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BAYERO UNIVERSITY KANO
FACULTY OF LAW.**

LL.M DISSERTATION

TOPIC:

**RIGHTS OF SPOUSES UNDER MUSLIM FAMILY CODE OF
MOROCCO, MOUDAWANA: AN APPRAISAL OF ITS COMPATIBILITY
WITH THE PROVISIONS OF THE SHARIAH**

BY

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SPS/12/MLL/00021

**BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POST
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REQUIREMENT FOR THE AWARD OF MASTER OF LAWS (LL.M)**

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DECLARATION

“I, Ibrahim Umar Abere do solemnly declare that this dissertation is the outcome of my own research and intellectual effort under the supervision of Mamman Lawan Yusufari PhD, and that all the sources, where necessary have been duly acknowledged and that this dissertation, to the best of my knowledge has never been presented for any Masters of Laws degree or purpose anywhere.”

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CERTIFICATION

This is to certify that the research work of this dissertation and all subsequent preparations of this dissertation conducted by Ibrahim Umar Abere SPS/12/MLL/00021 were carried out under my supervision.

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DEDICATION

**This dissertation is dedicated to my beloved children; AbdurRahman,
Maryam, Ahmad, Khadeeja and Abdullah.**

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All praise and thanks are due to Allah (S.W.T) for his uncountable favors upon me throughout my life of which the accomplishment of this dissertation as a requirement of the award of Masters of Laws is one. I thank Him for making me witness this yet, another turning point in my life. May the peace and blessings of Allah be upon our Noble Prophet Muhammad (SAW) his household, companions and all those that follow their footsteps till the last day Amin.

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Abstract

Marriage under Islamic law has its distinct equitable rules and regulations as it concerns the rights and obligations of spouses. These set-out rights can be the rights of Allah, the rights of the husband, the rights of the wife or mutual rights of the husband and wife. Both in the past and present, governments of Muslim states world-over do come up with reforms to take care of new circumstances and situations reflecting the nature of Islamic law being a law for all times. Various factors are responsible for reforms that take place from time to time. However in an attempt to carry out such reforms, some enactments made do not only replace strict and rigid rules which are meant to be static as distinguished from those that are flexible, but go ahead to contradict the essence of the Shari'ah in that respect. This research work focuses on the assessment of some selected provisions of the Muslim Family Code of Morocco (Moudawana) 2004 with a view to testing their compatibility with the provisions of the Shariah so as to serve as lesson to the states implementing Shari'ah in Nigeria. For the purpose of this research, doctrinal method is employed. Materials were sourced from the primary and secondary sources of Islamic law and other relevant sources and analyzed accordingly in order to ascertain the extent to which the selected provisions of the Muslim Family Code of Morocco (Moudawana) 2004 complied with the rules of the Shariah. The research found that the selected provisions of Articles 25,40,41,42,43,44,45,51,52,83,84,86 and 124 of the Muslim Family Code of Morocco (Moudawana) 2004 are substantially against the provisions of the Shari'ah law regarding the rights of spouses. It is recommended that those provisions be reviewed by the legislators to comply with the provisions of the Shari'ah. This will save the system from breaking down due to non-compliance and the over flooding of the courts with several litigations on family law issues.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The rights of spouses under the *Shari'ah* are rights that are not only required to be respected they are also enforceable in a court of law in the event of breach of any of them. They are rights in different forms that are connected to the very essence of Marriage. The *Shari'ah* spells out what they are and how they are to be enforced by spouses as religious obligations and duties. Both parties to a Muslim marriage contract are required to know the rights of each other and take them as sacred as possible so as to achieve both divine and mundane benefits during the subsistence of the Marriage.

The *Qur'an* States:

“...and women shall have rights similar to the rights against them according to what is equitable...”¹

The *Qur'an* also states that:

“and among His signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily in that are signs for people that reflect.”²

¹ Qur'an 2: 228

² Ibid 30 : 21

The Prophet (SAW) (SAW) is reported to have emphasized the rights of spouses upon each other during his life time and one of the most spectacular statements is

contained in his all-comprehensive fare-well sermon. He states:

“Well then, people verily there are rights in favour of your women which are incumbent upon you and there are rights in favour of you which are incumbent upon them...”³

Rights in marriage can be classified under four broad headings, namely:

1. **The rights of Allah:** these rights are exclusively for Allah. None of the spouses has the right to waive such rights. They are co-extensive and include *inter-alia*:
 - i. Paternity or Legitimacy of children of the Marriage;
 - ii. Prohibition by Affinity;
 - iii. *Iddah*;
 - iv. Inheritance.⁴
2. **The mutual rights of spouses:** These rights are such that the spouses share mutually, i.e. they have common share in enjoying the rights. They are:
 - i. Sexual intercourse;
 - ii. Kind and impartial treatment⁵.
3. **The rights of the husband:** these rights are exclusive to the husband in relation to his wife or wives in a marriage contract. They are:
 - i. Obedience;

³Gurin, A. M. An Introduction to Islamic Family Law, Jodda Comm. Press Limited, Zaria, Nigeria, 2001, p 127

⁴ Ibid p102-104 (2014 Edition)

⁵ Ibid p105-106

- ii. Sexual intercourse;
- iii. Right of correction;
- iv. Right of restricting her movements;
- v. Right of marrying another wife;⁶
- vi. Right to recall a wife after a revocable divorce.

4. **The rights of the wife:** these rights are exclusive to the wife and they are:

- i. Right to be given out in marriage.⁷
- ii. Right to dower
- iii. Right to maintenance
- iv. Right to kind treatment
- v. Right to visit
- vi. Right to equal treatment
- vii. Economic right.⁸

These rights will be explained in detail in the course of this research work.

1.2 STATEMENT OF THE PROBLEM

It is the primary responsibility of the *Shari'ah* to protect six basic needs of man. These are the Faith, Life, Wealth, Mind, Offspring (Progeny) and Honour⁹. When these are adequately provided for, then it can be said that the *Shari'ah* is working. The concern of this dissertation is to discuss the rights of spouses under Islamic Law which can be subsumed under the protection of progeny which is one among

⁶ Gurin op cit p 107-110

⁷ Al-Asqalani, A.I.H, Bulugh A-Maram, with notes from the book of Subulus Salam written by Muhammad Ibn Ismail AsSana'ani, Darussalam Publishers, KSA, 1996, p347.

⁸ Ibid p 110-118

⁹ Auda, J. Maqasid Al-Shariah as Philosophy of Islamic Law, International Institute of Islamic Thought, London, 2008,p3

the six stated above and which can only be achievable through the institution of marriage.

Historically, in the 1955, there was a heated debate among the Northern educated “Leaders of Thought” over the status of Islamic Courts in the Northern Nigeria where a suggestion was put forward by one A.K Metteden who advocated for the adoption of the Egypt example by abolishing the Islamic Courts because of their conservative bias in the interpretation of the Islamic Law. The British intended to impose the reforms that were then in currency in North Africa and the Middle-East in the area of Family Law on the Parliament of Northern Nigeria but was resisted¹⁰. Based on this reality and historical antecedent, it is foreseeable that the reforms of 2004 in Morocco may be extended to countries in North and West Africa. This is a cause of concern for all stakeholders as it is essential that we, in Nigeria investigate the law and find out its cogency to our needs, values and legacy or otherwise. The particular reference for examination is the Moudawana of Morocco as a family code in which effort is made to check the provisions to ascertain their compatibility with the provisions of the *Shari’ah*. The *Shari’ah* takes this very seriously because marriage institution like other institutions under the *Shari’ah* has its standard rules and regulations which the rights of spouses stem from. The rights of spouses are those body of rights that the husband and wife in any Islamic marriage are entitled to equitably. This is so because when a society lives a life where the said rights do not operate, then there is bound to be lawlessness, chaos and total breakdown of the marriage contracts. The manner in which these rights are put in place to regulate this sacred institution by Muslim countries like Morocco is going to be checked in light of the *Shari’ah* and to examine the extent at which Jurists/Rulers can go in modifying these rights either by replacing them completely with

¹⁰ Paden, J.N. Ahmadu Bello Sardauna of Sokoto, Values and Leadership in Nigeria, Great Britain for the Hudahuda Publishing Company Limited, Zaria, 1986 p205.

something different or to merely modify the laws as they are under the *Shari'ah*. In view of the above, this research work becomes necessary in order to find out whether or not the selected provisions of the Muslim Family Code of Morocco (Moudawana) are compatible with the general provisions of the *Shari'ah*. The provisions to be examined are Articles **25,40,41,42,43,44,45,51,52,83,84,86 and 124**.

For example Articles 40,51,52 and 25 states respectively:

ARTICLE 40

“Polygamy is forbidden when there is the risk of inequality between the wives. It is also forbidden when the wife stipulates in the marriage contract that her husband will not take another wife”

ARTICLE 51

“The Mutual Rights and Duties between Spouses are:

The wife assuming with the husband the responsibility of managing and protecting household affairs and the children’s education”

ARTICLE 52

“When either spouse fail to fulfill his or her obligation in marriage, as specified in the preceding Article, the other party may compel the

spouse to execute the obligation or resort to the irreconcilable differences procedure provided for in Articles 94,95,96 and 97 below”

ARTICLE 25

“The Woman of legal (Majority) may conclude her marriage contract herself or delegate this power to her father or one of her relatives”

1.3 RESEARCH QUESTIONS

Being that only Allah and His Messenger (SAW) are the Lawgivers under the *Shari’ah*, adequate provisions on rules and regulations governing the institution of marriage, leaving no stone unturned in an equitable and most balanced manner have been made. However, there are some Muslim countries, with specific reference to Morocco that have made some codifications that call for re-examination of some questions intended to be answered by this study:

1. What are the source of Amorality and the rejection of divine laws?
2. Is the Muslim Family Code of Morocco (Moudawana) compatible with the classical provisions of the *Shari’ah*?
3. If the answer is in the negative, to what extent can the Jurists go in modifying the rules provided by the *Shari’ah* in the name of codification?

4. What is the effect of adopting codified rules that are at variance with what the *Shari'ah* provides as rights of spouses?
5. What are the chances that similar legislation can be transferred to Nigeria?

1.4 AIM AND OBJECTIVES

The aim of this research work is to appraise the compatibility of the rights of spouses under Muslim Family Code of Morocco, Moudawana with the provisions of the *Shari'ah*.

Therefore this study seeks to achieve the following objectives:

1. To examine and explain the Rights of Spouses under the *Shari'ah*.
2. To determine to what extent the rules of *Shari'ah* governing the rights of spouses are rigid or flexible to either totally foreclose or allow input of the jurists from time to time using *Ijtihad* taking Moudawana of Morocco as a case study.
3. To examine the effect of non compliance with the *Shari'ah*.

SIGNIFICANCE OF THE STUDY

The significance of this dissertation lies in analyzing some Articles of the Muslim Family Code of Morocco (Moudawana) with a view to assess its compatibility with the provisions of the *Shari'ah*. In essence if the research is conducted, will serve as a reference to

legislators, draftsmen, rulers in Muslim countries, researchers interested in the contemporary development of the Islamic Law, institutions of learning and the general public on whether or not the selected provisions of Muslim Family Code of Morocco on rights of spouses is compatible with the provisions of the *Shari'ah*.

1.5 SCOPE AND LIMITATION

This research will be concerned and will limit itself to only some selected Articles of the Muslim Family Code, 2004 (Moudawana). These Articles are 25,40,41,42,43,44,45,51,52,83,84,86 and 124. The above Articles will be quoted and analyzed based on their compatibility with the provisions of the *Shari'ah*. The primary, secondary and subsidiary sources will be relied upon in carrying out the compatibility tests.

1.7 METHODOLOGY

The method to be used for this research is first doctrinal as well as comparative which would entail a conceptual research where a careful examination of the primary sources as well as secondary sources would be made. These primary sources include the *Qur'an* and the *Sunnah*.

The secondary source include works of the renown Muslim Jurists of the past and present in an effort to expound understanding from the primary sources as stated above in form of *Ijma'*, *Qiyas*, *Ijtihad* to mention but a few and as may be contained in their Books, Journals and reviews, textbooks, workshop/seminar/conference papers, and judicial decisions.

1.8 LITERATURE REVIEW

There is much literature on Moudawana as the Muslim Family Code of Morocco in light of the Islamic law and based on other social considerations that are very rich, Islamic jurists discussed and produced numerous materials on the subject; this can be found mainly in Islamic family law materials. The literature covers commentaries on jurisprudence where detailed discussions are provided by Islamic jurist. There are some materials that are dedicated to discussion on issues of divorce, marriage, inheritance in light of the Family Code. Very few are dedicated to discussion on the Family code in light of the provisions of the *Shari'ah* in isolation.

Below are some of the literatures:

A New Family Law in Morocco¹¹ Is a very relevant literature where the author discussed how the rights of women are trampled upon by the then Moudawana of Morocco 1958 citing examples of how the law restricted the rights of women in Morocco in respect of inheritance, custody, divorce and so on. The reforms brought about by the revised Family Code of 2004 are then commended by the author. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

***Shari'ah, Muslim States and International Human Rights Treaty Obligations.*¹²** This material discussed the agitation of the people of Morocco to change the Moudawana from what it used to be to the present document as it is. Meaning, it is a reflection of the will of the people of Morocco even though it stated how the series of demonstrations and others forced the King Hassan, II to bring about the new Family Code. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

¹¹ Zineb, T. A New Family Law in morocco, United Nations Development Fund for Women, 19, December, 2003.

¹² Nisrine, A. Shariah, Muslim States and International Human Rights Treaty Obligations, British Institute of International and Comparative Law, London, 2008.

The Qualities of the Reform of the New Family Law.¹³ The relevance of this literature lies in the discussion on how the King Hassan, II ordered sittings with women groups for the draft of the bill that brought about the present Muslim Family Code of Morocco, Moudawana, 2004. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Assessing the impact of the 2004 Moudawana on women's rights in Morocco.¹⁴ This literature is very relevant as it discussed how the coming together of women's groups forced the bill and subsequent enactment of the Moudawana of 2004. It stated that the Moudawana was enacted to advance Women's rights and overturn the discriminatory provisions of the former law stating among others some of the new rights as the right of the woman to dispense with the guardianship requirement in marriage, the prohibition of the husband from divorcing his wife unilaterally, the requirement of the permission of the judge before a man can go into polygamy. The gap left here which this research intends to fill is that the above literature did not discuss whether or not

¹³ Katja, Z. The Qualities of the Reform of the New Family Law, Faculty of Oriental Studies: University of Oxford, May 2007. pdf

¹⁴ Beath, M. Assessing the impact of the 2004 Moudawana on women's right in Morocco, Fulbright-Hays, Summer seminars Abroad, 2008.pdf

the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Progressive or Conservative, Women Influence Islam.¹⁵ This literature tried to defend how the provisions of the Moroccan Family Code, Moudawana did not contradict the provisions of the *Shari'ah* by giving distinct interpretations to the some provisions to defend the new code's positions on the rights of women as wives in a marital relationship. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

A New Family Law in Morocco¹⁶ The literature is very relevant due to the fact that it dealt with the content of the Moudawana of Morocco of 1958 which is said to have denied the woman a number of her rights and went ahead to discuss how the movement for reform of the Code was made specifically to cure and make for the denied rights of women in their matrimonial homes as wives. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

¹⁵ Charles, L. Progressive or Conservative, Women Influence Islam, Women's E-news, 9. October, 2005

¹⁶ Zineb, T. Op cit.

The History and Significance of the New Moroccan Family Code¹⁷

The literature is also very relevant because it summarized the initial agitation to replace the 1958 Moudawana and give a concise breakdown of the new Muslim Family Code of Morocco (Moudawana) of 2004 which the author commended the effort of the King Hassan II for his cooperation to making it a reality. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Gender inequality in Morocco Continues, Despite Amendments to Family

Law.¹⁸ The relevance of this literature is the fact that the author summarized the worries of those that spearheaded the reforms that brought about the 2004 Moroccan Family Law, Moudawana, but however highlighted the points where the enactment has failed to match theory and practice in the Moroccan context. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

¹⁷ Harrak, F. The History and Significance of the New Moroccan Family Code, Institute for the Study of Islamic Thought in Africa, Working paper Series. No 09-002. March 2009.

¹⁸ Cited in <http://www.moroccofamilylaw.org>. last visited 5, November, 2015.

Advancing Women's Rights Through Islamic Law: the Example of Morocco.¹⁹ The author in this literature discussed the Moroccan new Family Law Code 2004 as a success and a case study for the use of Islamic law to advance international law and women's rights. It is therefore a relevant literature to consult in this research. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Morocco's Imperfect Remedy for Gender Inequality²⁰ this literature is very relevant. It touched and explained the new rights the law Moudawana of Morocco gave the women but concluded by stating that the law is very far from the common man in terms of implementation. This he attributed to lack of education and enlightenment, poverty among others. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

The implementation of Morocco's 2004 Family Code, Moudawana: Stock-Taking and Recommendations²¹ this material is very rich in terms of analysis of the Moudawana, 2004 content and statistical account on the level of

¹⁹ Hursh, J. Advancing Women's Rights Through Islamic Law: the Example of Morocco 27, Berkeley J, Gender L & Just 252, 2012.

²⁰ Gomez-rivas, C. Morocco's Imperfect Remedy for Gender Inequality, Published in MER, 247.

²¹ Hanafi, L. The implementation of Morocco's 2004 Family Code, Moudawana: Stock-Taking and Recommendations. Last visited 25 November 2015.

compliance and practice among the citizens of Morocco. As much as it supports the reform of the Family Law Code, it also mentioned how the level of implementation is poor due to lack of education of those at the grassroots of their rights as Muslim women. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

***Ijtihad*: a source if Islamic Law and a tool of making Islamic Law Relevant to contemporary issues.**²² This material is very relevant as it extensively discuss the concept of *Ijtihad* and relating its applicability in the Muslim society at all times to keep the laws of the *Shari'ah* relevant to all situations irrespective of time and space. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Polygamy under Islamic Law: An Appraisal of the Law and Practice.²³

This literature is very relevant as it discussed in it, the legal basis for polygamy, the practice among the Muslims and the need for laws to regulate the practice of polygamy among the Muslims. The gap left here which this research intends to

²² Mustafa,Z and Nassarawa, I.A. *Ijtihad: a source if Islamic Law and a tool of making Islamic Law Relevant to Contemporary issues*, LL.M Seminar Presentation, Faculty of Law BUK, 2011.

²³ Badamasiyyu, J. *Polygamy under the Islamic Law: An Appraisal of the Law and Practice*, Faculty of Law, BUK, Kano.

fill is that the above literature did not discuss whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Comparative analysis of laws of some Muslim states regulating justice and sharing of time in a polygamous home.²⁴ This literature discussed the nature of equality expected of a husband with regards to his wives in a polygamous home. The gap left here which this research intends to fill is that the above literature did not discuss its subject matter with reference as to whether or not the new Code of Family Law is in strict compliance with the provisions of the *Shari'ah*.

Shari'ah the Islamic Law²⁵ is a book that is very relevant, where he discussed justice as respect to people. Also explanation on how the *Shari'ah* does not accommodate any modification in the rule of perfect justice. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law of Morocco is in strict compliance with the provisions of the *Shari'ah*.

Women and the dissolution of marriage in Islam.²⁶ This literature is also very relevant to this work, it is written on Islamic family law generally, where

²⁴ Wada, S. Comparative analysis of laws of some Muslim states regulating justice and sharing of time in a polygamous home, LL.M Seminar Presentation, BUK, 2014.

²⁵ Do, i A., *Shariah the Islamic Law*, London, Taha Publishers, 1984 pp9-10

²⁶ Ahmad. A. M., *Women and The Dissolution of Marriage in Islam*, available in www.Islam.gov.my/sites/default/file, Last visited on 17/02/2015

discussion on excuses for dissolution of marriage under Islamic law was provided, also it discussed methods of dissolution of marriage in Islam and nature of rights of each spouse to terminate a marital union, definition of *Khul'i* technically was made available, and also discussed extensively on compensation in *Khul'i*, legal basis of *Khul'i* in Islam, and lastly the effect of *Khul'i* under Islamic law. The gap left here which this research intends to fill is that the above literature did not discuss whether or not the new Code of Family Law of Morocco is in strict compliance with the provisions of the *Shari'ah*.

