Codification of Islamic Family Law as an Instrument of Social Reform:

A Case Study of the Emirate of Kano and Comparison with the Kingdom of Morocco

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Declaration for SOAS PhD thesis

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Abstract

This thesis examines the subject of codification of Islamic Family Law as an instrument of social reform in Muslim-majority countries, taking an ongoing exercise in Kano State, northern Nigeria, as a case study. The question of women's rights and gender equality has become central to modern discourse, and the Muslim world is a part of this global conversation. Despite the controversy around the appropriateness of codification of Islamic Family law in the form of statutes, it has come to be accepted as a useful tool in the hands of many states for altering rights and obligations in the family. The Kingdom of Morocco's Family Law of 2004 has inspired those seeking a synthesis between classical Islamic law and modern international conventions. The draft Kano State Code of Muslim Personal Status was produced in 2019 by a committee of scholars set up by the Emir of Kano. The thesis reveals that, although the draft code makes a significant step towards social reform, some of its provisions are not sufficient to address the real problems faced by women in Kano, especially around the age of marriage, maintenance, domestic violence, and unfair treatment in polygamous marriages. It also reveals that, while there is a lot to learn from Morocco, some of the reforms in Morocco have led to adverse consequences for the institution of the family. It concludes with recommendations for making the proposed Kano Code effective, including amendments to certain provisions, improvement in social policy around education, and strengthening of arbitral institutions and processes. It also notes that reform must be a gradual process, keeping in tandem with the level of socio-economic development, and there is no single interpretation of Islamic Family Law that is correct and applicable to all jurisdictions.

Dedication

This work is dedicated to my mother (Mai Babban Daki) Hajiya Saudatu (Anduwa) Hussain, with love and honour.

A Note on Transliteration

For the transliteration of Arabic terms, we have relied upon the ALA-LC (American Library Association-Library of Congress) Romanization Tables as can be found here: [1]

(There are a few exceptions. For example, although the format *Shari'ah* is used in the thesis, we write "Sharia Court" because that is how the court is named in the Law setting it up.)

[1] https://drive.google.com/file/d/1083jJ_T9lGi7n4feJXE6JKkqBdDqkp88/view?usp=sharing

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Acknowledgments

In the name of *Allah*, the Beneficent, the Merciful,

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Our analysis of the Draft Code in Kano was only made possible with the availability of video recordings and transcripts of the deliberations and public hearings of the drafting committee. For these I am eternally grateful to the committee chairman, Dr Bashir Aliyu Umar, Imam of al-Furqan Mosque, Kano. Nura Sani Abdullahi was tasked with the production of hundreds of pages of transcript.

Finally, I thank my family for their love, support, and prayers over the years.

I pray to Allah to bless all of them.

Chapter One: Introduction

1.1 Background of Study

This study engages with the subject of codification of Muslim Law of Personal Status, or its presentation in the systematic form of statutes, as an instrument for addressing matters of a social nature, and thus altering rights, obligations, privileges, etc. as distributed among social groups to promote modern conceptions of equality and justice. The specific instance that will be considered is the case of a draft Kano State Code of Muslim Personal Status (KSCMPS) (2019) proposed in the predominantly Muslim Emirate of Kano, in Northern Nigeria, compared with the Family Law of Morocco.

"Muslim Law of Personal Status" refers to the law as it relates to a known person and covers areas broadly included in what the French Napoleonic code referred to as "*statut personnel*".[1] These laws cover matters related to marriage, dissolution of marriage, custody, wills and testaments, endowment, inheritance, and the rights of children.

These laws base their legitimacy on being derived wholly or substantially from the sources of Islamic Law, or the *Shari'ah*, which are the Qur'an and the sayings, actions, and affirmations of the Prophet Muhammad (generally referred to as the *Sunnah*). These are interpreted by jurists applying individual or group intellectual effort, (*Ijtihād)*,[2] which forms the source material for deciding which interpretation or opinion to select as a binding statute backed by legislative force.[3]

One of the principal drivers of the demand for codification of the Muslim Law of Personal Status has been the emergence in the Arab and Muslim world of strong voices of Muslim feminists, as well as male scholars sympathetic to these voices, seeking new interpretations of the sources of Islamic law, particularly around the forced marriage of minor girls, domestic violence, arbitrary repudiation of marriages, and polygyny. Subsequent debates have sought to bring in rights in inheritance as part of the discourse on gender equality.[4]

There have been several studies on codification (including failed attempts at codification) of Islamic family law in several countries,[5] but thus far there has been none on Islamic personal law in Nigeria. Despite the adoption of "full *Shari'ah*" by several Muslim-majority states in

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[1] Tarek Elgawhary, *Rewriting Islamic Law: The Opinions of the 'Ulamā' Towards Codification of Personal Status Law in Egypt* (Piscataway, NJ: Gorgias Press, 2019) p. 32.

[2] Mashood Baderin, *Islamic Law: A Very Short Introduction* (Oxford: Oxford University Press 2021), chapter 3; Nasir, ibid, chapter 1; John Esposito, *Women in Muslim Family Law* (New York: Syracuse Press2001), chapter 1.

[3] We will discuss sources and methods of Islamic law in chapter 2

[4] Nasr Abu Zayd, for example, argues that the laws of inheritance in the Qur'an point to a "direction of disregarding the inheritance system based on blood kinship…and…developing an equality-based system in the future…" See N. Abu Zayd, "The Status of Women between the Qur'an and Fiqh" in Ziba Mir-Hossini et al., *Gender and Equality in Muslim Family Law* (London: I.B. Tauris 2013), p. 162. Also see, for example, the case of Jordan, in Dörthe Engelcke, *Reforming Family Law: Social and Political Change in Jordan and Morocco* (Cambridge: Cambridge University Press 2019), pp. 174-177.

[5] Examples include Engelcke, ibid; Ann Elizabeth Mayer**,** *Islam and Human Rights: Tradition and Politics (*Boulder, CO: Westview Press 2013); Lynn Welchman**,** *Women and Muslim Family Laws in Arab States* (Amsterdam: Amsterdam University Press 2007; Leila Alikarami**,** *Women and Equality in Iran: Law, Society and Activism* (London: I.B. Tauris 2021); and on the Republic of Niger in Alice J. Kang, *Bargaining for Women's Rights: Activism in an Aspiring Muslim Democracy* (Minnesota: University of Minnesota Press 2005).

Northern Nigeria, only Islamic criminal law has been codified.[6] The draft KSCMPS under review in this study represents the first serious, comprehensive exercise in codifying the Muslim Law of Personal Status in Nigeria's history.

The first context of this study is the Muslim world in which debates continue around the very idea of "reform" with the identity of Muslims linked with the interpretation of the law regarding Woman in society – her agency, control of her sexuality, and rights and obligations within a presumed divinely ordained patriarchal social structure.[7]

The second is the specific question of debates around the codification of Muslim personal laws in general and how this is located or represented within an ideological, often Western-inspired agenda of social reform.[8]

The third context is the social situation in Kano, and questions around the age of marriage and consent, domestic violence, maintenance rights, repudiation and its consequences, and polygyny. In addition to reviewing any existing secondary literature on these social issues, an analysis will be carried out on data to be collected from three institutions that deal with marital issues in Kano State – the Sharia Courts,[9] the *Hisbah* Corps[10] and the Emir of Kano's Court. Quantitative and qualitative analysis of the information gathered is expected to shed light on the severity or otherwise of some of the problems that the KSCMPS seeks to cure.

It is also important to compare the KSCMPS produced by this committee with an appropriate comparator Muslim-majority country. Given that Northern Nigeria and Morocco both subscribe to the Maliki School of *Sunni* jurisprudence,[11] we will compare the position taken by jurists in both jurisdictions and try to explain the source of differences. In her work on the Moroccan Family Law reform, Miyase Yavuz argued that the reason reform voices gained an upper hand in Morocco was that "they conformed with the will of the King".[12] Mounira

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[6] In Kano State, for example, this is the *Kano State Shari'a Penal Code Law, 2000*, Dated Ramaḍan, 1421/November 2000 (Kano: Kano Printing Corp., 2000)

[7] See for example Mounira M. Charrad, *States and Women's Rights: The Making of Post-Colonial Tunisia, Algeria, and Morocco* (Berkeley and Los Angeles, CA: University of California Press 2001); Jocelyne *Cesari* and José *Casanova (eds) Islam, Gender, and Democracy in Comparative Perspective* (Oxford: Oxford University Press 2017); Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (London: I.B. Tauris 2015).

[8] See Elgawhary, supra; Guy Burak, "*Codification, Legal Borrowing and Localization of Islamic Law"* in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds) *Routledge Handbook of Islamic Law* (Abingdon and New York: Routledge 2019); 'Abd al Raman al-Shathry, *Hukm Taqnin al-Shari'ah al-Islamiyya* (Riyadh: Dar al Sami'iy li al-nashr wa al tauzi' (1427AH/2006AD).

[9] This relates to the question of legal pluralism in Nigeria. The Shari'ah as a Source of Law and the jurisdiction of Shari'ah courts will be covered as part of this study. See G.A. Bello, *Modern Nigerian Legal System* (Abuja: LawLords Publications 2018) and Akintunde Obilade, *The Nigerian Legal System* (Ibadan: Spectrum Books 2018).

[10] *Hisbah*, or Accountability, is an Islamic Doctrine of upholding morality in society. The function of forbidding wrong and commanding good was carried out in the pre-modern Muslim world by the office of the *Muhtasib.* In modern times this is now carried out by parastatals with quasi-policing and quasi-judicial powers called *Hisbah* Corps or *Hisbah* Police. See Al-Mawardi*, al-Aḥkam al-Sultaniyyah: The Laws of Islamic Governance* (London: Ta-Ha Publishers, 1966).

[11] The Muslim world is generally divided into a majority Sunni and minority Shiite sect. The Sunni world has four recognized schools of jurisprudence named after their eponymous founders and adopting their methodologies in arriving at rulings. These are the *Hanafī, Mālikī, Shāfi'ī* and *Hanbalī* Schools..

[12] Miyase Yavuz, *"*The Role of *Ijtihad* in Family Law Reforms of Modern Muslim-majority States: A Case Study of Morocco*"* (PhD Thesis, Department of Law, SOAS, London 2017), p. 23

Charrad[13] has shown how the dependence of politicians on traditional structures and clans may have adverse implications for women's rights.

Finally, we shall examine the prospects of the KSCMPS and how to improve its effectiveness, relying on insights from the theory of law as an instrument of social change.[14]

1.2 Statement of the Research Problem

Rising cases of divorce as well as widespread failure of marriages and abandonment of parental and marital obligations remain a source of concern in Kano State. The institution of marriage has been abused, as many marriages are simply ended on questionable grounds and women and children are abandoned to cater for themselves. Some of the factors underlying this trend are presumed to be the young age of marriage; absence of consent; domestic violence; ease of arbitrary divorce with no compensation for the woman, and poverty. These factors led to the setting up of a committee of jurists and experts by the Emir of Kano to produce the draft code that is the subject of this thesis.

Codification of Islamic family law in modern Muslim-majority countries has been adopted as a measure for reforming the Islamic family system. For several years, reform advocates and feminist groups have been calling for the same in Northern Nigeria.[15] According to Saudatu Mahdi, as of 2005, out of thirty-eight predominantly Muslim countries reviewed, 66% had fully codified the Muslim Personal Status laws, while 16% had done this for parts of the laws. Only 18% had not codified the Law, and Nigeria was listed among these.[16] In fact, since 2005, countries such as UAE, Qatar, Bahrain, and Saudi Arabia listed as not having codified the law have moved out of this category after enacting Islamic family law codes.[17]

While codification was adopted as a socio-legal reform measure in several jurisdictions, it has been confronted by opposition and resistance on the part of some scholars and this thesis will discuss the debates and theoretical issues around codification.[18] The matter is made more complex by the very low level of socio-economic development in Northern Nigeria. The marriage of minors, for example, is a matter that may be connected to the lack of access to

[13] Charrad, supra.

[14] For some of the theoretical work on this please see Roger Cotterrell, *The Sociology of Law: An Introduction*, (Oxford: Oxford University Press, 2nd edn 1992), chapter 2; *Yehezkel* Dror, "Law and Social Change" *Tulane Law Review*, 33, no. 4 (1959), pp. 787-802; *Yehezkel* Dror, "Law as a Tool of Directed Social Change: A Framework for Policy-making" *American Behavioral Scientist*, 13 (March 1970), pp. 553-559; William M. Evan, "Law as an Instrument of Social Change" in William M. Evan (ed.) *The Sociology of Law: A Social-Structural Perspective* (New York: Free Press 1980).

[15] Saudatu Mahdi, "Women's Rights in Shari'ah: A Case for Codification of Islamic Personal Law in Nigeria" in Philip Ostein et al (eds) *Comparative Perspectives on* Shari'ah *in Nigeria* (Ibadan: Spectrum Books 2005), pp. 1-6.

[16] Ibid, pp. 3-4.

[17] UAE Federal Law no. 28 of 2005 on Personal Status of 19 November 2005, Official Gazette no. 439 (35th year) November 2005, including Explanatory Memorandum; Qatari Law of the Family, Law no. 22 of 2006, Official Gazette no. 8 of 28 August 2006; Bahraini Law no. 19 of 2009(repealed and reissued in 2017 for Sunni and Shia) Saudi Arabian Personal Status Law 2022. See also Lynn Welchman "First Time Family Law Codifications in Three Gulf States", *International Survey of Family Law* (2010) (Gen Ed Bill Atkin), pp.163-178.

[18] This is the subject of chapter 3

education, poverty levels of parents, and other factors that will not just disappear with a new Law.[19]

1.3 Research Questions

The central question this research will address is: what is the justification for reform in the marriage institution in Kano, Northern Nigeria, from a women's rights perspective, and how likely are these reforms to be achieved through the proposed codification of the Muslim Law of Personal Status?

Answering this question will require defining subsidiary questions as follows:

1. What are the major problems faced by women in Muslim marriages in Kano that need to be addressed in the interest of justice and equality?
2. What has been the traditional approach of institutions like the *Shari'a Courts,* the *Hisbah* Corps, and the Emir of Kano's Court to the resolution of these issues?
3. How can the codification of the Muslim Law of Personal Status assist in defining rights, obligations, and privileges in the marriage institution?
4. What was the process followed in producing the draft Kano code; who were the key drivers; who were the drafters; and what guidelines were adopted and followed?
5. How does the work of Kano scholars compare with similar reform efforts in Muslim-majority states, with Morocco as the selected comparator? What can we learn from this comparative analysis about ideological positioning and similarities/differences in viewpoints around gender equality and women's rights between the Moroccan and Nigerian scholars?
6. What are the developmental issues that need to be considered in addressing these social problems and what are the prospects and challenges that the code faces as an instrument of reform?

1.4 Research Aims and Objectives

This thesis aims to examine the codification of the Muslim Law of Personal Status in Kano State and establish its justification, legitimacy, and potency in addressing socio-economic problems facing the region. This research aims to re-assess, based on the literature and empirical data, the fundamental assumptions underlying the project, and locate it within a global Muslim discourse on law, gender, and modernity.

The first objective is to establish the need for codification, by examining empirical records to establish the proliferation of social problems, particularly forced marriage of minors, domestic violence, lack of maintenance, arbitrary divorce, and conflicts among wives in polygamous settings. We will then examine the manner these problems are currently handled by various institutions, and how codification and standardization can improve on what currently exists.

The literature on the codification of Islamic law and the debate around its legitimacy is well-known. However, the Kano code is the first attempt at codification of Islamic family law in Nigeria. We will situate the local debates around codification in the context of the wider intra-

[19] This is not unique to Nigeria. See Farah Deeba Chowdhury, "The Socio-cultural Context of Child Marriage in a Bangladeshi Village" *International Journal of Social Welfare* 13 (3) (July 2004), pp. 244-253.

Islamic debate and contribute to the body of knowledge in the field by documenting the process of codification, the drafters of the code, the various elements that were targeted for reform, and the jurisprudential debates around key sections. The empirical material on the social issues in Kano and the details on the codification process and the draft code itself would constitute an original contribution to the body of knowledge in the research area.

One of the ways of assessing the code is in comparison with similar exercises elsewhere, and this will be done when we compare its provisions with similar sections in the Moroccan family code of 2004.

Finally, we will review existing evidence on the Law as an instrument of Social Change and, based on the literature, assess the potential of the code to make a real impact, leading to appropriate recommendations.

1.5 Theoretical Framework

At least three main areas of theoretical discourse, namely, Feminist theory, Islamic legal theory, and Law and Social Change theory, are critical to this study, besides other complementary ones.

1.5.1 Feminist Theory

The process of codifying the Muslim Law of Personal Status is intricately linked to the process of modernization, largely a result of the creation of nation-states due to colonization by European countries in the days of empire. Even Turkey, which, strictly speaking, was not a colony, codified its laws with inspiration from the French and Swiss codes, and these were passed down to the Arab States under the Ottomans.[20] The nineteenth and twentieth centuries saw the emergence of Muslim intellectuals who advocated not just the spread of modern scientific, technical, and liberal education in the Muslim world but also a renewal, or *tajdid*, in Muslim thought. The question of women and their rights in law and society featured prominently in these discourses.

The education of women in some parts of the Muslim world led to the emergence of women intellectuals and activists, leading to the production of a large body of literature on feminism. Participants in this discourse are not limited to Muslim women, as men and non-Muslim feminists have also engaged with the question. In many Muslim-majority countries, codification of Muslim law has taken place because of strong advocacy for gender equality.

The international discourse on women's rights has focused strongly on the agency and freedom of the woman, and the eradication of all rights and privileges that are given to some citizens based on gender. This emancipatory prescription of feminism is reflected in the advocacy and theorizations of Muslim feminists. A global movement of Muslim feminists, *Musawah* (meaning equality), has been active since its 2009 launch in Kuala Lumpur in challenging legal postulates[21] like *qiwāma* (men's rights of control over women in the marital

[20] Elgawhary, supra, p. 7.

[21] Lynn Welchman, in a path-breaking article, is to my knowledge the first to write about *qiwāma* and *wilāya* as informing doctrines, or "legal postulates", underlying contemporary Islamic family codes. See L. Welchman, "Qiwamah and Wilayah as Legal Postulates in Muslim Family Laws", in Ziba Mir- Husseini et al. (eds), *Men in*

home) and *wilāya* (guardianship) which are said to provide the basis for structuring a patriarchal society in which women are treated like minors.[22] By challenging, or reinterpreting these concepts, feminist scholarship seeks to arrive at a more egalitarian arrangement in the Muslim family and restrict or eliminate the practice of polygyny.

There are many shades of feminism in Muslim thought ranging from defenders of a patriarchal system as divinely ordained, to critics who see it as socially constructed. In Morocco, Fatima Sadiqi has written about the divide between "secular" and "Islamic" feminist discourses.[23] Ziba Mir-Hosseini, in a similar typology of the gender discourse in Iran, writes about "Traditionalists" (gender inequality), "Neo-Traditionalists" (gender balance), and "Modernists" (gender equality).[24] Saba Mahmood has produced a landmark study of religious feminists in Egypt who do not subscribe to the European feminist project in its entirety.[25]

1.5.2 Islamic Legal/Codification Theory

The legitimacy of any family law code in Muslim societies rests on its claims to being based on the Divine Shari'ah, that is, on the Qur'an and sayings of the Prophet Muhammad (S.A.W) and established principles of Islamic jurisprudence. Reform has therefore taken the form of an attempt to remain faithful to the principles of Islamic legal jurisprudence while accommodating the demands of modern feminism. Muslim reformers hold that Islamic revelation is not inconsistent with modern concepts of gender equality.

Some scholars have advocated the codification of Islamic law to reduce arbitrariness and provide transparency such that the state can enforce clearly defined rights and obligations. According to Zanki, some of these scholars are 'Ali al-Khafifi; Muhammad Abu Zahra; Hasanain Makhluf; Ahmad Fahmi Abu Sunnah; Muhammad Zaki Abdul Barr; Yusuf al Qaradhawi; Wahba al Zuahayli, and Muhammad Abdul Jawad.[26] Other scholars opposed the very idea of codification as undermining the religious character of the law and its methodology, as mentioned above. Thus, the second theoretical frame is Islamic legal theory, in general, and codification theory, in particular.

1.5.3 Law and Social Change Theory

As codification will be explored herein as an instrument of reform, this work will focus on examining the conditions necessary for law to be effective as an instrument of change and involve discussion of the process of drafting laws, the content of the law, and the social environment in which the law is produced and which it aims to reform. The aim is to explore how codification and the greater discipline associated with it can be effective in raising the threshold for the minimum age of marriage, encouraging child spacing, providing better care for women and children, regulating divorce and polygyny, etc.

Charge? Rethinking Authority in Muslim Legal Tradition, OneWorld Publications, 2015, Chapter 6

[22] Musawah's website can be accessed here www.musawah.org

[23] Fatima Sadiqi, *Moroccan Feminist Discourses* (London: Palgrave Macmillan 2014), chapter 4.

[24] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (London: I.B. Tauris 2000).

[25] Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press 2005).

[26] Zanki, supra, p. 134.

Thus, the main theoretical areas of focus would be Feminist theory, Islamic legal/Codification theory, and Law and Social Change theory, with other areas being subsidiary or complementary.

1.6 Research Methodology

The framing of this study dictated its reliance principally on socio-legal research methodologies. Although the code itself has been analyzed using standard doctrinal approaches to Islamic law, the study is imbricated in a social context as it establishes the need for law reform based on existing social conditions, and then examines the extent to which the proposed code addressed these problems and the potential for real social change.

We have not relied exclusively on the doctrinal approach, which is mainly "used to identify, analyze and synthesize the content of the law."[27] In the words of Mike McConville and Wing Hong Chui the method "focuses heavily upon the law itself with little or no reference to the world outside the law."[28] It involves purely internal analysis of law in isolation from the practical realities. This is one of the main limitations of the doctrinal method because the law is meant to regulate as well as influence human behaviour and actions.[29] By always locating law in its social context, the doctrinal analysis is thus enriched, and even more so when we bring intersections of religion, gender, and class to the analysis.

Quantitative methods were applied to the data collected from the courts, *Hisbah,* and the Emirate Council. The data was thematically organized and analyzed along the selected themes of the research. Simple statistical methods were applied to identify the most frequent problems facing women, thus identifying the social problems in need of urgent solutions. On the qualitative side, content analysis has been employed in this study,[30] this being suitable in standard analysis of textual materials and understanding of the workings of laws and institutions.[31] The study principally deals with the text of the proposed code and documentary materials from scholarly articles, case Law, the records in the Kano Emir's books, records from *Hisbah* as well as transcripts of meetings.[32]

The nature of the data required for this thesis, and exceptional circumstances, made reliance on research assistants necessary. The researcher, who is the 14th Emir of Kano, was dethroned

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[27] Terry Hutchinson, "Doctrinal Research: Researching the Jury" in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (New York: Routledge, Taylor & Francis, 2013), p. 7.

[28] Mike McConville and Wing Hong Chui, "Introduction and Overview" in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007), p. 1.

[29] Roger Cotterrell*, Law's Community: Legal Theory in Sociological Perspective* (Oxford: Oxford University Press, 1995), p. 296; Earnest M. Jones, "Some Current Trends in Legal Scholarship," *Legal Research and Methodology* (*Journal of the Indian Law Institute* 24, nos. 2, 3, and 4 (April –December 1982).

[30] Mark A. Hall, and R. F. Wright. "Systematic Content Analysis of Judicial Decisions," *California Law Review* 96, no. 1 (2008): 73; Kimberly A. Neuendorf, *The Content Analysis Guidebook* (London: Sage, 2002), p. iv.

[31] Hall, ibid, p. 99; Gregory C. Sisk, "Qualitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Making," *Cornell Law Review* 93 (2008), pp. 885-886]; W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, (Boston: Pearson, 7th edn 2011), p. 361; Robert P. Weber, *Basic Content Analysis* (Newbury Park, CA: Sage, 2nd ed. 2002).

[32]Rahmah Ismail, et al, "Consumer Right to Safe Product: The Application of Strict Criminal Liability in Product Safety Legislations in Malaysia," *Journal of Social Sciences & Humanities* 20, no. S (2012), p. 60; Harold H. Kassarjian, "Content Analysis in Consumer Research," *Journal of Consumer Research* 4, no. 1 (June, 1977), p. 18.

in March 2020, and exiled and detained in Nassarawa State by the State Government, with the support of the Presidency. Although the courts declared the exile and detention illegal and affirmed his fundamental right to free movement, his position makes it impossible to spend any kind of extended time in Kano or move around the state freely without being a threat to public order. Resort therefore had to be made to the assistants who gathered data in the form directed by the researcher and worked under his direct supervision.

Record books in Sharia courts are handwritten in the Hausa language by the Sharia court judges (known as Kadis), and most cases are spread over many pages and even different record books. The assistants scanned the record books, compiled the cases, and translated them into English for content analysis. Cases were classified based on the nature of claims into different *fiqh* categories and sub-categories. Excel spreadsheets allow for the slicing and dicing of data for quantitative analysis by court, by nature of claim, by gender of the plaintiff, etc. The analysis was strictly done by the researcher who supervised the structuring of the data and the design of the template. Cases were sorted into separate courts and classes of claim for ease of reference for content analysis. The research also relied on video recordings of symposia, debates, and meetings held while producing the code, which were transcribed for ease of reference. In Chapter 4, further details are provided on data sources, collection, and methodology.[33]

In Morocco, apart from reviewing relevant secondary literature, in-person interviews were conducted by the researcher. An interview protocol was designed drawing from the problem of research, the research questions, and objectives, as well as the reviewed literature. The study adopted a purposive sampling method in the selection of the respondents for the study.[34] Only respondents with requisite knowledge and expertise, and more directly involved in the production, teaching, dissemination, or implementation of the law were selected.[35] Details of the interviewees are provided in Chapter 6. The interviews were conducted in Arabic, recorded, and transcribed.[36]

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[33] All the primary data collected in the course of fieldwork in kano and Morocco can be found here: https://drive.google.com/drive/folders/17cIHa-vUUMx3NOG2x50X85B6FZM0Eulq?usp=drive_link

[34] Martin N. Marshall, "Sampling for Qualitative Research," *Family Practice* 13, no. 6 (1996), p. 523; Ma Hongxia et al, "Value of Qualitative Research in Polycystic Ovary Syndrome," *Chinese Medical Journal* 127, no. 18 (2014), p. 3310.

[35] Uma Sekaran and Roger Bougie, *Research Methods for Business: A Skill Building Approach* (Chichester: Wiley, 6th edn 2013), p. 252; Margarete Sandelowski, "Focus on Qualitative Methods: Sample Size in Qualitative Research," *Research in Nursing & Health* 18 (1995), p. 180; Imelda T. Coyne, "Sampling in Qualitative Research. Purposeful and Theoretical Sampling; Merging or Clear Boundaries?" *Journal of Advanced Nursing* 26, no. 3 (1997), p. 624; John W. Creswell, *Educational Research: Planning, Conducting and Evaluating Quantitative and Qualitative Research* (Boston, MA: Pearson, 4th edn 2012), p. 205; Silverman, D., *Doing Qualitative Research: A Practical Handboo*k (London: Sage, 3rd edn 2010) cited in Jennifer Rowley," Conducting Research Interviews," *Management Research Review* 35, no. 3 / 4 (2012) p.264. See also Donald E. Polkinghorne, "Language and Meaning: Data Collection in Qualitative Research," *Journal of Counseling Psychology* 52, no. 2 (2005), p.137; Michael Q. Patton, *Qualitative Evaluation and Research Methods*, (Newbury Park, CA: Sage, 2nd edn 1990),p. 169.

[36] Audio recordings of all interviews as well as transcripts can be found here: https://drive.google.com/drive/folders/17cIHa-vUUMx3NOG2x50X85B6FZM0Eulq?usp=drive_link

In the case of Kano scholars, the study relied on freely expressed views of jurists as contained in transcripts of debates during seminars and drafting sessions of the Code. This approach was adopted as a result of concerns that the imbalance of power between the researcher and respondents in Kano might impair the objectivity of respondents, and discourage a frank expression of views on the subject in an interview situation.

The primary data set thus included the following:

1. Fieldwork interviews (audio recordings and transcripts) in Morocco.
2. Record books of selected Sharia courts in Kano.
3. Record books of the Emir's court.
4. Record of Hisbah Cases.
5. Transcript of court cases for content analysis.
6. Videos and transcripts of deliberations of law drafting committee, meetings, debates, and symposia.
7. Significant reference material that is unpublished and not readily available to the public.

All this material has been stored in an accessible manner and collated in a file entitled "Codification Thesis Field Work Material", which can be accessed on Google Drive.[37]

The research has a comparative element, where the draft code in Kano is compared to Moroccan Family Law. As noted by Mark Van Hoecke, "comparing domestic law with the way the same area has been regulated in one or more countries has become almost compulsory in doctrinal legal research."[38] Patrick Glenn lists the following as the main aims of comparative law:[39]

1) An instrument of learning and knowledge
2) An instrument of evolutionary and taxonomic science
3) A contribution to one's own legal system, and
4) An instrument for harmonization of laws

Our analysis mainly focused on the first and third objectives above. The research sought to identify what Kano could learn from Morocco (and vice versa) in family law reforms and better understand how change occurs in the context of the dynamic tension between tradition and modernity in the Muslim world. Comparative analysis, as a result, leads us to insights that will

[37] All the material, and more, will be uploaded here: https://drive.google.com/drive/folders/17cIHa-vUUMx3NOG2x50X85B6FZM0Eulq?usp=sharing
[38] Mark Van Hoecke, "Methodology of Comparative Legal Research", *Law and Method* December 2015, p. 1.
[39] H. Patrick Glenn, "The Aims of Comparative Law," in Elgar *Encyclopaedia of Comparative Law* (Cheltenham: Edward Elgar Publishing, 2nd edn 2012), p. 57.

contribute to the on-going process of reform of law in Kano. All of this entails a law in context approach to comparative analysis.[40]

1.7 Relevant Fields of Research to the Study

The fields of Islam and Modernity, Islamic Law Reform, and secular and Islamic feminism are relevant to this study. Within this broad area there will be a focus on Muslim Personal Law and legal jurisprudence, with emphasis on codification as a tool for legal and social change. Some of the work done in the field of law and development will also inform some of the analysis and conclusions. There is also a significant body of research on Islamic legal theory and codification of Islamic law. In this chapter we will review the literature on Islamic feminism. Islamic legal theory in the Mālikī school of law will be reviewed in chapter 2, while the principles and practice of codification of Islamic family law will be covered in chapter 3.

1.8 Literature Review

The very term *feminism* has become controversial in intellectual discourse given the many intersections that overlap in the identity (and associated gendering) of the feminine body – racial, ethnic, religious, class, etc., and the irony of emancipatory and egalitarian discourses being promoted from the inner fulcrum of global, capitalist, and neo-imperialist power. It is therefore inevitable that ascendant voices of feminism from Europe and the US will be viewed by many as representations of the interest of white, educated, Christian or secular, middle-class/*bourgeoisie* women living in the metropolitan capitals of the world. According to this view, such a discourse is blind to the contradictions of the exploitation of the developing world by the capitalist West, or the double discrimination faced by women of colour, or gendered Islamophobia and other contradictions generated by the conflation of different markers of identity. A cursory look at some of the titles of books on feminism is sufficient evidence of the internal contestations over meaning within feminism itself.[41]

As Miriam Cooke points out, however, it is difficult to find a word that captures the broad range of struggle by women to improve their situation and claim their rights better than "feminism". [42] Nayereh Tohidi describes "Islamic feminism" as representing "a resistance and subversion from within the religious framework and Islamic institutions" as well as "an attempt by Muslim believers to reconcile their faith with modernity and gender egalitarianism."[43]

In reviewing the literature on women's rights and gender in Islam, one would find a very wide range of views, which for simplicity we will, following Fatima Sadiqi, classify as secular and Islamic. Sadiqi views Islamic feminists as relying on legal/doctrinal Islam and activism for their

[40] This is consistent with the methodology adopted by many authors. See Van Hoecke, supra, p. 8.

[41] For example Rafia Zakaria, *Against White Feminism* (London: Penguin 2021); Heidi Safia Mirza, *Young, Female and Black* (Abingdon: Routledge 1992); Lola Olufemi, *Feminism, Interrupted: Disrupting Power* (London: Pluto Press 2020). Perhaps in recognizing that there is no single feminism, Oxford Readers published the book titled *Feminisms* (with an "s"), edited by Sandra Kemp and Judith Squires in 1997.

[42] Miriam Cooke, *Women Claim Islam: Creating Islamic Feminism Through Literature* (London and New York: Routledge 2001), pp. ix-x.

[43] Nayereh Tohidi, "'Islamic Feminism': Negotiating Patriarchy and Modernity in Iran" in Ibrahim Abu-Rabi', *The Blackwell Companion to Contemporary Islamic Thought* (Oxford: Blackwell 2006), p. 624.

struggle, while secular feminists rely on a more "universalist" and spiritual Islam and adopt a strategy that is more reliant on intellectual debates in books and journals than affiliation to political parties.[44] The relative weakness of the feminist movement in Northern Nigeria resulted in advocacy being carried out largely by male scholars and traditional rulers operating largely within the domain of classical interpretations of Islamic law. It will be argued that the main thrust of the reform efforts in Kano was to address the maltreatment of women and increase their protection in marriage, whereas in Morocco the objective was the achievement of gender equality in the family.

Feminist discourse in general can be considered "a form of theory which identifies and opposes what it calls sexism, misogyny or patriarchy".[45] However, while Etin Anwar, for example, posits that "Muslim women owe it to themselves to dismantle the patriarchal elements of Muslim culture…",[46] other scholars question the universalistic claims of these anti-patriarchal discourses, and argue that real agency for the Muslim woman must include the freedom to accept patriarchy. Beginning from the concepts of positive and negative freedom in Liberal thought and proceeding to a critical appreciation of the post-structuralist feminism of Judith Butler, Saba Mahmood argues that "even illiberal actions can arguably be tolerated if…they are undertaken by a freely consenting individual who is acting of her own accord."[47] Thus, a Muslim woman who chooses to stay under the control of her husband and voluntarily gives up some of her independent agency in return for maintenance, protection and security is exercising her freedom of choice as a fully rational agent.

These theoretical debates are indicative of the range of reforms that have taken place in the Muslim world. The issues that tend to be debated most are age of marriage; consent; guardianship (*wilāya*); authority of the husband (*qiwāma*); maintenance; unilateral divorce and the right of women to divorce; custody; polygyny, and inheritance. The classical interpretations of Muslim law are perceived (or, alternatively, misconstrued) to limit woman's agency, compromise her full humanity, and render her inferior to man. The attempt to transform women's rights in different countries reflects the stance of the legislators and scholars (and the State) on the spectrum from secularism to traditionalism.

Modern feminist discourse begins from the premise that, to quote Anwar, "Muslim women have…lived within a social, cultural, and religious system which is not friendly to them" and which "systematically alienates women's worth as human beings."[48] Leila Ahmed[49] posits the existence of many forms of marriage in pre-Islamic Arabia, including polyandry and matrilineal uxorilocal marriages where the wife remained with her family and had custody of her children and the husband visited her.[50] She argues that, before the advent of Islam, wives had the right to divorce their husbands. She compares the Prophet's marriage to Khadija (an older woman,

[44] Sadiqi, supra, p. 127.
[45] Lorna Finlayson*, An Introduction to Feminism* (Cambridge: Cambridge University Press 2016), p. 4.
[46] Etin Anwar, *Gender and Self in Islam* (London & New York: Routledge 2006), pp. 4-5.
[47] Mahmood, supra, esp. pp. 10-25.
[48] Anwar, supra, p. 5.
[49] Leila Ahmed, *Women and Gender in Islam*: Historical Roots of a Modern Debate (Yale: Yale University Press1992).
[50] Ibid, p. 41.

financially secure, proposing to him, protecting, and providing for him, an only wife until her death) with his marriage to Aisha (a young girl whose consent was not sought, given by her father, under the control of the husband, living in a polygamous marriage). Ahmed sees Khadija's marriage as more of the type of marriage existing in the pre-Islamic era, and Aisha's marriage a pointer of the direction marriage would take after Islam.[51]

Although Ahmed conceded that the booming mercantile society of Mecca was already becoming more patriarchal before the message of Islam, she posits that the Prophet Muhammad (Peace be upon him)[52] and his message were pivotal to completing the transition to a patriarchal, polygynous setting. Her principal argument is that in pre-Islamic Arabia women had more agency, and she adds the somewhat controversial assertion that the society was more liberated sexually, with the very concept of fornication or adultery seemingly becoming morally impeachable only with the coming of Islam.[53] With the new direction indicated by the marriage to Aisha, the Prophet's time was still in transition as Aisha showed a lot of independence and agency, having a relationship of love, sometimes debating and challenging, and even leading troops in the "Battle of the Camel" against the fourth Caliph 'Ali.[54] Subsequently the move towards a strong patriarchy continued such that even the reduced agency wives like Aisha had was taken away from Muslim wives by later generations. Leila Ahmed provides very scant evidence for many of these conclusions and appears to expect her readers to accept them at face value. She presents neither archival material, nor historical or even literary evidence for her assertions. However, they seem to have found resonance and acceptance at least among some sections of scholarship.[55]

A contrary view is supported by the evidence of the traditions showing the existence of polygyny as a common practice before the period of revelation. It has been reported for example on the authority of Ibn 'Umar, that Ghailān al Thaqafī accepted Islam and he had ten wives who accepted Islam with him. The Prophet commanded him to choose four and divorce the others.[56] It has also been narrated that Qays ibn al-Hārith al-Asadī accepted Islam and he had eight wives. The Prophet commanded him to choose four out of them.[57]

The typology used in an early work by Ziba Mir-Hosseini[58] is useful as a broad framework for categorizing scholars and intellectuals along this spectrum. Based on an anthropological study

[51] Ibid, pp. 42-45.

[52] This formulaic prayer abbreviated often as PBUH) usually is added by Muslims to any mention of the Prophet. It is the English version of the Arabic *Salla Allahu 'alaihi wa Sallam* (blessings and greetings of Allah be upon him). Where it is not written it should be assumed for granted

[53] Ibid, p. 45.

[54] Aisha has captured the imagination of several writers in this respect. see for example Resit Haylamaz, *Aisha: The Wife, the Companion, the Scholar* (Clifton, NJ: Tughra Books 2016; first published in Turkish in 2009); and D. A. Spellberg, *Politics, Gender, and the Islamic Past: The Legacy of 'A'isha bint Abi Bakr* (New York: Columbia University Press 1994).

[55] Amira Sonbol writes: "Some historians, like Leila Ahmed, have argued convincingly that Islam established a patrilineal, patrilocal system, establishing blood-relationships as determinants for inheritance of property." See Sonbol, A. El Azhary (ed.), *Women, the Family and Divorce Laws in Islamic History*, (New York, Syracuse University Press, 1996), p. 4.

[56] Tirmidhi (1128); Ahmad (4609); al Dar Qutni (3683), among others

[57] Abu Dawūd (2241); Ibn Mājah(1952); al Dār Qutnī (3690), among others.

[58] See Mir-Hosseini, *Islam and Gender, supra.*

in the Holy City of Qom in Iran, Mir-Hosseini groups scholars on the matter of Islam and Gender into three: Traditionalists, Neo-Traditionalists, and Modernists.

Traditionalists, according to this typology, are "clerics who see the gender model in *Shari'ah* law to be immutable" and aim to convince others of "this truth".[59] She presents as examples of this group the Grand Ayatollah Yusef Madani-Tabrizi[60] and the Ayatollah Azari-Qomi.[61] Because these scholars defend classical views their opinion is consistent with the jurisprudence in classical *fiqh* texts in all the schools of law and remains the default position of the vast majority of jurists with authority in most Muslim-majority countries, including Nigeria.

The "Neo-Traditionalists" also believe in the immutability of the gender model while allowing for the possibility of re-interpretation in view of socio-temporal change but always within the bounds of the rules of classical Islamic jurisprudence.[62] In Iran this group seems to have been inspired by the work of one of the leading intellects of the Islamic revolution, the Ayatollah Morteza Mutahhari.[63] Mutahhari acknowledges the need to reinterpret family laws but rejects the fundamental premise of western liberal thought in the twentieth century which perceives differences in rights as inequality. Mutahhari argues that the family unit is unique and not like other social units, being constituted by two persons of a different sex and for procreation. Nature has endowed the male and the female with different attributes and roles in the process of procreation, with different capabilities, and strengths. Understanding, for example, that women are not as physically strong as men and thus need care during periods of pregnancy and breast feeding should naturally mean that men are responsible for taking on the burden of work, caring for women and protecting them. Equality, to Mutahhari, does not mean similarity. To him, marriage involves a nature relationship and a contract relationship. Ignoring the nature of woman will impose burdens upon her and deprive her of her rights.

The final category analysed by Mir-Hosseini are the "Modernists", where she takes as representatives of this tendency toward equality Abdolkarim Sorush and Hojjat ol-Islam Sa'idzadeh.[64] Both are seen to be advocates of equality between men and women in marriage. Sa'idzadeh stresses,[65] like other reformists, that while principles and rulings are eternal, details and forms are not. For example, he argues that the reason the *Shari'ah* allows husbands the unilateral right to divorce is that husbands (and their tribes) were given the responsibility for protecting the wives. The principle, therefore, according to Mir-Hosseini's account of Sa'idzadeh, is protection. Since at the time of revelation this was the form protection took, Islam accepted it but did not *legislate* it for all societies. In the contemporary world, one could see or envisage different forms of protection. For example, if protection of both men and women (including social security, it is implied) is the responsibility of the State,

[59] Ibid, p. 18.
[60] Ibid, pp. 26-48.
[61] Ibid, pp. 49-79.
[62] Ibid, pp. 88-208.
[63] Ayatollah Morteza Mutahhari, *Woman and Her Rights in Islam* (a translation of "Nizam-e hoqouq-e Zan dar Islam"). Translated by M. A. Ansari, Islamic Seminary Publications (undated).
[64] Mir-Hosseini, *Islam and Gender,* pp. 211-272.
[65] Ibid, pp. 268 ff.

then the State, according to Mir-Hosseini's account of Sa'idzadeh can take responsibility for divorce by prohibiting extra-judicial divorce and providing husbands and wives equal rights to seek divorce before the judiciary, as an arm of the State. Similarly, where husbands and wives protect and support each other and contribute to mutual maintenance without one depending on the other, they should have the same rights to divorce including unilateral divorce by either party. In this way the immutable principle is the protection principle, but as the nature of protection changes so will the form of divorce.

Saidzadeh here proffers one of the strongest arguments for state regulation of divorce in the literature, although it is rarely invoked as the basis for prohibiting extra-judicial divorce in countries like Morocco which have done so. Nevertheless, as we shall see in chapter 7, the ability of the state to legislate around divorce and take away the right men to unilateral repudiation is enhanced when it does provide social welfare nets for women and eliminates their total dependence on men for economic survival and security.

Mir-Hosseini has continued to write on Muslim feminism and to advocate for a more equal treatment of women in Islamic family law. We shall see in chapter 4 that her empirical work on family law courts in Morocco and Iran[66] provided the inspiration and blueprint for our own analysis of Sharia court data in Kano. We have also engaged with some of her more recent work at various points in this thesis.

Feminist advocacy goes beyond family law to issues like exclusion of women from public space and political or judicial offices at the highest levels. In this thesis, however, we will limit ourselves to feminist works relating to family law. A clear statement of the major goals of this feminism can be gleaned by studying *Musawah*, the organization launched in Malaysia in 2009, which describes itself as a "global movement for equality and justice in the Muslim family". *Musawah* was spearheaded by a Malaysian-based feminist NGO, Sisters in Islam, which since the 1980s has been active in advocacy for the rights of Muslim women, and opposition to discriminatory Islamic family law. Mir-Hosseini was one of the founding members. There are other movements such as WLUML (Women Living Under Muslim Laws), and WISE (Women's Islamic Initiative in Spirituality and Equality). However, *Musawah* has evolved into the leading, and maybe even an umbrella, organization for Muslim feminists as well as non-Muslim feminists researching Islamic family law.

This feminism, while committing itself to the rights of Muslim women in marriage, does not limit itself to traditional Islamic sources. The "Musawah Framework for Action"[67] explains that Islamic family laws are "*human interpretations* of the *Shari'ah* based on juristic theories and assumptions … (which) … can change in accordance with the changing realities of time and place and *contemporary* notions of justice" (italics mine). It also declares that "equality in the family is possible through a framework that is consistent with Islamic teachings, universal human rights principles, fundamental rights guarantees and the lived realities of women and men." Justice and equality are to be upheld, and this is by focusing on the principles (*qawã'id*)

[66] Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law Iran and Morocco Compared*, London, I.B. Tauris (1993)

[67] Musawah: For Equality in the Family, "Musawah Framework for Action", 2009 <musawah.org/sites/default/files/Musawah-Framework-EN_1.pdf> (Accessed 4 April 2022)

and objectives (*maqāṣid*) of the *Shari'ah* rather than its specific interpretations in historical time, while ensuring alignment with contemporary values of gender equality.

There is a plethora of writings by feminists along these lines, all aimed at confronting patriarchy and misogyny and advocating laws that are based on equality. The advocacy of feminists in Morocco, for example, was a significant factor in reforms of the family law, albeit backed by the political will of the King, altering the focus from securing better protection for women, to "equality" of men and women in marriage.[68] Among writers whose work falls in this category are Ziba Mir-Hosseini[69], Leila Ahmed[70], Amina Wadud[71], Etin Anwar,[72] Karen Bauer,[73] Fatima Sadiqi,[74] and Leila Alikarami.[75] The common thread is the challenge to historical, gendered interpretations of Shari'ah in favour of an understanding more aligned with contemporary ideologies of human rights, women's rights, equality, and liberal democracy.

As one would expect, this movement has received criticism and a backlash from scholars who view this as a western-inspired ideology aimed at undermining the values of Islām and reject prescriptive tendencies based on judgement from a European perspective. Saba Mahmood is critical of a feminism that presumes that the western identity between a woman's agency and resistance to structures of domination takes away the agency of the woman who willingly participates in the stabilization and entrenchment of these structures. She attributes this to the nature of feminism as "an *analytical* and a *politically prescriptive* project."[76] Lila Abu-Lughod finds a real disconnect between highly educated, western-trained, upper- class theoreticians advocating their vision of equality and the real-life understanding of poor Muslim women and their priorities. In fact, a more serious limitation on the agency of many women may be poverty and not gender as anthropological studies show.[77]

A critique of global Islamic feminism is therefore a failure to recognize its own positioning as being influenced by notions of justice and equality that are themselves western, which in turn reflects the way statements made from a position of power are presented as universal and

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[68] For an excellent discussion of this point see Miyase Yavuz, supra, esp. pp. 20-26.

[69] Mir-Hosseini is a prolific writer and major voice in Musawah. Her anthropological books on family law include the above-referenced *Islam and Gender*, and a study of family law in courts in Morocco and Iran titled *Marriage on Trial: A Study of Islamic Family Law* (London: I.B. Tauris 1993). In addition she has edited or co-edited several collections of academic articles on the subject including Ziba Mir-Hosseini et al (eds), *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (London: I.B. Tauris 2013); and Ziba Mir-Hosseini et al (eds), *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (London: Oneworld Academic 2015).

[70] *Women and Gender in Islam*, supra.

[71] Amina Wadud was a founding member of Musawah and Sisters in Islam. Her most famous book is a feminist exegesis of Qur'anic verses, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford: Oxford University Press1999). See also her "Islamic Feminism by Any Other Name" in Dina El Omari et al (eds), *Muslim Women and Gender Justice: Concepts, Sources and Histories* (London & New York: Routledge 2020).

[72] *Gender and Self in Islam*, supra.

[73] *Gender Hierarchy in the Qur'an,* supra.

[74] *Moroccan Feminist Discourses*, supra.

[75] *Women & Equality in Iran*, supra.

[76] Saba Mahmood, *Politics of Piety*, supra, p 10

[77] *Do Muslim Women Need Saving?*, pp. 177-198.

objective. The South African Muslim feminist, Sa'diyya Shaykh, for instance writes that "the primary incentive for some feminist Muslim scholarship is the reality that there is a dissonance between the ideals of Islam which are premised on an ontology of radical human equality and the fact that in varying social contexts women experience injustice in the name of religion".[78] As I have argued in my critique of this position elsewhere, it presents itself as a universal and objective reading when, in reality, the concept of justice and equality held by progressive feminists originates in a tradition of western scholarship since the enlightenment and "the interpretations conferred on Islam represent a hermeneutical process of finding meanings in the Qur'an and *hadith* that are consistent with the presuppositions of the Western-trained intellect."[79]

Several arguments have been proffered in support of codification of Islamic law. Among these are that it makes the law readily accessible to non-experts; paves the way for conducting government based on the rule of law; improves legal certainty and guards against arbitrariness on the part of judges; facilitates uniform application of the law in a territory; and enhances the sense of government by consent.[80] However, codification is not without its opponents among scholars. These jurists argue that the earliest record of an attempt to codify the law was by the Persian Ibn al Muqaffa' in 144AH in his *Risalat al Sahaba* where he urged the Caliph Abu Ja'far Al- Mansur to do so. Caliph Al-Mansur is reported to have told Imām Mālik: "O Abu Abdillah, codify this knowledge (of *fiqh*) and compile a book free from the extremism (*shadā'id*) of Abdullah ibn 'Umar, from the concessions (*rukhas*) of Abdullah ibn Abbas and from the unique views (*shawadh*) of Abdullah ibn Mas'ud. And seek the middle path of affairs (based on Prophetic saying "The best of affairs is of the middle path"), and what has been agreed upon by the Companions and the Imams".[81] Imam Malik advised against imposing his opinion on the people and rather implored the Caliph to allow diversity of views from jurists. The same request was made by the Caliphs al-Mahdi and Haroun Al Rashid but Imam Mālik still declined. Even when he wrote his *Muwatta'* it was on the condition that it would not be enforced on the people.[82] To these scholars, codification goes against the sound logic behind Mālik's position. Opponents also point to the implications of laws being driven by the power of the State and not the honest exertions of jurists, and the loss of flexibility that can lead to harsh penalties especially in the case of criminal law.[83]

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[78] Sa'diyya Shaykh, "*Transforming Feminisms: Islam, Women and Gender Justice*", in Omid Safi (ed.) *Progressive Muslims: On Justice, Gender and Pluralism* (Oxford: Oneworld 2003), pp. 147-162.

[79] Sanusi Lamido Sanusi, "The West and the Rest: Reflections on the Intercultural Dialogue about Shari'ah", in Philip Ostein et al (eds), *Comparative Perspectives on* Shari'ah *in Nigeria* (Ibadan: Spectrum Books 2005), pp. 251-274.

[80] Yusuf Abdul Azeez et al, "Codification of Islamic Family Law in Malaysia: The Contending Legal Intricacies" *Science International* (Lahore), 28(2) (2016), pp. 1753-1762.

[81] Ibn Farhun, *Al Dibaj al Mazhab fi Ma'rifat A'yan Ulama' al-Mazhab* (Cairo: Dar al Turath, nd), Vol 1, p. 118.

[82] Haitham H. Osta, "Modernization, Codification, and the Judicial Analysis: Exploring Predictability in Law in Shari'a courts in Saudi Arabia" (unpublished PhD thesis, School of Law, University of Washington, 2015).

[83] Lubna A. Alam, "Keeping the State Out: The Separation of Law and State in Classical Islamic Law" *Michigan Law Review,* vol 105, issue 6 (2007). Available at: https://repository.law.umich.edu/mlr/vol105/iss6/15 (Accessed 10 February 2022).

Tareq Elgawhary has written on the opinions of scholars on codification of personal status law in Egypt.[84] He presents the scholars who support codification (Qasim Amin, Muhammad 'Abduh, and Ahmad Shakir); those opposed to it (Rashid Rida, Zahid al Kawthari) as well as scholars who were ambivalent and those who drafted codes. The point here is that codification itself is not without controversy but in many Muslim-majority countries, the battle has been won by proponents. However, the actual form the code has taken varies from country to country, reflecting where the consensus lies in each jurisdiction along the wide spectrum of views on gender and rights.

Christina Jones-Pauly for example has analyzed reforms in Tunisia, Egypt, Pakistan, and South Africa, locating each of these countries on the spectrum, with Tunisia being, for her, an example of "*the* ideal Islamic reform".[85] In arriving at this judgement, Jones-Pauly echoes the views of many Muslim feminists since the Tunisian code is closest to modern civil codes and international treaties. Ayesha Imam, the Nigerian Muslim feminist, has argued for instance that these egalitarian codes are more in keeping with the principles of Islamic reform and equality.[86]

Several works have reviewed the process of codification of Islamic family laws, as well as the various positions taken by different countries on areas of contestation. Lynn Welchman offers a detailed analysis of the texts of the law as well as comparative analysis as it applies to member countries of the Arab League. In addition to debates around codification, Welchman comprehensively analyses the range of issues covering registration requirements, capacity and consent, polygyny, divorce, and custody, highlighting differences among Arab countries.[87] John Esposito also provides coverage in his book on women in Islamic family law. In his case he goes into detail of classical Muslim jurisprudence and locates the codification and reform efforts within the context of the debates on Islam in modernity. His areas of focus were Egypt, Pakistan, and India.[88] Esposito, therefore, unlike Welchman, goes beyond the Arab world. However, Welchman's coverage of the Arab world is much deeper and broader than Esposito's. in addition, Welchman does not in general evaluate laws in relation to "equality" or to classical fiqh, although her pioneering work on *Qiwama* and *Wilaya* as "legal postulates"[89] provides a framework for understanding laws in terms of their adherence to, or departure from, the classical construction of these postulates.

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[84] *Rewriting Islamic Law,* supra.

[85] Christina Jones-Pauly, *Women Under Islam: Gender, Justice, and the Politics of Islamic Law* (London: I.B. Tauris 2011).

[86] Ayesha Imam,"Fighting the Political (Ab)use of Religion in Nigeria: BAOBAB for Women's Human Rights, Allies and Others ", in Ayesha Imam, Jenny Morgan & Nira Yuval-Davis (eds) *Warning Signs of Fundamentalisms* (WLUML Publications 2004), pp. 125-134. It is also available at: https://www.academia.edu/31513770/Ayesha_Imam_2004_Warning_Signs_Fundamentalisms_and_N_Yuval_Davis_pdf

[87] Welchman, *Women and Muslim Family Laws in Arab States*, supra.

[88] Esposito, *Women in Muslim Family Law,* supra.

[89] L. Welchman, "Qiwamah and Wilayah as Legal Postulates in Muslim Family Laws", in Ziba Mir- Husseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition*, OneWorld Publications, 2015, Chapter 6

Dörthe Engelcke's work[90] specifically studies family law reform in Jordan and Morocco. After covering the colonial legacies in both countries, she examines the social field and the relative autonomy of the judiciary and state actors in both monarchies. The author then studies the dynamics in reform caused by international law, especially the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW),[91] the actual processes in reform and contested areas in each country.

Given that this thesis considers codification as an instrument of social reform, we will assess the likelihood of the code leading to meaningful social change. The relevant literature on law and social change provides a framework for making this assessment. Yehezkel Dror's contributions to this area provide a useful guide. Dror stresses the importance of institutions involved in and the processes of law-making, law-application and law-enforcement. Law itself is a pervasive element of institutions such that while family law, for example, cannot be understood in isolation from the wider legal system, this aspect of law is an "internal and essential part of the family institution, and cannot be …understood (outside)…of it".[92] He stresses that law must be seen as being made up of several policy components including substantive and procedural law; personnel (judges, lawyers, police, etc); organizations (legislature, court systems, etc); resources; decision rules and decision habits. According to Dror, utilization of one of these policy instruments in isolation of the others will be "very inefficient, usually useless, and often counter-productive".[93]

Dror relies on empirical work on the reception of European law in Turkey, to argue that law is more effective in influencing social action of a "mainly instrumental character" such as commercial activities, while it has limited impact on activities related to basic beliefs and institutions such as family life and marriage habits. The Turkish experience seems corroborated by evidence of the failure of Israeli law to enforce a minimum age of marriage among its Arab populations.[94]

Yakare-Oule Jansen has also tried to assess the extent to which law reforms in Egypt, Tunisia and Morocco improved women's position in marriage and divorce.[95] The author gives excellent coverage of jurisprudence of family law and the reforms of these countries and a critique of these from the perspective of the liberal conception of equality and rights which should not concern us at this point. The main area of interest is her analysis of factors that could hinder the implementation of reforms. First, courts will always fall back on classical law where the new law does not give ample guidance or where in fact the judge is unwilling to apply the new law due to personal convictions. Also, illiteracy and lack of information means women tend not to be familiar with their position under the new laws. Even in Tunisia, which has the most radical reforms, a significant percentage of women have little knowledge of the

[90] *Reforming Family Law,* supra.
[91] https://www.ohchr.org/en/treaty-bodies/cedaw (Accessed 4 April 2022).
[92] Dror, "Law and Social Change", supra, pp. 787-802.
[93] Dror, "Law and Social Change", supra, pp. 787-802
[94] Dror, "Law and Social Change", supra.
[95] Yakare-OuleJansen, "Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?" *Northwestern Journal of International Human Rights* 5 (2) (2007), pp. 181-212.

family code. Third, just as Dror argues in the case of Turkey and Israel, Jansen notes that "the influence of societal structure and traditional role patterns" cannot be underestimated. Specifically, expectations of immediate family members and the influence of upbringing are hard to negate, as well as issues such as underdevelopment and the resurgence of political Islam. There is a discrepancy in Tunisia, for example, between the perceived "emancipation" of women as laid down in the law, and their real position in society. The family remains, despite the letter of the law, traditionally patriarchal, and women are constantly reminded of their primary role as spouses and mothers.

This challenge is not limited to Muslim societies, but a question that surfaces in the wider discussion of law and social change. Seidman and Seidman have, for instance, noted how laws have failed to change society in post-colonial African states.[96] Having laid out the importance of prioritization, bill-creating and law-enacting, the authors stress the need for collaboration and involvement of policy institutions in law drafting. The paper examines weaknesses in the methodologies employed by drafters, the failure to properly identify the social problem to be addressed; validate the explanations for the causes of problematic behaviour; derive detailed and cost-effective provisions for altering identified behaviour; and then monitor and evaluate implementation and social impact. These four steps are critical to the effectiveness of legislation in social change.

Considering the challenges faced by law when it comes to changing behaviour, law will have to perform an educational function to overcome this resistance. William Evan posits that there are seven necessary conditions to be met if Law is to succeed, not just in institutionalizing new patterns of conduct, but facilitating the internalization of new attitudes consistent with the proposed law.[97]

These conditions are summarized below:

1. The source of the new law must have authority and prestige (so for example in our case, Muslims must trust the source as an Authority on the *Shari'ah*).
2. The law should be compatible with existing institutionalized values.
3. There should be models and reference groups for compliance (again, in our case, examples of Muslim-majority states that have adopted, with positive outcomes, similar laws without going outside the bounds of *Shari'ah*).
4. Make a conscious effort to use an element of time to permit adjustment and adaptation to new behaviour.
5. Enforcement agents must themselves be committed to the behaviour required by the law.
6. As resistance to the law increases, positive sanctions (incentives and rewards) are more effective than threats of negative ones (fines and punishment); and

[96] Ann Seidman and Robert B. Seidman, "Law, Social Change, Development: The Fatal Race – Causes and Solutions" in Ann Seidman et al (eds) *Africa's Challenge* (Asmara: Africa World Press 2007), pp. 19-50.
[97] "Law as an Instrument of Social Change" in W. M. Evan (ed.), *The Sociology of Law*, supra, pp. 554-562.

7. Effective protection must be given to those who will suffer if the law were evaded or violated (for example, a law that prohibits forced marriage of minors must ensure that minors who resist forced marriage by their parents are protected from the wrath of those parents)

The principles enunciated in the various contributions above will serve as the framework for our assessment of the likely effectiveness of the proposed code of Muslim Personal Status in changing social behaviour and making recommendations to address identified shortcomings.

1.9 Outline of Study

This chapter has provided a statement of the research problem, questions, aims and objectives, theoretical framework, methodology, and literature review. The next chapter deals with the sources of the Mālikī school of law and its legal theory and methodology. Chapter 3 brings together feminist theory and Islamic legal theory and how they combine in the process of reform-minded codification. The first three chapters constitute the theoretical core of the study.

Chapters 4, 5 and 6 are the empirical core. Chapter 4 presents the result of fieldwork in Kano and an analysis of primary data collected for the study. Chapter 5 presents the proposed Kano State Code of Muslim Personal Status (2019), reviewing the debate over reform, the constitution of drafting committee, their sources, and procedures, and engaging with relevant sections of the proposed code. Chapter 6 is the comparative chapter focusing on the Moroccan Family Law (2004), presenting fieldwork interviews, engaging with its provisions, and comparing it with the draft Kano code.

Based on the learnings from preceding chapters, chapter 7 maps out a future direction for the Kano code and factors to be considered for it serve as an effective instrument of social reform. The thesis is concluded in chapter 8 with recommendations for future research.

Chapter Two: Sources of Islamic Family Law in the Mālikī School

2.1 Introduction

The *Shari'ah,* or the well-trodden path, is what believing Muslims, the world over, hold on to for guidance in their lives. As the meaning of the term indicates, this is considered the right way to God, and deviating from it leads one astray. In the Holy *Qur'an*, we read:[1]

> Then we put you on the right way of religion (*thumma ja'alnāka 'alā sharī'atin min al amr*), so follow you that [Way], and follow not the desires of those who know not.

The primary source of this guidance is the Holy *Qur'an*, revealed by Allah (God) to His Messenger Muhammad (Peace and Blessings of Allah be upon him) as well as the sayings, actions and affirmations of the Messenger which are known as the *Sunnah.*[2]

The discipline of *fiqh,* or jurisprudence, is one that employs a clear methodology for extracting rulings from these sources, relying on several rules guiding the striving, or *ijtihād* to arrive at a correct understanding of what God and His Prophet mean with any given text. *Fiqh* therefore is a body of knowledge produced by human beings striving to understand and convey the divine command. One may therefore say that while the *Shari'ah* is divine, *Fiqh* is human. The jurists themselves are the first to admit that their exertions may lead to a correct or wrong answer[3] and thus there is great diversity of interpretation on many points of law in Islamic jurisprudence.

In the generations immediately following the Prophet and his Companions, several great scholars emerged who represented the early formulators of jurisprudence. Within the world of Sunni Islam, the followers of four eponymous Jurists (Imām Abū Hanifa, Imām Mālik, Imām al-Shāfi'ī and Imām Ahmad Ibn Hanbal) crystallized into clearly defined Schools of Law with distinct, if overlapping, methodologies and have come to be known, respectively, as the Hanafī, Mālikī, Shāfi'ī and Hanbalī Schools of Law. For mainly historical reasons Muslims and state institutions in Kano and all over Nigeria mainly follow the Mālikī School which was transmitted along with the spread of Islam from the Maghreb (North Africa). In addition to North and West Africa, the School is dominant in the Sudan, Bahrain, and Kuwait,[4] with followership in Ethiopia, Somalia, Eastern Saudi Arabia, the United Arab Emirates, as well as remaining adherents in Syria, Lebanon and Jordan.[5] Thus, in analyzing the sources of Islamic

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[1] *Surah* 45:17. Translations used in this work are from Abdullahi Yusuf Ali's *Translation of the Meanings of the Holy Qur'an in the English Language,* (Mohammedia, Morocco, Mohammed VI Foundation 2020).

[2] As Kamali points out, "the Sunnah is divided into three types: verbal *(qaulī*), actual *(fi'lī*) and tacitly approved *(taqrīrī),* see Mohammad Hashim Kamali*, Principles of Islamic Jurisprudence*, (Cambridge, U.K., The Islamic Texts Society 2020)), p. 65.

[3] Kamali quotes Imam Mālik as saying. "I am only a human, maybe I am wrong or maybe I am right … look into my opinions; if they are in agreement with the Qur'an and Sunnah, accept them, otherwise reject them". See *Shariah Law: Questions and Answers* (London: Oneworld 2017), p. 57. The Prophet also said that a mujtahid when correct has two rewards and when wrong he has one. Al Bukhari (No. 7352); Muslim (No. 1716)

[4] M. H. Kamali, *Shari'ah Law: Questions and Answers*, ibid, p. 56.

[5] Abu Zahra, *Tarīkh al Madhāhib al Islāmiyyah*, supra, p. 44.

family law in Kano and Morocco, this chapter will focus mainly on the methodology of the Mālikī School, as the applicable School of Law in both jurisdictions.

