

The application of religious law in North American courts: a case study of *mut'a* marriages

Safiya Ghori

Political Science and Middle East Studies, University of Arkansas, Fayetteville, AR, USA

The tradition of marriage has long been a fundamental aspect of religious societies. As with most religious traditions, Islam has texts, found in the Qur'an and Sunna, that govern this contractual relationship in some detail. Various schools of thought within the Shi'i tradition differ from Sunni traditions with regard to the contractual relationship of *mut'a*, or temporary, marriages. There is much controversy over the use of *mut'a* marriage contracts in North America, and scholars, both Sunni and Shi'i, are unable to agree on the legality and terms of this unique relationship. Within the last few years, Western courts have grappled with the complex interpretation of Islamic law in the context of these *mut'a* marriages. This comparative study examines the legal requirements for marriage in Islam as well as the legal requirements for *mut'a* within Shi'i traditions. The article compares the two concepts based on their religious mandates, discussing advantages and disadvantages of both permanent and temporary marriages and analyses approaches to *mut'a* taken by courts in the United States and Canada, as well as exploring the differences between permanent and temporary marriages.

Marriage in Islam

“Classic *fiqh* texts define marriage (*nikāḥ*) as a contract of exchange with fixed terms and uniform legal effect.”¹ Legally speaking, an Islamic marriage consists of a contract of exchange that involves a sort of ownership. *Nikāḥ* is a contract whereby a payment of money or valuables is made by a man to a woman in exchange for exclusive rights in a sexual union.² All schools of Islamic thought, both Sunni and Shi'i consider marriage to be a contract or *'aqd*.³

“*Aqd* is the Arabic term meaning ‘to coagulate’ or ‘to knot’.”⁴ Mir-Hosseini states: “Legally patterned after the contract of sale (*bay'*), the essential components of *nikah* are: the offer (*ijab*) by the woman or her guardian (*waliyy*), the acceptance (*qabul*) by the man, and the payment of dowry (*mahr*), a sum of money or any valuable that the husband pays or undertakes to pay to the bride before or after consummation.”⁵ While the legal requirements of marriage outlined in the contractual form above are necessary, marriage in Islam, as in other faith traditions, serves a religious and social function between two people based on the virtues of love and trust.

In Islam, great importance is placed on marriage as a familial structure between two people. The Qur'an says: “And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your

Email: sjghori@gmail.com

¹Ziba Mir-Hosseini, ‘The Construction of Gender in Islamic Legal Thought and Strategies for Reform’ <http://www.maryams.net/dervish/media/gender_construct.pdf> accessed July 10, 2005.

²Shahla Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran* (Syracuse University Press, New York 1989) 23.

³Ibid.

⁴Ibid. 31

⁵Mir-Hosseini, op. cit. 5.

hearts. Undoubtedly in these are signs for those who reflect” (Q 30:12).⁶ The Qur’an also states: “Allah has made for you your mates of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best” (Q 16:72). These verses, along with many others, show that God considers marriage one of the most virtuous and central institutions within Islam.

The significance of the institution of marriage receives its greatest emphasis from the following hadith of the Prophet: “Marriage is my Sunna. Whosoever keeps away from it is not from me.”⁷ Since following the practices of the Prophet Muhammad is a key facet of Islamic life, the weight of this hadith is evident. It is further emphasized by Anas bin Malik, attributing to the Prophet that “when a man marries, he has fulfilled half of his religion, so let him fear Allah regarding the remaining half.”⁸ Shari‘a is derived from the Qur’an and the Sunna in order to regulate the functioning of the family so that both spouses can live together in love, security and tranquility.

Marriage in Islam is considered a sacred relationship, so, as a matter of public policy, marriage contracted with the intention to divorce is not allowed. A similar concept is at work in American courts such that marriages based on an intention to divorce are void. However, according to some Shi‘i traditions, there is a hierarchy in marital agreements according to which the intent to end the marriage from the outset of the relationship may be established. “This hierarchy is to marry on a permanent basis; if that is not possible, then adopt temporary abstinence; if that is not possible, only then use the *mut‘a* marriage.”⁹ For years, Islamic scholars have pondered over the problem of gratifying sexual needs in a socially and religiously acceptable way, which has led to the controversy over *mut‘a* marriages.

