Sharia and national identity in Libya: Polygamy as a showcase

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1 Introduction

Sharia has always been key in identifying national identity in Libya, but what Sharia means and who is to decide on that are questions that have received various answers throughout Libya's recent history. The issue of polygamy can serve as a showcase.

Under the Monarchy (1951-1969), Sharia applied mainly to family matters.[2] Codes modelled after European examples governed other criminal, civil, commercial, and administrative matters. Family law became then, as in other MENA countries, closely linked to Islamic identity. It 'has become for most Muslims the symbol of their Islamic identity, the hard irreducible core of what it means to be a Muslim today. This is precisely because … [this law] is the main aspect of Shari'a that is believed to have successfully resisted displacement by European codes during the colonial period, and survived various degrees or forms of secularization of the state and its institutions in many Islamic Countries'.[3] Protecting this core took the form of subjecting it to the uncodified conventional rules of the Maliki *Madhab*[4] as extracted from its treatises and applied by religiously trained judges, *qadis*, setting in separate *shari'* courts. Back then, the regime abstained from legislating on family matters. Still, it merged civil and shari' courts, but this lasted for only four years. Unsurprisingly, during the Monarchy era, polygamy was subject to no legal restrictions.

However, the situation under Gaddafi's regime (1969-2011) changed. The regime introduced legislation to vet laws governing non-family matters for violations to Sharia so they would become Sharia-conform. The regime also enacted codes wholly based on Sharia to govern aspects of criminal, civil and commercial matters, e.g., laws on *hudud*.[5] This effected the perception of family law as the only area closely linked to Islamic identity. The regime felt confident enough to regulate this law via codes based at times on opinions that, while attributed to Sharia, were in fact unknown to not only the

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[2] Family matters are also referred to as personal status affairs. They are related to familial relationships such as "marriage, divorce, succession, guardianship, wills and waqfs or religious endowments". See Qasem, 1954, 135.
[3] An-Na'im, 2002, xi, xii.
[4] Madhab (plural Madhhabs) is a school of Islamic jurisprudence.
[5] "Hudud (sing. Hadd) – Punishments fixed in the Qur'an for crimes considered as violations of God's limits, namely theft, extramarital sex, unproven/wrongful accusation of extramarital sex, armed robbery, consumption of alcohol – and, according to some schools of thought, apostasy". Otto, 2010, 663.

Maliki madhab, but to other madhhabs as well. Such opinions were Gaddafi's own. The tight legislative restrictions on polygamy bear testimony to this.

This interpretation of Sharia and the legislation based thereon, became the target of post Gaddafi authorities (2011-). To them, this legislation shows that Gaddafi greatly deviated from the true Sharia and must be amended or completely overthrown. The legislative restrictions on polygamy in particular became quite early on the target of these authorities. Eventually, the Supreme Court declared them unconstitutional, and the legislature unequivocally annulled them. Still, this does not mean that the questions on what Sharia means and who is to decide on that are settled. As the constitution making process shows, the reality is far from that.

In this paper, I will present and analyse the debate on Sharia as related to Libya's national identity throughout the country's history since the 1951 independence (1), before examining how subsequent authorities have reacted to this debate when addressing the issue of polygamy (2). I will then conclude that, given Libya's trouble transition since 2011, it is difficult to predict with much certainty how the controversy over the role of Sharia including its position on polygamy will be resolved (3).

2 Sharia and national identity, a historical overview

Islam has always enjoyed a prominent place in forming Libya's national identity. This was true of the Monarchy era (1951-1969) when Idris el-Sanusi was not only the first (and last) King, but also the head of the Sanusi Order, a very prominent Sufi movement. Still, Sharia then played a rather limited role compared with subsequent eras.

The Constitution of the Monarchy did not recognize Sharia in lawmaking. It did declare Islam as the religion of the state, but this was seen as merely symbolic. Apart from family matters, the regime introduced laws based on European models that contained violations to Sharia. For example, it invited the Egyptian jurist Abd Razzag al-Sanhuri to help with drafting Libya's basic laws. Among others, he drafted the civil code which, expectedly, turned out to be almost identical to the Egyptian counterpart, which in turn was heavily influenced by the Code Napoléon. The new code allowed interest, widely seen as *riba*.[6] The penal code, whose drafters were inspired by the Italian penal code, punished consensual sex only in very limited cases, e.g., when committed by a spouse with another person in the marital house, and upon a complaint by the other spouse.