2.2 Sources and Methods of Law in the Mālikī School

The principal sources (divine and human) that this School of Law relies upon are: The Holy Qur'an; the Traditions of the Holy Prophet Muhammad (*Sunnah*); the practice *('amal*) of the "People of Madinah" (which, as we shall see, may be subsumed under the *Sunnah*); Consensus (*Ijmā')*; Analogy (*qiyās*);the opinion or *fatwa* of a Companion, General/Public Interest (*Maṣlaḥah*), Blocking the Means to error *(sadd al Dharā'i`),* Presumption of Continuity *(istis-hāb*), and Custom *('urf*). Izzi Dien posits that "the diversity of the sources of the Māliki School gave it … leverage over other schools particularly when it came to the employment of the principle of *maṣlaḥah*…"[6] In a similar vein, Kamali notes that the Mālikī School "is versatile and may be said in many ways more comprehensive (sic) than the other schools … the Māliki school has validated virtually the entire range of the proofs that are upheld by the other three Sunni schools."[7] These sources will be discussed below. The first three, namely the Qur'an, the *Sunnah* and Consensus, are generally accepted by all the Sunni Schools of Law.

2.2.1 The Holy Qur'an

The Holy Qur'an is the Muslim Holy Book, revealed to the Prophet Muhammad (Peace Be Upon Him) through the agency of the Archangel Jibrīl (Gabriel). Baderin mentions wide discrepancy among scholars on the number of verses dealing with legal topics, with views ranging from eighty to three hundred and fifty and beyond.[8] The process of extracting legal rules from the Qur'an is guided by a clear methodology of jurisprudence (*usūl al fiqh*) which often explains how different scholars arrive at different rulings even from the same primary text. The field of *usūl al fiqh* is too broad to cover in this project entirely[9] but we will explain some of its key areas and how they may impact legal rulings. *Shari'ah* rulings, (*al ahkām al shar'iyyah*) take the form of a Command (*Amr*) or a Prohibition (*Nahy*). A command may be obligatory (*farḍ/wājib*), recommended (*mandūb/mustahabb*), or simply permissible (*mubāh*). When an act is prohibited, this could be an indication that it is reprehensible (*makrūh*) or outrightly prohibited *(harām*).[10] The classical jurists, therefore, sometimes differed in their opinions as to whether a command is obligatory or recommended.

The science of *usūl al fiqh* also involves understanding hermeneutic and semantic techniques. These are rules of language that are necessary for understanding the rulings implied by texts. Texts differ in their levels of clarity or ambiguity, on what they encompass, on their specificity or generality, etc. Understanding this is critical to any attempt to extract a ruling from the

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[6] Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press 2004), p. 17.

[7] Kamali, *Shariah Law: Questions and Answers*, p. 56.

[8] See Mashood A. Baderin, *Islamic Law: A Very Short Introduction* (Oxford University Press 2021), p. 29.

[9] For detailed exposition on the field see, for example, Kamali, *Principles of Islamic Jurisprudence,* supra; Mahdi Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," *Arab Law Quarterly*, vol 18, no 3/4 (2003), pp. 215-249; Hallaq, *A History of Islamic Legal Theories,* supra.

[10] Kamali, *Principles of Islamic Jurisprudence,* supra, pp.187-201; Wahbah al Zuhailī, *Al Wajīz fī Usūl al Fiqh*, Dar *al*-Fikr *al*-Mu'asir 1995, pp. 119-135.

Qur'an.[11] This is not the place to go into detail on the intricate subject of legal theory, but a brief overview is useful, and much of what is mentioned here also applies to interpretation of the *Sunnah*. The focus will as much as possible be on the methods of Māliki jurists.[12]

Texts from the *Qur'an* may contain clear or unclear words. A clear text may still be open to interpretation, giving a meaning not necessarily derived from context. Abdullah Ibn Fodio notes that text may be clear and unambiguous and point to a single meaning (apodictic). Such a text is called a *naṣṣ*. It can also point to two or more meanings to the same degree in which case it is a *mujmal*. A third possibility is that it has more than one meaning but one of its meanings has a stronger weight in language and is therefore the apparent meaning which is called *ẓāhir*. Finally, it could have a meaning that is not the apparent one but derived from other proofs in which case it is called a *mu'awwal*.[13]

An example of the *naṣṣ* is the command given to anyone who wishes to continue from the lesser pilgrimage *('umrah*) to the pilgrimage (*hajj)* to make a sacrifice. Then the verse continues with: "but if he cannot afford it, he should fast three days during *hajj* and seven days on his return, making ten days in all."[14] This verse leaves no ambiguity on the obligation for those unable to make the sacrifice. Not only is fasting required but the exact number during *hajj* and after is specified.[15]

An example of one type of *mujmal* is the word *qur'* (in Q2:228, where the waiting period of divorcées is set at "three *Qur'*s"), which in Arabic can mean either the period of menstrual bleeding or the period of cleanliness in between bleeding periods. The word is considered ambivalent because it applies to these two meanings to the same degree. This is called a *mushtarak,* a word in multiple meanings inhere (which in Mālikī jurisprudence is a sub-class of the *mujmal*).[16] In deciding the intended meaning jurists will have to examine corroborating evidence in the text or outside of it and this leads to differences of opinion where they differ on the balance of evidence.

As for *ẓāhir* and *mu'awwal*, an example is the ruling on those who divorce their wives by *ẓihar* (comparing them to their mothers) if they wish to take them back.[17] They are required as a first line, to free a slave. If they do not have a slave, they are required to fast for sixty consecutive days before they approach the wives concerned. Finally, if they are unable to fast then they are required to feed "sixty indigent ones" (*sittīna miskīnan*). The apparent (*ẓāhir*) meaning of the word *miskīn* (the meaning that immediately comes to mind linguistically) is,

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[11] The following discussion draws heavily from Kamali, *Principles of Islamic Jurisprudence,* supra, pp. 117-166; Baderin, *Islamic Law*, supra, p. 30; Hallaq, *A History of Islamic Legal Theories*, pp. 181-195.

[12] I have relied for specific Māliki jurisprudential preferences on the following sources: M. Mukhtar Ould Abāh, *Madkhal ilā usūl al fiqh al Māliki* (Rabat: Dār Ibn Hazm 2011) esp. pp.75-160; Abubakr Madatai, *al Fiqh al Māliki wa adillatuhu 'ala Matn al 'Ashmāwiyyah Fī dhau' al Mudawwanah al Kubra* (Kano: Dar al Ghadd al Jadid 2020); Ibn Fodio, *Alfiyyah al Usūl wa Bina' al Furu' 'Alaiha*, supra, 2012); and Muhammad Ibn al Tālib*, Īsāl al Sālik Fī Usūl al Imām Mālik* (Tunis, 1436 A.H).

[13] Ibn Fodio, *Alfiyyah*,supra, p. 94.

[14] Q2:195

[15] Madatai, *al Fiqh al Māliki*, supra, p. 28.

[16] Ibn Fodio, *Alfiyyah*, supra, p. 102 ff

[17] Q58:3 &4

as translated here, an indigent. Based on this, the addressee is to feed sixty different indigent people. However, the word has a second, less often used, meaning, which is the measure that is used to quantify grains. If this meaning is taken (in this case the *mu'awwal),* then the offender can feed the same indigent person one full measure on sixty consecutive days.[18]

Additional complications arise as the spoken/pronounced text (*manṭūq*) has an unspoken/understood or implied meaning (*mafhūm*) by inference. In Mālikī jurisprudence the inference of difference, a divergent meaning or inferred interpretation that diverges from the obvious meaning of the text is called *mafhūm al mukhālafa* or *dalīl al khiṭāb.* A harmonious meaning, on the other hand, where the implied meaning is consistent with the pronounced text, is the *mafhūm al muwāfaqa* or *tanbīh al khiṭāb*.[19] An example of the divergent meaning is the Quranic injunction to punish slander with "eighty strokes".[20] It is understood from this that the punishment should be neither more nor less than eighty strokes. Thus, any number of strokes diverging from the number eighty violates the text. As for the second category, a consistent inferred meaning could be of the same degree as the text, or *a fortiori* (to a superior degree).[21] For example, when guardians are told "those who unjustly eat up the property of orphans, eat up a fire into their own bodies….",[22] then all deliberate acts that lead to the waste or depreciation in value of the property of orphans, such as setting it on fire, are equally prohibited. Prohibition, by inference, of such acts is in harmony with the pronounced text to the same degree. Such examples are called *lahn al khiṭāb* or *mafhūm al-musāwī* (an inference of equivalence). On the other hand, when the Qur'an says it is prohibited to say "fie!"[23] to parents, we know immediately that abusing or slapping a parent is, *a fortiori*, prohibited as an even more grievous offence. [24] In this case, the implied meaning is superior to the pronounced text, and this is called *fahw al khiṭāb* or *mafhūm al awlawī* (an inference of superiority/priority).

Making correct inferences from a pronounced text depends principally on understanding exactly what the text intends. For example, in the case of slander above, the intent of the spoken text is to prescribe eighty lashes as punishment for slander. The divergent meaning, therefore, will be a number or count *('adad*) that differs from eighty. Such a case is an instance of what is called *mafhūm al 'adad* (inference of quantity/count). On the other hand, let us take the text of the Qur'an that says to the Prophet: "Whether you ask forgiveness for them or not (their sin is unforgivable). If you ask for forgiveness for them seventy times Allah will not forgive them…."[25] We cannot understand from this that if he asks more than or less than seventy times they will be forgiven, because the import of the text is that their sin will not be

[18] Madatai, *al Fiqh al Māliki*, supra, p. 28; Muhammad Amin Shinqītī, *Muzakkira fi usūl al fiqh*, (al-Madina: Maktabah al-Ulum wa al-Hikam 2001) p. 215.
[19] Madatai, ibid, pp. 29-30.
[20] Q24:4
[21] Madatai, supra, pp. 29-30.
[22] Q4:10
[23] Q17:23
[24] Madatai, supra, p. 30.
[25] Q9:80

forgiven, no matter how many times he prays for them, with the number seventy just an indicator of a large number of times.

In general, there can be any one of ten factors that may provide a basis for divergent understanding from the pronounced text (*mafhūm al mukhālafa/dalīl al khiṭāb*). Without going into details of each, these are attribute (*sifah*); precondition (*shart*); *ratio legis (‘illah*); label *(laqab*); exception (*istithna’)*; count *(‘adad*); containment in time *(zarf zaman*); containment in space (*zarf makān*); restriction (*hasr*), and extreme limit (*ghāyah*).[26]

From the perspective of scope, texts are also classified into the General (*‘Āmm*) and the Specific (*Khāss*). Texts are also classified into the Absolute (*Muţlaq*) and the Qualified (*Muqayyad*); words are used in a Literal sense (*Haqīqa*) or as Metaphors (*Majāz*).[27]

2.2.2 The *Sunnah*

The *Sunnah* refers to the actions and sayings of the Holy Prophet Muhammad which “are believed to complement the divinely revealed message of the Qur’an, constituting a source for establishing norms for Muslim conduct and making it a primary source of Islamic Law”.[28] The *Sunnah* is therefore a wider concept than the *Hadīth*. Whereas the *Hadīth* refers to a report of the saying or conduct of the Prophet, the *Sunnah* is “the example or the law that is deduced from it.”[29]

The terms *khabar* (pl*. Akhbār*) and *athar* (pl. *āthār*) are also often used as alternatives to Hadith. However, jurists have in many cases tended to use the first to refer to a narration, while using *athar* (or *‘amal*) to refer to the precedent of the Companions.[30] Bearing this distinction in mind is important as it undergirds a fundamental source of differences in jurisprudence. The jurist Shafi’ī, for instance, places primary of evidence on the *Hadith*, whether it was accepted by the community or not, so long as the chain of narrators is authentic. Mālik, on the other hand, places emphasis on the practice of the Medinese community.[31]

This then brings us to the whole question of *‘Amal ahl al Madīna*, the practice of the people of Madina, as an independent source of Mālikī jurisprudence. It is best to treat this as part of *Sunnah*, as the real issue at stake is the preference Mālik gives to practice over authentic *Hadiths* that are narrated by one (or very few) companions (called *Āhād Hadīths*; sing. *Wāhid*) and not accompanied by practice. To illustrate this point, Imām Shāfi'ī mentions that he heard the wording of the *tashahhud* (the litany recited during prayer when seated at the end of the second or the last *rak’ah* (segment of prayer) from many narrators who reported it as taught by the Caliph ‘Umar to people in the mosque and in public. However, he adds, “when I heard an authentic narration going right to the Prophet, I adopted (it) because worship is based on

[26] Madatai, supra, p. 29. Also ‘Ulaysh, *Minahul Jalīl, Sharh Mukhtasar Khalīīl*,(Beirut : Dar al Fikr 1989) vol 1, p. 25 ; Mukhtar Ould Abah, *Madkhal ilā usūl al fiqh al Māliki* (Rabat: Dār Ibn Hazm 2011), pp. 63-66.
[27] For details on this please see Kamali, *Principles*, supra, pp. 117-166.
[28] J. Esposito, *The Oxford Dictionary of Islām* (Oxford: Oxford University Press, 2003), p. 305.
[29] Kamali, *Principles*, supra, p. 61.
[30] Muhammad Mustafa Azami, *Studies in Hadith Methodology and Literature* (Indianapolis, IN: American Trust Publications, 1977), p. 3.
[31] Kamali*, Principles*, supra, pp. 62-63.

what comes from the Prophet not on reports coming to us after him."[32] Imām Mālik, on the other hand, would not give a single narration priority over report of widespread practice of the people of Madina who met the Companions of the Prophet because of his conviction that for a practice of this nature to be widespread it was passed on from the generation of the Companions who would not initiate such a practice in vain without precedent from the Prophet. In the instant example, it would be inconceivable for 'Umar to make up wordings of the *tashahhud*, and for the many Companions who were present as he taught those wordings to keep silent unless it was received from the Prophet. Thus, where there is authentic report of widespread practice especially when narrated from the "Seven Scholars of Madina" *('Ulama' al Madīna al Sab'ah*),[33] this is taken by Mālik as a more authentic source for the *Sunnah* than a single *Hadīth.*

Thus, the "Practice of the People of Madīna", refers to a specific era, that of the Companions and the most senior scholars of the following generation, in matters that necessarily require Prophetic guidance to initiate.[34] This is why Ibn Taimiyya, for example, holds that "whosoever reflects on the foundations of Islām and the rules of the *Sharī'ah* will find the jurisprudence of Mālik and the People of Madīna the most authentic jurisprudence and foundation" (*asahh al usūl wa al qawā'id*)".[35] According to Ibn Rushd, "the position of Mālik is that practice is stronger than a single report, because practice that is linked to Madina cannot but be based on (Prophetic) directive. It therefore has the same import as reports that are narrated widely (*al Mutawātir min al Akhbār*), and thus is preferred ahead of a single narration (*Khabar al Wāhid*) and analogical deduction (*Qiyās*)."[36]

Mālikī Law thus relies on practice precisely because it considers such practice to be necessarily based on the Prophetic *Sunnah*. It is for this reason that the School of Law is often misrepresented as giving more weight to the practice of Companions (*Sahāba*) and Followers (*Tābi'ūn*) than to authentic reports from the Prophet. One example is the question of the consent of a woman to her marriage, where Mālik gives the father the right to marry off his virgin daughter without consent even if she is an old spinster,[37] despite the existence of authentic *hadith*s requiring her consent.[38] This position was based on the authority of Medinese praxis.

The weight given to practice, thus has implications for deciding on the authentic *Sunnah* to follow. The argument is that in *fiqh*, which deals with outward actions, Muslims should copy the actions of the Prophet. The practice of the Prophet, directly or as inferred from a common

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[32] Imam Shāfi'ī,*Kitab al- Risala Fi Usūl al-Fiqh*,] p. 269, quoted in Ould Abah, *Madkhal,* supra, p. 86.

[33] These are generally taken to be:'Ubayd Allah b. 'Abd Allah b. 'Utbah b. Mas'ūd; 'Urwah b. Al Zubayr; Al Qāsim b. Muhammad b. Abi Bakr; Sa'īd b. Al Musayyib; Sulaymān b. Yassār; Kharijah b. Zayd b. Thābit, and Abū Bakr b. 'Abd al Rahmān Al Harth b. Hishām. Some scholars have differed on the seventh, with some listing instead Abū Salmah b. 'Abd Al Rahmān b. 'Auf, and others listing Sālim b. 'Abd Allah b. 'Umar. See Ould Abah, *Madkhal,* supra, p. 86, fn. 2.

[34] See Muhammad Amin al Shinqītī, *Nashr al Bunūd*, 2:55, quoted by Madatai, *al Fiqh al Māliki*, supra, .p 35.

[35] Ibn Taimiyya, Ahmad Taqiyy al-Din] *Majmū' al Fatāwā,* (Algiers: Dar al Wafā', 1426 AH), 20: 328.

[36] Ibn Rushd, Abu al Walid,*Al Bayān wa al Tahsīl* (Beirut: Dar al Gharb al-Islami 1988) 1408AH), 1:331.

[37] Abubakr al-Kashnawi, *As-hal al Madārik, Sharh Irshād al Sālik* (Beirut:Dār al Fikr, n.d.), 2:70.

[38] Al Bukharī : 516; Muslim: 1419

practice among the people of Madina, takes precedence over an authentic tradition that is not reported from multiple, alternate channels.

2.2.3 Consensus *(Ijmā')*

The term *Ijmā'*, or Consensus, refers to an agreement on a point by the community, or the community of jurists, in a particular period, or a particular place (which, for the Mālikīs is Madina in the days of the Companions and Followers). Kamali argues that *Ijmā'* "does not directly partake of divine relation … (and thus) … is basically a rational proof.[39] This statement however needs qualification. As Kamali himself notes in a later part of the discussion on Ijmā', one of the conditions is that it must have a *sanad* (basis/evidence), and this is either textual authority or *ijtihād*.[40] This is consistent with the position of other scholars. In fact, according to Hallaq, in the earliest days of the evolution of jurisprudence, consensus "could hardly be distinguished from sunnaic practice", and "was raised in effect to the first source of law, save perhaps for the Qur'an".[41] The point is that consensus, however construed, has to be formed or agreed either on the basis of the material sources (such as when it validates the authenticity of a text or its interpretation), or rulings arrived at by jurists through intellectual effort such as analogical deduction (*qiyās*) based on the texts.[42] It would therefore seem that all consensus is actually an agreement on what is sunnah or uniformity in opinions formed on the basis of *qiyās* thus greatly limiting the scope for considering consensus as a stand-alone source of *Shari'ah* rulings, independent of these two.

There is a variety of opinions as to exactly who should be counted in the consensus. Both Ibn Hazm and Imam al-Shāfi'ī held it to be the consensus of all Muslims, and thus by necessity limited it to the Companions of the Prophet as unanimity of the entire Muslim population was impossible once the community (*ummah*) had spread itself geographically.[43] In fact, Abd Allah ibn Ahmad ibn Hanbal quotes his father as saying "whoever claims *Ijmā'* is telling a lie."[44] Most jurists hold that the consensus that is required is the unanimous agreement of the most learned jurists (*Mujtahidūn*) of any period following the demise of the Prophet on any matter,[45] although there is a view that this is not feasible in modern times and may in fact never really have been fully achieved.[46]

The position of the Mālikī School is that the unanimous agreement of the Companions is proof (*hujjah*). Where the Companions differ, and then the following generation (*tabi'ūn*) come to agreement on one of the positions then that is taken as a consensus. The school limits those whose views are considered defining consensus to the *Mujtahids* of every generation.[47]

As for the consensus of scholars in a particular land, the Mālikī School limits this to the consensus of the scholars of Madina in the era of Companions and senior followers (*tabi'ūn*).

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[39] Kamali, *Principles*, supra, p. 228.
[40] Ibid, p. 252.
[41] Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press 2011)), p. 110.
[42] Ould Abah, *Madkhal*, supra, pp. 96-97.
[43] Cited in Ould Abah, ibid, p. 96.
[44] Quoted in Kamali, *Principles,* supra, p. 246.
[45] Kamali, Ibid, p. 230.
[46] One scholar who holds this view is 'Abd al Wahhāb Khallāf. See Kamali, Ibid, pp. 246-247.
[47] Ould Abah, *Madkhal*, supra, p. 96.

The conviction, according to Hallaq, is because the Prophet made Madina his home and it was there the Qur'an was revealed. The Prophet had led the city, "ordered its life and … set examples (*sunan*) to be followed by the community of believers." [48] Kamali reports that there are differences among the disciples of Mālik as to whether this consensus relates to the narration of traditions, to Companions alone, and whether it is just preferable but not exclusive.[49]

2.2.4 Analogical Deduction (*Qiyās)*

Qiyās means measurement or comparison between and among things, and in jurisprudence it refers to extending a value from a specific and known case *(asl*) to a new one (*far')* based on the two cases sharing the same effective cause *('illah*).[50] A common example is the prohibition of all intoxicants based on the prohibition of grape-wine, since the reason for prohibiting wine is that it intoxicates.

In the absence of a clear text from the Qur'an and *Sunnah* dealing with new subjects, jurists strive to make rulings through this process of analogical reasoning to arrive at the unknown from the known. This method is accepted by all jurists in Sunni schools from the Companions onward (with variations in its regulation), except the Zāhirī jurist Ibn Hazm, who expressed strong opposition, on grounds that have been refuted by other jurists.[51] This is not the place to go into the refutation of Ibn Hazm,[52] except to point out that without analogical reasoning it would be practically impossible to find rulings for many matters that are not specifically covered by texts of the Qur'an and *Hadith*.

Qiyās is therefore a source for Mālikī jurisprudence, as it is for the other three eponymous Sunni Schools of Law. The Zāhirī School (followers of Imam Dāwūd al Isfahānī, prominent among whom was Ibn Hazm), the Shi'a and some Mu'tazilites, such as Ibrahim al-Nazzām, reject *qiyas* as a source of law.[53]

2.2.5 The Opinion or *Fatwa* of a Companion

Mālikī jurisprudence accepts the opinion of a learned Companion of the Prophet (*qawl al sahābī*) as a basis for rulings on the condition that no other Companion is known to have taken a contrary position to this.[54] In this, the school is in consonance with most jurists. There are jurists who hold that the *fatwā* of a Companion does not hold precedence over the *fatwā* of eminent jurists of a later generation, and some hold that only the opinions of the four rightly guided Caliphs, (Abu Bakr, 'Umar, 'Uthman, and 'Ali) should be so privileged.[55]

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[48] Hallaq, *Origins*, supra, p. 111.
[49] Kamali, *Principles*, p. 250.
[50] Ibid, p. 264.
[51] Madatai, *al Fiqh al Māliki*, supra, p. 36.
[52] A comprehensive refutation is offered by Muhammad al Amīn al Shinqītī, *Mawāhib al Jalīl Min Adillati Khalīl,* and reproduced in Madatai, ibid, pp.102-130. Also see Kamali, *Principles*, supra, pp. 290-292.
[53] Mustafa Sa'id al-Khinn, *Athar al-Ikhtilāf Fī al-Qawā'id al- Usūliyyah Fī Ikhtilāf al-Fuqahā'* (Beirut: Mu'assasah al-Risalah 1972), p. 471.
[54] See Madatai, *al Fiqh al Māliki*, supra, p. 36.
[55] For the different views on this, see Kamali, *Principles*, supra, pp. 315-322.

The view of Imām Mālik is that the fatwa of a Companion is a proof, and has priority over analogical reasoning, even where its implications are contradicted by analogy.[56] This is because of the possibility that the Companion is reporting from the Prophet, and because the Prophet commanded Muslims to take guidance from his Companions who are like stars.[57]Like other reports of the sunnah however, these opinions are subordinate to Medinese praxis.[58]

2.2.6 Public Interest (*Maṣlaḥah Mursala*)

One of the strengths of Mālikī jurisprudence is its recognition of what is considered good or in the public interest (*Maṣlaḥah*) as a source of jurisprudence. This method, also called *istislāh*, applies where there is no text from the material sources on the matter. In general, according to Al-Qarrāfī,[59] *Maṣlaḥah* is of three principal types. The first major category is one that has already been taken into consideration by the *Shari'ah* and is thus a "recognized good" (*Maṣlaḥah mu'tabarah*). This *Maṣlaḥah*, in turn, is of three types, in line with the general objectives of Islamic Law:

The first relates to the protection of necessities (*ḍarūriyyāt*), that is the faith (*dīn*), life (*nafs*), intellect/reason (*'aql*), progeny (*nasl*), and property/wealth (*māl*).[60] Any law that is aimed at protecting these in a manner consistent with divine sources is recognized. The second type is *Maṣlaḥah* that addresses needs (*hājiyyāt*). If these are not protected life will still go on but with extreme difficulty.[61] One would consider such rules as those protecting housing, and public health as falling into this category of *maslaḥah hājiyyāh*. The third addresses improvements in life, *tahsīniyyāt*, and will include such things as wearing fine clothes while attending ceremonies and avoiding food with unpleasant odours when mixing with others.[62] Al-Ghazzali, (in one of his opinions), restricts the recognized *Maṣlaḥah* only to the necessities. For example, if an enemy were to take some Muslims as a human shield and attack the community, then to save the people from being killed it would be lawful to attack the enemy even if the innocent Muslim hostages would be killed in the process.[63] According to Lubis, Ghazzali, by thus limiting *Maṣlaḥah*, "seems to confine the role of human choice to the mere solution of judicial problems".[64]

The second major category, (*Maṣlaḥah mulghāh*), is not accepted by the *Shari'ah*, in the sense that the divine sources deliberately did not make any ruling on this, where a ruling would have been required. An example is the prohibition from planting grapes because grapes are used to produce wine. While the *Shari'ah* explicitly prohibited the drinking of wine, it did not prohibit the cultivation and consumption of grapes or grape juice, even though wine is

[56] Ibid, pp. 315-316.
[57] Al-Khinn, *Athar*, supra, p. 533.
[58] Wymann-Landgraf, U. F., *Mālik and Medina: Islamic Legal Reasoning in the Formative Period*, (Koninklijke Brill NV, Leiden, 2013), p 107
[59] Shihab al-Din al-Qarāfī, *Matn Tanqīh al Fusūl fi 'Ilm al usūl* (Beirut: Dar al Rayāhīn 2019) , p. 267 and Ould Abah, *Madkhal*, supra, p. 122.
[60] Al-Khinn, *Athar,* p. 553.
[61] Al-Khinn, *Athar,* supra, p. 553.
[62] Al-Khinn, *Athar,* p. 553.
[63] Shihab al Din al Qarāfī, *Matn Tanqih al Fusul Fi 'Ilm al Usul* (Beirut: Dar al Rayāhīn 2019), p. 267.
[64] Nazly Hanum Lubis, "Al-Tufi's Concept of *Maṣlahah*: A Study in Islamic Legal Theory," MA thesis, Islamic Studies, McGill University, 1995 (Courtesy of National Library of Canada), p. 11.

produced from grapes. Such a prohibition can therefore not be introduced later by anyone under the guise of public good.

The third major category, which is the subject of interest here, is *Maṣlaḥah Mursalah*, or the public interest on which no text from the Qur'an or *Sunnah* specifically exists and which does not fall under the two categories above. This is a public good arrived at through the instrument of sound reason, with jurists having made attempts at defining its scope.

Ould Abah, in his work on Maliki legal methodology, indicates the following guidelines around the adoption of public interest in jurisprudence that are important to note here:[65]

a) Desires and arbitrary, idiosyncratic views are not considered *Maṣlaḥah.* This is because the Qur'an makes it clear in several verses that following vain desires is going astray. Imam Shāfi'ī made it clear that sometimes people confuse pleasure with public good and no one should speak on the lawful and prohibited without knowledge.[66] Indeed, al Qarrāfī defines *Maṣlaḥah* in literal terms as pleasure or ease, and that which leads to it, and its opposite (*mafsada*) as pain and difficulty or that which leads to them. Then he specifies that in *Shari'ah* not all that gives pleasure is *Maṣlaḥah* not all that causes pain is *mafsada*. For example, there is often pleasure in sinful acts but this is not a *Maṣlaḥah*. And there can be difficulty in acts of worship or obedience to divine law such as waging war to defend the religion, but this is not a *mafsada.*[67]
b) *Maṣlaḥah* is only called into effect in the realm of worldly activities (*Mu'āmalāt*), and not in the domain of worship (*Ibādāt*). All acts of worship are totally dependent on divine decree in the Qur'an and *Sunnah* and the interest of human beings is reflected in these, such as shortening the number of *rak'ahs* in prayer for the traveller, or breaking the fast in Ramaḍan for the sick and the traveller, or being brief in recitation when leading a large number in prayer to accommodate the weak and the old and those with pressing business.
c) *Maṣlaḥah* is to be considered within the framework of the overall objectives of the *Shari'ah* (*al Maqāṣid al Shar`iyyah al `Āmmah*), which are: the protection/ preservation of the faith; life; reason/ intellect; progeny and property, as mentioned above. Anything that will lead to destruction or impairment of these is to be avoided and whatever enhances and preserves them is in the general interest.
d) The differences that we find among jurists are on the weight given to *Maṣlaḥah* especially where there are conflicting proofs, and what to do in the event of a *Maṣlaḥah* being present with its opposite, a *mafsada* and the rules for leaning in favour of the one, or the other.
e) It is difficult to make blanket statements about the views of a specific school on *Maṣlaḥah*, as we often find jurists from one school taking opinions from jurists of another. Not all students of Imam al-Bāqillānī, for example were Mālikī, as we see in the case of his disciple Imam al Juwaynī, who was a Shāfi'ī jurist. Abu al Hasan al Karkhī,

[65] What follows is, unless otherwise stated or referenced, from Ould Abah, *Madkhal,* supra, pp. 116-117.
[66] Shāfi'ī*, al Risālah*, p. 507 quoted in ibid p. 116.
[67] See Muhammad al Baqqūrī, *Tartīb Furūq al Qarrāfī* (Beirut: Mu'assasa al Ma'arif 2003), p. 31.

a Hanafī, studied under the Mālikī jurist Ismā'il al Qāḍī. Even the Mālikī jurist al Qarrāfī wrote a commentary on the *Usūl* of al Rāzi, who was a Hanafī.[68]

As a result of the acceptance of the Maliki School of *Maṣlaḥah Mursalah* as a source of law, and its alleged rejection by several other schools, there seems to be a general sense that Maṣlaḥah is primarily only a source in the Maliki School. Serious study has, however, established that *Maṣlaḥah Mursalah* is a tool used very widely among jurists, including those who explicitly criticized the Mālikīs on its account. Qarāfī points out in this context that non-Mālikīs have been very clear in their refutation of Malikis, yet "when they come out with rulings you see them basing these on compatibility (*Munāṣaba)*, and do not demand of themselves proofs from the texts. They just rely on *Munāṣaba* and this is in fact the *Maṣlaḥah mursalah*" [that they condemn].[69]

Imam Ahmad Ibn Hanbal is also known to rely on *Maṣlaḥah*. Ibn Daqīq al-'Īd, for example, says that "there is no doubt that Malik gives the most weight to this type of proof, and following him is Ahmad ibn Hanbal".[70] Scholars have documented instances of the use of *maṣlaḥah* by Imam Ahmad[71], Imām al-Shāfi'ī,[72]and Imam Abū Hanīfa.[73] We can therefore say with certainty that *maṣlaḥah mursalah* has been relied upon by jurists of all schools, and in fact it is inconceivable that rulings can be made on new issues that emerge over time without consideration of what is considered good, by reason.

Later jurists differed in their views on the precise scope of *Maṣlaḥah*, even when they accepted it as proof with, in some cases, reservations. Abū Ishāq al-Shāṭibī is known as a pioneer scholar of the objectives, or *maqāṣid* of the *Shari'ah*, and its classification into necessities, needs and embellishments, which form the basis of the taxonomy above.[74] Lubis suggests that Ghazzali, as mentioned above, limits the scope of *maslaḥah mursalah* to necessities.[75] This is also the reading of Ghazzali's position by Imam Qarāfī.[76] A close reading of Ghazzali over several works, however, shows that he did not have a consistent view on this matter. The position reported above was the position taken by Ghazzali in *al-Mustasfa,* where he holds that the *masālih* that fall on the level of needs (*hājiyyāt*) and embellishments (*tahsiniyyāt*) cannot be taken into account without textual proof.[77] He also adds that the *maslaḥah* must fulfil three conditions: it must be all-encompassing (*kulliyyah*), apodictic (*qat'iyyah*) and necessary (*ḍarūriyyah*).[78] In another work, *Shifā' al Ghalīl*, Ghazzali takes the position that the *maṣalih* at the levels of necessity and need can be relied upon as proof "if

[68] See Ould Abah, *Madkhal*, supra, p. 117.
[69] Al Qarāfī, *MatnTanqīh al Fusul*, supra, p. 270.
[70] 'Abd Allah Ibn 'Abd al-Muhsin al Turkī, *Usul Madhhab al-Imam Ahmad*, p. 420, quoted in Ould Abah, *Madkhal,* p. 127. Also see Lubis, "Al-Tufi's Concept of *Maṣlahah"*, p. 17.
[71] See Ould Abah, *Madkhal,* ibid, pp. 132-133, and Al-Khinn*, Athar,* supra, pp. 554-555.
[72] Ould Abah, *Madkhal,* ibid, pp. 133-137, al-Khinn, *Athar,* ibid, pp. 555-557.
[73] Ould Abah, *Madkhal*, ibid,; al-Khinn, *Athar,* ibid, pp. 557-558.
[74]Ibrahim b. Musa al-Shātibī, *Al-Muwāfaqāt (*Dar Ibn 'Affan 1997)]
[75] Lubis, "Al-Tufi's Concept of Maṣlahah", p. 17.
[76] Al Qarāfī, *Matn Tanqih al Fusul,* p. 267.
[77]Abu Hamid al- Ghazzalī, *al-Mustasfā Fi 'Ilm al-Usul*,(Beirut: Dar al Kutub al 'Ilmiyya 1413 A.H.) 1:213.
[78] Qarāfī, *Matn Tanqīh al-Fusul,* ibid, p 268

they are consistent with the direction of the *Shari'ah* but not if they are strange or contrary to the rules (*qawā'īd*).[79]

Ibn 'Āshūr says about Imam Ghazzali, "he moves back and forth, sometimes joining those who accept *maṣalih musala* as proof, and at other times moves to the opinion of (his teacher) Imām al-Haramain (al- Juwainī) as he is uncertain (*taraddada*) on the degree of *maṣlaḥah*".[80] This criticism comes after Ibn 'Āshūr expressed surprise at the position of Imam al Haramain on *maṣlaḥah*, "despite his great knowledge and deep understanding *('alā jalālati 'ilmihī wa nafādhi fahmihī)"*.[81]

'Izz al-Dīn Ibn 'Abd al-Salām is known in this field by his classic book, *al-Qawa'id*.[82] In this work he sets out the meaning of *maṣlaḥah* and *mafsadah*, their classification, their hierarchy, and the rules on how to prioritize them. He writes that the *maṣalih* of this world and the hereafter can only be known through the *Shari'ah*. However, the *maṣalih* in worldly matters and the path to them and the factors that undermine them can be known by necessity and experience and custom and reliable thinking (*al-ẓunūn wa al-mu'tabarāt*)[83]Ibn 'Abd al-Salām argues, for example, that if *harām* (that which is prohibited) spreads in a land such that the permissible (*ḥalāl*) is not available, it is allowed to partake in the *harām* to the extent required. And this does not need to rise to the level of necessity (ḍ*arurah*) because if this was the condition, great harm could be done in the weakening of Muslims, their suppression by non-Muslims, an end to industry and occupations and the means of the general good. [84] Al Qarrāfī, one of Ibn Abd al-Salam's students, generally adopts his teacher's position in his books.[85]

The discussion on *maṣlaḥah mursalah* will not be complete without discussing the views of the Hanbalī jurist, Najm al-dīn al-Tūfī. It is recalled that jurists consider all claims of public interest that are rejected by the *Shari'ah* as *maṣlaḥah mulghāh*, and these are not accepted. This is the position of most jurists who accept *maṣlaḥah* as a proof. Tūfī's radical departure from the established position lies in his claim that *maṣlaḥah* is the strongest proof and even in the face of a conflict with the divine sources or consensus, *maṣlaḥah* is to take priority.[86] Tūfī makes his arguments in the context of his commentary on the Prophetic *Hadith*: "No harm to be caused and no harm to be retaliated" (*Lā Ḍarara wa lā ḍirār*). He argues that "harm" here is the public interest and it should be given priority even where it conflicts with the text. As can be expected, Tūfī's position is considered extreme by scholars given the near universal consensus on the priority of the Qur'an, *Sunnah* and Ijmā' as proofs. It is however to be noted that Tūfī limits this position to matters of worldly transactions (*Mu'āmalāt*) and does not give *maṣlaḥah* this role in matters of devotion and worship (*Ibādāt)* or fixed punishments (*hudūd*).

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[79] Abu Hamid al-Ghazzali, *Shifā' al-Ghalīl*, (Baghdad: Matba'ah al-Irshad 1971) pp. 208-209.
[80] Muhammad al-Tāhir Ibn 'Āshūr, *Maqāsid al-Shari'ah al-Islamiyyah* (Qatar: Wizaratul Auqaf 2004), pp. 245-246.
[81] Ibid, p. 245.
[82] 'Izz al-Dīn Ibn 'Abd al-Salām, *Qawā'id al-Ahkām Fī Masālih al-Anām* (Cairo: Maktabah al-Kulliyyat al-Azhariyyah 1991)
[83] See Ibn 'Ashur, *al-Maqaṣid*, Supra p. 212.
[84] Ibn 'Abd al-Salam, *Al-Qawa'id* 2:188, supra; Ould Abah, *Madkhal*, supra, p. 145.
[85] See Al Qarāfī, *al-Tanqih*, supra, and *al Furūq (*Beirut: Dar al Kutun al-'Ilmiyya 2009*)*
[86] See Lubis, "Al-Tufi's Concept of *Maṣlahah*", supra, Chapter 2; Izzi Dien, *Islamic Law*, supra, pp. 86-90.

Tūfī also makes it clear that his definition of *maslaḥah* "is much broader" than the *maṣlaḥah mursalah* Imam Mālik takes as proof. He proposes nothing less than to "rely on the texts and consensus in *Ibādāt* … and on *maslaḥah* in *Mu'āmalāt*".[87]Although this is the view associated with Tūfī in the bulk of the literature, it is one of two views he is known to have expressed on *maṣlaḥah*. The second view is consistent with the view of the majority and is expressed in his commentary on the *Mukhtasar al-Rauḍah*, after quoting the divisions of *maṣlaḥah* according to al Qarrāfī, and the example of not considering the prohibition of planting grapes because they are used in producing wine he wrote: "The *Shari'ah* has clearly allowed this good and the *maslaḥah mursalah* is a matter of the effort of the jurist *(Ijtihād)*. Were we to accept a *maslaḥah* that the text has rejected we would be setting aside the text by *ijtihād,* and this is an invalid consideration"[88] Thus Tūfī had two views on *maṣlaḥah* – one that is in line with the majority and another that is a radical departure from it. Nineteenth-century reformers, especially Rashid Rida, were responsible for bringing the second view to light[89] as part of the debates on reform of Islamic law and its reconciliation with modernity, although Rida himself is considered by some to have held a view that was more consistent with that of most jurists.[90]

Later in this work, it will be argued that *maṣlaḥah* constitutes a significant element in many of the arguments for reform and codification of Islamic family law. Some jurists argue that where public interest is in question, the State may regulate, or limit, or even prohibit that which is merely permissible (*mubāh)* and not desired or obligatory. There are, however, differing views on the conditions under which such a restriction or limitation may be imposed.[91] Several radical reforms of Islamic family law in the contemporary world have relied on this principle of restricting the permissible (*taqyīd al-mubāh*) based on *maṣlaḥah*. These include setting a minimum age of marriage, registration of marriage and divorce before the courts, restricting or prohibiting extra-judicial and unilateral repudiation, and regulating or even criminalizing polygamy, prohibiting wife-beating, among others. [92] We will return to this point in chapter 3, where we discuss examples of application of *maṣlaḥah* in the codification process.

2.2.7 Blocking the Means (*Sadd al-Dhara`i*)

The term *Dharī'ah* (pl. *Dharā'í'*) refers to the means to an end. If the end that is reached through the means is prohibited, then the means is also prohibited. If the end is lawful, then the means is lawful. This is a basis for law in the Mālikī School, based on the examples from the Qur'an and *Sunnah* and the deeds of the Companions. The Qur'an for example commands Muslims to refrain from abusing or insulting the false gods worshipped by polytheists, to avoid this leading to the polytheists, in their ignorance, in turn abusing or insulting the God (Allah) worshipped by Muslims.[93] The Prophet refrained from constant night prayer to avoid its being

[87] Quoted in Ould Abah, *Madkhal*, p.129.
[88] Quoted in ibid.
[89] See Izzi Dien, *Islamic Law*, p. 86.
[90] See Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (New York: Syracuse University Press, 2015), pp. 193-198.
[91] See for a good discussion of this Ahmad Khalid al-Tahhān, *Nūr al-Sabah Fi Fiqh Taqyid al Mubāh,* (Shabkat al-Alukah: www.alukah.net)
[92] See 'Abd al-Rahmān al-'Umrānī, *Taqyid al-Mubāh Fi Ba'dh Qawanin al-Usrah al-'Arabiyya Wa Fi Ba'dh al-Ijtihadat al-Fiqhiyyah al-Mu'asirah*, (Shabkat Alukah: www.alukah.net)
[93] Q6: 108

made obligatory on Muslims whereby many would be unable to comply.[94] The Caliph 'Uthman prayed in full while travelling even though shortening the prayer was preferred. His reason was the fear that desert Arabs and new converts without knowledge, seeing him shorten prayers, may assume that was the prescribed form. A companion reported that Abu Bakr and 'Umar often did not slaughter any animals for *'Eid al aḍha* (the Muslim holy day after *'Arafat*) to avoid poor Muslims thinking it was obligatory and putting themselves through debt and hardship to comply.[95]

Based on these arguments, Mālikī jurists would prohibit something that is lawful, if it is likely to lead to an unlawful or sinful act.

2.2.8 Presumption of Continuity (*Istis-hāb*)

Istis-hāb (literally accompaniment or companionship), refers to the presumption that facts remain as they are unless there is proof of a change. A condition introduced into a contract, for example is presumed to be lawful unless there is evidence that it is unlawful. A person known to be sane is presumed to remain sane unless there is evidence of insanity. A couple known to have been legally married remain married unless there is evidence of divorce or dissolution. A house known to belong to a person belongs to him unless there is evidence of sale or other transfer of title. In other words that knowledge about facts that was present in the past accompanies those facts into the present and future unless new and different knowledge is established.[96]

The principle is a valid one in Mālikī jurisprudence,[97] subject to the exhaustion of all avenues to ensure the non-existence of evidence to the contrary. Jurists accept this presumption as reasonable since God forgets nothing,[98] and the absence of specific evidence prohibiting something, for example, is taken as permission, so long as this is not in the domain of worship. It is this presumption that gives rise to the legal maxim, "Certainty is not dispelled by Doubt" (*al yaqīn lā yuzāl bi al shakk*).

Although this doctrine appears straightforward, its application tends to be problematic because of differences among Schools of Law in emphasis and definition. Take the example of a missing person. Unless there is evidence to the contrary the jurists agree that the person is presumed to be alive. But they differ on the implications of this presumption for the person's rights. The Shāfi'īs and Hanbalīs protect the rights the person was known to have before he/she went missing and any rights that accrue to the missing person even if the person has not been found. For example, were the person's father to die (while person is missing), he/she would be entitled to inheritance. The Mālikīs and Hanafīs, on the other hand, defend existing rights but do not permit the acquisition of new ones. In the instant example, any property owned by the missing person remains his/her property. Similarly, marriage ties remain and a missing man's wife, for example, remains his wife unless marriage is dissolved by a court. If he

[94] Madatai, *al Fiqh al Māliki*, supra, p. 38.
[95] These and other examples were given by al Shātibī in his *Muwāfaqāt*. Quoted by Madatai, *al Fiqh al Māliki*, supra.
[96] See Madatai, ibid, p. 39; and Kamali, *Principles*, supra, pp. 384-387.
[97] Kamali mentions the Malikis among opponents of *Istis-hab*, in *Principles* ,p. 384.
[98] Q19: 64

were to reappear after many years, she would still be his wife. However, these two schools, while protecting existing rights, do not allow the acquisition of new rights based on *istis-hāb*, so the missing person would not be given a share of his father's wealth as inheritance.[99]

Another example is in the law relating to divorce, in the case of a man who has more than one wife, divorces one (irrevocably), but is not certain which of the wives he divorced. Most jurists (*jumhūr*) hold that all his wives remain married to him because there is certainty that each was married to him and uncertainty around the divorce in the case of each wife, that is, one cannot say of any specific wife that she was divorced, with certainty. For these jurists therefore, the certainty of marriage overrides the doubt in the divorce. For Imam Malik, the ruling is different. Here, what is certain (*yaqin*) is that the man has divorced a wife. What is in doubt (*shakk*) is the identity of the wife so divorced. Given the certainty that the man has divorced a wife, retaining marriage ties with all his wives means being in a relationship with at least one woman who is not lawful to him. Mālik, in this case, considers all the wives divorced. As is clear from this example, the difference is not in applying the principle of presumption, but in identifying the certainty which must be presumed. For the majority, the marriage tie to each wife is certain and thus cannot be unbound by a pronouncement of divorce which, when applied to her specific case, is doubtful. For Mālik, the pronouncement of divorce is certain, and cannot be erased by doubt over the identity of the divorcee.[100]

There are many other examples of these differences, but these suffice to make the point.

2.2.9 Custom (*`Urf*)

`Urf refers to "recurring practices that are acceptable to people of sound nature".[101] It refers to the custom of a people in as long as it does not run contrary to the letter and spirit of the *Shari'ah*. Aisha the wife of the Prophet reports that the Prophet said to Hind bint 'Utbah (wife of Abu Sufyān): "Take (from his money) that which suffices you and your son in line with custom".[102] The context of the *Hadith* was the instruction given to women who joined Islam to desist from sins such as adultery and stealing. Hind mentioned that her husband, despite having means, was stingy with money and she sometimes would have to take from his money without his permission. The Prophet permitted that, since it was to meet the husband's obligation to maintain his family but directed that the amount taken be in line with custom.

As a result of this, judges and muftis take into consideration the customary practices of people in *mu'āmalāt.* Al Shinqītī affirms that it is not permissible for a judge or mufti to make a ruling on a word or phrase without knowledge of the meaning of the term in the custom of the people of that land.[103] One example of the use of *'urf* is, for example, if a man and a woman were to have a dispute over ownership of a necklace and a sword. Without clear evidence in the matter, custom would give each one that which is deemed compatible that is, the sword to the man and the necklace to the woman. Also, the use of certain terms in certain locations that in custom are used to mean divorce or oaths are considered as divorce based on such

[99] See Kamali, *Principles*, supra, p. 389.
[100] See ibid, p. 391.
[101] Ibid, p. 369.
[102] Al Bukhārī , *Sahīh*, 9:71 (No 7180)
[103] Nashr al Bunūd, 2: 272

customary usage.[104] It is important to note that not all custom is accepted as valid in *Shari'ah*. Where a custom makes lawful that which is prohibited or vice versa this custom is invalidated. However, where there is no conflict, custom is consistent with the needs of people and recognizing it lifts difficulties from them. The jurists hold that where the *Shari'ah* comes with an unrestricted (*muṭlaq*) ruling without specifying its form or language, application shall be based on custom. For example, in criminal law, one of the conditions for the crime of theft (*sariqah*) is that the stolen item must be locked in an appropriate place (*hirz*). The decision on what is the proper place to keep wealth of a certain nature and value goes to custom.[105]

2.4 Conclusion

The main objective of this chapter was to review the principal sources of Mālikī jurisprudence. This is considered important as Northern Nigeria and Morocco, the two areas of study in this thesis, both subscribe to the Mālikī School of Law. An understanding of the actual practice of law in the courts of Northern Nigeria, as well as attempts at codification of the law can only be meaningful against the background of the sources of law. These sources also inform arbitration done by the *Hisbah* board and the Emir of Kano's court and were relied upon as sources for codification.

The next chapter concludes the theoretical part of this study, as it examines codification of Islamic family law as an instrument of social reform. We begin with a discussion of law reform and gender equality, then explain legislative techniques employed in codification. In so doing, we bring to light the dynamic interaction between modern discourses on equality and Islamic jurisprudence and follow up with specific examples of how Islamic legal theory can be used to reconcile family law with changing values of modern society.

[104] Ould Abah, *Madkhal,* supra*,* p. 157.
[105]See al-Zuhailī, *Al Wajīz fī Usūl al Fiqh* , supra, pp. 97-100.

Chapter Three: Codification of Islamic Family Law as a Reform Tool

3.1 Introduction

Research on codification of Islamic Family Law often seeks to examine the various ways in which the law can "promote or prejudice a woman's autonomy or dignity."[1] According to Cesari and Casanova, these include, "Minimum age of marriage, her consent to marriage, marriage ban between certain religious and cultural groups, spousal rights and duties, guardianship, marital name requirement, marital property regime, divorce, custody of children, adultery, property after divorce, and inheritance and right to work."[2]

Islamic family law reform, therefore, has broadly taken the form of an attempt to improve the condition of women and, at its most progressive limit, to promote gender equality as the Islamic ideal. According to Marieme Yafout, several contemporary Muslim jurists and scholars have challenged the traditional views on the ideal Muslim family and the woman's place in it, arguing that a number of social practices which marginalize the woman and which are endorsed by classical jurisprudence are in no way Islamic *("ne sont nullement islamique")* but based on traditional rites and customs.[3] To support her argument Yafout names several scholars, among them Mohammed Abduh, Rashid Rida, Jamal al Din al Afghani, Muhammad al Ghazzali, AbdulHalim Abu Shuqqah, Yusuf al Qaradawi, Rashid al Ghannochi and Abdelsalam Yassine. She then posits that the views of these scholars have contributed to the expansion of the current of Islamic feminism (*le féminisme islamique*), which is the "stream of women who attempt to reconcile the Muslim faith and identity with a struggle for gender equality" *("Ce courant de femmes qui tentent de concilier la foi et l'identité musulmanes avec une lutte pour l'égalité de genre*").[4](Translations mine).

In this chapter, we conclude the theoretical part of this thesis with a discussion of codification and debates around its legitimacy, before discussing various techniques of codification.

3.2 Islamic Family law reform and gender equality

According to some scholars, the conception of justice found in Islamic legal discourses is pre-modern, and sanctions discrimination based on gender, which brings it into conflict with the modern ideal of gender equality associated with the expansion of human rights and feminist discourses.[5] Consequently, many Muslim majority (particularly Arab) countries have been

[1] Jocelyne Cesari and Jose Casanova, *Islām, Gender, and Democracy in Comparative Perspective* (Oxford: OUP, 2019) pp. 28-29

[2] ibid

[3] Marieme Yafout, "Le féminisme Islamique au Maroc: une conception de la libération des femmes en Islām" in Hakima Lebbar (ed), *Femmes et Religions: Points de Vue de Femmes du Maroc, (*Rabat : Galerie Fan-Dok, 2014) pp. 63-70

[4] ibid

[5] Ziba Mir-Hosseini, Karl Vogt, Lana Larsen and Christian Moe, "Muslim Family Law and the Question of Equality", in Ziba Mir-Hosseini et al. (eds), *Gender and Equality in Muslim Family Law*, (London: I B Tauris, 2013) see esp pp. 1-2

placed on the defensive when facing the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW).[6]

Our focus here will be on the various legislative techniques employed by reformist states in the process of their codification of Islamic family law. Additionally, a review of some of the secondary literature on the divergent views of scholars on the legitimacy and efficacy of codification will be undertaken. The chapter will conclude with a short analysis of codification in Muslim-Majority states.

3.3 Legislative techniques employed in codification.

In chapter two we discussed the multiple sources of Muslim Family law in the Maliki School. The principles of *Maṣlaḥah* (interest/benefit) and *Maqāṣid* (Objectives) provide the basis and justification for most of the reforms of the law in Muslim majority countries. Early proponents of codification like Makhluf al Minyawi[7] relied on the views of Maliki jurists as justification. Having first argued the need for having a political leader and the obligation to obey him, he then argued that Maliki jurists like Qarāfī and Nafrāwī have encouraged independent reasoning (*Ijtihād*) and also indicated permissibility of taking rulings from other Schools of Law so long as one does not deviate from the clear text of the Qur'an and Sunnah or the consensus of scholars.[8] On this basis he argues for the permissibility of legal eclecticism.

El Gawhary, in his analysis of the codification debates in Egypt, argues that codification rests on three key pillars. These are new thinking or new *ijtihād*, legal eclecticism or *talfīq,* and the confluence of politics and jurisprudence or *al siyāsah al shar'iyyah*.[9] It is clear from the literature that many proponents of codification were also advocates for reform. There has been disagreement among scholars over the legitimacy of legal eclecticism in pre-modern Islam. Wael Hallaq argues forcefully that *talfīq* is entirely new and had been "forbidden in Islamic law for both jurists and state authorities" in pre-modern times.[10] Hallaq further states that codification of family law was a pure creation of the modern state, and in fact ended up locking women into a state-inspired patriarchal structure of subordination.[11]

Codification, therefore, appears to Hallaq to be a purely secular process that has no real legitimacy in Islamic jurisprudence. This view is echoed by Coulson, who views codification as the manipulation of "traditional authorities…to yield the required rule", a "thin veil of pretense…which masked the reality of an attempt to fashion the terms of the law to meet the needs of society as objectively determined."[12] Ahmed Ibrahim, on the other hand, in his comprehensive review of historical sources, argued that although classical jurists had frowned

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[6] See, for example, Ann Elizabeth Mayer, "Internationalizing the Conversation on Women's Rights: Arab Countries Face the CEDAW Committee", in Yvonne Y. Haddad and Barbara F. Stowasser (eds*), Islamic Law and the Challenges of Modernity* (USA: Altamira Press, 2004) pp. 133-160

[7] The discussion on Minyawi relies heavily on Tarek Elgawhary, *Rewriting Islamic Law: The Opinions of the 'Ulama' Towards Codification of Personal Status Law in Egypt* (Piscataway, NJ: Gorgias Press, 2019) pp. 45-58

[8] Ibid, pp. 51-56

[9] Ibid, pp. 79, fn 4

[10] Weal Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge University Press, 2009) pp. 448-449

[11] Ibid, pp. 449-473

[12] Coulson, N. J., *A History of Islamic Law* (Edinburgh, 1962) p. 201

on what they called *tatabbu' al rukhas* (a process of looking for easy answers to legal questions through shopping in various sources), the reality on ground was that for centuries pragmatism had been a feature of Islamic jurisprudence reflected in "pragmatic eclectic *taqlid*, where change took place within the school, where the position based on weightier arguments (*rājih)* was abandoned for pragmatic reasons, or through the utilization of pragmatic eclecticism across school boundaries."[13] Ibrahim therefore concludes that the "utilization of eclecticism…in the modern period does not…represent a break with the juristic past" since, contrary to Hallaq's claims, *talfiq*[14] was not "outright forbidden", but "highly contested", in the pre-modern period.

Ziba Mir-Hosseini has discussed contributions of scholars like Tahir Haddad and Fazlur Rahman to new thinking about women in Muslim family law.[15] For the modernist jurists, the principal argument has been a need to establish a Muslim family along the lines of the Islamic ideal as contained in the Qur'an which defines marriage as a loving relationship, as opposed to the construction of jurists. Notable, among the early pioneers who propounded this view was Muhammad Abduh.[16]

In his review of the devices relied upon by the modern state in codifying Islamic law, Wael Hallaq identifies five that are most employed.[17] The first is the reliance on the concept of *ḍarūrah*, or necessity. This principle is an established one in Islamic jurisprudence permitting, for example, the eating of pork or the drinking of intoxicants if there are no alternatives available and life is in danger. Hallaq, however, suggests that the principle has been stretched far beyond its original scope by the modern state.[18] The second device is the use of the legal system to give selective effect to certain rules, based on considerations of the general interest or *maṣlaḥah*. An example is the instruction to the office of the registrar, who is given the power to decide what is legal or non-legal, for instance not to register marriage of minors below a fixed age. The adoption of this instrument circumvents outrightly prohibiting child marriage; such marriages are effectively not recognized by the state and the parties lack access to justice through the formal system. The third device is the "dispersal-cum-restructuring" of *fiqh* using two principal tools: *Takhayyur* and *Talfīq*. The first refers to selection, from within the school of law or outside of it, of an opinion that forms the basis of a code and relying on that opinion as justification. Sometimes these opinions may have been considered weak or less preferred within the school or even been rejected by the school entirely. The second, which is even more complex, is the mélange of various opinions from different schools in the same code, such that the code does not reflect the ruling of any one school in its totality while containing some element from other schools. As mentioned earlier,

[13] Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (New York: Syracuse University Press, 2015) supra, p. 235. "*Rajih*" is a technical term for the more weighty or sounder ruling compared to others

[14] ibid

[15] Ziba Mir Hosseini, "Justice, Equality and Muslim Family laws: New Ideas, New Prospects" in Z Mir Hosseini et al (eds), *Gender and Equality in Muslim Family Law* (I B Tauris: 2013) pp. 7-27

[16] See Nasr Abu Zayd, "The Status of Women Between the Qur'an and Fiqh", in Mir Hosseini et al, supra, pp. 153-154

[17] The following discussion is a summary of *Shari'a* from Hallaq, supra, pp. 447-449

[18] Ibid., p. 447

Hallaq is of the view that both *takhayyur* and *talfīq* are devices prohibited in the pre-modern period, even though other scholars have disputed this.

The fourth device, according to Hallaq, is neo-*ijtihād*, new and unprecedented interpretations of the law. He offers as examples the limitation of gestation period of pregnancy to one year in several codes when classical *fiqh* had sometimes extended the period to four years or more to limit the number of children born out of wedlock. A second example, to which we will later return, was the prohibition of polygamy in the 1956 Tunisian Code of Personal Status based on a new interpretation of the Qur'an. This code suggests that the ability to treat women equally is impossible, and since this was a condition for permitting polygamy, polygamy is not allowed.[19] The final device he mentions is the application of the principle that any law that does not contradict the sharia is lawful. The examples he gives here are prohibition of child marriage and unilateral divorce by the husband. [20] These and similar reforms, we will argue, were based on a principle that allows the state to set bounds and limitations to that which is permissible (*taqyīd al mubāh*).

3.4 Maqāṣid, Maṣlaḥah and Islamic Legal Reform

Codification has been driven by a reform mindset that focuses on the higher goals and objectives (*maqāṣid)* of *Shari'ah* and the derivative concept of the public good (or *maṣlaḥah*), which was discussed extensively in the previous chapter. Many of the proponents of reform and rethinking of Muslim law have laid significant emphasis on the primacy of attainment of higher objectives over compliance with historical rulings and literal interpretations of texts.[21]

Kamali, for example, believes that classical jurisprudence suffers from "technicalism and literalism" and is based on medieval social values. He argues that "objectives and values, rather than technicality and literalism, should have been the overriding theme and preoccupation of usūl al fiqh".[22] In order to properly ground the new ijtihād, Kamali discusses several maqāṣid-allied concepts.

The first concept, as one would expect, is *maṣlaḥah.* Following al Ghazzali, Kamali uses *maṣlaḥah* almost interchangeably with *maqāṣid* and argues that the concept has been underutilized in the *Shari'ah*. He argues against the restrictive use of *maṣlaḥah* that links it to revelation, arguing that human reason can arrive at a correct understanding of what is the general good, and even form the basis for making moral judgments as to right and wrong.[23] He also considers juristic preference (i*stiḥsān*), and legal maxims (*qawā'id*) as allied concepts to *maṣlaḥah*. Along with other reform thinkers, Kamali laid great emphasis on the need for new *ijtihād*. He argues that even if one acknowledges the exaggeration in the claim of the so-called "closure of the gates of *ijtihād*", one cannot deny that "Ijtihād has suffered a steady

[19] ibid, p. 449
[20] ibid
[21] For a good review of these scholars works, see Adis Duderija (ed), *Maqāsid al-Shari'a and Contemporary Reformist Muslim Thought: An Examination*, (Palgrave Macmillan, 2014)
[22] Kamali, Hashim, "Issues in the Legal Theory of Usul and Prospects for Reform", *Islamic Studies,* vol 40 (2001) p.5
[23] Duderija, supra, p. 26

decline, which probably started not too long after the crystallization of the *madhāhib*".[24] The author makes forceful arguments for the primacy of goals and objectives, relying on no less than the Qur'ān itself. In a passage worth quoting, Kamali writes:

"A cursory perusal of the Qur'an would be enough to show that the Qur'ān's primary concern is with values and objectives such as justice and benefit, mercy and compassion, uprightness and *taqwā*, promotion of good and prevention of evil, fostering goodwill and love among the members of the family, helping the poor and the needy, cooperation in good work, and so forth."[25]

Kamali, in taking this line of reasoning, is echoing the views of many of the reformers mentioned earlier in this chapter. Indeed, the very idea of *maqāṣid* has influences going back to the theology of the Mu'tazilites, and their doctrine that "God's decrees are subject to, rather than the origin of good and evil". This doctrine "ultimately resulted in an assertion that God is compelled to act in the interest (perhaps the best interest) of humankind. His law must be of benefit to his creation, for if it was not, his qualities of justice and goodness would be compromised."[26]

The underlying principle for reform thought therefore is that the *Shari'ah* must always be interpreted in changing situations with a view to attaining its higher goals and objectives; and these are not to be sacrificed by the determination to remain faithful to earlier interpretations. It is in this context that the questions raised concerning the place of women in the *Shari'ah* and gender equality are to be read.

It is to be noted that not all proponents of reform were also supporters of codification. In a sense, for some reformers, the biggest drawback of codification was that it would lead to the abandonment of *ijtihād*, which is the very legal tool supported by the reformers. For example, Rashid Rida, a foremost disciple of Muhammad Abduh, was opposed to codification.[27] Rida argues that the *Shari'ah* is totally transformed when rendered into a code by the State. This cuts it off from its divine origins and makes it a secular law since, in his schema, without a Caliph the State itself is not Islamic and its codes are also secular, leading to the "death" of *Shari'ah*.[28] Although Rida was a vigorous advocate of reform and "new thinking", and heavily influenced by al- Tufi's broad use of *maṣlaḥah* in *ijtihād*,[29] he was rather reticent about codification.

Other reformers shared the concerns of Rida on the adverse implications of codification on *ijtihād,* but at the same time considered that the benefits outweighed this drawback. The Moroccan scholar and nationalist 'Allal al Fāsī,[30] makes the point that codification per se, is not a necessary feature of good laws. Codification, according to him, is not a difficult

[24] Kamali, Issues in the Legal Theory of Usul, p. 12
[25] ibid p. 13
[26] Nasr Abu-Zayd, supra p. 159
[27] See El Gawhary, supra p. 126-136
[28] ibid, pp. 134-135
[29] ibid, p. 131
[30] See « La Codification de la Shari'a », in Allah El Fassi, *Défense de la Loi Islamique*, (french Translation by Charles Samara), Manshurat Mu'assasah Allal al Fassi, (1st edn, 2020) pp.171-175

enterprise *("une enterprise difficile*") and it is possible if Muslims want to codify Muslim law in the form done by modern European states. Al-Fasi points out that the Ottoman *Mujalla* was in fact a codification of Hanafi jurisprudence.[31] He argues that codification has its merits and demerits. Quoting al Mahmasani, he explains that among the merits of codification are that it provides clarity of the rules of the *Shari'ah* and rights and responsibilities; it facilitates for governments the application of the law and makes it easy for judges and magistrates to rule in accordance with this clear code. Among the disadvantages is that it denies the judge the freedom to exercise judgement when faced with cases that are all different and ties him to one opinion even where there are several possibilities to choose from.[32]

Al Fāsī ultimately argued that, while codification should not necessarily be given more importance than it deserves *("Il n'est…pas necessaire d'attribuer à la codification plus d'importance qu'elle n'en a"*), it is still worthwhile to codify the major principles, rules and norms extracted from *fiqh* works, taking cognizance of public interest and the needs of a changing society. Interestingly, al Fāsī does not object to the use of comparative law and adoption of European legislation on the condition that it is confirmed they do not contradict the Qur'an, in which case the laws are adopted not as imports but as something Muslims are allowed to do which does not conflict with their religion.[33]

Despite the reservations of the opponents of codification, however, most Muslim majority countries have codified family laws. As Christina Jones-Pauly points out[34], the principal arguments have been that it is easier for the State to obtain information on civil status of citizens and thus have greater control. Jones-Pauly argues that codification provides greater legal security by removing ambiguities, strengthening the rights of women, and enabling certain social problems to be remedied by reforming substantive law.[35] She also recognises that most countries have taken advantage of the codification process to push through reforms such as mandatory registration of marriage and divorce; setting a minimum age of marriage and putting restrictions on polygyny; the introduction of the use of conditions in marriage contracts to strengthen the position of women and their agency; the banning of forced marriages and limiting the power of male guardians; and increasing grounds of divorce for women.[36] The author goes on to mention Saudi Arabia and Northern Nigeria as two of the very few jurisdictions in which Muslim family law is yet to be codified.[37]

[31] ibid, p. 171
[32] ibid, p. 172
[33] ibid, pp. 174-175
[34] Christina Jones-Pauly, "Gender Relations", in R. Peters and P Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Co., 2014) pp. 137-149
[35] ibid, p. 145
[36] ibid, p. 146
[37] ibid, As mentioned earlier, Saudi Arabia has since issued a Family Code. The Kano Draft Code that is the subject of this thesis, is the first attempt in Northern Nigeria. However, it is yet to be adopted by the State Government or passed into Law by the State House of assembly as at the time of writing

3.5 The concept of Taqyīd al-Mubāh in Usul al-Fiqh

The term *taqyīd al mubāh* is understood to mean placing limits or restrictions (*taqyīd*) on something that is ordinarily permissible (*mubāh*) for some reasons consistent with attaining the objectives of the *Shari'ah* and preserving the common good and avoiding harm.