***Mut‘a* marriages in the Shi‘i context**

Even within Shi‘i traditions, temporary marriages, or *mut‘a* marriages, are considered socially disputed practices. Sachiko Murata points out that “Arabic dictionaries define *mut‘ah* as ‘enjoyment, pleasure, and delight’.”¹⁰ The definition of a *mut‘a* marriage is one in which a man and an unmarried woman decide how long they want to stay married to each other and how much money is to be given to the temporary wife. The contract stipulates a specific period of time for which the marriage will last. Both Sunnis and Shi‘is agree that *mut‘a* is referred to in the hadith of the Prophet as well as in books of *fiqh*. The word *mut‘a* derives from the root *m.t.‘*, meaning to “carry away” or “take away”.¹¹

In the hadith and other sayings of the Prophet, the actual word *mut‘a* is used. The Shi‘is hold that this term is the preferred name for temporary marriages because the Qur’an itself refers to this kind of marriage employing a term derived from the same root.¹² Therefore, in the Qur’an, the word *istimta‘*, the tenth form of the root *m.t.‘*, is translated as “to enjoy”: “so those of them [women] whom you enjoy, give to them their appointed wages” (Q 40:34). Sachiko Murata refers to the term *mut‘a* as a kind of “rental” because in general a man’s basic aim in this kind

⁶Translations of the Qur’anic text are taken from Abdallah Yusuf Ali, tr., *The Meaning of the Holy Qur‘ān* (Islamic Computing Center, London 1995).

⁷*Ṣaḥīḥ al-Bukhārī, Ibn Haiah, Babun Nikah*

⁸Ibid.

⁹Sayyid Muhammad Rizvi, ‘Marriage and Morals in Islam’, Chapter 3: The Islamic Sexual Morality (2) Its Structure, §B(2)(b) <http://al-islam.org/m_morals/index.htm> accessed February 1, 2007).

¹⁰Sachiko Murata, ‘Temporary Marriage in Islamic Law’ (MA thesis, Divinity School, University of Tehran 1974)<<http://www.al-islam.org/al-serat/muta/>> accessed February 1, 2007.

¹¹Ibid.

¹²Ibid.

of marriage is the sexual enjoyment of a woman, and in return for this enjoyment, the woman received a certain amount of money or property.¹³ Comparing the literal meanings, some scholars have posited that the overall objective of *mut'a* is sexual enjoyment while the purpose of *nikāh* is both enjoyment and procreation.¹⁴

Among Shi'is, for whom *mut'a* marriages are valid, the *mut'a* contract requires a declaration and an acceptance just like permanent marriages. The *mut'a* contract also requires that the declaration is made by the woman and the acceptance must be made by the man after the woman has made her declaration. His words must indicate that he is satisfied with the declaration in order for the contract to be valid. First the woman must say: *zawajtuka nafsī fi al-mudda al-ma'lūma'ala al-mahr al-ma'lūm* (I have married myself to you for the known period and the known dowry). Then the man must reply: *Qabiltu* (I accept). There is no legal requirement for a written contract or a witness,¹⁵ and in the oral *mut'a* marriage contract there is no requirement for a specific number of witnesses to the marriage and the marriage need not be registered in any court of law.¹⁶ In a Western legal context, this is quite problematic due to the lack of solemnization requirements (i.e., witnesses and registration) and the absence of a written contract between the parties.

In a Shi'i hadith, Ja'far al-Sadiq stated that the formula that should be recited when a *mut'a* marriage is contracted is: "I marry thee in *mut'a* according to the Book of God and His Prophet's Sunna without inheritance from me to thee or vice versa, for so many days, for so many dirhams..."¹⁷ There is also another hadith that states, "It [temporary marriage] is permitted and absolutely allowed for the one whom Allah has not provided with the means of permanent marriage so that he may be chaste by performing *Mut'a*."¹⁸

On the other hand, several Sunni texts assert that the custom of *mut'a* was outlawed by the second caliph 'Umar, in the seventh century AD. "However the Shi'i 'ulamā' consider his prohibition legally nonbinding."¹⁹ In response, Shi'is argue that *mut'a* marriage is sanctioned in the Qur'an (4:24).²⁰ They argue that it was permitted by the Prophet Muhammad himself.²¹ The Qur'an states: "Also forbidden are married women...lawful for you are women besides these if you seek them with your wealth for wedlock and not for debauchery."²² Shi'i 'ulamā' often hold that the word in this verse, *istamta'tum*, refers to the permissibility of *mut'a* for the purpose of enjoyment.

Some Sunni scholars believe that, initially, before 'Umar outlawed *mut'a*, there was a time when *mut'a* marriages were permitted. It has been quoted that "when the Prophet and his Companions made a pilgrimage to Mecca for *umra*, some of the Companions complained about their long separation from their wives, and the Prophet replied: "Then do and enjoy (*istamta'a*) these women."²³ Those Sunnis who hold that Q 4:24 refers to the permissibility of *mut'a* maintain that the verse was abrogated by other Qur'anic verses, in particular the sermon of 'Umar banning *mut'a* and later the hadith of the Prophet transmitted by his companions. Consequently, the Shi'a reject the validity of these arguments.²⁴

¹³Ibid. 21.