The Practice of Muslim Family Law in Nigeria²⁷ The book was written on Islamic family law generally, and the author discussed modes of separation of marriage under Islamic law. No reference is made to how countries that provide reforms in their Family code on the basic rules governing separation under the *Shari'ah*. This is the gap this research seeks to fill.

The Evolution of *Shari'ah* Divorce Law: Its Interpretation and Effect on Women's Rights to Divorce,²⁸ Is also very relevant to the work, it discusses the characteristics, nature and types of divorce, he also discussed right given to a women to terminate matrimonial relationship. Jurists discussed extensively the modes of separation of marriage under Islamic law as highlighted above,

²⁷ Ambali .M.A., The Practice of Muslim Family Law in Nigeria, Tamasa Publishing Company, Ltd, Zaria (Kaduna) Second Edition (1997).

²⁸ Mohammad.M., The Evolution of Shariah Divorce Law: Its Interpretation And Effect on Women's Rights to Divorce, www.albanygovernmentlawreview.org, Last Visited on 14/11/2015

some of the literature were written on Islamic family law generally, while some specifically provided discussion on separation of marital union in Islam, interestingly some of these works were written on the Maliki school only e.g. **Taqribul ma'any ala matnir Risalah, Annawadir wazziyadat ala ma fil mudawwanati minal ummahat, and Al-mudawwanah AL-kubrah.**

Indeed a lot of authors have written numerous works on the Muslim Family Code of Morocco (Moudawana) as seen above, but none of the literatures were written exclusively or specifically on compatibility of the family code with the provisions of the *Shari'ah*. In view of that, this research work aims at bridging the literature gap by focusing squarely on the compatibility of the selected provisions of Morocco Family Code with the provisions of the *Shari'ah*.

1.9 ORGANIZATIONAL LAYOUT

The research will be broken down into chapters for clear articulation of points:

Chapter One contains the Background of the Study, Statement of the Problem, the Research Question, Aim and Objectives, Significance of the Study, Scope and Limitation, Methodology, Literature Review and Organizational Layout.

Chapter Two will be containing the meaning and Sources of Islamic Law, the primary, secondary and tertiary sources, Application of the sources of Islamic Law in administration, Deduction from Islamic Laws, General Principles of Jurisprudence (*Fiqh*) and Jurisprudential Mxims.

Chapter Three will discuss the extent to which the jurists can go in modifying some provisions of the *Shari'ah* using the principles of *Ijtihad*.

Chapter Four will discuss the rights of spouses under the Islamic Law.

Chapter Five will contain a Critique of some selected provisions of Moudawana in light of the Provisions of the *Shari'ah*.

Chapter Six will deal with Summary, Conclusion, Findings and Recommendations.

CHAPTER TWO

SOURCES OF ISLAMIC LAW

2.1 INTRODUCTION

Islam, a holistic religion, stipulates regulatory frameworks encompassing all aspects of human life: spiritual, social, economic, and political. The *Qur'an*, among other things, provides guidance about social systems, economic ideologies and systems, governmental responsibility, law of inheritance, family law, equality of people, and social justice. Islam is thus said to be a combination of religion, culture, tradition, and civilization²⁹.

Islam, having the Unity of God as its fundamental principle, literally means peace and ‘submission’ demonstrated in the spirit of worshipping God (completely submitting to His will). The two fundamental sources of Islamic principles and dicta are the *Qur'an* and the *Sunnah* of the Prophet (SAW) Muhammad (SAW). The verses in the *Qur'an* are divided into two groups: clear or decisive verses and allegorical verses *Qur'an*³⁰. The *Qur'an* a “guidance for mankind” revealed to Prophet (SAW) Muhammad (SAW) between 610–632 CE cover three wide areas: the science of speculative theology (e.g., in comprehending, establishing, and maintaining human beings’ relationships with the Creator), ethical principles (e.g., about economic relationships and systems; roles and qualities of the leaders), and

²⁹ Hasan, S. Islamic Jurisprudence: Sources and Traditions Creating Diversity in Human Relationships Department of Political Science, United Arab Emirates University, Al Ain, UAE e-mail: samiul.hasan@yahoo.com p23

³⁰ Qur'an 3:74

rules of human conduct (e.g., law of inheritance, relationships within and across genders, and with the followers of other religions)³¹.

There are 3 sources that can qualify as the sources of Islamic Law and they are: Primary, Secondary and Subsidiary sources.

1. **Primary Sources:** This comprise the *Qur'an* and the *Sunnah* of the Prophet (SAW) Muhammad (SAW).
2. **Secondary Sources:** These are made up of *Ijma'* (i.e the consensus of the companions of the Prophet (SAW)) and *Qiyas* (i.e. The analogical deduction by the experts on Islamic Law of new cases from the original sources i.e. the *Mujtahudun*).
3. **Subsidiary Sources:** These sources consist of legal tools used by experts on Islamic law to derive new rules from primary sources. These include: *Istih'san* (i.e. legal preference); *Istislah* (public welfare); *Istishab* (linking of subject matter); *urf wal'adat* (custom and usage) and *sad al-dharai* (blocking the means).

2.2 PRIMARY SOURCES

A. THE *QUR'AN*

³¹ Hassan, S. Op cit p24

The *Qur'an* is the foremost primary source of Islamic Law. This book is a divine revelation providing law for man. It is guidance for all time and an explanation of the truth; a complete exhortation a clear message containing commandment and a criterion distinguishing between the truth and the falsehood, and in fact, a warrant from the Almighty Allah to all human being.³²

In the following lines, we shall read a few passages from the *Qur'an* on its value;

i. *QUR'AN AS A GUIDE FOR THE PIOUS PEOPLE*

This is the book; in it is sure guidance, without doubt, to those who fear God (that is, those who are pious)³³

ii. *QUR'AN AS A DECLARATION FOR MANKIND*

This is a declaration for mankind, guidance and admonition unto those who fear God.³⁴

iii. *QUR'AN AS A COMPLETE EXHORTATION FROM ALLAH*

³² Doi, A. Op cit page 21-22

³³ Qur'an 2:2

³⁴ Ibid 3:138

O mankind! There has come to you a complete exhortation from your lord, and a healing for the diseases in the hearts, and for those who believe, a guidance and a mercy.³⁵

iv. *QUR'AN* AS A CLEAR MESSAGE FOR MANKIND

Here is a clear message for mankind: let them take warning there from, and let them know that He is (no other than) one God; let men of understanding take heed³⁶.

v. *QUR'AN* AS A CRITERION OF RIGHT AND WRONG

Blessed is He who sent down the criterion (of right and wrong) to His servant that he may be a Warner to all creatures.³⁷

In addition to the above description given, all the *Qur'anic* provisions are not subjected to any form of amendment, modification or suspension. As such, every aspect of it is immune from alteration or changes for ever.

We have indeed, without doubt sent the message and we will assuredly guard it (from corruption)³⁸.

And most assuringly, Allah (SWT) promises to guide it forever from all forms of interpolation, corruption and human intervention:

³⁵ Qur'an 10:57

³⁶ Ibid 14:52

³⁷ Ibid 25:1

³⁸ Ibid 15:9

No falsehood can approach it from the front or behind it. It is sent down by One full of wisdom, Worthy of all praise³⁹.

However, the *Qur'anic* legal provisions, in some instances, do not give detail or comprehensive instruction in all topics. What it commands are few basic law or sets of general principles of law which are subjected to interpretation given by the Prophet (SAW) to explain them. These provisions are spread over many pages so that it needs diligent sorting out of these verses from different chapters on each subject of discussion.⁴⁰

Qadri tries to emphasize that the *Shari'ah* legal system is presets by Allah through a gradual process (*tadrij*) towards ideals for universal realization of lessening of the difficulties of man or by blocking all forms of human difficulties or narrowness (*adam al-harj*) leading to pain and failure.⁴¹ The aim is to achieve a community (*Ummah*) justly balanced to serves as model for all nations.⁴²

According to him:

The above goes to show the extent of the *Qur'an* as a source of law in Islamic Law. Law or *hukm* is one which is established by communication or *kitab* from God... the book contains maxims,

³⁹ Qur'an 41:42

⁴⁰ Philips A.A.B.: The Evolution of Fiqh (Islamic Law and the Madhhab), International Islamic Publishing House, Jeddah, Saudi Arabia, 1990, page 11-12

⁴¹ Qadri A.A – Islamic Jurisprudence in the Modern World, Taj Company, Delhi, India, 1963, page 18.

⁴² Qur'an 2:143

principles, and indications, general or fundamental methods of approach towards human conduct in general. It has a place as of a constitution or a fundamental code of law. The basic principles of law in Islam are derived from these fundamental outlines of the *Qur'an*.⁴³

Therefore, the *Qur'an* as a source of law validates other laws and tries to establish human conduct at a universal level towards what Philips refers to as;

1. Removal of difficulties or burden on man.⁴⁴
2. Reduction of religious obligations⁴⁵
3. Realization of public welfare.⁴⁶
4. Realization of universal justice⁴⁷.

Allah intends every ease for you and He does not want to put you in to Difficulty...⁴⁸

They ask you what is lawful to them: Say: lawful unto you are (all) things good and pure....⁴⁹

O you who believe! Eat not your property up among yourselves in vanities: but let there be among you commerce and trade by mutual agreement, nor kill (or destroy) yourselves; for surely, Allah has been so merciful to you.⁵⁰

⁴³ Qadri Op cit, page 188.

⁴⁴ Qur'an 2:286; 2:185; 22:78:4:28

⁴⁵ Ibid 43:24;5:5;2:173;5:104

⁴⁶ Ibid 4:29;9:103; 5:94

⁴⁷ Ibid 4:29;5:9;16:90

⁴⁸ Ibid 2:185

⁴⁹ Ibid 5:5

⁵⁰ Qur'an 4:29

O you who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Do justice: that is next to piety: and fear Allah for Allah is well acquainted with all you do.⁵¹

B. *SUNNAH*

Sunnah is the second primary source of the *Shari'ah* legal system. Ahmad as cited by Waliullah defines *Sunnah* to mean “the words, the acts and the acquiescence of the Prophet (SAW) and the words and acts of his companions”, while *Hadith* according to the quoted scholar “means the words of the Prophet (SAW) only.”⁵²

“The words *Sunnah* literarily means way, custom, habit of life, and technically, it is defined by the jurists as the utterances of the Prophet (SAW) (other than the *Qur'an*) known as *Hadith*, or his personal acts, and acts and saying of others tacitly approved by him.”⁵³ He further adds:

Hadith really means a report representing and account of what happened, whereas *Sunnah* means a practice or custom. In short,

⁵¹ Ibid 5:9

⁵² Waliullah M. Muslim Jurisprudence and the Qur'anic Law of Crime, Taj. Company, Delhi India, 1986, page 15-16.

⁵³ Qadri, op cit, page 189.

the *Sunnah* is what was practiced and the *Hadith* is the record of what was practiced.”⁵⁴

In essence, the two are used synonymously, meaning the words (*aqwal*), actions (*af'al*) and silent approvals (*taqriri'at*) of the Prophet (SAW). It is referred to as hidden revelation (*wahy khafi*) which tries to explain the legal act of either commission or omission to be performed by a legally capable person.⁵⁵

It must be noted that the position of the *Sunnah* as a source of Islamic law is premised on the need to understand the legal implication of what the *Qur'an* has legislated. Not one can understand the requirements or the correct interpretation except one to whom the message was sent to. What is clear is that the *Qur'an* has legislated on the basic rules and some general principles of law. The explanation thereof left the bulk of social, political, constitutional and international law for the Prophet (SAW) to develop from the principles already laid down in the *Qur'an*.⁵⁶

The consequence of this position made the Prophet (SAW) as the sole person charged with the responsibilities of explaining the *Qur'anic* provisions (Q16:44), to act as the conveyor of law (*Hukm*) of Allah (Q5:67) to mankind. This

⁵⁴ Op. cit, page 190

⁵⁵ Kamali M.H Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, U.K, 1991, page 50.

⁵⁶ Al- Faruqi I. and Al-Faruqi L. – The Central Atlas of Islam, Macmillan Polishing Company, New York, 1986, page 112-113.

conveyance or explanations led to further development of various branches of *Shari'ah* law like the family law (*Ahwal as-Shakhsiyyah*), contract and commercial law (*Muhamalat*) law of crime or criminal law (*Uqubat*) administrative law (*Ahkam al Sultaniyyah*), constitutional law (*Ahkam ad-Dusturiyyah*) international law (*'ilmas-siyar*) and Islamic law of evidence (*Murafa'at*) etc.

Apart from these functions of conveyance or explanation of the law (*hukm*) of Allah as set down in the *Qur'an*, the Prophet (SAW) had the capacity to legislate law not clearly mentioned by Allah. These responsibilities are confirmed by the following verses;

He made lawful for them the good (and pure) things and forbade them the bad (and impure)⁵⁷

And;

Whatever the messenger gives you, take it; and whatever he forbids you, leave it.⁵⁸

However, not all *Sunnah* are legally binding in all circumstances. There are *Sunnah* that are consisted of the Prophet (SAW)'s natural activities (*al-afal-jibilliyyah*) like how he ate, slept, dressed etc., they are the *Sunnah* without any legal connotation (*Sunnah ghayar tashri'iyyah*). Other types are the *Sunnah*

⁵⁷ Qur'an 7:157

⁵⁸ Ibid 59:7

dealing with legal provisions (*Sunnah tashri'iyah*) because their provisions consist of conducts of the Prophet (SAW) like his “acts, sayings, or tacit approvals, which incorporates the rules and principles of the *Shari'ah*”.⁵⁹ On that, according to Kamali, the *Sunnah* is binding on all;

Regardless of individual circumstances, social status, or political office. In acting upon these laws, the individual normally does not need any prior authorization by a religious leader or the government.⁶⁰

The implementation of the *Sunnah* as a source of the *Shari'ah*, as a general rule, necessitates the need to know its position in-law whether any act, saying or silent approval reported from the Prophet (SAW) “Constitutes an obligation (*Wajibaat*), Commendation (*Mandubaat*) or Lawful *ibahat* on the one hand or Prohibition (*Tahrimaat*) or Abomination or *karahat* on the other hand.” And according to Kamali;

When the direction of an act is known from the evidence in the sources, there remains no doubt as to its value. Alternatively, the *Sunnah* may itself provide a clear

⁵⁹ Kamali, Op cit., page 51.

⁶⁰ Ibid p51.

indication as to whether a particular rule which it prescribes is *Wajib*, *Mandub* or merely permissible.⁶¹

2.3 SECONDARY SOURCES

The secondary sources of the Islamic law comprise two other sub-divisions. They are; (a) *Ijma'* and (b) *Qiyas*

A. *IJMA'* (THE CONSENSUS OF OPINIONS)

Ijma' literally means “decision and Consensus”. However, jurisprudentially, Qadri defines *Ijma'* as “the consensus of the Muslim jurists of any particular period concerning a *Shari'ah* value.”⁶² Kamali, however, limited the unanimous agreement to any legal matter arrived at by the *Mujtahidun* (i.e. experts or jurists who are specialized in Islamic law) among the Muslim community of any generation after the demise of the Prophet (SAW). What this implies under the law is that it must be universal “consensus of opinion of the companions of the Prophet (SAW) (*Sahabah*) and the agreement reached on the decisions taken by the learned “Jurists” or jurists on various Islamic matters.”⁶³

Therefore, *Ijma'* under Islamic law has a “*Shari'ah* value”- being that it serves as a source of generating law and comes next after the *Qur'an* and the *Sunnah* of the

⁶¹ Kamali, op cit., page 53.

⁶² Qadri., op cit, page 1999

⁶³ Kamali, op cit. page 164-170.

Prophet (SAW) (SAW).⁶⁴ But unlike the two primary sources (i.e. the *Qur'an* and the *Sunnah*), it is not of divine origin. In simple terms, Kamali called it a “doctrine and proof of *Shari'ah*”, and fundamentally, a “rationale proof”⁶⁵ which Qadri considered similar to “opinion prudentium of the Roman law.”⁶⁶

What this means is that it is more of the opinion of the generality of the jurists on a point of law at a particular time. Nevertheless, it is a source of law validated by the *Qur'an* and the *Sunnah* which made whatever law created through this of effect and binding in practice.⁶⁷ In the *Qur'an*, Allah (SWT) said:

O you who believe!, obey Allah and the Messenger and those in authority among you. If you should fall into dispute on anything, refer it to Allah and the Messenger. (Q4:59).

It is to be noted here that “those in authority” referred to in the verse above pointed to, among others, the jurists, as mentioned by Ibn Kathir, on the authority of Ibn Abbas.⁶⁸ In addition to the above *Qur'anic* verse supporting it, the saying of the Prophet (SAW) also added weight behind the validity of *Ijma'* as a means to derived law

⁶⁴ Qadri, Op cit, page 175

⁶⁵ Kamali, Op cit, page 168.

⁶⁶ Waliullah, supra, page 31.

⁶⁷ ibid, page 31.

⁶⁸ Ibn Kathir A.D- Tafseer al-Qur'an al-azeem, Dar el Fikr, Lebanon, 1997, vol. 1, page 320.

My *Ummah* (community) would never agree on anything that will lead them astray.⁶⁹

In addition to all these, *Ijma'* in perspective may be in words (*Ijma' al-qawl*), in deeds or action (*Ijma' al-fil*) or acquiescence (*Ijma' al-Sukut*).⁷⁰ In other way round, if all jurists assented to it without any one left behind in opposition, it becomes a regular consensus of juristic opinion (*Ijma' al-azimah*). But if few of the jurists raise the issue of legal import and no jurist contradict it, it is referred to as irregular consensus (*Ijma' al-Rukhsa*).⁷¹

B. *QIYAS* (ANALOGICAL DEDUCTION)

Qiyas (analogical deduction) comes next to *Ijma'* as secondary sources of law. In literal sense, *Qiyas* means “measuring” or ascertaining the length, weight or quality of something.” In law, it signifies a process where the subject matter to be deduced (*Muqis*) is weighed’ or compared to the existing provision to arrive a new law by way of analogy called effective cause (*illah*).⁷²

By definition, what *Qiyas* means jurisprudentially, is “to extend (*ta’adiyyah*) the *Shari’ah* value from the original case (*or asl*) over to the subsidiary (or far’) by

⁶⁹ Doi, *ibid*, page 65.

⁷⁰ *Ibid*, page 65-67.

⁷¹ Qadri, *Op cit*, page

⁷² Kamali, *Op cit* page 197

reason of an effective cause' (*illah*) which is common to both cases and cannot be understand from the expression concerning the original case alone.⁷³

The above definition given by *Sadr al-Shari'ah*, cited by Qadri and reported by Kamali, identified four main important points in his definitions: these are: original case (*asl*); subsidiary or new case (*Far'*) effective cause or ratio legis (*illah*) and the rule (*hukm*).⁷⁴

On the validity of *Qiyas* and for it to be accepted as a source of Islamic law, it must have been validated by the primary sources (i.e. the *Qur'an* and the *Sunnah*). In the *Qur'an*, Allah (SWT) says:

...think deeply, o you who have understanding...⁷⁵

Or in a similar verse, Allah said;

...in this is a lesson for those who understand...⁷⁶

In the *Sunnah*, two classical examples were mentioned that validate the use of *Qiyas* in developing new situation from old ones. Abu Musa reported that the Prophet (SAW) once sent him as judge to the people of Yemen. While on his way, the Prophet (SAW) advised him saying: "Judge upon the Book of Allah,

⁷³ Qadri, Op cit, p 211, see Kamali, loc cit, pp 199-200.

⁷⁴ Ibid, op cit, p 211, see Kamali, loc cit, pp 198-199. see also Ambali Op cit P 10.

⁷⁵ Qur'an 59:2

⁷⁶ Ibid 3:13

and if you do not find in it what you need, rely upon the *Sunnah* of the Prophet (SAW), and if you do not find guidance in the two, then use your opinion.⁷⁷

The other example is when Muadh ibn Jabal was sent to Yemen. He was asked what he would use in judging the people. He mentioned the *Qur'an*, then the *Sunnah* of the Prophet (SAW) and where the two are silent upon the subject of discussion, he would apply his own *Ijtihad* (i.e. by exercising his reason to deduce a legal rule). The Prophet (SAW) patted his back, saying:

Praise be to Allah, who has disposed His Messenger's messenger to something which Allah's Messenger is pleased.⁷⁸

2.4 SUBSIDIARY SOURCES

In addition to the primary and secondary sources of *Shari'ah* law, there are other classifications under the categories of subsidiary instruments of law. These include;

A. ISTIHSAN (LEGAL PREFERENCE OR EQUITY IN ISLAMIC LAW)

This system of deriving rules from the Islamic sources of law was used by Abu Hanifah "to settle Fiqh rules in conformity with the requirements of everyday life, equity or social conditions." Kamali likens it to the principle of equity under the Common Law in the sense that, to a certain extent, it was "inspired by the

⁷⁷ Qadri, op cit, page 213.