Some scholars make a further sub-division of *mubāh* into two categories: the first is that which is permissible based on explicit revelation, such as commerce, pertaining to which the Qur'an says: "but God has made trade lawful and usury unlawful." [38] The second category is that which is permissible simply based on the principle of all things being lawful unless otherwise decreed (*al Barā'ah al Asliyyah*). For these scholars, there is no authority for anyone to place any kind of limits on the first category, while temporary and partial restrictions may be emplaced based on absolute need on the second category.[39] Ahmad al-Tahhan, for example, argues that whatever God and His Prophet have explicitly made lawful by revelation, no one whatsoever has the authority to limit or alter or restrict it in anyway, because to do so is to disobey God and to place one in the position of lawgiver.[40] According to this group, the only realm in which restriction is permissible is the realm of that which is the second category, and even then with a number of strict guidelines. These include compatibility with the *Shari'ah* and its objectives, reliance on scholars to define the limitation, paying attention to the public good, placing limits only where there is absolute necessity (*ḍarūra*), to the extent needed, and lifting the restriction when the need no longer exists.[41]

The implication of this view is a rejection of many of the reforms introduced into family law in Muslim majority states. These scholars would for example reject setting a minimum age for marriage because, in their view, the Qur'an allows the marriage of minors. Similarly, they would consider any kind of restrictions on a man's freedom to marry up to a maximum of four wives at the same time as going against the text of the Qur'an. They would confine the authority of the state to limit that which is lawful to such things as restrictions on travel to certain countries or at certain times, restrictions to the practice of certain professions, requirement to register marriage in court, fixing prices and wages where needed, prohibiting fishing certain types of fish or slaughtering certain animals, and so on.[42]

The jurisprudence behind this restrictive approach is far from agreed upon. As discussed in the last chapter, al-Ghazzali in one of his opinions limits the scope of *maṣlaḥah mursala* to the necessities (*ḍaruriyyāt)*. In another opinion, however, he seems to have expanded its scope to include needs (*hājiyyāt*). As Fadiga Musa points out, quoting al-Shinqīti, Imām Mālik himself did not restrict the scope of *maṣlaḥah* and applied it to the three categories of necessities, needs, and embellishments (*tahsīniyyāt*).[43]

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[38] Our'an 2:275

[39] Ahmad khaālid al Tahhān, *Nūr al Sabāh, Fī Fiqh Taqyīd al Mubāh*, Shabkah al Alukah (Makkah), pp. 4-5 <www.alukah.net/books_6346/bookfile/> accessed 18 November 2022

[40] Ibid, p. 5

[41] ibid pp. 6-10

[42] ibid, pp. 11-13

[43] Fadiga Musa, *Usūl Fiqh al-Imam Malik: Adillatuh al-'Aqliyyah*, (Dar al Tadmuriyya, Riyadh, 2007), vol 2 pp. 424-426. See Shinqiti in *Muzakkira fi Usul al Fiqh ,ala al-Rauḍah*.

There are still other contradictions in their arguments. While al Tahhān, for example, argues forcefully against limiting things permitted by the Qur'an and Hadith, he relies on examples of precisely that nature as justification for the authority to restrict in the first place. For example, he uses the instance of the second Caliph 'Umar b. al-Khattāb, who prohibited the senior companions from marrying Jewish and Christian women, even though this is permitted to Muslim men based on the Qur'an.[44]

3.5.1 Mubāh and the Question of Neutrality

Beginning with Shātibī, scholars have questioned the implicit presumption that the *mubāh* is a neutral category, that is neither recommended nor disapproved. Shātibī's analysis of the connections between that which is permitted and the objectives of the *Shari'ah* leads him to conclude that what is made permissible is not always neutral in its ruling. Many things that are considered simply permissible are tied to necessities (*ḍarūriyyāt*) or needs (*hājiyyāt)* and therefore take on the character of being obligatory at least upon some segments of society.[45] Shātibī breaks down *mubāh* in relation to *masālih*, into three categories. The first category is that which promotes the objectives of *Shari'ah*, be they necessities, needs, or adornments. These can become obligatory (*wājib*) or recommended (*mandūb*) as the case may require. The second category are things permissible, but which may undermine these objectives, in which case they may become prohibited (*harām*) or discouraged (*makrūh*). Only those things permitted that have no outweighing public good (*maṣlaḥah*) or harm (*mafsadah*) remain in the category of *mubāh*.[46]

According to Shatibi, for example, certain permissible things like fishing or farming or commerce are such that the community cannot survive without them. (We can also add for further clarity professions like healthcare work and education). Viewed partially (*bil juz')*, these professions are permissible in the sense that an individual is free to choose any or none of them. But viewed as a totality from the perspective of the common good, these professions are necessary for the preservation of the necessities (religion, life, intellect, progeny, and wealth). They are therefore *wajib* or obligatory from the perspective of totality (*bil kull*), and at least some members of society must be in these professions, with the ruler obliged to ensure that this is done, even if under compulsion.[47]

Similarly, eating good food and wearing nice clothes and drinking good drinks (where this is not an obligation or recommended on a specific individual) are all permissible and a person may choose to do so or not to. However, the *Shari'ah* recommends that we enjoy the good things God has provided for us, so from the perspective of totality, these things become *mandūb* or recommended, and not just *mubāh*[48].

On the other hand, some permissible things may weigh more on the side of harm (*mafsadah*) when viewed in totality. An example given by Shātibī is that of *ṭalāq* (divorce/repudiation). Viewed partially from the perspective of an individual, it is permitted and lawful for a husband

[44] See Qur'an 5:6
[45] Al Hussain al Mūs, Taqyīd al Mubāh, supra p. 124
[46] Shātibī, *al Muwāfaqāt fī Usūl al- Sharī'ah*, Dār al-Ghad al-Jadid, Vol 1: Part 1, p. 94
[47] ibid, Vol 1 (1/ p. 95-96)
[48] ibid, Vol 1 (1/p. 96-97)

to repudiate his wife. Viewed from the perspective of its effect on the totality, divorce removes a shield that protects spouses from the risk of seeking sexual gratification outside marriage, brings an end to an arrangement that is designed to produce progeny, undermines harmony and good relations within society, is disliked by God Almighty,[49] its drawbacks often outweigh its benefits, among other considerations. Whereas divorce is therefore permissible when viewed from the narrow prism of an individual, from a total perspective it becomes clear it is *makrūh* (discouraged), and not simply *mubāh*. [50]

The final category is that which is permissible pertaining to an individual but prohibited from a total perspective. For instance, an individual is permitted to refrain from killing a dangerous animal like a snake or hyena. However, if everyone decided not to kill these animals the entire community is exposed to risk of extinction such that refraining from killing these animals in totality becomes discouraged or indeed prohibited.

A number of scholars, especially in the nineteenth and twentieth centuries, followed Shatibi in his analysis of *mubāh* and its linkages to the *maqāṣid* or objectives of the *Shari'ah*. [51] Once the *mubāh* is so understood in all its nuances, it loses its "neutrality" in many instances and its character is altered to desirable or obligatory, if it promotes objectives, and discouraged or prohibited, if it undermines them. This is therefore the key to understanding the justification for its restriction or enforcement by political authorities. Things that are arguably permissible, such as marriage of minors, arbitrary and extra judicial repudiation, discipling a wife by light beating, polygamy, etc. when viewed as a totality shift from neutrality to being preponderantly harmful. This is the axis around which reform of family laws revolves.

3.5.2 Taqyīd Mubāh and the Reform and Codification of Family Law

In this section, we discuss the following topics and the debates around them in family law reform:

- Minimum Age of Marriage.
- Domestic Violence; and
- polygyny

3.5.2.1 Minimum Age of Marriage

One concern of social reformers, feminist movements and women's rights activists as noted by Welchman, is to limit the practice of early marriage.[52] The adoption of minimum age of marriage in several codes has been justified based on the principle of *taqyīd al mubāh*. In the explanatory notes to the unified Arab law of personal status, it is stated explicitly that "setting a minimum age limit on capacity for marriage is based on the power of the ruler to limit that which is lawful, in the opinion of men of knowledge and religion, if the lawful leads to harm."[53] Similarly, the commentators on the Law of Personal Status of Kuwait refer to the importance

[49] Abu Dawud:2178; and ibid, Vol 1(1/p. 94)
[50] Shatibi, ibid, Vol 1(1/91)
[51] Particular mention must be made of Ibn Ashūr and Abu Zahra. See al-Mūs, *Taqyid*, supra p. 53
[52] Lynn Welchman, *Women and Muslim Family Laws in Arab State*s (Amsterdam: Amsterdam University Press, 2007) p. 65
[53] *Al Mujallah al Fiqhiyya li al Fiqhi wa al Qadha'*, 2:57 quoted in al Omrāni, supra, p. 22

of recognizing the need for preparation, for producing healthy children, for taking on family responsibilities, coupled with the harm that accompanies marriage of minors including illness and arresting the young woman's own development and flourishing. Considering these, and "based on the duty of the ruler to limit that which is permissible if it leads to general harm", the law provided for physical and mental maturity (indicated by the minimum age) as conditions for capacity to enter a marriage that may be recognized officially.[54] The commentaries on the laws make it clear that *maṣlaḥah* is the principal driver of this reform. Allal al Fāsī, despite his view that the question of minimum age is a discourse with European origins, still acknowledges that setting a minimum age "falls under a foundation of *Shari'ah* (*aslun shar`īyyun*) which is the *maṣlaḥah* (good) of woman in general and the *maṣlaḥah*[55] of the family, as it were." In general, the arguments for setting a minimum age are the same across jurisdictions, with focus being on physical and mental health risks, consent, and limitations to opportunities.[56]

On the other hand, objections have been raised to setting a minimum age of marriage by some scholars. We have referred to al Fāsī's opinion about this being a western concept initially, and despite recognizing that it has a basis in Islamic Law it would appear he never really supported setting an age limit.[57] Some scholars argue, based on the Qur'an and Hadith, that marriage is a right of Muslims and is lawful, and that revelation explicitly permits marriage of minors. Al-Bukhari, for example, opens his chapter on "(the right of) a man to marry off his minor child", with a justification based on the Qur'an 65:4. This verse says in part : "And those of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts, is three months, and for those who have no courses (it is the same)…" [58]The reading of al-Bukhari, and those who agree with him, is that the term "those who have no courses" refers to minors who have not started menstruating. Therefore, since the Qur'an prescribes a waiting period for them after divorce, it is evident that their marriage is lawful. This interpretation has, however, been questioned by other scholars. Ibn al-'Uthaimīn, the Grand Mufti of Saudi Arabia, for example, disputes the claim of this being a clear text permitting marriage of minors. He argues that menstruation is delayed in some cases and a woman can even "be up to twenty years old without menstruating".[59] There is therefore no necessary correlation between being the beginning of menstruation and being below a certain age. For this reason, Ibn al- 'Uthaimin argues that this verse is not apodictic evidence for the permissibility of marriage of very young girls.[60] He also refers to al Tahhawi's report that Ibn Shubrumah does not permit the marriage of a minor (who is not mature enough for sexual intercourse and conception and childbirth). Ibn Hazm also reports from Ibn Shubrumah that a father may not marry off his virgin minor daughter until she matures and gives her permission and considers the marriage of the Prophet to A'isha as a minor to be an exception

[54] *Qanun al Ahwāl al Shakhsiyyah*, p. 151 quoted in Omrani, Supra, p. 22
[55] Allal al Fasī, *al Naqd al Dhātī*, (Matba' al Risala, Rabat, 1979) p. 282
[56] See Welchman, supra, p. 65
[57] Omrani, supra p. 24
[58] Al Uthaiimin, Muhammad ibn Saleh, *Sharh Sahīh al-Bukhari*, Maktabah al Tabari (1st edition, 2008) vol 4: 499.
[59] Ibid 4:500
[60] ibid

for the Prophet alone.[61]Al-'Uthaimīn concludes that this verse cannot be used as evidence that the Qur'an sanctions marriage of young girls.

On the second point, the marriage of the Prophet to Aisha at the age of six and consummation at the age of nine, al- 'Uthaimin accepts the authenticity of the report then asks "who, among men is like the Prophet and whose daughter is like Aisha?" He then says, in his opinion, "in these times", it is best to prohibit these marriages, "even though some scholars have claimed a consensus on the permissibility of a father marrying off his minor daughter without her permission." He mentions that there are so many cases of girls threatening to commit suicide because they are forced into marriage. He points out that parents in these times seek their own interest and not that of their daughters in marriage, therefore it is best to make these marriages unlawful until girls mature and give their consent. He concludes: "There is a ruling for every era."[62]

In general, Muslim majority states have acted to limit the marriage of young girls. Lynn Welchman has reproduced detailed provisions around age of minors from the legal codes of fifteen countries in all their variety, and there is no need to reproduce these here.[63]

3.5.2.2 Domestic Violence

One of the social ills bedeviling Muslim communities is wife beating and physical violence against women. Several studies have sought to examine the relationship between gender-based violence and Islamic Law. Hina Azam's excellent and path-breaking text examines the construction of sexual violation in Islamic jurisprudence, exploring the influence of pre-Islamic mores and values, and the very idea of transforming female sexuality into a commodity (even though in the case of the free woman she voluntarily accepted a monetary dowry in exchange for unrestricted and monopolistic sexual access by a male husband). These values fed into the construction of jurisprudence that produced a body of laws in modern Muslim states which have led to terrible consequences for women who have been victims of rape and abuse in jurisdictions as different as Pakistan and Northern Nigeria, according to Azam.[64] Our concern here, however, is with the physical maltreatment of women by their husbands, in the form of wife-beating and physical abuse.

As pointed out by al-Mūs, in the entire Qur'an only one verse[65] contains what has been variously interpreted as a permission (or command) for husbands to "hit" or "strike" or "beat" their wives when they fear disobedience (or other interpretations of the term *nushūz*).[66] The

[61] ibid
[62] ibid
[63] See Welchman, Supra pp. 161-166
[64] Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure*, (Cambridge University Press, 2015) This is an excellent read, but due to our focus on the physical abuse of wives in a marriage situation, we will make limited use of this reference. However, it is worthy to note the author's discussion of sexual violence in contemporary Muslim societies in the Introduction (1-20). There is also an interesting discussion of sexuality as a commodity in early Islamic discourse (84-88) and how this feeds into the construction of **zina** and rape laws.
[65] This is 4:34 which contains the much-debated phrase *waḍribūhunna* (and strike them)
[66] Ayesha Chaudhry has a detailed discussion of the various juristic interpretations of wifely "*nushūz"* in her book, *Domestic Violence and the Islamic Tradition* (Oxford University Press, 2013) esp 62-68. She follows this up later with an excellent analysis of how pre-existing patriarchal mindsets influenced the hermeneutical process

verse in question contains the *qiwāma* postulate which has provided the basis for entrenching male sovereignty over women in the home, and places on men the responsibility for maintenance of the family as well as educating, guiding, and disciplining the wives and minors. Where there is fear of the wife being out of control, husbands are counselled to admonish the wives, to desert their beds for a limited period, and to "beat" them. Almost every term in the verse has been the subject of multiple interpretations and discourse, and there have been various interpretations of exactly what is meant by beating, when it is justified, to what extent, to what end, etcetera. Indeed, Ayesha Chaudhry's full-length book on domestic violence[67] is a detailed discussion and commentary of the various positions on this verse. There have also been various views on the three elements of the disciplinary process, with many scholars insisting that they must be employed in sequential order.[68]

The jurisprudence of wife-beating becomes complex because this one phrase is also contradicted by many sayings and injunctions of the Prophet that severely limit, and even criticize in strong terms, the beating of wives. These hadiths clearly show that even if beating is permissible (*mubāh*), it is not neutral from the perspective of *maṣlaḥah* and *mafsadah*, and can thus be viewed in total as *makruh* (discouraged) if not outright *harām* (prohibited).[69] In the Prophet's sermon on Mount Arafah in the final pilgrimage of his life he said:" Fear Allah in the matter of your wives; you have taken them as a trust from Allah; you have made their sexuality lawful with the Word of Allah; it is your right that they do not allow anyone to lie on your beds and if they do that you beat them in a manner that is not extreme (*ghayr mubarrih*)."[70] Ibn Abbas, among the companions, interpreted this beating to mean "with a chewing stick/toothbrush (*siwāk)* or something similar to it."[71] Ayesha Chaudhry holds that, read literally, this hadith would suggest that the *nushūz* for which this non-extreme beating is permitted is "unfaithfulness or open lewdness and not disobedience."[72]

The sum of the evidence is that that wife beating, if allowed at all, is to be for extreme misconduct like open lewdness and unfaithfulness, must be so light as to be symbolic, and that it is preferable to avoid it completely. It is, at best, one of those things that is both permitted and disliked, like divorce. Indeed, al Bukhari, for this reason, titled the relevant chapter in the Book of Marriage, "Chapter on that which is Disliked in Beating Women."[73] For this reason, the jurists of the Maliki school were very particular about setting tight controls over wife beating such that it becomes almost impossible to keep within those guidelines unless one refrained from it altogether.[74]

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leading to radically different interpretations of the same term when applied to men and to women, see Ayesha Chaudhry , "Marital Discord in Qur'anic Exegesis: A Lexical Analysis of Husbandly and Wifely Nushūz in Q. 4:34 and Q. 4:128", in S. R. Burge (ed),*The Meaning of the Word: Lexicology and Qur'anic Exegesis* (Oxford University Press, 2015) pp. 325-350

[67] *Domestic Violence and the Islamic Tradition*, supra

[68] ibid 233, Ayesha Chaudhry lists at least 26 exegetes among those who hold this view in *Domestic Violence*

[69] Al Husain Al Mūs, *Taqyid al Mubāh*, supra, p. 269

[70] Muslim No 1218

[71] Al Qurtubi, *Al-Jāmi' Li Aḥkam Al-Qurān*, 3:157

[72] Chaudhry, *Domestic Violence*, pp. 81-82, fn 89

[73] Al Mūs, *Taqyid*, p. 268

[74] Ayesha Chaudhry reviews the four Sunni Schools of Law and their position on wife beating. She concludes that

Ibn 'Ashur takes the view that permitting wife-beating must take cognizance of custom *('Urf*), which, as noted in the last chapter is one of the sources of Maliki law. He notes that different peoples have different customs. People living in villages or deserts may not see wife beating as humiliation and the women themselves may not view it as such. Where the view is different and beating as a corrective measure does not serve a purpose or is viewed as humiliating then it should be prohibited.[75]

3.5.2.3 Polygyny

Islamic Law permits a man, if he so wishes, to marry up to four wives at the same time. There is nothing in the texts that shows that there is any preference for polygyny over monogamy. It has been reported from the Prophet's cousin and companion, Abdullah Ibn Abbas, that he said, "the best among this community is he with the most wives."[76] Flowing from the established position that marriage is for the purpose of procreation and given all the Prophetic *hadith*s encouraging Muslims to produce many children, it is to be expected that polygyny would be portrayed as a desirable thing in such a context. There is no evidence, however, that the Qur'an or Sunnah indicated an explicit preference for polygyny over monogamy.

Modern discourses, on the other hand, have focused on trying to eliminate or constrain the practice as part of the overall discourse of the feminist movement and women's rights. Lynn Welchman, in her coverage of codification in Arab states devotes a chapter to different approaches to reforms concerning polygyny.[77] These include outright prohibition in Tunisia,[78] which is so far an isolated and extreme case in the Arab world, although Turkey did the same. The clear ideological impetus behind the Tunisian law is reflected in Tunisian President Bourguiba's statement that polygyny had become "inadmissible in the twentieth century and inconceivable to any right-minded person."[79] Some other Arab States produced laws aimed at regulating or constraining polygyny, such as a requirement to show financial capacity to maintain multiple families and also that there is a lawful benefit to marrying an additional wife.[80] Other forms of constraint involve a requirement to obtain the consent of existing wife, making the lack of consent a legal ground for divorce particularly if this condition is inserted in the marriage contract, and recognizing polygyny as "injury" to the non-consenting wife even where there is no clause impeding it in the marriage contract. [81]

The opponents of polygyny argue that the Qur'an itself says that men cannot do justice between wives even if they tried to,[82] whereas the verse permitting polygyny states clearly that where a man fears he will not do justice between wives he is to marry only one.[83] The

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"the most distinctive feature of Maliki jurisprudence was a suspicion that husbandly disciplinary privileges might slip easily into abusive behaviour." Consequently, "Maliki jurists created judicial and extra-judicial mechanisms for supervising the disciplinary privileges of husbands," see Domestic Violence, supra, p. 109

[75] See Al Mūs, supra, p. 269

[76] Muhammad Nasir al-Kabary, *Al Qanābil al Zarriyyah*, Kano, 1376 A.H. p 8

[77] See chapter 7, "polygyny", in L Welchman, *Women and Muslim Family Laws*, Supra, pp.77-87

[78] ibid, p. 78

[79] Quoted by Welchman supra p. 78 referenced in fn 5, p. 204

[80] ibid, pp. 79-81

[81] ibid, pp. 81-85

[82] Qur'an 4:129

[83] Qur'an 4:3

argument, therefore, is that since the default position is lack of justice, the Muslim marriage should be monogamous with polygyny only permitted exceptionally and when absolutely necessary.

In chapters 5 and 6 we will see how jurists in Kano and Morocco approached the question of constraining or regulating polygyny. For now, it will suffice to note that the question of codification in this area is hotly debated. In response to the question of justice, for example, it is argued that the justice men are incapable of giving is justice of the heart over which they have no control. As for justice in treating wives, in the form of maintenance and sharing nights, for example, these are possible. The verses are therefore not mutually negating.[84] As mentioned above, only two countries have prohibited and criminalized polygyny in their laws, and the evidence suggests that despite the laws, the practice continues.[85]

Some scholars argue that even when written into law, it is impossible for the judge to know in advance that a man can do justice among wives, and thus the only thing that can be assessed is the financial means to maintain the expanded family. To this group, therefore, a requirement for the court to establish that justice can be done, before the marriage, is not meaningful. Establishing financial capacity, however, may be a basis for permitting the marriage. The question of justice can only be dealt with based on actual conduct.[86]

3.6 Conclusion

In this chapter we have extended our theoretical discussion to codification as an instrument of reform. We have discussed the significance of reform thinking as the catalyst for the codification process in family law, the arguments for and against codification, the various techniques used by the legislature, and then jurisprudential arguments around these techniques. We have also picked three high level examples of issues addressed in the codes and explained the arguments behind those changes as well as the counter arguments challenging their legitimacy.

This chapter has not exhausted all areas of family law targeted by reformers. For example, we will see that Morocco requires judicial oversight of the divorce (ṭ*alāq*) process with no official recognition for extra-judicial *ṭalāq.*[87] On the other hand, the jurists in Nigeria, like most other States,[88] have refrained from denying the validity of ṭ*alāq* pronounced by the husband since there is no ground for this in traditional jurisprudence. The only option is to consider claims after the fact and impose sanctions or compensation for injustice and arbitrariness. We will also discuss differing approaches to the question of triple *ṭalāq* pronounced at once between the two countries.

[84] See for example Al Omrānī, supra, pp. 16-17; Al Kabary, supra, p. 33; Welchman, supra, p. 78; Al-Mūs, supra, pp. 276-279; and Al-Payari, supra, pp. 103-104

[85] Al-Payari, for example, mentions that studies have shown the existence of "more than 187,000 cases of polygyny in Turkey". Supra, p. 92

[86] Al Omrani, supra, pp. 16-17; al-Mūs, supra, pp. 276-279

[87] Welchman, supra, p 124

[88] Ibid p 122 on this position of the majority of Arab states

Before we get to the codes, however, we need to examine the common social problems faced by women in Kano. This is the subject of our next chapter.

Chapter Four: Family Law Cases in Kano and the Case for Reform

4.1 Introduction

In this chapter, we present and analyse the results of extensive fieldwork conducted in Kano, Northern Nigeria, working with several research assistants from November 2021 to December 2022. The fieldwork was composed of two components. The first was the gathering, collation, and analysis of data relating to marital disputes before Sharia Courts, the Emirate Council, and the *Hisbah* Corps. The second component involved compilation and analysis of other data in the form of recordings and transcripts of sessions and meetings related to drafting and debating the contents of the proposed Kano State Code of Muslim Personal Status and linking these to the output of the drafting committee.

It is our hypothesis that, whereas there are common social problems faced by women all over the world, the prevalence and intensity of these problems will vary with differences in the stage of socio-economic development of the society. Reform should, therefore, be conducted in a "bottom-up" manner, based on an understanding of the specific social problems of specific societies, rather than a "top-down" and "one-size-fits-all" approach which assumes that the problems and priorities of all women are the same.

4.2 The Sharia Court System in Kano

The Sharia Court system in Northern Nigeria finds its legitimacy in constitutional provisions that allow Muslims to be governed by Islamic Law in matters of personal status and for courts to be set up to handle these. The *Shari'ah* is therefore considered a source of Law in the country.[1]

In line with the provisions of the constitution, the Kano State House of Assembly enacted the Sharia Court Law (2000), creating various Sharia Courts within the state. Section 3(1) of the Law set out each court's jurisdiction for the purpose of smooth implementation of *Shari'ah* in the state. These are summarized below:

A. **Sharia Court**: It is a court of First Instance, with limited jurisdiction to try both civil and criminal matters with territorial jurisdiction in the local government it is situated in and neighbouring local governments. Its powers to try cases exclude traffic offences, crimes involving registered associations/companies, and capital offences attracting the death penalty. An appeal against its judgement goes first to the Upper Sharia Court (Appeals) hence this court is sometimes referred to as Lower Sharia Court.
B. **Upper Sharia Court**: This is also a court of First Instance with unlimited jurisdiction in both civil and criminal cases within the state. An appeal from this court in civil, (particularly Islamic Personal Law), matters go to the State Sharia Court of Appeal, whereas remaining civil and criminal matters go to the High Court of Justice.
C. **Upper Shari'a Court (Appeals):** It is a court of appellate jurisdiction entertaining appeals from (lower) Sharia Courts across the state on civil and criminal matters.

[1] Please refer to sections 6(4)(a) and (b), 61, 260, 262, 275 and 277 of the *Constitution of the Federal Republic of Nigeria* (1999) (as amended); also see A. O. Obilade, *The Nigerian Legal System* (Ibadan: Spectrum Books 2018), p. 83; and G. A. Bello, *Modern Nigerian Legal System* (Abuja: Lawlords Publications2018), p. 229

D. **State Sharia Court of Appeal**: this is the **apex** Sharia Court in the state which entertains appeals from the Upper Sharia Courts of Appeal and Upper Shari'a Courts with jurisdiction to try civil matters pertaining to Islamic Law of Personal Status only. The jurisdiction of this court is restricted constitutionally. As such appeals on criminal and civil matters (outside Personal Status) go to the High Court of Justice and so on to the Federal Court of Appeal and, finally, the Supreme Court.

Historically, the above courts were the "Alkali" Courts that existed across Northern Nigeria even before the coming of the British colonial administration.

Being part of the *Shari'ah* system, the keeping of records by scribes and the process of consultation with Muftis that were of general practice in Muslim lands applied to these courts. We have not been able to find any written records from pre-colonial times but according to the Waziri of Kano, Sa'ad Shehu Gidado, record books from pre-colonial times were carted away by the British.[2] John Paden's manuscript collection at Northwestern University, USA, contains one manuscript,[3] written by an unnamed author, in which he narrates what he witnessed at the court of Emir Muhammad Bello b. Ibrahim Dabo (reigned 1883-1893) and the Kano civil war that erupted after the Emir's death. No specific mention of documentation by scribes was made, although this is a matter that may have been taken for granted.[4] The work of Allen Christelow which focuses on selected cases from the judicial records of the Kano Emirate Council under Emir Abbas between 1913 and 1914 instructively supports the assertion of the existence of judicial record=keeping in Northern Nigeria, and Kano in particular. Christelow mentions that when he found the record book on which his work was based at the National Archives, Kaduna, a note attached to it indicated it was the first record book. However, he later found an earlier record dated 1910 in the Emir's palace in Kano.[5] In any case it is inconceivable, given the spread of Islamic knowledge and Arabic literacy, as well as integration to the Muslim world, that the proceedings of courts were not written down especially as trials could extend for days or weeks.

4.3 Data Analysis of Sharia Court Cases

To have an objective basis for identifying most preponderant marital problems adjudicated in Kano, research was carried out on court cases heard between 2016 and 2020. A request was made to the Hon Grand Kadi of Kano State on 11 October 2021, requesting data of cases to establish the nature and distribution of complaints over the period.[6] At the time this request was made, there was no such record available in a useful format. The Sharia Court had no central database, and there was no record of the number of cases heard by any of the courts

[2] Conversation with the Waziri circa July 2023

[3] *Talkhīs Faidh al-Qadīr li Ausāf al-Mālik al-Khatīr*, unknown author, the manuscript is undated but the Kano civil war took place between 1893-1895 so this is the most likely period of writing. This may also explain the absence of minute details like scribe writing if the author was describing Emir Bello's court from memory during or immediately after the civil war that ended two years after the Emir's death

[4] My thanks to Dr AbdulBasit Kassim of New York University who availed me a copy of this manuscript from his collection of scanned documents from Northwestern.

[5] Allen Christelow ed., *Thus Ruled Emir Abbas: Selected Cases from the Records of Emir of Kano's Judicial Council* (East Lansing, MI: Michigan State University Press, 1994), pp. xviii-xix.

[6] https://drive.google.com/file/d/1NmR9h8o2cHTVaQ6lKMuySUP6k-eBkJCr/view?usp=share_link

in any period, not to speak of a breakdown into different categories amenable to statistical analysis.

In response to the afore-mentioned request, the Grand Kadi approved the setting up of a data collection team working under guidance and supervision of the researcher to design templates and collate and classify data in a manner useful to the subject of the thesis. (The team leaders have been duly named and acknowledged at the beginning, and the circumstances explained in chapter 1).

This work, after many iterations and revisions, was completed around the end of February 2023. In what follows we provide information on data sources, collation, classification, analytical methods, and challenges encountered as well as how this research impacted positively on the systems and processes in the Kano Sharia Court.

4.3.1 Data Sources, Collation and Classification

The principal sources of data from Sharia Courts were the Register (Cause Book) and the Record book. The Cause Book contains a summary of the contents of the record books, including:

1. Date of filing of case.
2. Name and address of claimant.
3. Type of claim.
4. Name(s) and address(es) of the defendant(s).
5. Proposed date of hearing.
6. Column for subsequent hearing/adjournment.
7. Case number (including case type, serial number, and year).
8. Verdict in summary form.

The Record Book contains the full details of the contents of the register. It commences with the date of filing and the hearing of each case when parties appear before the court. It contains details of proceedings of each case from the beginning to final determination. These records are written by the Kadi in long hand in the Hausa language, except when in the judgement a verse of the Qur'an, a hadith, or a specific ruling from a source of law is quoted verbatim in which case it is written in the original Arabic and then translated into Hausa. From the Record book one may read the detailed claim, admission, denial or counter claim, witnesses called, exhibits tendered, visitation reports and final verdict.

At the beginning of the exercise, the team obtained raw data from 90 active Sharia Courts in the state, and these turned out to be 62,032 records containing civil, criminal, and family law cases. It was therefore necessary to decide on a sampling process that would be representative of the state and provide an insight into the nature of the predominant adjudicated marital problems in the state.

The decision reached was to select nine courts of first instance (Lower Shari'a Courts and Upper Shari'a Courts). These courts were to be taken from the three senatorial zones (Kano Central, Kano South and Kano North). The courts in Kano central, (made up of 15 Local

Government Areas) are officially classified as urban while the other zones are considered rural. In each zone we picked one upper and two lower courts, to have as representative a sample as possible. Based on these criteria, the following courts were selected:

Table 1: Selected Courts for the Research

Court	Division	Senatorial District	Rural/Urban
Bichi	Lower	Kano North	Rural
Fagwalawa	Lower	Kano North	Rural
Gwarzo	Upper	Kano North	Rural
Karaye	Lower	Kano South	Rural
Kiru	Lower	Kano South	Rural
Tudun Wada	Upper	Kano South	Rural
Ungogo	Lower	Kano Central	Urban
Kwana Hudu	Lower	Kano Central	Urban
Goron Dutse	Upper	Kano Central	Urban

Source: Field Survey 2021-2023

The court registrars filled in the form and the Kadi certified the data and forwarded to the ICT department of the Sharia Court of Appeal for electronic entry. Microsoft Excel was initially used to record the data collected, but human error was heavily encountered as a result of orthography and lack of uniformity in how they were written up. The same subject matter was often written in different forms making it difficult to analyse.

This compelled the research to abandon excel and adopt "Kobo Collect tool" for data collection. This toolbox (www.kobotoolbox.org) is a free open-source tool for mobile data collection, available to all, which allows for collection of data in the field using mobile devices like mobile phones and tablets, as well as computers. Kobo supports the full data collection cycle-design, data collection and analysis.

Below is a list of data types used during the design and collection stage:

Table 2: List of Data Types for Data Collection

Data Type	Value	Description	Source
Case Type	Text	Category of Cases (Civil or Criminal)	From the court case register
Local Govt Area (LGA)	Text	LGA where the court is located	From the court case register
Court	Text	Name of court that did the case	From the court case register
Case Number	String	Unique identifier for a particular case	From the court case register
Date of Filing	Date	Date the case was	From the court case

		registered	register
Name of Parties	Text	Names of parties involved in the case	From the court case register
Gender	Text	Gender of the complainant	From the court case register
Date of Hearing	Date	Date of Hearing	From the court case register
Subject Matter	Text	Subject Matter	From the court case register
Reason	Text	Selected based on subject matter of the case	From the court case register
Court Decision	String	List of court decisions	From the court case register
Date of Court Decision	Date	Court Decision date	From the court case register
Name of Data Collector	Text	Data Collector	From the court case register
Specific Court Decision	String	Court Decision	From the court case register

Source: Field Survey 2021-2023

Classification and collation of data took a long time and was a complicated process principally due to the lack of experience and absence of a structured database. This resulted in a steep learning curve for the data team but, more severely, the court staff involved. The study focused on data from 2016-2020, although the later years had a dip in cases due to the Covid-19 pandemic. Also, the Upper Sharia Court, Goron Dutse, was unable to provide complete records but, considering the spread and large number of cases from the other eight courts, it was decided that the shortfall would not have any significant impact on the analysis. The record books of the courts were obtained, scanned, and saved on google drive.[7] Based on the cleaned-up registers, a total of 11,713 records were adopted as relevant to the research.

Classification posed a problem because of a lack of proper categorisation by subject matter. The approach taken was to use the broad categories in Islamic Family Law and give some order to the various cases. To begin with, the cases fell into two broad categories: the first is request for dissolution of the marriage (Hausa: *Neman rabuwar aure*) through judicial divorce (*Tatliq*) or discharge (*Khul'*); and the second, usually written as seeking assistance of the Law (Hausa: *Neman taimakon Shari'ah*), we have interpreted to be arbitration or reconciliation or settlement of dispute and classified using the legal term for these in Arabic which is *Sulh*. Where cases were pursued to conclusion, we refer to them as *Judicially Decided* (either

[7] All record books obtained from the nine courts can be viewed on https://drive.google.com/drive/folders/1ZJYFNp9k8PWlik9dKzPM8HnRGFRGFdR8?usp=share_link

accepted or rejected). Those which are struck out, dismissed, pending, or transferred, we have classified as *Not Decided*.[8]

For each of these, the complaints have been grouped under the relevant categories in Islamic Law. We have been guided broadly by the definitions found in Maliki texts.[9] We therefore grouped them under seven broad headings, namely:

1. *Ḍarar* (Harm)
2. *Nafaqah* (Maintenance)
3. *Shiqāq* (Dispute/conflict)
4. *'Aib* (Defect)
5. *Haḍāna* (Custody)
6. *Nasab* (Paternity)
7. *Haqq* (Enforcement of rights - Hausa: Hakki)
8. *Ijbār* (Forced Marriage) and
9. *Khul'* (Discharge*)*

The details of the elements falling into each category will be seen later in the relevant section of this chapter.

4.3.2 Challenges and Impact

The study faced several challenges but also led to several positive developments. The first challenge was that these records were not present in any central location or organized in a manner amenable to research. The tight schedule of court personnel and limited experience with data also meant that despite training, they were unable to perform tasks in an optimal manner. Due to the manual nature of court registers and records, we faced usual problems associated with non-digitized records. Cases are not always written in the same part of the notebook such that to read a case from beginning to end one must read different parts of the notebook or even different notebooks.[10] For content analysis, the work involved tracing these different parts, and scanning them, and also, as will be seen, producing English language summaries.[11] We also faced the problem of inconsistency in recording claims, without attention being paid to the Islamic legal terminology, which led to the challenges of classification discussed above. Lack of manpower in rural courts, as well as lack of proper safe keeping led to many missing, lost and destroyed records, and difficulties in tracking records and registers. We have already explained the role played by research assistants, without whom the gathering of data would have required more years. In chapter 8, we will discuss the posiotive impact of this research on the operations of the Sharia Court.

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[8] The inspiration for this classification is from the presentation of Ziba Mir-Hosseini, in her book, *Marriage on Trial: A Study of Islamic Family Law* (London: I.B. Tauris 1993). See for example pp. 51 and 52.

[9] In making these classifications we have referred to the following texts: A. A. Machika, *Guide to Advocates: An English Language Translation and Commentary on Tuhfatul Hukkam* (Kaduna: Zusalat Company, 2020); al Qutb al Dardir, *Al-Sharh al Kabir 'ala Mukhtasar al Khalil* (Beirut: al Maktaba al 'Asriyya, 2021); and Abubakr al Kashnāwī al Kusadawi, *Badrul Zaujain wa Nafhatul Haramain* (Dar al Fikr n.d)

[10] All record books collected for the nine courts were scanned and uploaded and can be viewed here: https://drive.google.com/drive/folders/1ZJYFNp9k8PWlik9dKzPM8HnRGFRGFdR8?usp=share_link

[11] These can be viewed here: https://drive.google.com/drive/folders/1gE4p5cRaTJ_Z2TIYBzX4x8t-NVvcoSq-?usp=share_link

We present below the key data, using frequency tables and histograms, with the objective of highlighting the major marital problems before the Sharia Courts in the five years under review to identify patterns across the years and locations across the state.

4.4 Descriptive Analysis of Court Data and Records[12]

Tables 1 and 2 below provide us with a total view of the data set gathered and analysed from the nine courts. In the five years under review, we obtained a total of 11,713 cases. Five courts accounted for 74% of the cases while the next four accounted for 26%. Goron Dutse Upper Shari'a Court submitted only 2% of the cases but this is more a reflection of failure to provide the data, and it is obvious that, being a court in Kano metropolis, it had many more cases than reported. Kwana Hudu Sharia court alone accounted for 21% of the cases. Apart from this, there were no major concentrations. The second highest number of cases is 16% from Tudun Wada compared to 9% for Kiru and Karaye which ranked sixth and seventh. The small range of 7% suggests that there are no major concentrations that would significantly distort findings. Similarly, the cases seem evenly distributed over the years with a noticeable rise in 2017 and 2018 followed by a return in 2019 and 2020 to numbers closer to the 2016 count.

Table 2 shows us that 36% of the cases received were judicially decided, leaving 64% that were struck out, dismissed, pending, or transferred. Of the judicially decided cases, the highest proportion accepted was in the *Khul'* category where 284 requests out of 288 (98.6%) were accepted by the courts. By comparison, 71.5% of decided *Nafaqah* claims and 65% of *Ḍarar* claims were accepted on decision. Of *Nafaqah* cases, 48% were either struck out or dismissed. An even higher percentage (about 72%) of claims for harm by women were either struck out, dismissed, or rejected by the judges. This goes to the issue of difficulty in proving harm in the marital home, which in some cases compels women to resort to *Khul*' to exit abusive marriages. Of judicially decided cases related to *Shiqāq*, 75% were accepted. This category generally involves claims of a lack of peace in marital home, eviction/expulsion from matrimonial home and seeking to know status of marriage (usually when a wife is sent to her parents/guardians for a long time without pronouncing divorce).

The data sets in Tables 1 and 2 therefore indicate that a significant percentage of the cases relating to family law are dismissed or struck out before conclusion, usually due to non-diligent prosecution or settlement outside the court. This is consistent with the findings of Ziba Mir-Hosseini in her study of family courts in Morocco. In the selected court, she found that among cases brought by women, only 42% were decided; 36% were either withdrawn or dismissed while 22% were abandoned. As for cases brought by men, only 18% were decided.[13]

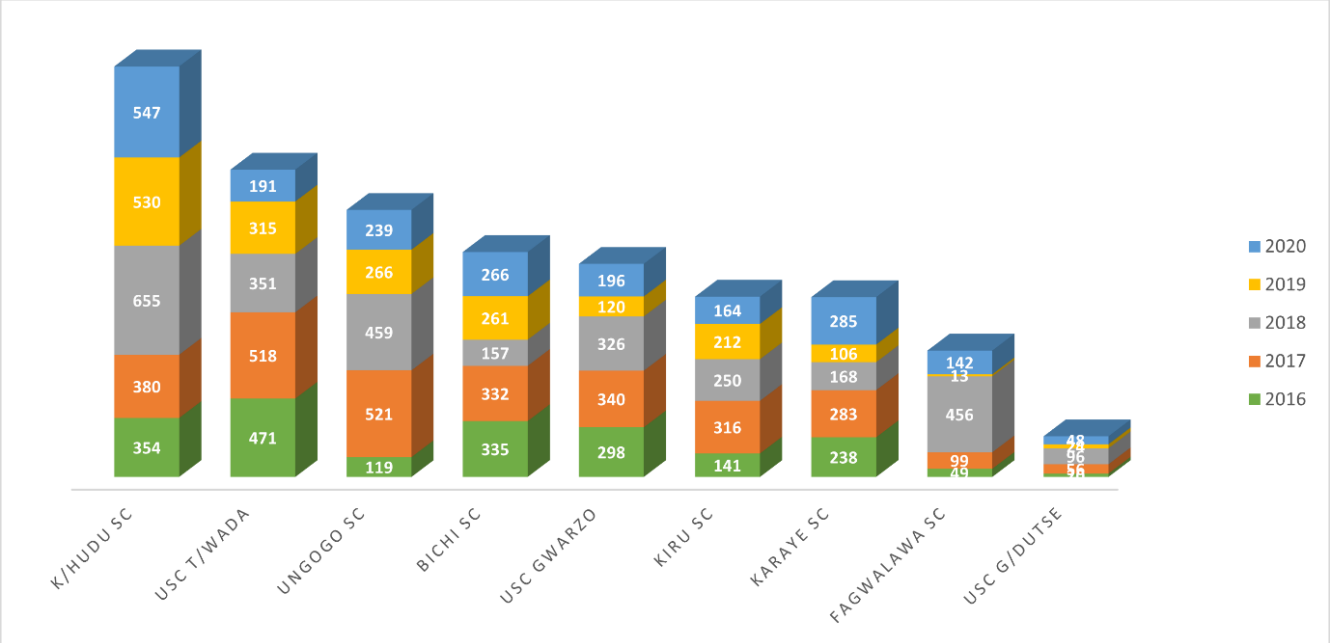
[12] In what follows we have limited ourselves to the consolidated data for the nine courts over five years. Data and graphs for each court have been produced and can be viewed here for more granular analysis: https://drive.google.com/drive/folders/1079iXDv9WL28jR-l7fhqsFvG6ABAgfV-?usp=share_link

[13] Mir-Hosseini, *Marriage on Trial*, supra, p. 51 and 52. The construction of Tables 1 and 2 in this thesis was partly inspired by the presentation here.

Table 3: Total Number of Cases by Court/Year

Courts	2016	2017	2018	2019	2020	Grand Total	% of Grand Total
K/HUDU SC	354	380	655	530	547	**2,466**	**21**
USC T/WADA	471	518	351	315	191	**1,846**	**16**
UNGOGO SC	119	521	459	266	239	**1,604**	**14**
BICHI SC	335	332	157	261	266	**1,351**	**12**
USC GWARZO	298	340	326	120	196	**1,280**	**11**
KIRU SC	141	316	250	212	164	**1,083**	**9**
KARAYE SC	238	283	168	106	285	**1,080**	**9**
FAGWALAWA SC	49	99	456	13	142	**759**	**6**
USC G/DUTSE	20	56	96	24	48	**244**	**2**
Total	**2,025**	**2,845**	**2,918**	**1,847**	**2,078**	**11,713**	**100**
% of Total	**17%**	**24%**	**25%**	**16%**	**18%**	**100%**	

Source: Field Survey 2021-2023

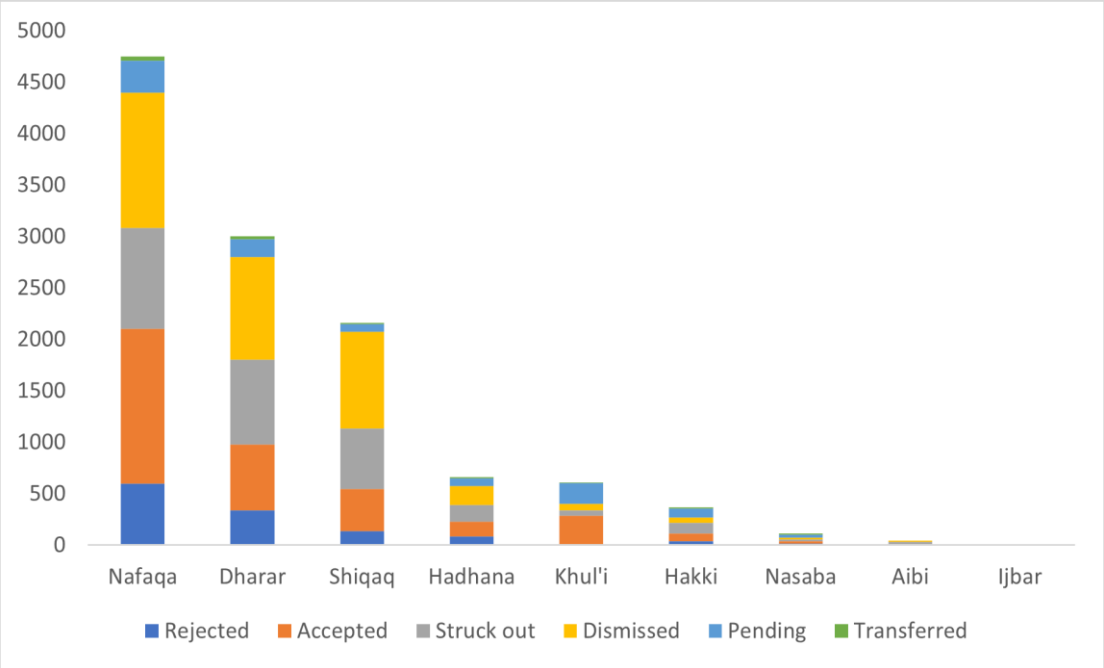


Source: Field Survey 2021-2023

Table 4: Summary of Cases by Decision (5 years)

	Judicially decided		Not decided				Total	
Demand	**Rejected**	**Accepted**	**Struck out**	**Dismissed**	**Pending**	**Transferred**	**No**	**%**
Maintenance	598	1,504	984	1,311	311	44	4,752	**41**
Harm	340	637	829	993	177	27	3,003	**26**
Discord	135	412	585	942	77	9	2,160	**18**
Custody	86	145	161	183	74	14	663	**6**
Ransom	4	284	50	62	202	2	604	**5**
Rights	37	79	100	55	87	11	369	**3**
Paternity	17	23	16	20	28	9	113	**1**
Defect	10	-	22	11	-	-	43	**0**
Forced marriage	-	1	2	1	2	-	6	**0**
Total	**1,227 (10%)**	**3,085 (26%)**	**2,749 (24%)**	**3,578 (31%)**	**958(8%)**	**116 (1%)**	**11,713**	**100%**
	36%		**64%**				**100%**	

Source: Field Survey 2021-2023



Source: Field Survey 2021-2023

Tables 3, 4 and 5 provide us with a summary of the cases by category.

Table 3 shows that in five years, there were only six cases of girls and young women going to court to complain about forced marriage. There are no cases of women challenging the right of husbands to be the decision-makers and in control of the home, and no case of any woman questioning the formula for inheritance, even if women have gone to court for enforcement of their rights under the *Shari'ah*. As we can see from Table 10, 80% of the cases in the rights enforcement category have to do with enforcement of inheritance rights.

Table 3 shows us that 41% of the cases brought before the courts have to do with *Nafaqah*, or maintenance. A further breakdown of these maintenance cases in Table 7, shows us that 68% of the claims have to do with feeding, either within the marriage (43%) or post-divorce (25%). A further 16% related to maintenance for breastfeeding. Claims for post-divorce feeding are for the children from the marriage since the husband is not responsible for feeding his divorced wife after the expiry of her waiting period. Of maintenance claims, 8% relate to husbands who have deserted their wives or travelled for long periods without providing for food. If we consider all these sub-categories as part of feeding in general, they represent 92% of the maintenance claims, leaving 8% represented by accommodation, clothing, and medical expense claims. The conclusion from the data is that, considering the very high levels of poverty in Northern Nigeria, the priority for women is survival, and being able to feed themselves and their children. On the question of *qiwāma* therefore, the focus is more on getting husbands to take up their responsibilities for maintenance than challenging the patriarchal family structure. Low levels of income and development give rise to priorities that differ from those of women with higher income and educational levels.

The second most frequent problem is Harm (*Ḍarar*), which accounted for 26% of the cases, over the period under review. Disaggregating this category (Table 6), we find that there were 1, 340 cases of wife-beating in the period, accounting for 45% of all claims for harm. Insulting parents, which is considered as harm in the Law, accounted for 15%. There were also claims relating to husbands slandering their wives by accusing them of infidelity or theft, as well as claims of denial of conjugal rights, and claims of discriminatory treatment among wives in polygamous homes. Each of these amounted to roughly 10% of *Ḍarar* claims.

Returning to Table 3, the next most frequent problem seems to be Discord (*Shiqāq*) which accounted for 18% of total claims. Of this category, 67% related to women complaining of a general lack of peace in the marital home, while 25% had to do with women expelled from the matrimonial home but not divorced. The remaining 8% were cases seeking confirmation of the status of their marriage, usually because of extended periods of staying with their parents and guardians while remaining legally married. As we noted in Table 2, above, 75% of *Shiqaq* cases that were concluded led to acceptance and dissolution of the marriage.

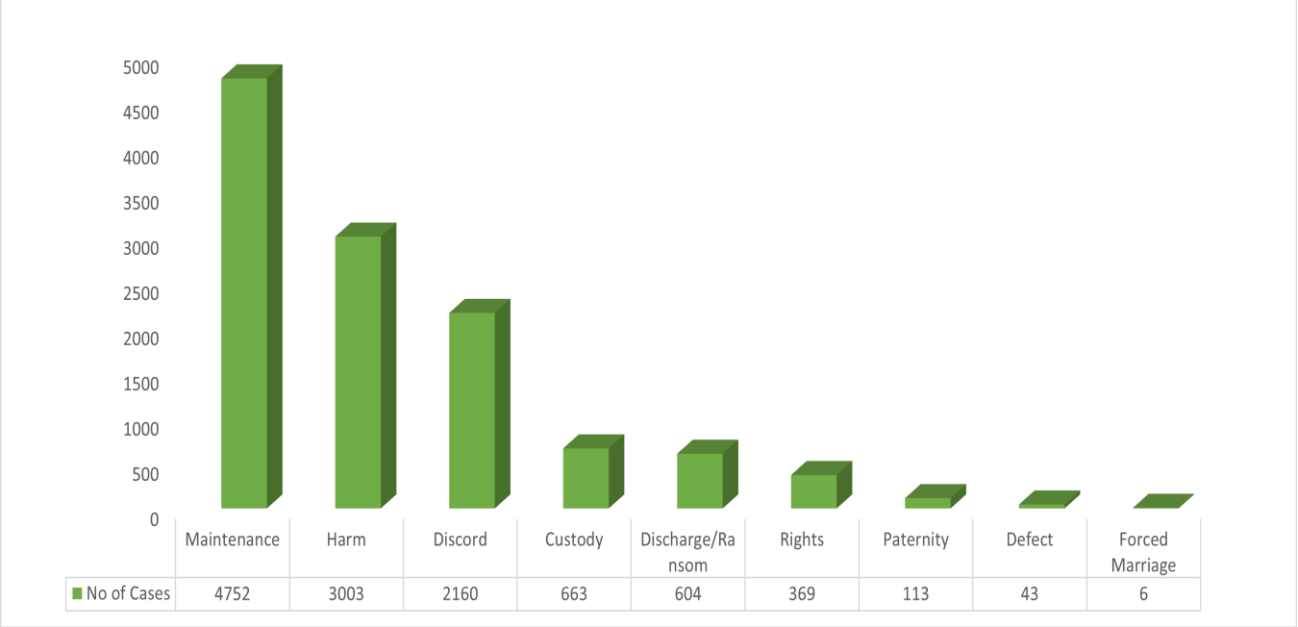
The three categories of Maintenance, Harm and Discord, therefore, accounted for 85% of the claims before the courts. Lack of feeding and domestic violence against women seem to be the top issues at stake, and any serious legal reform will need to address these. As mentioned earlier, the difficulty in proving harm, and thus exiting abusive marriages, is also a matter of concern that reforms ought to address.

Other claims were on custody; discharge/ransom; seeking rights enforcement; and defect, none of which accounted for more than 6% of total claims. We will therefore not spend much time on these, and proceed with content analysis of cases. We see in Tables 4 and 5 that in general women who suffer harm and discord tend to go to court for divorce, while for maintenance they go for assistance of the court.

Table 5: Summary of Cases by Category (5 years)

Demands	**No of Cases**	**% of Cases**
Maintenance	4,752	41
Harm	3,003	26
Discord	2,160	18
Custody	663	6
Discharge/Ransom	604	5
Rights	369	3
Paternity	113	1
Defect	43	0
Forced Marriage	6	0
	11,713	**100**

Source: Field Survey 2021-2023

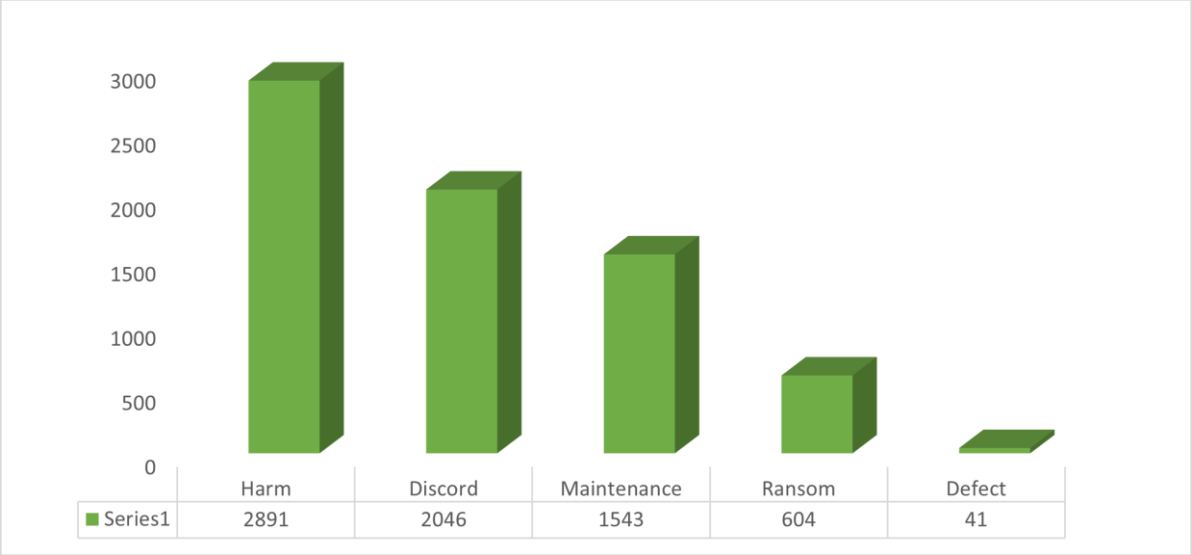


Source: Field Survey 2021-2023

Table 6: Tatliq Cases Classification (5 years)

***Tatliq* Cases Classification**	**No of Cases**	**% of Cases**
Harm	2,891	41
Discord	2,046	29
Maintenance	1,543	22
Ransom	604	8
Defect	41	0
	7,125	**100**

Source: Field Survey 2021-2023

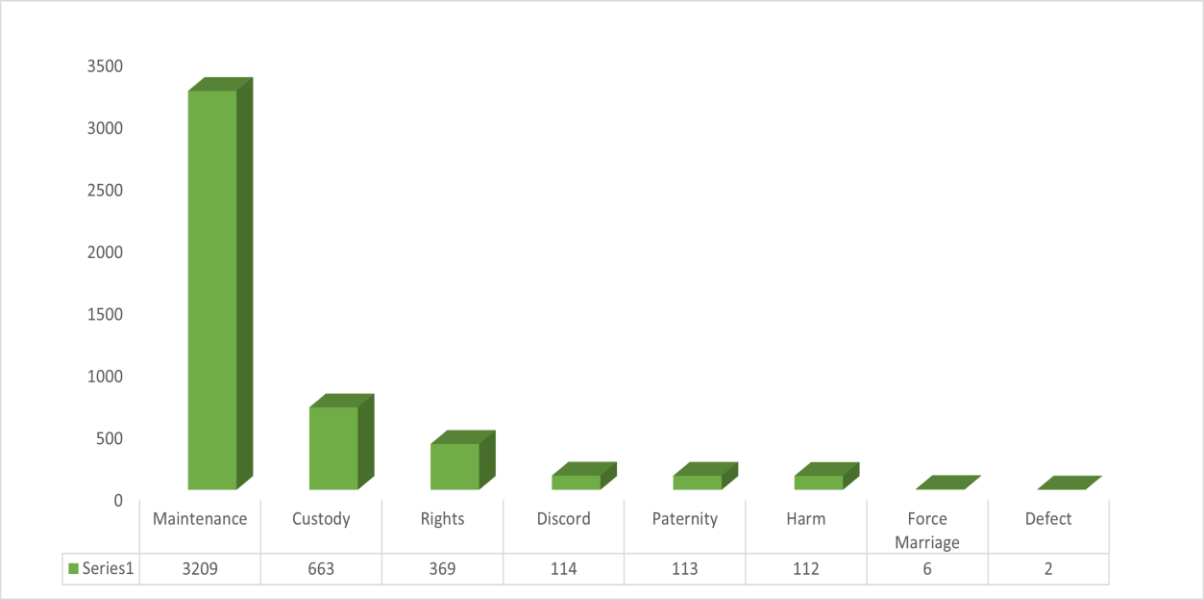


Source: Field Survey 2021-2023

Table 7: Sulh Cases Classification (5 years)

***Sulh* Cases Classification**	**No of Cases**	**% of Cases**
Maintenance	3,209	70
Custody	663	14.5
Rights	369	8
Discord	114	2.5
Paternity	113	2.5
Harm	112	2.5
Forced Marriage	6	0
Defect	2	0
	4,588	**100**

Source: Field Survey 2021-2023

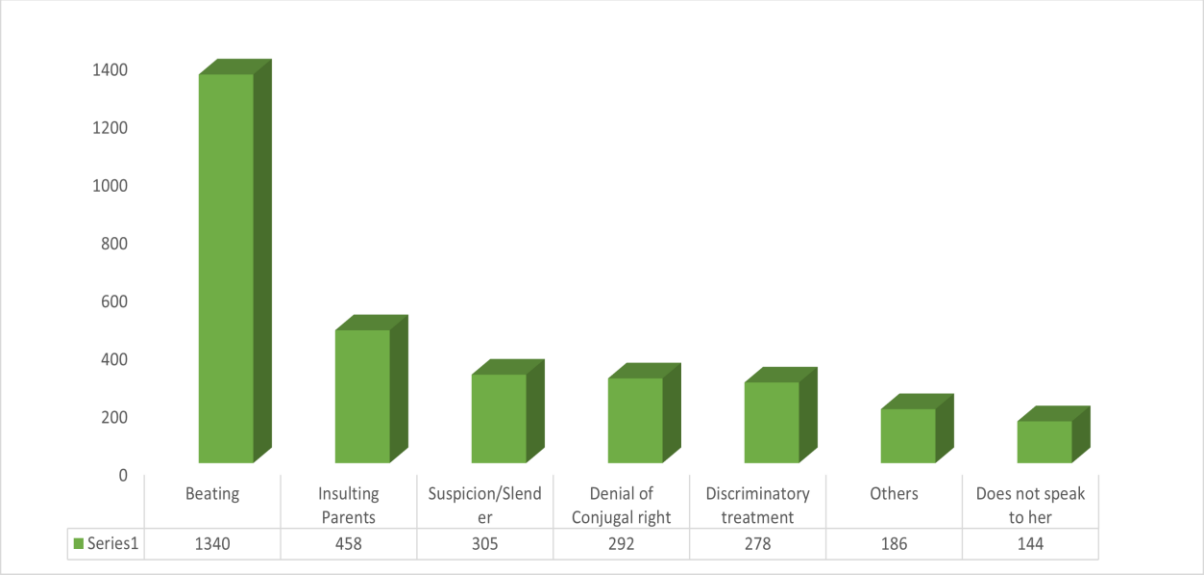


Source: Field Survey 2021-2023

Table 8: Ḍarar Cases by Type (5 years)

***Ḍarar* Cases Classification**	**No of Cases**	**% of Cases**
Beating	1,340	45
Insulting Parents	458	15
Suspicion/Slander	305	10
Denial of Conjugal right	292	10
Discriminatory treatment	278	9
Others	186	6
Does not speak to her	144	5
	3,003	**100**

Source: Field Survey 2021-2023

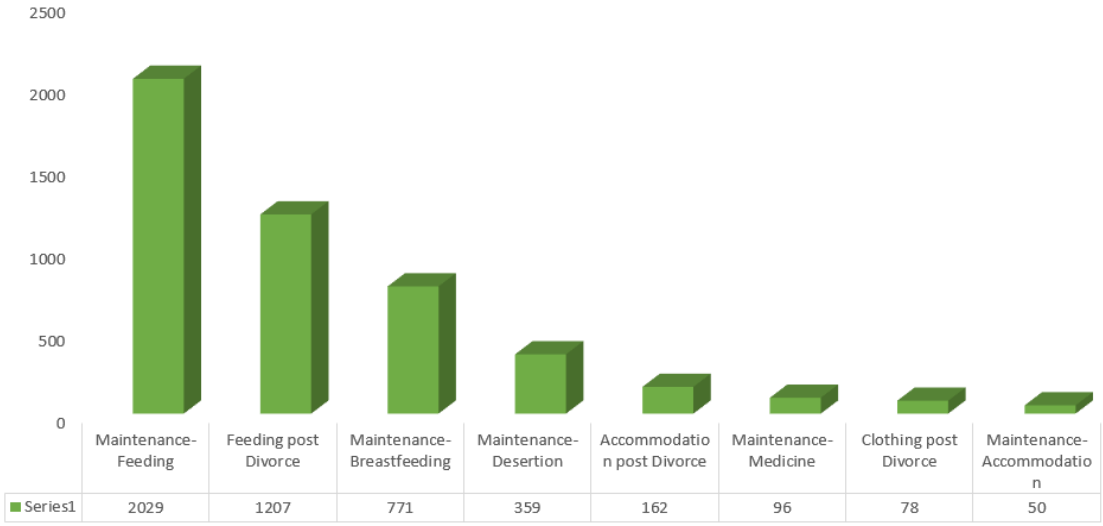


Source: Field Survey 2021-2023

Table 9: Nafaqah Cases by Type (5 years)

***Nafaqah* Cases Classification**	**No of Cases**	**% of Cases**
Maintenance-Feeding	2,029	43
Feeding post-Divorce	1,207	25
Maintenance-Breastfeeding	771	16
Maintenance-Desertion	359	8
Accommodation post-Divorce	162	3
Maintenance-Medicine	96	2
Clothing post-Divorce	78	2
Maintenance-Accommodation	50	1
Total	**4,752**	**100**