[6] Riba, which is, "categorically prohibited in Islamic law"," … refers to receiving or giving a lawful thing having monetary value in excess of that for which the thing was exchanged; interest charged on a debt is a prime example." Hallaq, 2009*, 178.*

Admittedly, there was still scope for resorting to Sharia, but that was quite limited. When encountering a case of a lacuna, judges presided over the civil courts, who received their training in secular law faculties, were instructed to apply the principles of Sharia.[7] These principles meant, according to al-Sanhouri, the rules on which there is consensus by all madhhabs. These are limited to a handful of rules. Besides, these rules must entail no conflict with the principles basing the Civil Code to prevent "…the Code's losing its character and legal harmony".[8] The referral to *Sharia* in such a way limited to a large extent "its practical usefulness."[9]

As for family matters, Sharia was the sole governing system.[10] It meant the uncodified rules of the Maliki *madhab*. Since opinions differ within the *madhab*, judges were instructed to apply the *rajah* opinion, i.e., the stronger in terms of evidence,[11] before changing this to *mashour* opinions, popular or mainstream.[12] Those judges sat in separate shari' courts and had to have had a high qualification in Islamic jurisprudence.[13]

Family law was seen as closely linked to Islamic identity, being the only area left to Sharia. Protecting this area meant abstaining from codifying the Maliki *madhab* rules pertaining to family matters and entrusting the adjudication on these matters to shari' courts. The Monarchy regime did not introduce any codes to substantively regulate these matters.[14] It, however, tried merging civil and shari' courts, upon the advice of el-Sanhuri. The merger entailed tasking all judges, regardless of their training background, religious or legal, with addressing all cases, family or non-family related.[15] The merger, however, lasted only for four years (1954-1958). It faced public dissent;[16] qadis, it was reported, refused to apply un-Islamic laws.[17]

Islam gained more prominence as an identifier of national identity under the Gaddafi regime (1969-2011). In addition to the inclusion in the 1969 constitutional declaration of the symbolic reference to Islam as the religion of the state, the Revolutionary Command Council issued a decree in 1971 declaring Sharia a principal source of legislation. The Council then formed committees to review

[7] Article 2 of the civil Code.
[8] Al-Sanhuri, 1997, 61. As cited by Bechor, 2007, 84.
[9] Anderson, 1954, 1. As cited by Bechor, 2007, 85.
[10] Personal status affairs of non-Muslim Libyans were regulated by their own religious rulings. As to Article 192 of the 1951 Constitution, "the State shall guarantee respect for the systems of personal status of non-Muslims". See also (Qasem, 1954, 136) who states the existence of the Rabbinical courts.
[11] Article 17 of Law on the Regulation of the Judiciary issued in 1958 and Law No. 29/1962 on the Regulation of the Judiciary. Official Gazette (special issue). Year 12. December 11, 1962.
[12] Law No. 13/1964 on the Amendment of Some Provisions of the Law on the Regulation of the Judiciary.
[13] Article (44) of Law No. 10/1985 on the Regulation of the Judiciary.
[14] Layish, 2005, ix. As to him, "Until Qadhdhafi's coup in 1969, no codification of *shar'i* law pertaing to personal status, succession and *waqf* had been attempted."
[15] Qasem, 1954.
[16] Metz, 1989, 193.
[17] Mohammed Khaleel al-Qumati, the first Libyan president of the Supreme Court (3/11/1954), an interview with al-Muhami Journal (Al-Muhami, 1990, 31–32).

existing laws for compatibility with Sharia's conclusive determinations and basic rules. The committees had to formulate recommendations as to how any incompatibility could be addressed. Besides the Maliki *madhab*, they could consult other madhhabs in their search for more feasible solutions. Based on the committees' recommendations, the regime introduced a new law (74/1972) to ban *riba al-nasia* (usury) in civil and commercial transactions between natural persons, and laws on *hadd* offences: theft and robbery (Law 148 of 11 October 1972), adultery (Law 70 of 20 October 1973), unfounded accusations of fornication (Law 52 of 16 September 1974), and, finally, the consumption of alcoholic beverages (Law 89 of 20 November 1974).

As for family matters, the regime initially attempted little change. It left them largely to the uncodified rules of the Maliki school. An exception was Law No 176/1972 on "Protecting Some Rights of Women in Marriage, Divorce for Prejudice, and Consensual Divorce". Besides the Maliki school, the drafters of the law resorted to other schools.[18] The changes this law brought about were, however, minimal. It stipulated the maturity of the spouses as a condition for marriage: 16 for females and 18 for males, it eliminated the right of the guardian to impose his word into marriage.[19] As for courts, the regime succeeded in 1973 in merging the civil and shari' courts. The merger, this time, was to last.