⁷⁸ Al-Alwani T.J- Source Methodology in Islamic Jurisprudence, International Institute of Islamic Thought, Herndon, Virginia, U.S, 1981, p 13

principles of fairness and conscience, and derives legitimacy from a belief in natural rights or Justice beyond positive law.”⁷⁹ Philips simplify it further by adding that the resort to its application “involves the preference of an opinion based on circumstantial need over an opinion based on *Qiyas*.”⁸⁰

Linguistically, it has its root in the words: “*hasuna*”, which implies “something that is good or beautiful.” However, jurists see it as a “Scientific method of exercising personal opinion in order to avoid any rigidity and unfairness that may result from the literal enforcement of the existing law.” This may be done by “setting aside the literal and established analogy in favour of an alternative ruling which serves the ideals of justice and public interest in a better way.”⁸¹

Jurists resort to *Istih’san* (elegantia juris) as one of the subsidiary sources of law with a view to reducing the hardship of the people and producing ease which is the ultimate purpose of the *Shari’ah* law. Al-Sarakhsi, one of the Hanafi jurists in a comprehensive analysis of the process sees the method as an attempt to live the *Qur’anic* life to the best. According to him;

“Avoidance of hardship is a cardinal principle of the religion”

itself. He further buttresses this point by supporting his

⁷⁹ Kamali, Op cit, page 245

⁸⁰ Philips, Op cit page 61.

⁸¹ Kamali, Op cit, page 246-247.

argument with the following verse of the *Qur'an* and the *Hadith* of the Prophet (SAW).⁸²

In the *Qur'an*, Allah was quoted to have said:

... Allah intends ease for you, and He does not want to put you in hardship...⁸³

In the *Hadith*, the Prophet (SAW) was reported to have said:

The best of your religion is that which bring ease to people.⁸⁴

So far, for its validity, *Istih'san* derives its legality from the *Qur'an* and the *Sunnah* through interpretation. In the *Qur'an*, Allah (SWT) says:

Those who listen to the word and follow the best thereof; those are the ones whom Allah has guided, and those are the ones endowed with understanding.⁸⁵

B. ISTISLAH OR MASLAHA MURSALA (CONSIDERATION OF PUBLIC INTEREST)

Maslaha by literal meaning implies “benefit” or “interest”. Under Islamic jurisprudence, it means any consideration in harmony with the objective of the

⁸² Kamali, Op cit page 247.

⁸³ Qur'an 2:185

⁸⁴ Kamali Op cit, page 247

⁸⁵ Qur'an 39:18

law-givers. Once a problem is raised and a solution is found to prevent harm and secure benefit to the people, it become a source of law under *Shari'ah*.⁸⁶

Maslaha is likened to public policy under the English Common Law. It differs in a higher sense for the fact that, it works towards the objectives of the law and never a law by itself. Ibn Qayyim, as cited by Kamali, pointed out that what *Maslaha* was meant to achieve is to establish a law oriented policy (*Siyasa al-Shari'iyyah*) which will, in the long run, bring the people (i.e. the beneficiary) closer to well being and move them away from corruption (*fasad*) or destruction.⁸⁷

In essence, *Maslaha* may be accredited (*Maslaha al-Mu'atabarah*), validated (*Maslaha Mursala*) or discredited (*Maslaha al-Mulgha*). The goal is to establish highly necessary or essential provisions (*Daruriyyah*) or form of embellishment or perfection (*Tahsiniyyah* or *Kamaliyyah*) one that which is supplementary or complementary to the rule of law.⁸⁸

C. ISTIDLAL (LEGAL DEDUCTION FROM OTHER SOURCES OF THE LAW)

⁸⁶ Kamali, Op cit, page 267

⁸⁷ Ibid, page 271.

⁸⁸ Kamali Op cit page 271-273.

Istidlal literally means “seeking proof of something”. In jurisprudential meaning, it is regarded as legal process where a new rule is deduced from a basis of a rule.”⁸⁹

Basically, this process employs methodology to establish a new rule by “seeking guidance, basis and proof from the sources although its dictionary meaning is merely an argumentation.”⁹⁰

In this way, there is employment of legal method to infer a point from another by seeking similar and essential point shared by the questions of law. Jurists from the Hanbali School of Law are exponents of this instrument and make use of it in deriving a new case from the original one.

D. *ISTISHAB* (LEGAL PRESUMPTION OF CONTINUITY)

Literally, *istish'ab* can be referred to as “escorting” or “companionship.” It may be continuance of legal conditions from the past to the present.”⁹¹

⁸⁹ Qadri, Op cit, page 226-227.

⁹⁰ Doi, Op cit, page 82

⁹¹ Qadri, Op cit, page 227

According to Ash-Shafi', cited by Qadri, it is a kind of process of "seeking for link" over a practice that has been proven and widely established and found to be legal in the past and to presume it to be so in the present time unless there is evidence of a proven change." It is therefore formulated by the Ash-Shafi' School of thought.⁹²

This is expressed in the Common law maxims: *Omnia praesumuntur legitimize facta donec probetur in contrarium* (meaning, all things are presumed to have been legitimately done, until the contrary is proved). Or in another maxim: *Stabil praesumptio done probetur in contrairum* (Meaning, all things are presumed to have been legitimately done, until the contrary is proved).⁹³

Under the Common law, it is likened to a legal presumption of the existence of a previous fact or returning to the *status quo ante*. Moreover, we must be quick to point out that the *Shari'ah* limits its application to the procedural aspect of law only. This is justifiably accepted except one can obtain proof to its contrary. The reason is that, this kind of presumption is based on

⁹² Ibid, page 227.

⁹³ Rutherford L. and S. Bone – Osborn's Concise Law Dictionary, Sweet & Maxwell, London, 1993, pp237, 309.

probability and it is most useful under the principles of evidence and not a law by itself.⁹⁴

What this implies is that, if there is clear evidence (*dalil*) from the primary texts, it will not be applicable. Its applicability is rooted in a condition where there is no evidence from the textual authority (*nass*). In that case, a question of law that falls under obligation is presumed to be permissible and obligatory or, on the other hand, one duty that came under prohibition will be forbidden except there is clear proof asserting the contrary.⁹⁵

E. *SADD AL-ADHARA'I'* (BLOCKING THE WAYS OR THE MEANS)

Sadd literally means “blocking” while *Dhara'i*, on the other hand, implies any means to reach a certain end. In technical connotation under *Shari'ah* law, it means “blocking the means to an expected end which is likely to materialize if the means toward it is not obstructed.”⁹⁶

This process is also one of the subsidiary sources of Islamic Law. The goal which the jurists want to achieve in using it is to block every means to which a

⁹⁴ Kamali, Op cit, page 289-299.

⁹⁵ Ibid, page 298-299.

⁹⁶ Kamali, Op cit, p 310.

bad consequent may be caused. This, they meant to do by blocking the source of an evil before it actually materializes.

In that way, sometimes, the blocked action or source may be legal and justified, but because it will lead to evil, immoral, unlawful act or a terrible situation, the jurists employed this principle of the *Shari'ah* that encourages blocking harm and preventing difficulties. The means and an end, which when connected, may lead to immorality or evil consequences are thereby blocked or foreclosed.⁹⁷

F. 'URF (CUSTOM)

These are customs or usages translated in the rules or manner prevailing within a selected community. Before the advent of Islam, there were pre-*jahiliyyah* customs or usages which were not opposed to the *Islamic* law. These sets of customs and usages continued to be applicable without being abrogated by the Prophet (SAW) and were allowed to subsist or become common usages, valid under the Islamic law.⁹⁸

⁹⁷ Ibid pp 311-312.

⁹⁸ Qadri, Op cit, page 227

The basic principle laid down is that for any custom or usage to become a source of law, it must be an approved type of custom (*al-‘urf as-sahih*), not one disproved (*al-‘urf al-fasid*).⁹⁹ This means it must be acceptable by the community of Muslims concerned as something good and not the contrary.

2.5 APPLICATION OF THE SOURCES OF LAW IN ADMINISTRATION

In the administration of Islamic Law, the sources of law are a cardinal requirement for attaining justice. In this sense, laws can only be effective and binding to the extent of their validity based on their authentic sources. No law can be taken as valid under the Islamic law if it has no authoritative link to the two primary sources (*Qur’an* and the *Sunnah* of the Prophet (SAW)). It therefore implies that if the authority from these two sources is absent, weak or doubtful, whatever law or principles of law derived or established based upon it will be void *ab initio*, and of no legal consequence.

As a result, a judge under the Islamic law tries to discover the *ratio decidendi* of any case by searching first from the sources of the law before resort to his own personal reason (if no clear text exists). Once he can find the basis (*asl*)

⁹⁹ Kamali, Op cit, page 286-289.

of the decision before him, he decides the case on the authority of the available law. If he did otherwise, his reliance only on human reason without divine guidance cannot be free from oppression, injustice and rebellion. These elements, if present in the society, often lead to chaos, disorder and lack of peace. And this is what the Islamic law seeks to prevent and eradicate.

Shari'ah law is not an arbitrary creation of law by the legislators. The basic sources are already established, particularly the *Qur'an* and the *Sunnah* from which competent jurists can derive the law. These primary sources may be likened to *stare decisis* under Common law in which the precedents set therein “are authoritative and binding and must be followed.”¹⁰⁰

However, where a jurist is to determine a new case (*res integra*), he has to do this by deducting or extracting it from the sources. This he can do by employing *Istidlal* (i.e. deduction of argument from the sources). Unlike Common law where judge tries to seek a common front between the previous *Ratio decidendi* and the new case, an Islamic law judge goes farther. He tries to find the legal principle common to both the old case (*asl*) and the new one (*far'*), seek the similarities between their roots through critical analysis,

¹⁰⁰ Rutherford L.Op cit, p 310.

measuring the weight of each argument and laying it before the fundamental objectives of the *Shari'ah* (*Maqasid as-Shari'iyah*) before arriving at a conclusion.¹⁰¹

2.6 DEDUCTION OF LAWS FROM THE *QUR'AN*

The legal provisions in the *Qur'an* fall in to two categories: there are verses that are *Mutashabihat* (allegorical like the *muqatta'at* or abbreviated letters, for example *Alif Lam Mim*) whose meanings are only known to Allah.¹⁰²

Others are jurisprudential (*Muhkamat*), defined by Ali (1975) as “basic or fundamental (of established meaning)”,¹⁰³ or what is described to comprise “the verses of *al-Ahkam* (commandments), *al-Fara'id* (obligatory duties) and *al-Hudud* (Legal laws for the punishment).¹⁰⁴

Therefore, the jurists main concern on legal issues is to find those textual rules from the proofs of *Shari'ah* law (*adillat as-Shari'iyah*). These come in form of transmitted textual proofs (*adillat naqaliyyah*) supported by rational proofs (*addillat'aqaliyyah*). These proofs, indication or evidence (*dalil*), furthermore, may be definitely proven or of proven authenticity from the *Qur'an* (*Qat'i*

¹⁰¹ Ambali M.A. Op cit p10-11.

¹⁰² Qur'an 3:7

¹⁰³ Ali A.Y The Glorious Qur'an Translation and Commentary, Islamic Foundation, Leicester, U.K., 1975, page 460.

¹⁰⁴ Al-Hilali M.T and Khan M.M- Translation of the Meaning of the Noble Qur'an, King Fahd Complex for the Printing of the Holy Qur'an Riyadh, Saudi Arabia, 1993 page 68.

ath-thubut) or speculative authenticity from solitary *AHadith* (*Zanni al-thubut*) authority.¹⁰⁵

The jurist will try to find the proof whether in a plain sentence (*ibarah*) of the *Qur'an*, or from hinted verses in the text (*Isharah*), or in the words of argument of the case (*dalala*) or the citation of a condition for its existence (*Iqtida*).¹⁰⁶

Having established this, there is need to know whether the content of the text is meant for general application (*'Amm*) or restricted to specific use (*Khass*). Then, if that is the case, what is the nature of the language use? Is the text use in their literal meaning (*haqiqi*) or figuratively or metaphorically (*Majazi*)? Or, in addition, is the text considered an abrogating *Shari'ah* value (*Naskh*) or abrogated (*Mansukh*) one?¹⁰⁷

Furthermore, since the *Qur'an* is an independent proof or proof on its right (*dalil al-mustaqil*), the texts are distinguished. Thus the texts may be on matters of conduct (*amaliyyah*), beliefs (*I'ttiqadiyyah*), ethics (*wijdaniyyah*) or legal (*tashri'iyyah*). The texts are distinguished. The jurists then look into the

¹⁰⁵ Kamali M.H Op cit, p9-12.

¹⁰⁶ Qadri A.A Op cit pp182-183.

¹⁰⁷ Kamali, Op cit, page 24-27.

legal deriving text in the light of the new case study. These legal (*tashri'iyah*) texts are estimated by some scholars to be about three hundred, while, according to as-Suyuti, cited by Doi, they are estimated to be about five hundred verses.¹⁰⁸

The jurist having considered the legal text involved, will try to analyze it further is the commandment set therein partly detailed or partly not (*Ahkam al-mujmal wal mufassal*) like injunctions on war, issues on Prisoners of War etc; Or are the verses at hand inconclusive or without detailed rules (*Ahkam al-mufassil*) like law on theft, retaliation, defamation. And in fact, there are others that have no clear cut explanations like the issues of public interest, types of government, etc.¹⁰⁹

In addition, where the texts are perspicuous (*muhkham*) needing no further argument or are explained in detail (*mufassal*), there is no need for any further interpretation or explanation. But many of the texts have inherent hidden (*Khafi*) meanings or the words used may have several significances (*mushatarik*). For example, the word '*ayn* may mean eye, fountain; the sun

¹⁰⁸ Doi Op cit page 36

¹⁰⁹ Doi Op cit pp 38-39.

etc., depending on the context.¹¹⁰ In fact, the text may at times have many possibilities (Mu'awwal)- like the word *nahr* which to Imam Abu Hanifa means “to slay” but which Ash-Shafi’i considered to mean “placing hands on the chest while praying.”¹¹¹

One of the possible constructions of the texts is that they may be definitive and explicit from the words of the *Qur'an* (*mantuq*) or implicit whose meaning could be implied from the logical construction of text and context (*mafhum*).¹¹² After all the above comparison, analysis, construction and recognition of texts are done, the jurist then tries to find the category of the legislation (*hukm*). Is it those rules that establish criterion of obligation, one that can be called law-creating obligation or provision that may be considered as one creating the condition (*shart*) for the rules (*hukm al-wad'i*).¹¹³

In *hukm al taklifi*, the provisions are primary rules that demand commission (*amr*) or omission (*nahy*) of an act. Such commission of act may be expressed in binding or absolute terms creating an obligation therefore become compulsory (*wajib*) or permitted (*Haram*). It may sometimes convey a

¹¹⁰ Kamali Op cit, p 95-101

¹¹¹ Qadri, Op cit. p180

¹¹² Kamali, Op cit, page 131.

¹¹³ Nyazee I.A.K. Theories of Islamic Law, International Institute of Islamic Thought and Islamic Research Institute, Islamabad, Pakistan, 1994, page 56, 66-67

prohibition (*tahrim*) or omission in absolute term conveyed as prohibition (*nahy*) and therefore forbidden (*haram*).¹¹⁴

Sometimes the provisions are not expressed in absolute terms. If such thing demands commission of an act it may be a recommendation (*nadab*) and as such, acting on it may be recommended (*mandub*). The act may be of mere permissibility (*ibahat*) and as such permissible (*mubah*) in *Shari'ah* value. On the other hand, the demand may be the omission of an act also not in binding terms. In such way, it is either an abomination (*karahah*) which under law is reprehensible (*makruh*).¹¹⁵

The application of the deduced new rules by the jurist then proceeds further for other consideration but only after two things are well thought-out;

- 1) Did the established new rules meet the condition (*shart*) that determines the invocation of the law?
- 2) Are there any sets of facts that may prevent the doing of the act (*mani'*) or that should have made the act an obligation, supposing they did not occur?¹¹⁶

¹¹⁴ Hammad A.Z. Ghazalis's Juristic Treatment of the Shariah rules in al-Mustasfa, in the American Journal of Islamic Social Science, vol. 4, No. 2. December 1987, page 160-167.

¹¹⁵ Nyazee, p 64, see also Hammad, Opcit p 160-167

¹¹⁶ Ibid p 67-68.

In the first question, for the creation of obligation (*taklif*), the subject must possess legal capacity (*ahliyyah*), capability (*qudra*) etc.¹¹⁷ on the second question, nothing should serve as vitiating elements like unsound mental capacity (*junun*), immaturity (*ghar baligh*), absence of Islam (*Kufr*) and presence of social condition like ill health (*maradh*) or similar legal barriers. Once these are taken into consideration and the law has met all the conditions, then it becomes applicable.¹¹⁸

2.7 DEDUCTION OF LAW FROM THE *SUNNAH*

If the effort to deduce the new case from the *Qur'an* could not be established, the jurist tries to extend his search to the *Sunnah*. *Sunnah*, in general terms, is categorized as legal (*Sunnah tashri'iyah*), non-legal (*Sunnah ghayr tashri'iyah*), and natural activities of the Prophet (SAW) (*al-afal al-jibilliyyah*)- like his way of sleeping which is peculiar to him. Other activities of his regarded as *Sunnah*, are his personal ways of life- like his manner of walking, dressing etc referred to as (*Sunnah al-azawaid*).¹¹⁹

To deduce a new case from the *Sunnah*, the jurist concerns himself with the legal type of *Sunnah* (*Sunnah tashri'iyah*), such *Sunnah* must be open, that is well

¹¹⁷ Hammad, p 164.

¹¹⁸ Nyazee, Op cit p 9-102

¹¹⁹ Kamali. Op cit, 51

known (*mash'hur*), and continuous (*muttasil*) from the authentic compiled *Sunnah*. The content of that *AHadith* must not fall under rejection (*jar'h*) but the accepted (*ta'dil*). Once the *Shari'ah* proof value (*hujjiyyah*) is established and the provision free from distortion (*tadlis*), it becomes a *Shari'ah* value (*hukm*).¹²⁰

Apart from the nature described above, for the fact that clear injunctions from the *Qur'an*, a *Hadith* with continuous chain of narration (*mutawatir*) are definitive (*qat'i*) proofs, does not mean that a jurist will stop at that and just apply it. It must be established further that the evidence is of continuous testimony (*tawattur*), with good and sound transmission (*riwayah*) from the authentic compiled *Hadith*.

Such *Hadith* must be agreed upon (*mutlaq*) an authenticated by the groups of *Hadith* collectors.¹²¹

2.8 DEDUCTION OF LAWS FROM OTHER SOURCES

The choice of other sources depends on the *Shari'ah* value inherent in them which follows a hierarchical order. Thus after *Sunnah*, the jurist tries to deduce the new case from other sources like *Ijma'*. In this way, the established *Ijma' of Sahabah* (according to the majority view), or that of '*amal ahl-al-Madinah* (the practices of

¹²⁰ Ibid, p 68-75

¹²¹ Doi, Op cit, page 51-57

the Jurists of Madina, the Prophet's (SAW) city), by the Maliki school, can be used to deduce the new case.¹²²

Apart from *Ijma'*, secondary sources like *Qiyas* could be used. The subsidiaries sources which are other forms of *Qiyas*, like *Istihsan*, *Istishab*, *Istislah* or *Maslaha*, *Istidlal*, even '*Urf*', are taken one after the other. What the jurist tries to do here is to find out the text relevant to the case from the primary sources. Then if not, he resorts to the secondary and, finally the subsidiary sources where evidences are sources from implicit (*al-khafi*) or explicit (*al-zahiri*) texts.¹²³

These texts must be received (*Sam'i*) evidence from the mentioned text. However, if not, the jurist can then resort to the use of rational ('*aqali*) or employment of ratiocination (*ta'lil*). By foreshadowing the cause of an index (*sabab*) of subject matter or following the description (*wasf*) of the text, he seeks the effective cause (*illah*) of the subject matter and tries to accord preference (*tar'jih*) to the rule of the five objectives (*maqasid*) of the *Shari'ah*.¹²⁴

Based on the similarity with the text from the primary, secondary and subsidiary sources, the jurists can deduce a new law which can interpret the new case as valid

¹²² Philips A.A.B Op cit pp60, 71.