Source: Field Survey 2021-2023

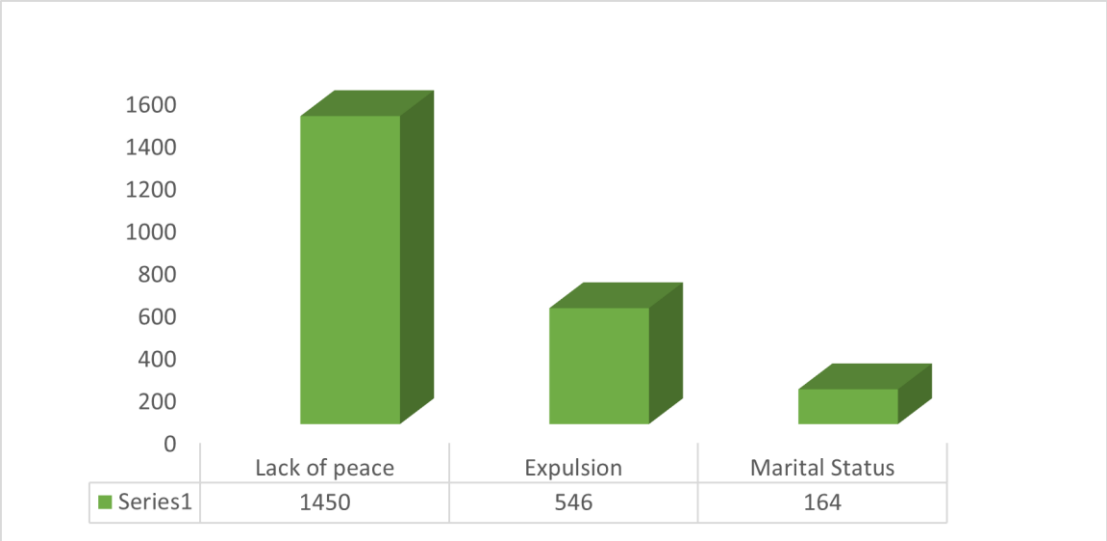


Source: Field Survey 2021-2023

Table 10: Shiqāq Cases by Type (5 years)

***Shiqāq* Cases Classification**	**No of Cases**	**% of Cases**
Lack of peace	1,450	67
Expulsion	546	25
Marital Status	164	8
	2,160	**100**

Source: Field Survey 2021-2023



Source: Field Survey 2021-2023

Table 11: Haḍānah Cases by Type (5 years)

***Haḍanah* Cases Classification**	**No of Cases**	**% of Cases**
Claim for Custody	618	93
Confirmation of Custody	45	7
	663	**100**

Source: Field Survey 2021-2023

Source: Field Survey 2021-2023

Table 12: Haqq Cases by Type (5 years)

***Haqq* Cases Classification**	**No of Cases**	**% of Cases**
Share of Estate	329	89
Access to Property	40	11
	369	100

Source: Field Survey 2021-2023

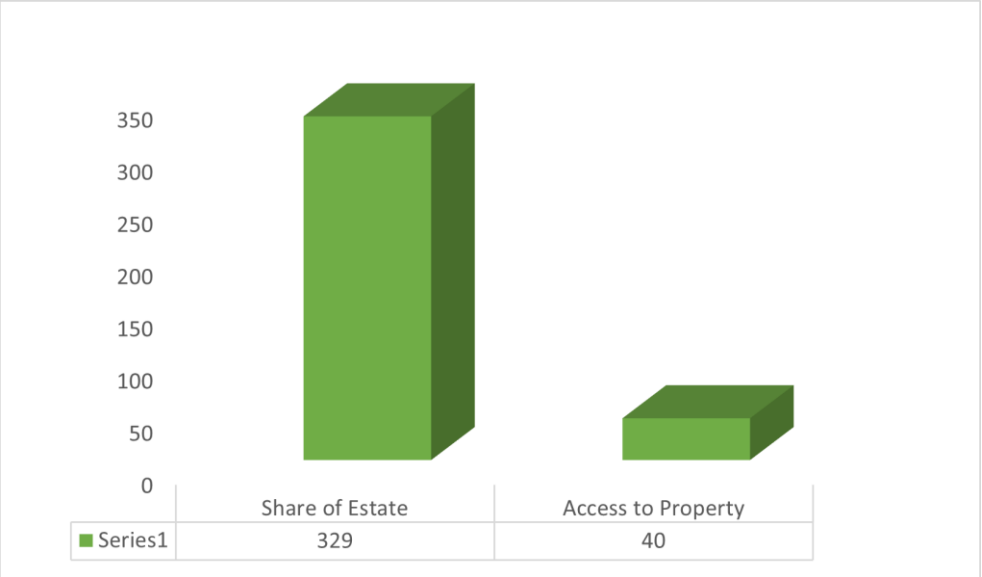
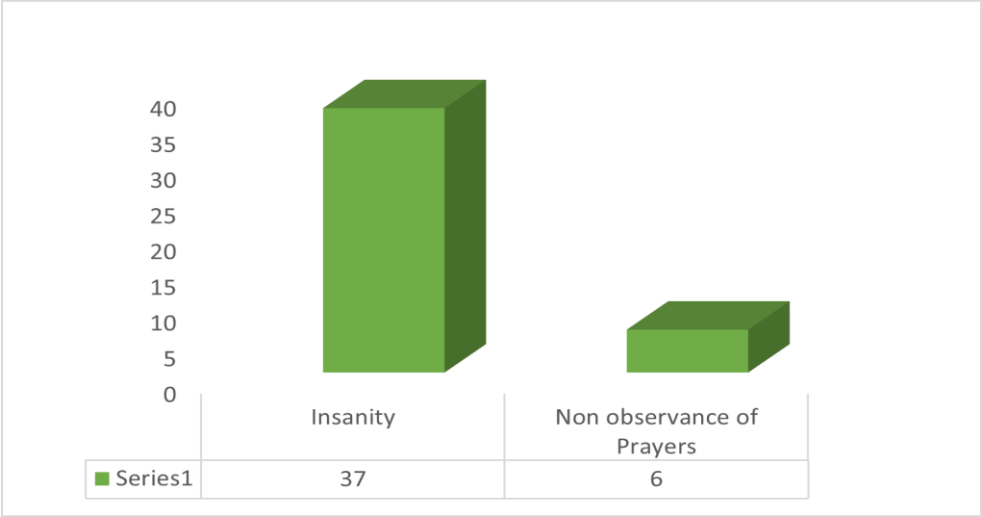


Table 13: 'Aib Cases by type (5 years)

***'Aib* Cases Classification**	**No of Cases**	**% of Cases**
Insanity	37	86
Non observance of Prayers	6	14
	43	**100**

Source: Field Survey 2021-2023



Source: Field Survey 2021-2023

Table 14: Ḍarar Cases by Year (5 years)

***Ḍarar* Cases**	**2016**	**2017**	**2018**	**2019**	**2020**	**Grand Total**	**% of Grand Total**
Beating	212	274	204	132	518	1,340	**45**
Insulting Parents	72	88	64	65	169	458	**15**
Suspicion/Slender	26	67	49	21	142	305	**10**
Denial of Conjugal rights	31	52	32	35	142	292	**10**
Discriminatory treatment	47	52	67	38	74	278	**9**
Others	69	7	55	35	20	186	**6**
Does not speak to her	18	38	32	12	44	144	**5**
Total	**475**	**578**	**503**	**338**	**1,109**	**3,003**	**100**

Source: Field Survey 2021-2023

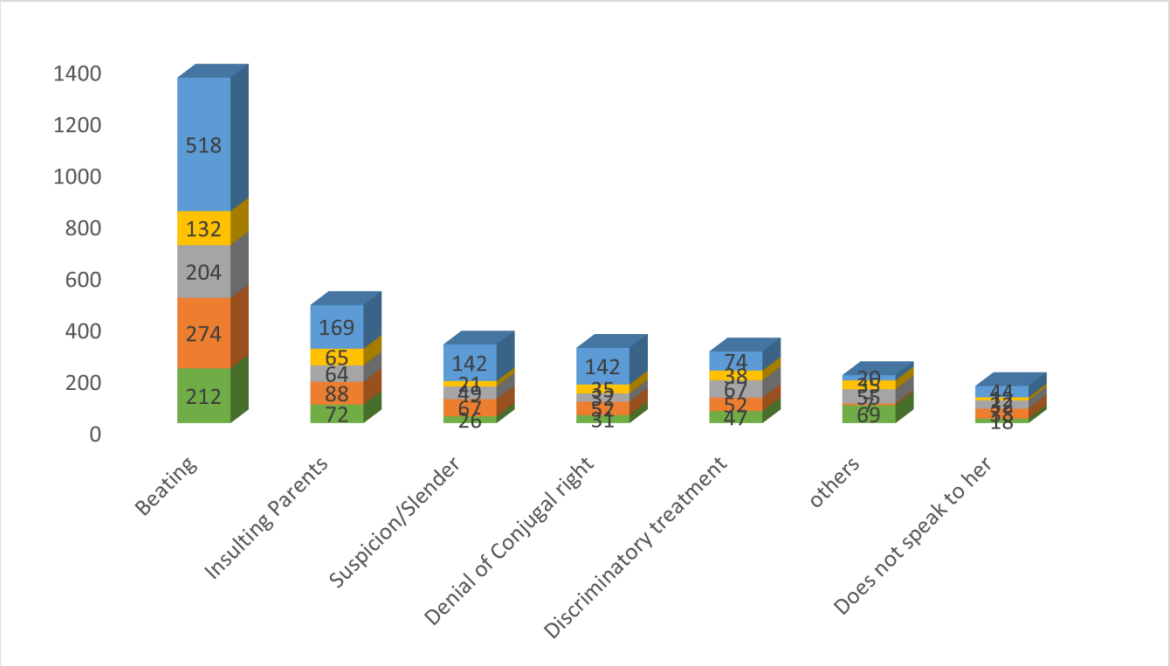


Table 15: Nafaqah Cases by Year (5 years)

***Nafaqah* Cases**	**2016**	**2017**	**2018**	**2019**	**2020**	**Grand Total**	**% of Grand Total**
Maintenance-Feeding	304	427	589	440	269	2,029	**43**
Feeding post-Divorce	282	324	291	202	108	1,207	**25**
Maintenance-Breastfeeding	106	229	254	90	92	771	**16**
Maintenance-Desertion	42	111	109	69	28	359	**8**
Accommodation post-Divorce	21	33	63	24	21	162	**3**
Maintenance-Medicine	34	29	25	6	2	96	**2**
Clothing post-Divorce	6	22	26	7	17	78	**2**
Maintenance-Accommodation	8	11	13	16	2	50	**1**
Total	**803**	**1,186**	**1,370**	**854**	**539**	**4,752**	**100**

Source: Field Survey 2021-2023

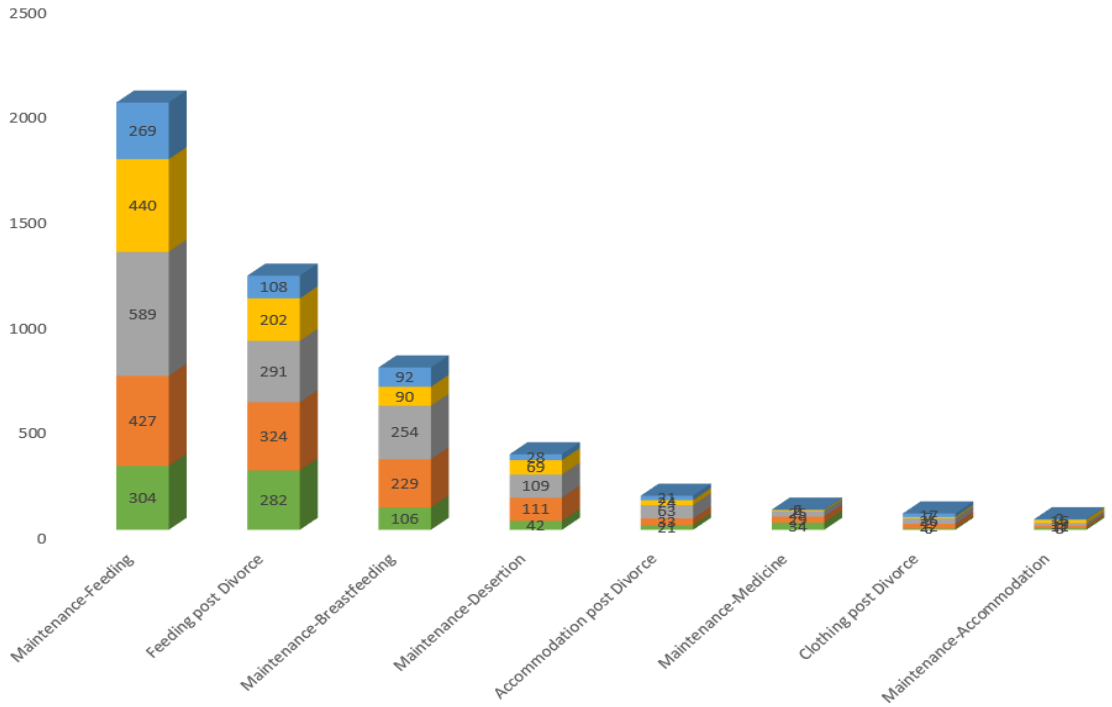
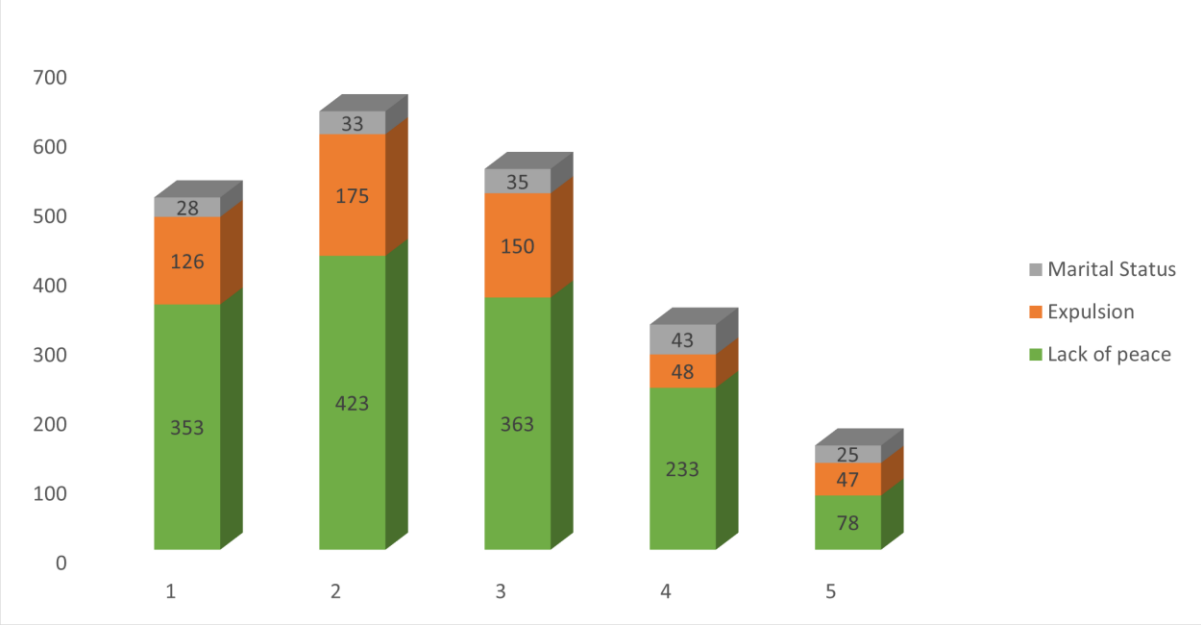


Table 16: Shiqaq Cases by Year (5 years)

***Shiqaq* cases**	**2016**	**2017**	**2018**	**2019**	**2020**	**Grand Total**	**% of Grand Total**
Lack of peace	353	423	363	233	78	1,450	**67**
Expulsion	126	175	150	48	47	546	**25**
Marital Status	28	33	35	43	25	164	**8**
Total	**507**	**631**	**548**	**324**	**150**	**2,160**	**100**

Source: Field Survey 2021-2023



4.5 Content Analysis of Sample Cases

This part contains analysis of cases before the three selected family law dispute settlement and adjudication institutions: the Kano Emirate Council, the Kano State *Hisbah* Corps, and the Kano State Sharia Courts. The data collection was carried out by a team of eleven Research Assistants (RAs), under direct supervision of the researcher. The process involved going through the record books (recorded in the Hausa Language) of the nine selected courts, identifying cases related to the themes of the thesis and producing a summary in the English language based on the following format. The summaries are available on record. [14]

i) Suit no.
ii) Name of parties
iii) Subject matter
iv) Summary of facts
v) Parties' appearance
vi) Verdict

The content analysis followed the data classification explained earlier and with the objective of drawing attention to the way cases are handled by the courts. Before going into the analysis of data, therefore, it is important to explain the approach taken by Sharia Court judges based on Mālikī law to the handling of principal complaints.

4.5.1 Sharia Court Procedure in Adjudicating Marital Issues

The principal guide relied on by the Sharia Courts for procedure is *Tuhfatul Hukkam*, written by Ibn Asim al Qarnādi al Andalūsi. Apart from many Arabic commentaries of this text, it has also been translated into both English[15] and Hausa[16] because of the strong reliance on it by the judges. In summarizing the approach of *Shari'a Court* judges in Kano to cases, I will rely on an excellent lecture note prepared by Kadi Atiku Muhammad Bello for the Judicial School, Sharia Court of Appeal, Kano State of Nigeria.[17]

4.5.1.1 Ḍarar (Harm or Cruelty)

When a woman appears before a judge to complain about beating, the judge first establishes the exact nature of complaint: the type of beating, whether by hand or a whip or some other item, what parts of the body, how painful or light, what kind of injuries inflicted. If the husband admits the allegation, harm is established, and the woman is entitled to divorce. According to Imam Mālik "there is nothing known to us as small harm or great harm"[18] which means that the woman's right to protection from harm is absolute and does not depend on serious violence. The overriding emphasis of the Mālikī school on the right of the husband to discipline his wife has always been restraint.

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[14] See: https://drive.google.com/drive/folders/1gE4p5cRaTJ_Z2TIYBzX4x8t-NVvcoSq-?usp=share_link

[15] Machika, supra

[16] 'Uthman Muhammad Daura, *Jagorar Masu Hukunci: Tarjamar Tuhfatul Hukkam* (Zaria: Hudahuda Publishing Company 1996)

[17] The full lecture note of Kadi A. M. Bello in Hausa can be read here: https://docs.google.com/document/d/1L1boL570EiJa3ox7qYzh71cIym8ZINGF/edit?usp=share_link&ouid=103574690661711321715&rtpof=true&sd=true

[18] Quoted by A. M. Bello, ibid, p. 2

The difficulty arises when the husband denies the allegation. The burden of proof falls on the wife, and she needs to produce eyewitnesses to the act of beating, or several witnesses who testify that it is well known that the husband beats her.[19] It is usually very difficult for a woman to prove harm done to her inside the home without witnesses and in such a case the husband is given the right to return her to his home. However, if she insists on not returning, she has the option of paying ransom (*Khul'/Iftada'*) in return for her freedom from the marriage.[20] Many women who are victims of harm have been compelled to pay their husbands ransom to free themselves from abusive marriages where they are unable to prove *Ḍarar*. In general, the judges leave the door of *khul'* wide open as a way out of abusive marriages where standards of proof are not met. Unfortunately, this path imposes a financial burden on the woman and makes it difficult for the wife to extract compensation from the abusive husband since, technically, the marriage is being ended at her instance. Out of 288 judicially decided *Khul'* cases in the period under review, only four were rejected.

Where the woman chooses to return and there is a repeat complaint in the court or another court, the judge sets up two arbitrators (*hakamain)* in line with the dictates of the Qur'an.[21] These should ideally come from each of the families and should be learned in *Shari'ah* and respected. If the conditions are not met, the judge can appoint two learned and respected individuals in the community to sit with the couple and arbitrate. The decision of the arbitrators is final, so they could decide that the marriage be dissolved and this would be applied by the court.[22]

An exception to the burden of proof is made where there is evidence of bodily harm or injury such as marks or bumps or scars and the woman claims the husband is responsible. For this evidence to be set aside, the husband will have to take an oath on the Qur'an to the effect that he did not beat her, he did not cause the harm and injury, and he has no knowledge of how those injuries came about. If he refuses to take the oath her evidence is accepted, and she obtains a divorce from the court.[23]

4.5.1.2 *Nafaqah* (Maintenance)

It is an obligation on the man to provide accommodation, feeding, clothing, medical needs, and all essentials of life for his wife or wives, and for his needy parents, and his sons until puberty, and his daughters until they are married and move to their marital homes.[24]

In dealing with *Nafaqah* cases and deciding how much a husband/father is to pay for maintenance of children or pregnant divorcees, the judge exercises judgement, and the amounts vary from case to case. The judge considers the husband's wealth and earnings, his other responsibilities such as dependent parents and other wives and children.[25] The law is

[19] This is based on the *Tuhfatul Hukkam* (from now on referred to as the *Tuhfa*). References will be to the English translation by Machika. This point is on p. 198
[20] Ibid, p. 2
[21] Qur'an 4:35
[22] A. M. Bello, supra, pp. 2-3
[23] Ibid, pp. 3-4
[24] Machika, *supra*, pp. 258-259
[25] A. M.Bello, supra, p. 9

that the amount prescribed takes into consideration the type of necessary food, its price, the number of mouths to feed, and what is customary at the time and place.[26] What a rich man pays differs from a poor man. Also amounts vary between say urban and rural areas and even with the status and needs of the woman.

When a woman claims that her husband has failed to provide her with maintenance, like feeding or clothing or accommodation, and this is due to lack of capacity to do so, the author of the *Tuhfah* recommends a grace period of two months to be given, after which judicial divorce (*tatliq*) takes place.[27] However, in practice, the judges are not bound by this period and may give a shorter period to go and look for employment or money to feed her. Failing this, the judge should then direct him to divorce her, in which case this is considered a revocable divorce. If he finds the means to maintain her during her waiting period, he may revive the marriage through recall (*raj'ah*).[28] There are also clear guidelines on dealing with maintenance of a divorcee during pregnancy, and during breastfeeding, and after weaning.[29] In the latter part of this work, we will examine the question of whether this position of the Mālikī School of law is optimal for the institution of marriage or if, rather, there are other views outside the School which ought to be adopted, to meet the needs of the wife for maintenance without a hasty annulment of the marriage.

The current practice in Kano Sharia Courts is to impose on the defendant an amount to be paid monthly or weekly, or even food items to be delivered regularly. If the husband fails to meet these obligations and he is employed, the judge has the power to compel the employer to deduct amount from his salary and pay the wife her dues.[30] If self-employed or running a business, the judge can have bailiffs confiscate his assets until he pays in a short period and if not, dispose of those assets to give the wife her dues. In the extreme, the court may remand him in custody for a short period until he pays.[31] Where the husband travels to a far or unknown place for a long time *(ghaiba*) and does not leave maintenance for the wife, and this is established, a period of one month is given, and on expiry if she so desires divorce is granted, but a revocable one which allows the husband to keep her (unless there had been two previous divorces, making this a third and final one) if he returns during the waiting period.[32]

4.5.1.3 *Khul'* (Discharge/Ransom)

This is something that comes up a lot in the courts, being a feature of family law in the Maliki school which is now universally accepted. It is permissible for a woman to pay ransom and free herself from a marriage if she, and the husband, are mature and of sound mind. [33] Whereas men are legally allowed to divorce their wives without judicial intervention, women

[26] Machika, supra, p. 267
[27] Ibid, p. 268
[28] A. M. Bello, supra, p. 4
[29] The discussion is in the chapter on Maintenance in the *Tuhfah*, see Machika, supra, pp. 258-279
[30] This is under Order 13 of the Kano State Shari'ah Court Civil Procedure Rules, 2021
[31] A. M. Bello, supra, p. 10
[32] Ibid, p. 6
[33] See Kashnāwī, *Badrul Zaujain*, supra, p. 157

are compelled to pay ransom for their freedom even when they suffer harm or lack of maintenance if they are unable to establish their claims.

Technically, *Khul*' happens when a woman receives discharge from her marriage and she in return pays back the dowry, or gives up maintenance during pregnancy, or maintenance during waiting period or child maintenance. Usually, the woman pays back the dowry exactly, and this is the form most rulings on *Khul'* take. In some cases, however, there is a negotiation between the husband and wife if the husband refuses to accept dowry alone. The wife can offer a larger amount as ransom, and this is called *fidya or iftada'*. The husband may also accept a smaller amount, and this is called *Sulh* (or truce). Finally, the wife may obtain discharge by writing off an established and legitimate claim against the husband, or return every gift given to her prior to consummation of marriage and this is called *Mubāra'a*.[34] We have, following the practice of the courts, referred to all these types of discharge as *Khul'*, and generally translated this as "discharge" or "ransom".

A woman who seeks discharge from a marriage shortly after contracting it is often asked to return the dowry and at least those marital gifts that can be returned, such as jewellery, perfumes, or clothing not used. We have not been able to locate the specific jurisprudential grounds for this, but it does have support in Maliki *fiqh.* In the *Muwatta'* of Imam Malik (the rendition of Yahya) he reports that the Caliph 'Umar ibn Abd al-'Azīz wrote to one of his officials affirming the obligatory right of a woman to any gifts her father may have prescribed as part of marriage conditions. Based on this, Imam Malik ruled that where a man divorced a woman after marrying her but before consummating the marriage, she is to return half of the marital gifts along with half of the *Mahr*.[35] In his commentary on this, the jurist al-Bājī justified Malik's position by explaining that "the gifts were part of the totality of transfers by which the marriage was concluded, like the *Sadaq/Mahr*."[36]

Where a husband refuses to be reasonable in accepting an amount offered as ransom by the wife, which the judge approves, the judge imposes the *Khul'* on him and rules to discharge the woman based on the approved terms.[37]

Another area of dispute is on discharge of the husband from maintenance obligations for his children, after weaning (say for five years, or until puberty, or until the child can maintain himself/herself). The standard Mālikī position is that a woman may offer the husband the option of his relinquishing his responsibility for maintenance of his children, but jurists differ on validity of this condition beyond the age of two (weaning period). The position of Ibn al-Qāsim is that once the child attains the age of two the father is obliged to take up maintenance. In this case the *khul*' will be valid but the consideration is invalidated beyond that age. The practice in many jurisdictions, however, is based on a different opinion that

[34] Machika, supra, p. 239; Daura, U. M., *Jagorar Masu Hukunci*, (Zaria, Hudahuda publishing company, 1996) p. 216.

[35] Imam Mālik, al-*Muwatta'* (Beirut: Dār al Turāth al 'Ārabī, 1985) 2/527

[36] Al-Bājī, al Muntaqā, *Sharh al-Muwatta'* (Cairo: Matba' al Sa'āda, 1st edition, 1332 A.H.), 3/283, (Hadith no 11 in Kitab al Nikāh)

[37] I am grateful to Kadi Atiku Bello, of the Kano State Shari'ah Court of Appeal for these fine insights into *Khul'* cases. Various telephone conversations in April, 2023

makes the consideration valid as agreed. This is the view of al-Maghīra, Sahnūn, Ashhab and Ibn Mājishūn.[38] According to a serving Kadi in Kano, some Kadis only approve this condition if the relief is for a limited period, and do not accept a situation where the entire burden is placed on the wife.

4.5.1.4 Defect (*'Aib*)

This traditionally refers to things like insanity or leprosy or ailments in private parts or terminal diseases. All these are reasons for terminating marriage especially if the partner was not aware of these defects before contracting the marriage. For our analysis, we have added claims relating to what is traditionally called sinfulness *(fusuq*) to this category. These include claims that the husband does not pray regularly, or does not fast, or drinks alcohol etc. In general, the judges try to get the husband to change his behaviour where possible, but respect the right of a woman to exit marriage where the husband is dissolute, insane, or afflicted by a dangerous ailment of which she was not aware before the marriage.

4.6 Review of Family Law Cases before the Courts by Subject Matter

We now present the content analysis from the record books. For reasons of space only some examples are covered in the body of the thesis, selected from a far more substantial body of summaries extracted and translated during the fieldwork. All the cases extracted are, however, available for further study. [39] In addition, the entire record books of the nine selected courts with the original transcripts in Hausa are accessible. [40] Below is a summary of key findings.

4.6.1 *Ḍarar* (Harm)

Claims filed before the nine courts under this category cover cases of wife-beating, denial of conjugal rights, insulting wife's parents, discriminatory treatment amongst co-wives and suspicion/allegation of infidelity and theft. These are discussed below.

4.6.1.1 Wife-beating

Beating constitutes a significant issue within the *Ḍarar* category. Some Muslim husbands believe in the legitimacy of beating their wives to "discipline" them in the event of intransigence (*nushūz*), as part of the husband's rights under the *qiwāma* postulate. Apart from the question of disagreements among scholars on this point, this "beating" hardly ever conforms to the guidelines issued in Maliki law – of being the final stage in a sequence, of being the least preferred option, or being resorted to only when necessary, and of not causing any form of bodily harm.[41] The Maliki jurist, Abū al-Walid al- Bājī, holds the view that where a

[38] For this discussion I have reliedthe Hausa translation and commentary on the *Tuhfah* by Daura, U. M., *Jagorar Masu Hukunci*, supra, pp 216-217

[39] For all the cases referred to here and many others, please see https://drive.google.com/drive/folders/1gE4p5cRaTJ_Z2TIYBzX4x8t-NVvcoSq-?usp=share_link

[40] All the court record books are available on https://drive.google.com/drive/folders/1ZJYFNp9k8PWlik9dKzPM8HnRGFRGFdR8?usp=share_link

[41] These are all discussed comprehensively in Ayesha Chaudhry, *Domestic Violence and the Islamic Tradition*, (Oxford: Oxford University Press 2013), pp. 109 ff

husband causes bodily harm to the wife, she is entitled to retaliation.[42] In a number of cases, judges seem to have adopted this position by referring husbands to the Police for prosecution.

In 2016, about 30 [43] cases of wife-beating were filed before the **Kiru Sharia Court.** However, most cases were struck out, based on Order 9, KSSCR 2000 which permits the court to close or strike out a case for want of diligent prosecution, especially in the absence of both the plaintiff and the defendant.[44]

In 2017, issues of *Ḍarar* featured in cases filed by women seeking divorce on the grounds of beating before **Upper Sharia Court Goron Dutse**.[45] In a particular case, the plaintiff reconciled with the defendant and agreed to return to his house despite the injury he inflicted on the plaintiff in the course of beating her.[46] This is despite the fact that once she had proven her case she had an absolute ground for divorce.[47] In two cases, the defendants admitted to beating the plaintiffs but instantly pronounced divorce.[48] The court accepted the divorce and ordered a dissolution of the marriage. Seven cases had no continuation pages.[49]

In 2018, of the cases before **Upper Sharia Court Gwarzo,** 40 involved wife-beating. Out of this number, three plaintiffs got a divorce[50], which would suggest a small number of cases ending in dissolution of the marriage. Two of the three cases appear to be of interest. While one defendant admitted beating his wife, and the woman got divorced,[51] the court had to refer two other matters to the police because of the physical injury in one case [52], and the nature of the beating in the other because a piece of wood was used to hit the plaintiff.[53]

In 2019 **Kwana Hudu Sharia Court** heard 39 cases on wife-beating.[54] A case of a perpetual drunkard with the habit of beating his wife on return from his drinking spree was reported.[55] The defendant admitted to beating the plaintiff, and the plaintiff got a divorce. **Fagwalawa**

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[42] Ibid, p. 115

[43]CV/11/16; CV/17/16; CV/18/16; CV/23/16; CV/36/16; CV/45/16; CV/71/16; CV/74/16; CV/80/16; CV/84/16; CV/140/16; CV/145/16; CV/148/16; CV/177/16; CV/193/ CV/208/16; CV/211/16; CV/212/16; CV/215/16; CV/219/16; CV/225/16; CV/227/16; CV/230/16; CV/236/16; CV/244/16; CV/252/16; CV/257/16; CV/264/16

[44]CV18/16; CV/42/16; CV/45/16; CV/60/16; CV/71/16; CV/73/16; CV/80/16; CV/84/16; CV/95/16; CV/100/16; CV/120/16; CV/121/16; CV/126/16; CV/129/16; CV/133/16; CV/148/16; CV/167/16; CV/177/16; CV/183/16; CV/184/16; CV/188/16; CV/189/16; CV/208/16; CV/215/16; CV/219/16; CV/224/16; CV/225/16; CV/227/16; CV/230/16; CV/237/16; CV/244/16; CV/250/16; CV/257/16; CV/264/16

[45] CV/113/17; CV/192/17; CV/215/17; CV/228/17; CV/244/17; CV/249/17; CV/283/17; CV/323/17; CV/371/17

[46] CV/216/17; CV/246/17; CV/260/17; CV/450/17; CV/490/17

[47] Machika, supra, pp. 198-199

[48] CV/244/17; CV/249/17

[49] CV/113/17; CV/274/17; CV/283/17; CV/315/17; CV/317/17; CV/323/17

[50] CV/306/18; CV/320/18; CV/555/18

[51] CV/320/18

[52] CV/341/18

[53] CV/318/18

[54]CV/21/19; CV/42/19; CV/58/19; CV/69/19; CV/92/19; CV/135/19; CV/145/19; CV/162/19; CV/172/19; CV/241/19; CV/267/19; CV/326/19; CV/341/19; CV/378/19; CV/381/19; CV/387/19; CV/389/19; CV/409/19; CV/417/19; CV/432/19; CV/424/19; CV/434/19; CV/443/19; CV/465/19; CV/466/19; CV/483/19; CV/487/19; CV/494/19; CV/503/19; CV/511/19; CV/530/19; CV/608/19; CV/624/19; CV/627/19; CV/650/19; CV/666/19; CV/668/19; CV/679/19; CV/681/19

[55] CV/92/19

Sharia Court recorded 7 cases of wife-beating in 2020.[56] Notwithstanding that a particular case involves the beating of a pregnant plaintiff, all the cases were struck out under Order 9, Rule 2 of the KSSCR, 2000,[57] for want of diligent prosecution.

From the examples above, wife beating is a common and widespread problem in Kano, even though the courts view it seriously and, where established, take decisive action. The problem seems to be the tendency not to pursue the cases to their logical conclusion, which may be because reconciliation has been achieved, or the husbands divorce the wives during the trial or some other reason like family pressure from parents, or fear of some more serious consequences like destitution. A major concern, as mentioned earlier, is that many victims of domestic violence are forced to remain in abusive marriages so long as they are unable to bring evidence of bodily harm.

4.6.1.2 Denial of Conjugal Rights

Women have approached the nine selected courts seeking divorce because their husbands denied them their conjugal rights for more than five months and, in some cases, several years. In **Kwana Hudu Sharia Court**, for example, these types of cases abound.[58] Two out of the 2016 cases were struck out under Order 9. The other case ended through *Khul'*. There were similar cases before **the Upper Sharia Court Gwarzo** on the subject.[59] The two cases in 2016 were struck out under Order 9. The single 2017 case ended with *Khul'*. With respect to the 2018 cases, one ended through *Khul*' while the other had no continuation. As for the 2019 cases there was Khul' in one. The same holds for **Kiru Sharia Court.**[60] While a plaintiff complained before the **Kiru Sharia Court** about being starved of her conjugal rights for a year,[61] another complaint was that he had moved entirely to her co-wife's rooms and abandoned her.[62] There were cases on the same subject before **Karaye Sharia Court.**[63] A case involved a woman who sought and obtained a divorce because she was starved of sexual rights for two years.[64] Again, in many of these cases it is clear that wives are compelled to go down the route of paying ransom given the difficulty in providing evidence of this charge.

4.6.1.3 Discriminatory Treatment among Co-wives

Polygyny is a pervasive cultural practice in Northern Nigeria, and this is one area where Sub-Saharan Africa differs from the rest of the Muslim world. We will see in Chapter Six that, in Morocco for example, polygyny in the present age is a very rare occurrence and polygamous

[56] CV/72/20; CV/87/20; CV/99/20; CV/111/20; CV/126/20; CV/133/20; CV/159/20
[57] Order 9, Rule 2, Kano State Sharia Court Rules, 2000.
[58] CV/136/16, CV/474/16 and CV/699/17
[59] CV/107/16; CV/367/16; CV/288/17; CV/316/18; CV/481/18 and CV/43/19; CV/53/19
[60] CV/31/16; CV/72/16; CV/143/16; CV/154/16
[61] CV/72/16
[62] CV/143/16
[63] CV/830/16; CV/848/16; CV/205/17; CV/206/17; CV/458/17; CV/494/17; CV/572/17; CV598/17; CV/654/17; CV/3/18; CV/80/18; CV/205/18; CV/255/18; CV/300/18; CV/358/18; CV/365/18; CV/391/19; CV/424/19; CV/449/19; CV/525/19; CV/532/19; CV/567/19; cv8/20; cv/71/20; cv/128/20
[64] CV/830/16

families are a very small percentage of the total.[65] In general, complaints in Kano state are not on polygyny per se, but the injustice and failure to comply with the stipulations of the *Shari'ah*.

In 2016, fourteen claims bordering on discriminatory treatment between co-wives were filed by women before the **Kiru Sharia Court**.[66] Divorce was pronounced in court in 4 cases[67] and in a case, the parties reported to have settled. The remaining 9 cases were struck out based on Order 9, Rule 2, KSSCR 2000. What was constant was the issue of the husband's ability to maintain more than one wife, which provides strong support for the need to establish financial capacity before permitting polygyny. One disturbing case concerns the gang-beating of the plaintiff by her husband and her co-wives. Unfortunately, the plaintiff could not lead any evidence; hence her case was struck out by the court.[68] These instances, however, give some indication of the high level of discord and abuse in many polygamous homes.

In 2018, seven cases concerning discriminatory treatment between co-wives were filed before the **Upper Sharia Court Gwarzo**. Four were struck out for want of diligent prosecution based on Order 9, Rule 2, KSSCR, 2000.[69] There was divorce in 2 cases[70] and *Khul'* in the other case.[71]

In 2019, eight cases concerning discriminatory treatment between co-wives were filed before **Fagwalawa Sharia Court**. A case ended with a divorce[72] while the 7 remaining cases were struck out for want of diligent prosecution based on Order 9, Rule 2, KSSCR, 2000.[73] In the same year, 4 cases on claims of discriminatory treatment between co-wives were filed before the **Kwana Hudu Sharia Court**.[74] All the cases were, however, struck out under Order 9, Rule 2, KSSCR, 2000, for want of diligent prosecution.

In 2020, nine cases of discrimination amongst co-wives in polygamous marriages were filed before the **Karaye Sharia Court**.[75] The parties in a case reconciled, and their case closed based on Order 2 Rule 5, KSSCR, 2000.[76] Another case ended with outright divorce.[77] A case was, however, dismissed for not being properly filed.[78] A plaintiff paid ransom to get a divorce through *Khul'*.[79] The remaining 6 cases were struck out under Order 9, Rule 2, KSSCR, 2000.

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[65] Anderson, supra, notes that while polygamy is "common in…parts of Africa…it is extremely rare in…India, Pakistan, Tunisia and Egypt", p. 228

[66] CV/57/16; CV/72/16; CV/108/16; CV/115/16; CV/135/16; CV/143/16;CV/157/16; CV/160/16; CV/161/16; CV/162/16; CV/181/16; CV/182/16; CV/197/16; CV/211/16

[67] CV/57/16; CV/143/16; CV/181/16; CV/182/16

[68] CV/211/16

[69]CV/265/18; CV/337/18; CV/453/18; CV/509/18

[70] CV/178/18; CV/229/18

[71] CV/230/18

[72] CV/603/19

[73] CV/593/19; CV/595/19; CV/596/19; CV/610/19; CV/611/19; CV/653/19; CV/733/19; CV/

[74] CV/106/19;CV/421/19; CV/532/19; CV/533/19

[75] CV/339/19; CV/373/19; CV/432/19; CV/454/19; CV/458/18; CV/463/19; CV/472/19; CV/476/19; CV/488/18.

[76] CV/120/20

[77] CV/176/20

[78] CV/60/20

[79] CV/128/20

4.6.1.4 Accusation of Infidelity and Theft

Women had filed cases before the nine selected courts seeking divorce because they were accused by their husbands of infidelity and at times, theft of belongings. Five cases were filed in 2016 before the **Kiru Sharia Court** (a rural court). Parties reconciled in one case, and another was struck out under Order 9, KSSCR, 2000.[80] Three out of the cases ended with outright divorce.[81]

Three cases each were filed in 2016 and 2019 before the **Kwana Hudu Sharia Court**[82] and the **Upper Sharia Court Gwarzo**[83] respectively. All the cases before the **Upper Sharia Court Gwarzo** were struck out under Order 9, KSSCR, 2000. As for the **Kwana Hudu Shari'a Court**, two were struck out under Order 9, and the third ended with *Khul'*[84] with the wife agreeing to refund ₦ 20,000 dowry and the sum of ₦ 400,000 for marriage materials (*Kayan lefe*) as a ransom for freedom from the marriage.

This is a rare case of huge payment in addition to dowry and could only happen as the woman had the means and clearly needed to exit the marriage.

Karaye Sharia Court recorded four cases of suspicion of infidelity in 2018[85] and 2019.[86] The only case in 2018 and two out of the three of 2019 were, however, struck out under Order 9. Eventually, the remaining case of 2019 was struck out, too, for want of evidence.

4.6.2 Nafaqah (Maintenance)

The bulk of the cases before the nine selected courts are claims for feeding; claims for breastfeeding allowance; desertion (*Ghaiba*); claims for accommodation during the pendency of the marriage and after divorce; lack of feeding, and lack of clothing. Interesting cases on each subject abound across the nine selected courts. Some of these cases end in divorce, and where the woman is already divorced, the court orders the husband to make upkeep payments for his children. The payments generally are small, reflecting the poverty in the region. A regrettable development is that some women who are already suffering from lack of maintenance are compelled to resort to paying ransom to exit the marriage.

The 2016 data collected from **Karaye Shari'a Court** indicates that 94 cases of husbands' failure to feed, clothe, accommodate, and provide medical care were filed. Twenty-one of the cases resulted in outright divorce[87] while 58 of the cases were struck out based on Order 9 of KSSCPR 2000. In 11 cases, the plaintiffs paid ransom to get a divorce from their husbands as defendants.[88] Thirteen divorce cases relate to the failure of husbands to provide medical care

[80] CV/9/16; CV/101/16.
[81] CV/40/16; CV/76/16; CV/131/16
[82] CV/136/16; CV/383/16; CV/452/16
[83] CV/52/19; CV/64/19; CV/70/19
[84] CV/136/16
[85] CV/166/18
[86] CV/433/19; CV/519/19; CV/581/19
[87] CV/27/15, CV/46/15, CV/89/15, CV/255/15, CV/293/15, CV/317/15, CV/339/15, CV/342/15, CV/398/15, CV/436, CV/551/15/556/15, CV/583/15, CV/655/15, CV/662/15, CV/713/15, CV/721/15, CV/722/15, CV/794/15
[88] CV/112/16, CV /31/15, CV/39/15, CV/61/15, CV/117/15, CV/149/15, CV/151/15, CV/213/15, CV/235/15, CV/278, CV/383/15, CV/424/15, CV/438/15, CV/502/15, CV/519/15, CV/553/15, CV/562/15, CV/593/15, CV/695/15, CV/706/15

and attention. One interesting case involved a defendant who confessed to being HIV-positive. The woman got a divorce and was directed to ascertain her status. She did and was reported to be HIV-negative.[89]

An examination of the data collected from **Kiru Sharia Court** shows that in the year 2016, cases of failure and neglect of husbands to feed, clothe, accommodate, and provide medical care featured in the cases filed before the court. Thirty-six cases were of the husband's failure to provide food for their wives and children. In some cases, although the food was provided, meals are skipped, or the food provided was not sufficient.[90] 18 out of the 36 relate to *Ghaiba* as the husbands travelled to the far south of the country, away from their wives and children for years without making provision for their food. One interesting case revealed that the husband travelled to an unknown destination abandoning the plaintiff for two years without food or care.[91]

The year 2017 presents interesting data on cases from **Ungogo Sharia Court** as most cases were on the maintenance of divorcees and their children. However, there were cases of lack of maintenance of pregnant divorcees.[92] The amount of money awarded for the monthly upkeep of pregnant divorcees and monthly upkeep per child generally ranged between ₦1,000[93] to ₦5, 000. The highest was ₦10, 000 in two cases.[94]

The 2018 data collected from **Bichi Sharia Court** reveals that 115 cases were filed on lack of maintenance. There were 110 cases that relate to the husbands' failure to provide food for their wives and children and breastfeeding allowances after divorce.[95] The remaining 5 cases

[89] CV/382/16

[90] CV/3/16; CV/5/16; CV/15/16; CV/25/16; CV/31/196 CV/35/16; CV/47/16; CV/50/16; CV/52/16; CV/70/16; CV/76/16; CV/78/16; CV/81/16; CV/82/16; CV/86/16; CV/90/16; CV/91/16; CV/98/16; CV/102/16; CV/106/16; CV/108/16; CV/119/16; CV/122/16; CV/130/16; CV/150/16; CV/151/16; CV/166/16; CV/177/16; CV/179/16; CV/185/16; CV/192/16; CV/206/16; CV/226/16; CV/229/16; CV/256/16

[91] CV/3/2016

[92]CV/119/17; CV/127/17; CV/128/17; CV/130/17; CV/139/17; CV/156/17; CV/161/17; CV/168/17; CV/181/17; CV/184/17; CV/187/17; CV/193/17; CV/198/17; CV/203/17; CV/210/17; CV/215/17; CV/217/17; CV/223/17; CV/228/17; CV/234/17; CV/239/17; CV/247/17; CV/269/17; CV/271/17; CV/273/17; CV/277/17; CV/281/17; CV/290/17; CV/291/17; CV/301/17; CV/306/17; CV/306/17; CV/317/17; CV/319/17; CV/325/17; CV/326/17; CV/341/17; CV/343/17; CV/349/17; CV/350/17; CV/353/17; CV/356/17; CV/357/17; CV/359/17; CV/367/17; CV/373/17; CV/375/17; CV/388/17; CV/401/17; CV/402/17; CV/406/17; CV/407/17; CV/408/17; CV/415/17; CV/417/17; CV/418/17; CV/422/17; CV/423/17; CV/424/17; CV/426/17; CV/429/17; CV//443/17; CV/456/17; CV/455/17; CV/459/17; CV/460/17; CV/462/17; CV/464/17; CV/474/17; CV/475/17; CV/479/17; CV/487/17; CV/491/17; CV/502/17; CV/507/17; CV/543/17; CV/545/17; CV/549/17; CV/550/17; CV/555/17; CV/559/17; CV/560/17; CV/564/17; CV/566/17; CV/582/17; CV/584/17; CV/587/17; CV594/17; CV/595/17; CV/598/17; CV/604/17; CV/614/17; CV/615/17; CV/616/17; CV/624/17; CV/633/17; CV/635/17; CV/646/17; CV/657/17; CV/658/17; CV/662/17; CV/669/17; CV/673/17; CV/677/17; CV/678/17; CV/679/17; CV/710/17; CV/ 725/17; CV/ 735/17; CV/738/17; CV/ 742/17; CV/ 746/17; CV/747/17

[93] CV/367/17

[94] CV/401/17; CV/422/17

[95] CV/11/18; CV/17/18; CV/20/18; CV/22/18; CV/33/18; CV/41/18; CV/50/18; CV/51/18; CV/56/18; CV/58/18; CV/66/18; CV/80/18; CV/82/18; CV/92/18; CV/104/18; CV/110/18; CV/116/18; CV/121/18; CV/134/18; CV/137/18; CV/149/18; CV/153/18; CV/154/18; CV/164/18; CV/165/8; CV/166/18; CV/168/18; CV/176/18; CV/177/18; CV/182/18; CV/192/18; CV/206/18; CV/208/18; CV/209/18; CV/212/18; CV/216/118; CV/228/18; CV/238/18; CV/239/18; CV/243/18; CV/251/18; CV/252/18; CV/254/18; CV/260/18; CV/263/18; CV/265/18;

relate to claims for lack of accommodation, out of which all but one were struck out for want of diligent prosecution.[96] The parties in the outstanding case in this category reconciled.[97] The sum of ₦12,000 was the highest monthly upkeep or maintenance allowance granted to divorced women and children as pregnancy, breastfeeding or feeding allowances. The lowest award for a child's monthly upkeep was ₦1,200. Seven cases ended up with outright divorce despite the involvement of *Hakamain* (two arbitrators) and the traditional rulers. In addition, 7 plaintiffs paid ransom to secure divorce through *Khul'*.[98] The court struck out 42 cases based on Order 9, Rule 2, KSSCR, 2000. [99]

In 2019, the data collected from **Kwana Hudu Sharia Court** presented a similar pattern. Here, 226 cases related to the neglect of husbands to provide food while living with them and based on desertion (*Gaiba*). Claims for accommodation and medical care also featured in the cases filed before the court. There were 182 cases struck out for lack of diligent prosecution under Order 9 Rule 2, KSSCR, 2000. Overall, 195 of the cases were on the failure of the defendants (husbands) to feed the plaintiffs (women and children)[100] and 7 cases relate to *Ghaiba* as wives

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CV/269/18; CV/275/18; CV/281/18; CV/285/18; CV/290/18; CV/291/18; CV/300/18; CV/302/18; CV/303/18; CV/304/18; CV/321/18; CV/322/18; CV/2328/18; CV/329/18; CV/337/18; CV/348/18; CV/352/18; CV/357/18; CV/360/18; CV/364/18; CV/365/18; CV/369/18; CV/370/18; CV/371/18; CV/374/18; CV/380/18; CV/384/18; CV/388/18; CV/402/18; CV/403/18; CV/410/18; CV/412/18; CV/414/8; CV/418/18; CV/419/18; CV/423/18; CV/437/18; CV/428/18; CV/431/18; CV/436/18; CV/439/18; CV/441/18; CV/443/18; CV/444/18; CV/445/18; CV/463/18; CV/467/18; CV/478/18; CV/479/18; CV/483/18; CV/485/18; CV/488/18; CV/489/18; CV497/18; CV/502/18; CV/503/18; CV/504/18; CV/505/8; CV/507/18; CV/509/18; CV/512/18; CV515/18; CV/516/18; CV/519/18; CV/523/18; CV/524/18; CV/527/18; CV/533/18; CV/534/18

[96] CV/325/19

[97] CV/329/18

[98] CV/58/18; CV/92/18; CV/302/18; CV/322/18; CV403/18; CV/433/18; CV/497/18

[99]CV/20/18; CV/22/18;CV/50/18; CV/51/18; CV/66/18; CV/104/18; CV/116/18; CV/164/18; CV/168/18; CV/206/18; CV/208/18; CV/209/18; CV/216/118; CV/251/18; CV/252/18; CV/263/18; CV/265/18; CV/275/18; CV/303/18; CV/321/18; CV/329/18; CV/352/18; CV/360/18; CV/365/18; CV/369/18; CV/388/18; CV/418/18; CV/423/18; CV/427/18; CV/ 428/18; CV/436/18; CV/439/18; CV/444/18; CV/479; CV/488/18; CV/489/18; CV/502/18; CV/504/18; CV/507/18; CV/509/18; CV/512/18; CV/516/18; CV/524/18; CV/534/18

[100] CV/6/19; CV/CV/12/19; CV/13/19; CV/15/19; CV/19/19; CV/20/19; CV/21/19; CV/26/19; CV/28/19; CV/42/19; CV/43/19; CV/47/19; CV/55/19; CV/71/19; CV/72/19; CV/82/19; CV/89/19; CV/90/19; CV/99/19; CV/101/19; CV/102/19; CV/108/19; CV/109/19; CV/111/19; CV/112/19; CV/113/19; CV/115/19; CV/119/19; CV/124/19; CV/125/19; CV/126/19; CV/131/19; CV/136/19; CV/142/19; CV/143/19; CV/149/19; CV/153/19; CV/155/19; CV/160/19; CV/167/19; CV/168/19; CV/170/19; CV/180/19; CV/182/19; CV/183/19; CV/186/19; CV/189/19; CV/191/19; CV/1194/19; CV/211/19; CV/214/19; CV/218/119; CV/228/19; CV/229/19; CV/220/19; CV/230/19/ CVCV/232/19; CV/233/19; CV/234/19; CV/235/19; CV/238/19; CV/239/19; CV/240/19; CV/241/19; CV/243/19; CV/249/19; CV/250/19; CV/258/19; CV/265/19; CV/266/19; CV/271/19; CV/274/19; CV/278/19; CV/281/19; CV/289/19; CV/290/19; CV/291/19; CV/302/19; CV/325/19; CV/329/19; CV/335/19; CV/342/19; CV/346/19; CV/347/19; CV/348/19; CV/350/19; CV/353/19; CV/355/19; CV/356/19; CV/359/19; CV/365/19; CV/367/19; CV/368/19; CV/369/19; CV/373/19; CV/388/19; CV/389/19; CV/390/19; CV/392/19; CV/397/19; CV/400/19; CV/405/19; CV/410/19; CV/415/19; CV/417/19; CV/418/19; CV/421/19; CV/423/19; CV/424/19; CV/425/19; CV/428/19; CV/433/19; CV/441/19; CV/442/19; CV/450/19; CV/453/19; CV/545/19; CV/457/19; CV/461/19; CV/462/19; CV/464/19; CV/467/19; CV/478/19; CV/479/19; CV/481/19; CV/484/19; CV/488/19; CV/491/19; CV/492/19; CV/496/19; CV/497/19; CV/472/19; CV/501/19; CV/502/19; CV/503/19; CV/507/19; CV/513/19; CV/515/19; CV/516/19; CV/519/19; CV/522/19; CV/524/19; CV/541/19; CV/547/19; CV/548/19; CV/549/19; CV/551/19; CV/553/19; CV/557/19; CV/559/19; CV/560/19; CV/567/19; CV/568/19; CV/570/19; CV/571/19; CV/579/16; CV/581/19; CV/584/19; CV/589/19; CV/590/19; CV/593/19; CV/598/19; CV/605/19; CV/607/19; CV/619/19; CV/621/19; CV/C29/19; CV/633/19; CV/635/19; CV/637/19; CV/641/19; CV/643/19; CV/652/19; CV/655/19; CV/656/19; CV/656/19; CV/661/19; CV/663/19; CV/665/19; CV/672/19; CV/676/19; CV/677/19; CV/682/19

complained of being deserted by their husbands for years, ranging between 4 years to 11 years[101] without food and other marital obligations.[102] A case in the *Ghaiba* category resulted in divorce, while the remaining cases struck out for want of diligent prosecution. Three cases had no continuation. Sixteen cases relate to failure to provide accommodation,[103] while 5 cases were on failure and neglect to provide medical care.[104] The monthly maintenance allowances awarded to pregnant divorcees ranged between ₦1,000 and ₦8,400. In one case, a divorcee with seven children was awarded the sum of ₦8,000 only as monthly upkeep.[105] In some cases the judge ordered the husband to provide bathing soap and detergents, for example, in addition to money.

4.6.3 *Haḍāna* (Custody)

The custody of children is one of the standalone themes of the research even though connected to divorce cases. Against the dictates of the *Shari'ah*, cases abound where husbands were reported to have forcefully removed children in the custody of their divorced wives. Under the Maliki School, priority is given to the mother and her maternal relations on the issue of custody of children after divorce. The period of custody, according to the *Tuhfa*, is from teething up to puberty for a boy, while for a girl it is until she enters her marital home.[106]

In 2016, eight cases were filed for the custody of children before **Upper Sharia Court, Gwarzo**.[107] Custody was granted to a mother in one case.[108] In another case, although the father of the child admitted the right of the mother to custody, the child involved chose to stay with his father, and the mother waived her right.[109] One plaintiff withdrew her case following the intervention of her children.[110] The remaining cases were struck out for want of diligent prosecution under Order 9, Rule 2, KSSCR, 2000.

Seven cases were filed on claims for custody of children before the **Upper Sharia Court, Tudun Wada** in 2017.[111] The court confirmed and/or returned custody to the mothers of two children who sued as plaintiff or defendant.[112] The other five cases were struck out for lack of diligent prosecution.

In 2017, sixteen cases were filed for the custody of children before the **Kwana Hudu Sharia Court**.[113] Custody was granted to a mother and a grandmother in two cases.[114] One case had

[101] CV/54/19; CV/59/19; CV/141/19; CV/148/19; CV/292/19; CV/382/19; CV/499/19
[102] CV/54/19; CV/59/19; CV/141/19; CV/148/19; CV/292/19; CV/382/19; CV/499/19
[103] CV/13/19; CV/79/19; CV/166/19; CV/178/19; CV/232/19; CV/240/19; CV/249/19; CV/265/19; CV/290/19; CV/365/19; CV/390/19; CV/397/19; CV/454/19; CV/560/19; CV/589/19; CV599/18
[104] CV/68/19; CV/111/19; CV/189/19; CV/243/19; CV/253/19
[105] CV/336/18
[106] Machika, supra, p. 275
[107] CV/5/16; CV/34/16; CV/118/16; CV/119/16; CV/266/16; CV/306/16; CV/346/16; CV/393/16
[108] CV/34/16
[109] CV/05/16
[110] CV/346/16
[111] CV/328/17; CV/341/17; CV/401/17; CV/403/17; CV/416/17; CV/445/17; CV/498/17
[112] CV/328/17; CV/401/17
[113] CV/184/17; CV/188/17; CV/191/17; CV/277/17; CV/278/17; CV/279/17; CV/311/17; CV/438/17; CV/450/17; CV/458/17; CV/482/17; CV/500/18; CV/503/17; CV/574/17; CV/581/17; CV/591/17
[114] CV/311/17; CV/458/17

no continuation, and the other 14 cases were struck out for want of diligent prosecution under Order 9, Rule 2, KSSCR, 2000.

In 2018[115] and 2019[116] 2 cases were filed for the custody of children before the **Upper Sharia Court Gwarzo**. In both cases, the court granted custody to the mothers, as a plaintiff in the 2018 case, and as a defendant in the 2019 case.

In 2020, seven cases were filed for the custody of children before **Karaye Sharia Court**.[117] After fulfilling all the judicial processes, custody was granted to two mothers as plaintiffs.[118] In another case, custody was granted to the father as the plaintiff.[119] However, the remaining three cases were struck out for want of diligent prosecution under Order 9, Rule 2, KSSCR, 2000.[120]

The general conclusion from this review of custody cases is that, in line with Maliki law, the judges protect the right of the mother to custody, unless there is evidence that she is not fit to take up this responsibility.

4.6.4 *Khul'* (Divorce through the Payment of Ransom)

Across the nine selected courts, cases of women exercising their right to divorce their husbands as permitted by the *Shari'ah* through the payment of ransom for freedom from the marriage abound.

Before **Karaye Sharia Court**, for instance, a total of 145 cases ended through *Khul'* within the five years under review. In 2020 alone, this court recorded 58 cases ending with divorce.[121] Many cases of *Khul'* were not initially filed as cases of women seeking divorce through *Khul'*, for reasons stated earlier. Eight out of the 58 *Khul'* cases mentioned above were initially cases of harm[122] such as beating, and a case initially commenced as a case of discord[123] but ended through *Khul'*, due to failure to establish the claim because of paucity of evidence or witnesses. This is a common occurrence across the courts.

In 2017, six plaintiffs with initial cases of harm had to resort to *Khul'* before the **Upper Sharia Court Goron Dutse** because of a lack of witnesses to testify on their behalf. They paid ransom as a condition before they could get a divorce.[124] The same happened to 4 cases before the

[115] CV/278/18
[116] CV/121/19
[117] CV/33/20; CV/65/20; CV/93/20; CV/101/20; CV/135/20; CV/135/20; CV/168/20; CV/193/20
[118] CV/65/20; CV/168/20
[119] CV/33/20
[120] CV/568/19
[121] CV/34/20; CV/58/20; CV/59/20; CV/60/20; CV/61/20; CV/63/20; CV/69/20; CV/71; CV/86/20; CV/87/20; CV/94/20; CV/96/20; CV/98/20; CV/103/20; CV/110/20; CV/116/20; CV/128/20; CV/130; CV/135/20; CV/152/20; CV/157/20; CV/165/20/ CV/166/20; CV/169/20; CV/171/20; CV/173/20; CV/177/20; CV/179/20; CV/184/20; CV/185/20; CV/186/20; CV/192/20; CV/195/20; CV/207/20; CV/217/20; CV/217/20; CV/226/17; CV/226/20; CV/227/20; CV/241/20; CV/243/20; CV/249/20; CV/263/20; CV/263/20; CV/273/20; CV/277/20; CV/295/20; CV/309/20; CV/314/20; CV/315/20; CV/320/20; CV/322/20; CV/325/20; CV/332/20; CV342/20; CV/343/20; CV/346/20; CV/348/20
[122] CV/88/20; CV/177/20; CV/185/20; CV/217/20; CV/227/20; CV/263/20; CV/267/20; CV/322/20
[123] CV/186/20
[124] CV/1/17, CV/3/17; CV/42/17, CV/62/17; CV/242/17; CV/388/17

Upper Sharia Court Tudun Wada in 2016.[125] There were equally two cases from **Upper Sharia Court Gwarzo**.[126] In most of these cases *Khul'* has taken the form of dowry payments, although some cases where women agreed to feed themselves while breastfeeding have been observed.

4.6.5 *Shiqāq* (Discord)

Disputes are inherent in marital relationships. That is why the *Shari'ah* made adequate provisions in the event of misunderstanding between couples. The idea of *Hakamain* (arbiters) was factored into the Qur'an.[127] From the nine selected courts, cases of *Shiqāq*, such as disputes submitted to the court by women for the determination of the status of their marriage with their husbands, cases of lack of marital peace and assistance either for reconciliation or divorce in situations where the women are expelled from the marital home by their husbands abound. In 2018 for instance, 8 cases on lack of matrimonial peace were filed before the **Upper Sharia Court Gwarzo**.[128] One case out of this number ended with divorce through *Khul'*. The remaining 7 cases were struck out based on Order 9, Rule 2, KSSCR, 2000. There was an interesting case before the **Kwana Hudu Sharia Court** in 2017 where a woman complained that lack of matrimonial peace forced her out of the main marital home to a visitors' room (*shago)* outside the house.[129] The case was, however, struck out under Order 9, Rule 2, KSSCR, 2000.

Cases of wife expulsion as discord issue were found in the data. Before **Upper Sharia Court Gwarzo,** 11 cases involved wife expulsion from the marital home, in the year 2016. The women complained that they stayed at their parents' houses for months and sometimes years without any provision from the husband, visit or reconciliatory initiative from the husbands.[130] Out of this number, a case was settled, one had no continuation,[131] two plaintiffs got outright divorce[132] while one obtained divorce through *Khul'*.[133] The remaining cases were struck out under Order 9, Rule 2, KSSCR, 2000. The court received 10 cases in 2018 on the subject.[134] Six out of the 10 cases were struck out under Order 9.

Before **Bichi Sharia Court**, 4 cases on *Shiqaq* were filed in 2016.[135] While two of the cases had no continuation, [136] one ended with divorce through *Khul'*[137] and the remaining case was struck out under Order 9. [138] **Upper Sharia Court Tudun Wada** also recorded 10 cases falling

[125] CV/613/16; CV/691/16; CV/723/16; CV/769/16
[126] CV/125/17; CV/252/17
[127] Qur'an 4 verse 35, Translation of the Glorious Qur'an by Yusuf Ali, https://quranyusufali.com/4/
[128] CV/166/18; CV/196/18; CV/227/18; CV/340/18; CV/341/18; CV/444/18; CV/446/18; CV/400/18
[129] CV/328/17
[130] CV/32/16; CV/50/16; CV/124/16; CV/126/16; CV/139/16; CV/159/16; CV/240/16; CV/316/16; CV/320/16; CV/329/16 ; CV/411/16
[131] CV/126/2016
[132] CV/169/16; CV/426/16
[133] CV/283/16
[134] CV/168/18; CV/169/18; CV/173/18; CV/269/18; CV/283/18; CV/296/18; CV317/18; CV/366/18; CV/425/18; CV/426/18
[135] CV/20/16; CV/40/16; CV/449/16; CV/453/16
[136] CV/20/16; CV/449/16
[137]CV/40/16
[138] CV/453/16

under the *Shiqaq* category in 2016.[139] All but one of the cases was struck out under Order 9, Rule 2, KSSCR, 2000.[140]

4.6.6 *'Aib* (Defect)

The cases filed before the nine selected courts in this category relate to complaints about physical and mental health and complaints of creed, such as observance of prayer.

Claims were filed, across the nine selected courts, by women seeking divorce because their husbands did not observe the five daily prayers. For example, **Upper Sharia Court Gwarzo** had 8 cases of women seeking divorce from their husbands who do not observe prayer.[141] In two cases, the plaintiffs only got divorced through *Khul'* after paying a ransom.[142]

Similar cases were filed across the other courts. **Kwana Hudu Sharia Court** also determined cases on complaints against husbands who do not observe daily prayers and Ramadan fast.[143] A woman got a divorce in a case filed in 2017.[144] **Karaye Sharia Court** equally determined similar cases in 2016 and 2017 respectively. The marriage in one case ended with outright divorce, and the plaintiff in another case got divorce through *Khul',* pointing to some possible inconsistency in the handling of this claim, usually because of benefit of doubt as Muslim husbands are unlikely to confess to not living by any of the five pillars of Islam.[145] **Kiru Sharia Court** equally determined similar cases and pronounced divorce in a case filed before it in 2017.[146]

4.6.7 *Ijbār* (Forced Marriage)

The issue of forced marriage featured among the cases filed before the nine selected courts. Although this was not frequent, young girls have had cause to approach the selected courts to request the dissolution of their marriages, which they alleged were against their consent.