¹⁴Ibid. 2.

¹⁵'How do I do mutah? The Mutah Marriage Contract Procedure' <www.mutah.com/how_do_i_do_mutah.com> accessed February 1, 2007.

¹⁶Haeri, op. cit. 2.

¹⁷*Wasā'il*, 14:466.

¹⁸Ibid. 14:449-450.

¹⁹Haeri, op. cit. 1.

²⁰Ibid.

²¹Ibid.

²²Murata, op.cit. 28.

²³Ibid. 33.

²⁴Ibid. 34.

Sunnis often argue that *mut'a* cannot be considered a legitimate form of sexual union because it excludes such things as inheritance, divorce, allegiance, forswearing and *zihār* (repudiation),²⁵ and that since the necessary elements of marriage are not present in *mut'a*, it cannot be considered a marital union, and the woman cannot therefore be considered a legal wife. Shi'i scholars argue that several of these factors are part of a permanent marriage but are not necessary for every legitimate sexual relationship. The general opinion of the four Sunni schools of thought regarding the reasoning behind *mut'a* marriages is that the practice used to be permitted, but only in certain circumstances connected with military expeditions.²⁶ Murata argues that soldiers often at war had no opportunity to satisfy their desires and this prompted the development of *mut'a*.

The four Sunni schools of law all agree that temporary marriages are invalid.²⁷ The factor that invalidates the *mut'a* marriage is the stipulation of the time period. Murata states that the Shafi'i school even goes a step further and adds that "even if the time period stipulated by the contract should be the life-time of the husband or the wife, the contract is still invalid, since the contract of marriage requires that its effects continue after death. On the other hand, some Shi'a consider *mut'a* to be of special importance and have tried to keep it alive as an institution within their societies.

"The Shi'i sect of Islam recognizes two forms of marriage: 1) permanent marriage or *nikah*, and 2) temporary marriage known as *mut'ah* or *sigheh*."²⁸ In Islam, marriage contracts are subject to two initial requirements; first, for a marriage contract to be valid there must be a certain number of witnesses and second, there must be an act of making an offer and an acceptance, similar to any contractual agreement. This integral part of the Islamic marriage contract is the dower or *mahr* and is usually the subject of negotiation between the parents of the bride and groom.²⁹ From the legal point of view, the *mahr* is perceived to be the consideration given for the woman.

There are also several rules that dictate which parties may enter a *mut'a* contract. A man can arrange for an agreement of *mut'a* only with a Muslim woman or with a 'person of the book'³⁰ (a person of Christian or Jewish faith). Thus it is not permissible to engage in a temporary marriage with an unbeliever, and a Muslim woman cannot marry a non-Muslim. There are strict requirements with regard to marriage between relatives, and the same rules apply in a *mut'a* marriage as in a permanent marriage are the same in the *mut'a* marriage.³¹ In addition, Imam Ja'far quoted a hadith that "it is reprehensible to contract a temporary marriage with a virgin because it is a stain upon her family".³² A virgin may not be married temporarily without her father's permission.³³

A distinct element of the temporary marriage is that it is for a specified period of time. According to the Imam al-Rida, "*mut'a* must be a stipulated thing for a stipulated period."³⁴ The marriage may be contracted for a period ranging from one hour to 99 years and the length of the time period does not affect the legal status of the *mut'a* marriage. It has been argued that this is similar to a contract for renting since the woman takes on certain of the legal characteristics of

²⁵Ibid.

²⁶Ibid.

²⁷Ibid.

²⁸Tamilla Ghodsi, 'Tying a Slipknot: Temporary Marriages in Iran' (1994) 15 Mich. J Intl L 645, 661.

²⁹Ibid. 664.

³⁰Murata, op. cit. 21.

³¹Ibid. 22.

³²*Wasa'il* 459: 10.

³³Ibid. 458:5.

³⁴Ibid. 479:1.

rented property. Imam Ja‘far stated: “There will be no *mut‘a* without two things: a stipulated period and a stated dowry.”³⁵

Once the contract is concluded, the wife must receive the whole dowry whether or not the marriage has been consummated. The wife is entitled to the dowry as long as she places herself at her husband’s disposal and does not present any obstacles to consummating the marriage.³⁶ When the contracted period of time is over, the wife is freed from the obligations of the contract. The contract must refer to a dowry of specified property whether in cash or kind, whose value is safe from increase or decrease.³⁷ There is no condition or requirement concerning the amount of the dowry except that the two sides come to an agreement over items which may properly be exchanged. The man may give the dowry upon the commencement of the marriage contract or at the end of the specified time.³⁸ The dowry in a temporary marriage is different from the dowry in a permanent marriage in that the payment of the dowry in a temporary marriage depends on the fulfillment of the time period.