More significant changes to the legal system started to occur in 1977. The regime then issued the 'Declaration on the Establishment of the Authority of the People' that signalled the start of transforming Gaddafi's thoughts, as expressed in his Green Book, into law. The Declaration changed the country to Jamahiriya, i.e., the state of the masses, based its ideological stance on a form of Islamic socialism, and, more importantly, stated that the Quran was the constitution of Libyan society. This was consistent with Gaddafi's denial of the *Sunnah*.[20] [21] He also spoke dismissively of *madhhabs*, and claimed that every Muslim, not only qualified jurists, should be able to interpret the Quran. He called for opening "… the gates of *ijtihad* (free interpretation of the sources of Sharia)",[22] and gave himself the liberty to practice it.[23] As some writers plausibly argued, while he, at first, used classical Islam to legitimise his political measures, Qaddafi, later, reformulated Islamic precepts to fit his own ideology.[24]

The effect of interpreting Sharia in that way was considerable. While it became no longer confined to family matters, it also became no longer confined to Libya's predominant *madhab*, i.e., the Maliki

[18] Official Gazette no.61 of 23 December 1972.
[19] Mayer, 1978, 47.
[20] *Sunnah* is the Prophet Mohammed's sayings and acts. It is the second source of *Sharia*, after the Quran.
[21] Takeyh, 1998, 161,162. Martin, 2004, 557.
[22] Martin, 2004, 557.
[23] Martin, 2004, 530.
[24] Takeyh, 1998, 161-62.

madhab. The regime introduced laws to regulate family matters based on opinions not only unknown to this *madhab*, but, at times, to no other *madhab*. Law No. 10/1084 on Marriage and Divorce is a case in point. Besides the Maliki *madhab*, this law was based on opinions from Shia *madhhabs*, and long extinct *madhhabs* such as al-Zahiri.[25]

Legislation introduced as Sharia-based under Gaddafi became a target in the 2011 uprising. At first, his opponents cited it as evidence of his deviation from the true Sharia, which would justify the revolt against him. This is not to say that the uprising was a religious one; still, religious groups played an instrumental role. They lobbied the transitional authorities for introducing legislation addressing Gaddafi's legislative legacy.

The National Transitional Council (NTC) (2011-2012) introduced legislation to increase the role of Sharia, understood this time as being more faithful to classical interpretations. In August 2011, it issued an Interim Constitutional Declaration that made Sharia *the* principal source of legislation. Religious groups criticized the Declaration for its wording implied that resorting to sources other than Sharia was possible. In their view, it should have made Sharia the *sole* source of legislation.[26]

To, perhaps, compensate for that, the NTC issued Law 15/2012 on the Establishment of Dar el-Ifta. Dar el-Ifta played a key role in promoting the role of Sharia as could be seen, for example, in the debate on Law 1/2013 on the Prevention of Usurious Transactions. The General National Congress (GNC) (2012-2016), the NTC' successor, enacted this law with a view to replacing the conventional banking system with an Islamic one. Dar el-Ifta lobbied members of the GNC, and the main argument it provided was that enacting the law would ensure Libya's Islamic character even it may result in financial losses.[27] This argument was used in such a way that GNC members found it difficult to argue otherwise; "it would have looked as explicitly arguing against the Quran", a GNC member recalled.[28] The fear of financial losses, however, led the GNC to include in the law a provision giving legal entities, such as banks, two years (until 1 January 2015) to fully comply with the law. The Grand

[25] Izzbaida, 2016-2017, 235.
[26] Bayān hay'at ʿulamā' lībīā bi-shaʿān al-iʿlān al-dustūrī al-mu'aqit. 6 October 2011. Altawheed Forum: https://www.eltwhed.com/vb/showthread.php?33175-%C8%ED%C7%E4-%E5%ED%C6%C9-%DA%E1%E3%C7%C1-%E1%ED%C8%ED%C7-%C8%D4%C3%E4-%C7%E1%C5%DA%E1%C7%E4-%C7%E1%CF%D3%CA%E6%D1%ED-%C7%E1%E3%C4%DE%CA&s=3931e8e61a1ea27cb118f4055c61faa6&p=252557#post252557 [last accessed 10 April 2022].
[27] Bughrara, and Al-Ghitta, 2016.
[28] Moghairbi, Amina, former member of the GNC. Interview by Elatrash, Hala. Benghazi, August 2018.