¹²³ Kamali, Op cit. p192-228, also see Qadri, Op cit, p208-228.

¹²⁴ Ibid p196-228, also see Qadri, Op cit, p208-228

(*sahih*), null (*batil*), imperfect (*fasid*), authorized (*nafidh*), unauthorized (*mawquf*), binding (*iazimat*), or not binding (*ghair kazunat*). As a result, the effect of the law formed becomes a legal provision for which the subject matter can be considered.¹²⁵

2.9 GENERAL PRINCIPLES OF FIQH (*QAWA'ID AL-FIQH'IYYAH*)

From the above process, jurists developed some principles which, if details are forgotten, one can still conveniently discern the objectives of the law. They, therefore, serve as a basis of Islamic law, or basis upon which the law can be considered.

2.10 JURISPRUDENTIAL MAXIMS

The above general principles are known under Islamic law as *qawaid al-fiqh'iyyah*. These principles developed all from the substantive aspect of the law. They are different from sources or methodology of law (*usul'*) which are based on the approach to the law. (or procedural aspect). The following legal maxims were among those compiled by Imam Jalaluddeen Suyuti in his book: **Al-Ashbah Wal Naza'ir**. Qadri have quoted the following ones in his book;

1. Presumption of Original Freedom from Liability: That is presumption that a person is free from liability except proven otherwise by the transmitted text.

¹²⁵ Qadri, Op cit, page 240

This is similar to Latin Maxim: *Stacit praesumptio done probetur in contrarium* (meaning that, a presumption will stand good until the contrary is proved).

2. The Continuity of a legally established fact until contrary is proven: That is, something judged to be legal in the past is deemed to be continuously legal except a new fact prove it contrary. This is likens to the Latin maxim: *omnia praesumuntur legitimate facta done probetur in contrarium* (meaning that, all things are presumed to have been legitimately done, until the contrary is proved).
3. Presumption of Generality until a Limitation is placed: that is, a source from the text is deemed applicable to the general populace except there is evidence that limit it to certain premise.
4. Hardship (or *Mashaqqah*) causes the giving of facility: that is, since the Law giver have several instances made mention of making facility and not hardship, every law intended should provide facility and not further hardship.¹²⁶
5. Necessities (or *Darurah*) make forbidden things canonically harmless: that is, the Law-giver has made it a law that in cases of necessity a forbidden act becomes harmless or suspended until the situation improves. This maxim is

¹²⁶ Qur'an 2:185

likened to the Latin one; “*Necessitas quod cogit defendit* (Meaning that necessity defends or justifies what it compelled).

6. A thing permitted on account of an excuse becomes unlawful on the cessation of the excuse: that is, where the Law-giver provides suspension of an obligation because of natural excuses, once the excuses disappear, there is legal presumption that obligation has resumed. This mentioned maxim is likened to that of Latin one: on *cessante ratione legis, cassat ipsa lex* (meaning that, when the reason of the law is ceasing, the law itself ceases).
7. A damage (*or darar*) cannot be put to an end by its like: that is, the doing of damage cannot right the first damage done. Simply put, injury and retaliation by damage is not allowed.
8. To repel a public damage (*darar*), the doing of private damage is preferred.
9. Severe damage is made to disappear by a lighter damage: that is, if a little damage will help in dismantling several damages, it is permitted to do the lighter one.
10. When two wrongful acts (*or fasad*) meet, the remedy of the greater one is sought by the doing of lesser ones: that is, in case where there are two evils, the remedy to the greater one should be pursued even by doing a lesser evil.

11. The smaller of the two harms is chosen: that is, in case where there are two serious harms, the one that appear lesser should be preferred against the one that appear greater.
12. The repelling of mischief is preferred to the acquisition of benefits: that is, it is better to prevent evil from happening than allow the pursuit of good things. Because, if that good is pursued, the evil in it will render it of no effect in law.
13. Whether a want (*hajjat*) be general or whether it be special, that is, public or private nature, it is reduced to the degree of the necessity (*or darurah*): that is, in the situation where the societal needs – be it in general, or special necessity reduces the constraint which strict application will bring about. This can be likened to the Latin Maxim: *Necessitas publica major est quam private* (meaning that, public necessity is greater than private ones).
14. When the receiving of a thing is forbidden, its being given to others is equally forbidden: That is, if the Law-giver prohibits the taking of a thing, giving it out is also forbidden. This is similar to the Latin maxim: *Quano aliquid prohibetur fieri, prohibetur ex directo et per obliquum* (meaning that, when ever anything is forbidden, it is forbidden to do it directly or indirectly).
15. Custom is of force: that is, a custom that contradict no legal text has a binding force among the people. This is similar to the English maxim; *Consue est altera lex* (meaning that, a custom has the force of law).

16.No validity is attached to conjecture which is obviously tainted by errors: that is an obvious error cannot be validated however appealing it may be.

17.A thing established by evidence is as though it were established by actually seeing it.

18.No evidence is admitted against supposition based upon evidence.¹²⁷

In the book “Zahir al-Riwayah” (Books of Primary Questions), Muhammed ibn al-Hassan as-Shaibani, one of the Hanafi disciples, compiled some juristic maxims of which part was adapted by the Uthmanic Muslim caliphate (1293AH-1876AD) as the law governing the last Islamic state in our contemporary time (before its default). The law was seen by contemporary scholars as the first legislated modern legal code developed by Muslim jurists.

In fact, the Islamic civil code (or Muslim private law) was prepared by a committee or jurists appointed and charged with the duty of formulating a codified legal document for the Islamic State. At the end, they compiled what was later known as *Majallat al-ahkam al-adliyyah* (or the corpus of juridical rules of justices) or simply referred to as *Majallah*. We shall, in the following lines, cite some of these legal maxims as selected and cited in the work of Husaini,

1. What is from the time immemorial will be kept in its ancient state.

¹²⁷ Qadri op cit page 263-267. Note: I have tried to explain the maxims briefly in my own words, slightly different from that of the author.

2. What is clear in decisive text is not subjected to any point of analogy.
3. There is a presumption of a thing to remain in state in which it was found.
4. Damage does not become of time immemorial.
5. Latitude should be afforded in the case of difficulty: This implied that in case where hardship appeared in a particular issue, latitude and indulgences must be demonstrated to avoid complicating the hardship.
6. Necessities are to be estimated based on their quality: that is, necessity should not bring indulgence or justifications as obligation or continuous reliance on it even when there is no more need for it again. If the necessity is small, it can only be justified because of the difficulty or circumstance.
7. When a prohibition is removed, the thing to which such prohibition attaches reverts to its former status of legality.
8. When it is forbidden to perform an act, it is also forbidden to request its performance.
9. Constraint does not destroy the right of another.
10. Public usage is conclusive and action must be taken in accordance therewith.
11. A thing may be deemed impossible in fact, if that thing is customarily regarded as impossible.
12. It is undeniable fact that rules of law vary with change in time.

13. Effect is only given to custom where it is of regular occurrence or when the custom is universally prevailing.
14. Effect is given to what is of common occurrence, not to what happens infrequently.
15. A matter recognized by custom is regarded as if stipulated by agreement.
16. When a matter is established by custom it is as if a legal text has established it.
17. In a situation where prohibition and exigency do conflict, preference is to be given to prohibition.
18. The enjoyment of a thing is the compensating factor for any liability attaching thereto.
19. The burden is in proportion to the benefit, and the benefit is in proportion to the burden.
20. The dealing by one person with the property of another without his leave is not lawful.
21. When the original fails, resort is made to its substitute.
22. Management of citizen's affairs is dependent upon public welfare.

23. Permission by the canon law (*Shari'ah*) excludes the liability to make compensations.¹²⁸

In conclusion, this chapter tried to highlight a threshold upon which legislation under Islamic law setting can be based; the sources of Islamic Law. It gives an overview of what the application of Islamic law entails as it has to do with the sources where the legislation draft is derived from while administering justice in an Islamic setting. Therefore, where the provisions of laws in an Islamic state goes contrary to what the primary, secondary and subsidiary sources of Islamic law provides, such can easily be identified and corrected to comply accordingly.

In other words, it is like a set of rules laid down to guide conduct in order to safeguard derailing from the basics. The making of such established rules have the following advantages:

1. It will serve as a sort of sanctuary where the limits are defined to provide guidance in the administration of justice under the *Shari'ah*.
2. It will also be used as a reliable parameter to check where, when and how contradictions and discrepancies can be identified in any legislation or set of

¹²⁸ Hussaini S.W.A. Islamic Environmental Systems Engineering, The Macmillan Press Ltd, London, U. K, 1980, page 76-79.

rules meant for the governance in the course of the administration of justice under the *Shari'ah*.

CHAPTER THREE

THE EXTENT TO WHICH THE JUSRISTS CAN GO IN MODIFYING SOME ASPECTS OF THE PROVISIONS OF THE *SHARI'AH* USING THE PRINCIPLES OF *IJTIHAD*

3.1 INTRODUCTION

Ijtihad is the most important source of Islamic law next to the *Qur'an* and the *Sunnah*. The main difference between *Ijtihad* and the revealed sources of the *Shari'ah* lies in the fact that *Ijtihad* is a continuous process of development whereas divine revelation and Prophet (SAW)ic legislation discontinued upon the demise of the Prophet (SAW). In this sense, *Ijtihad* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth¹²⁹.

The above is the only way to maintain the universality of Islamic law and ensure its relevance irrespective of space and time. Contemporary jurists must find a way out of any new situation that calls for legislation to cater for the need of the society anywhere on the globe.

This however does not give the Jurist, Ruler or such ever person in position to seek a way that is outside the confines of the *Shari'ah* provisions. In other words, the exercise is guarded one meant to relate the primary sources of the *Shari'ah* to a new or vague contemporary situation by retaining the provisions of the primary sources of the *Shari'ah* and deriving the solution from it. As the case under review,

¹²⁹ Kamali, M.H. Op cit. p315.

where the contemporary *Ijtihad* reached by the Jurist/Ruler comes in direct conflict with the provisions of the *Shari'ah*, then one will question how valid such an alleged *Ijtihad* can be and to what extent can it stand the test of compliance with the *Shari'ah* provisions.

Since *Ijtihad* derives its validity from divine revelation, its propriety is measured by its harmony with the *Qur'an* and the *Sunnah*. The sources of Islamic law are therefore essentially monolithic, and the commonly accepted division of the roots of jurisprudence into the primary and secondary is somewhat formal rather than real. The essential unity of the *Shari'ah* lies in the degree of harmony that is achieved between revelation and reason. *Ijtihad* is the principal instrument of maintaining this harmony. The various sources of Islamic law that feature next to the *Qur'an* and the *Sunnah* are all manifestations of *Ijtihad*, albeit with differences that is largely procedural in character. In this way, consensus of opinion, analogy, juristic preference, considerations of public interest (*maslahah*), etc., are all inter-related not only under the main heading of *Ijtihad*, but via it to the *Qur'an* and the *Sunnah*.

The detailed evidences found in the *Qur'an* and the *Sunnah* are divided into four types, as follows.

- 1) Evidence which is decisive both in respect of authenticity and meaning.

- 2) Evidence which is authentic but speculative in meaning.
- 3) That which is of doubtful in authenticity, but definite in meaning.
- 4) Evidence which is speculative in respect both of authenticity and meaning¹³⁰.

Ijtihad does not apply to the first of the foregoing categories, such as the clear *nusus* concerning the prescribed penalties (*hudud*). But *Ijtihad* can validly operate in regard to any of the remaining three types of evidence, as the following examples will show:

1) An example of *Ijtihad* concerning evidence which is definite of proof but speculative of meaning is the *Qur'anic* text in sura al-Baqarah.¹³¹ 'The divorced women must observe three courses (*quru'*) upon themselves.' There is no doubt concerning the authenticity of this text, as the *Qur'an* is authentic throughout. However its meaning, in particular the precise meaning of the word *quru'*, is open to speculation. *Quru'* is a homonym meaning both 'menstruations' and 'the clean periods between menstruations'. Whereas Imam Abu Hanifah and Ibn Hanbal have adopted the former, Imam Shafi'i and Malik have adopted the latter meaning, and their respective *Ijtihad* leads them to correspondingly different results.

¹³⁰ Kamali op cit p317

¹³¹ Qur'an 2:228

2) *Ijtihad* in regard to the second variety of evidence relates mainly to *Hadith* material, which may have a definitive meaning but whose authenticity is open to doubt. To give an example, the *Hadith* which provides in regard to zakah on camels that 'a goat is to be levied on every five camels.' has a clear meaning, which is why the jurists are in agreement that there is no zakah on less than five camels. But since this is a solitary *Hadith*, its authenticity remains speculative. *Ijtihad* concerning this *Hadith* may take the form of an investigation into the authenticity of its transmission and the reliability of its narrators, matters on which the jurists are not unanimous due to the different criteria that they apply.

This would in turn lead them to different conclusions. Should the differences of *Ijtihad* and the rulings so arrived at be conflicting to the point that no reliance can be placed on any, they are all to be abandoned and no obligation may be established on their basis.

3) To give an example of *Ijtihad* concerning evidence that is speculative in both authenticity and meaning, we may refer to the *Hadith* which provides: 'There is no *salah* without the recitation of sura al-Fatihah.

Being a solitary *Hadith*, its authenticity is not proven with certainty. Similarly it is open to different interpretations in the sense that it could mean either that *salah*

without the *Fatihah* is invalid, or that it is merely incomplete. The Hanafis have held the latter, whereas the Shafi'is has adopted the former meaning of the *Hadith*.

And finally with regard to such matters on which no evidence can be found in the *nusus* or *ijma`*, *Ijtihad* may take the form of analogical deduction, juristic preference (*istihsan*), or the consideration of public interest (*maslahah*), and so on.¹³²

***Shari'ah* gives priority to human welfare over human liberty. Muslims as well as non-Muslims living in a Muslim state are duty bound not to exploit common resources to their own advantage. Where in the administration of justice in an Islamic state, the presumption is that all laws employed are either derived from express provisions of the *Shari'ah* in the first place. When there exists a situation where the provisions of the express sources of the *Shari'ah* are not clear on a given case, the jurists are bound to make derivations but still restricting themselves to the general intent of the *Shari'ah*. Such derivations are made using personal reasoning of the jurist such as basis for decisions.**

Behind every legal, social or political institution of Islam, there is a divine sanction which every believer is expected to reverence no matter

¹³² Kamali Op cit p319

where he lives. He cannot change his own whims into laws. There are the limits of Allah (*Hududullah*) which are imposed in order to curtail man's ambitions and devices. *Halal* (Lawful) and *Haram* (Unlawful) are clearly mentioned and these are the boundaries which every Muslims as well as non Muslim living with them must respect. If he transgresses any of these limits, he is doing wrong or committing a crime. Even between these two boundaries of lawful and unlawful, there exist the things which are doubtful (*Mujtabihaat*), which must be refrained from in order to avoid excesses. The *Hadith* of the Prophet (SAW) (SAW) says,

“That which is Lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which not many people know. Thus the one who avoids doubtful matters clears himself in regard to his religion and honor, but he who falls into doubtful matters will fall into that which is unlawful...”¹³³

In reality these limits provide safeguards of the rights of men and nations and give men sense of responsibility to Allah and hence to the entire mankind. These limits stop him from being inhuman and make him respect the blood and property of another man and give equality of

¹³³ Related by Sahih Al-Bukhari, Hadith 52, Sahih Muslim 1599.

treatment to all individuals, male and female before the law. In commercial dealings, these limits provide for respect for contractual dealings and pledged word and prohibition of usury and gambling. In the case of individual conduct, these limits provide for the prohibition of intoxicants and not to do injustice to servants and give charity to poor relations and provide for the strict law governing inheritance. In the dealings with nations, these limits provide for respect for treaties, and gives strict code of conduct for one's dealings with the fellow men by not destroying even the enemy's means of sustenance, and show mercy to the surrendered enemy and show respect for non-combatants. In short, in every action of a man's dealings with fellow men, there are limits (*Hudud*) imposed by Allah which are nothing but the sanction of the Divine *Shari'ah*.

Judicial power, according to the *Shari'ah* must always operate in conformity with equity even to the benefit of an enemy and to the detriment of a relative. *Shari'ah* does not allow the slightest modification in the rule of perfect justice, or any form of arbitrary procedure to replace it. It firmly established the rule of law, eliminating all differences between the high and the low. This is not to dispense with some real situations where the jurists have to make or derive rules

based on personal reasoning to tackle cases of urgency or of a given circumstance that must be treated. In such cases, the general intent of the *Shari'ah* is viewed as the guiding principle as the framework upon which the jurists would be guided to bring out rules.

The *Qur'an* asserts that all mankind, born of the same father and mother, forms one single family that the God of men is unique, that the Creator has ordered men according to nations and tribes so that they may know and assist one another for the good of all.

In the administration of justice, therefore, a judge must be upright, sober and calm. Nothing should ruffle his mind from the path of rectitude. If he does wrong, he is not only responsible to the people but also to God,. The noble Prophet (SAW) advised: “No judge shall pass a judgment between two men while he is angry”¹³⁴

The basic principles of the *Shari'ah* therefore can be summed up as follows;

- a. The larger interest of the society takes precedence over the interest of the individual.

¹³⁴ Sunan bn Majah, Hadith no 2316

- b. **Although relieving hardship and promoting benefit are both among the prime objectives of the *Shari'ah*, the former takes precedence over the latter.**
- c. **A bigger loss cannot be inflicted to relieve a smaller loss or a bigger benefit cannot be sacrificed for a smaller one. Conversely, a smaller harm can be inflicted to avoid a bigger harm or a smaller benefit can be sacrificed for a larger benefit.**¹³⁵

3.2 MODES OF *IJTIHAD*

There are three modes of *Ijtihad* exercised by the Muslim Jurists. The first is where the Jurist gives a literal interpretation and stays as close as possible to the meaning of the text interpreted. The purpose is to discover the true intent of the Lawgiver.¹³⁶

The second mode is where the jurists attempt to extend, through analogy or *Qiyas*, the laws derived from the first mode to situations not expressly covered by the texts.

¹³⁵ Doi, A. Op cit pp 9-11

¹³⁶ Nyazee, I.A.K. Theories of Islamic Law, The Methodology of Ijtihad, Academy Art and Printing Services, Kuala Lumpur, Malaysia, 2000, pp291

The third mode of *Ijtihad* is said to be when the set of facts awaiting decision is neither contained expressly in the texts nor can a derivation be achieved successfully by applying the method of extending the first mode through analogy. In this situation, the jurists employ the interpretation based on the purpose of the law.

The essential difference is that in analogy the jurists solve a legal problem by extending the meaning from the single text, while invoking the purpose or spirit of the Laws means looking at all the texts or a group of texts collectively in the light of their purposes. In this mode, the jurist is required to work on the basis of the general principles of the law when these principles conform with the purpose of the *Shari'ah*. This third mode is not usually exercised by the *Fuqaha* (jurists) but the rules or imams who deal with public law rather than private law and who usually employ the general principles of the *Shari'ah* to form the laws or to provide relief.¹³⁷

3.3 THE PROOF OF *IJTIHAD*

Ijtihad is validated by the *Qur'an*, the *Sunnah* and the dictates of reason (*`aql*). Of the first two, the *Sunnah* is more specific in validating *Ijtihad*. The *Hadith* of Mu'adh b. Jabal, as al-Ghazali points out, provides a clear authority for *Ijtihad*.