Another distinction between *mut‘a* marriages and permanent marriages is that there is no opportunity for divorce in *mut‘a* marriages. The man and woman become separated from each other by the expiry of the time period, or by the man returning the time, or cutting the contract short by simply paying the requisite amount and releasing her from contractual duties, which is essentially returning the remaining time to the woman.³⁹ In a temporary marriage, the only thing that a woman can demand is the dowry, which she is entitled to.⁴⁰

There are no rules of inheritance between husband and wife in *mut‘a* marriage unless this is specifically mentioned as a condition of the contract. If there are no conditions stipulated in the contract, then there is no inheritance. Imam Ja‘far stated: “Among the *mut‘a* statutes is that you do not inherit from the woman, nor does she inherit from you”.⁴¹ There is also the question of inheritance by a child born as a result of a temporary marriage. Usually, the child’s inheritance is one-half of that of a child by a permanent marriage, while its inheritance from its mother is the same as it would be in a permanent marriage.⁴²

As with permanent marriages, there is a time period in *mut‘a* marriages which must be observed by the woman after the marriage period has ended before she can contract another marriage. It consists of two menstrual periods, provided that the woman is of an age when she menstruates.⁴³ If the husband in a *mut‘a* marriage should die, the woman’s waiting period is four months and ten days, provided she is not pregnant. No new contract for *mut‘a* marriage can be concluded before the expiry of the period of waiting, although if the same couple wish to renew their contract, they do not have to observe the waiting period. Thus, while there are similarities between the legalities of permanent marriages and *mut‘a* marriages, there are quite clear guidelines with reference to the practice of *mut‘a* within the tradition.

Some Shi‘i ‘*ulamā*’ uphold temporary marriage as an institution that is not only compatible to its western counterpart of ‘free gender’ relations, but consider it more progressive and morally superior to it.⁴⁴ These Shi‘i ‘*ulamā*’ perceive temporary marriage as being different from

³⁵Ibid. 14:1.

³⁶Murata, op. cit. 25.

³⁷Ibid.

³⁸Ibid.

³⁹Ibid. 26.

⁴⁰Ibid.

⁴¹*Sharḥ al-lum‘a*, 5:182–183; *Jawāhir*, 5:161; *Al-bayān*, 229.

⁴²Murata, op. cit. 27.

⁴³Ibid.

⁴⁴Mahnaz Afkhami, ‘Women in Post-Revolutionary Iran: A Feminist Perspective’ <www.dhushara.com/book/zulu/islamp/eye.htm> accessed February 1, 2007).

prostitution, despite structural similarities. Mahnaz Afkhami states, “For them temporary marriage is legally sanctioned and religiously blessed, while prostitution is legally forbidden, religiously reprehensible, and therefore challenges the social order and the sanctioned rules for the association of the sexes”.⁴⁵ In almost all cultural and religious norms, prostitution is viewed as detrimental to society’s general health and welfare because it is considered to violate society’s ethics and ethos. When comparing prostitution with temporary marriage, the ‘*ulamā*’ argue that the latter, while performing a similar sexual function, takes place in compliance with the law and social order.

Those who resort to it, therefore, are perceived as following a divinely recommended way to satisfy “natural urges”. For some Shi‘is, “not only is temporary marriage not considered immoral from a religious and legal perspective, it is actually considered a positive element in preventing corruption and prostitution.”⁴⁶ For them, *mut‘a* is not like prostitution because a woman is unlikely to be able to make a living from *mut‘a* since she could not legally have more than half a dozen partners in a year.

***Mut‘a* in Iran**

The specific example of *mut‘a* in Iran, where it is referred to as *sigheh*, is a prime example of temporary marriages in modern times. Traditional Islamic beliefs with respect to the role and nature of women became part of the Shari‘a and dominated parts of Iranian society insofar as they affected civil law. “In 1967 Mohammed Reza Shah Pahlavi promoted the enactment of the Family Protection Act.”⁴⁷ At that time, although the government did not outlaw temporary marriage, it attempted to increase the rights of women and allowed women to participate in education, employment and suffrage. The restoration of the Shari‘a following the Islamic revolution reversed several gains that had improved the status of women; eventually Khomeini ordered that all women should wear the Islamic covering.⁴⁸