Mufti criticised this move; to him, it showed that that the GNC was not serious in combating usury, *riba*.[29]

Not before long, however, the GNC became fully devoted to Sharia promotion efforts. Around August 2014, Libya witnessed a political divide in which the GNC continued to act as the legislative assembly in the western region of the country including the capital Tripoli, where religious forces were more dominant. In the eastern region, a newly elected House of Representatives (HoR) claimed the same. Since then, the GNC enacted legislation enhancing further Libya's Islamic character and the role of Sharia. It first amended the Interim Constitutional Declaration, so Libya was described as "an independent Muslim state" instead of "an independent democratic state", and Sharia became "the source of all legislation" instead of, only, "the principal source". The amended version deemed "void any legislation, work, or act incompatible with its [Sharia] provisions and objectives." The GNC issued a statement describing this provision as "the best constitutional text in all the constitutions of Muslim countries without any exception."[30]

Later, the GNC formed a committee of religious scholars led by the Deputy Mufti to review legislation for compatibility with Sharia.[31] The review revealed, as to the committee, violations to Sharia even in legislation claimed to be Sharia-based. It drafted laws to end or amend incompatible laws, which the GNC readily enacted. Amongst these were Law No. 20/2016 that, among others, made apostasy a crime punishable by death, and Law No. 22/2016 that introduced stoning to death as a punishment when the adulterous person is married.

In contrast, the House of Representatives (HoR), the rival legislature in the eastern region, showed no such enthusiasm for promoting the role of Sharia. In fact, the HoR's legislation could be seen as reactionary towards the GNC's. For example, reacting to the role that Dar el-Ifta played in supporting the GNC, the HoR issued Law No. 8/2014 on the Dissolution of Dar el-Ifta. The law did not provide for an alternative body. This vacuum was soon filled by the High Committee for Fatwa, a body fully dominated by Madkhalis who advocate for extreme interpretations of Sharia and relegation of traditional *madhhabs*, including the Maliki.

As for the Constitution Drafting Assembly (CDA) (2014-), it thrived, as evidenced in the draft it announced in July 2017, to strike a balance between promoting the role of Sharia and maintaining the civil character of the state. Whether it succeeded is debatable. The draft deemed Sharia *the* source of

[29] See the website of the Dar al-Ifta: https://ifta.ly/%D8%AA%D8%A3%D8%AC%D9%8A%D9%84-%D9%88%D9%82%D9%81-%D8%A7%D9%84%D8%AA%D8%B9%D8%A7%D9%85%D9%84-%D8%A8%D8%A7%D9%84%D8%B1%D8%A8%D8%A7-%D9%84%D9%85%D8%A7%D8%B0%D8%A7%D8%9F/738/ [last accessed 10 April 2022].
[30] Al-mu'atamar al-waṭanī al-ʿām. "Bayān bi-juhud al-mu'atamar al-waṭanī al-ʿām fī taḥkīm al-sharīʿa al-islāmiyya wa aqrār al-qawānīn bimā la yukhālif aḥkāmiḥā." 19 April 2016.
[31] Resolution No. 25/2015.

legislation, a wording that could be read as excluding all other sources. The draft also provided for an independent institute composed of Sharia specialists for research and fatwas and stated that judicial rulings are to be issued in the name of Allah not the Libyan people.

Still, the 2017 draft did not define Sharia. Thus, it would be the task of parliament, when enacting new legislation, or the constitutional court, when deciding on the compatibility of legislation with Sharia, to decide on this definition. It would be possible, as a CDA member explained, to interpret Sharia as only the conclusive rulings, which are quite limited in number and effect.[32] The draft also underpinned the democratic character of the state and the rule of law. It provided for numerous human rights and basic freedoms.

The draft received different responses. There are those who saw its provisions on Sharia as paving the way for Libya to become a theocratic state. (Shaeteer 2017)[33] Others, however, saw these provisions as insufficient. The High Committee for Fatwa in the eastern region, in a statement dated 1 August 2017, accused the Constitution Drafting Assembly of proposing numerous explicit violations to Sharia, e.g., unqualified freedoms of thought and expression, formation of political parties and civil society organizations, and equality between men and women. At the end, the Committee advised the Libyans, rulers and the ruled, to discard the draft constitution.[34]

Indeed, this draft will be subject to a public referendum, and will need the approval of two thirds of the voters to pass. This could be a too high threshold to pass given how controversial its provisions are, especially those pertaining to Sharia.

3 (Lack of) Legislation on polygamy as an identity manifestation

Polygamy has never been a widespread phenomenon in Libya.[35] Still, it attracted, as evidenced in legislation introduced under Gaddafi and in his aftermath, the attention of the subsequent authorities. They thrived to impose restrictions on polygamous marriages, or remove them, in a way apparently intended to show how faithful they are to the true, from their view, understanding of Sharia as an identifier of national identity.