¹³⁷ Nyazee op cit p292

The same author adds: The claim that this *Hadith* is *mursal* (i.e. a *Hadith* whose chain of narration is broken at the point when the name of the Companion who heard it from the Prophet (SAW) is not mentioned) is of no account.¹³⁸

According to another *Hadith*, 'When a judge exercises *Ijtihad* and gives a right judgment, he will have two rewards, but if he errs in his judgment, he will still have earned one reward.'¹³⁹

This *Hadith* implies that regardless of its results, *Ijtihad* never partakes in sin. When the necessary requirements of *Ijtihad* are present, the result is always meritorious and never blameworthy. In another *Hadith*, the Prophet (SAW) is reported to have said: 'Strive and, for everyone is ordained to accomplish that which he is created for.'¹⁴⁰

There is also the *Hadith* which reads: 'When God favors one of His servants, He enables him to acquire knowledge (*tafaqquh*) in religion.'¹⁴¹ The jurists of Islamic Jurisprudence have also quoted in this connection two other *Hadith*, one of which makes the pursuit of knowledge an obligation of every Muslim, man or woman, and the other declares the Jurists to be the successors of the Prophet (SAW)s¹⁴².

¹³⁸ Ibid p320

¹³⁹ Dawud, A. III, 1013, *Hadith* no. 3567.

¹⁴⁰ Bukhari, *Sahih* (Istanbul ed.), VI, 84; Amidi, *Ihkam*, IV, 209.

¹⁴¹ Ibid (Istanbul ed.), I, 25-26.

¹⁴² Ibn Majah, *Sunan*, I, 81, *Hadith* no. 224; Amidi, *Ihkam*, IV, 230, 234; Shatibi, *Muwafaqat*, IV, 140

The importance of the last two *Hadith* to *Ijtihad* is borne out by the fact that *Ijtihad* is the main instrument of creativity and knowledge in Islam.

The various *Qur'an* verses that relate to *Ijtihad* are all in the nature of probabilities. Although the pursuit of knowledge is a duty of every individual, attaining 'erudition in religious disciplines', is necessary for those who guide the community and warn them against deviation and ignorance. On a similar note “And those who strive in Our cause, We will certainly guide them in Our paths”¹⁴³ It is interesting that in this ayah the word *subulana* ('Our paths') occurs in the plural form, which might suggest that there are numerous paths toward the truth, which are all open to those who exert themselves in its pursuit.¹⁴⁴

The Companions practiced *Ijtihad*, and their consensus is claimed in support of it. In their search for solutions to disputed matters, they would base their judgment on the *Qur'an* and the *Sunnah*, but if they failed to find the necessary guidance therein, they would resort to *Ijtihad*. It is therefore imperative for the learned members of the community attempt to find solutions to new problems through *Ijtihad*.¹⁴⁵

¹⁴³ Qur'an 29:59

¹⁴⁴ Kamali op cit p321

¹⁴⁵ Kamali op cit p320

3.4 CONDITIONS OF *IJTIHAD*

The person carrying out *Ijtihad* must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence which enables him to form an independent judgment. In his capacity as a successor to the Prophet (SAW), the *mujtahid* performs a religious duty, and his verdict is a proof (*hujjah*) to those who follow him; he must therefore be a Muslim, and be knowledgeable in the various disciplines of religious learning. A person who fails to meet one or more of the requirements of *Ijtihad* is disqualified and may not exercise *Ijtihad*.

These requirements are as follows:

(a) Knowledge of Arabic to the extent that enables the scholar to enjoy a correct understanding of the *Qur'an* and the *Sunnah*. A complete command and erudition in Arabic is not a requirement, but the *mujtahid* must know the nuances of the language and be able to comprehend the sources accurately and deduce the *ahkam* from them with a high level of competence. The language of the *Qur'an* and the *Sunnah* is the key to their comprehension and the *Ijtihad* of anyone who is deficient in this respect is unacceptable¹⁴⁶.

(b) The *mujtahid* must also be knowledgeable in the *Qur'an* and the *Sunnah*, the Makki and the Madinese contents of the *Qur'an*, the occasions of its revelation

¹⁴⁶ Kamali op cit p322

(*asbab al-nuzul*) and the incidences of abrogation therein. More specifically, he must have a full grasp of the legal contents, or the *ayat al-ahkam*, but not necessarily of the narratives and parables of the *Qur'an* and its passages relating to the hereafter. For a *mujtahid* may infer a legal rule from the narratives and parables that are found in the *Qur'an*. The knowledge of *ayat al-ahkam* includes knowledge of the related commentaries (*tafasir*) with special reference to the *Sunnah* and the views of the Companions.¹⁴⁷

(c) The *mujtahid* must possess an adequate knowledge of the *Sunnah*, especially that part of it which relates to the subject of his *Ijtihad*. This is the view of those who admit the divisibility of *Ijtihad* (for which see below), but if *Ijtihad* is deemed to be indivisible, then the *mujtahid* must be knowledgeable of the *Sunnah* as a whole, especially with reference to the Law texts, often referred to as *Ahadith al-ahkam*. He must know the incidences of abrogation in the *Sunnah*, the general and the specific, the absolute and the qualified, and the reliability or otherwise of the narrators of *Hadith*. It is not necessary to commit to memory the narrations that has to do with laws or the names of their narrators, but he must know where to find the Prophet (SAW)ic narrations when he needs to refer to them, and be able to distinguish the reliable from the weak and the authentic from the spurious.¹⁴⁸

¹⁴⁷ Ibid p322

¹⁴⁸ Kamali op cit. p 251

3.5 THE SCOPE OF *IJTIHAD*

There are about three restrictions in terms of the scope of *Ijtihad*. These are as follows:

- 1. The first restriction that is placed on the activity is that there is no *Ijtihad* within an explicit rule in the texts. This means that when a rule is so explicit that it is incapable of carrying more than one meaning, then the jurists are prohibited from undertaking *Ijtihad* in that sense.**
- 2. Where the facts awaiting interpretation are not covered by the literal meanings of the law, then the jurists are allowed to employ analogy. The form of analogy used here is very strict and it goes by the name *Qiyas al illa*. The meaning of this is that the analogy carried out here is just to give an interpretation by extending the meaning to a new case from a single text of the *Qur'an* and *Sunnah* with specific meaning on the basis of a common underlying cause.**

3. The third scope signifies a situation where the jurist undertakes the extension of considering the texts collectively, that is by looking at the spirit of the law.¹⁴⁹

In conclusion, *Ijtihad* is allowed as long as it does not contradict express provisions of the *Shari'ah*. It will also be legally wrong to carry out *Ijtihad* when it is not premised on the general basis of the *Shari'ah* and does not in a general term, seek to cure a new issue using the basis of the *Shari'ah* provisions.

How the law was declared as valid Islamic law in the past and how is it declared valid today? This question goes to the heart of the process of *Ijtihad*.¹⁵⁰

¹⁴⁹ Nyazee op cit p288

¹⁵⁰ Ibid p296

CHAPTER FOUR

RIGHTS OF SPOUSES UNDER THE *SHARI'AH*

4.1 INTRODUCTION

The Islam Law has in place, rights and duties which spring from marriage. On marriage certain obligations are imposed on the parties and certain rights are vested in them. The rights and obligations arising out of a marriage are reciprocal so that if either the husband or the wife fails to perform his or her part of the express or implied conditions of the contract of marriage, he or she shall no longer be entitled to the enjoyment of the rights vested in him or her. Before the advent of Islam women had no *locus standi* in the eyes of the customary laws of many societies in the world.¹⁵¹ These pre-Islamic Arab customs as well as the Rabbinical Law dealt most harshly with them¹⁵². Under the present Customary Law in Nigeria, a husband is bound to maintain his wife during marriage but there is generally no corresponding obligation on the wife to maintain her husband as provided by the statutory law¹⁵³. In some areas, the duty of the husband to maintain his wife has received statutory recognition¹⁵⁴. But it must be noted that the duty to maintain the wife under the Customary Law exists only during the subsistence of the marriage. If the marriage has been terminated by divorce the duty to maintain comes to an end¹⁵⁵. The rights and duties of the spouses under Islamic Law do not have to do with maintenance only, for the Holy *Qur'an* says:

¹⁵¹ Gurin Op cit p101

¹⁵² Anyebe, A.P., Customary Law; the war without guns, 1984

¹⁵³ Nwogugu, E.I., op. cit

¹⁵⁴ Tijjani, N., Matrimonial Causes in Nigerian law and practice, lagos 2007

¹⁵⁵ Tijjani, N., ibid

"...And women shall have rights similar to then rights against them, according to what is equitable. But men have a degree (edge) over them."¹⁵⁶

The Prophet (SAW) (S.A.W.) at his last Pilgrimage delivered a master- piece Sermon which established the very foundation for a just, humane society with golden principle of co-existence. In the Sermon, the Prophet (SAW) was particularly emphatic on the subject of mutual rights and obligations between spouses. He, in this connection, stated:

"Well then, people verily there are rights in favour of your women which are incumbent upon you, and there are rights in favour of you which are incumbent upon them. As to what is incumbent upon them in your regard is that they should not let your bed be trampled by other than you, should not allow those to enter your houses whom you do not like without your authorization and should not commit turpitude. If they do commit that, then God has given you permission to reprimand them, to separate yourself from them in beds, and to strike them but not hard. If they abstain and obey you, then it is incumbent upon you to provide their food and dress in accordance with good custom. And I command you to treat women well, because they are like captives in your houses possessing nothing for themselves, and you, on your part, take them as deposit from God, and permit yourselves the enjoyment of their person by means of a word of God. Have therefore the fear of God, with regard to women, and I order you to treat them well..."¹⁵⁷

4.2 THE CLASSIFICATION OF RIGHTS OF SPOUSES

1. The rights of Allah: these rights are exclusively for Allah, The Creator.

None of the spouses has the right to waive such rights. They are co-extensive and include:

i. Paternity or Legitimacy of children of the Marriage. The meaning of this is that every child is entitled to be linked with a father. In other words, the child has to be a descent of a known man that is responsible

¹⁵⁶ Quran, Ch. 12, verse 228

¹⁵⁷ Reported by Bukhari and Muslim

for his conception during a subsisting marriage. In its legal sense, however, with which we are very much particular, it is restricted to the descent of a child from his father, and it is sometimes applied to descent from the mother.¹⁵⁸

This shows that every child has to have a placement somehow in the society. So every child has to have a father and it has to be the one real father whose fatherhood once established, would be irrevocable.¹⁵⁹ The methods of establishing such a lineage can be done by marriage acknowledgment or evidence.¹⁶⁰ On the other hand, if the child in question was conceived out of wedlock, the child is not considered as legitimate, and its descent will derive from the mother only. It is on the strength of this that the Prophet (SAW) (S.A.W) is once reported to have said:

“a woman who misplaces a child’s legitimacy by relating its descent to someone who is not responsible for its conception has committed a grave offence, alienated herself from God, and will be denied the blessing of eternity. Likewise, a father who obscures his child's legitimacy by denying his responsibility for its conception has offended God and inflicted himself universal disgrace.”¹⁶¹

The overall intent of the *Shari’ah* from the foregoing is that it detest any situation that will render a child fatherless or unclaimed in the society due to the stigma and the general perception of people in respect of an illegitimate child.

ii. Prohibition by Affinity

These are the women prohibited to be married by the men under the *Shari’ah*. The prohibition can be a temporary or permanent one.

¹⁵⁸ Hughes, Dictionary of Islam

¹⁵⁹ Gurin op cit p

¹⁶⁰ M.T. El-Imairi, personal status in Islamic law, 1978, p. 208

¹⁶¹ Sbd, al Ati, the family structures in islam, 1982 Edn

- a. Temporary Prohibition include the following: this is a prohibition that is of temporary nature, meaning, the woman is only prohibited for the man within a certain period and a change in situation can do away with the prohibition hence the man and woman can marry legally.

Some of these situations are:

A married woman, difference of religion, triple divorce, woman serving *iddah*, marriage during pilgrimage, marriage during death-illness, two sisters at a time, marriage with a fifth wife and marriage to an adulteress/adulterer.

- b. Permanent Prohibition includes Consanguinity, affinity and fosterage.

- iii. ***Iddah***: this is known as the waiting period observed by a married woman as a result of death of the husband or divorce by the husband. This is a right of Allah that must be adhered to and no party to a marriage contract can or has the power to waive it. It is an exclusive right of Allah.

In the event the marriage contract has come to a terminal point by whatever means, either by the death of the husband, or in case of divorce the wife or upon decree by a court for divorce of the wife for some reason or the other, that wife has been ordered by the Almighty God to serve the *Iddah* period, and the duration of the *iddah* period varies from one type of dissolution to another.

- iv. **Inheritance**: this is another right of Allah. It connotes the legal acquisition of properties of the deceased by his/her spouse. It is a prescribed right and in fact, one of the most explicitly defined one in the

Qur'an as the respective fractions of shares and how they change in differing situations were all defined by the All-Mighty Allah Himself.

"Men shall have a share in what parents and kinsfolk leave behind, and women shall have a share in what parents and kinsfolk leave behind, whether it be little or much a determinate share..."¹⁶²

The above *Qur'anic* verse speaks for itself. This is a direct command from God. It is therefore His sole right. Any attempt therefore to pervert the effect of this command shall attract Allah's wrath. However each of the beneficiaries has to have the requisite qualification for entitlement to the share.¹⁶³

Thus, each of the spouses, on becoming a spouse relict, will have to take his/her due share from what the deceased has left behind, as he or she has become entitled to inherit the deceased through the marital tie. It is pertinent to look at the position of each of the spouses briefly *vis-a-vis* his/her entitlement to inherit one another.

(i) *Position of the husband* The husband, on his wife's death, has no power to exclude totally any of his deceased wife's relatives; he is neither totally excluded by any of such relatives. He must therefore take a portion of the net estate at any rate. He has two statuses while inheriting:

(a) He enjoys a maximum of one-half of the net estate left by his deceased wife, where the latter has left no issue (i) either from the former or any other previous husband; or

¹⁶² Quran Ch 4, verse 7

¹⁶³ Quran Ch. 4, verses 11, 12 and 176

(b) He takes one-fourth of the net estate left by the deceased wife where:

i) He co-exists with an issue(s) of hers -whether from him or from some previous husband. This is what is provided in the Holy *Qur'an*:

"And you shall inherit one half of what your wives leave behind provided they have left no child; but if they have left a child, then you shall have one-quarter of what they leave behind..."¹⁶⁴

(ii) *Position of the wife:*

'Where the husband dies, leaving back the wife, she excludes totally none of the deceased's relatives. Conversely she is not excludable totally by any of her deceased husband's relatives. The wife therefore enjoys the following status:

(a) She takes a maximum share of 1/4 of the net estate left by her deceased husband where the latter left no issue either from the former or from any other wife;

(b) She takes a minimum share of 1/8 of the net estate of her deceased husband where he left an issue or issues either from her or any other wife of his.

It should well be noted that where the number of wives exceeds more than one, they have to share the prescribed shares above. The *Qur'an* states:

"...And your widows shall have one-quarter of what you leave behind, provided you have left no child but if you left a child, then they shall have one eighth of what you leave behind..."¹⁶⁵

¹⁶⁴ Qur'an, Ch 4, verse 12

¹⁶⁵ Quran Ch 4, verse 12

2. The mutual rights of spouses: These rights are such that the spouses share mutually, i.e. they have common share in enjoying the rights. They are:

- i. Sexual intercourse
- ii. Kind and impartial treatment¹⁶⁶.

The rights enumerated under (A) above are rights pertaining to the Almighty God yet some Jurists would prefer to call it mutual rights of the spouses. None of them has the right to relinquish either of these rights because, strictly speaking, they belong to Almighty God as prescribed in many verses of the Holy *Qur'an*. In addition to those rights there are pure mutual rights for the Spouses. Each of the spouses might relax or relinquish such rights towards the other. These rights are:

i. Sexual intercourse

The right to cohabitation and consortium is only permitted by virtue of a valid marriage contract; and each spouse can, as of right, demand it from the other. The *Qur'an* says:

"The Believers must (eventually) win those who abstain from sex. Except which joined them in the marriage bond or (the captives) whom their right hands possess..."¹⁶⁷

The *Qur'an* goes further and says:

"Permitted to you on the night of the fast is the approach to your wives. They are your garment and you are their garments."¹⁶⁸

¹⁶⁶ Ibid p105-106

¹⁶⁷ Quran Ch 23, verses 5 and 6

¹⁶⁸ Quran Ch 2, verse 187

Men and women are each other's garment, i.e. they are for mutual comfort, mutual support and mutual protection, and fitting into each other as a garment fits the body. We all know what garments mean: they are intended to cover a person's body, thereby covering his nudity; so do husband and wife, by entering into the contract of marriage they preserve their chastity and secure comfort for each other which can only be obtained through a valid marriage. Yet, another verse of the Holy *Qur'an* says:

"It is He who created you from a single person, and made his mate of like-nature, in order that he might dwell with her (in love)...¹⁶⁹

ii. Kind and impartial treatment

The *Qur'anic* verses and Prophetic traditions on several occasions enjoined spouses to treat each other with kindness and promote good and honourable relation with each other. For instance, the Holy Quran Says:

"...And women shall have rights similar to the, rights: against them, according to what is equitable; But men have a degree (of advantage) over them."¹⁷⁰

It is also the general admonition by the Prophet (SAW) of Islam (SAW) to the Muslims that they treat each other kindly.

3. The rights of the husband: these rights are exclusive to the husband in a marriage contract. They are:

i. Obedience

¹⁶⁹ Quran Ch 7, verse 189

¹⁷⁰ Quran, Ch 4

- ii. Sexual intercourse
- iii. Right of correction
- iv. Right of restricting her movements
- v. Right of marrying another wife.¹⁷¹
- vi. Right to correct ones wife
- vii. Right to recall a wife after a revocable divorce.

(i) Obedience

The main obligation of the wife as a partner in a marital relationship is to contribute to the success, blissfulness and happiness of the marriage as much as possible. She must do a lot to the comfort and well-being of her husband. She is to neither offend him nor her children but to obey him as he is responsible for earning a living for the family and providing them with the necessities of life. This is perhaps best illustrated by the following authorities:

"Men are the protectors and maintainers of women because God gives the one more strength than the other, and because they support from their means. Therefore, the righteous women are devotedly obedient and guard in the (husbands) absence what God would have them guard..."¹⁷²

In some Prophet (SAW) traditions, it is reported that:

Ibn Abbas also reported that: "one day a woman came to the Prophet (SAW) (S.A.W.) and said to him:

"I have been delegated to you as a representative of women; that *Jihad* is a duty imposed upon men by Allah. If they succeed, they are rewarded and if they are

¹⁷¹ Gurin op cit p 107-110

¹⁷² Quran Ch 4, verse 34

killed, they remain alive in abundance with their Lord. We the womenfolk do stand for them', then what is our position?"

Then the Prophet (SAW) (SAW) replied her:

"Communicate to any woman you meet that obedience to husband and acknowledging his rights is equal to the *Jihad*. But only few of you do that."¹⁷³

Another tradition, Anas bin Maliki reported the Prophet (SAW) to have said:

"Were it permissible for a human being to prostrate before another, I would have ordered a wife to prostrate before her husband whenever he enters unto her for the rights given by God to the former over the latter."¹⁷⁴

From the totality of the above authorities, it can safely be concluded that the *Shari'ah* has imposed obedience on a wife to her husband.

(ii) Sexual intercourse

It is the duty of the wife to make herself available for the satisfaction of his sexual desire at any time unless she has some lawful reasons to offer, such as menstruation, or fasting the obligatory fasting (Ramadan) or she is engaged in the rituals of pilgrimage, etc. If, however, she refuses without any valid reason, some Maliki jurists say that this is an act of rebellion and her right to maintenance lapses.¹⁷⁵ The Prophet (SAW) (S.A.W) is reported to have said:

"Whenever a woman has been invited by her husband for cohabitation and she refuses for no just cause, the angels will curse her throughout the night."

The authenticity of the *Hadith* has been agreed by all jurists.¹⁷⁶

iii) Right of correction

¹⁷³ Cited in Gurin Op cit p 108

¹⁷⁴ Ibid p108

¹⁷⁵ Ibid p108

¹⁷⁶ Gurin Op cit p108

Islamic Law has given a husband right to correct his wife's doings and behaviour whenever necessary. The Holy Qur'an exhorts:

"...As to those women on whose part you fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds. (And last) beat them (lightly); but if they return to obedience seek not against them means (of annoyance)..."¹⁷⁷

In case of wife's negligence or misbehaviour four steps are suggested to be taken in the sense that it is the admonition, followed by dislodging their beds, then slight beating. Scholars prescribe the priority as they are stated in the verse.