An article in the *New York Times*, “Love finds a way in Iran: temporary marriage”, discusses several pertinent issues related to contemporary *mut‘a* marriages. Elaine Sciolino tells the story of Maryam, a hairdresser, and Karim, a home appliance salesman. Karim and Maryam carried on a secret love affair for five years and their relationship was sanctioned by Iran’s Islamic Republic, a place where unmarried couples who have sex or even date and hold hands can be arrested, fined and even flogged.⁴⁹ This was because Karim and Maryam were temporarily married. They stated in the article that “they went out a lot together and didn’t want to get into any trouble. They wanted to have documents so that if they were stopped in the streets they could prove they weren’t doing anything illegal”.⁵⁰ They stated that their marriage ritual was simple. Although they could have sealed their contract privately, they went to a cleric in Tehran with photographs and identity papers. Because Maryam had previously been married and divorced at a very young age, she was no longer a virgin and did not need her father’s consent. Sciolino states in her article that “an odd mix of feminists, clerics and officials have begun to discuss *sigheh* [*mut‘a*] as a possible solution to the problem of Iran’s youth.”⁵¹

Shahla Sherkat, editor of *Zanan* (Women), a monthly feminist magazine, states in the article, “First, relations between young men and women will become a little bit freer and second, they can satisfy their sexual needs. Third, sex will become depoliticized and fourth, our society’s

⁴⁵Afkhami, op. cit.

⁴⁶*supra*.

⁴⁷Ghodsi, op. cit. 658.

⁴⁸Ghodsi, op. cit.

⁴⁹Elaine Sciolino, “Love finds a way in Iran: temporary marriage”, *New York Times*, October 4, 2000; <<http://www.nytimes.com>> accessed February 1, 2007.

⁵⁰Ibid.

⁵¹Sciolino, *ibid*.

obsession with virginity will disappear”.⁵² Even conservatives like Muhammad Javad Larijani, a Berkeley-educated former legislator, favor temporary marriages. He states in Sciolino’s article, “What’s wrong with temporary marriage? You’ve got a variation of it in California. It’s called a partnership. Better to have it legal than have it done clandestinely in the streets.”⁵³ The reality of the matter is that young men and women do have relationships and some argue that these relationships should be defined within an Islamic framework.

Temporary marriage versus permanent marriage

When comparing the temporary marriage and the permanent marriage, there are differences in “1) the legality of the contract, 2) the duration of the term of marriage, and 3) the consideration for the marriage.”⁵⁴ In temporary marriages, the parties themselves can perform the acts of contractual formation as well as the marriage ceremony. In addition, the *mut’a* marriage does not require witnesses to its formation nor does the contract need to be registered.⁵⁵

The second component is the duration which may be from one hour to 99 years. The expiry of the specified duration ends the marriage so there is no need for divorce. However a recision or termination by the husband can terminate the contract.⁵⁶ The third component of the *mut’a* marriage contract is that a financial consideration must be paid to the woman. This is comparable to *mahr* in permanent marriages, although the consideration paid in *mut’a* is usually considerably less than in a *nikāh* marriage and it is usually paid before consummation of the marriage. A failure to stipulate the amount in the contract renders the contract invalid.⁵⁷ Because the *mut’a* contract stipulates payment as well as duration of time, many scholars have compared it to a contract for a lease.

Both forms of marriage require that a woman who has never been married obtain consent from a male guardian (usually a father) before engaging in the contract, although women who contract into temporary marriages are usually divorced or widowed. These women can contract the marriage themselves, but women who have never been married must obtain their fathers’ permission before contracting any marriage.

Scholars argue that one of the primary advantages of temporary marriage is that children resulting from such unions are considered legitimate and are given inheritance rights from the father, like children resulting from permanent marriages. However, while the permanent wife has inheritance rights, the temporary wife does not. Neither does the temporary wife have maintenance rights, which means that a husband does not have to provide economic support for the woman during the marriage.⁵⁸

According to Shi’i scholars, there were four main reasons for the Prophet’s allowing temporary marriage in the early Islamic period: 1) it provided a legal framework for individuals to engage in sexual relations in times of war when men were separated from their families; 2) it satisfied an individual’s needs; 3) it represented a way for war widows to be provided for and; 4) it provided legitimacy and inheritance rights to children born to individuals engaging in extra-marital relations.⁵⁹ “Because engaging in temporary marriage brings women monetary benefits, some see the institution as a means of economic support for needy women.”⁶⁰ Under current

⁵²Ibid.

⁵³Ibid.

⁵⁴Ghodsi, op. cit. 667.

⁵⁵Ibid.

⁵⁶Ibid. 668.

⁵⁷Ibid.

⁵⁸Ibid. 673.

⁵⁹Haeri, op. cit. 78.

⁶⁰Ghodsi, op. cit. 673.