Under the Monarchy, and in line with the adopted opinion of the Maliki *madhab*, there were no restrictions on polygamy. As mentioned earlier, judges had to resort to the *rajah* opinion, i.e., the

[32] Buḥamra 2019.
[33] Shaeteer 2017.
[34] Al-lajna al-ulia lil efta, 2017.
[35] Freedom House, 2010.

stronger in terms of evidence, and then *mashour, i.e.*, popular or mainstream amongst jurists, opinions within this *madhab*, and these, like other conventional opinions in other *madhhabs*, impose no restrictions on polygamy. They do require the man who seeks polygamous marriage to be able to provide for all his wives, and to treat them in an equal and just way. Still, it is this man who should decide whether he fulfils both requirements, not supervised when doing so save by his own piety.[36]

However, this changed under Gaddafi. He spoke out against polygamy and issued directives that made it increasingly restricted. This was not the case in the early years of his rule; then, more conventional interpretations of Sharia prevailed. Law No 176/1972 as amended in 1973 only effected marriages of Libyans to foreigners; "… while a man who marries only Libyans enjoys the traditional right of polygamy, a man who marries a foreign woman must remain monogamous, because he is prohibited from marrying a second wife, whether Libyan or foreign."[37]

The change occurred with the introduction of Law No. 10/1984 on Marriage and Divorce. While it still allowed polygamy, this law required a prior judicial permission. Article 13 read: "It is permissible for the man to marry another wife with the permission of the competent court after checking his social circumstances, and physical and financial ability". This wording raised questions, as some writers pointed out. A term like "social circumstances" is quite vague; what exactly would the judge be looking at when checking if a man' "social circumstances" permit him to marry a second woman? Besides, while the intent was to restrict polygamy, the law said, "it is permissible for the man to …"; it would have been better to use a phrase such as "it is not permissible for the man to … unless …".[38]

Stronger wording and restrictions came later. As amended by Law No. 22/1991, Article 13 read: "It is not permissible for the man to marry another woman unless the following two conditions are met: (1) obtaining the written formal (*rasmi*) consent of the current wife, or the issuing of a permission by the court, (2) ensuring, by the court, that his social circumstances, and financial and health ability enable him to do so [marry a second wife]." The failure to meet any of these conditions would result in the annulment of the second marriage and its effects. The first wife could file a lawsuit asking for the annulment to be declared.

This amendment too raised questions. The requirement of a formal consent to conclude the second marriage is said to be alien to Sharia that deems the marriage contract only consensual. The vague term of "social circumstances" was still there. More importantly, the law invalidated the second marriage and all its effects, e.g., linage, inheritance, maintenance. What if this marriage resulted in

[36] Izzbaida, 2009, 224.
[37] Mayer, 1978, 47.
[38] Izzbaida, 2009, 225.

children; would they be deemed illegitimate? A judge faced with this dilemma would, some writers argued, conclude that this marriage is correct in terms of Sharia, incorrect in terms of law.[39] What would be the effect on this judge's consciousness? they wondered.[40] Practically speaking, being valid in terms of Sharia could offer little help; an official at the local office of civil affairs registration would decline to issue essential documents such as the family book and the birth certificates.[41]

Not long, however, the regime introduced even stronger restrictions. As per Law No. 9/1994, the husband had to present "serious reasons" for wanting to marry a second wife, and to get either the first wife's written consent before the competent court, or the court's permission after a successful lawsuit by the husband against her. If these conditions were not met, the second marriage would be void, and the first wife could initiate a lawsuit, orally or in writing, asking for the divorce of the second wife.

Interestingly, in a rare challenge to the head of the regime, the General People's Congress (the legislature) enacted in 1998 a law that removed the requirement of the first wife's consent. It only required the permission of the court after checking the husband' social circumstances, and financial and health ability. The first wife could request a judicial divorce on the grounds of material and psychological harm she suffered because of the second marriage if she could prove it.[42] However, Gaddafi, in a move of "dubious legality," annulled that law.[43] His interference shows how crucial to his image as a women liberator restricting polygamy was.

Aware of this, the Supreme Court evaded addressing the question on the legitimacy of such restrictions from a Sharia viewpoint. According to Libyan law, the Court can invalidate legislation for incompatibility with the constitution. Libya under Gaddafi had no constitution, but there were laws and charters that arguably enjoyed a constitutional character. Amongst these was the Declaration on the Establishment of the Authority of the People (DEAP) that pronounced the Quran to be the law of Libyan society. One could challenge a law for violating the Quran, hence the DEAP.