A case of forced marriage was reported to the **Kiru Sharia Court** in 2016.[147] The plaintiff approached the court requesting the court to intervene because her father intended to forcefully marry her to a cousin she did not love on the directive of her grandmother. The plaintiff's preferred husband is also rejected based on a tradition prohibiting Fulanis from marrying a butcher. The plaintiff requested the court to prevail on her father to marry her to the person she loved and whom she had been dating for eight years with their permission and who had paid customary money for the marriage (*kudin aure*). The date for the marriage had been fixed before this new development. She insisted that though her preferred choice was a butcher, he was a religious man with a respectable trade.

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[139] CV/584/16; CV/585/16; CV/609/16; CV/615/18; CV/631/18; CV670/18; CV/685/16; CV/687/16; CV/693/16; CV/696/16
[140] CV/609/16
[141] CV/124/16; CV/126/16; CV/350/16; CV/351/16; CV/179/17; CV/397/18; CV/911/19, CV/41/19
[142] CV/397/18; CV/41/19
[143] CV/396/16; CV/486/17
[144] CV/486/17
[145] CV/715/16; CV/92/17
[146] CV/31/17
[147] CV/2/16

After confirming the plaintiff's story, the court invited the Imam of Yako and the District Head and directed them to go and conduct the marriage ceremony between the plaintiff and her preferred suitor. This case raises several interesting questions of law and custom. It shows the influence of extended families, with the girl's father apparently being compelled to try and force his daughter into a loveless marriage so as not to risk offending his own mother. The emphasis of Islam on honouring the mother is sometimes taken advantage of unduly by mothers, who force their sons to make a choice between pleasing them or pleasing their wives or children. The case also highlights the strong position of *Shari'ah* on the *Khitbah* (courtship), where it is prohibited for Muslims to try and marry a woman who is already in a relationship heading for marriage with another Muslim, unless that suitor is "dissolute in his habits, or irreligious *(fāsiq*)."[148] It also raises the question of compatibility, as the judge here clearly adheres to the position that being of faith and good character is more important than ethnicity or social class in determining compatibility (*kafā'ah*).

There was a case of forced marriage before **Upper Sharia Court Tudun Wada** in 2016.[149] The plaintiff alleged that she was forcefully married by her father to the defendant, whom she did not love. The case was, however, struck out for lack of diligent prosecution under Order 9, Rule 2, KSSCR 2000.

A case of forced marriage was equally reported to the **Bichi Sharia Court** in 2019.[150] The case was a referral from the Emir of Kano to the court. The plaintiff requested the court's assistance to intervene because her father forcefully married her to the defendant whom she did not love. The plaintiff, at some point after the marriage, ran away from the marital home. The marriage was annulled.

In general, the courts seem willing to intervene to stop forced marriages, after listening to the parents and being satisfied that there was a clear injustice or greed on the part of the parents. It gets a little complicated where the father says, for example, that the daughter is wayward and at risk of scandal and fornication; or that, being of age, she has refused to accept proposals from several suitable suitors; or where she has already been married and the marriage had been consummated before she came to court. In such situations there is usually an arbitration process aimed at finding a solution satisfactory to all.

4.7 The Kano Hisbah

The Kano State *Hisbah* Board established the *Hisbah* Corps under the Kano State *Hisbah* Board Law No. 4 of 2003. The entire Corps is under the Commander General appointed by the Governor of Kano State.[151] The Board is organized with headquarters in metropolitan Kano with Zonal Committees/offices and Local Government Committees.[152] For smooth operations, the Board is permitted, subject to the Governor's approval, to establish any number of

[148] F.H. Ruxton, *Mâliki Law: Being a Summary from French Translations of the Mukhtasar of Sîdî Khalîl with Notes and Bibliography* (London: Luzac & Co 1916)
[149] CV/594/16
[150] CV/129/16
[151] Section 7 (2) Kano State Hisbah Board Law No. 4 of 2003.
[152] Section 9 and 12 Kano State Hisbah Board Law No. 4 of 2003.

departments needed.[153] Members of the Board are appointed by the Governor and are responsible for the day-to-day running of all *Hisbah* activities in the state.[154] Membership of the Board to be appointed comprises a Chairman who shall be a devout Muslim of unquestionable moral character, versed in Islamic jurisprudence and a qualified administrator. Other members include the Commander General, who is the Chief Executive officer of the Corps and representatives from organizations such as the Emirate Council, State Vigilante Group and Civil Defence Corps, the Ministry of Justice, the State Security Services, the Immigration Service, Nigeria police and other members of unquestionable moral character.[155]

The functions of the *Hisbah* Corps, as provided under Section 8 of the enabling law, are diverse. It assists law enforcement agencies such as the police in crime detection, prevention, and reporting. [156] It is expected, in its preaching role, to admonish Muslims to unite in kindness, admonishing them to abide by good conduct, and forbidding evil.[157] Other functions include advice and moral counselling to people to live in conformity with Islamic values and injunctions, the prohibition of the taking of usury, hoarding, and speculation; encouraging charitable deeds and orderliness in religious gatherings; general cleanliness and environmental sanitation; traffic control; monitoring and sanitising viewing centres, cinemas and the like; controlling and monitoring of activities of *Almajiri*s (itinerant qur'anic pupils often begging on the streets) and the Qur'anic (*Tsangaya)*[158] schools in collaboration with the relevant agencies such as the Islamiyya, Qur'anic and *Tsangaya* Education Board; managing new converts to Islam and victims of abuse through the provisions of accommodation, feeding, education and general welfare and rehabilitation of drug addicts and prostitutes and people with anti-social behaviour.[159]

4.7.1 The Approach of *Hisbah* to Dispute Resolution

As it relates to this thesis, the Corps has a reconciliatory mandate of settling disputes between willing persons or organizations.[160] It equally has the mandate of "arranging and conducting marriages between willing parties in accordance with Islamic Law.[161] On these issues, *Hisbah* is a voluntary institution for settling disputes. Nevertheless, over the years, the Corps has been prominent in receiving and settling marital issues in a way, one can say, more effectively than the formal institutions charged with adjudication.

In November 2020 alone, the guidance and counselling unit of the headquarters received 288 cases of marital dispute, 7 cases of forced marriage and 568 cases related to the maintenance

[153] Section 6 Kano State Hisbah Board Law No. 4 of 2003.
[154] Section 4 (1) Kano State Hisbah Board Law No. 4 of 2003.
[155] Section 4 (1) (a), (b) and (c) Kano State Hisbah Board Law No. 4 of 2003.
[156] Section 8 (ii) and (iii) Kano State Hisbah Board Law No. 4 of 2003.
[157] Section 8 (ii) and (iii) Kano State Hisbah Board Law No. 4 of 2003.
[158] "*Tsangaya*" refers to local schools where children learn to read the Qur'an under tutelage of a *Mallam*. These students are referred to in Hausa as "*almajirai*" (sing. *Almajiri*), probably originating from the Arabic "*Al-Muhajir*" – one who has left his homeland on a *hijra* in search of knowledge, given the itinerant character of many of them. Several are poor and end up begging to find food while studying, so a young beggar is also called *almajiri*, creating some ambiguity in the referent.
[159] See generally Section Kano State Hisbah Board Law No. 4 of 2003.
[160] Section 8 (x) Kano State Hisbah Board Law No. 4 of 2003.
[161] Section 8 (xiv) Kano State Hisbah Board Law No. 4 of 2003.

of divorcees and children. The Bichi Zonal Office received 286 cases of marital dispute. A total of 9 cases were of forced marriage. The Gaya Zonal Office received 286, while 22 cases related to forced marriage. The Metropolitan Command settled 346 marital disputes. A total of 10 cases were of forced marriage. The Karaye Zonal Command settled 248 matrimonial disputes. A total of 7 cases were of forced marriage. The Rano Zonal Command settled 173 marital disputes. A total of 27 cases were of forced marriage. We can already see that, unlike the Sharia courts, the Hisbah regularly entertains cases of forced marriage of girls. This, as we will argue later, may reflect a cultural practice where daughters/wives are sometimes able to take their fathers/husbands before non-judicial arbitration entities on this question but only rarely sue them before a judge.

The *modus operandi* of these units is Alternative Dispute Resolution (ADR). Parties are admonished of the Qur'anic injunctions and prophetic traditions on settling their misunderstandings as couples. The process is participatory. *Hisbah* does not impose a settlement on the parties. The parties freely negotiate, agree, and come up with the terms of the settlement but are tasked by the Corps to respect all the agreements reached as required by the *Shari'ah*. It should be emphasized that the Corps does not have a strict enforcement mandate but can refer any defaulting party to a court of law to enforce agreements voluntarily reached by parties. Relying on the provision of the *Shari'ah* against reneging from voluntary agreements, the courts compel parties to abide by the terms agreed before the *Hisbah*. Innovatively, the Grand Khadi of Kano State Sharia Court of Appeal established a court at the premises of the headquarters of *Hisbah* Board for ease of operation and for enforcement of the mandate of the Corps.[162]

4.7.2 Review of Selected Sample Cases

The records at *Hisbah* are not properly bound or kept in record books like the courts, and there is a need to improve record-keeping and access. Cases are recorded on loose sheets of paper which we have used for this analysis.[163]

4.7.2.1 *Nafaqah* (Maintenance)

The preponderant cases before the *Hisbah,* just like the Sharia courts, relate to maintenance claims. The amount awarded is often very low, as is the case with the courts. However, disputes are resolved faster at *Hisbah*, and Alternative Dispute Resolution (ADR) is mainly employed. In other words, the parties and themselves agree to the settlement and terms, and then the role of *Hisbah* is to monitor adherence and, if need be, take the matter to court for enforcement where arbitration fails to yield the desired result. Monthly upkeep or breastfeeding allowances agreed between the parties vary. Sampled cases confirm that the

[162] For deeper insight into how Hisbah operates in practice, I am grateful to Sheikh Ibrahim Shehu Maihula (Shehi Shehi), Chairman of the Hisbah Board, who explained its workings to me in a telephone conversation early in March 2023.

[163] Most of the sample cases referred to have been scanned and uploaded here: https://drive.google.com/drive/folders/1LmqE5uLHadN_gQE5oXJerrPFQuJbWaPZ?usp=share_link

parties agreed sums of ₦ 1,500,[164] ₦2,000,[165] ₦2,500,[166] ₦3,000,[167] ₦ 4,000,[168] ₦ 5,000[169] etc., as a monthly upkeep allowance per child following a divorce. In one case, a divorcee agreed to receive the sum of ₦300 as monthly upkeep for her daughter.[170] Interestingly, the settlement terms often contain a further undertaking for the provision of other necessities such as detergents and medication when the need arises. As an example, fathers of three children agreed to pay the sum of ₦7,000 as the monthly upkeep of their children in addition to providing soap and other detergents.[171] In another example, parties settled a dispute on the condition of payment of the sum of ₦10,000 plus detergents as upkeep for a child.[172] Another case was settled on a weekly basis with payment of ₦1,000 as upkeep allowance for a child, although the defendant undertook to provide medication in the event of sickness.[173] In some cases, the actual food items are agreed, such as one in which the husband committed to providing two measures of rice and five packets of spaghetti in addition to the sum of ₦1,500 in 2017 as monthly maintenance/upkeep allowances for two children.[174]

The Corps also settled cases for claims of pregnancy upkeep allowance, with the award also ranging between ₦1,000 to ₦10,000 monthly. Cases abound where the terms of settlement comprise several issues of maintenance. Settlements have been reached requiring the defendant to provide his children with clothing from time to time. A case in 2017 had provision of clothing, medication, and adequate feeding of the plaintiff among the settlement terms.[175] These cases abound in 2018 as well.[176]

4.7.2.2 *Ḍarar* (Harm)

Cases of *Ḍarar*, such as wife-beating, maltreatment and abuse have been filed and settled at the *Hisbah*. Many are resolved through arbitration. For example, in one 2016 case, the settlement terms included that the defendant would desist from beating, disparaging, and nagging the plaintiff (his wife).[177] In other cases, the wives agreed to return to their husbands'

[164] KN/HB/CR13/G/C/3145, Hisbah Corps Record, 2016, page 6 settled on July 4, 2016 (2:00 pm afternoon shift); KSHB/GCU/5780, Hisbah Corps Record, 2017, page 28 settled on July 18, 2017 (Morning shift);
[165]KSHB/GCU/18/597, Hisbah Corps Record, 2018, page 25, settled on January 31, 2018 (Morning shift); KSHB/GCU/3818, Hisbah Corps Record, 2017, page 34, filed on July 21, 2017 (Morning shift);
[166]KSHB/GCU/18/587, Hisbah Corps Record, 2018, page 24, settled on January 31, 2018 (Evening shift); KSHB/GCU/908, Hisbah Corps Record, 2018, page 40 settled on February 11, 2018 (Morning shift)
[167] KSHB/GCU/5162, Hisbah Corps Record, 2017, page 17, settled on July 2, 2017 (Morning shift); KSHB/GCU/1543, Hisbah Corps Record, 2018, page 68 ,settled on March 8, 2017 (Evening shift);
[168]KN/HB/CR/668, Hisbah Corps Record, 2018, page 26, settled on February 3, 2018 (Morning shift); KSHB/GCU/1549, Hisbah Corps Record, 2018, page 67 settled on March 8, 2017 (Morning shift);
[169] KSHB/GCU/5659, Hisbah Corps Record, 2017, page 29, settled on July 18, 2017 (Morning shift);
[170] KN/HB/CR13/G/C/2888, Corps Record, 2016, page 2, settled on July 4, 2016 (2:00 pm afternoon shift)
[171] KSHB/GCU/1146, Hisbah Corps Record, 2018, page 69, settled on March 12, 2018 (Morning shift); KSHB/GCU/18/1904, Hisbah Corps Record, 2018, page 71, settled March 14, 2018 (Evening shift)
[172] KSHB/GCU/3973, Hisbah Corps Record, 2017, page 8, settled on June 17, 2017 (Morning shift
[173] KSHB/GCU/5654, Hisbah Corps Record, 2017, page 22, settled on June 17, 2017 (Morning shift)
[174] KSHB/GCU/5780, Hisbah Corps Record, 2017, page 28, settled on July 18, 2017 (Morning shift);
[175] KSHB/GCU/5296, Hisbah Corps Record, 2017, page 20, settled on July 8, 2017 (Morning shift)
[176] KSHB/GCU/18/056, Hisbah Corps Record, 2018, page 4, settled on January 7, 2018 (Morning shift); KSHB/GCU/112, Hisbah Corps Record, 2018, page 5, settled on January 9, 2018 (Morning shift)
[177] KN/HB/CR13/GC, Hisbah Corps Record, 2016, page 3, settled on April 4, 2016 (2:00 pm afternoon shift)

house on the condition that the husbands desist from beating and abusing the wives[178] or insulting their parents. An unusual case of *Ḍarar* was settled with the husband insisting as part of the settlement terms that the plaintiff should not wrestle him again.[179]

There were also cases resolved in 2018 with defendants promising never to beat the plaintiffs again as one of the terms of the settlement.[180] In one case, the husband added among the terms of the settlement that the plaintiff must also bear with him when he lacks what to give her.[181] Another interesting case was settled on terms that the husband stops beating, abusing and accusing or suspecting the plaintiff. [182] A case was equally settled on the wife's condition that her husband would stop insulting, disparaging her among other terms.[183] Parties have been reported agreeing that the husband will never insult the plaintiff.[184] In another case the plaintiff agreed to settle and return to the matrimonial home but that the defendant should agree to stop beating her. On his part he also agreed to her terms but added that the defendant should stop her habit of shouting at him.[185]

4.7.2.3 *Haḍanah* (Custody)

Disputes over custody of children are among the high number of cases submitted for settlement or arbitration before the *Hisbah* Corps. In general, the decisions mirrored the decisions of the courts in line with Maliki law, where the maternal side is consistently given preference.

To give a few illustrations, custody was returned to a mother plus the monthly upkeep allowance for the daughter and provision of detergents and medication when the need arose in a case in 2017.[186] An agreement was reached between the plaintiff and the defendant that their daughter would stay with her grandmother and that the defendant would be paying ₦2,000 as upkeep for her.[187] Similar settlement was reached and custody of four children was granted to their grandmother with a further undertaking of a monthly allowances of ₦8,000.[188] Custody of children was also returned to a mother with an undertaking of ₦2,000 payment as monthly upkeep for the two children.[189]

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[178] One example is KSHB/CR/6244, Hisbah Corps Record, 2016, page 9, settled on June 6, 2016 (Evening shift);
[179] KSHB/CR/4963, Hisbah Corps Record, 2017, page 16, settled on July 1, 2017 (Morning shift); KSHB/GCU/7080, Hisbah Corps Record, 2018, page 334, settled on September 12, 2018 (Morning shift
[180] KSHB/GCU/1023, Hisbah Corps Record, 2018, page 35, settled on February 13, 2018 (Morning shift); KSHB/GCU/1453, Hisbah Corps Record, 2018, page 56, settled on March 1, 2018; KSHB/GCU/ 1364, Hisbah Corps Record, 2018, page 78, settled on March 15, 2018 (Morning shift); KSHB/GCU/ 7447, Hisbah Corps Record, 2018, page 341, settled on September 23, 2018 (Morning shift)
[181] KSHB/GCU/1023, Hisbah Corps Record, 2018, page 35, settled on February 13, 2018 (Morning shift)
[182] KSHB/GCU/1100, Hisbah Corps Record, 2018, page 49, settled on February 25, 2018 (Morning shift)
[183] KSHB/GCU/ 6542, Hisbah Corps Record, 2018, page 310, settled on August 29, 2018 (Evening shift)
[184] KSHB/GCU/2162, Hisbah Corps Record, 2018, page 65, settled on March 6, 2018 (Morning shift); KSHB/GCU/18/ 8084, Hisbah Corps Record, 2018, page 360, settled on October 10, 2018 (Morning shift)
[185] KSHB/GCU/ 9244, Hisbah Corps Record, 2018, page 362, settled on October 29, 2018 (Morning shift)
[186] KSHB/GCU/3973, Hisbah Corps Record, 2017, page 8, settled June 6, 2017 (Morning shift)
[187] KSHB/GCU/5352, Hisbah Corps Record, 2017, page 24, settled July 13, 2017 (Morning shift)
[188] KSHB/GCU/ 1996, Hisbah Corps Record, 2018, page 83, settled on March 17, 2018 (Evening shift)
[189] KSHB/GCU/5649, Hisbah Corps Record, 2017, page 26, settled July 14, 2017 (Morning shift)

In 2018 settlement was brokered between divorced disputing spouses. Custody of four children was granted to a mother and an undertaking of ₦6,000 monthly upkeep for the children.[190] In another case, the mother agreed to return custody of her daughter to the father because she married another person.[191] The father added that the mother should not come to his house to visit her daughter, promising to take her to her auntie's house and she would see her there. Cases equally abound where the mothers of children return custody and care of their children to the children's fathers. A mother of two children returned their custody to their father.[192] Surprisingly a mother came to the Corps and agreed to return the custody of her son because she is no longer interested in continuing with the care and custody of the child.[193]

Some cases present interesting scenarios where the parties agree to share custody of the children. For example, in a 2018 case, the parties agreed after a triple divorce (one where they may not remarry unless she marries another man and consummates that marriage before becoming a divorcee again or a widow and thus available for remarriage) that the mother retains custody of the baby, and the father retains custody of the other children. The husband agreed to provide her with accommodation, medical care, and a monthly allowance of ₦4,500.[194] In another case custody of six children was divided into three. Two children each to the plaintiff and defendant and custody of the remaining two under the care of the defendant's uncle.[195] Such agreements are usually driven by financial capacity to bear the burden.

A mother, the custody of whose children are with her former husband, agreed to settlement on the conditions that her children should be allowed to visit her during school holidays or during *Eid el Fitr* and *Eid el Aḍha* celebrations for at least 3-10 days.[196] Similar settlement was reached with the wife demanding and the husband agreeing to allow the children to be visiting their mother for a week during school holidays, or if there is any event on the side of her relatives.[197]

In general, settlement of custody follows the Maliki rules of custody being with the mother and her family and guardianship with the father. However, arbitration process allows for flexibility such that what is in the best interest of the child and agreeable to the divorced partners is implemented.

4.7.2.4 Discriminatory Treatment

Cases of marital disputes relating to discriminatory treatment between co-wives in a polygynous setting have been severally reported and settled by the *Hisbah* Corps. Most of the

[190] KSHB/GCU/990, Hisbah Corps Record, 2018, page 9, settled January 16, 2018 (Morning shift)
[191] KSHB/GCU/345, Hisbah Corps Record, 2018, page 23, settled January 23, 2018 (Morning shift)
[192] KSHB/GCU/7094, Hisbah Corps Record, 2018, page 333, settled on September 10, 2018 (Evening shift)
[193] KSHB/GCU/6766, Hisbah Corps Record, 2018, page 315, settled on August 30, 2018 (Morning shift)
[194] KSHB/GCU/952, Hisbah Corps Record, 2018, page 43, settled February 15, 2018 (Afternoon shift)
[195] KSHB/GCU/1290, Hisbah Corps Record, 2018, page 73, settled March 13, 2018 (Morning shift)
[196] KSHB/GCU/1821, Hisbah Corps Record, 2018, page 74, settled March 14, 2018 (Morning shift)
[197] KSHB/GCU/ 7181, Hisbah Corps Record, 2018, page 338, settled on September 15, 2018 (Morning shift); KSHB/GCU/ 6668, Hisbah Corps Record, 2018, page 311, settled on August 29, 2018 (Evening shift)

complaints revolve around a lack of peaceful co-existence[198] and distribution of food among co-wives in polygynous settings. The settlements mostly reached are that the husband will treat his wives equally[199] and that the plaintiff should live peacefully with her co-wife or wives.[200] In others, the wives insisted on justice in distribution of the husbands' nights among the wives, such that each gets equal time in line with the *Shari'ah* guidelines. [201]

A unique case on the subject was presented in 2017, representing a rare instance where a wife reported her husband for trying to marry a second wife without the means to maintain them, and which constitutes a good pointer to where reform is needed. In the instant case, the defendant agreed to live up to his responsibility of maintaining the plaintiff and to jettison his desire to add a wife, as a settlement term, until his earnings improve sufficiently to add a new wife.[202]

4.7.2.5 *Khul'* (Discharge/Ransom)

Cases have been settled with the husbands accepting ransom in return for divorcing the plaintiff, such as happened in one case in February 2018.[203] Before this settlement, the plaintiff was in her parents' house for eight months following a misunderstanding with the defendant. Although *Hisbah* does not have the powers to dissolve a marriage, if both husband and wife agree on *Khul,'* or the husband decides to pronounce divorce, the matter does not need to go to court.

4.8 The Emir's Court

The Kano Emirate Council represents one of Nigeria's oldest and largest Emirate Councils. It is a traditional institution that is highly regarded in Sub-Saharan Africa, with a King-List going back to the 10th Century and a well-grounded political and administrative structure going back to the 14th Century.[204]

The Emir (Hausa: *Sarki*) sits at the top of the hierarchy and presides over the Council as Emir-in-Council. Council members are the four Kingmakers and selected senior titleholders, as well as representatives of the religious scholars, business community and State Ministry of Local Government. The Emirate is divided into districts, each headed by a traditional titleholder (Hausa: *Hakimi)* appointed by the Emir with the approval of the State Governor. Each district is divided into villages, each headed by a village head (Hausa: *Dagaci*) appointed by the Emir. At the lowest level there is a ward head (Hausa: *Mai Unguwa*) appointed by the Emir or the

[198] KSHB/GCU/115, Hisbah Corps Record, 2018, page 13, settled January 16, 2018 (Morning shift)
[199] KSHB/GCU/5441, Hisbah Corps Record, 2017, page 21, settled July 11, 2017 (Morning shift)
[200] KSHB/GCU/1683, Hisbah Corps Record, 2018, page 71, settled March 13, 2018 (Morning shift)
[201] KSHB/GCU/1595, Hisbah Corps Record, 2018, page 72, settled March 13, 2018 (Morning shift); KSHB/GCU/18/7396, Hisbah Corps Record, 2018, page 345, settled on October 10, 2018 (Morning shift); KSHB/GCU/7469, Hisbah Corps Record, 2018, page 342, settled on September 25, 2018 (Morning shift); KSHB/GCU/18/7368, Hisbah Corps Record, 2018, page 340, settled on September 22, 2018 (Morning shift)
[202] KSHB/GCU/5782, Hisbah Corps Record, 2017, page 30, settled July 18, 2017 (Morning shift);
[203] KSHB/GCU/1118, Hisbah Corps Record, 2018, page 49, settled on February 21, 2018 (Morning shift)
[204] For an excellent historical review of the political and administrative system of Kano, see M. G. Smith, *Government in Kano, 1350-1950* (First published by Boulder, CO: Westview Press 1997)

District Head, depending on location. The Emir also approved the appointment of all Imams of Friday mosques and of *Eid* prayers.

This structure means the Emir has his appointed representatives down to grass-root level. Instructions from the Emir flow seamlessly to every nook and corner of the Emirate, while he receives daily reports of major developments through the hierarchy. Many cases are resolved at ward, village, and district levels, but several also come to the Emir either at first instance or on appeal where the plaintiff is dissatisfied with proceedings at the lower level.

The Emir's Court has no powers and serves largely as a customary arbitration institution that entertains civil and family cases from parties willing to subject themselves to the process. In general, the people find this cheaper and easier than the formal court process, as the Emir, in keeping with Islamic political tradition, is expected to provide access to all citizens to freely present their complaints. Sitting daily in the Emir's Court are members of council, and religious scholars and jurists of the court (Hausa: *Mallaman Gaban Sarki*). These scholars are usually the Grand Imam and some selected Imams, retired Sharia Court Judges, and jurists who are all experts in *Shari'ah* jurisprudence. Cases are brought and heard, and they guide the Emir on where to direct the case and how to best handle it.

These scholars are headed by the Waziri/Vizier, who, though holding a hereditary title, is always a reputable jurist from the relevant family. Before the current Waziri, his grandfather, father and two uncles held the office over a period of more than 100 years. The proceedings before the Emir are diligently written in a record book by a stenographer who is also a scholar from the Waziri family. The books, going back more than a century, are all kept in the custody of the Waziri, who is the councillor in charge of the Emir's Court and religious affairs. Allen Christelow has published a study and translation of 415 cases from the days of Emir Abbas at the turn of the 20th century.[205] In the century and more since then, the Court has been stripped of its authority to hear criminal cases, and in Civil cases it lacks judicial powers and can only arbitrate, based on customary practice.

Where a matter needs the intervention of the Court or a Government agency, the Emir arranges access and a recommendation for the matter to be treated. Where a claim is already before a court of law, or has been decided in court, the Emir does not entertain it and rules that the plaintiff awaits judgement and proceed to the Appeals court if dissatisfied with the ruling, as the Emir's court has no jurisdiction to override a court ruling.

Over the years, an increasing proportion of complaints received by the Emir has been on marital matters relevant to this research. Out of 8,727 received between January 2014 and December 2016, 4,900 (56%) related to cases and women seeking assistance on marital issues such as parental obligations, matrimonial peace, domestic violence, forced marriage, and maintenance of women and children post-divorce, among others. In 2017, the number of cases was 2,323 out of 3,968 cases (58.5%), while the 2018 figure was 4,018 out of 5,697 (or 70.5%).

[205]A. Christelow (ed.), *Thus Ruled Emir Abbas: Selected Cases from the Records of the Emir of Kano's Judicial* Council (East Lansing, MI: Michigan State University Press 1994)

We will briefly give highlights of the cases below.[206]

4.8.1 *Ijbār* (Marriageable Age)

Within the period under review, 2015-2020, a total of 8 cases were reported. One interesting case involved a sixteen-year-old girl that was withdrawn from Junior Secondary School class two and forcefully married off against her wish. The Emir directed that the matter be referred to Social Welfare Ministry.[207] In another scenario a girl of 19 years reported to the Emir that her parents wanted to marry her to a thirteen-year-old boy against her wish.[208] There was also a case reported concerning a convert whose hand for marriage was sought. The Emir, however, advised the would-be groom to wait until she attained majority because she was fifteen years of age and a minor at the time.[209]

4.8.2 *Nafaqah* (Maintenance)

A recurring issue submitted to the Emirate Council is the issue of *Nafaqah*. So many cases reveal how husbands abdicate their responsibility by failing to provide for their families. Some absconded, while others failed to meet up their spousal responsibility. A total of 43 cases were reported. For example, a case was reported of a woman with ten children who was abandoned and was only given the sum of ₦500 every ten days to feed herself and the children.[210] The directives of the Emir were always to "Sarkin Hatsi," (the officer of the Emirate in charge of the Emirate's food reservoir) to give them food. For the complainants requiring cash, the Emir's directive is to the Sallama who is often directed to give them a certain amount as the Emir may direct. These are official courtiers with specified responsibilities. This is a recurring decimal because this vulnerable group comprising of women and children has been abandoned by the men on whose shoulders the responsibility rests, as mentioned above. The Emir therefore acts like a social security net providing support for the women while they sort out their issues in court. This is not enough to take care of all their needs but often deals with their immediate requirements.

An aspect of *Nafaqah* is providing medical care to spouses and children. Ten cases in this area were received and treated.[211] Some reported having been diagnosed with terminal illnesses and cannot afford the surgery bills. Others have been diagnosed but cannot afford drugs to commence or continue treatment. About 9 cases involving several persons were reported. In addition, sick women, and children whose husbands cannot afford to take care of their illnesses are reported to the Emirate Council. While in some cases, cash support is given for settling hospital bills directly by a courtier, the Dan Rimi, based on the Emir's directive, a

[206] The Record books from which these cases were drawn have been scanned and can be found here: https://drive.google.com/drive/folders/1C0ycDKv2-PFdQ17JteQvohc4gPkliYyq?usp=share_link

[207] EMIRATE COUNCIL RECORD BOOK 35, 31ST MARCH, 2015, PAGE 5

[208] EMIRATE COUNCIL RECORD BOOK 8, 13TH FEBRUARY, 2020 = 19TH JUMADA AKHIR, 1441 CASE NO.1, PAGE 172

[209] EMIRATE COUNCIL RECORD BOOK 22 13TH JUNE, 2017 = 19/9/1438, PAGE 217

[210] BOOK 30, MONDAY 22, OCTOBER, 2018, PAGE 2

[211] CASE NO. 42, 52, 56, 57, 58, 63, 66, 68, 83 FROM THE CASES COLLECTED FROM THE EMIRATE COUNCIL RECORD.

reference to the Ministry of Health, Health Services Management Board is sometimes written from the Emirate Council for necessary assistance.

Provision of accommodation by the husband is part of *Nafaqah*. Ten cases[212] involving several married and divorced women were reviewed. Some of the women were abandoned with five children without accommodation or the money to pay for rent.[213] A divorced wife to a staff member at Federal College of Education, Kano, reported to the Emirate Council that her former husband had ejected her and her six children from his house, locking them outside. In another case, a heavily pregnant but divorced lady was thrown out of her matrimonial home. Five cases of claims for clothing involving several women and children were reviewed.[214]in all these cases the Emir sends the parties to the Waziri for arbitration, failing which they are referred to the *Hisbah* or the court.

4.8.3 *Ḍarar* (Harm)

Cases of wife-beating, maltreatment and violence against women have been reported to the Emirate Council. A total of 20 cases were examined.[215] Wife-beating dominated the list of complaints relating to domestic violence. In a case, the woman came complaining to the Emir that her husband does not want children, and whenever she conceives, he resorts to beating her.[216] Usually, these cases are referred to the District Head for arbitration, or to the Court if the woman seeks divorce.

4.8.4 *Haḍanah* (Custody)

Connected to divorce cases is the issue of custody of children. Five cases were reported.[217] The husbands in some cases, forcefully remove the children in the custody of their divorced wives. Here also, the Emir facilitates access to justice through the Courts where customary arbitration at local level fails.

4.8.5 Discriminatory Treatment

Cases of husbands marrying their second wives and deserting their first wives and their children have been reported to the Emirate Council. Five of those cases were seen.[218] In a reported case, the defendant married a second wife and left her with four children, no feeding, and no clothing. The eldest of the abandoned children was nineteen, and the youngest is thirteen.[219] The other cases, the defendant abandoned the first wife for six months.[220] In these cases the first attempt is usually to ask the District Head or the *Hisbah* to admonish the husband and urge a change of behaviour. When this fails, the matter goes to Court.

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[212] CASE NO. 23, 42, 48, 63, 65, 73, 85, 93 FROM THE CASES COLLECTED FROM THE EMIRATE COUNCIL RECORD.
[213] BOOK 30, MONDAY 22, OCTOBER, 2018,PAGE 8
[214] CASE NO. 27, 48, 88, 96, 97 FROM THE CASES COLLECTED FROM THE EMIRATE COUNCIL RECORD
[215] CASE NO. 13, 17, 27, 28, 41, 50, 72, 76, 88, 96, 98, 100, 102, 103, 104, 108, 109,110,112,115 FROM THE CASES COLLECTED FROM THE EMIRATE COUNCIL RECORD
[216] EMIRATE COUNCIL RECORD BOOK 6, 2015, PAGE 97
[217] 13, 17, 64, 74, 113 FROM THE CASES COLLECTED FROM THE EMIRATE COUNCIL RECORD
[218] 10, 14, 22, 48, 70, 86,115 FROM THE CASES COLLECTED FROM THE EMIRATE COUNCIL RECORD
[219] EMIRATE COUNCIL RECORD BOOK 9, 2015, PAGE 39
[220] EMIRATE COUNCIL RECORD BOOK 5, 2015, PAGE 60

4.9 Conclusion

In this chapter, we have relied on empirical data to arrive at some understanding of the most serious marital problems faced by women in Kano State, Northern Nigeria. As indicated in the chapter opening, this analysis is essential as a basis for outlining the desired direction of reform, but also for assessing the relevance of the attempted reforms in the Draft Kano State Code of Muslim Personal Status to the condition of Muslim women in Kano.

By far the most serious problems facing women appears to be the failure of husbands to provide maintenance as required under Islamic Law. Sometimes this is simply because of a lack of protection and enforcement mechanism, compelling women to report the matter to authorities, particularly where they are divorced and with children. At other times, the general economic conditions and poverty levels make it difficult for men to maintain their families, and the lack of opportunity for earning for women makes them totally dependent on their husbands and male relatives. In many other cases, men choose, irresponsibly, to marry more wives than their earnings can support, condemning at least some of the wives to a life of penury. The muted discourse around family planning and child spacing also means there is a high total fertility rate in the state, further compounding the burden of a high dependency ratio. It is therefore clear that this problem will require a multi-faceted solution, as the legal issues cannot be isolated from harmful cultural practices, and wider questions of development policy, social safety nets, poverty alleviation, girl-child education, population control and women empowerment. Any laws made to address this issue therefore must be accompanied by the appropriate collage of social policies, as will become clearer in this study.

In the next chapter, we present legal reforms attempted by the traditional and religious leadership of Kano. We hope to determine the extent to which the draft code addressed the realities, experiences, and problems of the women in Kano State, the solutions proffered, the usefulness and limitation of these solutions, and the jurisprudential arguments behind them. This will lay the foundation for the subsequent chapter where we consider the strengths and weaknesses of a typical code underpinned by modern concepts of gender equality (the revised Moroccan *Mudawwana*). The learnings from Chapters Four, Five and Six will inform our suggestions for the way forward in Kano, both in terms of a suitable code that addresses the problems of Kano women, and the wider social and economic considerations that must be addressed for any kind of codification to have the desired reform effect.

Chapter Five: The Proposed Kano State Code of Muslim Personal Status

5.1 Introduction

This chapter focuses on the proposed Kano State Code of Muslim Personal Status (2019) as drafted by the family law committee set up by the 14th Emir of Kano, Muhammad Sanusi II (reigned 8 June 2014 to 9 March 2020). The chapter will give a detailed overview of the Emir's committee on social reforms, which had three sub-committees, namely those on Education, *Waqf,* and Family Law. It will then go into the drafting of the code, providing, in summary, the composition of the family law committee, its terms of reference, guidelines, and *modus operandi*. Next, the chapter presents an analysis of selected sections of the code, with a view to highlighting how the code addresses specific issues relating to the concerns of the modern advocates for reform of Islamic Family Law.

The data sets informing this chapter are largely unpublished. There were newspaper reports covering the setting up of the committee, and the Draft Code itself is widely distributed[1] but not yet passed into law. Fortunately, the committee did arrange a few conferences and debates around key issues and held several drafting and validation retreats which were all recorded on video. These tapes served as primary source for the transcripts that form records of proceedings and debates based on which this chapter was largely written. The transcripts and videos referred to are all available on record for review.[2]

5.2 Background to the Reforms

5.2.1 Emir's Committee on Social Reforms

On 8 August 2015, the 14th Emir of Kano, Muhammad Sanusi II, in a gathering that brought together the Kano State Governor and Government officials, the Management of Bayero University, Kano (BUK), academics, traditional Islamic scholars and title holders in the Emir's Court, at the Bayero University Council Chambers, inaugurated the main Committee on Societal Reforms in Kano. The inauguration was widely reported in the news media. The Daily Trust of 9 August 2015 reported the news with the following headline: Kano Emir Inaugurates Social Reform Committee.[3] The Committee which had Emeritus Professor Muhammad Sani Zahraddeen, the Grand Imam of Kano as Chairman, was to serve as the coordinating body for the project of societal reforms envisioned by the Emir. It had the following terms of reference:

a. To serve as the co-ordinating body on the work of the sub-committees that will be formed under it; and

[1] The Code can be found here: https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing

[2] These are in the collection of codification thesis field work materials here: https://drive.google.com/drive/folders/17cIHa-vUUMx3NOG2x50X85B6FZM0Eulq?usp=sharing

[3] See the online news website: Nigeria: Kano Emir Inaugurates Social Reform Committee - allAfrica.com accessed 17 August 2022

b. To collate the resolutions of the sub-committees and formulate final resolutions for the project.

Three sub-committees were constituted under this main committee as follows:

a. Education Sub-Committee.

b. Zakat and Waqf Sub-Committee.

c. Family Law Sub-Committee.

5.2.2 Terms of Reference

The three sub-committees were constituted under the Main Committee in view of the interconnectedness and interdependence of the social and economic problems of the society. Lack of access to education is a result of poverty and lack of opportunity, as well as a cause of breakdown of family life and values. In the same vein abandonment of family care and care for orphans, widows, and divorcees in many cases stem from (and cause) poverty and lack of access to education, especially of the girl-child. Because of these linkages the work of the committees was conceived to complement each other. The view from the beginning was that certain issues around the family could not be addressed without addressing education. Education on the other hand needs funding which private foundations could support.

The terms of reference of the family law sub-committee were given as follows:

- Study existing provisions of marriage, divorce, family support, and inheritance under *Mālikī Fiqh* and make appropriate recommendations.
- Review the reports of committees constituted for family issues to identify contemporary problems and new occurrences (*nawāzil*), and develop appropriate solutions based on *Fiqh* and social realities.
- Propose a code of Muslim personal law for possible adoption in the State.
- Study past and present traditions among Muslim societies and their approaches to dealing with contemporary family issues such as dowry and marital gifts.
- Any other issue related to Muslim personal law that the committee regards as worthy of study.

Attempts have been made previously to address the challenges of marital life and divorce in Northern Nigeria. For example, a committee had been set up under the defunct Northern Region in the early 1960s to advise the provincial government on reforms to marital issues and divorce. [4] Group Captain Ndatsu 'Umaru, who served as Military Governor of the State between December 1987 and July 1988, had set up committees to investigate the problems of rampant divorce, street begging by children and other social ills and make recommendations to Government. An edict was enacted following the recommendations of

[4] Conversation with a member of the committee, Professor Shehu Galadanchi, circa June 2018

the committee that provided for the registration of marriages and other reforms.[5] In relation to the previous attempts, the initiative that is the subject of this research stands out in several ways:

First, it set out to identify contemporary problems and new occurrences on family issues, and develop appropriate solutions based on *Fiqh* and socio-economic realities, which is a methodology that recognises the principle of changing of rulings based on the exigencies of time and place. It would study past and present traditions among Muslim societies in the world and learn from their approaches to dealing with contemporary family issues, especially the provisions they adopted in their various codes of personal status. This approach facilitates the proffering of Islamic solutions to social problems and allays the fear from some quarters of imposition of perceived western ways and practices on Muslim societies.

Secondly, because of the interconnectedness between marital and family problems, lack of education and poverty and deprivation, the initiative was designed to address the trio of marital reforms, educational reforms, and economic empowerment.

Thirdly, it had as one of its main deliverables, the introduction of a proposed Muslim Law of Personal Status for adoption by interested states in the region and beyond into their legal systems.

Fourthly, the initiative brought together traditional scholars (*ulamā)*, with their deep knowledge of classical *Malikī Fiqh* borne out of decades of teaching its principal texts; university scholars and academics specialising in *Fiqh*, legal studies, social sciences, education and psychology; retired and practising Sharia Court judges and lawyers; and women activists and social workers, economists and experts in Islamic finance; all gathered together under the umbrella of the traditional institution of the Emirate, which is widely regarded and accepted as the custodian of Islamic belief, practice and culture in Northern Nigeria.

5.3.3 Membership of the Family Law Sub-Committee

The Family Law Sub-Committee had a membership of 44. The following are the members and their profiles:

1. Dr Bashir Aliyu 'Umar,
   Sub-Committee Chairman, Associate Professor, Department of Islamic Studies and *Shari'ah*, BUK. Former Director, Centre for Islamic Civilization and Interfaith Dialogue, BUK. Currently Imam of Al Furqan Mosque, Kano, and Jurist at Kano Emir's Court. PhD, Sciences of Hadith, Islamic University Madina.

2. Prof. 'Uthman Shu'aib Nurain,
   Sub-Committee Secretary. Professor of Islamic Law and Dean, Faculty of Law, BUK. PhD Thesis: Codification of Islamic Law, Ahmadu Bello University, Zaria.

3. Alkali Sani Shu'aib,
   Retired Upper Sharia Court Judge, Kano and currently a Jurist at Kano Emir's Court.

4. Sheikh Nasidi Abubakar G/Dutse,

[5] Marriage (Customary Practices Control) Cap 91 Laws of Kano State

Dept of Arabic, Bayero University, Kano. A traditional scholar and well-known exegete of the Qur'an in Kano.

5. Sheikh Abdulwahab Abdullah,
   Imam of Khulafa'ur Rashideen Mosque, Kano. A graduate of Islamic University Madina and a well-known Mufti in dedicated Fatwa sessions of several media in Kano.

6. Prof Ibrahim Ahmad Maqqarī,
   Professor of Arabic Language, an Imam of the National Mosque, Abuja, and a member of the Consultative Shura body of the Tijjaniyyah Tariqah in Nigeria.

7. Prof. Muhammad Babangida Muhammad,
   Director, Centre of Qur'anic Science, BUK, and Professor of Islamic Studies. Imam of Bilal Mosque, Karkasara, Kano and Ameer of the National Islamic Centre, Zaria.

8. Prof. Ahmad Murtala,
   Head of Department, Dept of Islamic Studies and *Shariah*, BUK, and Professor of Islamic Studies. Imam of Dar al Hadith Mosque, Tudun Yola, Kano

9. Dr 'Umar Sani Fagge,
   Professor of Arabic, Dept of Arabic, BUK. A well-known preacher, teacher, and religious leader in Kano.

10. Dr Abdulkadir 'Uthman Ismail,
    Senior Lecturer, Department of Islamic Studies and *Shari'ah*, School of Continuing Education, BUK and Imam, Al Faruq Mosque, Kano.

11. Dr Nura Abdullahi,
    Senior Lecturer, Dept of Islamic Studies and *Shariah,* BUK and Secretary Board of Trustees of Khairat Islamic Trust, Kano, a pioneer Waqf institution in Kano. Deputy Director, Centre for Islamic Civilization and Interfaith Dialogue, BUK.

12. Prof. Nura Sani,
    Professor of Islamic Studies, Dept of Islamic Studies and *Shariah*, BUK.

13. Prof. Mustapha Ismail,
    Professor of Arabic, Dept of Arabic, BUK, a well-known women's rights activist and Director, Centre for Human Rights in Islam, Kano

14. Dr Taufiq Abubakar,
    Deputy Director, Centre of Qur'anic Science, BUK and Senior Lecturer, Department of Islamic Studies, BUK.

15. Barr Gazali Abdullahi,
    Private Legal Practitioner.

16. Barr Muhammad Muntaqa Mahbub,
    Senior Lecturer, Nigeria Police Academy, Wudil.

17. Maryam Uwais,

Senior Advisor to the President of Nigeria on Social Investments. Legal practitioner with almost 40 years cognate law experience and a socio-economic and women's rights activist.

18. Salamatu Ibrahim,
    Former Ameerah Muslim Sisters' Organisation and a retired nurse.

19. Prof. Musa Borodo,
    Professor of Medicine, Faculty of Medicine, BUK and Ameer, Al Hudaibiyya Foundation, Kano.

20. Mal Rabiu Inuwa Ibrahim,
    Hudaibiyya Foundation, Kano and former Secretary, Kano State Council of Ulama.

21. Sheikh Ibrahim Khalil,
    Chairman Kano State Council of Ulama and well-known preacher, teacher, and religious leader in Kano.

22. Sheikh Ibrahim Shehu Maihula,
    Chairman of the Kano State Hisbah Commission and former Commissioner, Kano State Shari'ah Commission. The teacher Shaikh of the legendary Malam Shehu Maihula traditional school of Fiqh and Islamic studies, specializing in the *Mukhtasar* of Khalil, and a member of the Tijjaniyyah Shura Council of Kano.

23. Sheikh Faḍlu Dan Almajiri,
    Member, Tijjaniyya Shura Council, Kano and Imam, Taibah Mosque, Rijiyar Lemo, Kano.

24. Qadi Abdullahi Waiya,
    Former Grand Qadi, Kano State Sharia Court of Appeal.

25. Muazzam S. Khalid,
    Lecturer, Dept of Islamic Studies and Shariah, BUK and Imam, Hasan ibn Ali Mosque, Kano.

26. Shaikh Abdullahi Uwais,
    Renowned Jurist and Teacher Shaikh of one of the legendary Madabo Quarters traditional schools, Kano. He is also a member of the Tijjaniyya Shura Council, Kano.

27. Saudatu Mahdi, MFR,
    Women rights advocate and Secretary-General of Women's Rights Advancement and Protection Alternative (WRAPA), Abuja, Nigeria.

28. Prof. Hassana Darma,
    Professor of Special Education and Vice-Chancellor, Khadija University, Majiya. She was a former Director of Centre for Gender Studies, BUK.

29. Barr Sa'ida Sa'ad Bugaje,
    Legal Practitioner, Kaduna, and human rights activist.

30. Prof. Binta Jibril,
    Professor of Economics and Director, International Institute of Islamic Banking and Finance, BUK. She is a former Kano State commissioner of education and a co-school proprietress.

31. Prof. Aisha Ismail,
    Professor of Political Science, and a former Director, Centre for Gender Studies, BUK.

32. Prof. Hadiza Galadanci,
    Professor of Obstetrics and Gynaecology, and former Director, Centre for Advanced Medical Research, BUK.

33. Prof. Juwairiyya Gbadamosi,
    Professor of Islamic Law, Faculty of Law, BUK and Ameerah, Muslim Sisters Forum.

34. Barr Huwaila Ibrahim,
    Private Legal Practitioner, Kano and Chairperson, Federation of Women Lawyers, and a human rights activist.

35. Mal Abdullahi Aikawa,
    Shari'ah Scholar, Kano, and Ameer of the Tajdid Movement in Kano.

36. Mal Aminu Inuwa,
    A Social Scientist and former Director-General, Public Complaints and Anti-Corruption Directorate, Kano.

37. Prof. Nasiru Ahmad,
    Faculty of Law, BUK, Professor of Islamic Law, Bayero University, Kano.

38. Prof. Musa U. Abubakar,
    Faculty of Law, BUK, Professor of Islamic Law, Bayero University, Kano and Secretary, Independent Corrupt Practices and Other Related Offences Commission, Nigeria.

39. Kadi Atiku Muhammad Bello,
    Kadi, Kano State Sharia Court of Appeal.

40. Kadi Ahmad Muhammad Gidado,
    Kadi, Kano State Sharia Court of Appeal.

41. Alkali Garba Ahmad Ibrahim,
    Retired Upper Sharia Court Judge, Kano State Judiciary.

42. Alkali Muhammad Mudatthir,
    Sharia Court Judge, Jigawa State Judiciary.

43. Alkali Habibuddeen Sulaiman,
    Retired Upper ShariahCourt Judge, Kano State Judiciary.

44. Barr Abubakar Aliyu.
    Director, Legal Aid Council, Kano State.

From the composition of the members, there is a clear dominance of traditional and academic *Shari'ah* scholars and jurists in the Sub-Committee. The academicians mainly graduated from universities in Saudi Arabia, Egypt, Sudan, and Northern Nigeria (Particularly the Bayero University, Kano). A few of these scholars hold what are considered modern and progressive

views, but the majority lean to tradition. There were eight women in the committee with about three of them having a history of constant engagement with the gender debates in Islamic Law. However, all members were sympathetic to women's rights and deeply concerned with issues of marriage of minors, girl-child education, domestic violence, arbitrary divorce, and maintenance rights. Some of the scholars in the committee have had experience not just in teaching but in arbitration bodies like the *Hisbah*. About seven members were either serving or retired Sharia Court judges, and their practical experience of real-life injustices against women means they were generally more sympathetic to major reforms than scholars dealing only with books and theory.

On balance, it is fair to say that the committee leaned towards improving the condition of women in the family and giving women additional protection by the courts. However, it was not ideologically inclined towards the modernist emphasis on gender equality as the sole objective of reform. The strong presence of tradition-leaning scholars in the committee, which was important for the output to receive legitimacy and acceptance of the public, also served as a constraint on the extent of reform. Most traditional scholars do not reject the principles of equity and fairness and kind treatment of women in marriage. However, they believe strongly that these principles are already established in classical Islamic Law, and any deviation is a result of cultural practices or a misunderstanding of the Law. The traditional view remains that the distribution of roles in the family is based on *maṣlaḥah*. Every party is assigned that to which he/she is best-suited, and this is not a matter of equality but complementarity. The draft code was therefore more aligned to the very early family codes in Morocco, such as the personal status *Mudawwana* of 1957, than to the modern Family *Mudawwana* of 2004. The limited presence of women and near absence of strong advocates of modern feminism as a Muslim discourse naturally affected the premises and end-results of the process.

5.3 Drafting the Code

5.3.1 Procedure of Writing the Draft

The drafting committee adopted the topics extracted from the *Tuḥfah*[6] as the skeleton of its draft and resolved to be guided by the Muslim personal status codes of several countries, without discrimination as to the school of jurisprudence upon which the code was developed. Furthermore, in researching the contemporary issues that the proposed code was expected to address, the earlier efforts to address the issues of marriage, divorce, maintenance and child custody and care were consulted, as well as several academic dissertations and studies on the social dimensions of these issues and their challenges in contemporary Kano society. The committee extensively referred to the standard texts of Mālikī *Fiqh*, and where the need arose the reference cut across the other schools of Islamic jurisprudence viz. Hanafī, Shāfi'ī, Hanbalī and, in limited cases, Zāhirī.

5.3.2 The Sources

For the *Fiqh* sources the drafting committee extensively relied, at a primary level, on the sources mainly used by the *qadis* in the lower, upper and Sharia Courts of appeal.

[6] See sub-section 5.3.2 below

These were:

1. *Tuḥfah al Ḥukkām* of Ibn 'Asim mentioned above and its commentary *Al Iḥkām wa al Itqān fī Sharḥ Tuḥfah al Ḥukkām* or *Sharḥ al Mayyarah* by Mayyarah al Fāsī, Muhammad ibn Ahmad (d 1072H).[7] The other commentary of *Al Bahjah fī Sharḥ al Tuḥfah*[8] of Al Tusūlī, Ali ibn Abdussalam (d 1258H) was less frequently referred to, except where the need arose.

2. *Al Risala* of Ibn Abī Zaid, Abu Muhammad Abdullah ibn Abdulrahman Al Qairawānī (d 386H) and its commentary *Al Fawākih al Dawānī* by Shihab al Din Ahmad ibn Ghanim al Nafrāwī (d 1126H)[9]. Where the need arose, these other commentaries were also referred to: *Ḥashiyah al 'Adawī 'alā Kifāyah al Ṭālib al Rabbānī*[10], by Abul Hasan Ali ibn Ahmad al Adawī (d 1189H) and *Sharḥ Zarrūq 'ala Matn al Risalah*[11] by Ahmad ibn Ahmad Zarrūq al Fāsī (d 899H).

3. Different commentaries and margins of the *Mukhtasar* of Khalil b. Ishaq al Mālikī

As for the codes, the drafting committee at every step took guidance from the following codes:

1. *Mudawwanah al Usrah* of the Kingdom of Morocco. This was extensively relied upon by the drafting committee in view of its being based, in terms of school of Islamic jurisprudence, mainly on the Maliki School.

2. *Wathīqah al Masqaṭ li al Nidhām (al Qānūn) al Muwaḥḥad li al Aḥwāl al Shakhṣiyyah Li Duwal Majlis al Ta'awun Li Duwal al Khalīj al 'Arabiyyah* (The Muscat Declaration of a Unified Code of Personal Status for the Countries of the Gulf Cooperation Council) of 2001. This code is mostly based on the Hanbali School of jurisprudence. The Committee relied upon it heavily, after the *Mudawwanah*.

3. Code of Personal Status of the United Arab Emirates. This Code as mentioned in its article 2 is based on what is most acceptable in the Maliki School, then in the school of Ahmad, then in the school of Al Shafi'i, then in the school of Abu Hanifah. Because of its strong leaning to the Maliki School, the Committee also very frequently referred to it.

4. The Code of Personal Status for the State of Kuwait.

5. Islamic Family Law (Federal Territories) Act 1984 of Malaysia (incorporating all amendments up to January 2006. It is based on the school of Al Shafi'i.

6. Code of Personal Status of Jordan of 1976. The Code is based on the school of Abu Hanifa, which is the school followed in the Hashemite Kingdom of Jordan.

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[7] Published by Dar al Ma'rifah, 1431H.

[8] Published by Dar al Kutub al Ilmiyyah, Beirut, 1998.

[9] Published by Dar al Fikr, 1995.

[10] Published by Dar al Fikr, 1994.

[11] Published by Dar al Kutub al Ilmiyyah, Beirut 2006.

7. Draft Code of Islamic Law Applicable to Muslims in India.

5.3.3 Review, Exposure, and Validation

With the development of the first draft by the drafting committee, it was agreed that the following process would be adopted before producing a final draft:

a. A review and validation of the draft by the whole membership of the Family Law Sub-Committee.

b. Exposure of the draft for comments by critical stakeholders, by convening a seminar to analyse the rulings in the draft.

c. A final validation by the Main Committee on Social Reforms; and

d. Translation of the draft from Hausa to English, while at the same time doing a third degree and final review and validation of the draft.

The review and validation by the Family Law Sub-Committee was done during two retreats in Zaria, then finalised in a series of sessions at the Centre for Islamic Civilisation and Inter-faith Dialogue of the Bayero University, Kano. A transcript of the proceedings of one of the two retreats, which covered many of the contentious issues debated, is available[12] and reference will be made to it in an analysis of some of the pertinent rulings contained in the draft.

A public debate was organised in the form of a seminar held at one of the main lecture theatres of Bayero University, Kano on 26 March 2017. This seminar debated the issue of marriage of minors from the perspectives of Islamic Law; health and mortality; education and training, as well as social relations. A transcript of the proceedings is available and will be referenced in this analysis.[13]

The Main Committee also held a validation session. The comments from these review and validation meetings were taken by the drafting committee and deliberated upon and, where required, the draft was reviewed and updated.

5.4 Analysis of Selected Relevant Provisions in the Code

The drafting of the Code sailed through the turbulent waters of jurisprudential differences of opinion, and the difficult task of weighing and arriving at a ruling (*tarjih*), at every stage of the drafting process. Some of these rulings had historically been in serious contention among jurists leading to difficulty in *tarjih*, while others required the evaluation of context, time and locality in arriving at a final position. The following is an analysis of a selection of some of these rulings.

5.4.1 Age of Marriage

The issue of setting an age for eligibility of marriage for females was one of the most contentious, if not the most contentious issue, at several stages of developing the Draft Code. The Drafting Committee, in following the footsteps of the Muslim Codes of Personal Status of

[12]See https://drive.google.com/file/d/1efNMgRIq8SoveJ6giB1CHQMDNEpvggF-/view?usp=sharing
[13] See https://drive.google.com/file/d/1oFv9vyYjV3bahixhPpzocfQwjwjzKjHM/view?usp=sharing

other jurisdictions,[14] after several debates initially decided to set an age for eligibility of marriage.

In the first draft, Article 6 stated that a man or a woman shall be of 17 years of age for eligibility to marry. The Committee based its decision on the opinion of Imam Malik as reported by Al Qurtubi[15] where he considered 17 years as the age of puberty, and therefore the age at which a guardian,(other than a father or a guardian appointed by the father and given the right to marry off a young daughter), could give a woman in marriage.[16] There was no consensus on this in classical law.

For instance, a report from Ibn 'Umar is regarded as the basis for specifying 15 years as the age of puberty by Imam Ahmad[17], as well as Al Shafi'i, and Ibn Wahab and Ibn Habib among the Maliki scholars.[18] The hadith is reported by Imam Muslim[19] on the authority of Ibn 'Umar, who said: "The Prophet, peace and blessings of Allah be upon him, examined me for participation in the Battle of Uhud when I was 14 years of age and he did not permit my participation. Then he examined me for the Battle of Khandaq when I was 15 years of age, and he permitted my participation. Nafi' said: I visited 'Umar ibn Abdulaziz when he was the Caliph and I mentioned this hadith to him, and he said: this is the dividing line between the matured and the child. He wrote to his governors to give a share of the bounty to those of 15 years of age; and that anyone below that age is to be considered among the dependants." The scholars mentioned above therefore assumed that the hadith implicitly defines age of puberty.

The drafting committee did not accept this view and, instead, followed the interpretation of this hadith by Ibn Al Arabi[20] that the Prophet was simply considering the capacity to join a battle, which had nothing to do with setting a threshold for puberty. Al Qurtubi strengthened this interpretation with the practice of 'Umar ibn Abdulaziz in considering 15 years as the age at which a person will be able to participate in battle and be entitled to a share of the booty, and not to be regarded among the dependants in this context of participation in battle.

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[14] The *Mudawwanah* of Morocco set the age for both males and females at 18 (see Article 19 of the *Mudawwanah*). It is also the provision of the Oman Law of Personal Status as in Article 7.
The Jordanian Code similarly sets the age at 18, but allows the judge to allow the marriage of someone below that age if the age is 15 and there is benefit for the person in the marriage, based on guidelines set by the Grand Judge to be followed in determining the benefits (see Article 5).
Article 8 of the Islamic Family Law of the Federal Territories of Malaysia set the age of 18 for a man and 16 for a woman with provision for exception with the written permission of the *Shari'ah* judge.
Article 30 of the United Arab Emirates Personal Status Law set the age of eligibility as age of puberty, and the age of puberty is set at 18 for the person that has not attained puberty earlier than that age under the Shari'ah.
Article 10 of the Muscat Declaration states that a person under the age of 15 may not be married without the consent of the judge.

[15] *Al Jami' Li Aḥkam al Qur'an,* vol. 5, p. 35

[16] See Al Qayrawani, Ibn Abi Zaid, *Al Risala* with its commentary *Al Fawakih Al Dawani,* vol. 2, p. 6, where it says: "It is not permissible for other than a father to marry off a woman until she reaches puberty and gives permission."

[17] Ibn Qudamah, *Al Mughni,* vol. 13, p. 176

[18] See Ibn Al Arabi, Abu Bakr, *Aḥkam al Qur'an,* vol. 2, p. 411

[19] Sahih Muslim, Hadith no. 1868

[20] Supra 5:35

During the first validation of the draft, the issue of the minimum age of marriage was heavily debated, and presentations were made by some women's rights activists and a medical expert who presented on the multidimensional hazards of early marriage, which included physical, psychological, educational, and social hazards. From the presentations, it was clear to the majority of the Marriage Sub-Committee that the dangers associated with early marriage were real and that it is the fundamental objective of the *Shari'ah* to remove harm or minimise it. Due to the objections of some scholars to minimum age, the draft was initially modified under Article 7 to replace the first draft as follows:

> A female that is below the age of 17, but some of the signs of puberty had appeared on her may be married with the permission of the judge, after consultation with a trustworthy doctor.

This was strongly objected to because of the difficulty involved in implementation. Access to courts as well as to medical personnel is extremely low, especially in the rural areas. The validation committee therefore decided to organise a public symposium to examine the following:[21]

1. What is the position of early marriage under the *Shari'ah*?

2. If it is confirmed that early marriage gives rise to the hazards highlighted, is there a basis under the *Shari'ah* for disallowing it or putting some limits to its permissibility? and

3. What are the situations under the *Shari'ah* in which restrictions could be placed on a permissible act?

The symposium was held on 26 March 2017, and presentations and deliberations were made in five sessions as follows:

Session I: Early Marriage and Its Associated Problems from a Medical Perspective

Session II: Early Marriage from the Perspective of Education and Learning in Contemporary Times

Session III: Early Marriage from the Perspective of the *Shari'ah*

Session IV: Restricting the Commission of a *Halāl* Act Under the *Shari'ah*

Session V: Early Marriage and Its Social Dimension

The medical perspective[22] presented statistics that showed a high percentage of maternal mortality mainly due to eclampsia, which is more prevalent in pregnant women under the age of 19, as well as vesicovaginal fistula. These life-threatening conditions and the social, psychological and health hazards associated with the fistula were found to be harmful[23] such that their eradication becomes a necessity (*ḍarurah*) because they are associated with

[21] See transcript, supra, pp. 1-3

[22] The debate by medical personnel is captured in the transcript, pp. 11-57. The main paper was presented by Professor Hadiza Galadanchi, Consultant and Professor of Gynecology and member of the committee.

