inquiry with lawyer Nawal, a month later, it appeared her strategy and hopes had materialised for the court had dismissed the brother's claim. However, Alaa had been told that he had hired a lawyer and wanted to file another claim against her. Lawyer Nawal cautioned Alaa to be careful, she was worried that Alaa would receive a court summons in the near future.³⁴ I stayed in touch with lawyer Nawal over the course of four months, but the case had seemed to come to a standstill. The brother did not file a new claim.

VI. Pushing the Envelope for a Good Cause

The possibility of registering customary marriages and establishment of paternity of children born from these marriages (including "illegitimate" children), is one example of the versatility of Syria's legal system.³⁵ This versatility also offers the possibility for lawyers and other legal practitioners to find creative solutions, within the legal framework, for women like Alaa, when the existing laws do not provide an adequate or favourable solution. Extra-judicial instruments, such as the possibility to obtain an *ex post facto* proof of marriage provide a welcome alternative. Lawyer Nawal took the view that, because of the unfair laws against women and the disadvantaged position of women in general, she is "forced" to use the existing procedural gaps and legal loopholes (which are many) if this is needed to help her (predominantly female) clients.³⁶ With the help of connections in the right places, the rules can be circumvented and facts recreated in a manner that they make sense for the purpose at hand.³⁷

Obviously, fabricating a marriage contract or proof of paternity is not in accordance with the law. Lawyers who provide legal assistance in these cases knew very well that they were liable to punishment, as the Penal Code forbids any illegal changes in a child's identity, i.e. paternity fraud (Art. 479).³⁸ In addition, the Syrian Bar Association tried to step up against these practices

³³ In other words, sexual intercourse between a man and a woman who are not legally married to each other.

³⁴ Personal communication with lawyer Nawal, 6 April 2009.

³⁵ Flexibility in personal status law is not limited to Syria, in legal systems of other contemporary Arab countries we find a similar situation; see, for example, on Gaza/Palestine: NAHDA SHEHADA (2009), "Negotiating Custody Rights in Islamic Family Law" in: THOMAS KIRSCH and BERTRAM TURNER (eds.), *Permutations of Order: Religion and Law as Contested Sovereignities*, Farnham: Ashgate, 247-262; and on Tunisia: MAAIKE VOORHOEVE (2014), *Gender and Divorce Law in North Africa: Sharia, Custom and the Personal Status Code in Tunisia*, London: I.B. Tauris.

³⁶ Personal communication with lawyer Nawal, 10 March 2009.

³⁷ For an adoption case in Syria, in which similar extra-judicial instruments are employed, see "Ahmed's story" recounted by CLARKE (2009: 21-25, supra n. 24). Bargach states in her study on abandoned children in Morocco that similar practices occurred in Morocco (JAMILA BARGACH (2002), *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham: Rowman & Littlefield Publishers, (110-111, 116)). Likewise, Voorhoeve states that Tunisian family judges are willing to manoeuvre around the rules to establish legal paternity of an illegitimate child (MAAIKE VOORHOEVE (2012), "Judicial Discretion in Tunisian Personal Status Law" in: VOORHOEVE 2012: 199-229 (220-21) (supra n. 20)).

³⁸ Law no. 148 of 22 June 1949, with amendments.

by threatening to impose sanctions on transgressors. For that reason, these lawyers had to be prudent when employing extra-judicial strategies. Even so, I was told that paternity fraud happens with some regularity. One lawyer told me he “resolved” about 15 cases this way, including an imprisoned single mother and an abandoned Iraqi woman in Damascus, all with the purpose of giving an illegitimate child a last name.

Analogous to Shehada’s observations in the Gaza city *shar’iyya* courts concerning the way Gaza’s judges handle child custody cases, I argue here that these Syrian lawyers, litigants, judges, and other legal experts involved in the process of legitimizing an “illegitimate” child’s descent, exploit the “gaps of indeterminacy” of the legal order.³⁹ The legal structure does not provide an adequate solution and therefore the “good-doers” push the boundaries of the system for the benefit of mother and child.

VII. Concluding remarks

Extra-judicial options may thus prove to be beneficial to a great variety of individuals, such as unwed mothers and couples who do not wish to marry in court because they want to get married (secretly) against their families’ wishes (e.g. because the spouses belong to different social classes, religions, denominations). Another group that benefits from the available extra-judicial possibilities is the judiciary, as *ex post facto* registrations of marriages, divorces and proof of paternity unburden the already overloaded judicial system.⁴⁰ However, this situation of legal flexibility also offers ample opportunities for those who are not very strict with the law. It can encourage people to resort to corruptive practices or simply ignore the law; for example, husbands can divorce and abandon their wives, leaving them in a state of legal uncertainty. In that regard, the extra-judicial options only degrades the already poor legal position of women and children, especially in divorce and extra-marital circumstances.

As was demonstrated in the first part of this paper, the situation becomes even more complex when the jurisdictions of different religions intersect, and particularly when one of the spouses, usually the husband, converts to Islam. In these circumstances the plurality of the system works favourably for individuals who choose to forum shop in order to achieve some personal gain, i.e. a divorce. However, not without consequence, as a conversion may turn out unfavourable for the unconverted spouse and his/her children, for he/she might lose custody of his/her children to the converted Muslim parent. The plurality and versatility of Syria’s family legal system can thus be used or work out in different ways, as a bane or blessing in disguise.

³⁹ SHEHADA 2009: 248 (supra n. 35).

⁴⁰ See, for example, DALIA HAIDAR, “Just Challenges” in: *Syria Today* (online edition), July 2009, available at: <http://www.syria-today.com/index.php/july-2009/363-focus/1997-just-challenges> (last visited 8 September 2009).