Indeed, in 1998, the Court received a challenge against the constitutionality of Article 13 of Law No. 10/1984. In this case, a first wife filed a lawsuit asking, besides other requests, for the annulment of her husband's second marriage for concluding it without her consent. While seeing this case, the Court of the North of Tripoli concluded that the relevant Article seemed to be unconstitutional as it

[39] Izzbaida, 2009, 229.
[40] Izzbaida, 2009, 229.
[41] This is not only a theoretical possibility. As shown by a case brought before the Supreme Court to challenge the constitutionality of Article 13, the office of civil affairs registration cited Article 13 to refuse to register the second wife in the husband's family book. The Supreme Court. Constitutional Appeal No. 26/59 dated 23/12/2013.
[42] Izzbaida, 2009, 233.
[43] Hinz 2002, 23, as cited by Welchman 2007, 31.

limited polygamy contrary to the Quran. As the DEAP stated that the Quran was the law of the society, this made Article 13 unconstitutional. On 13 September 1998, the court suspended the case and referred it to the Supreme Court.

The Supreme Court, however, dismissed the case without discussing its substance. As to the Court, Law No. 17/94 on the Regulation of the Supreme Court provided for only two ways to challenge the constitutionality of any legislation: (1) filing a lawsuit before the Supreme Court by a person who has personal and direct interest in deeming the concerned legislation unconstitutional, and (2) referring by a lower court of any serious and essential claim of unconstitutionality that arose while hearing the case. The second way required, as the Supreme Court interpreted it, that the claim be raised by one of the litigants, not the court hearing the case. Since it was the Court of the North of Tripoli that took the initiative to refer the unconstitutionality claim to the Supreme Court, the latter decided on 19 May 2005 not to accept the case. It then returned the matter to the North of Tripoli Court so it could decide on substance, i.e., the annulment of the second marriage.

That the judges of the lower court took the initiative to refer the unconstitutionality claim to the Supreme Court seems to be motivated by what some writers described as a consciousness problem.[44] While seeing polygamy as permissible by Sharia, the judge had no option but to declare as legally invalid a second marriage concluded in violation to Article 13. Declaring this article unconstitutional could have paved a way out of the dilemma. Yet, the Supreme Court was not prepared to confront the regime and preferred to dismiss the case without looking at its substance. Left with no other options, some judges rejected cases filed by first wives to declare second marriages invalid.[45] Of course, their rulings would likely be struck down, if appealed, for violating the law. Still, this shows the extent to which these judges were prepared to go to avoid violating what they thought was the true interpretation of Sharia.

As explained earlier, Gaddafi' successors too shared the belief that the legislative restrictions on polygamy were incompatible with Sharia. As early as 23 October 2011, eight months after the start of the uprising against the Gaddafi's regime, the new leaders announced their intention to remove these restrictions. In his speech on the Liberation Day, Mustafa Abdul Jalil, the chairman of the National Transitional Council (NTC), announced that 'any law violating Islamic Sharia is suspended with

[44] Izzbaida, 2009, 229.

[45] According to Ibrahim Ahmed, private lawyer, he defended in 2008 a husband in a lawsuit brought by his first wife to divorce the second wife; the husband had failed to get the needed consent. The husband was in a difficult position as the conditions for the divorce cases were all present. The lawyer then argued that Article 13 violated the Quran that explicitly permits polygamy. As such, it violated the Declaration on the Establishment of the Authority of the People (DEAP) and was unconstitutional. The judge, however, surprised him by rejecting the lawsuit. Buzaid, Juma. Ta'dud aljauzat fi alqanoun alibi (polygamy under Libyan law). Facebook. 25 April 2021. https://www.facebook.com/Juma.buzaid/posts/4300753249948922 , last 10 April 2022.

immediate effect, including the law that restricts polygamy'.[46] This shows how polygamy featured high, as evidence of commitment to the true interpretation of Sharia, in the eyes of policy and decision makers. Legally speaking, Abdul Jalil's statement was unsound. He could not in his capacity as the chairman of the NTC annul or even alter any law. Expectedly, courts continued to require the consent of the first wife.