[23] See https://drive.google.com/file/d/1oFv9vyYjV3bahixhPpzocfQwjwjzKjHM/view?usp=sharing for Galadanchi's presentation on pp. 11-27

preservation of life, which is among the five necessities the *Shari'ah* strives to protect.[24] On the other hand, others argued that instead of preventing early marriage to eradicate this harm or minimise it, serious efforts were needed to develop medical services and outreach. They argued that in advanced countries, minors do have babies through caesarean section with limited hazard to mother or baby, buttressing the assertion that the solution to the problem was medical intervention and not a social policy of prohibiting early marriage.[25] In reply, it was observed that for the past forty years, the state of medical services especially in Muslim majority states of Nigeria, has been deteriorating instead of improving. Therefore, if society were to wait for medical services to improve to prevent the high rate of maternal death and other health and social problems associated with childbirth by under-age mothers, the obvious harm to life and good living that the *Shari'ah* commits itself to eradicating would certainly not be addressed.[26]

The session on education and training also came up with interesting insights. The keynote speaker who has had extensive experience in matters relating to girl-child education, strongly supported the push for educating girls.[27] He pointed out, however, that practically all marriages of girls under 17 were in the rural areas, since the availability of schools and access to education and healthcare in the urban centres has minimized this problem in cities and large towns.[28] Analysing data from the National Bureau of Statistics, he speaker showed that although around one million boys and 900,000 girls are enrolled in primary schools in Kano State, the total number enrolling in junior secondary school is less than 261,000.[29] Only 41% and 30% of children of age make it to junior secondary and senior secondary schools, respectively. Most of these were in the urban areas, thus confirming the high proportion of minors without access to secondary schooling in rural areas. Two-thirds of rural areas in the State did not even have any junior secondary schools.[30] Even where children completed secondary education, the data showed that, in the State, only 35% to 40% of the school-leavers received a pass grade in SSCE, with one third of these coming from fee-paying private schools, which are all in urban areas. This shows that the vast majority of those who attend public schools end up failing SSCE and have no chance of becoming lawyers or doctors or engineers. Since a secondary school-leaver who cannot obtain higher qualification is not seen as being more valuable than a total illiterate, the incentive for parents to keep supporting the education of girls is not there.[31] Added to this is the fact that young men in the villages working on farms marry early (usually below the age of 20), and naturally they marry girls who are a few years younger. Parents in rural areas fear a breakdown in sexual mores where adolescent girls and boys who are not in school are allowed to live with each other freely and so tend to marry off the boys and girls and then provide the groom with his own land to till and raise his

[24] Al Shatibi, *Al Muwafaqat,* vol. 2, p. 20
[25] Transcript supra. See critical contributions by Dr Kabir Abubakar pp. 28-32, and Dr Idris Abubakar pp. 33-39
[26] Remarks by Professor Musa Borodo, ibid, pp. 40-41
[27] Ibid, paper by Engineer Bashir Adamu Aliyu at pp. 60-61
[28] Ibid, p. 63
[29] Ibid, p. 64
[30] Ibid, pp. 64-65
[31] Ibid, p. 67

family.[32] Questioning the analysis of maternal mortality and age, the speaker showed that 86.8% of women who died in childbirth never visited a hospital throughout their pregnancy, again making the point that the problem is not age of marriage but lack of access to healthcare.[33]

The speaker also provided data to show that even in the western world the age of marriage was only raised in some countries recently to 18 years and some western nations still have a lower minimum age. Also, he noted that in these European countries there is an age of consent to have sexual intercourse that is lower than the age of marriage, because pre-marital sex is not an offence. Any law based on *Shari'ah* must recognize that if a child is old enough to give consent to sex, then she is old enough to marry, because pre-marital sex is not permitted by the *Shari'ah*. Given that the average median age of first sexual intercourse in the West is 16, he detects a certain hypocrisy in criticising marriage at that age. In the UK, 250 out of every 1,000 girls under the age of 15 acknowledge having had sexual intercourse.[34] In every region of the world, poor girls are at higher risk of getting pregnant than wealthier ones with a better education.[35]

The recommendations of the paper were, therefore, the following: First, a need to recognize that children who read and write the Arabic script and the Qur'an (as many rural children do) are not illiterates. They should be provided a pathway to higher education even if it is in Arab countries. Second, the government needs to provide schooling and healthcare in poor areas and improve the quality of education. Third, the government needs to support school feeding and provide financial support to parents who allow their daughters to mature before marriage as an incentive, for example, by bearing wedding costs. [36] Although there were comments and discussion on this paper, the principal arguments and presentations were not faulted or undermined.[37]

The two sessions on age of minors and jurisprudence largely reflected the discussions in previous chapters on minimum age of marriage and restricting that which is lawful (*taqyīd al mubāh*). I will therefore not repeat the arguments here.[38]

The final session in the symposium brought together two women, Saudatu Mahdi (a woman activist) and Dr Zahra'u M. 'Umar (Deputy Commandant of *Hisbah* Corps). Dr Mahdi spoke at length on the harmful effect of child marriage on the girl and society, and the fact that many of those who marry minors are driven by nothing but vain desire. She urged those who are quick to claim that the Prophet (S.A.W) married one of his wives at a young age to remember he also married many older women and divorcees and to also copy his *Sunnah* in how he treated his wives and family.[39] As for Dr 'Umar, she drew extensively on her experience in the

[32] Ibid, pp. 68-69
[33] Ibid, p. 75
[34] Ibid, p. 77
[35] Ibid, p. 78
[36] Ibid, pp. 78-80
[37] Ibid, pp. 81-96
[38] See ibid, pp. 98-173. Refer also to the discussion on this subject in Chapter Three of this thesis..
[39] Ibid, p. 182

Hisbah especially with domestic violence. She gave many examples of abuse of young girls in marriage. There is the case of a 52-year-old man in Warawa Local Government who married a 13-year-old girl. On having forced intercourse with her he caused serious damage to her organs and showed no remorse thereafter.[40] In Dambatta Local Government a 12-year-old girl was married off to a young man but she kept leaving the house to avoid sex and he had his friend physically accost her, bring her home and hold her down while he raped her.[41] A man in Gwale Local Government beat his young minor wife for refusing sex and he fractured her arm in the process.[42] She gave several disturbing instances of cases some of which she herself handled in Minjibir, Takai and Ajingi Local Governments; the point she made was that this was a widespread problem. Her conclusion was that the issue is a serious one, as young girls are clearly more prone to being victims of such violence. Beyond the question of age of marriage, the state has a major cultural problem of a lack of regard for women and their dignity, violence, and disrespect and these would have to be addressed by any family law, with or without a minimum age of marriage.[43]

This public debate and further discussions of the committee led to a final decision not to legislate a specific minimum age of marriage. The decision was informed by a recognition that early marriage was in certain fundamental respects a reflection of very low levels of socio-economic development, poor governance, and failure of social policy. The society would need to provide alternatives to marriage in the form of access to quality education and healthcare, and support for poor families, to effectively adopt reforms that have been successfully adopted by Muslim countries which have already attained higher levels of social development. In the final draft of the Code, the marriage clause was worded as follows, despite strong reservations by reform advocates:

> 27. The marriage of a woman shall not be consummated, until she has reached the age of puberty, and she is physically and psychologically fit for consummation of marriage and has the ability to discharge marital responsibilities.[44]

The attempt to have a minimum age of 17 or 18 legislated failed in this instance. Also, it is evident that this proposal sets guidelines for consummation of the marriage and not the contract, thus clearly permitting marriage even before puberty. Also, although puberty alone is not sufficient ground for consummation, the law still does not provide an age for physical and psychological capacity, leaving this clause open to wide discretion, such that only when harm is actually done can measures be taken legally.

The committee, however, included clauses to regulate and restrict marriage of minors. Apart from the father, no one is permitted to contract a marriage for a girl before puberty, making marriage contracts for minors illegal, unless conducted by the father. The relevant section reads:

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[40] Ibid, p. 185
[41] Ibid, p. 186
[42] Ibid
[43] Ibid, pp. 186-189
[44] Section 27 of the Code
https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing at p. 15

61. Any guardian, other than a father among the guardians mentioned in Section 58 of this Code, shall not marry off a woman under his guardianship unless the following conditions are fulfilled:

a. If she reaches the age of puberty as mentioned in Section 28 of this Code.

b. If she gives her consent.[45]

As indicated above, the drafters of the code did recognize the existence of difficulties in ensuring compliance with the law on consummation, and the possibility that once a marriage is contracted, the husband may consummate marriage with a young wife who has not attained the required levels of physical development for intercourse and pregnancy. The following provisions were therefore made in section 29:

29. (1) Whoever contravenes the provision of Section 27 of this Code has committed an offence, and shall, on conviction, be liable to:

a. Imprisonment of not less than 6 months; or

b. A maximum of 20 lashes; or

c. Both.

(2) A woman who sustains an injury as a result of her husband's contravention of Section 27 of this Code shall be entitled to damages.

30. Any member of Zauren Sulhu or Hisbah shall have the right to institute a legal action against any guardian or husband or any other person who contravenes the provision of Section 27.

Section 29 (2) above is particularly noteworthy in view of the health risks associated with early marriage. By imposing both punishment for consummating marriage too early and providing for damages due to injury to be determined by the judge, the drafters have taken tentative steps towards reform and addressing concerns, even though a specific minimum age has not been prescribed. Section 30 also provides an avenue for parties other than the girl to institute action against perpetrators, considering the cultural constraints in a male-dominated society that hinder women (and girls, in particular) from seeking enforcement of their rights. In general, the level of socio-economic development and a concern for preserving traditional and religious sexual mores among the young, rather than jurisprudence per se, seem to have been the decisive factor that prevented adoption of a specific minimum age of marriage. Investment in basic, qualitative education and healthcare, especially for girls and women, is necessary and should lead to a change in this position as it has in other Muslim majority countries.

[45] Ibid, p. 21

In the next chapter, we will see that the Kingdom of Morocco, in its 2004 Family Law, set a minimum age of marriage of 18, but also allows marriage below that age for mature girls with the permission of the judge. Whereas the attempt to apply the same rules for age 17 has failed in Kano this time, this appears the likely direction for the next round of reforms.

5.4.2 *Wilāyah* (Guardianship)

Unlike other parts of the Muslim world, the broad question of guardianship was not a controversial one in Kano, as there is no feminist discourse seeking a change to the classical Mālikī position requiring a male guardian for validity of a woman's marriage. For the most part, the Law kept to the position of Maliki Law in classical jurisprudence although reforms led to a deviation from Maliki Law on the question of compulsion *(Ijbār*), using the tool of *talfiq* (syncretism).

As mentioned in Chapter Three, one of the major areas of interest for feminists and modern reformers of Islamic Family Law has been the question of a woman's consent to marriage, and the very idea of necessity for a male guardian. The idea that a male guardian is necessary for the validity of a marriage for women of all ages, and the idea that a father may marry off his daughter in certain circumstances without seeking or obtaining her consent are both seen to be unjust constraints on female agency. We will here address how the proposed code dealt with these issues.

The first question is on guardianship as a condition for the validity of a marriage contract. The differences of opinion among classical jurists are well known. The accepted position in the Maliki School is that a guardian is necessary for a valid marriage for all women.[46] Ibn Rushd mentions that this is Imam Malik's view in Ashhab's narration, although he also mentions a second narration from Ibn al-Qasim that its stipulation is recommended, not obligatory.[47] However, as stated above, the accepted position in the texts is that it is obligatory in the Maliki School. This is also the view of Imam al- Shafi'ī.[48] Imam Abu Hanifa, according to Ibn Rushd, permits a woman to contract a marriage with someone of equivalent status even without a guardian,[49]although there is some nuance to this position. Strictly speaking, the Hanafi School considers guardianship as recommended in the case of free, adult women (whether virgin or deflowered). In the case of minors and slaves and the mentally retarded it is obligatory.[50] We will not here go into details of the legal arguments for each school,[51]as we will return to it in greater detail subsequently.

As we will see in the next chapter, the Moroccan jurists (partially) adopted the Hanafi position, giving adult women the freedom to marry without a guardian or appoint who they wish to contract marriage on their behalf, while taking away the right given to the guardian to

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[46] F.H. Ruxton, *Mâliki Law: Being a Summary from French Translations of the Mukhtasar of Sîdî Khalîl with Notes and Bibliography* (London: Luzac & Company 1916), p. 92

[47] Ibn Rushd, *Bidayat al Mujtahid* (trans. Imran Nyazee as *The Distinguished Jurist's Primer*, vol. 2, p. 9

[48] Ibid

[49] Ibid

[50] See Muhammad Qudrī Pāsha, *al-Ahkām al-Shar'iyyah fī al-Ahwāl al-Shakhsiyyah* (Cairo: Dar al-Salam, 2nd edition, 2009), vol 1, p. 119, fn1 with reference to Fathul Qadir 3:255

[51] These are comprehensively covered in the literature, see Ibn Rushd, supra, vol. 2, pp. 3-7, for example.

withhold consent after the fact in Hanafi law. In Northern Nigeria, the question of guardianship per se has not been an issue for women and there has been limited debate on the question of guardianship and it is generally accepted that the guardian is obligatory. In fact, marriages in Northern Nigeria are almost always contracted without the presence of bride and groom and contracted by guardians in front of witnesses.

The proposed Kano Code, in Section 21, sticks to the classical Maliki position and provides as follows:

> 21. The constituent elements to a valid marriage contract shall be:
>
> a. The parties to a marriage.
> b. The marriage formula.
> c. The guardian to a woman; and
> d. Ṣadāq[52]

Sections 56 and 57 make further elaboration thus:[53]

> 56. No valid marriage contract can be concluded without the guardian of the woman.
> 57. Where a marriage is contracted without the guardian, such marriage is void ab initio, and the couple shall be separated by an order of the court no matter how long they have been together.

The main issue of contention in Kano, which is one of the social problems identified in the previous chapter, is the power given to the father to marry off his virgin daughter without seeking or obtaining her consent. In classical Mālikī law the father may impose marriage on his daughter who is insane (on a permanent basis, even if deflowered and a mother of children, but not one who suffers temporary insanity in which case she is treated as a sane woman in the periods when she is in control of her senses and her consent obtained if she is deflowered)[54]. He may also impose it on his virgin daughter even if she is old and not a slave; and on his young daughter who has lost her virginity (even if) due to an accident or illicit intercourse.[55] We have mentioned in Chapter Two that according to the classical texts there are two views on the old virgin (spinster/*al-ʿĀnis*),[56] and also linked Malik's position to his reliance on the practice of Madinah. The accepted position in the school, however, is compulsion for all virgins.

Dardīr specifically says a father can compel his virgin daughter into a marriage "even if she has attained the age of sixty or more". [57] So clearly for Malik, if a daughter is a virgin and/or a minor (even if deflowered), the father may impose marriage on her. For minors, al-Shafi'ī permits the paternal grandfather to give them away, while Abū Hanīfa allows other guardians that right. Malik limits the right of compulsion to the father.[58] Al-Shafi'ī also takes deflowering

[52] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing at p. 14
[53] Ibid, p. 20
[54] Dardīr, Sharh al Kabir 'ala Mukhtasar Khalīl, supra, vol. 1, p. 607
[55] Ruxton, *Mâliki Law*, supra, p. 92
[56] Al Kashnawi, A., *As-hal al Madārik, Sharh Irshād al Sālik* (Beirut: Dār al Fikr, n.d.) vol. 2, p.70.
[57] Dardīr, supra, vol. 1, p. 607
[58] Ibn Rushd, supra, vol. 2, pp. 6-7

in its literal sense, which means that a girl who has illicit sex or is raped is treated the same as one deflowered in a legal marriage, and her consent must be obtained.[59] Although Ibn Rushd suggests that in this the Shafi'ī school differs from the Maliki on this point, a close reading of Maliki texts adds nuance to this point. The author of the *Mukhtasar,* in making the point that a father may compel his *thayyib* (deflowered) daughter into marriage if she is a minor, makes it clear that this applies even if she was deflowered by accident or through rape or illicit intercourse. The alternate view possible on freedom from compulsion is one of two opinions relating to a minor girl who has had repeated intercourse such that she has lost shyness and sense of modesty.[60]

The summary is that there is, among the founders of the four eponymous schools of law, a consensus that a father may, without her consent, marry off his virgin daughter who has not reached puberty. Ibn Rushd, however, notes a dissenting opinion reported from Ibn Shubrama.[61] As for the deflowered minor, al-Shafi'ī does not allow this. For him, the cause for compulsion is virginity such that a deflowered minor or adult must give her consent. Abū Hanifa, on the other hand sees the cause as minority, so allows compulsion of minors (virgin or deflowered), but not those who have reached puberty in either category. Malik, in his turn, sees both virginity and minority as causes and permits compulsion of minor virgins and deflowered girls, as well as virgins who have attained majority.[62] The Maliki School, therefore, allows compulsion for a wider range of women and girls than other schools. However, it compensates for this by only giving the power of compulsion to the father. The other schools of law constrain the categories of women who may be married without consent when compared to the Maliki school, but grant the power of compulsion to guardians other than the father.

Confronted with the social problem of forced marriage in Kano, the drafters of the code resorted to the technique of syncretism, or *talfīq*, discussed in Chapter Three.[63] We reproduce the relevant sections (79-88) below:[64]

> 79. Without prejudice to the provision of Section 84, consent of a woman is a condition for a valid marriage contract.
>
> 80. A woman who is thayyib shall expressly give her consent.
>
> 81. In case of a virgin, her silence when asked or any other indication signifying consent by custom is regarded as her consent.
>
> 82. The guardian of a virgin shall ensure that her silence amounts to a consent.
>
> 83. No person other than the father has the right to exercise the power

[59] Ibid at vol. 2, p. 6
[60] Dardīr, supra, vol. 1, p.607
[61] Ibid
[62] Ibid, vol. 2, pp. 5-6
[63] In Chapter Three we discussed the views of scholars on *Talfiq* as being at least "highly contested", if not outright forbidden, in pre-modern times,
[64] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing pp. 25-26

of ijbār over a woman, save a waṣiy mujbir.

84. The power of ijbār can only be exercised over a woman who cannot give her consent due to her incapacity on account of her immaturity or mental retardation, where the father or waṣiy mujbir considers marriage to be in her best interest.

85. Where a father or waṣiy mujbir uses his selfish interest in exercising the power of ijbār, the court shall revoke the marriage.

86. Where a father or waṣiy mujbir exercises the power of ijbār over a woman who by this law is not subject to ijbār, such a woman has the right to seek redress before the court.

87. Where a person who has no power to exercise ijbār as provided by this Code exercises it over a woman, the woman has the right to challenge it before a court.

88. Where the court is satisfied that a woman who is married without her consent is not subject to ijbār as provided by this Code, the court shall revoke the marriage without giving the husband the chance of reconciliation.

In keeping with the position of Imam Malik, consent is considered obligatory in all cases, with only the father given the power, in section 83, of *Ijbar* (compulsion), to the exclusion of other guardians, except one whom the father has explicitly granted that power through delegation (the *wasiy mujbir*). Section 80 requires the explicit consent of the deflowered female (*thayyib*), including minors. In this the drafters deviated from the Maliki (and Hanafi) position on deflowered minors and adopted the Shafi'ī view which grants a deflowered minor freedom from compulsion. In the case of virgins, section 84 restricts compulsion to minors or those who are insane, thus again deviating from the Maliki (and Shafi'ī) schools and adopting the Hanafi position which grants agency to all women who have attained majority, including virgins. Using this syncretistic method, the Code therefore departs from the classical Maliki position, by granting adult virgins and deflowered minors the right to give consent before marriage and granting the courts powers to annul all marriages contracted without consent except as outlined in the code and by the persons empowered to compel. Worthy of note is that, while restricting the range of women who can be married off without their consent, the drafters did not follow other schools in granting the power of compulsion to guardians other than the father or *wasiy mujbir*.

We however note a certain inconsistency between the sections above and earlier sections of the law dealing with insane persons. Read together, even fathers lose the power of compulsion over their daughters by reason of insanity without a court order. The relevant sections are:

25. No valid marriage contract can be concluded by or for an insane

person, except with the order of a court.

26. A court shall only permit the marriage of an insane person under

the following conditions:

a. Consent of the guardian.

b. The other contracting party having been aware of the state of insanity consents to same.

c. Confirmation from experts that the insanity shall not lead to harm or endanger the life or property of the other contracting party.

d. Confirmation that the marriage is in best interest of the insane.

Thus while not entirely taking away the powers of *Ijbar* from fathers, the law not only limits it to a subset of women previously affected, it sets guidelines to ensure that such a marriage is in the interest of the minor and not in the selfish interest of the father. The law gives the court the power to annul any marriages contracted by fathers without the consent of their daughters, if it is established that this was not in the interest of the daughters. To this extent the new code marks significant progress from the present situation, which is based on the much wider and less regulated and restrained powers given to fathers to take away the agency of women and their consent, even after reaching age of puberty and beyond.

5.4.3 Domestic Violence/Wife-beating

In Chapter Three, the question of wife-beating was discussed within the general discussion of its jurisprudence, pointing out its problematic nature since, while the Qur'an permits it, Prophetic traditions constrain, discourage, and even prohibit it, leading to a range of views among scholars. In Chapter Four, we showed that although the Maliki jurists lean towards restraint on men's power to beat their wives, in practice the strict guidelines around wife-beating are rarely adhered to by the perpetrators in the area of study.

The classical texts set out clearly the steps to be taken in the event of wifely *nushūz* (intransigence, disobedience). Dardīr explains *nushūz* as failure to abide by legally binding obedience, such as refusal to allow the husband sexual access without cause; or going without his permission to places she knows he has not permitted her to go to; or non-compliance with religious duties like ritual purification after intercourse or menstruation or not being steadfast in daily prayers; or locking him out of the house or her rooms.[65]

The *first* step, according to the *Mukhtasar* and based on the Qur'anic injunction, is admonition (*wa'z*). This is described as exhortation and reminder in a format that "softens the heart" towards obedience and avoiding wrong-doing.[66] If this fails*, then thereafter* (*thumma*) the next step is desertion (*hijr*) which refers to distancing himself from her bed in the hope that this will make her return to obedience.[67] If this fails, *then thereafter* (*thumma*) he is permitted to beat her with a non-harmful beating (*ḍarb ghayr mubarrih*). This is one that does not break

[65] Dardīr, *Sharh al Kabir*, supra, vol. 1, p.702
[66] Ibid
[67] Ibid, vol. 1, p. 703

a bone or distort any of her features.[68] Dardīr states that in using the term "*thumma*" (and thereafter), the author of the *Mukhtasar* has made it clear that these steps are sequential, and the husband cannot move to one step before completing and seeing the results of previous ones. In other words, if she changes with admonition, he has no right to desert her bed and so forth. In addition, he is not allowed to beat her in any injurious manner even if he knows that this is the only way she will abandon intransigence. If he harms her in this way she is entitled to divorce and retaliatory compensation (*qisās*).[69] For the light-beating, even that is only allowed if the husband believes it will serve the purpose. If he has any doubt as to whether light beating will make her change then his options are limited to the first two, and he may not even beat her lightly. In other words, it is not enough to think that beating may make the wife change. The husband needs to be certain that light beating will yield the result desired of returning her from intransigence.[70]

Where a husband violates these guidelines (and beats her lightly before going through the preceding prescribed steps or beats her in a harmful way) then, if she seeks the court to stop him (but does not seek divorce) the court also takes three steps. First, the judge admonishes him to fear God and treat his wife justly and stop maltreating her. If this fails, he directs her to stop availing herself to the husband sexually for a period. If this fails, and if the judge is convinced that beating the husband will make him stop beating her, he directs that the husband is beaten.[71]

Despite the above provisions for calling the husband to order, if the wife asks for divorce on account of harm it is her right, and it shall be granted. [72] Harm here has been defined to mean a type that is not permissible in the *Shari'ah*, such as deserting her bed without just cause, cursing her or her parents, (and on this he is to be disciplined in addition to annulment of marriage), or compelling her to have anal intercourse, or intercourse while menstruating, as examples.[73]

We have shown from data in Chapter Four that harm, especially wife-beating, is a major social problem in Kano as the records before the courts prove. We also noted in Chapter Three the view of the Maliki scholar, Ibn 'Ashur, that in keeping with the sources of Maliki jurisprudence, permitting wife-beating must take cognizance of custom ('*urf*).[74] We live in a century where, world-wide, beating wives is viewed as humiliating and disgusting and as such one would have expected the drafters of the Kano code to make any kind of beating unlawful. This could have been achieved in the draft law by refraining from giving the option of beating any kind of positive mention. Unfortunately, while clearly setting out the limits of beating and the

[68] Ibid
[69] Ibid
[70] Ibid
[71] Ibid, in the *Mukhtasar* and Dardīr's commentary the two steps mentioned in the case of husband are admonition and beating. However, *al Dasūqī* includes step 2, desertion by the wife, both for consistency and also because his longing for her may be even more powerful a corrective than beating. See *Tahsīlāt al Dasūqī* in the margins of Dardīr's *Sharh al Kabir*, ibid. [vol. 1, p. 703
[72] Ibid vol. 1, p. 704
[73] Ibid
[74] See al-Mūs, *Taqyīd al Mubāh*, supra, p. 269

consequences of abuse, and making it a ground for annulment, the very fact that the proposed law permits beating opens the door to a continuation of domestic violence, most of which is unreported.

In fairness to the committee, the draft sections clearly define limits of beating to the extent that, if complied with, harm and abuse would be eliminated. The real risk is not in the wording of the law, but the principle of permitting husbands, based on religious law, to discipline wives by beating, no matter how lightly, in the Kano environment. For many Muslims, especially those in poor, rural areas and those with little education, the idea that a man can beat his wife to discipline her is all that they understand, with very little understanding of all the complex rules around this provision. Even where there is such knowledge, once beating takes place in anger the likelihood of compliance with limits diminishes, as we have seen in practice. Despite robust debates in the Sub-Committee, conservative jurists insisted that wife-beating, properly done in line with the law, is discouraged and contrary to the ideal, but still permissible in the *Shari'ah*. The arguments on *'urf, taqyid al mubāh, and sadd al dhari'ah,* which were covered earlier in this thesis, did not sway them. They therefore stuck to Maliki *fiqh*, instead of relying on Maliki *usul al fiqh* to come up with *ijtihād* that would lead to a major, and much-needed reform. We produce below the relevant sections of the Draft Kano code:

240. Doing any of the following shall be considered as nushūz on the part a wife:

a. Refusal to obey her husband where she is required to do so by the Shari'ah.

b. Denial of sexual relations without lawful justification.

c. Leaving her matrimonial home without the permission of her husband or lawful justification.

d. Refusal to discharge religious obligations.

e. Locking the husband out or imprisoning him.

f. Infidelity on the part of the wife or fraud in his property.

g. Any other unacceptable behaviour of the wife which a court may deem as nushūz.

241. A nāshiz wife shall not be entitled to maintenance as provided in Section 177 of this Code.

242. A husband whose wife is nāshiz may take the following measures in sequential order:

a. Admonish her in order to desist from the nushūz and become obedient, or request a person of high esteem in her sight to so admonish her;

b. Desert her on bed, provided it does not exceed four months;

c. Beat her lightly, not in a severe manner, with handkerchief,

chewing stick or small piece of cloth, as a symbolic way of correcting her, PROVIDED

i. The face and other sensitive parts of the body are avoided;

ii. The light beating will not lead to any injury, wound or bruises;

iii. He is certain that the light beating will serve the purpose of correcting her.

243. Where it is certain that the light beating will not serve the purpose, the husband shall not resort to it.

244. Where the light beating under paragraph (c) of Section 242 injures the wife or resulted to any injury, the wife shall have the right to claim compensation.

245. Where a husband beats his wife in a manner not permitted under paragraph (c) of Section 242, whether it resulted to injury or not, she shall have the right to seek for divorce and claim compensation.

246. Where a husband beats his wife and injures her or results to injury, a court shall convict him under either Section 162 or 163 of the Kano State Shari'ah Penal Code, 2000. This also applies where a wife beats her husband in the same manner.

247. A husband shall not take a measure as listed under Section 242 on his nāshiz wife unless he is certain that the preceding measure will not be effective.[75]

It is evident that the committee did an excellent job of capturing the letter of Maliki jurisprudence on constraining husbands and protecting wives from harm. The Code also gives abused women ample redress apart from annulment, including compensation for harm and criminal prosecution of the abusing husband. It is fair to conclude that the drafters were not so much interested in preserving the right of husbands to beat their wives as in protecting wives from violence that is prohibited the *Shari'ah*, at least according to the Maliki School, which frowns at even the smallest harm as mentioned in Chapter Four.

Best intentions notwithstanding, it is rare for a husband who beats his wife, usually in anger, to have the presence of mind to look for a "handkerchief, chewing stick, or small piece of cloth" and avoid slapping or even punching or kicking her, which are the forms wife-beating takes in practice. In certain instances, whips and canes and pieces of wood have been used, often causing grievous harm as we saw in chapter 4. If the objective is to minimize wife-beating, a far more effective signal is to outlaw it completely and communicate same widely, such that husbands are simply taught that wife-beating is against the law and a punishable offence irrespective of circumstances.

[75] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG5.6 0OX-bd/view?usp=sharing, pp. 54-56

This is in fact the recommendation of Ibn 'Ashur in his exegesis of the Qur'anic verse 4:34. After setting out all the problems and risks associated with wife-beating of any kind, he concludes as follows:

> Based on this, our position is that: it is permissible for those in authority, when they see that husbands are not good in exerting punishments appropriately, nor observing the limits thereof, to prevent them from using this punishment, and to declare that whoever hits his wife will be punished. This is to prevent aggravation of harm between couples, especially in situation of weakness of the quality of restraint.[76]

The committee missed the opportunity to do the above.

5.4.4 Discord

In Chapter Four, we saw that from the 5-year data of the 9 courts analysed, almost 20% of cases on family law had to do with marital discord (*Shiqāq*). We also noted that 30% of cases seeking divorce were on account of discord. Of these, almost 70% were for "lack of peace in the marital home", and another 25% had to do with expulsion from the home. In cases of discord, it is difficult to establish harm before the courts, which has led to many women being compelled to resort to ransom payment to end the marriage via *khul'.* It is also almost always the case that both parties tend to blame each other for the lack of peace with the truth always somewhere in the middle, that is, both parties contribute to the discord although one may be more blameworthy than the other. It is for these reasons that the Qur'an sets out a path of reconciliation (*sulh*), involving two arbiters to make peace, and only when that fails should there be recourse to separation.[77]

Dealing with discord has been one of the challenges of codification. Reformers and women's rights groups have been concerned that women are unable to exit unhappy marriages unless they can prove harm or pay ransom. We shall see in the next chapter that in Morocco, the *Mudawwana* was amended to provide for "judicial divorce (*tatliq*) on the ground of discord", principally to make it possible for women to escape this problem. We will also show how this change has resulted in an elevated rate of divorce and increasing breakdown in the family, with consequences for children. The reality of marriage is that discord is bound to happen, and reconciliation, patience and support of the community help preserve the unit and protect the interest of children.

In its attempt to deal with discord, the Kano Committee, to its credit, recognised the need to provide a clear framework for reconciliation and arbitration, recognizing that judges in general are trained to interpret and apply the law and not be peace makers in marital disputes. Even when they have the talent for this, the time to reconcile so many quarrelsome couples is not there, so the cases invariably end in divorce. We shall see in Chapter Six that this has in fact been the unfortunate consequence of the new provisions in Morocco where, although in theory the judge is supposed to undertake reconciliation before divorce, this process rarely yields the desired outcomes, because of the absence of a clear process and arbitral institution.

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[76] Ibn 'Ashũr, Muhammad Al Tahir, *Al Tahrir wa Al Tanwir* (Tunis: Dar Al Tunisia li al Nashr, 1984), vol. 5, p. 44

[77] Qur'an 4:35

In Kano, the role of arbitration has traditionally been done by community elders, traditional rulers/religious leaders and the *Hisbah*. We saw this in detail in the last chapter. Building on this experience and aiming to strengthen arbitration and preserve the marriage institution, the drafters of the code stressed not just the importance of the two arbiters but provided for an arbitration and reconciliation council (Hausa: *Zauren Sulhu*) which is the point of contact for settling disputes. In this way, the drafters, based on the Qur'anic injunction, recognize the importance of reconciliation, as opposed to adjudication, in such cases and provide an innovative framework for peace-making that seeks to address grievances while giving the marriage the highest chance of survival. This is in keeping with the spirit of the *Shari'ah,* and its general objectives (*Maqāṣid*), as they apply to the institution. The *Zauren Sulhu is* structured at the ward level which is the nearest point to the family, with elders and respected neighbours who are familiar with all parties, reducing the cost and logistical effort involved in going to court. By making this provision all over the state, there will be enough reconciliation councils for all disputes, unlike the court process where the judge will have difficulty reconciling so many families in addition to the normal judicial workload.

The strong emphasis on arbitration in disputes is one of the strengths of this code, and only when this fails will the marriage be annulled. Interestingly, members of the *Zauren Sulhu* are to be appointed by the Governor on the recommendation of the Emirate Council, thus effectively giving legal backing to the Emir's Court and incorporating its reconciliation and arbitral processes into the judicial process. All ward heads in the state are appointed either by the Emir directly or by his appointed District Heads. Similarly, all Imams of Friday mosques across the state are appointed directly by the Emir on the recommendation of District Heads and after being examined and interviewed by the Grand Imam of Kano. These representatives of the Emir undertake reconciliation and arbitration, and where this fails at ward level, escalate the matter to the level of the Village Head, District Head or to the Emir. The inclusion of *Zauren Sulhu* therefore integrates the infrastructure and personnel of the Emirate Council and Emir's Court into the judicial arbitration process, strengthening the traditional system and conferring powers on it via the courts. By including a representative of *Hisbah*, the three institutions studied in this thesis and covered in Chapter Four are innovatively brought together in a seamless process.

We reproduce below the relevant sections of the Code:

> 253. Where a claim of maltreatment and injustice among the spouses could not be proved and the relationship continues to deteriorate and unabated a court shall appoint two competent arbiters (ḥakamān) one from the relations of the wife and the other from relations of the husband, and where they cannot be sourced from the relations of the spouses, others may be appointed or the dispute shall be referred to Zauren Sulhu of the ward where the spouses reside.
>
> 254. A court may refer the dispute directly to Zauren Sulhu instead of appointing the arbiters.
>
> 255. Zauren Sulhu under this Code is hereby established for each ward in the State and shall have the following membership:

a. Ward Head as Chairman;
b. Chief Imam of the Ward;
c. A person learned in the Shari'ah and social matters;
d. A respectable old man;
e. A respectable old woman;
f. Representative of Hisbah Commission.

256. Members of Zauren Sulhu shall be appointed by the Governor on the recommendation of the Emirate Council.

257. Zauren Sulhu shall have the following responsibilities:

a. Mediating in disputes between spouses and family members;
b. Requesting a court to appoint a guardian in respect of orphans without guardians, abandoned and vulnerable children;
c. Requesting a court to order the distribution of the estate of a deceased where one of the heirs is exposed to harm on account of lack of or unjustifiable delay in the distribution of the estate;
d. Any other responsibility assigned to them by this Code, a court or any other law.

258. In the cause of settlement of marital disputes, regard shall be given to the following:

a. Zauren Sulhu shall co-opt a representative of each spouse whenever dispute affecting them is in issue;
b. Zauren Sulhu may invite any competent person to assist in settling the dispute.

259. Where one of the spouses delays to appoint a representative as arbiter for no justifiable reason, and the court appoints someone for the defaulting spouse, such a spouse has no right to challenge the appointment except with cogent and acceptable reasons.

260. The court may specify a time frame to the arbiters for the settlement of the dispute, but the arbiters may seek for an extension of the time frame.

261. The arbiters shall trace the root cause of the dispute and exert their utmost in resolving the dispute, under the supervision of a court.

262. Where the arbiters are unable to settle the dispute, and they establish that harm is being perpetrated by the husband and the wife is seeking divorce on that ground, or where both of them are seeking the dissolution of the marriage, the marriage shall be dissolved through one bā'in divorce.

263. Where the harm is being perpetrated by the wife, the arbiters shall dissolve the marriage through khul'.

264. Where the harm is perpetrated by each of the spouses the arbiters shall dissolve the marriage without compensation to any one of them, or where the harm perpetrated by her exceeds that of the husband, they shall dissolve the marriage with compensation to the husband commensurate with the harm perpetrated by the wife.

265. Where the arbiters are unable to determine who is blameworthy among the spouses and it is the husband who is seeking for the dissolution of the marriage they shall dismiss his application, BUT where the wife or both the spouses are seeking the dissolution of the marriage the arbiters shall dissolve it without any compensation.

266. Any unanimous decision of the arbitrators shall be treated as valid and binding.

267. Whatever decision is reached by the arbiters shall be reported to the court for endorsement and execution.

268. The spouses or their guardians shall have the right to appoint their own arbiters or to refer their dispute to Zauren Sulhu for settlement, and the decision of the arbiters or Zauren Sulhu shall be valid and binding.

269. The arbiters appointed by the spouses or Zauren Sulhu shall investigate the root cause of the dispute and exert their utmost to settle the dispute in the same manner required of the arbiters. appointed by a court.[78]

We will see in Chapter Six that the Moroccan reforms have in comparison turned out to be weak on this score, as the provisions of divorce on grounds of discord have not been accompanied by strong arbitral arrangements leading to the unintended consequence of rapid increases in rates of divorce, with its negative implications.

5.4.5 Divorce

Divorce has been a major area of concern for reformers and feminist movements. Some of the concerns have to do with the lack of financial security for women after divorce. Others have to do with the vulnerability of women to arbitrary repudiation by their husbands, while they, on the contrary, find it difficult or impossible to exit loveless marriages. Several techniques have been applied to address some of these concerns in the Muslim world.

The first is the non-recognition (in some jurisdictions) by the State of any divorce that is not before a court or at least registered with the approval of the court. In approving this registration, the judge is thus availed the opportunity to ensure that the interest of all parties, especially the wife and any children, is fully taken care of. This, as we shall see in the next chapter, is the path chosen by Morocco. We will discuss various implications of this in this chapter and the next.

[78] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing pp. 58-61

Linked to this is the second technique, which is to estimate and impose financial penalties and maintenance costs on the husband to provide financial security to the wife and make these judicially enforceable. These costs not only take cognizance of the wife's needs and the husband's means, but also the circumstances leading to the divorce and whether it is deemed justified or frivolous.

A third, and now very common device, is the adoption of a minority view in classical jurisprudence, which treats multiple divorces pronounced at the same time as a single divorce. This view, principally associated with the views of the Hanbalī scholar Ibn Taimiyya and his followers, is based on sound jurisprudence but deviates from the unanimous position of the four eponymous Sunni schools of law. Its adoption provides husbands who hastily pronounce multiple divorces the opportunity to reconsider and continue with the marriage, and thus wives are given additional protection and security.

We will now turn to the Kano Code and see how it adopted, or failed to adopt, these devices and techniques, and why.

On the question of making divorce conditional upon registration and approval by the courts, the committee saw the benefit of that for the wife but felt constrained by what it saw as the clear Sunnah. The fundamental stumbling block is the Tradition of the Prophet (S.A.W) reported by Abu Huraira thus:

> Both earnestness and jest are earnest in three things: Marriage, divorce and the bringing back of a divorcee into matrimony (*raj'ah*)[79]

The implication of this Hadith is that once a husband pronounces divorce, even in jest, the woman is divorced. Thus, even if a requirement is made in Law for registering a divorce, failure to do so does not change the fact of divorce. We will in the next chapter discuss some of the arguments put up by defenders of the ban on extra-judicial divorce in Morocco. Surprisingly, no one seems to have given serious consideration to the very strong argument of Saidzadeh, which we reviewed in chapter 1 during our discussion of Mir-Hosseini's work. Saidzadeh had linked the question of divorce to protection and argued that where the State-and not the husband or clan- is responsible for protection it can assume the power to approve divorce.[80] It is a brilliant argument but needs wide ventilation and acceptance among jurists.

The reform in Morocco, however, resulted in negative unanticipated consequences, as we will see in chapter 6. If a man divorced his wife a hundred times without registering it before a judge the State would not recognize the divorce. This means couples considered divorced under religious law continue living together and bearing children legitimately under what is effectively a civil law. Even if the wife left the husband, she would be entitled to inheritance. Moreover, if a man divorced his wife and came to register it, he would be asked to pay her financial entitlements within a limited period. Failing this, he would be considered to have retracted or retreated (*tarāja'a*) from the decision to divorce her. This concept of

[79] Reported by Abu Dawud, *Al Sunan* Hadith no. 2194; Al Tirmidhi, *Al Jami* Hadith no. 1184, and Ibn Majah, *Al Sunan*, Hadith no. 2039.

[80] Mir-Hosseini, *Islam and Gender,* supra pp 268-272

retraction/retreat (*tarāju'*), unlike that of *raj'ah* (bringing a divorcee back into marriage), has no basis in the *Shari'ah*. In the case of *raj'ah*, the marriage subsists but the divorce counts as one divorce. In the case of *tarāju'*, the divorce is considered as something that never happened. It is an unprecedented innovation which, to the jurists who oppose it, simply opens the door to calamitous consequences, with the State allowing, or compelling people to live in unions not considered lawful under Islamic law.

The drafters of the Kano Code maintained the classical position of recognizing a divorce as valid be it verbalized or written or registered or effected by a wife who had had the right delegated by the husband, and all the ways in which divorce is considered to have occurred in the *Shari'ah*:

> 292. Divorce may be one, two or three in number.
>
> 293. Three divorces may be made in one pronouncement or at different intervals or pronouncements.
>
> 294. Divorce may take place through any of the following ways:
> a. Direct pronouncement;
> b. Writing;
> c. Indication that bears the implication of divorce where he is unable to pronounce or write the divorce;
> d. Indirect pronouncement implying divorce if the husband intends it to be divorce.
>
> 295. Divorce may be a divorce of sunnah or a divorce of bid'ah [81]

This does not stop the divorced woman from seeking compensation and redress from the courts, or the judge from imposing financial and other penalties on the husband especially if he was frivolous or malicious in the divorce.

> 350. A divorcee shall be entitled to mut'ah al ṭalāq from her former husband.
>
> 351. In determining the quantum of mut'ah al ṭalāq the following shall be considered:
> a. The gift shall be sufficient to save the divorcee from vulnerability;
> b. The gift shall be reasonable to console the divorcee;
> c. The financial status of the former husband.
>
> 352. Mut'ah al ṭalāq for a divorcee in a raj'ī divorce is given at the end of the 'idda. Where it is given before the end of the 'idda and the husband returns her into matrimony, he forfeits the right to take back the gift.
>
> 353. Where the divorce is a bā'in one, the mut'ah al ṭalāq is paid to the divorcee immediately after the divorce.
>
> 354. Maintenance during 'idda is not a substitute to mut'ah al ṭalāq, therefore a woman who is entitled to maintenance during 'idda is also entitled to mut'ah al ṭalāq.
>
> 355. A woman divorced before consummation and prior to fixation of ṣadāq shall be entitled to mut'ah al ṭalāq, but not ṣadāq.
>
> 356. Mut'ah al ṭalāq shall not apply in cases of divorce at the choice
> (takhyīr) of the wife, khul', li'ān, void marriage, or in any similar instance.

[81] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing p. 67

> 357. A woman whose marriage was judicially dissolved on account of harm (ḍarar) or deception on the part of the husband, shall be entitled to mut'ah al ṭalāq. [82]

In making *mut'ah ṭalāq* compulsory the committee shifted from the majority view in Maliki Law that it is recommended, to a minority view which is closer to the Shafi'ī School, as discussed in Chapter Two. This was a case of exercising discretion and making a choice (*takhyir*) among various opinions, a technique discussed in Chapter Three of this research. If the judge directs payment of divorce Mut'ah and a husband who has the means refuses to pay, the assumption is that the judge has recourse to the provisions of the Law in the case of Maintenance (*Nafaqah*). The amount shall be considered a judgement debt, and the judge may dispose of wealth and assets belonging to the husband and take any other measures necessary to ensure compliance, as in the case of Maintenance.

It is reasonable to say that in terms of strict compliance with the principles of *Shari'ah*, the position of Kano scholars is better than that of the *Mudawwana*. Without breaching the rules on divorce, the provisions of Mut'ah and the powers of pursuit under *Nafaqah* allow the courts to provide the needed redress and protection for the divorcee. The Moroccan jurists could have attained their objective without resorting to the objectionable innovation of *tarāju'* or *retraction*, which is unknown to Islamic Law.

On the final technique, that which concerns triple divorce in one pronouncement, the Kano Code provides as follows:

> 309. The court shall affirm three divorces made by a person in one pronouncement as three divorces.[83]

This is the position of the four schools of *Fiqh*, contrary to the position of Ibn Taymiyyah and Ibn al Qayyim and the contemporary scholars that follow their opinion, which was based on the Hadith of Ibn 'Abbas as reported by Muslim:[84]

> Divorce during the time of the Prophet, peace and blessings of Allah be upon him, Abubakar and two years of the reign of 'Umar, was that pronouncement of three was regarded as one. Then 'Umar ibn Al Khattab said: 'people have hastened that which they had the chance to give careful consideration (before executing)'. As a result of that he gave effect for it (to be regarded as three).

The committee followed the opinion of the four schools and reviewed and accepted the arguments in its support as copiously elucidated by Ibn Hajr and Muhammad al Amin Al Shinqiti: [85]

In keeping to this position, the scholars have not towed the line of many jurisdictions, including Morocco, which accepted the minority view of Ibn Taimiyya. Apart from being backed by a sound hadith, this view is more consistent with the general interest and objectives of the *Shari'ah*. The idea of two opportunities to restart a broken marriage before separation

[82] Ibid, pp. 78-79
[83] Ibid, p. 71
[84] Muslim, Hadith no. 1472
[85] See the arguments in Ibn Hajr, Ahmad ibn Ali, *Fat'h al Bari*, vol. 9, pp. 362-367; Al Shinqiti, Muhammad Al Amin, *Adwa al Bayan,* vol. 1, pp. 104-141.

after the third breakdown is clear and sequential in the Qur'an and is aimed at preserving the marriage institution, permitting couples to reflect and, if they so desire, make a new effort at being together in the interest of the family. Especially in modern times when the consequences of broken homes are there for all to see, one would think the committee in Kano here lost an opportunity to accept a reform that would have been beneficial to society at large.

5.4.6 Polygyny

We stated in Chapter Three that a major area of advocacy for women's groups and modernist thinkers has been for the elimination or restriction of polygyny. The technique for this, as mentioned, has ranged from outright ban or criminalization to the introduction of very strict conditions that sometimes render it virtually impossible. These include, for example, proof of financial capacity to maintain multiple families; consent of the existing wife and the proposed one to live in a polygamous family; proof of a reason or justification that is acceptable to the court.

Before discussing the position taken by Kano jurists on codifying polygyny, it is perhaps important to note that monogamy and polygyny in the modern world are cultural phenomena. Whereas polygyny is becoming rare in many parts of the world, it is a common practice in sub–Saharan Africa, and particularly common in West Africa. Moreover, polygyny is not only common to the Muslim parts but to Christian populations of all denominations. Indeed, many churches have tacitly turned a blind eye to multiple marriages under customary law from their members.[86] When comparing the position taken by Moroccan scholars with that taken by Kano scholars, it is important to bear this fact in mind.

The scholars in Kano were driven more by a desire to protect women in a traditional family setting than by an ideological drive for a modern concept of gender equality in marriage and overturning of "patriarchy". Chapter Four also revealed that the cases brought by women living in polygamous homes to *Shari'a Court*s and arbitration entities were mainly to do with inequitable treatment, injustice, and denial of rights. Indeed, in her study of Muslim Hausa women in Kano, Barbara Callaway noted that "a girl's first marriage is commonly made to an older man who may already have one or more wives".[87] Some of her observations may be dated now, and rather not well thought through, such as "romantic love is not … part of an Islamic marriage" and it is "unusual to find a Muslim woman disappointed in a marriage if the husband is a good provider",[88] but her reading of polygyny as a common and normal practice among the Muslim Hausa and in particular in Kano where she did her research remains valid to this day. This context is important.

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[86] See for example, Victor Agadjanian, "Condemned and Condoned: Polygynous Marriage in Christian Africa*", Journal of Marriage and Family,* 82(2) (Apr 2020): 751-758; Victor Agadjanian and Alex C. Ezeh, "Polygyny, Gender Relations and Reproduction in Ghana", *Journal of Comparative Family Studies* (2000) 31(4): 427-441

[87] Barbara Callaway, *Muslim Hausa Women in Nigeria: Tradition and Change* (New York, NY: Syracuse University Press, 1987), p. 36

[88] Ibid

There is a history in Kano of modern scholars challenging the legitimacy of polygyny, concubinage, women seclusion, and marriage of minors. In 1956, Mallam Isa Wali, an Arabist from a traditional family of scholars published a series of articles in the Nigerian citizen, challenging the traditional view on these issues.[89]His position was rejected by most Kano scholars. A leading jurist, Sheikh Muhammad Nasir Kabara, published a refutation in which he defended the classical position in Islamic law on these matters.[90]

It is fair to say that most scholars and jurists in Northern Nigeria accept the key arguments of the Sheikh Kabara on polygyny. First, they believe it is lawful for a man to marry one, two, three or four wives at his own discretion and that neither monogamy nor polygyny is recommended over the other. Second, the Prophet and many companions and hundreds of scholars in generation after generation have been polygamous and all of them have considered polygyny lawful and, in some cases even preferable to monogamy. Third, they reject the interpretations of some modern scholars of the verses around justice as failing the basic tests of good exegesis. The modernists seem to argue that God *knows* that men can *never* do "justice" among wives[91] and yet, knowing that it is impossible, he still permits them to marry multiple wives, leaving it to them to be monogamous if they fear that they will not do "justice".[92] This is an interpretation that leads to absurdity. If God held that justice to be beyond human capacity but still a pre-requisite for lawful polygyny, God would have simply made polygyny unlawful. The only credible exegesis is that the term "justice" (*'adl*) used in both verses has a different meaning in each context, as explained in the Prophetic traditions. For this reason, to ban polygyny or criminalize it on this basis is unacceptable.

The Committee therefore did not even consider the possibility of banning polygyny. However, it noted the challenges and injustices faced by women and addressed them in two principal ways. The first was in setting out prerequisites for polygyny as follows:

> 170. A man is entitled to marry from one to four wives, provided he satisfies the following conditions stipulated by the Shari'ah:
> a. Ability to maintain justice among the wives; and
> b. Ability to provide maintenance for the wives [93]

The committee therefore restricted itself to the classical requirements for lawful polygyny. However, it is noted that the ability to do justice is not something that can be judged, and this is something that comes up in the context of marriage. No court can ascertain before a man marries a second wife that he is able or unable to do justice. The second point, provision of maintenance, is something that can be judged from the circumstances of the husband and the expected minimum living standards of the wives. However, the code makes no provision for

[89]see https://drive.google.com/file/d/1oRwD2aalRma6-OI-1QbgkFqq8mJd5B-6/view?usp=sharing for Isa Wali's articles and writings on him
[90] Kabara, M. N., al-Qanabil al-Zarriyya fi al-Radd 'ala Isa Wali (Kano,: Kanzu Press, 1376 A.H.)
[91] Qur'an 4:129
[92] Qur'an 4:3
[93] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing p.40

who ascertains this and what process is to be followed. This is a weakness in the legislation as it cannot be enforced.

The second effort at addressing the challenges faced by women in polygyny tried to address the psychological trauma and conflicts arising from wives living together and sharing amenities. The Code provided thus:

> 194. Where a husband has more than one wife, he shall not make them share accommodation in a single house with common facilities such as toilet, kitchen and the like, except with their individual consent.[94]

This was based the opinion of Khalil ibn Ishaq in his book *Al Taudih*,[95] which is a commentary of Ibn Al Hajib's *Al Mukhtasar*. Even though this was largely a non-contentious point in the committee, one of the scholars, Sheikh al Qasiyuni Kabara (son of the afore-mentioned Sheikh Nasir Kabara) argued that this clause would make it difficult for ordinary people to marry at a time when women were roaming around waiting for husbands, and when social mores were degenerating. He agreed that wives should not be compelled to share dwellings, but rejected the view that their consent was required to share common facilities. For his opinion he relied on Ahmad Baba's refutation of Khalil on this point, where he held that Khalil had no precedent on this from the opinions of Maliki jurists.[96]The Committee however opted to go with Khalil on this, given the frequency of conflicts brought to judges resulting from sharing of private spaces like toilets and kitchens and living areas. Again, although the provision is commendable, there was no mention of how it would be monitored, implemented, and enforced. The benefit of these clauses is they now allow women to sue husbands who want to marry additional wives and are not of means, at which point the judge would be bound to ascertain means. But considering that the permission of the court is not required to contract a marriage, nothing is said about what happens when a man without means goes ahead to marry multiple wives and the matter comes to court after the fact. Similarly with sharing spaces, the option left to the woman is to accept it after the fact or seek a divorce. Either way, without further amendments, it is not evident that these provisions are sufficient to address even the limited reform objectives set by the Committee for itself.

5.4.7 *Nafaqah* (Maintenance)

As we saw in Chapter Four, the most frequent complaint filed by women before courts against husbands has had to do with lack of maintenance. The Committee set out the components of maintenance as follows:

> 171. A wife has a right to maintenance on her husband which includes:
> i. Feeding
> ii. Clothing
> iii. Shelter

[94] Ibid, p. 45

[95] Khalil ibn Ishaq al 'Askari, *Al Taudih* (Dublin,Markaz Najibawaihi,2008, 1st edition), vol. 4, p. 260.

[96] See Al Dasuki, Muhammad ibn Ahmad ibn Arafah, *Hashiyah al Dasuki ''ala Sharh al Kabir*, (Beirut, Dar al Fikr), vol. 2, p. 342 for the statement of Ahmad Baba.

iv. Necessary household items
v. Medical care including pre-natal and post-natal care
vi. Necessary cosmetics
vii. Basic religious knowledge
viii. Any other necessary and life enhancing provision in accordance with prevailing custom in the locality [97]

The committee simply codified what is existent in classical jurisprudence, albeit exercising the principle of *takhyir* (preferential choice) by including medical care as part of obligatory maintenance. The Committee followed the various extant codes in this.[98] The popular position in the four schools of Fiqh is that medicine and doctor's fees are not part of maintenance[99] although there are dissenting minority views including in the Maliki School. Al Shawkani of the Zaidi School makes it obligatory for the husband to pay for medicines to protect her and preserve her health.[100] A strong view in Maliki Law is that the husband "need not provide his wife with medicine; but he must pay the doctor. The husband need not provide his wife with finery".[101] Ibn Abd al Hakam, among Maliki jurists, holds that doctor's fees and medical care are obligatory on the husband.[102] According to Wahba al Zuhailī this opinion in the Maliki School is the reason that the Egyptian Code of 1985 regarded medical care as obligatory maintenance on the husband.[103]

The view of most classical jurists was based on an unfortunate analogy that compared the wife to a leased accommodation. Just as a tenant is not obligated to repair the apartment, the argument goes, the husband who is entitled to benefit from the use of the woman's body is not responsible for preserving its health![104] To the drafting committee's credit, members agreed with dissenters who considered this analogy a false one, with leases based on one party outwitting the other, while marriage is a contract based on honour. The Committee thus adopted the position of regarding medical care as an obligatory part of maintenance, which is not the well-known (*mashhūr*) position that is regarded as the expression of the Maliki school.

The committee also averted its attention, after serious debate, to a cultural practice where the bride's family spends a lot of money, for example, on beds, furniture, and kitchen equipment when the daughter gets married. Indeed, in Hausa land the bride's family seems to bear a disproportionate burden of wedding costs. The *ṣadāq* tends to be very low while the

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[97] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing p. 41

[98] Oman, Article 44; Mudawwanah Article 189; Muscat Declaration, Article 45; UAE, Article 63; Jordan Article 66.

[99] See for the Hanafi School: Al Zabidi, Abu Bakr in Ali, *Al Jawharah al Nayyirah 'ala Mukhtasar al Qaduri*, (Al Khairiyyah Press, 1322 A.H.) vol. 2, p. 84; For the Maliki School: Ibn Shas, Abdullah ibn Najm, *'Iqd al Jawahir al Thaminah fi Madhhab 'Alim al Madinah*, (Beirut, Dar Al Gharb al Islami, 2003, 1st edition, ed. Dr Humaid ibn Muhammad Lahmar), vol. 2, p. 601; For the Shafi'i: Al Ramli, Muhammad ibn Ahmad, *Nihayah al Muhtaj Ila Sharh al Minhaj* (Beirut. Dar al Fikr, 1984), vol. 7, p. 195. For the Hanbali: Ibn Qudamah, Muwaffaq al Din Abdullah ibn Ahmad, *Al Kafi fi Fiqh Al Imam Ahmad* (Cairo, Dar al Kutub al 'Ilmiyyah, 1994, 1st edition), vol. 3, p. 233.

[100] Al Shawkani, Muhammad ibn Ali, *Al Sail al Jarrar Al Mutadaffiq 'al Hada'iq al Azhar,* (BeirutDar Ibn Hazm, 1st edition), p. 460

[101] Ruxton, *Maliki Law*, supra, p. 148

[102] Muhammad 'Ulaysh, *Minah al Jalil* (Beirut, Dar al Fikr 1989, 1st edition), vol. 4, p. 394

[103] Al Zuhailī, Wahbah ibn Mustapha, *Al Fiqh al Islami wa Adillatuh*, (Damascus: Dar Al Fikr, 2014), vol. 10, p. 7381.

[104] Ibid, p. 7380.

bride's family spends many times that amount. This has resulted in poor fathers going round begging or going into serious debt or even running away when it is time to marry off their daughters. Most people, not knowing that this is a cultural practice, do not understand that the bride's parents have no obligation to furnish her home beyond the value of the *ṣadāq*, and if they choose to do so it is either a voluntary act of kindness or a loan to be repaid. In the *Tuhfatul Hukkām*, Ibn al Āsim says: "A well to do father is not compelled to furnish his daughter with household items out of his wealth on her marriage; A *Thayyiba* shall similarly not be compelled to furnish her house with anything outside her dowry."[105] Because the imposition of this burden especially on the poor has become a major social problem in Kano, the Committee considered it appropriate to integrate this clarification into the Code thus:

> 172. Guardians of a woman are only required to provide household items equivalent to the value of the ṣadāq given to the woman. Any addition thereto either from the personal wealth of the woman or the guardian, is discretionary.[106]

The proposed code sets out the obligations for maintenance, which consider the financial capacity of the husband; standard of living of the wife; prevailing customary practice in the locality and general economic conditions.[107] It also lists the circumstances under which maintenance may or may not be forfeited.[108] The judge is empowered to use the husband's assets and wealth for maintenance where the husband with capacity to do so travels without providing same, or compute the amount and count it as a debt payable on his return.[109]

In dealing with the case of inability to provide maintenance, the Committee remained faithful to classical jurisprudence thus:

> 195. Inability to provide maintenance means where a husband becomes unable to discharge his marital obligations under Section 171 of this Code.
>
> 196. Inability to provide maintenance relieves the husband from the obligation of maintenance, the moment he is adjudged incapable.
>
> 197. Inability of a husband to provide maintenance shall be a ground for his wife to seek for divorce, unless the wife was aware of the said inability before the marriage contract.
>
> 198. Where a husband is unable to provide maintenance, and upon application by the wife seeking for divorce, a court shall order him to:
>
> a. Provide the maintenance or divorce her;
>
> b. Discharge the obligation of providing maintenance within sixty (60) days or whatever period the court deems appropriate;
>
> c. Where the period of grace expires and the husband is unable to discharge the obligation and refuses to divorce the wife, the court shall order for a raj''i divorce.

[105] See Machika, *Guide to Advocates*, supra, p. 182.
[106] https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing p. 41
[107] Ibid section 174, p. 42
[108] Ibid sections 175-185, pp. 42-44
[109] Ibid Section 186, p. 44

> 199. (1) Where a court ordered for divorce on the ground of inability of the husband to provide maintenance, but he subsequently becomes capable, he has the right to return her into matrimony with or without her consent, provided she has not completed her 'idda.
>
> (2) Where the wife agrees to return to him despite his inability to provide the maintenance, the husband may take her back provided she has not completed her 'idda.
>
> (3) Where the wife has completed her 'idda, she can only return to the husband on a fresh marriage contract.[110]

The major weakness in the code on maintenance is the failure of the drafters to avert their minds to steps that could be taken before annulment even where the husband is unable to fully pay for maintenance. For example, in the environment of poverty and economic hardship if the husband falls on hard times but the wife has means, there is no option, as in some other jurisdictions, for her to be compelled to maintain herself and her children even if as a debt on the husband. Later in this thesis, we look at various options available in other Schools of law that ought to be considered so that the institution of marriage is kept intact, and the family is not quickly broken up because the husband faces financial difficulties. Also, we will see how in Morocco, the State set up a family fund from which women who have a court ruling on maintenance can draw funds, and these count as a debt on the husband. Such social security arrangements would go a long way in prolonging marriages for men who are genuinely in financial difficulty and are not ready to break their marital ties.

In our view, this section of the code is not sufficiently robust to address this major social problem, especially with empirical evidence showing it is the most serious one facing women. There is a need to strengthen the jurisprudence behind the law on this score, and we will make recommendations in the appropriate section of the thesis based on rulings of jurists outside the Maliki school. We will also stress the importance of institutions of support and poverty alleviation as necessary complements to the law.

5.5 Conclusion

In this chapter, we reviewed the process leading to the production of a draft Family Code in Kano State and analyzed selected areas of the Code relevant to this research in great depth. We started by providing a background to the establishment of a Committee on Social Reforms by the Emir of Kano, which focused on three inter-related areas: Education, Voluntary Foundations/Endowments, and Family Law.

Having discussed composition and terms of reference for the Family Law Committee, we proceeded to a discussion of the procedure for drafting the code, the sources relied upon and the validation process. In our analysis of the various areas of the code selected, we relied on transcripts of the Committee's deliberations as well as symposia and validation meetings. These transcripts were prepared from video recordings of these sessions and the videos and transcripts are available in the folder entitled Codification Thesis Fieldwork Materials.[111]

[110] Ibid, pp. 46-47

[111] https://drive.google.com/drive/folders/17cIHa-vUUMx3NOG2x50X85B6FZM0Eulq?usp=drive_link

In analyzing selected areas of the Code, we have tried to remain focused on both the areas that are of concern to feminist and women's rights movements and those that represent the most serious problems faced by women in Kano, even if they do not receive much attention in other Muslim majority environments at more advanced levels of socio-economic development. What is clear is that the composition of the drafting committee (mostly dominated by elderly male, traditional jurists, judges, and scholars); the levels of socio-economic development; the strength of feminist movements and discourses; the influence of western modernity and the emphasis on traditional values all come into play in determining what code is produced. In Kano, the focus was on enhancing the protection of women in a traditional Muslim family and not on gender equality and a struggle against "patriarchy". This starting point naturally leads to certain predictable outcomes when viewed against Muslim feminism or the legal reforms in other Muslim countries such as Morocco.

The analysis tried to link the chapter with other parts of the research. We brought in references to the sources of Islamic Family Law discussed in Chapter Two as well as the codification techniques and jurisprudence of reformers discussed in Chapter Three. We also linked the draft code to the case made for reform based on data analysis in Chapter Four to assess where possible, the extent to which the draft code would effectively address the highlighted social problems. Finally, in anticipation of Chapter Six, we brought in some comparative analysis with the *Mudawwana* of Morocco.

The analysis showed that the proposed Code is very strong on some points and weak in others and anticipates some of the recommendations that will come up in Chapter Seven on the future of the Code. In the next chapter we will use the results of field work and interviews conducted in Morocco to further compare the position of Kano and Moroccan scholars. We will try and present jurisprudential arguments on the Moroccan side and examine the strengths and weaknesses of selected parts of the *Mudawwana* when compared to the Kano code. In all this we bear in mind that Moroccan reforms were driven by a quest for gender equality, and for reconciling Islamic Law with modern international treaties, subject to red lines and boundaries set by the Moroccan King.

The combined learnings from this chapter and the next will provide us with guidance for Chapter Seven where we will look at the future of the code in Kano, the areas that need to be reworked and the implementation challenges that need to be considered for the law to serve its purpose. We will thereafter conclude and summarize the entire thesis in Chapter Eight.

Chapter Six: A Comparative Analysis with the Family Law of Morocco

6.1 Introduction

In laying out the research methodology for this thesis in Chapter One, it was indicated that in addition to Islamic legal and socio-legal methods, there would be an element of comparative legal analysis between the proposed Kano state Code(2019) and the Morocco Family Code (2004).[1] It was noted that this comparative analysis would be an instrument of learning and knowledge, through which the research would aim to understand what lessons could be learnt by the two jurisdictions, each from the other. Relying on Patrick Glenn[2], we listed the following as the main aims of comparative law:

5) An instrument of learning and knowledge
6) An instrument of evolutionary and taxonomic science
7) A contribution to one's own legal system, and
8) An instrument for harmonization of laws

Bearing the above in mind, comparative analysis should lay the groundwork for the evolution of the Kano Code and gain insights, from the Moroccan experience, which should contribute to the further refinement of the Law in Kano, the subject of the next chapter. These insights, as the research has indicated so far, pertain both to changes that are desirable in the Law and things to view with some caution in view of the experience of Morocco and some unintended (or unanticipated) consequences.

In Chapter Five, our review of the proposed Kano State Code of Muslim Personal Status already anticipated some of the discussion in this chapter by comparing some of the key provisions with what obtains in the Moroccan Family Law of 2004. This chapter will extend that discussion by laying out the arguments underpinning the legislation in Morocco, the internal debates around some topics in Morocco itself and the jurisprudential and practical implications of the Law. Before we go into these matters, however, it is apposite that we provide some justification for the selection of Morocco as the comparative jurisdiction, provide a brief context to the Moroccan code, and explain the data sources for this chapter. The materials for this chapter were gathered during fieldwork conducted in Morocco from December 2022 to February 2023.

6.2 Justification for the Selection of Morocco

Trading links between the Maghreb and Sub-Saharan Africa go back to the days of Carthage but with the emergence of Islam these links also took a religious dimension as scholars from the Islamic West joined caravans for the purpose of spreading the religion to the sub-Sahara, especially during the period of the Almoravids (*al-Murābitūn*) and Almohads *(al-*

[1] The terms "Mudawwanah" or" Mudawwanah al-usra" wherever used in this chapter refer to the Moroccan Code of Family law, 2004. All references to "the code", "the family code", "the Moroccan family code"," the 2004 code" also refer to this code. Where the Kano code or another is intended this will be made clear in context.
[2] H. Patrick Glenn, "The Aims of Comparative Law," in Elgar *Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar Publishing, 2nd edn 2012), p. 57.