(iv) Right of restricting her movements

The wife must remain in her matrimonial home and must not go out without permission from the husband, unless she has a genuine cause to leave the matrimonial home, e.g. maltreatment by the husband or lack of food or the fact that the matrimonial home does not fit her social status¹⁷⁸. She must guard her chastity and the husband's property, she has to look after his children and feed them from her breast and serve him in accordance with the prevailing custom of their society and their tradition. However, it is his religious obligation to be compassionate so as to relax his right to restrict her freedom of movement. If there arises a conflict between this right of his and the wife's parent's right to visit and be visited by their daughter, his right prevails.

(v) Right of marrying another wife

The wife may not legally object to the husband's right to take another wife or to exercise his right of divorce. This marital contract establishes her implicit consent

¹⁷⁷ Qur'an 4:34

¹⁷⁸ Gurin Op cit p110

to these rights. However if she wishes to restrict his freedom in this regard or to have similar rights, she is legally allowed by some jurist to do so. She may stipulate in the marital agreement that she, too, will have the right of divorce, or that she will keep the marriage bond only so long as she remains the only wife. Although the majority of Muslim jurists objects to such stipulation as they have seen it as denying the husband his God's given right.¹⁷⁹

(vi) Right of husbands to discipline wives

The right to discipline an earring woman is given to man (*Qur'an* 4:34):

And as for those, on whose part you fear disobedience, admonish them and keep away from them in their beds and chastise them. Then if they obey you, seek not a way against them. Surely Allah is High and Great.

4. The rights of the wife: these rights are exclusive to the wife and they are:

- i. Right to be married out by a guardian¹⁸⁰
- ii. Right to dower
- iii. Right to maintenance
- iv. Right to kind treatment
- v. Right to visit
- vi. Right to equal treatment
- vii. Economic right.¹⁸¹

From the foregoing discussions based on the *Qur'anic* legislation and Prophet (SAW)ic traditions, it is abundantly clear that Islam has elevated the legal status of woman far better and enviable than her counterpart in the other legal systems. By

¹⁷⁹ Gurin p 110

¹⁸⁰ Al-Asqalani Op cit p347

¹⁸¹ Ibid p 110-118

the act of marriage she becomes one of the twin halves of the husband and can own property independent of the husband and deal with it the way she likes.

A marital right is that interest recognized and protected by the law, respect for which is a duty and disregard of which is a wrong imposed upon a husband with reference to his wife or wives. Thus the husband should not feel that by providing for his wife such rights he is doing her a favour. Nor shall he cause her injury or grief by way of boasting or arrogance. Such rights primarily include the following:

a. The right to be married out by a Guardian: This position of the Islamic Law might be clear and explicit when it comes to the practice and sayings of Prophet (SAW) Muhammad (SAW) as can be seen below:

i. Bulughul Maram (English Translation) *Hadith* no 835¹⁸²

“Narrated by Abu Burda Bin Abu Musa on the authority of his father ; Allah’s Messenger SAW said, “ There is no Marriage without a guardian” (Ahmad and Al Arba’a reported it; Ibn Almadini, Attirmidhi and Ibn Hibban graded it Sahih.

Imam Ahmad reported this *Hadith* from Al Hassan from Imran ibn Al Hassan’ “there is no marriage without a guardian and two witnesses”.

ii. Bulughul Maram (English Translation) *Hadith* 836¹⁸³

¹⁸² Al-Asqalani, A.I.H, Bulugh Al-Maram, with notes from the book of Subulus Salam written by Muhammad ibn Ismail As Sana’ani. 1996. p347.

¹⁸³ Ibid p347

Narrated Aisha RA Allah's messenger SAW said "if any woman marries without the consent of her guardian, her marriage is void, if there is cohabitation, she gets her jointure for the intercourse her husband has had. If there is a dispute, the ruler is the Guardian of the one who has no Guardian" Al Arba'a except An Nasa'I reported it; Abu Awana Ibn Hibban and Alhakim graded it Sahih.

b. The right to be paid dower

In order to constitute a valid marriage, Islamic law requires that the husband should give to the wife some legal property capable of constituting a valid transaction and which would be for the exclusive control of the wife.¹⁸⁴ This is the form of gift given to the wife at the time of the marriage contract. It is a condition precedent in any marriage contract under the Islamic Law to pay the dower. It is however not compulsory to pay at the time of the solemnization of the marriage contract but it cannot be overlooked.

c. Right to maintenance:

This is the act of taking care of the wife by the husband in a subsisting marriage union. Maintenance in marriage life of a Muslim refers to those necessities incumbent upon the husband to his wife or wives which will render their marital life easy, happy and successful.¹⁸⁵ However there exist some conditions to entitle the wife to such a maintenance. Some of these are,; marriage must be valid and subsisting, marriage must be consummated, wife must be able to tolerate conjugal relations, wife must be assessable for conjugal relations, wife must respond to the invitation to cohabit by her adult husband and wife must obey reasonable orders of the husband.¹⁸⁶

¹⁸⁴ Gurin Op cit p62

¹⁸⁵ Ibid p119

¹⁸⁶ Ibid p212-122

d. Kind treatment to the wife

The *Qur'an* and the *Sunnah* of the Prophet (SAW) are replete with exhortations that a husband has to treat his wife or wives in a kind manner. It is inconsequential whether the wife is a Muslim or non-Muslim, richer, poor, and according to many authorities, minor or adult, healthy or sick. She is entitled to this right by virtue of the fact that she is devoted to the husband's companionship and she is confined to his household, or by the very reason of marriage, i.e. being his wife, and "trust".¹⁸⁷

e. Right to visit

The wife has to be allowed some rights to pay a visit to some near relations or receive some near relations at the matrimonial residence. In case of a wife who has children with any previous husband, the children who are minors, may visit her once a day, or if they are adult, once every Friday likewise her parents. They should be accompanied however with his trusted female representative.¹⁸⁸ The point is that the wife has the right to visit all her relations on equitable terms.

f. Economic rights.

This is a right of the wife under Islamic law. It means the right of the wife of a subsisting marriage to own her own property different and distinguishable from that of her husband. In the practice of the companions of the Prophet (SAW) (SAW) it is clear that they, the women do own their properties as of right and exclusive to their personal use, control and disposition. Under Islamic Law, a woman has right over her property the same way a man does. The *Qur'an* states:

¹⁸⁷ Gurin Op cit p111

¹⁸⁸ Ibid p112

“do not cover the bounties which Allah has bestowed abundantly upon some of you than on others. Men shall have the benefit of what they earn and women shall have benefit from what they earn.”¹⁸⁹

So, all the wealth earned by a wife is entirely her own property. She possesses full propriety right over it without any right of interference from either her father, husband or any other person. And if she invests her money in a business, or earn with her own hand, she is the sole owner of the fruits of her labour.¹⁹⁰

These are some of the rights of spouses as discussed above. The nature of rights in law is that of one's entitlement. If the person concerned so wish can pursue it to the fullest and it is equally the choice of the person to forego it too.

¹⁸⁹ Qur'an 4:

¹⁹⁰ Gurin Op cit p116

CHAPTER FIVE

CRITIQUE OF SELECTED PROVISIONS OF THE MOROCCAN FAMILY CODE, 2004 (MOUDAWANA) IN THE LIGHT OF THE PROVISIONS OF THE *SHARI'AH*

5.1 INTRODUCTION

This chapter will discuss only the provisions of the selected Sections/Articles that are relevant to the research. A total of twelve Articles of Moudawana comprising of Articles 25,40,41,42,43,44,45,51,52,83,84, and 124 are going to be reviewed in a way that the section of the law is quoted and the textual provision of the *Shari'ah* is provided to check the compatibility or otherwise. However, before commencing the compatibility tests, the quotation below contains all the sections of the selected Articles discussed in the course of the analysis. It forms the bedrock and philosophical framework of what the Muslim Family Code of 2004 (Moudawana) should represent and wish to achieve as

presented in the Preamble of the official gazette of the Muslim Family Code, (Moudawana) 2004¹⁹¹, highlighting the major reforms sought by the piece of legislation as reproduced below:

“One of the results of this supreme royal attention was the historic achievement of this pioneering family code, its provisions drafted in a modern legal jurisprudential style, in conformity with Islam’s tolerant rules and exemplary purposes while providing balanced, fair and pragmatic solutions resulting from enlightened open *Ijtihad* (juridical reasoning).

This code further stipulates that human and citizenship rights are accorded to all Moroccans, women and men equally, in respect of the holy divine religious references. The parliament, with its two houses, is proud of the wisdom, insight, responsibility and realism that King Mohammed VI, may God glorify him, has made predominant throughout the entire preparatory process of this social human rights document, and proudly values the distinguished historical transition that this family code represents, given that it is a legal text constitutive of the modern democratic society.

The nation’s representatives in the parliament praise the democratic initiative of his majesty the king, who ordered the presentation of the family code bill to the two houses of parliament for consideration, because of the belief of his majesty, the commander of the faithful and

¹⁹¹ This unofficial English translation of the Moroccan Family Law (Moudawana) was prepared by a team of English and Arabic speaking lawyers at the Global Rights head office in Washington D.C. and their website www.globalrights.org.

sovereign representative of the nation, in the prominent role of the parliament in the democratic construction of a country of institutions.

The parliament also gratefully praises the king's provision for specialized family courts and a just fit, modern and efficient system of family justice. The parliament further emphasizes the mobilization of all its members behind the commander of the faithful to provide all the means and texts to permit the establishment of an integrated and harmonious legislative apparatus, which will serve to consolidate the family and enhance the joining of forces in society.

Given all of these considerations, the parliament is proud of the precious content and enlightened guidance in His majesty the king's historical speech upon the opening of the second legislative year of the seventh term. Those orientations will be adopted by the parliament as the best preamble for the family code, particularly what was included in the sovereign royal speech, as the King, may God support him said:

“In our severing instructions and guidance to the commission, and while giving our views on the family code bill, we adopted the following fundamental reforms:

One: Adopt a modern form of wording and remove degrading and debasing terms for women.

Place the family under the joint responsibility of both spouses, given that ‘women are men's sisters before the law’ in keeping with the words of my ancestor the chosen Prophet (SAW) Sidna Mohammed,

Peace Be Upon Him, as reported, “Only an honourable person dignifies women, and only a villainous one degrades them.”

Two: Entitle the woman who has come of age to tutelage as a right, and she may exercise it according to her choices and interests, on the basis of an interpretation of a holy verse stipulating that a woman cannot be compelled to marry against her will: “... place not difficulties in the way of their marrying their husbands, if it is agreed between them in kindness.” A woman may of her own free will delegate tutelage to her father or a male relative.

Three: Equality between women and men with respect to the minimum age for her marriage, which is now fixed at eighteen years for both, in accordance with certain provisions of the *Malekite*¹⁹² school, and authorize the judge to reduce this age only in justified cases, and further equality between girls and boys under custody who may chose their custodian at the age of fifteen.

Four: concerning polygamy, we took into consideration the commitment to the tolerant principles of Islam in establishing justice, which the Almighty requires for polygamy to take place, as it is plainly stated in the Holy Koran: He said ‘... and if you fear that you cannot do justice (to so many) then one (only).’ And since the Almighty ruled out the possibility for men to do justice in this particular case, He said: ‘You will not be able to deal equally between

¹⁹² Philip A,A,B. Op cit pp 69,71. The founding scholar of this School of Thought Malik bn Anas bn Amir was born in Madina in the year 717CE. The sources of Law used by the Malikee School of thought are: the Qur’an, Sunnah, Amal (Practices) of the Madinite, Ijma of the Sahaba, Individual opinion of the Sahaba, Qiyas, Customs of the Madinite, Istislah (Welfare) Urf (Customs).

(your) wives, however much you wish (to do so)’ and he thus made polygamy quasi impossible under Sharia (religious law).

We further adhered to the distinguished wisdom of Islam in allowing men to legitimately take a second wife, but only under compelling circumstances and stringent restrictions, with the judge’s authorization, instead of illegitimate polygamy occurring if we prohibit it entirely.

From thence, polygamy shall be allowed only in the following circumstances and according to the following legal conditions:

The judge shall not authorize polygamy unless he has verified the husband ability to guarantee equality with the first wife and her children in all areas of life, and there is an objective and exceptional motive that justifies polygamy.

The woman has the right to stipulate a condition in the marriage contract by which her husband will refrain from taking another wife, as Omar Ibn Al-Khattab, may God be pleased with him, is quoted as saying: ‘The intersection of rights is in the conditions.’ In the absence of such a condition, the first wife is summoned to obtain her consent, and the second wife must also be notified and consent to the fact that the husband is already married to another woman. Moreover, the first wife has the right to petition for divorce for harm suffered.

Five: as a token of our royal concern for our dear subjects residing abroad, marriage procedures are to be simplified for them: the marriage contract is to be drawn up in the presence of two Muslim witnesses and in accordance with the procedures in effect in the

country of residence, and then registered with the proper Moroccan consular or judicial authorities, according to the *Hadith*: ‘Seek ease, not hardship.’

Six: Make divorce, defined as the dissolution of marriage, a prerogative that may be exercised as much by the husband as by the wife, in accordance with legal conditions established for each party and under judicial supervision to control and restrict the abusive arbitrary practices of the husband in exercising repudiation, and this according to the rules established on the basis of the *Hadith* BY Prophet (SAW) Mohammed, Peace Be Upon Him, ‘the most hateful to God among all lawful things is divorce.’ The new legislation also reinforces the mechanisms for reconciliation and mediation both through the family and the judge. If the husband has the right of repudiation, the wife may also avail herself of this right through *tamleek* (assignation). In all cases, before repudiation may be authorized it must be ascertained that the repudiated woman has received all of her vested right. A new procedure for repudiation has been established that requires judicial permission, and the repudiation can not be registered until all vested rights owned to the wife and children have been paid in full by the husband. Irregular pronouncements of repudiation by the husband shall not be considered valid.

Seven: expand the woman’s right to file for divorce when the husband does not fulfill any of the conditions stipulated in the marriage contract, or for harm caused to the wife such as lack of financial support, abandonment violence, and other harm, in view of endorsing

the general legal principle: ‘neither harm nor be harmed’ to promote equality and equity between the two spouses. Another new provision introduces of the right of divorce by mutual consent under judicial supervision.

Eight: protect children’s rights by inserting provisions of international conventions ratified by Morocco into the Moudawana. Children’s interests with respect to custody are also guaranteed by awarding custody to the mother, then to the father, then to the maternal grandmother. Should this prove impossible, the judge will entrust custody to the most qualified relative. Furthermore, the child under custody is guaranteed suitable accommodation, separate from the other financial maintenance obligations, and cases concerning maintenance obligations must be settled swiftly within a one-month time limit.

Nine: protect the child’s right to acknowledgement of paternity in the event the marriage has not been officially registered for reasons of force *majeure*, where the court examines the evidence presented to prove filiations, and establish a five year time limit for settling outstanding cases in this regard to put an end to the suffering endured by children in this situation.

Ten: allow the granddaughter and grandson on the daughters side the right to inherit from their grandfather, just as the grandchildren on the son’s side, in keeping with the principles of *Ijtihad* (judicial reasoning) and justice in the compulsory legacy.

Eleven: concerning the management of property acquired by the spouses during marriage: while confirming the principle of separate marital property, the bill makes it possible for the couple to agree, in a document separate marital property, the bill makes it possible for the couple to agree, in a document separate from the marriage contract, on a framework for managing assets acquired during marriage. In case of disagreement, the judge shall resort to general rules of evidence to assess each spouse's contribution to the development of the family capital.

Ladies and gentlemen, honourable members of parliament,

The reforms, of which we cited the most important, should not be considered as a victory of one group over another, but rather constitute achievements for all Moroccans, and we took care to ensure that they were consistent with the following principles and references:

- I cannot, as commander of the faithful, permit what God has forbidden and forbid what God has permitted.
- Adopt the tolerant principles of Islam in advocating human dignity, and enhancing justice, equality and good amicable social relations, and with the cohesiveness's of the *Malekite* school as well as *Ijtihad* (judicial reasoning), which makes Islam valid for any time and place, to implement a modern *Moudawana* for the family, consistent with the spirit of our glorious religion.

Not consider the *Moudawana* as a law for the woman only, but a *Moudawana* for the entire family – father, mother and children – and

further ensure that this *Moudawana* eliminates discrimination against women, protects the rights of children and preserves men's dignity.

Would any one of you agree to throw his family, wife and children out of the home into the street, or for his daughter or sister to be treated unjustly? As the King of all Moroccans, we do not legislate for specific groups or categories of people; rather we epitomize the general will of the nation, which we consider as our extended family.

To protect the rights of our faithful subjects of Jewish faith, we have emphasized in the new family code that they shall be governed by the provisions of the Hebraic Moroccan family law.

Whereas the 1957 *Moudawana* was enacted before the creation of the parliament, and amended in 1993 during a transitional constitutional period by virtue of *Sheifyan Dahirs (Royal Edicts)*, we have esteemed it perspicacious to present the family code bill to the parliament for the first time in view of its implications for civil law, noting that its religious legal provisions fall within the competence of the commander of the faithful.

We expect you to rise to this historical responsibility, both through your respect of the sacredness of this bill's texts, inspired by the tolerant principles of Sharia (religious law), and through your adoption of other texts. These provisions should not be considered as exhaustive or approached in a narrow-minded way, but rather should be approached realistically and insightfully, because this constitutes an *Ijtihad* (judicial reasoning) effort suitable for contemporary

Morocco and our openness to development which we are determined to integrate wisely and progressively.

As the commander of the faithful, we will follow your work in the light of the words of God, ‘... and consult with them upon the conduct of affairs,’ and ‘And when you thou art resolved, put thy trust in Allah’. In order to ensure all conditions necessary for the optimal enforcement of the family code, we addressed a royal letter to our minister of justice. In this letter, we explained that whatever reforms the *Moudawana* may contain, its implementation hinges on the creation of a fair, modern and effective family justice system – particularly since it became clear from the application of the present *Moudawana* that the inadequacies and flaws it contains are not simply due to its clauses, but rather are the consequences of the absence of a qualified family justice system in terms of logistics, human resources and procedures – to fulfill all conditions of justice and equity, accelerate the resolution of cases and promptly enforce judgments.

We further ordered him to accelerate the establishment of suitable facilities for the administration of family justice within the different courts of the Kingdom and the training of qualified personnel at different levels, given the powers that this bill gives to the judiciary, in addition to the necessity to accelerate the creation of a family solidarity fund.

Furthermore, we ordered him to submit to us proposals for the constitution of a committee of experts to draft a practical guide containing different provisions, texts and procedures concerning the

family justice system for it to serve as its unified source of reference and as the procedure for this family code, and efforts must also be made to reduce the current civil procedure code deadlines for the execution of family affairs.”

From the above position of the Moroccan Monarch, it is clear that the King is yielding to or putting an effort to satisfy the agitations from interest groups mounting pressure on him to make changes in the Laws of Morocco to their favour especially those inclined to the feminist ideas such as movements, societies, organization seeking gender equality as a result of influence from the West. This is more rampant in Muslim countries where the values actually differentiate between men and women equitably in some aspects of living and that is the point usually hinged upon by the Western propagandist movements seeking to make the laws of Islam look arbitrary, discriminatory against women and non-applicable in the modern times and to give twisted meanings to them just to achieve their desired objectives.

This research is specifically centered on the following specific provisions of Moudawana (The Family Code of Morocco, 2004)¹⁹³. This is done in a descending sequence of the provisions arrangement.

5.2 CRITICAL ANALYSIS OF THE SELECTED ARTICLES

5.2. 1 ANALYSIS OF ARTICLE 25

“The Woman of legal (Majority) may conclude her marriage contract herself or delegate this power to her father or one of her relatives”

CRITIQUE:

The above is in clear contradiction of the provision of the *Qur'an* and some traditions of the Prophet (SAW) (SAW) some of which are stated below:

Allah says:

“...And do not marry polytheistic men (to your women) until they believe...”¹⁹⁴

¹⁹³ This unofficial English translation of the Moroccan Family Law (Moudawana) was prepared by a team of English and Arabic speaking lawyers at the Global Rights head office in Washington D.C. and their website www.globalrights.org

¹⁹⁴ Qur'an 2 v 221

The above verse shows that the Muslim woman is given out by somebody and not her giving out herself in marriage. This position of the Islamic Law might be clearer when it comes to the practice and sayings of Prophet (SAW) Muhammad (SAW) as can be seen below:

a. Bulughul Maram (English Translation) *Hadith* no 835¹⁹⁵

“Narrated by Abu Burda Bin Abu Musa on the authority of his father ; Allah’s Messenger SAW said, “ There is no Marriage without a guardian” (Ahmad and Al Arba’a reported it; Ibn Almadini, Attirmidhi and Ibn Hibban graded it Sahih.