In response, the Grand Mufti criticised the restrictions and called on the lawmakers to remove them. This was a fatwa[47] he handed down on 20 December 2012 in response to a question submitted by a man married with three children who wanted to marry a second wife. He needed to marry a second wife, he explained, as his first one was suffering from a chronic disease. The court, however, declined to give him a permission to do so unless he obtained the first wife's consent. Article 13 was still in force, he was told. His question to Dar el-Ifta was whether Sharia knows such restrictions. The Grand Mufti explained that Sharia permits marrying a second wife if the husband can provide for both wives in a just and equal way. Asking for the first wife's consent, he stated, is a condition unknown to Sharia, and the Prophet said, "Whatever condition is not in the Book of Allah [the Quran] is void". He called upon the lawmakers to annule the condition so the law would become Sharia-conform.[48]

While it took the lawmaker a few more years to introduce the requested change, this time the Supreme Court provided a quicker response. On 5 February 2013, the Court declared as unconstitutional the restrictions on polygamy per Article 13. When a wife discovered that her husband had married another woman, she filed a lawsuit before a District Court in Tripoli demanding the annulment of the second marriage as Article 13 stipulated. In response, the husband argued that this Article 13 was unconstitutional. By requiring the consent of the first wife, which was hardly possible to get, this article effectively made polygamy impossible. This made it inconsistent with Sharia that knows no such restrictions, and inconsistent with the Constitutional Declaration that made Sharia the principal source of legislation, hence unconstitutional. On 5 January 2012 the case before the District Court was suspended, and on 26 March 2012 the husband filed his claim before the Supreme Court.

[46] See Adam Nossiter, Hinting at an End to a Curb on Polygamy, Interim Libyan Leader Stirs Anger, New York Times, 30 October 2011, available at:http://www.nytimes.com/2011/10/30/world/africa/libyan-leaders-remark-favoring-polygamy-stirs-anger.html?pagewanted=all&_r=0, last accessed 10 April 2022.

[47] A fatwa is "a formal ruling or interpretation on a point of Islamic law given by a qualified legal scholar ar (known as a mufti)". Britannica, T. Editors of Encyclopaedia. "fatwa." Encyclopedia Britannica, September 27, 2016. https://www.britannica.com/topic/fatwa.

[48] Al-Ghariani, Sadiq. Hukm ishtirat muafaqat alzauja alawla fi alzauaj bi ukhra (Rule on requiring the first wife's consent for marrying another). Ftawa No. 730, dated 20 December 2012. Available at: https://ifta.ly/%d8%ad%d9%83%d9%85-%d8%a7%d8%b4%d8%aa%d8%b1%d8%a7%d8%b7-%d9%85%d9%88%d8%a7%d9%81%d9%82%d8%a9-%d8%a7%d9%84%d8%b2%d9%88%d8%ac%d8%a9-%d8%a7%d9%84%d8%a3%d9%88%d9%84%d9%89-%d9%81%d9%8a-%d8%a7%d9%84%d8%b2/667/, last accessed 10 April 2022.

Deciding on such a claim entails adopting a specific position on the interpretation of Sharia. While the claim was based on conventional opinions that allow no restrictions on polygamy, there are others contrary views. As to these opinions, polygamy is only permissible (*mubah*); it neither obligatory (*wajib*), nor recommended (*mandub*), and restricting what is permissible is permissible, the juristic ruling says. Such a ruling is claimed to be the justification behind disallowing polygamy in the Tunisian family law and regulating and limiting it in many other Muslim countries including Egypt, Morocco, Pakistan, and Indonesia.[49]

Given that the impact of its decision would not be limited to the case at hand, one would expect the Supreme Court to address all various opinions especially those arguing that restricting polygamy is acceptable to Sharia. However, as it appears from its half page long reasoning, the Court did not mention any opinions which could have been expressed by the defendant. In its ruling on 5 February 2013 the Court reasoned that Sharia allows polygamy save in very limited cases, e.g., marrying a woman and her sister or aunt. Hence, it is not permissible to enact laws restricting it. Since Article 13 subjected polygamy to conditions impossible to meet, the Court reasoned, effectively banned it, hence violated Sharia, which is the principal source of legislation. This, it concluded, made Article 13 unconstitutional.

Under Libyan law, such a ruling deprives the law concerned of its status as law. It becomes, thus, no longer enforceable. The Supreme Court reiterated this when addressing another challenge against the constitutionality of Article 13. This time, the husband and the second wife together filed the lawsuit. They concluded their marriage on 23 February 2007, but the office of civil affairs registration refused, citing Article 13, to recognize it and add the second wife to the family book. The fate of the marriage became thus in the hands of the first wife; she could end it by filing a divorce case. This constituted an infringement on the right to marry, which is a human right, and the principle of equality between the two women in this case. Besides, the article violated Sharia that permits polygamy. In the ruling it issued on 23 December 2013, the Court stated their argument in full but noted that their request had already been granted. The Court's rulings on constitutionality claims, like the one it had issued on 5 February 2013, are binding on all lower courts and all entities in Libya; they are *erga omnes* rulings.