Muwahhidūn). Studies of the history of Kano record the role played by the Tlemcen scholar, AbdulKarim al-Maghīlī, who came to Kano in the fifteenth century during the reign of Sarki Muhammadu Rumfa (reigned 1463-1499). He played a major role in guiding Sarki Rumfa on the organization of the State along Islamic lines and wrote him his famous treatise *Taj al-din fī mā yajib 'alā al-mulūk* (translated to the "crown of religion concerning the obligations of kings"). This small book, sometimes referred to simply as "the obligations of the princes", is considered a guide to good government in line with Islam. The Nigerian scholar, Sheikh Adam Abdallah al-Ilorī, compares this work to the classical Abbasid political guide, *al Ahkām al-Sultāniyya* of Māwardī.[3] He also wrote a *Wasiyyah*, (literally a will but in this case advice and admonition to a ruler), addressed to Sultan Rumfa, which Al-Ilori compared to "the Letter of the Caliph 'Umar to Abu Musa al-Ash'ari on the matters of adjudication or the Letter of Hasan al-Basri to Umar Ibn Abd al-Aziz on the attributes of the just Imam or Malik's letter to Harun Rashid…."[4]Al-Ilori notes that Abdullahi Ibn Fodio reproduced this letter in his works *Tanbih al-Ikhwan* and *Diyā' al-Siyasah*.[5] This is all in addition to providing rulings (some from his earlier stay in the Songhai Empire as guidance to King Askia) which had a great influence on the thoughts of Sheikh 'Uthman Dan Fodio, the leader of the early nineteenth-century jihād in West Africa.[6]

Because Islam came to most of Northern Nigeria principally from the Maghreb, the two societies have had a long history of cultural and civilizational interaction. For example, the Tijjaniyya Sufi Order, which has the largest following in Nigeria and most of the sub-region, was founded by Sheikh Ahmad Tidjani who was born in Algeria and lived and died in Fez, Morocco and whose tomb remains a Mecca of sorts for millions of his followers. More relevant to our analysis, the entire region subscribes to the Maliki School of Law, and the training of scholars and jurists over centuries has been based on the same texts and sources. Even the recitation of the Qur'an in West Africa is from the recension of Warsh from Nafi', and written in the *Kufan* script, just as in Morocco. Theologically, traditional scholarship in both societies is committed to the Ash'arite School, and consistently opposes the recent ascendancy of Salafi-Wahhabism whose origins are from Hanbalite jurisdictions.[7]

The influence of the Maghrebi scholars on the spread of Islam and the Arabic language in West Africa was the subject of a published lecture delivered by Sheikh Al-Ilori at the *Durūs Hassaniyya* in Rabat, in the month of Ramadan, 1410 A.H. (1990 A.D.).[8] In this work al-Ilori

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[3] Al-Ilori, Adam Abdallah, *Al-Imam al-Maghili wa āthāruhū fi al-hukumah al-Islamiyyah al-qurun al-wusta fi Naijiriya,* Cairo (Maktaba Wahba), 2012, p.42. Al-Ilori reproduces al-Maghili's book in pp 49-62.

[4] Ibid p 41.

[5] Ibid, Al-Ilori also reproduces the Letter in ibid pp42-48.

[6] Al-Maghīlī's influence on Dan Fodio is well documented. One of Dan Fodio's pamphlets, *Sirāj al-Ikhwān*, is almost entirely composed of the replies of al-Maghīlī to the queries of King Askia Muhammad Ali of Songhai. Al Ilori reproduces Maghili's fatwas to the Emperor of Songhai (ibid at pp 62-70), as well as references to Dan Fodio quoting maghili in his works (ibid at p25)

[7] Al-Sayyid Muhammad Rifqī, "Ramziyyah Imarah al-Mu'minīn Hamiyah al-Qiyam al-Islamiyya", opening lesson for year 2012, Muhammad I University. (this is an unpublished lecture and I thank Professor Ibrahim Maqqari of Bayero University, Kano, for availing me with a copy).

[8] Al-Ilori, A. A., *Āthār al-Magharibah fi Nashr al-Islam wa al- 'Arabiyyah fi Gharb Ifriqiyyah*, Cairo, (Maktaba Wahba), 2016 (Beingthe published text of a lecture delivered at the *Durūs Hassaniyya* in Rabat, Ramadan 1410 A.H./1990 A.D.

makes a distinction between two kinds of Salafist thought- Eastern and Western.[9] The Salafism of the East (*Salafiyyah al-Mashriq*) was exemplified by Imam Ibn Hanbal, and some scholars in the Hanbali School like Ibn Taimiyya, Ibn al Qayyim, Ibn al- Jawzi and Ibn Abd al-Wahhab. This Salafism is characterized by a strong emphasis on hadith, a preference for literalism and rejection of metaphors and allegories in the attributes of God, strong opposition to Sufism, the study of logic and theology, opposition to intercession through the Prophet or saints, and other features that are commonly associated with contemporary Salafi-Wahhabi thinking.

By contrast, the Salafism of the West (*Salafiyyah al-Maghreb*) draws inspiration from Maliki (and Shafii and Hanafi scholars, but not Hanbalis). The scholars are theologically adherents of the Ash'ari school and invariably Sufis. They believe in intercession and are committed to the Maliki School in Fiqh. Al-Ilori argues convincingly that the Islam of West Africa was influence by this second type of Salafism and the scholars of the region, like those in the Maghreb are all Malikis and Ash'aris and Sufis. Another distinguishing element is that Western Salafism has a history of commitment to social reform and admonition of leaders to justice, whereas many of the Eastern Salafi scholars were known to criticize other Muslim groups but carefully avoid holding political leaders to account or confronting bad leaders.[10]

According to al-Ilori, the major learning centres of al- Azhar in Egypt, al Zaytuna in Tunis and al-Qarawiyyin in Fez all remained faithful to this western Salafism. From the Maghreb, Islam was spread to West Africa starting from Abdallah Ibn Yaseen and his successors who led the Almoravid movement, then came the works of scholars like Ibn Abd al-Barr al-Qurtubi, Al-Qadi Iyad (author of the famous al-Shifa'), Abu Madyan, Ibn Abi Hamza, Ibn al-Hajj, al- Jazuli, Ahmad Zarruq, Abd al Aziz al-Dabbagh and al-Shatibi. All these scholars and others unnamed were "Malikis, Ash'aris, Sufis, and missionaries and these are the scholars who influenced the *ulama'* of Nigeria and West Africa with their Salafism to the present day".[11]

Eastern (Wahhabi) Salafism is thus a late entrant to the region, and al-Ilori produces evidence refuting the allegation, (originally emanating from Thomas Arnold in his book- *The Preaching of Islam*), that Uthman Dan Fodio was influenced by Ibn Abd al-Wahhab's ideas. Instead, he shows, with clear proofs, how the former was influenced by Maghrebi scholars and quoted them in his works.[12]

Given these historical ties, commonality in schools of law and theology, and strong interaction between the regions, Morocco is a natural choice as a comparative jurisdiction to Kano for the purpose of this research. Because both Kano and Morocco are Malikite jurisdictions, there are several levels of analysis in comparing the two codes. At the basic level, we shall examine the jurisprudence and the arguments based on which the Moroccan law adopted positions that vary with those of Kano jurists. We will rely on interviews with jurists and judges and academics in Morocco, in addition to extensive secondary literature on this area. A second level is comparison of the structure and composition of the committees that drafted the respective codes, the mandates given to the committees and the ultimate objective of the

[9] Ibid pp 29-36 is where this discussion can be found.
[10] This criticism has been labelled by scholars against Ibn al Jawzi and Ibn Taimiyyah, for example see ibid p 32
[11] Ibid p 35-36. Quote at p 36
[12] Ibid pp 37-43

codification exercise, as explanatory factors for differences. We will highlight the impact of the intensity of feminist discourse in Morocco, which is itself a cultural phenomenon tied to the level of education of women, and the penetration of western, secular and modernist thought in the country. A society with a strong and vocal feminist movement is more likely to push legislation in a liberal direction regarding gender equality than one without it. A third level is the level of socio-economic development, the investment in basic education and healthcare, and the availability of State support for the poor and social safety nets. As we analyze the responses of interviewees, we will come across these variables in isolation or combination explaining differences between codes. Without pre-empting the conclusions from the research, it will be apparent that codification is not just an objective process of setting out rulings from religious texts, but one that is imbricated in a system of social relations, influenced by entrenched relations of power between men and women in the *social imaginary*, a sociological term that "suggests the ways people imagine their collective existence together…(and)…the expectations-and morality-of collective daily life."[13]

6.3 Brief Context on the Moroccan Family Code of 2004

The Moroccan Family Code in its latest version was issued in February 2004[14] at the end of a process that took place under guidance of the King (Mohamed VI). As stated in the preamble, the King assembled religious scholars, and men and women "from a diversity of profiles and fields, to conduct a fundamental review of the personal status code".[15] The directive of the King to this committee was to maintain fidelity to the provisions of religious law, while making use of *ijtihād* (juridical reasoning)[16]…"taking into consideration the *spirit of our modern era* and the imperatives of development, in accordance with the Kingdom's commitment to *internationally recognized human rights*".[17](Italics mine). Evidently, this Law would be based not just on the *Shari'ah*, but on international conventions on rights to which Morocco is signatory, to the extent that these do not contradict established and unambiguous divine laws. We shall see later how this guideline expanded the scope of *ijtihād* and permitted the council to move away from the 1957 Personal Status Code on several fronts.

The path to the Family Code of 2004 (hereinafter: "the Code") was a long one and has been traced for us by Khamlīshī.[18] Brief highlights of the preceding era should place the Code in better relief. Khamlīshī begins by reminding his readers that judges, strictly speaking, apply

[13] Plummer, K., *Sociology: The Basics*, (Routledge, 3rd edition, 2022), p 91

[14] References to the Code are from Human Rights Education Associates (HREA), *The Moroccan Family Code* (*Moudawana*) *of February 5, 2004: An unofficial English translation of the original Arabic text*, (Washington, Global Rights, 2005). I thank Dr Hassan Ibrahimi who availed me a soft copy of this document and which can be found here: https://drive.google.com/file/d/1DzsYe89caIRUP2Fttfs1zQpONrYElHoD/view?usp=sharing

[15] Ibid. p. 2

[16] For a detailed study of the use of *ijtihād* in producing this code see Yavuz, M., "The Role of *ijtihād* in Family Law Reforms of Modern Muslim-majority States: A Case Study of Morocco", (Unpublished PhD thesis, Department of Law, SOAS, London, 2017).

[17] The Code, pp, 2-3

[18] Ahmad al-Khamlīshī, *Min Mudawwanah al-Ahwāl al-Shakhsiyyah ilā Mudawwanah al-Usra*, (Cairo: DarAlkalema), 2015. See vol. 1, pp. 9-62. Khamlīshī is the Dean of the Dar-al Hadith al Hassaniyya in Rabat, a prominent jurist and member of the committee that reviewed the Personal Status Code 1957 to produce the Family Code 2004.

the law and are not lawmakers. This applies to Islamic Law the way it does to secular laws. In Islamic Law the judge applies the "*Shari'ah*", and this comes from two principal sources. The first is that which is stated explicitly (*mansūs 'alaihi*) in the Qur'an and Sunnah. The second is that which a *mujtahid* derives/deduces/infers (*yastanbitahu al-mujtahid*) from these two sources.[19] After laying out the different levels of scholarship up to the *mujtahid* in pre-modern times, he then points out, quoting Ibn Khaldun, that by the fourth century A.H. a general view was forming that there were no scholars worthy of the title of *mujtahid*, although Khamlīshī pointed in a footnote that this was a theoretical position. In practice, the books of jurisprudence and the judges relied on the *ijtihād* of jurists of the ninth *hijrī* century and beyond for their rulings.[20]

In any event, the strong skepticism about latter-day scholarship led to a view, based on classical Maliki jurists like Khaliīl and al-Zurqānī, that judges must be restricted not only to the Maliki School, but to that which is well-known and reputed (*mashhūr*), or that which has been preferred based on the balance of arguments, being considered the weightier (*al-rājih*). The Moroccan superior courts ruled that even where a Qadi based a ruling on the Qur'an or authentic *Hadīth*, the ruling was to be set aside if it contradicted the *mashhūr* or *rājih* in the Maliki School.[21] This was the situation at the time the Moroccan Code of Muslim Personal Status (*Mudawwanah al-Ahwāl al-Shakhsiyyah*) was promulgated at independence in 1957.

We will not go into a discussion of the 1957 Code, which has been replaced. However, several points need to be made to enable us to understand why the 2004 code would diverge from the 1957 code on some key points. These points also would explain why the Kano Code bears close similarity to the 1957 code and why, even within Morocco, some traditional jurists were deeply opposed to some of the reforms in the 2004 code.

The first point is on the major reason behind the 1957 Code, and the objectives it aimed at. The idea of a codified Islamic Law was part and parcel of a nationalist drive for independence. We have already, in Chapter Three, discussed the views of the nationalist, 'Allāl al-Fāsī and his (nuanced and cautious) support for codification. Indeed, the royal decree setting up a committee for codifying the rulings of Islamic Law (*al-Ahkām al-Fiqh al-Islāmī*) came on 19 August 1957, barely five months after independence from France.[22] The objective was to codify in a clear and encompassing manner these laws to make their application easy and consistent and protect the interest of litigants, thus guaranteeing excellent justice. According to Khamlishi, the leadership of Morocco wanted to reclaim the nation and "free it from the law of Christians who did not believe in Allah and His Messenger and did not follow the true religion".[23] In 1957 therefore, the objective was to codify an "authentic" Islamic family law clearly different from Western, Christian and secular laws while in 2004 the objective was to attain some synthesis between the two opposed worldviews.

[19] Ibid, p. 10
[20] Ibid, p. 11, fn 1
[21] Ibid, pp. 12-14
[22] Ibid, pp. 23-24
[23] Ibid, p. 25

The second point to note is that the 1957 committee was made up of ten members only in addition to the Minister of Justice who chaired its deliberations.[24] However, the members of the committee were drawn from graduates of al-Qarawiyyīn University (in Fez) which, like similar institutions in the Islamic world at the time, deferred to the rulings of *fiqh* perceived as deductions from the Qur'an and Sunnah and revelation of the will of Allah. In other words, the members considered *fiqh* the law of Allah.[25] Indeed, the intellectual climate of Morocco at that time was one in which there was no distinction between *"fiqh"* and *"Shari'ah*". The two were considered identical,[26] and the concept of *fiqh* being an interpretation through a human medium that may be questioned or set aside or altered had not gained ascendancy.

The third point is that the 1957 committee had a very short time in which to complete its work. Having dissolved customary courts and replaced them with *Shari'a Court*s, it was recognized that the judges had limited knowledge of *Shari'ah* and there was a need to expedite the production of a codified *Shari'ah* for their use. According to the Ministry of Justice, the draft sections on Marriage and Divorce were submitted on 19 October 1957 (exactly two months after the committee was constituted). Seven of the members met on 6 November 1957, and again for two days beginning 13 November 1957, at the end of which the law was finalized. Khamlīshī argues that Marriage and Divorce are among the most nuanced subjects in Islamic Law and completing these sections (comprising 82 articles) in two days is indicative that the committee was denied sufficient time for reflection and refinement.[27]

The final point is that the committee was explicitly guided to abide by the Maliki School as much as possible. It was felt that if the law was to be for Morocco it was necessary to base it on "what is *rājih*, *mashhūr* or known practice in the Maliki School".[28] This is very much like the implicit guidelines the Kano committee worked with. In the few instances where the Moroccan code deviated from the Maliki School, the influence of the Syrian code was evident.[29]

Taking all these points together, the 1957 code was produced by traditional jurists to simplify the law for a new generation of judges and to assert the Islamic character of the newly independent state. It was faithful to traditional Maliki *fiqh* which was seen as synonymous to the *Shari'ah* (or Divine Law) and did not base itself on sources outside Islamic Law.

The Family Code of 2004, on the other hand, aimed at reconciling Islamic Law with international treaties and modern conceptions of women's rights and gender equality. This distinction is important. The consultative committee set up to review the law was not dominated by jurists but designed to reflect Moroccan society. It had human rights' activists, feminists, civil society organizations and Islamic jurists, which resulted in some jurists condemning some of its provisions. A prominent member, Sheikh Muhammad Qāsim al-Ta'wīl, one of the most respected jurists of al-Qarawiyyīn, withdrew from the committee in

[24] Ibid, p. 24
[25] Ibid p 25
[26] Ibid
[27] Ibid, p. 26
[28] Ibid, p. 24
[29] Ibid

frustration and wrote several books laying out the "correct" position of the *Shari'ah* on many subjects and criticizing many of the innovations in the Code.[30]

The directives given to the 2004 review committee by the King allowed them to incorporate provisions of international treaties where they were not in conflict with the apodictic text (*naṣṣ*) of the Qur'an and *Sunnah*. [31] This allowed the committee to take rulings from the Maliki and other schools of law, without restrictions to the *rājih* or *mashhūr*; to adopt laws that are not of Islamic provenance (such as the United Nations Convention on the Rights of the Child); and to come up with new rulings consistent with modern times so long as the limit set by the King was respected.

In the years preceding the 2004 reform, the Moroccan government had actively started a process aimed at increasing the participation of women in public affairs. Various secular women's rights groups emerged which, in deference to the broader social discourse, tactically aimed at establishing the compatibility between their modern conception of human rights and Islamic Law.[32] The King invited a group of female activists to present their demands to him in person on 5 March 2001. Less than two weeks after that, women's groups announced the formation of a network, *Printemps de l'Égalité* (Spring of Equality), for the reform of the personal status law. By April the King set up the reform committee, which was more diverse than previous committees and included women and human rights activists. For the first time the commission, which reported directly to the King, listened to public opinion, received memoranda from civil society groups and listened to about 80 organizations over an eight-month period.[33] Women's rights groups, reacting to the King's speech when presenting the draft Law to Parliament, acknowledged that he had given them "90%" of what they asked for,[34] and in the end the Parliament was unable to make major changes to a Law that came directly from the King.[35]

The respective outputs of the 1957 and 2004 laws should, as expected, be radically different in view of the above facts. The Law reflected the demands of the Moroccan feminist movement backed by the political support of the King, in what is seen as a surprising alliance between women's rights movements and authoritarianism.

To conclude this section, we present a summary of key directives given by the King to the committee, which are relevant to this research, as reproduced in the preamble to the Code:

1. Adopt modern wording and remove degrading and debasing terms for women. Place the family under the *joint* responsibility of both spouses. [ie Do away with the concept of *Qiwama*].

[30] Among these books by al-Ta'wil are: i.*Shadharāt al-Dhahab fi mā jadda fī Qadhāyā al-Nikāh wal Talāq wal Nasab; Ii. Al-Wasiyyah al Wājibah fil Fiqh al-Islāmī; iii. Ishkāliyyah al-Amwāl al- Muktasabah Muddatul Zaujiyyah*; all published in 2019 by Manshūrāt al-Bashīr bin'Atiyyah, Fez. These books were reviewed with an introduction by his disciple, Muhammad al-'Amrānī.

[31] We discussed these definitions in Chapter Two on sources of Maliki Law.

[32] See Dörthe Engelcke, *Reforming Family Law*, pp 134-136

[33] Ibid, pp. 140-142

[34] Ibid p. 142

[35] Ibid p. 144

2. Allow women who have reached the age of majority to decide if to marry under tutelage of a guardian and if so, who the guardian should be. [ie Do away with the necessity of *Wilāya* for adult women].
3. Equalize minimum age of marriage for men and women.
4. Take into cognizance the verse that makes justice among wives impossible which makes polygyny quasi-impossible. Place restrictions that allow polygyny only in exceptional and justifiable circumstances.
5. Make divorce a prerogative that may be exercised as much by the husband as by the wife, and only under judicial supervision; ensure that the woman receives her vested rights before authorizing divorce. Irregular pronouncements of divorce by husbands are not to be considered valid.
6. Expand the woman's right to file for divorce for non-fulfilment of terms of marriage contract and for harm.[36]

There were other directives, including for instance those relating to paternity and inheritance for the grandchildren on the daughters' side just as it is allowed for those on the son's side. We have limited ourselves to the key ones related to the areas selected for discussion in this thesis. The prominence given to the demands for reform by international feminist movements is obvious in these directives, and we will now turn to how this may account for differences with the proposed Kano Code.

6.4 Theoretical Excursus

The fundamental purpose of this chapter is, as indicated above, to analyze selected sections of the Moroccan family law and compare these with the provisions of the proposed Kano code. This raises questions of theory. If Morocco and Northern Nigeria are so similar, belonging to the same (Mālikī) school of law, relying on the same foundational texts of jurisprudence, how do we account for variations in their interpretations of the law while accepting both as Islamic?

In this context, a general model of law making in Islam proposed by Behnam Sadeghi turns out to be useful.[37] Sadeghi questions the accepted view, laid out in chapters 2 and 3 of this research, which describes Islamic law as the "end product" of the process of interpreting the foundational texts, namely the Qur'an and the *hadith*s (sayings of the Prophet).[38] In fact, according to him, the image must be turned on its head, at least in the Hanafi case. The laws are the starting point for the jurist while the product is an interpretation that reconciles the law with the textual sources.[39] Sadeghi argues that scholarship has generally assumed that pre-modern law is founded on the principles of Islamic legal theory, or *usūl al-fiqh*, when in fact the principles expounded in this field have not always been applied in practice.[40] Although he considers the Hanafi school to be a good example of his thesis, he argues that jurists are at

[36] https://drive.google.com/file/d/1DzsYe89caIRUP2Fttfs1zQpONrYElHoD/view?usp=drive_link see the Preamble, pp3-7

[37] Sadeghi, Benham, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*, (Cambridge University Press, first published 2013, paperback edition, 2015). References to the paperback edition

[38] Ibid p xii

[39] Ibid p. xxii

[40] Ibid p. xiv

best located on a continuum from those who rely on the texts to determine the law to those who use the texts to rationalize the law. On this understanding, even Imām al-Shāfi'ī, who argued for the "absolutely binding quality of Prophetic hadiths" most likely rationalized away traditions that were inconsistent with the laws he inherited. Examining this question would have to be through his work on positive law, *al-Umm*, and not the popular *al-Risāla* which, "being on methodology, may conceivably use concrete examples in a selective manner that does not fairly represent the overall character of his jurisprudence."[41]

An examination of Sadeghi's general hermeneutic model sheds light on how jurists may be located on this continuum. Sadeghi argues that positive law is generally a product of three inputs:

1. *The Canon*, which is the body of absolutely binding foundational texts (in this case the Qur'an and prophetic Traditions) and the interpretation of these texts.
2. *Received law*, which is the legal heritage and precedents, including decisions of past and present Islamic jurists.
3. *Present conditions and values*, which Sadeghi elaborates on under three sub-headings:
    A) Personal attributes of the individual jurist *such as his/her values*, personal circumstances, and *idiosyncrasies.*
    B) Present social attributes: *circumstances, needs, values of the larger society*.
    C) Present disciplinary attributes: tendencies, practices, and circumstances specific to the field of law, community of jurists, or more generally, the law-making class.[42](emphasis mine)

Within this general model, jurists are located based on their hermeneutic-methodological approaches. Some demonstrate hermeneutic flexibility while others do not. Where a very wide range of rulings is deemed derived directly from the Canon, there is little flexibility in the law. Where present conditions and values play a major role there is more dynamism and flexibility in the law.[43]

In chapter 2, we argued how the interpretation of texts of the Qur'an and *hadith* (which Sadeghi calls the Canon), is subject to various rules and how and why jurists differ on interpreting the same verses or giving weight to different sources. In the model above, received law is also an area of indeterminacy. A strong commitment to legal precedent (such as an explicit commitment to what is well-known or *mashhur* in a particular school of law) limits the ability of jurists to radically alter the law. On the other hand, an approach that is willing to accept minority or "weaker/*marjūh*" opinions gives more flexibility. Even more flexibility is to be found in an approach that considers precedent as a guide but not binding, being the personal interpretation of jurists *(fiqh*) and not Divine law (*Shari'ah*), and which may then be discarded in the interest of present conditions and values. Usually, rejection of

[41] Ibid, f.n. 4 on p. 4
[42] Ibid pp 12-15
[43] For full details of Sadeghi's General Model, see ibid pp 1-39

precedent would be justified either by reliance on a less-preferred view or selection from another school, or on the canon, or on some other basis such as *maṣlaḥah* (general good). These were matters we discussed in chapter 3.

Another source of indeterminacy when it comes to received law is the sheer number and variety of precedents and sources. In chapter 2, for example, we provided a list of the principal books relied on by jurists in Kano for their reading of Maliki law. The principal text was the *Mukhtasar* of Khalil b Ishaq, and its commentaries. But this book, as the title makes clear, is a summary. In the preface to the book the author makes clear he is writing a book that contains what the fatwa of the Maliki school is.[44] He also limits himself to what is contained in the *Mudawwana* of Imām Mālik (compiled by Sahnūn) and the views of a limited number of jurists (al-Lakhmi, Ibn Yūnus, Ibn Rushd and al-Māzarī).[45] The same applies to other sources that are summaries such as the *Risāla* of al-Qairawānī. Where jurists expand the source material for Maliki law, the probability becomes one of finding rulings in the same school of law that differ from the famous ones. Sheikh Hamza Ben Hamza, one of the jurists this researcher interviewed in Morocco[46], pointed out that there is generally a very narrow view of what is the Mālikī opinion, due to the narrow range of sources referred to. It is important to look at significant works that are more all-encompassing such as al-Qairawānī's *al-Nawādir*,[47] or al-Qarrāfī's *al-Dhakhīra*[48] which are more comprehensive than shorter works by these and other jurists.

Applying Sadeghi's model to this research helps us understand the source of differences in the law. The Moroccan Code of 2004 sees only apodictic (*qat'ī al-dalāla*)) texts in the Qur'an and hadith as canon. Every other thing is open to interpretation and interpretations are considered non-canonical if multiple meanings are possible (*zannī al-dalāla*). This, added to the wider range of source material, makes the Code less constrained by historical law than both its 1957 predecessor and the proposed Kano Code, where adherence to received law was the norm, only to be abandoned exceptionally. A third source of difference was the explicit commitment, in Moroccan law, to international treaties on human, women's and children's rights. This, in Sadeghi's schema, would reflect changing values of the larger society due to modernization, as reflected in the strong feminist movement. The international discourse on human rights is considered as holding the potential to disturb national laws and move them towards a global standard. In his ground-breaking work in socio-legal studies, Niklas Luhmann tentatively recognizes the potential of human rights law to achieve this, through a "normative institutionalization" of value commitments, where it no longer sufficient to hold one's values. Values are insisted upon normatively, impressed upon others, and lead to "morally motivated programmes of demands."[49] Islamic law in modern states has not been immune to these

[44] Dardir explains this to mean that which is mash-hūr or rājih in the madhhab. See Dardir, Sharh al-Kabir, supra p. 16

[45] Ibid pp. 16-17

[46] Details on this follow in the next section

[47] Abu Muhammad ibn Abi Zaid al-Qairawani, *al-Nawādir wa al-Ziyādāt 'alā mā fī al-Mudawwanah min ghairihā min al-Ummahāt*, (ed. Muhammad Uthman in 12 volumes, Beirut, Lebanon, Dar-al Kutub al-Ilmiyya,2010)

[48] Shihab al-Dīn al Qarrāfī, al-Dhakhīrah fī Furū' al-Mālikiyyah, (ed. Abu Ishaq Abdulrahman in 11 volumes, Beirut, Lebanon, dar al-Kutub al-Ilmiyya, 2017)

[49] Luhmann, Niklas, *Law as a Social System*, (trans. Klaus A. Ziegert, Oxford University Press, 2004), pp 468-9

discourses, and the proximity of Morocco to Europe and the influence of global secular feminist discourses has clearly had an impact on the Law. The dynamic impact of the modern discourse on gender equality and Islamic family law has received attention from scholars.[50]

It is the thesis here that these factors are major contributors to the differences in interpretation of Islamic law between the drafting committees in Morocco and Kano. The point here is not to analyze the merits and drawbacks of relying on these global discourses as the standard for reforming Islamic family law. We will argue in the next chapter that critics have highlighted the ideological biases and prejudices implied in some of this discourse, its disconnection from the lived reality of pre-modern Islam, and the implicit claim of the superiority of modern (read western European) civilization when compared to an essentialized (and largely fictional) and stereotypical "Islam".[51] We now turn to a discussion of the sources of data for this chapter before undertaking the comparative analysis of relevant sections of the Moroccan and Kano codes.

6.5 Data Sources for this Chapter

The analysis in this chapter will rely on several primary and secondary sources. Many books have been written on Family Law in Morocco from various perspectives. Some have had the objective of situating the code in the context of Maliki jurisprudence.[52] Others trace the transition from the 1957 Code to the 2004 Code and lay out the rationale for the various reforms to Family Law.[53] Others examine the Law from the perspective of objectives(*maqāṣid*) of the *Shari'ah* and general good (*maṣlaḥah*).[54] There is a growing number of works focusing on *maqāṣid* and *maṣālih* to facilitate broader readings of Family Law in Islam.[55] Still others are studies of the practice of the Law and experience with implementation[56], while others represent critical views arguing that the 2004 Code violates the *Shari'ah*.[57] Several of these works provide the secondary sources for this chapter.

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[50] Four articles related to this can be found, for example, in Emon, A.M, Ellis, M.S. and Glahn, B.(eds.), *Islamic Law and International Human Rights Law*, (Oxford University Press, 2012). These are 1. Kapur, R, "Un-Veiling Equality: Disciplining the 'other' Woman Through Human Rights Discourse" (pp 265-290); 2. Mir-Hosseini, Z., "Women in Search of Common Ground: Between Islamic and International Human Rights Law" (pp291-303); 3. O'Connor, Justice Sandra D., "Commentary: Women and Islamic Law" (pp.304-308; and 4. Welchman, L., "Musawah, CEDAW, and Muslim Family Laws in the 21st Century", (pp.309-319).

[51] Sonbol, A. El Azhary, "Introduction", in Sonbol, A. El Azhary, (ed.), Women, the Family and Divorce Laws in Islamic History, (New York, Syracuse University Press, 1996), pp 1-20

[52] For example, Abdallah Bin Tahir, *Mudawwanah al-Usra fi Itār al-Madhhab al-Mālikī wa Adillatih,* (Casablanca: Matba'Funun al-Qarn 2007)

[53] For example, Ahmad al-Khamlīshī, *Min Mudawwanah al-Ahwāl al-Shakhsiyyah ilā Mudawwanah al-Usra*, (Cairo: Dar Alkalema 2015); and Zuhour al-Hurr, *Islāh Qānūn al-Usra fi al-Maghreb: al-Masār wa al-Manhajiyya* (Casablanca:independently-published 2015)

[54] For example, Idriss Hamādī, *al-Bu'd al-Maqāsidī wa Islāh Mudawwanah al-Usra* (Casablanca: Ifriqiyya al-Sharq 2005); and Muhammad Kuradah, *Dhābit Maṣlahah al-Usra* (Rabat: Dar Nashr al-Ma'rifah 2019)

[55] An excellent example, being a published doctoral thesis. Is AbdelKader Dawudi, *Maqāsid Nizām al-Usra fi al-Tashrī' al-Islāmī* (Beirut: Dar Ibn Hazm2015)

[56] For example Hassan Ibrahimi, *Dirāsāt 'Amaliyya fi Mudawwanah al-Usra* (Rabat: Dar Nashr al-Ma'rifah 2018); and Muhammad al-Mahdi, *al-Marji' al-'Amalī fi Sharh Qanūn al-Usra al-Maghribī*, (Rabat: Dar al Afak al-Maghrebiyya 2021)

[57] For example, the works of Muhammad al-Ta'wil, supra.

Primary data takes the form of in-person oral interviews with jurists, lawyers, judges, and academics involved in drafting, teaching, researching, and implementing the Code. All interviews were conducted personally by the researcher in Arabic, and audio recordings are available. The researcher was accompanied by a research assistant who recorded the interviews and arranged amateur transcripts and English language translations thereof.[58] The interview protocol generally focused on an attempt to tease out the rationale behind some of the innovations in the Code, especially in the areas of interest to this research: minimum age of marriage; Consent; Guardianship; Divorce; Wifely obedience; Maintenance; and Polygyny. The interviews were all conducted individually although on two occasions there were focus group sessions, involving some of those later interviewed individually. Initial contacts with key interviewees were made possible by the Director-general of the Muhammad VI Foundation for African Scholars in Fez, Dr Sidi Muhammad Rifqi, and the Dean, Faculty of Letters and Human Sciences, Rabat, Professor Jamal Eddine El Hani. Interviews were conducted in the cities of Rabat, Casablanca, Oujda, and Fez.

Below is a full list of interviewees, venues and dates on which interviews were conducted:

1. **Dr Zohour al-Hurr**: Former judge at Morocco Supreme Court, member of Human Rights Commission, lawyer and activist and member of the drafting committee of the *Mudawwana*. She was interviewed in her law office in Casablanca on 20 January 2023 and was part of a focus group in the Faculty of Letters and Human Sciences, Muhammad V University, Rabat, on 5th January 2023
2. **Dr Tayeb Lamnawar**: Professor of Islamic Law at Dar al Hadith Hassaniyya specialising in Family Law. He was interviewed at the Dar al hadith in Rabat on 5 January 2023, and was part of the focus group at the Faculty of Letters.
3. **Dr Milouda Chame**: Professor of Family Law at Muhammad V University Law Faculty, Rabat. Her research focus is on basing family law on the objectives(*maqāsid*) of the *Shari'ah,* and not foreign ideologies. She was interviewed at the college in Rabat on 5 January 2023.
4. **Dr Zahira Fountir**: Professor, Faculty of Law and Economics, Muhammad V University Agdal campus, and member of national human rights council. She was interviewed as part of a focus group on 5 January in Rabat at the Faculty of Letters and at the faculty of Law and Economics.
5. **Dr Mustapha Bassou**: Lecturer in the Faculty of Law and Economics, Muhammad V University, Agdal campus. Focus group, 5 January 2023, Faculty of Law.
6. **Dr Saloua Chokri**: Lecturer in the Faculty of Law and Economics, Muhammad V University, Agdal campus. Focus group, 5 January 2023, Faculty of Law.
7. **Dr Chebhanna Maa al-'Aynaine:** Islamic jurist, former Judge, researcher, member of the drafting committees of both the 1957 and 2004 codes. Interviewed in his home in Rabat, 5 January 2023.
8. **Dr Mustapha Hamza Ben Hamza:** Head of Eastern Region Islamic Council and member of 2004 Code drafting committee. He was interviewed in his office in Oujda on 30 January 2023.
9. **Dr Bouthaina Ghalabzouri:** Professor of Islamic Jurisprudence (*usul al fiqh*) and specialist in Family Law at the Faculty of Letters and Human Sciences, Muhammad V University, Rabat. She was interviewed on 5 January 2023 at the Faculty in Rabat.

[58] The audio recordings, transcripts and photos for these interviews can be found here: https://drive.google.com/drive/folders/1IueZVORzSp1n3PGl5hGhrr3SvtG0Dye7?usp=sharing

10. **Dr Hassan Ibrahimi:** academician and prosecuting judge at the public prosecution headquarters. Interviewed on 3 February 2023, in Casablanca.
11. **Dr Kareem Muntaqa:** Professor of Law, Sidi Mohamed Ben Adellah University, Fez. Interviewed on 4tJanuary in Fez.
12. **Hameed Belmaki:** Presiding judge of the High Court in Sefrou. He was interviewed in his office in the Court in the presence of the head of prosecution, **Yaseen Makhliy**, on 8 February 2023 in Sefrou.

In the rest of the chapter, we shall discuss relevant sections of the 2004 Code considering the literature and these interviews and compare same to the Kano Code. The learnings from this, and from the previous two chapters, will then be brought together in Chapter Seven, which sets out recommendations for fine-tuning the Kano Code for it to serve as an effective and relevant instrument of social reform.

6.6 Comparative Analysis of Relevant Sections of the Code

As mentioned earlier, the primary drivers of the reforms to the *Mudawwana* were gender equality and the search for synthesis between Islamic Family Law and international treaties to which Morocco was signatory. In Kano, the focus was standardization of the law and protection of the rights of women as granted them by classical jurisprudence. Whereas in the case of Kano the drafting committee was overwhelmingly made up of Islamic jurists, the committee in Morocco had a broader membership drawn from different tendencies reflecting Moroccan society. In fact, religious scholars were in a minority.

The period between 1957, (when Morocco promulgated the Personal Status Code), and 2004, (when the new family code was promulgated), was one of tremendous social and cultural change. Economic development, urbanisation, intensity of western education, migration to Europe and exposure to European culture and modernity, all contributed to creating a new social imaginary. In Chapter Three, we gave the example of a progressive nationalist, 'Allal al Fāsī who in 1957 held that any discussion on the age of marriage was a purely western discourse without basis in Islam. By 2004, this had become a fully indigenous discourse and a matter of public agitation, due to reasons we will discuss later. In 1957, 'Allal al Fāsī had expressed reservations about polygyny. His major jurisprudential perspective was that the *Shari'ah* in the Prophet's lifetime contained some issues that are best labelled as "Guidance Injunction" (*Amr Irshādī*). For example, the Qur'an placed an upper limit of four wives in polygyny and introduced guidelines of maintenance and justice among wives. Although the Qur'an did not prohibit polygyny, the clear direction set by capping the number of wives was towards monogamy, and thus later generations of Muslims were expected to complete this process, taking their cue from this guidance. This is like the restrictions on slavery, and the encouragement to free slaves, which were indicative of the need to abolish slavery at the appropriate time.[59]

The evolution of society is what allows for the gradual implementation of these rules. The regulations and restrictions around polygyny in the 2004 code, for example, were stronger than those in the 1957 code. While discussing this evolution, Zahira Fountir mentions that at

[59] Dawudi, *Maqāsid Nizām al-Usra*, supra, pp. 263-264

the turn of the twentieth century most Moroccan families were polygamous, with having four wives being considered almost the gold standard. Her grandmother, for example, would be shocked that anyone thought there was something wrong with that. Her mother, on the other hand would support two wives but consider three or four a little much. On the contrary, for her and her generation only monogamy is acceptable, and they find it extremely difficult to come to terms with the concept of polygyny.[60] This background is necessary to stress the point that *ijtihād* always takes place in a social context. What is right for one country may not be appropriate for another. Also, even in the same society, *ijtihād* will change over time as society itself evolves. Sometimes, reform can only happen in a gradual manner (*tadrīj*). In comparing the attitude of the jurists in Morocco with those of Kano, and their *ijtihād*, it is therefore important to bear these facts in mind.

We now begin the comparative analysis of selected topics.[61]

6.6.1 Age of Marriage

The Moroccan Code makes the following provisions on legal capacity to marry:

> **Article 19**
> Men and women acquire the capacity to marry when they are of sound mind and have completed eighteen full Gregorian years of age.
> **Article 20**
> The Family Affairs Judge in charge of marriage may authorize the marriage of a girl or boy below the legal age of marriage as stipulated in preceding Article 19, in a well-substantiated decision explaining the interest and reasons justifying the marriage, after having heard the parents of the minor who has not yet reached the age of capacity or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry
> The decree granting the petition to marry for a minor who has not reached the age of legal capacity for marriage is not open to appeal.
> **Article 21**
> The marriage of a minor is contingent on the consent of his/her legal tutor.
> The legal tutor's consent is expressed by signing, along with the minor, the marriage authorization petition and being present during the conclusion of the marriage contract.
> If the minor's legal tutor refuses to consent, the Family Affairs Judge rules on the matter.

This is like the initial proposal in the Kano draft code with the difference that the proposed age was 17 years in Kano. As discussed in Chapter Five even this proposal was rejected by the Kano committee in the end for reasons stated in that chapter. It is to be noted that although the Moroccan Code prescribes 18 years as age of capacity, the judge is permitted, under the stated circumstances, to authorise the marriage of legal minors. In setting 18 as the age of capacity the *Mudawwana* based this on the *mashhūr* in the Maliki School [62], as reported by Ibn Āshir.[63] Because of the leeway provided by the law to judges to authorize marriage of

[60] See Interview with Dr Zahira Fountir, Rabat, 5/1//2023 here: https://drive.google.com/drive/folders/1b0V_2obDacnniB4D-WtRwjJZhzOR1Ycy?usp=sharing
[61] https://drive.google.com/file/d/1DzsYe89caIRUP2Fttfs1zQpONrYElHoD/view?usp=sharing
[62] Ibrahimi, *Dirasat 'Amaliyya*, supra pp. 53-54
[63] Dr Tayyeb Lamnawar, interview, 5/1/2023, Rabat: https://drive.google.com/drive/folders/1uSP_BSygcOrbA0S9-mIwj6zVsppBNcZT?usp=sharing

minors, this became open to abuse. Subsequently, the Supreme Court restricted the judges to only authorize marriage of girls who have attained the age of 16, subject to the necessary conditions in Articles 20 and 21 above. In addition, where the bride is a minor, the proposed husband's age may not be more than twice that of the proposed bride.[64]

In setting out the age of 18, the Moroccan scholars applied the principle of *Taqyīd al-Mubāh* which we discussed in Chapter Three. In the absence of any apodictic text (*naṣṣ)* making marriage of minors either obligatory or recommended, it remains at best permissible. Where the State is convinced that there is a general interest to be protected, prohibiting or controlling that which is permissible is justified in the *Shari'ah*.[65]

The general good here goes beyond the issues discussed around the physical and mental risks to children who get married without capacity to take all the responsibilities. Tayyeb Lamnawar points out that Morocco is in geographical proximity to several European countries like France, Spain, Belgium, and Holland. There are many Moroccan immigrants in those countries where marriage below the age of 18 is not legally recognized. Those countries often refused to recognize marriages contracted under Moroccan law because of the matter of legal age. To make life easy for these families it was important to adopt a similar law to theirs, so that Moroccan marriages would be recognized as legal in those countries. Before these reforms, Moroccan men married under-aged girls and were compelled to go through a designed divorce (*ṭalāq sūrī*) and then (re)marry when the woman becomes 18, and similar complications. This is in addition to the obligations in the relevant international treaties signed by Morocco.[66]

In general, all the scholars interviewed supported the clauses in the *Mudawwana* and the further restrictions. Zahira Fountir mentions that marriage below 18 still happens in villages and the desert either because of a lack of access to education or due to strong customary practices.[67] Bouthaina Ghalabzouri does not accept the often-made argument that poverty is a justification for marriage of minors in the absence of any evidence that early marriage solves the problem of poverty. On the contrary, in her view, a poor family that gives away its minor daughter to a poor husband merely creates an additional poor family, so marriage is not the solution to an economic problem.[68] Hameed Belmaki, a judge, believes that advances in education and social security have helped greatly in the success of this reform. According to him the government has built schools across the nation including rural areas, and there has also been investment in students' transportation to the nearest schools where the need

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His reference to Ibn Āshir is to the Manzūmah al-Murshid, as quoted in Abdallah Bin Tahir, *Mudawwanah al-Usra fi Itār al-Madhhab al-Maliki wa Adillatih Mudawwanah al-Usra fi Itār al-Madhhab al-Mālikī wa Adillatih* (Agadir: Matba' al-najah al-jadida 2005), Book 1 (al-Zawaj), p. 92

[64] Ibrahimi, *Dirasat 'Amaliyya,* supra, pp. 56-60

[65] Dr Bouthaina Ghalabzouri, interview, 5/1/2023, Rabat
https://drive.google.com/drive/folders/1nfUKqrbgfs3WaDRpG30rekw4wCna6TRa?usp=sharing

[66] Tayyeb Lamnawar, interview, 5/1/2023, Rabat

[67] Fountir, interview, 5/1/2023, supra

[68] Ghalabzouri interview, 5/1/2023, supra

arises. In addition, the family fund provides financial support for poor families with school-age children to encourage them to keep their wards in school.[69]

Traditional jurists objected to the provisions of the *Mudawwana* on age of marriage, on the grounds that these provisions are not supported by the Qur'an and Sunnah, and that delaying the age of marriage leads to illicit sex, as evidenced by the rising number of children born out of wedlock and very young "single mothers" in Morocco.[70] In Chapter Three we had presented the arguments of the Saudi jurist and Mufti, Ibn Uthaimīn on this matter. First, he does not accept that the Qur'anic verse on the waiting period for divorcees who have not menstruated is apodictic to minors as it is a known occurrence for some women not to menstruate well into the age of majority. As for the marriage of the Prophet to Aisha this is seen as an exception and specific to him. This argument is supported by all the interviewees. Maa al-'Aynaine adds that it is not permissible to follow the practice of the Prophet in marriage as it is evident that he had many things specific to him[71] (for example he was married to more than four wives at the same time). As for the argument that delaying marriage until the young girls reach the age of 18 leads to an increase in illicit sex, one response was that there is no evidence that marriage brings this to an end or that only girls below 18 are single mothers. Marriage is not just about quenching sexual desire but involves love and motherhood and care for children and home and other things that require physical and mental maturity to handle.[72]

In deference to the various arguments against minimum age, however, the judge was given the power to, exceptionally, approve marriage of minors based on guidelines. According to Khamlishi, capacity is not considered a condition for validity of marriage (*shart sihhah*), but instead an administrative condition (*shart idārī*). For this reason, capacity was not listed among the conditions of a valid marriage (Art. 13) nor is its absence a reason for annulling marriage (Art. 61).[73] We note however that as part of conditions for contracting a marriage in Article 13, the Code includes legal capacity and the absence of any legal impediment. Article 65(5) also requires marriage authorization for persons not yet of marriage age. These conditions are all aimed at ensuring that marriage under 18 only happens under strictly exceptional circumstances and with judicial supervision and permission.

Taking all the above into consideration, the Morocco code provides greater protection for young girls from early marriage than the proposed Kano Code. The specification of a precise age makes it easier to implement. The Kano Code, as we have seen, makes a general provision prohibiting consummation of marriage with a girl who is not yet mature enough physically and mentally to bear the responsibilities of marriage. While this may find evidence in classical *fiqh* it is subjective and arbitrary and difficult to define. In an environment where marriage of minors is a major problem the Law is an important part of the reform toolkit. Setting an age

[69] Hameed Belmaki, interview 8/2/2023, Sefrou
https://drive.google.com/drive/folders/1g4q5bqKAVByCAwlMYhzVr_HvPQYLkRcj?usp=sharing
[70] See BinTahir, supra, Book 1, p.98; Tawil, *Shadharāt*, supra, p. 14
[71] Dr Chebhanna Maa al-'Aynaine, interview, 5/1/2023, Rabat
https://drive.google.com/drive/folders/1reWaFeihszuABtJb7wkv2mv-0ZKqQtKm?usp=sharing
[72] Al-Mahdī, *al Marji' al-Amalī*, supra, p. 261
[73] Khamlīshī, supra, p. 226

of capacity, even if it is the *rājih* age of maturity of 15[74], would have been an important first step in this direction. As Ghalabzouri and al-Hurr point out, reform begins somewhere and then advances,[75] and the minimum age in Nigeria could be lower than in Morocco considering the totality of socio-economic and cultural factors.[76] In the next chapter we shall consider the recommendations on changes that are necessary for Kano to deal effectively with the problem of marriage of minors.

6.6.2 *Wilāya* (Guardianship)

In this section we compare the provisions for Guardianship in the Moroccan and Kano Codes from two angles: the first is the power of *ijbār* and the second the needfor a male guardian in contracting the marriage of adult women .

6.6.2.1 *Ijbār* and Consent

There is no provision in any part of the 2004 Morocco code for the marriage of any male or female child or adult without consent.[77] Bin Tahir attributes this to its being considered an aberration,[78] but the reason is more likely that this is what the drafters considered to be the correct position of the *Shari'ah*, as forced marriage is explicitly disallowed by the Prophet. Welchman notes that the original 1957 code in Morocco retained the power of *Ijbār* even over an adult woman where there was a clear risk of her committing illicit sexual intercourse.[79] She, however, points out that, in 1993, the country repealed all remaining vestiges of the legality coercive rights even in exceptional circumstances.[80] This is evidence that the silence of the 2004 on coercion was not an oversight, but affirmation of its illegality.

In Chapter Five, we noted that the draft Kano code retains vestiges of the legality of coercion, by granting a father the right to marry off his virgin daughter who has not attained puberty without her consent. We also argued how the drafters resorted to syncretism to narrow the scope of coercive powers which, in classical Maliki law extend to adult (even elderly) virgins, and deflowered minors. We shall now turn to the jurisprudence behind the rejection of all coercion by the Moroccan Code.

The jurists who allow coercion of virgin-daughters base this on her ignorance of what marriage entails, and that is their basis for making a distinction between her and a deflowered woman who knows marriage and its particulars.[81] The Prophet (S.A.W) is reported to have said "the deflowered woman has more right over herself than her guardian (has), and the virgin's permission should be sought and her silence is her permission."[82] It is also established that

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[74] Bin Tahir, *Mudawwanah al-Usra*, supra, Book 1, p. 96

[75] Actually the Moroccan Parliament is reported to have commenced debate on the review of the 2004 Code. See: https://timep.org/2023/07/07/the-moudawana-moroccos-nearly-20-year-old-family-code/

[76] Ghalabzouri, interview, 5/1/2023, Rabat, supra; Zohour al-Hurr, interview, 20/1/2023, Casablanca https://drive.google.com/drive/folders/1RDXERzofPcNn6hEuGzQgNBAmaE0yWqxS?usp=sharing

[77] Lamnawar, interview, 5/1/2023, Rabat, supra

[78] Bin Tahir, *Mudawwanah al-Usra*, supra, Book 1, p.99

[79] Lynn Welchman, *Women and Muslim Family Laws in Arab States* (Amsterdam: Amsterdam University Press 2007), p. 64

[80] Ibid, p. 68

[81] Dawudi, *Maqāsid Nizām al-'Usra*, supra, p. 145

[82] Muslim no 1421; al-Muwatta' no 1469; Abu Dawud no 2098; al-Tirmidhi no 1108; al-Nasa'I no 5351; Ibn Majah

the father of Khansa' bint Khidām, who was a deflowered woman, married her off against her will and the Prophet reversed the marriage.[83] Ibn Abbas reports that a virgin girl came to the Prophet complaining that her father married her off without her consent and he gave her the choice to keep the marriage or invalidate it.[84] Dawudi notes that the girl in this last tradition was not the Khansa' in the earlier one so the Prophet rejected coercion in the case of both a deflowered and a virgin female.[85] The Prophet (S.A.W) also said, "a virgin should not be married without her permission". When asked about the nature of this permission, he replied, "that she keeps silent".[86]

All the above *Hadiths* are very clear that the Prophet did not approve the marriage of any woman, virgin or deflowered, before or after puberty, without her consent or permission. According to Ibn Rushd, those jurists who approve coercion base it on the "conflict of the indirect implication with the general implication (*mafhūm al-mukhālafa*), in another saying of the Prophet (SAW): "The orphan girl is not to be married without her consent".[87] It has also been reported from the Prophet that "the guardian cannot compel a deflowered woman. And an orphan girl's command must be sought. Her silence is her affirmation."[88] In another narration he says "an orphan girl's instruction must be obtained over herself; if she is silent that is her permission. If she refuses, she cannot be coerced."[89] Because of the specification of the "orphan girl" (one whose father is dead) the inference they drew is that she who has a father need not give her consent. The weakness of this argument lies in the fact that the spoken word (*manṭūq*) is more explicit and stronger than an inference (*mafhūm*). Coercion of non-orphans cannot be a valid inference in the presence of explicit and stated prohibitions against coercion.[90] The mention of the orphan girl is simply to stress that even when a girl's father is dead, she may not be forced into marriage without her consent. This is consistent with the protection given to orphans as they are more susceptible to being denied their rights since they have no fathers to protect them.

From all the above, coercion of women or marrying them off without consent has no basis in the *Shari'ah*. This is why, even when the four schools agree that a virgin minor may be coerced, they are unable to agree on whether the basis of that right is minority (according to Abu Hanifa), virginity (according to Shafi'ī), or either (according to Malik).[91] They disagree on the construction of an analogy (*qiyās*) upon a point of consensus because there is no clear justification for that consensus in the Sunnah.

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no 1870

[83] Al-Bukhari no 5138; al-Muwatta' no 25; Abu Dawud no2101; al-Nasa'I no 5362; ibn Majah no 1873

[84] Abu Dawud nos 2096 & 2097; ibn Majah no 1875 [Please give correct entries in Biblio and the highlighted below where not repeated]

[85] Dawudi, supra, p.146

[86] Al-Bukhari no 5136; Abu Dawud no 2092; al-Tirmidhi no 1107; al-Nasa'I no 5357; Ibn Majah no 1871

[87] Ibn Rushd, *Bidayat al Mujtahid* (trans. Imran Nyazee as *The Distinguished Jurist's Primer*, supra, Vol. 2, p. 5.

[88] Abu Dawud no 2100 ; al-Nasa'I no 5354

[89] Abu Dawud no 2093 ; al-Tirmidhi no 1109; al- Nasa'I no 5360

[90] Dawudi, supra, p 151-152

[91] Ibn Rushd, supra, p. 6

The position taken by the 2004 code is therefore more consistent with the letter and spirit of Islamic Law, and the drafters of the Kano Code ought to avert their minds to these arguments, especially as forced marriage, as we have seen, is a social problem especially in rural areas. The limited number of cases before the courts is because of the nature of power relations in a patriarchal cultural setting. Girls do not ordinarily sue their fathers even when they are unhappy with their actions, and the system has no social safety nets and protection for these young girls.

6.6.2.2 Guardianship for an Adult Woman

The 2004 Code makes the following provisions in Articles 24 and 25:

> **Article 24**
> Marital tutelage is the woman's right, which she exercises upon reaching majority according to her choice and interests.
> **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.

This provision is one of the key demands of feminists, who see the concept of tutelage or Guardianship as debasing to women and a constraint on their agency. As we saw in Chapter Five, the Kano Code remained faithful to the Maliki position that a guardian is necessary for the validity of the marriage of all women.

In her defence of the position in the Moroccan Code, Ghalabzouri refers to Ibn Rushd's statement that the reason for the difference in opinion among jurists on the necessity for tutelage is absence of an apodictic text (*naṣṣ*) on it. All the texts relating to this subject are open to interpretation and the jurists all exercised *ijtihād*. She insists that the common argument that the 2004 code is deviating from the Maliki School come from a confusion between specific interpretations, which make up *fiqh*, and methodology, or *usul al-fiqh*. The Maliki School should be viewed as a totality. After all, she says, even direct disciples of Malik differed from him on many individual rulings, but no one said they had departed from his *madhhab*. The bulk of the rulings in *fiqh* are based on texts of either probable authenticity (*zannī al-thubūt*), or a probable pointer to a meaning (*zannī al-ḍalālah*), or both. These texts are not always of both certain (*qat'ī*) authenticity and apodictic, in which case there would have been no legitimate ground for an opinion.[92] Maa al-'Aynaine agrees with her on this point, reiterating in addition that Aisha, the wife of the Prophet, was a guardian to the daughters of her brother Abdul Rahman. As for the argument that the Prophet prohibited women from "marrying themselves off", he says that marriages under the Code are conducted with a formula, in front of witnesses, documented by scribes and registered in courts so cannot fall into the category contemplated by this prohibition.[93] Lamnawar, for his part, argues that tutelage is a matter of custom. He points out that, although Ibn Asim, in the *Tuhfah al-Hukkam, considers* the guardian as a constituent part (*Rukn*) of the marriage contract (which

[92] Ghalabzouri, interview, 5/1/2023, Rabat
[93] Maa al-'Aynaine, interview, 5/1/2023, Rabat

is the position adopted in the Kano Code), this is in fact not so. For something to be considered a constituent part in *usul al-fiqh*, the marriage itself could not stand without it. But the constituent parts of marriage are the husband and wife, and the marriage formula. This is why some commentaries on the *Tuhfah al-Hukkam*, such as the *Bahjah*, have disagreed with the text on this point. To Lamnawar, a guardian is not necessary in marriage for adult women but is required in the case of a minor who cannot be trusted to take such a decision as marriage without guidance from an adult.[94]

Milouda Chame, on the other hand, believes that a major reason the Code took this position on Guardianship, is the confusion caused by seeing family law from the prism of gender equality. For her, all laws in Islam have objectives (*maqāṣid*) and these aim at the realization or preservation of necessities (*ḍaruriyyāt*), needs (*hājiyyā*t), or embellishments (*tahsīniyyāt*). In the case of the institution of marriage, the purpose is the protection of the necessity of progeny (*nasl*) and thus the interest of the child – even before birth – is paramount. To her, Islamic Family Law wisely allocates roles to all parties for which they are best suited, and these roles do not mean superiority or inferiority or inequality. A woman, in choosing a husband, is also choosing a father for her child, and must therefore choose one who is appropriate and suitable. The guardian is the person who is best positioned to guide on that choice in her own best interests and those of her children yet unborn. This has nothing to do with her capacity, as the guardian is not permitted to force her into marriage without her consent, or to block her from marrying a suitable suitor. She also argues that every school of law prescribes a *waliyy* (guardian). The difference is that the majority prescribe a *waliyy* at the beginning, while the Hanafis prescribe a *waliyy* at the end, since the guardian has the right to invalidate a marriage contracted by a woman with a man who is not her comparator (*kuf'*).

Marriage approved by and conducted with the participation of a guardian protects the dignity of the woman, strengthens family bonds and the society. Breaking women away from their families at the point of marriage in the name of gender equality weakens the society and is based on a partial view. However, Chame believes that Guardianship should be to whoever is best suited to provide this guidance and is not necessarily gender based as Aisha acted as guardian to her own nieces.[95]

The 2004 code provides women who have attained majority with the right, if they so wish or find it necessary or expedient, to conduct their own marriage or delegate to a tutor of their own choosing. Zahira Fountir notes that despite the very loud cries of women and heated debates around Guardianship before the amendments, the evidence is that almost two decades after this law only a minuscule percentage of Moroccan women have married without a guardian. She attributes this to the important role of custom in marriage. It is not just about the Law. In Morocco, women do not wish to marry without a male guardian and see the involvement of their fathers as an honour.[96] This same point, on the insignificant impact of this reform in practice was also made by Ghalabzouri.[97]

[94] Lamnawar, interview, 5/1/2023, Rabat
[95] Milouda Chame, interview, 5/1/2023, Rabat
[96] Fountir, interview, 5/1/2023, Rabat
[97] supra

This underscores the need for reform to be bottom-up and evidence-based, aiming to address real and specific social problems that vary with time and place. We will not go into the detailed discussion from *fiqh* books on the position of scholars on Guardianship. In brief, there are five main positions:[98]

1. The position of most jurists in the schools of Malik, Shafi'ī and ibn Hanbal, which is that the guardian is a constituent part of marriage and a marriage contracted without a guardian is invalid.
2. The Hanafi position that a woman may contract her own marriage with a compatible partner (*kuf'*) and for a dowry of her worth (*sadaq al-mithl*). If these conditions are fulfilled the guardian must accept but if not, he has the power to invalidate the marriage. This is also close to the views of al-Zuhri and al-Sha'bi.
3. The position of Imam Abu Thawr, who holds that the marriage is valid if she contracts it *with the permission* of her guardian.
4. Dawud al-Zahiri makes a distinction between the virgin and the deflowered woman and makes a guardian necessary for the former but not for the latter.
5. It can be deduced from a report of Ibn al Qasim from Malik a second opinion, which is that a guardian is *sunnah* but not obligatory, because Malik allows inheritance between a couple married without a *waliyy*, among other arguments.[99]

The point to note here is that the commonly held view that the Morocco code adopted the Hanafi position on this point is, strictly speaking, incorrect.[100] The Code does not give the guardian the right to review the marriage terms and the power to invalidate the marriage if need be. Taking out Guardianship completely is an innovation aiming for gender equality, and a deviation from the established and adopted opinions in classical *fiqh.*

It may be argued, in response, that the Moroccan Code does not eliminate the role of the guardian. All that it has done is allow adult women to decide whether they want a guardian and who they want to be their guardian. This is correct, although it is noted that if a woman exercises her right under this law to marry without a guardian, she has effectively eliminated a role for her father either before or after contracting the marriage. Although marriage is a new and important phase in the life of the woman, she still needs a family and to know that she has a home to return to if the marriage fails. Within the marriage she needs the counsel, support, arbitration and love of her father and other relations. The role of the guardian does not end with supporting or endorsing her marriage partner. The father is a permanent part of her life – before birth, in childhood, as an adult, in marriage and even after the marriage in the case of divorce or widowhood. Opening the door to weakening this bond, assuming it becomes rampant, potentially has adverse social consequences that are not compensated for by the presumed benefit, especially where the law already includes protection for women

[98] I will be summarizing here the detailed analysis in Dawudi, supra, pp. 133-136

[99] Dawudi, ibid, provides the detailed jurisprudential arguments for each school. For a detailed discussion on Guardianship, also see Ibn Rushd*, The Distinguished Jurist's Primer*, supra, Vol 2: 8-19

[100] In point 2 of the preamble to the Code, the position is anchored on the Qur'an 2:232, which is the same verse interpreted by the Hanafi school to give women the right to contract marriage without a Guardian. (see https://drive.google.com/file/d/1DzsYe89caIRUP2Fttfs1zQpONrYElHoD/view?usp=drive_link pp 3-4). The Hanafis however, provide for the Guardian reviewing this act and invalidating it under certain conditions. This power does not exist in the 2004 code.

against coercion and the abuse of powers of the guardian to block her from marrying a man of her choice. Not considering the wider objectives of the law, as Chame argues, leads to a narrow focus on gender equality, and may lead to unintended negative consequences.

6.6.3 Qiwāma

The postulates of *wilāya* and *qiwāma* are considered by feminist discourse the lynchpins of the patriarchal Muslim family, and these must be necessarily dismantled for Islamic Law to become consistent with a modern egalitarian cosmology. We have shown in the previous section how the *wilāya* postulate was dealt with in the *Mudawwana*. In this section we discuss *qiwāma.*

By way of background, the *qiwāma* postulate was established in the following Qur'anic verse:

> Men are the protectors and maintainers (*qawwāmūn*) of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient and guard (in the husband's) absence what Allah would have them guard. And to those women, on whose part you fear disloyalty and ill-conduct (*nushūz*), admonish them (first), (next) refuse to share their beds, (and last) smack them (lightly); but if they return to obedience, seek not against them means (of annoyance): for Allah is Most High, Great.[101]

This verse sets out, in the view of many, the patriarchal structure of the family, the authority and trusteeship of the husband, the submission and obedience of the wife, the financial responsibility of the husband (ie the economic dependency of the wife), and the right of the husband to discipline the disobedient wife including, if necessary, by light smacking. It is so crucial to the structuring of family law that Ayesha Chaudhry devoted an entire book to the verse, contextualizing its interpretations within the framework of the on-going dialogue between patriarchal and egalitarian cosmologies.[102] Unfortunately, in my view, Chaudhry's concept of a "patriarchal cosmology" takes it beyond trusteeship in matters of the family to the allegation that scholars who hold on to this view consider that "men have direct, unfettered access to God but women's relationship to God is mediated by men, who must oversee their wives' moral well-being."[103] This is indeed a debatable, extreme caricature of Islamic scholarship which holds on to the essential equality of all human beings before God with preferment based strictly on piety and good deeds, not gender. Nowhere do Muslim jurists make men the intermediaries between women and God. But this is not the place to pursue this debate.

Chaudhry notes that pre-colonial exegetes justified male disciplinary privileges by their "rank" over women.[104] Although *qiwāma* can have several meanings and has been defined by exegetes using many different words, all its meanings are hierarchical,[105]with its translation offering "little potential for a gender-egalitarian reading."[106]

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[101] Q4:34
[102] Ayesha Chaudhry, *Domestic Violence and the Islamic Tradition* (Oxford: Oxford University Press 2013)
[103] Ibid, p. 12
[104] Ibid, p. 40
[105] Ibid, p. 41
[106] Ibid, p. 27

The demands of women's rights and feminist groups on the need to build a Muslim family based on a gender-egalitarian cosmology were acceded to by the Moroccan King. The preamble to the 2004 code contains excerpts of "the King's historical speech" which were "adopted by the Parliament as the best preamble for the Family Code."[107] The first matter addressed by the King was *qiwāma*; the second was *wilāya*, thus:

> …The King, may God support him said:
> "In our sovereign 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 Sidna Mohammed, Peace Be Upon Him, as reported, 'Only an honorable 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 choice 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."[108]

The Moroccan code therefore places the family under the joint responsibility of both spouses. Nowhere in the code is there a mention of which of the spouses is a leader, or head, of the family. Article 4 defines marriage thus:

> **Article 4**
> Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue, and the creation of a stable family, *under the supervision of both spouses* according to the provisions of this Moudawana.

The Kano Code, on the other hand, in its section on Interpretation, states as follows:

> 'Marriage' means a contractual agreement under the rules of the Shari'ah between a male and a female, without fixation of time for its termination, solemnised as an act of worship and for safeguarding chastity, *under the leadership of the male*, where each party exercises his or her rights and obligations through mutual love and affection.[109]

Thus, while the Moroccan Code does away with male leadership in the family, the Kano Code retains the hierarchy within the family, stressing the importance of mutual love and affection throughout. The difference in foundation is reflected in other sections of the two codes. In setting out rights and obligations, for example, in the chapter on Valid Marriage and its Effects,

[107] *The Mudawwana*, English translation, supra, p. 3
[108] Ibid pp 3-4
[109] The Kano Code, supra p 6

Article 51 of the Moroccan code sets out "mutual rights and duties between spouses" and does not identify any differences in rights and obligations specific to gender:

> **Article 51**
>
> The mutual rights and duties between spouses are:
>
> 1- lawful cohabitation on the basis of good conjugal relations, justice, equality in case of polygamy, mutual fidelity, virtue, and the preservation of family honour and their children.
>
> 2- cohabitation, mutual respect, affection, and the preservation of the family interests.
>
> 3- the wife's assuming with the husband the responsibility of managing and protecting household affairs and the children's education.
>
> 4- consultation on decisions concerning the management of family affairs, children, and family planning.
>
> 5- good relations with each other's parents and close relatives, respecting, visiting and hosting them within accepted standards.
>
> 6- the right to inherit from each other.