Islamic regimes, the economic situation places a heavy burden on young individuals who wish to marry and start a family. “Temporary marriages therefore provide a timely and modern means for satisfying youth’s sexual needs without preventing them from pursuing their education and professional objectives.”⁶¹

Advantages of *mut‘a*

Shi‘i clerics in Iran argue that temporary marriages preserve the family and therefore contribute to social harmony. In order to prevent the occurrence of extramarital relations in Iran, there is strict segregation of the sexes. Men and women in each other’s company outside the home can be stopped by Revolutionary Guards and questioned about their relationship. “Temporary marriage contracts, because the law recognizes them as legal, allow individuals to become *mahram* [related by blood, marriage or sexual ties] to each other and are able to be in each other’s company without veiling.”⁶² Therefore for some, “the purpose of this form of *sigheh* marriage is to remove the legal distance between a man and woman by creating a fictive marital relation enabling the sexes to circumvent the law, to cross the boundaries of sexual segregation legitimately and to interact more freely.”⁶³

Oftentimes, arguments have been made that improving a woman’s financial condition increases the autonomy and independence of women. Supporters of *mut‘a* also argue that at the contracting stage women actively initiate and negotiate the terms of the contract in *mut‘a* marriages, whereas in permanent marriages, this right is often reserved for the bride’s family. In addition, because temporary marriage allows the woman to live alone, the woman is able to preserve an independent household and have an extra income.⁶⁴

Despite the fact that *mut‘a* has been criticized as legalizing prostitution, it is argued that “the devout Muslim is likely to make use of the institution in its strictly nominal form to facilitate the sharing of space with a non-*mehram* person inside and outside the home in a legal manner.”⁶⁵ In these cases, sexual consummation of the marriage contract is not intended. Additionally, nonsexual temporary marriage contracts can be arranged by parents of men and women who are dating or are engaged to be married. Arranging the contract for dating couples enables them to spend time together legally in socially restrictive countries.⁶⁶ For example, in countries like Iran, the temporary marriage contract provides a legal framework for individuals to overcome the barriers to male-female socialization.

In some cultures, temporary marriage serves as a fundamental tool in the current regime’s efforts to control individual behavior in a manner that is consistent with Islamic precepts. “In order to suppress extramarital sexual relations and maintain sexual segregation with the clashing ideals of sexual desire, the Iranian clergy promote temporary marriage as a solution.”⁶⁷

Disadvantages of *mut‘a*

One of the fundamental problems with *mut‘a* is its lack of formal obligation, which creates a level of uncertainty as to how the legal institution governs the relationship.⁶⁸ Because the

⁶¹Ibid. 675.

⁶²Ibid. 679.

⁶³Haeri, op. cit. 89.

⁶⁴Eric Hall, *Deep Debate over Temporary Marriage in Iran*, Reuter Library Report, February 6, 1991.

⁶⁵Jane Khatib-Chahidi, ‘Sexual Prohibitions, Shared Space and Fictive Marriage in Shi‘ite Iran’ in S. Ardener (ed), *Women and Space: Ground Rules and Social Maps* (Palgrave-MacMillan, London, 1981).

⁶⁶Ghodsi, op. cit. 680.

⁶⁷Ibid. 685.

⁶⁸Ibid. 681.

contract is private, men can leave their temporary wives whenever they wish, as well disown their children from the *mut'a* without being put through any procedure. For example if two individuals contracted a temporary marriage without a witness and without proper registration, either individual could deny its existence at any time. Without witnesses and formal registration, the temporary wife could never prove in court that there was ever such a union and any child of the union would be denied both legitimacy and economic maintenance.⁶⁹ In addition, because the contract can be formed by a simple oral agreement, uncertainty of contract terms often arises. If a dispute arises the terms of the contract could be difficult to prove in court.⁷⁰

Haeri argues that “the independence which temporary marriage bestows on women is outweighed by characteristics of the marriage that disadvantage women and preserve the inequality between the sexes in Iran.”⁷¹ Although, theoretically, in a social sense, women experience a greater level of autonomy in a temporary marriage, the institution was not initiated to achieve this. Haeri argues that the system is designed to meet men’s needs and their sexual urges, and women are given fewer rights than men when contracting into these relationships. Haeri states: “Shi’i law appears to be negating female sexuality by placing emphasis on reproduction in permanent marriage or financial compensation in temporary marriages.”⁷² A man’s legal right to have an unlimited number of temporary marriages simultaneously reflects *mut'a*’s primary purpose of meeting male sexual needs. On the other hand, women may only contract into one temporary marriage at a time and must wait a certain period of time after it before remarrying. Neither do women in temporary marriages have inheritance rights or maintenance rights, unlike women in permanent marriages.

The temporary marriage’s limited duration precludes women from securing a permanent position in Iran’s most revered social institution: the family.⁷³ Iranian society is not likely to realize the purported benefits of temporary marriages without first altering the institution. Journalist Trudy Rubin has discovered that “not all women are enthusiastic about the *sigheh*. Some working class women complained that their husbands use any spare cash to contract temporary marriages for a few hours, turning *sigheh* into virtual prostitution.”⁷⁴ This type of application is clearly an abuse of its purported purpose.