Unaware of this legal effect, however, legal notaries entrusted with concluding marriage contracts continued to ask for the first wife's consent.[50] A legislative intervention seemed needed. Indeed, on 14 October 2015, the General National Congress (GNC) introduced, upon the advice of the previously mentioned Expert Committee, Law No. 14/2015 to amend Law No. 10/1984 by, among others, ending

[49] Otto 2010: 631-2.
[50] Buzaid, Juma. Ta'dud aljauzat fi alqanoun alibi (polygamy under Libyan law). Facebook. 25 April 2021. https://www.facebook.com/Juma.buzaid/posts/4300753249948922 , last 10 April 2022.

Article 13 altogether. [51] However, the validity of this law, one should mention, like that of the other laws that the GNC introduced after 2014, is seriously questioned. Its rival, the House of Representatives (HoR) claimed to be the only legitimate legislature, and in the eastern part of the country, which is under its control, the GNC's laws including the one on polygamy have not been implemented. Still, these laws are largely recognised and implemented in a great part of the country, including the capital Tripoli, home to around one third of the population. They contribute to a dichotomy of legislation Libya has witnessed since the 2014 divide. For example, in the east, the age of marriage is still 20, in accordance with the original stipulation of Law No. 10/1984, and apostasy is not, yet, a crime. In the west, the marriage age is 18 and apostasy is a crime punishable by death.

While hoping that the efforts to address the effects of the divide will succeed, one cannot help but wonder what that means for the GNC's legislation including that on polygamy; will it be kept and enforced in the entire country, or rather be revoked. Since an important part of this legislation, including that on polygamy, is meant to enhance the role of Sharia, conventionally interpreted, as an identifier of national identity, the question on the fate of this legislation is in essence a question about this role, which is still far from settled.

4 Conclusions

Through the analysis of legal developments concerning polygamy, this paper showed that while Sharia has undisputedly been key in building Libya's national identity, its interpretation, and the authority to decide on that have been anything but undisputed.

The Monarchy regime (1951-1969) confined Sharia almost exclusively to family law, which then was seen as closely linked to the country's Islamic identity. The regime left this law to the uncodified rules of the Maliki *Madhab* as interpreted and applied by *qadis*. Usurpingly, polygamy remained unrestricted. The Gaddafi regime (1969-2011), however, widened the application of Sharia beyond family law, which then lost its special connection with Islamic identity. The regime introduced Sharia-based legislation on both family and non-family matters. Gaddafi's own thinking was key in the process. To enhance his image as a women liberator, he directed legislation presented as Sharia-based that increasingly restricted polygamy. This move attracted heavy criticism for violating conventional Sharia, and in Gaddafi's aftermath (2011-) these restrictions got struck down, in 2013, by the Supreme Court and, in 2015, by the General National Congress (GNC).

[51] Several of these laws were published, in Arabic, in the Official Gazette, issue 5, 17 November 2015. Available online: http://itcadel.gov.ly/wp-content/uploads/pdfs2013/add05-2015.pdf , last accessed 10 April 2022.

Still, whether such interpretations will continue to dominate the application of Sharia in Libya is unclear. The ongoing debate on the draft constitution bears testimony to that. The Constitution Drafting Assembly (CDA) struggled to build consensus on, among other key issues, the role of Sharia. In its latest draft, it tried to promote this role while maintaining the civil character of the state. Besides underpinning the democratic character of the state and providing for many human rights and basic freedoms, the draft considered Sharia *the* source of legislation, established a Council for *Shari* Research, and stated that judicial rulings are to be issued in the name of Allah not the Libyan people. However, the draft received criticism from secular voices for establishing for a theocratic state,[52] and from religious ones for assigning a too little role to Sharia.[53] Unsurprisingly, the draft's position on Sharia is expected, among others, to lead to its rejection in the planned public referendum.

Obviously, there is no easy way to address the issue of Sharia in Libya. A contributing factor is the fact that the still existing political divide, that developed at times into armed conflicts, took, among others, a religious dimension, i.e., Islamists vs secularists. As a result, promoting the role of Sharia is often seen as part of the former's efforts for dominance. The ongoing efforts to end this divide and address its effects need to include a societal dialogue including the two about the identity of the new Libya, and what role Sharia can be assigned.

[52] Shaeteer 2017.
[53] See Al-Lajna al-Ulia lil Efta. 2017. Bian bi shan Musudat Mashrou' al-Distour (a Statement on the Draft Constitution).1August.Accessed10April2022: https://www.facebook.com/916893245007894/posts/1596901657007046/.

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