Imam Ahmad reported this *Hadith* from Al Hassan from Imran ibn Al Hassan’ “there is no marriage without a guardian and two witnesses”.

b. Bulughul Maram (English Translation) *Hadith* 836¹⁹⁶

Narrated Aisha RA Allah’s messenger SAW said “if any woman marries without the consent of her guardian, her marriage is void, if there is cohabitation, she gets her jointure for the intercourse her husband has had. If there is a dispute, the ruler is the Guardian of the one who has no Guardian” Al Arba’a except An Nasa’I reported it; Abu Awana Ibn Hibban and Alhakim graded it Sahih.

c. Bulughul Maram (English Translation) *Hadith* 837¹⁹⁷.

¹⁹⁵ Al-Asqalani, A.I.H, Bulugh Al-Maram, with notes from the book of Subulus Salam written by Muhammad ibn Ismail As Sana’ani. 1996. p347.

¹⁹⁶ Ibid p347

¹⁹⁷ Al Asqalani Op cit 347

Narrated Abu Hurairah RA Allah's Messenger SAW said, "a woman without a husband must not be married till she is consulted and a virgin must not be married till her consent is asked. They asked O Allah's Messenger, how is her consent indicated? 'He replied, "it is by her silence." (Reported by Bukhari and Muslim).

Commenting on this *Hadith* AS Sanan'ani¹⁹⁸ has this to say:

"The consent of a woman is essential for marriage. If a guardian, even the father married his daughter out without her consent, she has got the right to cancel it.

Ayim is a word in Arabic of a woman who already has sexual experience, she may be a widow or a divorcee. An unmarried adulteress in reality is an *Ayim* but under the Orders of *Shari'ah*, she is not *Ayim*. An *Ayim* must give her consent by word for her marriage otherwise the marriage is not possible; but for a virgin an *Ayim*, if she has not reached puberty, then her consent is not necessary, only the permission of the *Waliy* is sufficient".

The point from the above remains that the woman going into marriage must be given out by a guardian and not that she gives herself out.

d. Bulughul Maram (English Translation) *Hadith* 838¹⁹⁹

Narrated Ibn Abbas (RA) The Prophet (SAW) (SAW) said "A woman who has been previously married has more right over her person than her Guardian, and a virgin must be consulted, and her consent is her silence"(Reported by Muslim)

¹⁹⁸.Ibid p347

¹⁹⁹ Asqalani Op cit p348

A version has; “a guardian has no authority over a woman who has been previously married: and an orphan girl must be consulted.” Reported by Abu Dawud and An Nasai; Ibn Hibban graded it Sahih.

The role of the guardian in the above *Hadith* is still recognized as a factor for the validity even where the woman in question has previously married because the only thing he is not allowed to do in this respect is for his decision to override that of the woman.

e. Bulughul Maram (English Translation) *Hadith* 839²⁰⁰

Narrated Abu Hurairah RA Allah’s Messenger SAW said, “A woman may not give a woman in marriage nor may she give herself in marriage.” (Reported by Ibn Majah and Addaraqutni. Its narrators are reliable.)

The above position of the Law is clear that a woman cannot give herself out in marriage neither can she give out another woman for that purpose. The rationale behind this is so from the human experience of the institution of marriage where the woman is placed at the position of sub-ordinate of the husband she marries. It is only reasonable that since the woman is going into a new life where she will be expected to serve under the control of the husband, she needs protection of those giving her out. The role played by that position of the guardian is that of

²⁰⁰ Ibid p348

protection where it is understood from the gesture that she is the weaker among the two coming together and as such she require and needs the backing of her male elders serving as her guardian for that purpose.

5.2.2 ANALYSIS OF ARTICLE 40

“Polygamy is forbidden when there is the risk of inequality between the wives. It is also forbidden when the wife stipulates in the marriage contract that her husband will not take another wife”

CRITIQUE:

The above Article will be discussed under two different headings thus:

a. The possibility or otherwise of measuring the ‘Risk of inequality’ between the wives.

The nature of inequality is not stated in the Act neither is it reasonable for anyone who may assess the risk to do that successfully when the wife-to-be is not yet under the marital care of the husband. This part of the Act remains vague and is capable of breeding unwarranted sentiment that would result in the breaching and forestalling of the right of the husband to even start making the move to take a second wife.

b. The validity of making such stipulations by the wife of an Islamic Marriage.

The issue of making stipulations during marriage contract is there and allowed by the jurists. However the nature of stipulation made is what the *Shari'ah* questions for no stipulation made under any circumstance of contract or agreement by two parties to the extent of rendering a lawful unlawful or an unlawful lawful. The *Hadith* states:

Bulughul Maram (English Translation) *Hadith* 735²⁰¹

Narrated Amr bin Auf Al-Muzani RA, Allah's Messenger (SAW) said "Truce is allowable between Muslims except such which make something unlawful lawful or such making something which is lawful, unlawful. And Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful, or makes lawful something which is unlawful". Attirmidhi reported and graded it Sahih.

Commenting on the above *Hadith*, As Sana'ani states:

"in Arabic, *Sulh* means peace. There are many kinds of *sulh* such as a treaty between Muslims and non-Muslims, a reproachment between husband and wife, a truce between rebels and government, a concord of two angry persons and government in financial disputes...."

²⁰¹ Asqalani Op cit p306

“Basic principle about agreement is that it should not be against any law of the *Shari’ah* and it should not change unlawful into lawful and vice versa...”

Where then a stipulation made by either of the parties to a marriage contract which essentially contradicts the clear provisions of the *Shari’ah*, such shall be rendered inoperative and will not be taken as a promise to be fulfilled rather an act of forbiddance that must be shunned. The Prophet (SAW) (SAW) in one of his famous narrations by Aisha (RA) is reported to have said **“if you vow to obey Allah fulfill your vow, but if you vow to disobey Him do not fulfill the vow”**,²⁰²

5.2.3 ANALYSIS OF ARTICLE 41

“The court will not authorize polygamy

-if an exceptional and objective justification is not proven

-if the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspects of life”

The following can be deduced from the above Article:

a. The Court is the one to authorize polygamy.

²⁰² AbdulWahhab, M, Kitabut Tauheed, Babu minashirki an nadhari lighayrillahi Ta’ala, Darut Tawheed, 2002 p157
Also in Bukhari, Hadith no 6696, 6700

The decision to be polygamous is a right of the man²⁰³. Where this right is shifted to the Court to authorize or not to authorize it in the face of a clear *Qur'anic* verse calls for questions.

It can be implied from the Article that, where any man just decide on his own to marry another without the authorization of the court, he will be committing a wrong against the court which consequence is better imagined.

b. An exceptional and objective justification must be proven as a condition precedent.

Justification for marrying a second wife can be at worse, objective but not necessarily exceptional. This is because on an objective ground of being able to fend for more than a wife, fear of falling into committing Adultery as examples can suffice when assessed objectively on a normal note. But when exceptionality is put as a yardstick, it goes directly to root of the right to make the decision *ab initio* by the man which will run directly contrary to the verse quoted above.

c. The evidence of enough material resources to support both wives

The evidence of enough material resources of the man to cater for both wives can and is encouraged to be assessed objectively by any authority.

²⁰³ Qur'an 4v3

d. Ability to deal equally between both wives in all aspects of life.

The above is very likely to be a human impossibility. The nature of man might never conform to the above condition in the real sense. Where the attention of the husband is drawn to deal justly among his wives, scholars interpret such to mean material things like the sharing of time and provisions. But where it has to do with things that are not material like love as an example can never be equalized in dealing with more than one person.

Hence making it a criteria or condition precedent in a general sense like it is in the above Article is like attempting what can never yield result.

5.2.4 ANALYSIS OF ARTICLE 42

“In the absence of stipulation by the wife in the marriage contract precluding polygamy, the husband wishing to resort to it must petition the court for authorization. The authorization petition should include the exceptional and objective motives that justify the request, and attach a statement of the Applicant’s financial situation”

CRITIQUE:

As discussed under Article 41 above, the authorization of polygamy or otherwise by the court is contrary to the provisions of the *Shari’ah* as stated above which make the decision of Polygamy a right of the husband. Furthermore, the court is

human and every human has a distinct way of perception in every situation that gives room for objectivity like this. The sitting judge in any case can choose to look at the assessment of anybody brought before him in a manner that he thinks fit and not necessarily considering the man in need for another wife. This assertion can be seen from the word ‘authority’ which is synonymous in this context to a ‘final say’. If this is allowed then it is most likely to breed injustice and unfairness which is a contradiction of the cardinal role of the judiciary.

5.2.5 ANALYSIS OF ARTICLE 43

“The court summons the wife whose husband wishes to take another wife, when she personally receives the summons and does not appear in court or refuses to accept the summons, the court sends her a formal notice by a process server instructing her that if she does not appear at the hearing scheduled in the notice, the husband’s petition will be decided in her absence”

The insistence of the Article to make the court a deciding factor in all cases of Polygamy and the attitude of the legislature to sort of make the issue look detrimental *prima facie* to the wife and portray it as a heinous crime is uncalled

for contrary to the very objective of legalizing polygamy under the *Shari'ah* where the *Qur'an* 4 v 3 states that:

“...marry the women of your choice, two or three or four. But if you fear that you shall not be able to deal justly with them, then only one...”

The point from the above verse is that the preference is to be polygamous. In other words, polygamy is rather encouraged and not discouraged because as it's clear from the verse, it is when one finds himself not being able to deal justly that one is advised to stick to one.

The justice referred to in this verse only relates to the humanly possible equitable treatment. In the matter of love, even if one really wants to do justice with sincerity of purpose, he will not be able to do so knowing human being what they are²⁰⁴.

The Prophet (SAW) is reported to have said:

“Narrated ‘Aisha (RA) Allah’s Messenger (SAW) used to divide visits to his wives equally and say “O Allah, this is my division concerning what I

²⁰⁴ Ibid p147

possess, so do not blame me concerning what You possess and I do not.”

„205

In the above respect, the key area that caution is given to men that go into polygamy is their ability to do justice among the wives and not a prohibition of Polygamy itself (either express or implied).

The Hadith above is a clear indication

5.2.6 ANALYSIS OF ARTICLE 44

“The hearing takes place in the consultation room in the presence of both parties, and both are heard in order to reach agreement and reconcile them after an examination of the facts and the presentation of the requested justifications”

“The court may authorize polygamy in a well founded decision not open to appeal once it established the existence of an objective and exceptional justification and put into place conditions benefitting the first wife and her children”

²⁰⁵ Al-Asqalani A. A Op cit p371

The first part of the above Article can be seen as a scenario where both parties are likely to make private issues public. Where for instance, the justification for the choice to take another wife by the husband is lack of sexual satisfaction from her and the fear not to fall into committing sin, this can be taken from the man privately in the absence of his wife and treated in isolation but where such a private issue peculiar to the husband and will most likely be offensive to his wife if heard by a third party must be said in her presence as the Law says, then the law will be encouraging chaos and unrestiveness in several homes as a result. And at worse, the law would have succeeded in presenting itself only to be contravened.

*Qur'an*²⁰⁶ states:

“And cause not mischief upon the earth after its reformation”

Another verse states in *Qur'an*²⁰⁷ clearly that:

“...And do not spy or backbite one another...”

The analysis intended by the verses above is that where the law put in place by any authority is capable of breaching peace especially in institutions as sacred as marital ones, such will be causing havoc rather than cementing good relationship.

²⁰⁶ 7:5

²⁰⁷ 49:12

The court here might unknowingly be delving into private issues of people they adjudicate between and such is not decent.

The second leg of the Article provides that, even where the man has proven such exceptional justification to marry another wife, there must be in place conditions by the court to benefit the wife and her children. This is contrary to the injunction of the *Shari'ah* to deal with both wives justly.²⁰⁸

5.2.7 ANALYSIS OF ARTICLE 45

“When the court confirms in the discussions that continuation of the conjugal relationship is impossible, and where the wife whose husband wants to take another wife persists in her request for divorce, the court determines a sum of money corresponding to the first wife’s full rights as well as those of their children that he is required to support. The husband must pay the fixed sum of money within a maximum time limit of seven days. Upon submission of the requisite sum of money, the court issues the divorce decree”

²⁰⁸ Qur'an 4:3

There are about 4 legal issues arising from the above Article thus:

- a. **A wife can insist on divorce due to the intention of her husband to take another wife and court mandates the husband of such a woman to pay her a certain sum of money to take care of her and her children.**

The position of the *Shari'ah* in this type of circumstance is clear and unambiguous. The law does not prescribe any special sum for the wife and children except the obligation of the general maintenance during the *Iddah* period and after which the wife will not be entitled to any form of gift or maintenance as of right from the husband. Moreover where a wife insists on divorce, the *Shari'ah* provides that she should be the one to pay for leaving (*Khul'i*) and not the contrary as contained in the Family Code!

- b. **A maximum period of seven days to pay the above sum.**

The period of seven days is also in clear contradiction of the verse of the *Qur'an* and the *Sunnah* where the obligation on the husband during *iddah* period only is to cater for his wife and the children and not turning her out of the house except in exceptional circumstances.

The seven days ultimatum has no legal basis and would cause unnecessary hardship where the position of the *Shari'ah* is always “Hardship should be removed” wherever it is.

Allah says:

“...do not turn them out of their (husband's) houses, nor should they (themselves) leave (during that period) unless they are committing a clear immorality. And those are the limits (set by)Allah...”²⁰⁹

The analysis here is that the verse prescribes the remaining of the woman in her marital home after divorce to observe the waiting period as a general rule. The only exceptional circumstance is where she proves to be immoral. Being a verse of the *Qur'an*, and very literal and self-explanatory, it will be a contradiction for any Muslim family code to go against such a provision.

c. The court is the one that issues the divorce decree.

Under the *Shari'ah*, there exists special circumstance only which the court gives a divorce otherwise; divorce is a right of the husband only. The above circumstance do not warrant any court of law to give divorce on the husband's behalf where it is not stated in the Article that the court only

²⁰⁹ Qur'an 65:1

takes such step when there is a violation of its directive to so do by the husband upon a justifiable legal basis.

The exceptional circumstances where the court issue divorce decree on its own is when the Qadhi after the careful consideration of an application made to him by the wife, the Qadhi is satisfied that the woman is prejudiced by a marriage, he will annul the marriage.²¹⁰

5.2.8 ANALYSIS OF ARTICLE 51

“The Mutual Rights and Duties between Spouses are:

No 3. The wife assuming with the husband the responsibility of managing and protecting household affairs and the children’s education”

The above Article has given joint responsibility to both husband and wife with regards to the managing and protection of the household affairs which include the welfare of the children.

5.2.9 ANALYSIS OF ARTICLE 52

“When either spouse fail to fulfill his or her obligation in marriage, as specified in the preceding Article, the other party may compel the

²¹⁰ Doi A. op cit p171

spouse to execute the obligation or resort to the irreconcilable differences procedure provided for in Articles 94,95,96 and 97 below”

Article 52 above is of the effect that any of the spouses can compel the other to carry out any household responsibility as an obligation irrespective of whether the person in question is the husband or the wife. The refusal to carry out any of the household responsibilities by the spouses compelled can lead to divorce.

CRITIQUE

Taking Articles 51 and 52 jointly, Islam has made it obligatory on every husband to provide maintenance to his wife whether she is poor or rich even if he is poor...²¹¹

Maintenance is defined by the Jurists as “all that a man provides in terms of food, clothes and shelter towards his wife, parents, kindred, servants and animals²¹²”

Hence maintenance is a sole responsibility of the husband and not for both spouse. Where any legislation is to the contrary, it needs to be

²¹¹ Zaidan A.K. Al-Muttasal fi ahkamil Mar’ah wa baitil-Muslim Fil-Shariatil-Islamiyyah, Al-Risala Publishers, Beirut, Lebanon, 2000, Vol 9 p424

²¹² Aridhah, K.M. Aljami’u Fifiqhhi-Nisa’I, Darulkutubli Islamiyyah, Beirut, 2000, pp293-294

reviewed especially when it is said to have been made to serve the course of the *Shari'ah*.

The *Qur'an*²¹³ states that:

“...but the father of the child shall bear the cost of their food and clothing on equitable terms...”

The directive of Allah here is to the father who solely bears the responsibility to take care of the welfare of his children. No joint responsibility is intended as could be seen from the literal meaning of the verse.

The *Qur'an* states also that:

“Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him²¹⁴”

The father in the above verse is referred to where the obligation is to take care of the family by him according to his means only. No other person's means is considered in this context but his alone.

²¹³ Qur'an 2v 233
²¹⁴ Ibid 65 v 7

The Prophet (SAW) of Islam (SAW) stated in his farewell sermon that:

“Fear Allah in your affairs with women, indeed you have taken them under the covenant of Allah. You have indeed made lawful sexual intercourse with them with the word of Allah, verily, they have rights over you; to be fed and clothed equitably”²¹⁵.

The Prophet (SAW) from the above text makes it the right of the wife to be fed and clothed equitably by the husband and gives no room for joint responsibility as envisaged by the above Article.

In relation to treatment of the wife by the husband the Prophet (SAW) also state clearly in a *Hadith* that:

“Let him feed her whenever he feeds and clothe her whenever he clothes himself and never shall he abandon her except in the room nor shall he beat her face or disgrace her”²¹⁶

Also taking the above authorities jointly, they are of the effect that it is against the provisions of the *Shari’ah* for the wife to participate in the up keep of the house. Rather she and her children are entitled to be

²¹⁵ Al-Afify, T.A. (nd) Haqquz Zauji ala Zaujatihi, wa Haqqu-A-Zaujah ala Zaujiha, Darul-Itisan, Cairo.p67

²¹⁶ Al-Asqalani, A.A. (nd) Fathul Bari, bisharhi sahihul Bukhari, Almatba’ atussalafiyyah, Cairo, Vol,9 p507

maintained fully with regards to feeding, clothing, shelter and other welfare proportionate to his income.

It is therefore seen here that it is unfair for any Law to make her (the wife) fend for the family as a duty. Furthermore, no one can question her non participation in the matrimonial home maintenance nor compel her to take any of such responsibilities as an obligation.

The *Qur'an* states clearly that:

“Men are the Protectors and maintainers of women, because Allah has made one of them excel the other, and because they (the men) spend (to support them) from their means...”

5.2.10 ANALYSIS OF ARTICLE 83

“if the attempt to reconcile the spouses fails, the court shall fix a sum of money the husband must deposit at the court within a maximum delay of thirty days to discharge all vested rights due to the wife and dependent children as provided for by the two following articles”

This section makes it an obligation on the husband to pay an amount as shall be fixed by the court to cater for the divorced wife and her children. The rights due to the wife will be calculated and summed up for payment by the husband.

5.2.11 ARTICLE 84

“The amount due to the wife include: the delayed dowry if appropriate, maintenance for iddat (Legal waiting period) and consolation gift which is assessed based on the length of marriage, the financial means of the husband, the reason for the repudiation, and the degree to which the husband has abused his rights. During the iddat period, the wife remains in the conjugal home, or if need be, in a suitable home based on her and the husband’s financial situation. Failing this, the court shall fix an amount of money to cover housing expenses to be deposited with the court as part of the vested rights due to the wife”

The above section of the law is to the effect that certain parameters like the length of the marriage, the reason for separation and the extent of the abuse of rights by the husband only and other considerations will be used in measuring the amount of money to be paid by the husband at the point of divorce.

The Articles 83 and 84 are definitely such that are likened to a trap set to nail the offender by all means which should not be the intent of any legislation.

The fact that the sections contain words like:

“Maintenance for iddat (Legal waiting period) and consolation gift which is assessed based on the length of marriage, the financial means of the husband, the reason for the repudiation, and the degree to which the husband has abused his rights. During the iddat period, the wife remains in the conjugal home, or if need be, in a suitable home based on her and the husband’s financial situation. Failing this, the court shall fix an amount of money to cover housing expenses to be deposited with the court as part of the vested rights due to the wife”

All to be deposited in the court within a maximum delay of 30days...; are unequivocally going to spell a magnitude of hardship on anybody in that circumstance. This is a situation that calls for the looking into intent of the *Shari’ah*.