Legal application of *mut'a* in Western courts

Generally there is a great lack of understanding regarding Islamic law and culture in American courts. Existing case law demonstrates that judges frequently perceive Muslim culture as too alien to fit into existing legal structures. In the case of *Y.J. v. N.J.*, a Canadian family law case, an Ontario court imposed traditional Western notions of the family instead of recognizing the implications of *mut'a*.⁷⁵ The “best interest of the child” is the standard for awarding custody in Canada and the United States.⁷⁶

Y.J. v. N.J. was a Canadian decision determining the custody of S, a five-year old Muslim girl. The case demonstrates the problems inherent in the application of this objective test. By insisting on the

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹Haeri, op. cit. 205.

⁷²Ibid. 72.

⁷³Ghodsi, op. cit. 686.

⁷⁴Trudy Rubin, ‘Women still getting arrested for improper dress in Iran’ *Gazette* (Montreal) (July 6, 1991) B3.

⁷⁵Pascale Fournier, ‘Comment: The Erasure of Islamic Difference in Canadian and American Family Law Adjudication’ (2001) 10 *JL & Poly* 51, 71.

⁷⁶Ibid.

stability of the custodial family, the court refused to engage the unusual circumstances that gave rise to the dispute: that fact that a Canadian child was born as the result of a Muslims man's simultaneous second marriage (*mut'a*).⁷⁷

By emphasizing the best interest of the child without giving sufficient attention to the religious and cultural context in which S was born, the Ontario courts failed to incorporate several Islamic jurisprudential elements in determining this issue. Specifically, the judge failed to examine the legitimacy of children born during a *mut'a* marriage.

As with Canadian courts, the courts of the United States have also confronted the institution of *mut'a*. In a California Appellate court case, *In re Vryonis*, "the appellant Speros Vryonis, a non-practicing member of the Greek Orthodox Church, was the director of the Center for Near Eastern Studies at UCLA."⁷⁸ The respondent, Fereshteh, a Shi'i Muslim from Iran, met Speros when she visited the Center in 1979.⁷⁹ In 1982, the couple began to date, but Fereshteh repeatedly expressed her concern that under the tenets of her religion she needed marriage or commitment in order to see Speros.⁸⁰

On March 17, 1982 Fereshteh conducted a private marriage ceremony for the two of them that conformed to the requirements of *mut'a*. According to the court, "Fereshteh was unfamiliar with the requirements of American or California marriage law, although she believed that the ceremony created a valid and binding marriage, and Speros so assured her."⁸¹ The court noted that that the relationship was kept secret, that all "usual indicia"⁸² of marriage were lacking, and that the bond subsequently deteriorated the point that the couple spent only two nights together. Azizah Al-Hibri points out that some putatively objective indicia of Western marriages are in fact based on assumptions incompatible with Islamic marriages. For example the concepts of merged bank accounts and a common surname, mentioned by the court to be lacking in *Vryonis*, are opposed to widespread Muslim practice.⁸³

In July of that year, Speros, who had not stopped dating other women, informed Fereshteh that he was going to marry someone else, which he did in September. As a result, Fereshteh began telling others about the marriage ceremony she had performed two years earlier, and in October 1984 she went to court seeking spousal support and determination of property rights.⁸⁴ The trial court found in Fereshteh's favor under the "putative spouse doctrine" based upon the reasonable expectations of the parties to an alleged marriage entered into in good faith.⁸⁵

The judgment was overturned on appeal because Fereshteh's belief was held to be independently unreasonable. The appellate court effectively defined Fereshteh's perspective as too irrational for Western legal relief to be granted. The court stated: "Because the parties made no colorable attempt at compliance with the procedural requirements, Fereshteh could not reasonably believe a valid California marriage came into being. Fereshteh's ignorance of the law does not compel a contrary conclusion. Further her reliance on Speros's assurance is unavailing."⁸⁶ The court made no attempt to dispel its ignorance of the Islamic law of *mut'a*.

⁷⁷Ibid.

⁷⁸*Re Vryonis* [1988] 202 Cal.App.3d 712.

⁷⁹Ibid.

⁸⁰Ibid.

⁸¹Ibid. 714.

⁸²"The couple did not cohabit or hold themselves out as husband and wife, and in no way approximated the conduct of a married couple" (ibid. 722).

⁸³Azizah Al-Hibri, 'Issues regarding family law affecting American Muslims' (paper presented to the NGO Forum, United Nations Fourth World Conference on Women, Huairu, China, September 7, 1995).