Allah has stated in the *Qur’an*.²¹⁷

“Allah intends ease for you and do not intend hardship for you....”

The above verse presupposes that any law of the *Shari’ah* prescribed for mankind intends ease and not hardship. Meaning, man should always make rules as facilitate righteousness not rebellion.

²¹⁷ 2:18

A popular maxim of scholars of Islamic jurisprudence states that ‘Hardship (or *Mushaqqah*) causes the giving of facility’. That is, since the Law giver has in several instances made mention of making facility and not hardship, every law intended should provide facility and not further hardship.

The Articles above are capable of putting the husband of the marriage in a very difficult situation that may result to rebellion, disobedience or even violence. It appears as if the wife is being driven out of the matrimonial home which is clearly contrary to the intent of the law.

5.2.12 ARTICLE 124

“The husband may take his wife back during the legal waiting period (Iddat) if the husband wants to take back his wife after a revocable divorce, two Adouls (Public notaries) shall certify this and immediately inform the judge”

The requirement of the above Article is that the husband must be certified by some notaries and the judge informed of his intention to take back his divorced wife. It should be noted here that it is not just witnessing the taking back of the wife by the notaries but certification.

“Before the validating the ‘Resumption document’ the judge must summon the wife to inform her of this. If she does not comply with this request and she

refuses to return, she may resort to the Irreconcilable difference procedure in preceding Article 94”

The wife under this Article must be satisfied with the intention of the husband to take her back before effect can be given to it by the court who summons her for the purpose.

CRITIQUE

Based on the provisions of the *Shari'ah*, the husband has the right to take back his wife who still menstruates as long as she has not yet entered her third menstruation in the course of the *iddah* retirement- third in the case of a free woman and second menstruation in the case of a slave woman²¹⁸

It will suffice just to utter the words like “I take you back” or the return can be effected through action like resuming sexual relations, or kissing each other.²¹⁹

“And when they have (nearly) fulfilled their term, either retain them according to acceptable terms or part with them according to acceptable terms. And bring to witness two just men from among you and establish the testimony for (the acceptance of) Allah”²²⁰

²¹⁸ Al-Qayrawani, Risalah, ch.32, Bab fil Nikah wal Talaq, pp89-97

²¹⁹ Doi A. op cit p177

²²⁰ Qur'an 65:2

“...And their husbands have more right to take them back in this (period) if they want reconciliation”²²¹

The two verses above clearly illustrated the fact that it is the right of the husband to take his wife back during the waiting period of revocable divorce and the only obligation on him by the *Shari'ah* is to inform two just witnesses. The wife or any other person or authority has no legal basis to ratify this action of his. By the Article bringing in the court to play the role of validating the husband's action by a 'Resumption document' is contrary to the provision of the *Shari'ah* as stated in the above verse.

5.2.13 CONCLUSION

In conclusion, the essence of the criticism above is mainly premised on the fact that the foregoing Articles of Moudawana affects rights of the persons concerned in the circumstances. **The Articles 25,40,41,42,43,44,45,51,52,83,84, and 124 of the Code have been analyzed in the light of some textual provisions of the *Shari'ah*. The analysis carried out above is meant to be clear using only the literal interpretations of the texts referred to. This is to enhance the comprehension of readers.**

²²¹ Ibid 2:228

The result of the compatibility test conducted as can be seen from the preceding paragraphs shows a lot of discrepancies between what the *Shari'ah* sources provide as laws and what the Articles contain as representing the *Shari'ah* positions. In other words, there are discovered incompatibilities. The provisions of the *Shari'ah* contradicted by the Muslim Family Code are such provisions that are clear, devoid of ambiguity and incapable of accommodating the flexibility it is given. The position of the *Shari'ah* is that, what is clear in a text is not subject to analogy.²²² It is also a settled principle of Islamic Jurisprudence that, constraint does not destroy the right of another.²²³ Hence, where an agitation of various interest groups mounted on the legislature to bring about reforms of the Muslim Family Code, such reforms ought to have been carried out within the tenets of the *Shari'ah* only, taking into consideration the rigid and flexible provisions so as to guard against contradictions of express provisions of the law as in this case.

The impact of the Family Law Code reform is already visible in the Moroccan society as women seem to have taken readily to their new

²²² Hussaini S.W.A. Op cit p;76.

²²³ Ibid p77.

autonomy, exercising the right to marry without a male guardian in 20.7% of all marriages in 2008, up from 18.9% in 2004.²²⁴

The reform also abolished the legal requirement of a wife's obedience to her husband, and stipulated that both the husband and wife are joint heads of the household. However, the husband is still legally required to financially support his wife in accordance with Islamic fiqh (teaching).²²⁵

While the personal status code did not completely abolish polygamy, women can now stipulate clauses into their marriage contract, such as a monogamy clause which can legally forbid their husbands from taking another wife. Men must now obtain judicial authorization to take a second wife, and they must prove to the judge that they can financially care for all their wives and children. Importantly, the first wife must be present when the husband appears before the judge to seek authorization.²²⁶

²²⁴ Siham, A, "Moroccans Assess Moudawana Progress" Magharebia, Oct, 9, 2009, available at, <http://magharebia.com/engb/articles/awi/reportage/2009/10/09/reportage-01> last visited 10th October 2015.

²²⁵ See generally Family Code (Morocco), Translated in the Moroccan Family Code (Moudawana), GLOBAL RTS. (February 5 2004) [http://www.globalrights.org/sight/docserver/Moudawana-English Translation.pdf](http://www.globalrights.org/sight/docserver/Moudawana-English%20Translation.pdf) (Last visited 5th December 2015)

²²⁶ Malchiodi, B. "Assessing the Impact of 2004 Moudawana on Women's Rights in Morocco" Participant in the 2008 Fulbright-Hays Summer Seminars abroad Morocco: the delicate Balance Between Traditional Identity and Modernity, 2008, p5

Since the reforms, the number of polygamous marriages has decreased rapidly.²²⁷ From 2005-2006 there was a 12.5% decrease in the percentage of polygamous marriage relative to all marriages, from 32% to 28%.²²⁸ However, the rate of change is extremely variant from city to city, seemly based on the pre-reform statistic and co-economic difference.²²⁹ The Personal Status Code did not completely abolish unilateral repudiation of a wife by her husband, but the practice of repudiation was placed under judicial oversight. Additionally, two new forms of divorce were introduced. Children could now also acquire Moroccan nationality through their mother, therefore, a Moroccan woman who has a child with a non –Moroccan man can pass the nationality unto their offspring.

²²⁷ <<Morocco>> Social Institutions and Gender Index. OECD, Development 2012, <http://genderindex.org/country/morocco>.

²²⁸ Ann M. E, “Law on the Books vs Law in Action: Under Enforcement of Morro’s Reform, 2004. Family Law, The Moudawana” Cornell University School of Law, 2011, Cited by Hanafi,L in The Implementation of Morocco’s 2004 Family Code Moudawana: Stock-Taking & Recommendations,. November, 2013, p7

²²⁹ Ibid p7

CHAPTER SIX

SUMMARY, CONCLUSION, FINDINGS AND RECOMMENDATIONS

6.1 INTRODUCTION

The theme of this dissertation is making out a compatibility test of the Muslim Family Code of Morocco, 2004, known as Moudawana vis-à-vis the provisions of the *Shari'ah*. This chapter will summarize, make some conclusions, state some findings and suggest some recommendations to its findings.

6.2 SUMMARY

Chapter One contains a General Introduction of the Topic, Statement of the Problem, Research Question, Objective of the Study, Significance of the Study, Methodology, Literature Review and Organizational Layout of the thesis. In Chapter Two, the sources upon which the *Shari'ah* is formed classified as Primary, Secondary and subsidiaries and were discussed. Chapter Three dealt with the actual Critique of the twelve relevant selected Articles of the Islamic Family Law Code of Morocco, Moudawana provisions and comparing those sections of the Law with

the *Shari'ah* provisions. The Chapter Four provided for the concept of *Ijtihad* and the scope within which jurists are limited while carrying out *Ijtihad*. Chapter Five has to do with the Conclusion, Summary and Recommendations.

6.3 CONCLUSION

The personal status code, the Moudawana was adopted in January 2004 and passed into law in February 2004. Several important rights were secured for Moroccan women via the 2004 Moudawana, including the right to self-guardianship, the right to divorce, and the right to child custody.²³⁰ Additionally, sexual harassment was made punishable by law under the Moudawana. The age of marriage for girls was raised from 15 to 18, and girls were no longer required to have a male guardian to approve their marriage.

Rights of spouses being an important aspect of safeguard of the institution of marriage under the *Shari'ah* must be known, practiced and maintained by the Muslims wherever they are on the globe; it is so because of the universality of the application of the *Shari'ah* and its perfection in catering for present and future

²³⁰ Sadiqi, F. "Five Years After the New Moroccan Family Law", University of Fez, 2010, p2 available at <http://magharebia.com/engb/articles/awi/reportage/2009/10/09/reportage-01>, last visited 10th October 2015.

needs of man in all his endeavors and as such, has to be understood by all the Muslims world over.

Although the study is centrally on the provisions of the *Shari'ah* on rights of spouses vis-a-vis the Muslim Family codes of Morocco, it is meant to apply to every other Muslim country with similar modifications to their family law codes for Muslims all over the world.

The Moroccan state is an Islamic state pursuant to Article Three of the Moroccan Constitution and an adherent of the Maliki school of thought. Moudawana of Morocco discussed above is such that has direct bearing on the general provisions of the Islamic Family Law. In the Islamic legal system, the desire to ascertain what is valid in Islamic law led to the development of schools of *Fiqh* (Law). The schools brought uniformity into the law by selecting and preferring individual rules from among a large body of rules. Followers of a school were like insiders of a legal system. They internalize the law by having faith in the school and its founders. The law within the school came to be generally obeyed. There was no Act of the legislation to provide validity to the law

from the outsider's point of view. The followers of a school could say with certainty: this is the law.²³¹

Methodologies employed by jurists, rulers, legislators and other law making bodies differ. However any methodology chosen to be used for the purpose of reform requires that the general principles must be verified and checked against the ultimate purpose of the *Shari'ah*. The purposes of the *Shari'ah* are not laws in themselves; they serve as the criteria for confirming the authenticity of the general principles employed by the jurist, whether these principles are stated in the text of the *Qur'an* or the *Sunnah* or even being derived from them by the Jurist...²³²

The provisions under review essentially and specifically dealt with rights of spouses in relation to the new Family law as earlier stated and to what extent it has showed compliance or otherwise.

The reviewed provisions of Articles 25,40,41,42,43,44,45,51,52,83,84, and 124 of Muslim Family Code of Morocco 2004, Moudawana, have been discussed in line with the provisions of the *Shari'ah* where the

²³¹ Nyazee op cit p298

²³² Nyazee op cit p300-301

necessary critique on its compatibility with the provisions of the *Shari'ah* have been made.

6.4 FINDINGS

The provisions of Articles 25,40,41,42,43,44,45,51,52,83,84, and 124 of Muslim Family Code of Morocco 2004, Moudawana have been juxtaposed with the provisions of the *Shari'ah* and have been found to be substantially at variance with it. In other words, the concern of this dissertation which was mainly to check the provisions of the Family Code's compatibility with the *Shari'ah* has been carried out. This can be perceived from the sources of *Shari'ah* that were investigated and discussed in the light of the topic where it is made clear from the findings that the provisions of the Muslim Family Code of Morocco, 2004, (Moudawana) under review are in direct contradiction with some of the provisions of the *Shari'ah* dealing with them.

Based on the research conducted, mainly, the above stated rights were found to have contradicted some express provisions of the *Shari'ah* and the following are the findings:

Women seem to have taken readily to their new autonomy, exercising the right to marry without a male guardian in 20.7% of all marriages in 2008, up from 18.9% in 2004.²³³

The reform also abolished the legal requirement of a wife's obedience to her husband, and stipulated that both the husband and wife are joint heads of the household. However, the husband is still legally required to financially support his wife in accordance with Islamic fiqh (teaching).²³⁴

While the personal status code did not completely abolish polygamy, women can now stipulate clauses into their marriage contract, such as a monogamy clause which can legally forbid their husbands from taking another wife. Men must now obtain judicial authorization to take a second wife, and they must prove to the judge that they can financially care for all their wives and children. Importantly, the first wife must be present when the husband appears before the judge to seek authorization.²³⁵

²³³ Siham, A, "Moroccans Assess Moudawana Progress" Magharebia, Oct, 9, 2009, available at, <http://magharebia.com/engb/articles/awi/reportage/2009/10/09/reportage-01> last visited 10th October 2015.

²³⁴ See generally Family Code (Morocco), Translated in the Moroccan Family Code (Moudawana), GLOBAL RTS. (February 5 2004) [http://www.globalrights.org/sight/docserver/Moudawana-English Translation.pdf](http://www.globalrights.org/sight/docserver/Moudawana-English%20Translation.pdf) (Last visited 5th December 2015)

²³⁵ Malchiodi, B. "Assessing the Impact of 2004 Moudawana on Women's Rights in Morocco" Participant in the 2008 Fulbright-Hays Summer Seminars abroad Morocco: the delicate Balance Between Traditional Identity and Modernity, 2008, p5

Since the reforms, the number of polygamous marriages has decreased rapidly.²³⁶ From 2005-2006 there was a 12.5% decrease in the percentage of polygamous marriage relative to all marriages, from 32% to 28%.²³⁷ However, the rate of change is extremely variant from city to city, seemly based on the pre-reform statistic and co-economic difference.²³⁸ The Personal Status Code did not completely abolish unilateral repudiation of a wife by her husband, but the practice of repudiation was placed under judicial oversight. Additionally, two new forms of divorce were introduced. Children could now also acquire Moroccan nationality through their mother, therefore, a Moroccan woman who has a child with a non –Moroccan man can pass the nationality unto their offspring.

It is the finding of this research that the Family Code of 2004 is already taking its toll in the Moroccan society according to the statistical account. The meaning therefore is the violation of some sacred and guarded provisions of the Shari'ah by Muslims in a Muslim Country

²³⁶ <<Morocco>> Social Institutions and Gender Index. OECD, Development 2012, <http://genderindex.org/country/morocco>.

²³⁷ Ann M. E, "Law on the Books vs Law in Action: Under Enforcement of Morro's Reform, 2004. Family Law, The Moudawana" Cornell University School of Law, 2011, Cited by Hanafi,L in The Implementation of Morocco's 2004 Family Code Moudawana: Stock-Taking & Recommendations,. November, 2013, p7

²³⁸ Ibid p7

without much concern of the Divine consequences according to Islamic belief.

In conclusion, the essence of the findings above is mainly premised on the fact that the foregoing Articles of Moudawana affects rights of the persons concerned in the circumstances. **The Articles 25,40,41,42,43,44,45,51,52,83,84, and 124 of the Code have been analyzed in light of some textual provisions of the *Shari'ah*. The analysis carried out above is meant to be clear using only the literal interpretations of the texts referred to. This is to enhance comprehension of readers.**

The result of the compatibility test conducted as can be seen from the preceding paragraphs shows a lot of discrepancies between what the *Shari'ah* sources provide as laws and what the Articles contain as representing the *Shari'ah* positions. In other words, there are discovered incompatibilities.

6.5 RECOMMENDATIONS

The provisions of the *Shari'ah* contradicted by the Muslim Family Code are such provisions that are clear, devoid of ambiguity and incapable of accommodating the flexibility it is given. The position of the *Shari'ah* is that, what is clear in a text is not subject to analogy.²³⁹ It is also a settled principle of Islamic Jurisprudence that, constraint does not destroy the right of another.²⁴⁰ Hence, where an agitation of various interest groups mounted on the legislature to bring about reforms of the Muslim Family Code, such reforms ought to have been carried out within the tenets of the *Shari'ah* only, taking into consideration the rigid and flexible provisions so as to guard against contradictions of express provisions of the law as in this case.

It is the recommendation of this dissertation that the jurists, rulers or reformers restrict themselves to the provisions of the *Shari'ah* when making reforms to laws that have to do with the divine provisions. Going out of the strict rules of the *Shari'ah* by applying *Ijtihad* where it cannot be accommodated is a violation of the divine law which humans are incapable of changing. It is and remains a duty on any authority concerned in the Law reforms in Muslim countries like Morocco to get the input of classical scholars that are well learned in the practice and

²³⁹ Hussaini S.W.A. Op cit p;76.

²⁴⁰ Ibid p77.

procedure of Islamic jurisprudence to set out the scope within which any proposed reform shall be based. That the reliance on the agitations by groups and movements that are not necessarily religious should not force the authorities concerned with law reforms to easily give-in especially when such proposed reforms are in express contradiction with the provisions of the *Shari'ah*.

It is hereby recommended that:

1. The provision of Article 25 be amended to the extent of allowing the guardian of an unmarried woman take his rightful position of 'Giving out' the hand of the woman in marriage as seen from the clear provisions of the Prophet (SAW)ic traditions stated above not for her to conclude her marriage on her own or have it as a right to delegate the power of guardianship to any male of her choice.
2. The provision of Article 40 be amended to the extent of not forbidden polygamy in the general sense as it appears. It should also restrict the kind of stipulations allowed under the *Shari'ah* since it is not allowed to make stipulations that will render unlawful lawful and lawful unlawful.
3. The provisions of Article 41 is recommended for amendment to the extent of taking the power of authorizing polygamy since it is a right possessed by every man that has the means. The reason being that such power to

authorize or otherwise is susceptible to abuse by the courts. The exceptional and objective justification is too stringent a condition. The law can be restricted to objective condition and not exceptional which might never be there in the real sense. The law should give full right to the husband desirous of taking another wife to do so without any form of interference. However , it is good and commendable if the means of maintaining of more than one wife is checked by an unbiased mechanism of the government to curtail abuse of the right. The emphasis is that the right should be maintained but the check of abuse of the right is recommended.

4. The ‘exceptional objective’ is still emphasized here as what should removed from the Article 42 of this law due ot the difficulty involved in measuring such and the likelihood of abuse by the authorities concerned in relation to the husband desirous of taking another wife.
5. It is the recommendation of this research that Article 43 be removed completely as it renders the situation ‘one of approval’ by the wife which is not correct in light of the *Shari’ah* provisions provided. The wife should not be made to approve the decision of her husband to take another wife which is his right especially when he is proven to be capable of having the means to shoulder the responsibility.

6. It is also the recommendation of this research that Article 44 be removed from the Law for portraying the decision of a man to take additional wife as a trouble-like-scenario where reconciliations must take place and if amicably reached, the court may authorize polygamy after giving some laid down rules that are not known to the *Shari'ah*.
7. The recommendation of this research in respect of Article 45 is to remove it completely for being pessimistic and instigative in nature. No law should be trouble-suggestive as the primary aim of law is to regulate behavior for peaceful co-existence in the every given society. The Article is quick in suggesting divorce which is very much detested under the *Shari'ah*! The ultimatum also given to the husband is also likely to be abused.
8. It is the recommendation of this research that Article 51 be redrafted to reflect the husband as the sole maintainer of the matrimonial home. Meaning, the wife should not be made to share the managerial and protective responsibilities of the home which are solely the responsibilities of the husband under the *Shari'ah*.
9. The recommendation of this research work in respect of Article 52 is to expunge it completely from the law for being alien to the intent of *Shari'ah* in maintaining a balanced home front by apportioning each couple distinct responsibilities.

10. This research hereby recommends that Article 83 be removed from the Act for using the words like ‘Must’ to compel the husband deposit some money in the court for the divorced wife for containing the maximum period of ultimatum of thirty days for the husband to act or else face sanction for its likelihood to breed hardship which is unnecessary.
11. Just as the preceding recommendation, Articles 83 and 84 are also recommended for complete removal reason being that they portend a great deal of hardship to the husband which is against the general provisions and intent of the *Shari’ah* when making laws.
12. It is the recommendation of this research that Article 124 be modified to restrict the right to recall back a divorced wife during the legal waiting period to the husband only without the interference of no other person or authority. It is in violation of the right of the husband to determine whether or not the wife decides to go back or not.

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