⁸⁴*Re Vryonis* [1988] 202 Cal.App.3d, 714–716.

⁸⁵Ibid. 716.

⁸⁶Ibid. 721.

It held that, “a belief that one’s marriage conforms to the precepts of one’s faith is insufficient to come within the putative spouse doctrine.”⁸⁷ Because the facts were at odds with the formation and existence of a valid marriage pursuant to California law, Fereshteh could not reasonably rely on Speros’ statement that they were married. The court therefore concluded that Fereshteh’s cause of action was unreasonable and not in good faith and she was subsequently denied spousal benefits.⁸⁸

In the American legal system, there is no contractual arrangement that is comparable to a *mut’a* marriage contract. Although *mut’a* has been compared to premarital agreements, they are inherently different. A premarital agreement is a contract executed between prospective spouses in contemplation of marriage, fixing what the parties’ marital property rights and financial responsibilities will be after they marry. In *Re Marriage of Dawley*, the parties married out of fear that an extramarital affair would jeopardize their jobs.⁸⁹ The wife alleged they contemplated a temporary marriage. Their premarital agreement did not mention the parties’ intent but did contain the husband’s promise that he would support the wife, her child from a previous marriage, and any child born to them for a period of fourteen months after the marriage.⁹⁰ “The court held the agreement did not promote divorce by its terms and that the objective language prevailed over the subjective intent behind the agreement.”⁹¹ While this durational language is similar to what might be used in a *mut’a* contract, the purposes of premarital agreements and *mut’a* contracts differ greatly.

In the American legal system, the universality and neutrality of the law leaves little room for unsolemnized, unlicensed and unrecorded marriages, regardless of the relative equities presented by the parties. However, there was little effort made by the court to understand Fereshteh’s perspective or her Muslim culture and identity. The problem is that when claims to universality go unchallenged, the practices of minority cultures are measured against unstated norms and thus become abnormal. Unfortunately universalist reasoning in the judicial system can produce unjust and exclusionary results.

Canadian and American courts are increasingly facing the dilemma of *mahr* enforcement and *mut’a* assessment. Although American family law was once based explicitly on Christian principles, political and legal institutions today are committed to an ideal of religious neutrality. As a result, the religious underpinnings of the family law system are often ignored or denied. Several *mahr* and *mut’a* cases demonstrate the existence of multicultural challenges to family law. Judges should therefore acquire a better understanding of culturally complex disputes in the context of Islamic law.

While a major problem with *mut’a* is that it lacks a form of solemnization, there should be some sort of recognition of its legality within the system in which it was created. American marriage solemnization statutes are written broadly, with one common formulation specifying that a marriage may be solemnized in accordance with the traditions of any religious denomination. Generally, for the solemnization requirement to be met, there must be some type of religious marriage ceremony. Courts have recognized marriages that were solemnized within different traditions or in a different place or time,⁹² but, because *mut’a* marriages do not require any type of solemnization, this aspect would be difficult to legally establish in a court of law.

⁸⁷Ibid. 723.

⁸⁸Ibid.

⁸⁹*Re Marriage of Dawley* [1976] 17 Cal.3d 342, 347.

⁹⁰Ibid.

⁹¹Jennifer Kim, ‘Comment: Getting Married: Contesting the Enforceability of a Premarital Agreement’ (2000) 11 J Contemp. Legal Issues 133, 137.

⁹²Ann Laquer Estin, ‘Embracing Tradition: Pluralism in American Family Law’ (2004) 63 Md LRev 540, 568.

For *mut'a* marriages to be taken into account in the Western legal system, a major reform in the *mut'a* system needs to take place, including a process for solemnization.

Conclusion

In the context of the institution of marriage, traditional contract marriages and temporary marriages have their advantages and disadvantages. While *mut'a* marriages have proven culturally advantageous in such societies as Iran, there are serious legal impediments present when seeking redress in North American courts. Consideration of the examples presented in Iran suggests that temporary marriages provide an outlet for young people. When looking at the various passages from the Qur'an as well as the differing Shi'i and Sunni hadiths, it is difficult to procure one convincing legal authority. Both Sunni and Shi'i schools of thought provide thoughtful insight as to the nature and legalities of these unions.

Nevertheless, *mut'a* marriages must undergo a major reform if this institution is to be recognized in the Western legal system. Furthermore, because political and legal institutions in North America today are committed to an ideal of religious neutrality, many minority groups face the repercussions of harsh and neglectful legal judgments made by judges in the case of those seeking redress for religiously accepted practices. While there is much dispute over the Islamic interpretations of *mut'a*, it is clear that Western courts must seek to recognize and understand these religious concepts and take them into account when reaching their verdicts.

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