Article 52 gives either spouse the right to compel the other to execute his or her responsibilities, or resort to the "irreconcilable differences" procedure. The chapter goes on to set out the rights of children from "their parents".[110]

The Kano Code, on the other hand, states clearly in Art. 156 that there are i) Rights peculiar to the husband; ii) Rights peculiar to the wife; and iii) Rights that are common to the spouses. The code then proceeds, in Art. 157 to set out the wife's rights over her husband (which include maintenance, right to visit and receive parents and relatives, sexual satisfaction, fair and equitable treatment in polygyny and basic religious knowledge). The husband's rights set out in Art. 158 include obedience by the wife, sexual satisfaction, his permission to go out, taking care of property and children, and cooking for him and doing any other chores equitably recognized by custom, where the need arises. Mutual rights are set out in Art. 159.
Several other rights are spelt out including the right of the wife to spend the night on the same bed as the husband and the right of the husband to marry up to four wives.[111] In spelling out individual and mutual rights, the Kano Code is similar to the 1957 personal status law in Morocco, which set out these rights in its sections 34, 35 & 36.

In discussing the position of the Code on *qiwāma*, Ghalabzouri argues that it is not done away with, because *qiwāma* is about *Nafaqah* (maintenance) and the man is still responsible for it (more on this below). On leadership she argues that it is a joint leadership, that the woman does most of the leadership, care, and work in the house. Afterall the Prophet said in a *hadith*:

[110] See *Mudawwana*, Articles 51-55, pp. 17-18
[111] See the Kano Code, Articles 155-194, pp. 37-45

"All of you are shepherds".[112] The argument, however, is a strange one as we shall see when we discuss the connection between *qiwāma* and maintenance in detail below. It is also surprising that Ghalabzouri relies on a tradition that, when read in full, suggests the leadership of the husband in the family. The full *Hadith* goes thus:

> Abdullah ibn 'Umar reported: The Messenger of Allah (PBUH) said, "Every one of you is a shepherd and is responsible for his flock. The leader of the people is a guardian and is responsible for his subjects. A man is the guardian of his family and is responsible for them. A woman is the guardian of her husband's home and his children, and she is responsible for them. The servant of a man is a guardian of the property of his master, and he is responsible for it. No doubt, every one of you is a shepherd and is responsible for his flock."[113]

This clearly shows that the husband is the trustee over the family. The debate over *qiwāma* goes back to the question of equality, and if the role given to the husband and father of being responsible for the care, protection and leadership of the family diminishes the status or capacity of the wife. For feminists this is the case. In Chapter One, we presented the argument of those Mir-Hosseini calls "neo-traditionalists"[114], who argue that the *Shari'ah* simply allocates roles to those who are best suited to perform them in the interest of the proper functioning of the institution. We discussed the views of Ayatollah Murtaḍa Mutahhari, for example, that marriage involves both a contract relationship and a nature relationship. The God-given nature of men and women is therefore given consideration in assigning roles.[115] Welchman notes several modern challenges to the interpretation given to *qiwāma*, but affirms that in traditional jurisprudence the postulate has been linked to the husband's obligations of maintenance, the wife's duty to obey and "the structure of divorce law that gave husbands the right to unilaterally dissolve the contract of marriage."[116] She suggests that the Moroccan law may have taken the position suggested by some modern scholars that the goal of substantive equality might require a provision that "men maintain and women do not obey",[117] although she also points to amendments in Tunisia that impose some obligation to "participate"[118] in the maintenance if she has means. Amira Sonbol, on the other hand, argues that Ta'a, or obedience, is an innovation introduced by the modern state, and not based on classical jurisprudence. A close reading of her thesis, however, will show that she is referencing a specific and narrow definition of obedience: that which she refers to as the "forced incarceration" of women which is found in some family law codes.[119]

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[112] Ghalabzouri, interview, 5/1/2023, Rabat

[113] Al-Bukhari no 7138; Muslim no 1829

[114] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (London: I.B. Tauris 2000) pp 88-208

[115] Ayatollah Morteza Mutahhari, *Woman and Her Rights in Islam* (a translation of "Nizam-e hoqouq-e Zan dar Islam"). Translated by M. A. Ansari, Islamic Seminary Publications (undated).

[116] Lynn Welchman, "A Husband's Authority: Emerging Formulations in Muslim Family Laws", in *International Journal of Law, Policy and the Family* 25(1), (2011), 1-23, quote on p. 7

[117] Ibid, p. 12

[118] Ibid

[119] Amira El-Azhary Sonbol (1998) "Ta'a and modern legal reform: A rereading", *Islam and Christian-Muslim Relations,* 9:3, 285-294. Esp pp. 286-290

Milouda Chame argues that *qiwāma* has nothing to do with gender equality and is in keeping with the *maqāṣid* of the *Shari'ah*.[120] In a published article, she articulates this position, arguing that while interpreting *qiwāma* to mean control and suppression and authoritarianism by men is wrong, its proper interpretation, for example, as protecting the weak, caring for the family and taking care of their needs, guidance and support, are consistent with complementarity of roles and not inequality of gender.[121]

Ben Hamza delinks *qiwāma* from obedience, arguing that obedience is mutual, and husbands are also expected to obey their wives. To buttress his point, he draws attention to the following Qur'anic verse:

> Q.66:1 "O Prophet! Why hold you to be forbidden that which Allah has made lawful to you? You seek to please your consorts. But Allah is Oft-Forgiving, Most Merciful"

Ben Hamza's argument is that this verse is a pointer to the fact that the Prophet bowed to the wishes of his wives and tried to do what pleased them always, so obedience is mutual.[122] Tayyeb Lamnawar, on the other hand, agrees that a leader in the home is necessary, and provisions of male headship of the home are present even in Justinian codes.[123] Zohour al-Hurr notes that absolute equality is non-existent. Roles are different and complementary, and she supports *qiwāma* if practised properly and with consultation and respect.[124]

There appears to be no clear consensus among interviewees on this subject. This is not surprising because the dynamic of the relations between husbands and wives in the household are likely to defy legislation. Where one party bears a disproportionate burden of the family obligations, that party would feel entitled to certain rights and privileges in return. Indeed, if *qiwāma* is seen as a privilege for men, it is also because husbands have been saddled with obligations that are not imposed upon their wives.

In a comprehensive analysis of the *qiwāma* postulate, Omar al-Rachīdī clarifies these nuances.[125] After examining most definitions and contexts of the term *qiwāma*, he shows that the vast majority refer to protection and maintenance. In fact, *qiwāma* is more about imposition of obligations (*taklīf*) than about preferment (*tashrīf*), with leadership being only one of many dimensions.[126] After going over the interpretations of exegetes of the various elements of *qiwāma*, he presents a summary as follows (all translations mine):

> Men and women are thus equally commanded to follow the truth and avoid error. In view of the natural strength of Man compared to the nature of Woman the *Shari'ah* imposed on him obligations that are more burdensome and difficult than those imposed on her. These are the obligations of protection and maintenance. Consequently, men were conceded

[120] Chame, interview, 5/1/2023, Rabat
[121] Milouda Chame, "al-Qiwāma: Mafhūmuha, Asbābuha, Mazāhiruha", in *Basa'ir al-Rabat*, Vol. 2, Feb 2006, pp. 69-104
[122] Mustapha Hamza Ben Hamza, interview, 30/1/2023, Oujda
[123] Lamnawar interview, 5/1/2023, Rabat
[124] al-Hurr, interview, 20/1/2023, Casablanca
[125] Omar al-Rachīdī, "Masālih al-Qiwāmah bain Tashri' al-Qawānīn wa Fiqh al-Wāqi' " in Bouthaina Ghalabzouri (ed.) *Mudawwana al-Usra: Min al-Taqyīm ilā al-Taqwīm* (Rabat: Matba' al-Aminiyya 2021), pp. 72-103
[126] Ibid, p. 79

> certain rights commensurate with these obligations among them: the right to straighten the conduct and activities of individual members of the family in the light of revealed truth. This means: the decisions of the man on matters of the family are subject to discussion, and the man has no right to stop the family members from good deeds. This is in addition to the obligations placed by the *Shari'ah* on all those given responsibility to overlook and forgive errors from their flock and consult with them to protect the retention of the family and gravitation of its individual members towards its leader.[127]

According to Rachīdī, the real problem is with men who see *qiwāma* as justification for injustice, who inflict harm on their wives sometimes with the assistance of family members[128]and who fail to conduct their affairs in consultation with the members of the family, and neither overlook faults nor strive to be generous in forgiveness.[129] "Preferment" *(tafḍīl*) in *qiwāma* is, in this view, not a one-way street. If we see men as being preferred by looking at the rights given to them in the family, we should also note that women have been preferred by the obligations imposed on the men towards them. This is why modern women seek equality with men on their rights, while the men in turn seek equality with women in their obligations.[130]

We now return to the Moroccan code of 2004 and see how it treats obligations. Consider the following provisions:

> **Article 198**
>
> Maintenance paid by the father to his children shall continue until they come of legal age, or until those who have pursued their education reach the age of twenty-five. In any case, maintenance paid to the daughter shall not cease until she can earn a living on her own or until her maintenance becomes incumbent upon her husband. The father shall continue to pay maintenance to children suffering from a handicap and unable to earn a living.
>
> **Article 231**
> Legal representation is exercised by:
> 1. A father of legal majority;
> 2. A mother of legal majority, in the absence of the father or when the father is deprived of his capacity;
> 3. A testamentary guardian designated by the father;
> 4. A testamentary guardian designated by the mother;
> 5. The judge;
> 6. The court-appointed guardian.
>
> **Article 194**
> The husband shall be obligated to pay maintenance to his wife the moment their marriage is consummated, as well as if she has bidden her husband to consummate their marriage once it has been duly concluded.
>
> **Article 195**
> Maintenance for the wife shall be awarded by judicial decision starting from the date the husband has ceased to pay the maintenance expenses incumbent upon him, and the

[127] Ibid, p. 98
[128] Ibid, p. 96
[129] Ibid, pp. 98-99
[130] Ibid, pp. 88-89

wife does not lose her right to maintenance unless she has been ordered to return to the conjugal home and has refused.

Article 196
A wife who has been revocably repudiated shall lose her right to accommodation but not to maintenance if she leaves the home where she is required to observe the legal waiting period without the consent of her husband or without a good reason.
A wife who is pregnant and has been irrevocably repudiated shall be entitled to maintenance until the delivery and if she is not pregnant, she is entitled to accommodation only until her legal waiting period has ended.

Reading these and similar provisions, we find that the *Mudawwana* kept a part of the Law which favoured feminists and threw away part of the same verse which did not favour them. Having done away with the leadership of the husband at home, the logical step would be shared burdens and financial responsibility. As it is, the husband alone is responsible for maintenance of the wife and children. The wife is entitled to divorce if the husband does not pay maintenance. Even after divorce she is entitled to maintenance and compensation. The 2004 code takes away the leadership of the husband, without relieving him of any of the obligations placed upon him by Law as the justification for the said leadership. In contrast, the Kano Code imposes upon the husband his obligations, but also grants him due rights in return. The challenge with the Moroccan code is not its egalitarian cosmology, but the selective and inconsistent application of that cosmology, which leads to internal contradictions.

The Personal Status Law of 1957, like the proposed Kano Code, itemised rights due to the husband, rights due to the wife, and mutual rights. The new Code combined all of these under mutual rights in Art. 51 but excluded four of the rights in the 1957 law. Three of these were re-introduced under different articles:

1. The right of the wife to maintenance was provided for in Article 149.
2. The right of the wife to manage her own wealth and finances without any oversight or interference by the husband was provided for in Article 49.
3. The right to breastfeed her children was provided for in Article 54.

The fourth right, which was the right of the husband to obedience by his wife in "the manner known to the *Shari'ah*" (*Ma'rūf*) was deleted and not mentioned anywhere in the Moroccan Code. This has raised questions about the real meaning of gender equality. As Bin Tahir asks, how can woman be equal to man when she is preferred exceptionally over him? All his obligations towards her are maintained but his one right to being obeyed by her is taken away from him in the name of equality. Surely, for equality to be consistent, if the man's right to be obeyed is taken away from him, the obligations that gave birth to that right should also be taken away.[131]

Some critics of *qiwama* may argue that in the modern world the women are also earners, and so do not need men to maintain them. While this is true, there are several other points to note. First, in many parts of the world, the lack of high levels of education and access to certain academic disciplines combine to limit the economic opportunities of women. Even in the

[131] Bin Tahir, *Mudawwanah al-Usra*, supra, p. 232

most advanced countries the debate over the gender pay-gap is on-going, as women earn less than men even when doing the same jobs.

The 2023 Nobel Prize for Economics was awarded to the Harvard professor Claudia Goldin, whose research has been on women's earnings and economic participation through the centuries. Although she has shown the impact of high education and the contraceptive pill on improving women's earnings, her research also reveals a large remaining gender gap. On 9 October 2023, the Royal Swedish Academy issued its press release announcing Goldin as the prize-winner. An interesting part of the statement reveals Goldin's revelation that the bulk of "earnings difference is now between *men and women in the same occupation*, and that it largely arises with the *birth of the first child*"[132](italics mine). It is precisely this difference in earning potential between men and women that underlies the assignment of roles in Qur'an 4:34. The verse makes men responsible for spending of their wealth and providing for the needs of the family, while making them the ultimate decision-makers on family matters based on this financial responsibility.

6.6.4 Nushūz (wifely disobedience)

Nushūz, which is a blameworthy and negative quality in both men and women, but has been mainly a referent for wifely disobedience, is not considered at all in the 2004 code in its traditional form. To provide clarity, let us review these definitions in the interpretation section of the Preamble to the Kano Code:

> 'Nāshiz' means a woman who does nushūz to her husband.
>
> 'Nushūz of a husband' means an intentional act of the husband to cause physical or psychological harm to his wife by way of desertion, beating, de-humanising, degrading (sic.), or forcing her to commit an act forbidden by the Shari'ah.
>
> 'Nushūz of a wife' means recalcitrance of the wife to the husband in any circumstance where it is obligatory on her to obey him.

The *Mudawwana* contains no provision requiring obedience of the wife to the husband, as this is considered a vestige of subordination of women to men in a patriarchal family. Consequently, it makes no reference to the reliefs available to the husband in the event of disobedience. Chaudhry explains that wifely *nushūz* has been given four broad meanings by exegetes: disobedience, sexual refusal, rising out of one's place, and hatred for one's husband. Husbandly *nushūz,* on the other hand was interpreted as "literally rising out of bed, hatred for one's wife, sexual or monetary withdrawal, and roughness in speech and action (such as injuring a wife through physical violence)".[133]

In another context, Chaudhry analysed the lexical inconsistency in defining the same word when applied to different genders, attributing it to a patriarchal discourse that provided the frame of reference for these interpretations. The exegetes were in effect, projecting their patriarchal mind-sets on the text, such that *nushūz* was interpreted in a manner consistent

[132] The Prize in Economic Sciences – Press Release on http://www.nobelprize.org>prizes
[133] Chaudhry, *Domestic Violence*, supra, p. 63

with pre-existing notions of male supremacy.[134] The Kano Code captures many of the traditional definitions of wifely and husbandly *nushūz* in Articles 240 and 248, respectively, in a manner broadly consistent with the summary provided by Chaudhry.

In the case of the *Mudawwana*, it adopts a more gender-neutral approach to *nushūz*, by simply considering it the failure of either to continually meet up to his or her obligations as defined in the Law. The relevant provision is reproduced below:

> **Article 52**
>
> When either spouse continually fails to fulfil his or her obligations 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.

We will return to the subject of irreconcilable differences (*shiqāq*) later when we review the *Mudawwana* provisions on divorce. The point we would make here is that the *Mudawwana* gives the spouses equal rights of compelling the other to fulfil obligations, although it does not specify how that compulsion should be achieved.

In her analysis of *nushūz*, Chaudhry argues that the exegetes in general considered husbandly *nushūz* to always result "from a husband's reaction to his wife's deficiencies."[135] As a result, wives were encouraged to forego their marital rights and thus free the husbands from fulfilling their obligations. She adds:

> Husbandly *nushūz* was not removed through disciplinary action because husbands ranked higher in the marital hierarchy. Whereas husbands could discipline wives in order to reclaim their spousal rights from them, wives could not in turn discipline their husbands. The fact that pre-colonial exegetes interpreted wifely and husbandly *nushūz* to have different meanings suggests that they were less concerned with maintaining a cohesive, consistent lexical definition of *nushūz* and were more concerned with interpreting *nushūz* to fulfil their vision of an appropriate marital relationship within a larger cosmological framework. In this framework, all definitions of wifely (and husbandly) *nushūz* served to reinforce a hierarchical marital structure.[136]

This is a brilliant application of post-structuralist thought to the body of knowledge that is Qur'anic exegesis, and there is no doubt Chaudhry marshalled enough evidence to support her reading of the hermeneutics of exegetes. Unfortunately, it is an incorrect representation of Family Law to claim, as she so confidently does above, that "husbandly *nushūz* was not removed through disciplinary action." It is true that the wife is not given the authority to directly discipline the husband, but the moment she seeks the intervention of a court, the judge steps in to discipline a husband whose *nushūz* is established, to compel him to rectify his ways.

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[134] See Ayesha Chaudhry, "Lexical Definitions of *Nushūz* in Qur'anic Exegesis: A Comparative Analysis of Husbandly and Wifely *Nushūz* in Q. 4:34 and Q. 4:128" in S. R. Burge (ed.) *The Meaning of the Word: Lexicology and Tafsīr* (London: Oxford University Press in Association with the Institute of Ismaili Studies 2015)
[135] Chaudhry, *Domestic Violence*, supra, p. 63
[136] Ibid, p. 64

In laying out the laws of Islamic jurisprudence, Muhammad ibn Juzayy al-Gharnāṭī[137] says that *nushūz* takes three forms (*hālāt*). The first is when it comes from the wife (wifely *nushūz*) in which case the husband takes the three steps in Q. 4:34 *sequentially*. He admonishes her, and *if that fails,* he deserts her bed, and *if that fails* he beats her lightly. If he believes she will not change except with serious beating, he *must not* beat her at all. The second case is where the *nushūz* is from the husband. In this case the judge admonishes and warns him to change his ways, and if he fails to return to the path of justice, the wife should be divorced from him on account of his harm. In Chapter 5, we noted that the commentaries on the Mukhtasar set out the same three disciplinary stages in the case of husbandly *nushūz*: The judge admonishes him, and if that fails *he directs the wife to desert the husband's bed and deny sexual access*, and if that fails the court can authorize beating.[138]In the case of the husband being beaten there is no requirement for it being a light beating with a chewing stick and the like, with the nature being left to the judgement of the court. The third form of *nushuz* is where the matter is complicated and confusing, the relationship has become very bad, the complaints frequent, and neither spouse is able to establish with evidence *nushūz* from the other. This is when *shiqāq* applies and resort is made to arbitration.

It is therefore incorrect to claim, as Chaudhry does, that husbandly *nushūz* is not subject to discipline. This is not to take away from valid concerns about husbands abusing their wives in the name of discipline, and the difficulty of access to justice or proof of husbandly *nushūz*. It is therefore apposite that the *Mudawwana* provides for either party to compel the other to meet obligations. It does not specify how, but Article 400 states as follows:

> **Article 400**
> For all issues not addressed by a text in the present code, reference may be made to the Malikite School of Jurisprudence and to ijtihād (juridical reasoning) which strive to fulfil and enhance Islamic values, notably justice, equality and amicable social relations.

It is therefore plausible that the judge will resort to some, or all of the devices mentioned above in the case of husbandly *nushūz*.

In Chapter Five, we noted that the Kano Code laid out the three steps that the husband may take in the event of wifely *nushūz,* which are the steps set out in Qur'an 4:34. The code also makes provisions for dealing with husbandly *nushūz* as follows:

> **249.** Nushūz of a husband can be proved through any of the following ways:
> a. Two male eye witnesses;
> b. Admission by the husband;
> c. Widely heard evidence that the husband is maltreating his wife;
> d. Any other evidence which a court may accept in the circumstances of the case.
>
> **250**. (1) Where it is proved that a husband has committed any of the

[137] Muhammad Ibn Juzayy al-Gharnāṭī, *Al-Qawānīn al-Fiqhiyya fi Talkhīs madhāhib al-Mālikiyyah: Arabic text accompanied by Hausa translation by Dr Jamilu Abdullahi* (publisher and date not stated) p. 51
[138] See reference to Dardīr*'s Al-Sharh al Kabir* and *al Dasūqī* in Chapter Five, fn 71, above.

acts under Section 248 of this Code, a court, upon conviction, shall
sentence him to any of the following punishments:
a. Warning to desist from the act henceforth;
b. Threatening him;
c. Flogging him, where it is appropriate and the wife agrees to
continue with the marriage.
(2) Where a husband persists in doing any of the acts under Section 248 of this Code, after exhausting all the measures under Sub-section (1) of this section, a court shall give him a last chance and thereafter dissolve the marriage.

The Kano Code, therefore, sets out disciplinary measures open to the husband within the family to be exhausted before recourse to divorce. It also provides disciplinary measures to be taken by the judge against an offending husband before resort to annulment.

A disappointing aspect of the Kano Code is that, despite all the constraints it places on wife-beating, it retained the rulings of classical *fiqh* of an earlier era. In Chapter Three we laid out all the arguments for banning any kind of domestic violence, with wife-beating being at best permitted but undesirable even as a last resort. This is a clear instance where the principle of *taqyīd al-mubāh* ought to have been invoked. In Chapter Four, we presented evidence of the frequency of complaints before the courts on domestic violence and, for that reason alone, wife-beating out to have been prohibited, in any manner whatsoever. The idea that a law would allow a husband to beat his wife or have a husband flogged for failing to meet obligations (unless it is retaliation in the case of his flogging and harming his wife) is totally inconceivable in this century. As we shall point out in Chapter Seven, any further review of this code needs to address this issue.

As for the *Mudawwana*, one can only expect the judges to apply the recommendations on enforcement in the law (minus beating/flogging), prior to divorce, in line with Article 400.

6.6.5 Divorce

In comparing the *Mudawwana* with the proposed Kano Code on the question of divorce, we begin by stating that the divorce provisions in the *Mudawwana* appear to have been inspired by three main considerations:

1. Narrowing the range of permissible divorce by men and reducing the scope for discretion/arbitrariness as much as possible.
2. Widening access of women to divorce and their ability to initiate and secure annulment at will.
3. Providing financial security and maximizing financial compensation for divorced women.

We will discuss these in turn, noting that a full analysis of the jurisprudence behind each instance is beyond the scope of the present work.

6.6.5.1 Restricting Scope of Male Discretion in Divorce

One of the principal projects of feminist groups is the struggle to address the widespread problem of arbitrary and frivolous divorce. Islamic Law places the right to divorce in the hands

of the husband, as head of the family, protector, and maintainer who spends his wealth on the dowry (*sadāq*), on maintenance (*Nafaqah*) for the wife and children during and after marriage, and compensation (*mut'ah*) in the event of divorce. Among other reasons it is assumed that given the level of financial investment and the cost of divorce, the husband has a stake in keeping the marriage as long as possible. In the early days of Islam, it was also the case that men, being more pious, were conscious of the fact that divorce is the most despised thing to God among what has been permitted, and this permission has only been granted to be used in exceptional circumstances as marriage is supposed to be a union for life. The, presumably exercised caution and restraint in the matter of divorce.

As men became less pious, this responsibility became a *power* that was used arbitrarily. Women were divorced at will, sometimes over a minor argument or over nothing, as in cases where men simply lost interest or wanted to change wives. In many parts of the Muslim world (including Kano), these women were left, after spending years caring for the home while the husband earned income and built up his wealth, without any kind of financial compensation. Often, they were compelled to either fend for themselves and their children from the marriage or give up their right to custody if they were not able to care for their beloved children. This is the well-known situation in many parts of the Muslim world, and in Chapter Four we saw that in Kano, for example, issues around maintenance for divorced and lactating mothers were a major part of the pleas before judges.

The 2004 code sought to address this problem by availing itself of all possibilities known to Islamic Law. Relying on the principle of *takhyīr* (selection), the drafters considered that many of the issues were amenable to *ijtihād*, and selected rulings that aimed at invalidating several categories of divorce. Administrative procedures and judicial oversight were also introduced.

Article 70 of the code prohibits everyone from resorting to annulment of marriage through repudiation or divorce "except in exceptional circumstances, considering the rule of least harm, given the family dislocation and harmful effects on children." Article 78, on the other hand, defines repudiation as dissolution of marital bonds "exercised by the husband and wife" and "under judicial supervision." These two articles read together already capture the subject of this sub-section. Men would now only exercise their right to divorce *under judicial supervision*, and this would only happen *in exceptional circumstances*. Article 78 also introduces the right of the wife to exercise divorce, signalling what would follow in expanding the access of women to divorce in a manner that was on occasion a departure from classical jurisprudence.

One of the strategies adopted by the code was to invalidate several types of divorce which, under what is known in Maliki law, are held to be valid. (To avoid having to quote the Kano Code consistently we should just state here that the Kano Code restricted itself in these matters to what is applicable in practice or that which is *mashhūr* in the Maliki school). The following articles of the Moroccan code cover some of these:

> **Article 90**
> The repudiation authorization petition is not accepted from an inebriated person, a person who has been forced to do so, or an irate person.

Article 91
Vows and pledges do not result in repudiation.
Article 92
Multiple expressions of repudiation pronounced verbally, with a symbolic gesture or in writing result in only one repudiation.
Article 93
Repudiation made conditional on doing something or abstaining from something has no effect.

Article 90 invalidates the divorce of an inebriated person, without specifying the nature of intoxication. The position of most jurists is that divorce is binding on anyone who imbibes forbidden intoxicants because he deliberately placed himself in a situation where he would lose control of his senses and he should be punished by making him responsible for his actions. This is the popular position in the Maliki School, although there is an isolated view of Muhammad ibn 'Abd al-Hakam invalidating the divorce of a drunk.[139] Bin Tahir reports that where a man is so drunk he does not know the difference between the ground and the sky or a man and a woman then he is like an insane person and jurists invalidate his divorce. According to Tahir the differences lie with the drunk who has some of his faculties left[140] (although it may be argued that anyone able to find his way home and recognize his wife and utter divorce does have some of his faculties). The *Mudawwanah* abandoned Maliki jurisprudence in most of the provisions above. Let us clarify.

One view among jurists is that the divorce of a drunk (art. 90) is invalid as he is not in control of his senses, and the punishment for drinking is already given in the Law so this should not be added as punishment. Among those who hold this view are 'Uthman b. Affan, 'Umar b. Abd al-Aziz and Layth b. Sa'd. It is also a view among some jurists in the Shafi'ī and Hanafī School. It is the position in the Zahiri School[141] and it is held by later Hanbalites like Ibn Taimiyya and Ibn al-Qayyim.[142] This is opposed to the *mashhūr* in Maliki law, but it is the position adopted in the *Mudawwana*.

The invalidation of divorce under coercion (art. 90) is non-controversial as most jurists are agreed that this divorce is invalid. The only school that validates this divorce is the Hanafī School and their position is weak on evidence. The Qur'an makes exception for those who pronounce disbelief under coercion, which is a far more serious issue than divorce.[143]

As for an irate person (art. 90) most scholars in the four Sunni schools of law consider his divorce valid, with dissenting views from later Hanbalites like Ibn Taimiyya and Ibn al-Qayyim. It is this minority view. Again contrary to the Maliki position, that the *Mudawwana* selected.[144]

Article 91 invalidates divorce based on vows (*ṭalāq bi al-yamīn*). This is a matter on which scholars report no ruling from Malik or his direct disciples, and a difference of opinion among

[139] Dawudi, supra, pp. 302-303
[140] Bin Tahir, supra, pp. 116-117
[141] Dawudi, supra, p. 303, fn 3
[142] Bin Tahir, supra, p. 120
[143] Dawudi, supra, pp. 305-306
[144] Bin Tahir, supra, pp. 124-127

later jurists of the school. Some say it is invalid and the maker should repent his sin while others say it is valid.[145] The *Mudawwana* selected the first view.

As for Article 92, in Chapter Five we explained that the Kano Code considers three divorces pronounced at the same time as three. This is the position of most of the companions and the consensus of all four Sunni Imams. Later jurists including Ibn Taimiyyah, Ibn al-Qayyim, al-Shawkāniī and al-Albānī consider it one divorce, and this is the position the *Mudawwana* adopted. The Shi'a Imamiyya do not even count it as a divorce.[146]

Article 93 invalidates conditional divorce (*ṭalāq mu'allaq*), even though the Maliki School sees it as valid.[147] So here as well it parted ways with the Maliki School.

Thus, the *Mudawwana*, considering these rulings matters of *ijtihād*, selected positions largely outside the well-known position of the Maliki School to invalidate many categories of divorce. Except for the divorce under coercion, the other categories were invalidated based on rulings outside Maliki practice. The objective, as stated earlier, was to limit the frequency of divorce and make it truly exceptional, pronounced voluntarily and with intention and knowledge of implications of the pronouncement. Because this is all a sphere of *ijtihād*, the position of the *Mudawwana* is backed by the views of some jurists, even if in some cases they are a minority, and scholars may have considered their arguments weak. What is evident here is that a decision had been taken to narrow the scope of divorce, based on *maslahah.* Thus, wherever there was a view supporting this objective it was selected, to address a real-life problem. The Kano code, on the other hand, retained what was *mashhūr* or *rājih* in Maliki law.

6.6.5.2 Opening the Door of Divorce to Women

Whereas the 2004 code appears in the last sub-section committed to reducing the incidence of divorce, in other parts it opens the door wide to increasing divorce rate through innovations that are unknown to the *Shari'ah*. The objective, to be clear, was to make access to divorce easier for women who seek to exit a marriage, considering that men have the right to unilaterally pronounce divorce. This approach is one of the weaknesses of an ideologically driven, partial view of the *Shari'ah*. It is based on the principle of gender-equality, and the need to allow women the same rights as men in divorce. Apart from the fact that the approach ignores the connection between repudiation being in the hand of the husband and the responsibilities and obligations placed on him, the code compounds an existing problem where divorce is easy for the husbands by making it also easy for the wife. The result is that this marital bond, which the code itself has noted should be kept unless necessary, is now loosened with great facility.

One of the innovations in the code is *shiqāq,* the divorce through irreconcilable differences*.* Although the term *shiqaq* exists in family law, and we have in our discussion of *nushūz* explained when it arises (which is the third form where it is not possible to identify the *nāshiz* party), the code simply borrowed the term, but its application is far beyond its use in *fiqh*. Lamnawar says the use of terms like irreconcilable difference and mutual agreement makes it

[145] Ibid, p. 130
[146] Ibid, pp. 134-137
[147] Ibid, p. 141

easy for people to understand the Law, as some of the terms are imports from the western legal tradition.[148] Zahira Fountir also confirms that the code borrowed the nomenclature from the *Shari'ah* without sticking to its meaning, making divorce easy. This, as we shall see, has made Morocco witness unprecedented levels of divorce, and is one of the unexpected consequences of this opening of the doors.[149]

Ghalabzouri, who is sympathetic to the motives for the innovation, argues that without this opportunity women had been forced to remain in abusive marriages or pay ransom (*khul'*) because harm inside the home is difficult to prove. She acknowledges that this may have opened the door to increased divorce, and that judges are of the view that a woman who asks for divorce under this law should not be paid compensation so that it becomes divorce by mutual consent.[150]

The 2004 code itself specifically refers to five circumstances in which spouses resort to irreconcilable differences. These are:

1. Where a husband wants to marry another wife, the current wife refuses but does not demand a divorce (Art. 45).
2. Where one of the spouses continually fails to meet mutual obligations (Art. 52-this was noted when discussing *qiwāma*).
3. Where a wife is unable to establish harm but insists on demanding divorce (Art. 100).
4. Where a wife insists on demanding *khul'* and the husband refuses (Art. 120).
5. Where a husband wishes to return his divorced wife in a revocable divorce and during the waiting period and the wife refuses to return (Art. 124).

Allowing divorce where harm is not established, and allowing a divorced wife in a *raj'ī* divorce to refuse to return when divorce is revoked are at clear variance with Islamic Family Law. Indeed, Bin Tahir believes all these clauses were merely aimed at empowering women to leave the matrimonial home against the wish of their husbands.[151] The lack of definition of irreconcilable differences also opened the door to judges to decide for themselves what constitutes *shiqāq,* to the extent that a judge in Marrakech ruled that: "the very fact that the wife has said she wants to end the marriage is sufficient to establish *shiqāq*. There is no option but to accept her plea and divorce her from her husband with an irrevocable divorce due to irreconcilable differences (*talqatan ba'inatan li al-shiqāq*).[152]

As a result of this opening of doors, divorce numbers in Morocco increased astronomically. Divorce for irreconcilable differences increased from 4,865 in 2005 to 48,376 by 2012 and 39,826 by 2013.[153] Chebhanna Maa al 'Aynaine, when asked about this, responded that the numbers may be exaggerated by several factors. The first is that the practice of registering divorce and judicial oversight may make data available that we did not have when divorce was unilateral. Also, the modern means of communication give us information over a wide area

[148] Lamnawar, interview, 5/1/2023, Rabat
[149] Fountir, interview, 5/1/2023, Rabat
[150] Ghalabzouri, interview, 5/1/2023, Rabat
[151] Bin Tahir, supra, p.151
[152] Al-Mahdi, *al-Marji' al-'Amalī*, supra, p. 50
[153] Ibid, p. 51

that was not available before.[154] However, it is more likely that these numbers indeed reflect the new ease of divorce, and that this reform has thus undermined the stated commitment of the law makers to make divorce rare and exceptional.

6.6.5.3 Financial Security for Women

When any party approaches the court for annulment based on *shiqāq* the court tries to reconcile them including through arbiters. Where this fails the court fixes the woman's vested rights to be paid by the husband within a specified period (Articles 94-97). It is noted that the *Mudawwana* does not make a distinction based on who seeks the dissolution such that a wife may exit a marriage at her own discretion against the will of the husband, who is still expected to pay the rights for her, and any children, provided in Articles 83-85. These vested rights are also payable when a husband seeks permission to register a divorce and before the permission is granted. Furthermore, the entire amount is to be deposited in court within thirty days (Art. 83), failing which he is considered to have renounced his intention to repudiate his wife (Art. 86).

In Chapter Five we had discussed the danger of this provision, which is that it introduces a strange term *(taraju'* or retreat/renunciation) that is unknown to Islamic Law and creates a situation where marriages that are invalid under the *Shari'ah* are validated by the code. The problem arises where a husband has pronounced divorce verbally, and then is unable to register it because he has failed to pay vested rights within the deadline. In such a case the 2004 Moroccan code does not approve or recognize a divorce that has crystallized under the *Shari'ah*.

Ghalabzouri's response to this is that there is no apodictic text that says verbal divorce is always valid, and the distinction must remain between *fiqh* and *Shari'ah*. She says this is a matter of custom. In the time of the Prophet transactions and contracts were verbal. People bought and sold, married, and divorced, presented evidence, all verbally. In the modern Morocco everything is documented, and transactions (*mu'āmalat*) are not concluded verbally, therefore insisting on documentation of divorce before the courts is consistent with *usul al-fiqh*, and changing *ijtihād* with a change in circumstances.[155]

Ben Hamza, on the other hand, believes this reform violates the *Shari'ah* and considers the *Mudawwana* to be a work in progress. He believes this section ought to be reviewed.[156] Chebhanna Maa al-'Aynaine comments, wisely, that laws "are born, age and die" and the time will come to look at the *Mudawwana* and make improvements if there is need.[157] Milouda Chame sees this section as extremely problematic and suggests that it would have been better to register the divorce and resort to the avenues open for enforcement of maintenance to secure vested rights. She is of the view that, on a holistic reading of the *Mudawwana*, verbal divorce is valid. This is because the Preamble which is part of the law states that "irregular pronouncements of repudiation by the husband shall not be considered valid". The law then proceeds in Articles 90-93 (which we discussed above) to explain those irregular

[154] Maa al-'Aynaine, interview, 5/1/2023, Rabat
[155] Ghalabzour, interview, 5/1/2023, Rabat
[156] Ben Hamza, interview, 30/1/2023, Oujda
[157] Maa al-'Aynaine, interview, 5/1/2023, Rabat

pronouncements that are invalid. The implication is that except for these, other pronouncements are valid.[158] On this view the court must register the divorce once pronounced while compelling the husband to pay vested rights, since the law does not explicitly classify verbalised divorce as irregular. This would be the correct approach to achieving the aim of the reform without discarding the *Shari'ah*.

On divorce based on irreconcilable differences, the problem is compounded when we consider the ruling of the Supreme Court on 17 January 2012. The court ruled that consolation payments (*mut'ah al-ṭalāq*) are only payable where repudiation or annulment was initiated by the husband, and that the lower court erred in granting this claim to the wife who initiated divorce due to *shiqāq*. The Supreme Court's argument was that Art. 84 which provided for vested rights was clear that the circumstances leading to repudiation are to be considered and where the wife initiates divorce, she is not entitled to these rights.[159] Ibrahimi believes that the court has taken away from women one of the gains they made in the *Mudawwana*. This has, in turn, led to a perverse consequence.

A husband who wants to divorce his wife and fails or refuses to pay vested rights, now simply makes her life so miserable that *she* is forced to apply for divorce for reason of *shiqāq*. He, therefore, succeeds in obtaining the divorce he wanted without paying her the vested rights, as she initiated the divorce. The aim of providing divorced wives with financial compensation is thus defeated.[160]

In our view, notwithstanding good intentions, both the principle of retraction (*taraju*') and the loose definition given to *shiqaq* have led to absurdity and will probably be reviewed in subsequent reforms.

6.6.6 Polygyny

The *Mudawwana* sets stringent conditions that make polygyny almost impossible. These provisions are contained in Articles 40-46. The law prohibits polygyny where there is a fear of inequity between wives or when a wife stipulates in the marriage contract that the husband will not take a second wife. Bin Tahir points out here that it is impossible for the court to inequity or injustice before it takes place, as this is internal to the man who is planning to marry. The court can only judge after injustice has occurred. In making the pre-nuptial stipulation against polygyny binding, the code abandoned the Maliki position and adopted the ruling of the Hanbali School on this subject.[161]

The succeeding articles lay out conditions for approving polygyny. The judge is not to authorize polygyny unless exceptional circumstances have been established, and there is evidence of financial capacity to maintain two families. The first wife is to be informed. Her permission is not required, but if she insists on divorce the court sets an amount of money corresponding to her full rights that must be paid within seven days. Failure to pay is considered withdrawal of application to marry another wife. If the husband insists on proceeding and has met the

[158] Chame, interview, 5/1/2023, Rabat
[159] Ibrahimi, *Dirāsāt 'Amaliyya*, supra, p. 264
[160] Ibrahimi, interview, 3/2/2023, Casablanca
[161] Bin Tahir, , supra, pp. 199-200

conditions, while the first wife objects but does not ask for divorce, the court automatically activates the irreconcilable differences procedure. The marriage to the new wife cannot be contracted until she has been informed by the judge that the husband is already married.

Ghalabzouri explains that the rules in the *Mudawwana* are not aimed at prohibiting polygyny but at ensuring that Islamic principles are adhered to. Men should honour commitments they make to monogamy and should not marry without their existing wives being aware. They should also be able to maintain the families, and polygyny cannot just be a matter of the desire or pleasure of men but based on a serious and exceptional need. Marriage is not just about vain desires.[162]In the *Mudawwanah,* even when the wife consents to the husband marrying a second wife, the judge may withhold approval if exceptional circumstances have not been established.

Fountir explains that the man does not need the permission of his wife to marry another wife. However, the wife must have the right to decide if she wants to share her husband. Marriage is about mutual consent, and the wife should not be compelled to be in a polygamous home if she does not accept it.[163] Tayyeb Lamnawar points to the problems associated with men marrying multiple wives and not being able to cater for them or the children. He notes the Prophet's action in stopping Ali from marrying a second wife while married to the Prophet's daughter, Fatima. He also stresses that Moroccan women today will not accept what their predecessors accepted, and laws are for people and must consider their needs.[164]

Al-Hurr agrees with all these points but also acknowledges that polygyny is sometimes a response to a human desire. She says some men now enter illicit relationships because the courts will not permit them to marry another wife.[165] Milouda Chame also believes that if a man can maintain several wives he should be allowed to, as prohibition will lead to illicit relations. She argues that there are more women than men in the population and from experience there are women who accept polygyny. When looked at from the perspective of the *maqāṣid*, polygyny is not all negative as it has its own positive and beneficial dimensions.[166]

Bin Tahir, representative of the view of jurists, has expressed reservations on this tightening of regulations around polygyny.[167] He accepts that in jurisprudence the State has the right to regulate that which is lawful (*taqyīd al mubāh*), but this should be subject to two conditions. The first is that this rule is only applied to establish a real, as opposed to imagined, *maṣlaḥah*.

According to him, polygyny is very rare and uncommon in Morocco. Even in Arab countries known for polygyny, polygamous families did not exceed 4% of unions in Egypt and Libya in the 1950s and were less than 1% in Syria. Moroccan ministers have stated in Parliament that less than 1% of Moroccan families are polygamous. Given how rare polygyny is in Morocco,

[162] Ghalabzouri, interview, 5/1/2023, Rabat
[163] Fountir, interview, 5/1/2023, Rabat
[164] Lamnawar, interview, 5/1/2023, Rabat
[165] Al-Hurr, interview, 20/1/2023, Casablanca
[166] Chame, interview, 5/1/2023, Rabat
[167] For what follows see Bin Tahir, supra, pp. 207-208

Bin Tahir does not see the need for all the debate around it, much less the need for a special law to prohibit that from which the people have themselves refrained.

One would respond, to the contrary, that it is precisely in countries like Morocco that these laws become necessary. If the situation is as described above, then culturally, Morocco is a monogamous society, and Moroccan women are not likely to imagine, on entering a marital union, that their husbands will want to marry a second wife. In this kind of environment, the mental, emotional, and psychological harm from the shock of polygyny is likely to be severe, so strict laws making polygyny difficult are appropriate. The only reservation is that where the two women agree to share a husband the court should not have the power to stop the marriage on grounds that the judge is not satisfied that there are exceptional circumstances. Moroccan society is not the same as the Hausa Muslim society of Kano where, as we saw in Chapter Five, polygamy is a way of life and generally accepted as part of the culture.

The second condition Bin Tahir places is that the rule should be invoked based on consideration of the Islamic religion and not be driven by international agreements that have no relation to Islam. Here again, one would note that, based on the numbers given by Bin Tahir himself, it is most likely that the great majority of Moroccan women are opposed to polygyny and would like it to be prohibited, with or without international treaties. To the extent that polygyny is simply permitted and not obligatory or desirable, tight rules ensuring it happens only in compliance with the letter and spirit of the *Shari'ah* are appropriate.

We saw in Chapter Five that the provisions in the proposed Kano Code around polygyny were tame and unlikely to be of any effect in their current form. This is despite the strong need for regulation of polygyny in Kano, and in Northern Nigeria in general. The need for restricting polygyny in Kano is based on different considerations from those in Morocco. In the latter, it is in consideration of the feelings of the Moroccan woman, and the harmful effects on her given the cultural environment. In Kano, the inability of husbands to provide maintenance is the biggest problem faced by wives. This problem is compounded, in fact, many times over, by the prevalence of polygyny, and high fertility rates. This cultural practice[168] has resulted in men marrying many wives and producing children they cannot feed, educate, or care for. In fact, polygyny and high birth rates among the poor are among the main causes of widespread poverty and ensuing social problems in the region.

The economic consequences are devastating, and the statistics given in Chapter Five are indicative of that. High rates of poverty, a youth bulge that is uneducated, a high dependency ratio and other consequences of the failure of the region to achieve what is called a "demographic transition", have resulted in rising waves of crime, drug addiction, political thuggery and even terrorism and banditry, which plague Northern Nigeria. The economic transition necessary for improving living standards across the board is not possible without an accompanying demographic transition. The latter is not possible without the younger

[168] For a comprehensive discussion of cultural norms including polygyny, divorce and high birth rates, see Barbara Callaway, *Muslim Hausa Women in Nigeria: Tradition and Change* (New York, NY: Syracuse University Press 1987), pp. 1-34

generation moving away from polygyny and having fewer children than their parents thus reducing the dependency ratio.[169]

It is understood, of course, that new laws are only one part of what is needed to achieve this. But there is a clear link between excessive population growth and rising poverty and insecurity, and so family law reform in this area is crucial. In the case of the *Mudawwana*, the laws are properly constructed to achieve the objective of making polygyny almost impossible without prohibiting it legally as in, for example, Tunisia. In this there are lessons to be learnt.

6.6.7 *Nafaqah* (Maintenance)

The *Mudawwana* is like the Kano Code in making maintenance of wife and children the obligation of the husband. It also makes non-maintenance a ground for divorce. Where a husband has assets from which maintenance can be paid, the court fixes the means of payment. Where the husband does not have financial capacity and is unable to resolve this in thirty days, or where he has capacity and refuses to provide maintenance, the court shall grant the wife's petition for divorce (Art. 102). There is no serious difference between the two codes on maintenance.

It should be stated, however, that Morocco has set up a "Family Support Fund" (*Sundūq al-Takāful al-'Ā'ilī*). In 2010, a law passed by the King sets out guidelines that permit a wife and children who have received a court ruling on maintenance, where the husband/father is unable to pay or cannot be found, to benefit from this fund.[170] This is a social welfare system which we shall return to in Chapter Seven, as the State needs to step in on questions of maintenance especially where poverty levels are high. We will discuss recommendations on maintenance in detail in the next chapter.

6.7 Conclusion

In this chapter, we provided a brief overview of the Family Code of Morocco (2004) with the intention of carrying out a comparative analysis of key sections of the Code with the proposed Kano State Code of Muslim Personal Status (2019). A major source of data for this chapter was a series of in-person interviews conducted by the researcher in Morocco. The interviewees ranged from academic specialists in Islamic *fiqh*, to lawyers, judges, jurists, and administrators. Some of these were involved in the drafting of the Family Code as members of the committee set up by the King. We discussed the rationale for choosing Morocco as a comparator.

The analysis brought out issues in jurisprudence, but also the interplay of feminism, modernity, and socio-economic factors and how these all played a role in the collective *ijtihād* behind the 2004 Code, using these factors as explanatory variables for the differences noted between the two codes. Where possible we compared the two codes and highlighted strengths and weaknesses.

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[169] For a full analysis and explanation of this, see E. Jimenez and M.A. Pate "Reaping a Demographic Dividend in Africa's Largest Country: Nigeria" in H. Groth and J. May (eds), *Africa's Population: In Search of a Demographic Dividend* (Cham: Springer International Publishing 2017), pp. 33-51

[170] This law is reproduced in Ibrahim Ahtab, *Mudawwanah al-Usra fī Dhaw' Ākhir al-Mustajaddat al-Shar'iyyah* (Agadir: Majmu'ah al Handasah al Qanuniyya 2022), pp. 244-248

The Family Code of Morocco is strong on the protection of the rights of women and children and the promotion of gender equality. It runs sometimes into contradictions, and has produced unintended consequences, when it retains a narrow ideological focus. It does an excellent job, for example, in constraining the scope of discretion of men in divorce and narrowing the range of divorces that are considered valid. However, by opening the door to women having easy access to divorce the objective of limiting it and enhancing stability of the family was undermined. It also was shown to have an inconsistent approach to the entrenchment of true gender equality. However, its provisions regulating polygyny are seen to be largely positive, as are its strong support for the financial security of women within marriage and after divorce. At all points we tried to bring in the voices of our interviewees to add context to the nature of intellectual debate in Morocco itself, and gain from their practical experience as drafters, teachers, and implementers and interpreters of the law. This chapter is the last of three chapters (Four, Five and Six) based on field work conducted in Nigeria and Morocco. In the next chapter, we make proposals for fine tuning the Kano Code based on the learnings from this study, before concluding the thesis in Chapter Eight.

Chapter Seven: Towards an Effective Kano State Code of Muslim Personal Status

This chapter brings together the outcomes from the previous six chapters and makes recommendations that should improve the effectiveness of the proposed Kano State Code of Muslim Personal Status as an instrument of social reform and human development in the state. The first three chapters laid out the theoretical framework for the analysis. Chapter 2 discussed the sources and methods of the Mālikī school of Islamic jurisprudence (*madhhab*), to which Nigeria and Morocco officially subscribe. Chapter 3 discussed codification as a reform tool, examining both the influence of modern egalitarian discourses and new approaches encouraging innovation and renewal in jurisprudence on the development of legal codes. Both chapters were presented against a backdrop of an extensive literature review on Islamic legal reform, especially Muslim feminist theory, undertaken in chapter 1.

The next three chapters were based on empirical work carried out in Kano and Morocco. Chapter 4 presented quantitative and qualitative analyses of data from nine *Shari'a Court*s in Kano State. The quantitative analysis revealed the nature of frequent complaints by women before Sharia Courts, providing evidence that the draft Kano code did not effectively address the most serious and frequent problems faced by women in Kano. The qualitative analysis generally showed that where women pursued their rights before courts, there was a strong tendency for the courts to grant them protection and enforcement, including annulment of the marriage where so demanded, on account of maintenance, harm and discord or irreconcilable differences. The findings in chapter 4 would suggest a need to take a second look at some sections of the Proposed Code, which was further highlighted and specified in chapter 5.

Chapter 6 was a review of the 2004 Moroccan family law, which is held up by Muslim feminists as the model of a progressive and egalitarian law and credited as being the "original inspiration" for the setting up of a global Muslim feminist association, *Musawah*, with the objective of promoting similar egalitarian laws in Muslim majority countries.[1] A comparative analysis of the Kano and Moroccan code however reveals that any claims of having an "ideal" or "model" Islamic family code for universal application in all Muslim-majority countries should be viewed with caution, as every code has its strengths and weaknesses, and the law cannot be divorced from the society it seeks to regulate. Muslim societies differ in culture, history, levels of socio-economic development and priorities. Besides, breaking away from some of the legacies of "pre-modern" and "patriarchal" Islamic law sometimes leads to unexpected adverse consequences for the marriage institution, which is the base for social cohesion and stability, especially in Muslim societies.

Against that background, we now analyze the prospects of the Kano code as an instrument of social reform in the state. This chapter will briefly discuss the need to design reforms based on a concrete analysis of the situation in each society and the problems of its women, by

[1] Ziba Mir-Hosseini, "Women in Search of Common Ground: Between Islamic and International Human Rights Law", in Anver M Emon et al. (eds.), Islamic Law and International Human Rights Law, pp290-302. Quote on pp. 298-299

briefly discussing the pitfalls of an uncritical adoption of global feminist discourses as the sole impetus for Islamic family law reform everywhere. We will also review some literature on why law-making sometimes fails to achieve its objectives, with a view to improving the design of the Kano Code to ensure its appropriate effectiveness. The rest of the chapter will be devoted to recommendations on required changes to the draft code, as well as policies that affect the wider social environment, if the law is to serve the purpose of addressing the social problems faced by most women in Kano State. After this chapter we will summarize and conclude the thesis in chapter 8.

7.2 Islamic Family Law Reform and Global Discourses

The previous chapter reviewed the 2004 Mudawwanah of Morocco and the influence of modern international human rights treaties and concepts of gender equality on its production. These same influences were projected on to the explicit programmes and positions of Muslim feminist movements, such as Musawah and its *Framework for Action*, as analysed in chapter 1. Some of the discussion in this section will link the findings in chapter 6 with the literature review on feminist theory in chapter 1.

Sadeghi's general model[2] presented in chapter 6 provides a framework for locating the hermeneutical methodology of Muslim feminism. Legislation such as the Morocco Family Code belong to the category where the conceived law is the starting point and not necessarily the product of Islamic legal reasoning. The stated objective of reconciling classical jurisprudence with international treaties to which Morocco was a party would suggest a commitment to have a modern law that establishes gender equality in family matters and frees women from patriarchy. What is left is to find some justification from within the Islamic tradition that allows a reconciliation between classical law and "modern" values. One example is the manner many forms of divorce considered valid in Maliki Law were jettisoned and invalidated with the objective of reducing the scope of valid repudiation. This, and other issues, were covered in the previous chapter.

Dörthe Engelcke is very clear that many of the legal groups engaged in law reform and advocacy in Morocco were secular groups with a history of belonging to left wing political parties. She observed that:

> "These groups are labelled secular since they mainly operate within an international human rights framework. In the event that they use Islamic arguments or cooperate with religious authorities to justify their demands, they do so tactically in the face of strong opposition from Islamists and other social conservatives rather than out of conviction. Demonstrating that their demands are in conformity with Islamic law thereby becomes a means to disable opposition. These groups see women's rights as human rights and thus as universal rather than culturally specific…"[3]

It is this last statement that has been the subject of serious debate. In chapter 1, we noted the assertion of Sa'diyya Shaykh that the "ideals of Islam…are premised on an ontology of radical human equality"[4] and the criticism that the concept of equality held by progressive

[2] Sadeghi, B., *The Logic of Law Making in Islam*, supra, Chapter 1, pp 1-39
[3] Engelcke, D., *Reforming Family Law*, supra P 134
[4] Sa'diyya Shaykh, "*Transforming Feminisms: Islam, Women and Gender Justice*", in Omid Safi (ed.) *Progressive*

feminists originated in western post-enlightenment scholarship. According to this critique, as we noted, "the interpretations conferred on Islam represent a hermeneutical process of finding meanings in the Qur'an and hadith that are consistent with the presuppositions of the western-trained intellect."[5]

This question is inseparable from its origins in Women's studies, in general, and Middle East studies in particular. According to Sonbol:

> "…it was natural that the first successes in Middle East women's scholarship were works guided by the principles and objectives of the dominant Western feminist paradigm that emphasizes the liberation of women from patriarchal shackles…therefore, male dominance, or gender relations based on male dominance, is the predominant paradigm in Middle East feminist studies, as it is in Western feminism. Arab feminists…have minced no words in their attack on their societies, where women are considered the chattel of husbands, fathers, or brothers."[6]

Sonbol is skeptical about the universalist claims of this egalitarian discourse, referencing critics who assert that Western feminist thought is "based on the concrete experiences and realities of women living in Western societies…which do not reflect the concrete experiences and realities of Middle Eastern women."[7] The result is that Muslim society is judged by the standards of Christian Europe. Julia Clancy-Smith[8] refers to the Arab woman being fed "into an emerging colonial gaze and discourse fixed upon *la femme arabe*, upon her sexuality, her femininity, her procreative powers.[9] She quotes General Daumas, who describes the customs he is describing as "revolting to European sensibilities."[10]

The European "gaze" is not limited to the Arab world. Barbara Callaway,[11] commenting on the Muslim Hausa society of Kano, has this to say:

> " In this culture women are positioned in effect as the minor wards of their fathers and husbands; they are induced to marry early, to confine their activities to the domestic sphere…and to observe postures of deference and service toward men…Because most men, whether commoners or traditional ruling elites, have not been exposed to secular teaching, they have had little opportunity to develop an awareness of modern or enlightened attitudes concerning women"[12]

She acknowledges that the condition of women in any society is impacted by a diverse range of factors like mode of economic organization, and contradictions intrinsic to specific forms of

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Muslims: On Justice, Gender and Pluralism (Oxford: Oneworld 2003), pp. 147-162.

[5] Sanusi, Sanusi Lamido, "The West and the Rest: Reflections on the Intercultural Dialogue about Shari'ah", in Philip Ostein et al (eds), *Comparative Perspectives on* Shari'ah *in Nigeria* (Ibadan: Spectrum Books 2005), pp. 251-274.

[6] Sonbol, Amira El Azhary (ed.), *Women, the Family and Divorce Laws in Islamic History*, supra. p. 3
[7] Ibid p 4
[8] Clancy-Smith, J.," La Femme Arabe : Women and Sexuality in France's North African Empire", in Sonbol, A. E. (ed.) supra pp 52-63
[9] Ibid. p. 53
[10] Ibid p 57
[11] B.J., *Muslim Hausa Women in Nigeria*, (New York, Syracuse University Press, 1987)
[12] Ibid. p xvi

society. However, she insists that her research is focused on "religion and culture" as "the particular set of influences" affecting the roles and social place of women.[13] Thus the organizing principles for the patriarchal settings described are to be found in "the *Hausa* ethos of *male domination* and the *Islamic* emphasis on *male supremacy.*"[14](italics mine). As Sonbol aptly puts it, scholars focus on trying to understand why Muslim societies have failed to modernize and what is to blame for the continued backwardness of these societies. "The blame is usually placed at the door of culture and religion.[15] Thus, Salwa al-Khamash entitles her book *The Arab Woman and the Backward Traditional Society*, in which Islamic traditions are presented "as the basis for the subjugation of Arab women."[16]

This European gaze looks downward at traditional Muslim society which, in comparison with modern society, is characterized as "backward." "Islam" is essentialized, and Muslim societies are treated as monolithic. Progress, on the other hand, happens when the Muslim family begins to look more like the European family. Monogamy is the ideal, while polygyny which has been the norm in most Muslim societies over most of their history is an aberration. Societies in which girls marry at 15 or 16 are backward and do not respect child rights, but those that permit 14-year-old girls to have consensual, pre-marital sex are not. Such an approach to social reform is bound to be tied up in debates and controversy, because nothing is at stake if not values and identity markers that societies stand by. Consequently, Islam becomes a battle ground as each party claims authenticity. Muslim feminist groups distance themselves from "Western feminism" and argue that their battle for equality is rooted in a correct interpretation of Islamic law, taking cognizance of the dynamic evolution of *fiqh* over time. Conservative jurists, as we have seen, condemn many reforms as being against the *Shari'ah* and inspired by international treaties based on non-Muslim values.

On the evidence of this thesis, there is a different way of looking at the issue. Many of the progressive law reforms in Muslim majority countries, (and the *Mudawwana* of 2004 is a prime example), indeed take international agreements and modern concepts of gender equality as a starting point and merely try to reconcile this adopted position with the Qur'an and *hadith*. However, the claim that this renders the laws un-Islamic is not tenable. As seen in chapter 6, Sadeghi has argued convincingly that this hermeneutic approach is also to be found in classical jurisprudence and is strongly evident in Hanafī law. He argues that where a position taken by the early jurists was seen to contradict a verse of the Qur'an or hadith, the approach taken was to rely on abrogation *(naskh*) or preponderance *(tarjih*) or harmonization (*tawfiq*).[17] So long as modern reformers are able to reconcile their positions with the texts therefore they are not operating outside boundaries of pre-modern jurisprudence and should be granted the same legitimacy as their predecessors. It is therefore untenable to criticize these codes

[13] Ibid, p21-22
[14] Ibid p 28
[15] Sonbol, supra p. 2
[16] Ibid. P 3
[17] Sadeghi quotes the 4th/10th century Hanafi jurist al-Karkhī explicitly recommending this.. see Sadeghi, op. cit p. 135

inspired by international treaties as un-Islamic, since the hermeneutical method underlying them is not alien to (at least some) classical jurisprudential approaches to law making.

The challenge comes when feminists make universalizing claims to having the "correct" understanding of Islam and question the Islamic character of alternate interpretations. The argument sometimes made is that received law simply reflects a gendered and patriarchal world view and is inconsistent with the Qur'anic ideal of equality. This claim ignores the fact that the concept of equality advocated by reformers was acquired not from the Qur'an but from post-enlightenment Western European thought, and the new "readings" of the law merely represent interpreting the Qur'an in a manner that reconciles it with these modern values. Several of the issues raised in modern debates (such as forced marriage, necessity guardianship in the case of adult women, marriage of minors) were also debated in pre-modern Islamic jurisprudence. However, the conception of a family based on gender equality, where the authority of the husband and father is erased, is a distinctly modern one. The *Mudawwana* of Morocco is perhaps the right Islamic law for Morocco given where the society is and what its values are. This does not make it the right law for Northern Nigerian Muslims currently. Indeed, the first *Mudawwana* of 1957 which was driven by the determination to affirm the Islamic and non-Christian character of the Moroccan state had become obsolete by 2004 when the driving force was a quest for synthesis between Islamic law and modernity.

Social reform, therefore, must be rooted in concrete situations and the Kano code should address the problems of Kano women, rather than aspire to conform to an international discourse not rooted in the concrete experiences and realities of the society. As society evolves, where "modern" or "Western" values become dominant, interpretations consistent with those values emerge. Mounira Charrad's groundbreaking work already showed how, even in the Maghreb, differences in the colonial experience and French policy in Tunisia, Algeria and Morocco led to different attitudes towards women's rights by the newly independent states.[18] The colonial experience in Northern Nigeria was one of British "Indirect Rule", and the educational policies put in place were deliberately designed to insulate northern Nigeria from the influence of modernity. The British, determined not to reproduce a progressive Muslim elite of the kind in Egypt and India, deliberately reinforced the pre-colonial traditions on ground, stressing the importance of hierarchy and obedience to an aristocratic class with the Emir at the top reporting to, and accepting the supremacy of white colonial officers. An excellent study by Peter Tibenderana of the impact of colonial educational policy in producing a religiously and culturally conservative Northern Nigeria is available, and this is not the place to go into detail.[19]

After the return to democratic rule in Nigeria in 1999, twelve Muslim majority states in the northern part of the country, including Kano, formally announced the adoption of *Shari'ah* law as their official law, asserting their Muslim identity. Since then, northern Nigeria has seen a

[18] Charrad, M.M., *States and Women's Rights: The Making of Post-Colonial Tunisia, Algeria and Morocco*, (California, University of California Press, 2001)

[19] Tibenderana, P. K., *Education and Cultural Change in Northern Nigeria, 1906-1966: A Study in the Creation of a Dependent Culture*, (Kampala: Fountain Publishers, 2003)

rising wave of Islamic extremism, including terrorist activity by groups like Boko Haram.[20] In this context, the social imaginary would not be conducive to accepting values seen as Western or Christian, and the tendency is to interpret laws in a manner consistent with the desire to assert Islamic authenticity. This means the scope of ijtihād and the flexibility of jurists will itself be defined by this discourse.

The summary of the argument is that a variety of constructs of the law are consistent with the terms "Islamic" and "Reform", and no single interpretation can be held up as a correct model for all Muslim majority societies to adopt. For northern Nigeria to readily accept interpretations of the Law in some other Muslim majority countries, there must be substantial investment in the education of girls and women, and policies that improve access for women to economic and political empowerment. Thus, it is not really the Law that will lead to transformation of society, but the other way round, while not totally being oblivious to the dialectical nature of the relationship between the social base and the legal superstructure. What becomes clear is that while codification of Islamic law will have some impact on women's rights in Kano, a truly egalitarian law is only possible with a more egalitarian society, and law is only one component of what is needed to achieve this goal. We will return to these points later in this chapter.

7.3 Making Effective Laws

Having established the necessity for reform to be rooted in the concrete realities and experiences of women living in a specific society at any given time, there is still the question of factors that need to be taken into consideration for laws to achieve the objectives set by the makers in any given context. History is replete with laws that fail to achieve their aims, or that lead to consequences unanticipated and sometimes undesired due to a lack of attention to implementation challenges. While in the last section we looked at the impact of society on the interpretation of law, in this section we will be looking at the potential of law to effect changes in society and, specifically, the factors that may constrain this.

In chapter 1, we reviewed several contributions to the theory of law and social change, which we will not repeat here in full. We reviewed the contribution of Yehezkel Dror, in which, relying on empirical work in Turkey, he argues that law is effective in influencing social action of a mainly instrumental character(such as commercial activities), but is of limited efficacy when dealing with matters of basic beliefs and institutions such as family life and marriage habits.[21] We also reviewed Yakare-Oule Jansen's contribution based on law reforms in Egypt, Tunisia and Morocco.[22] She highlighted the role of courts which fall back on classical law, the lack of

[20] For an excellent collection on articles on this phenomenon see Mustapha, A.R. and Meagher, K. (eds.), *Overcoming Boko Haram: Faith, Society and Islamic Radicalization in Northern Nigeria*, (James Currey, 2020)

[21] Dror, Y., "Law and Social Change", *Tulane Law Review* 33 (1959), pp. 787-802 and Dror, Y., "Law as a Tool of Directed Social Change: A Framework for Policy-making" *American Behavioral Scientist*, 13 (6) March 1970, pp. 553-559

[22] Yakare-Oule Jansen, "Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt,

conviction on the part of some judges about the legitimacy of reforms, the limited knowledge of the family code and awareness of rights among women, and the influence of family members and upbringing as factors leading to a divergence between the perceived "emancipation of women" in the law and their real position in society. Ann Seidman and Robert Seidman[23] also noted how laws have failed to change society in post-colonial Africa, highlighting steps that are critical to the effectiveness of legislation in social change. These begin with the proper identification of the social problem to be addressed. Finally, we summarized seven necessary conditions laid out by William Evan if law making were to succeed, which effectively brought together disparate strands from the arguments of the previously analyzed contributors.[24]

In addition to the afore-mentioned authors, David Goddard's work in this area[25] will be relied upon in laying the foundation for the rest of this chapter. Goddard's work is the most comprehensive we have seen on the subject, covering the ways in which legislation fails, the psychology of designers and how that affects judgment in design, lessons from previous mistakes and comprehensive checklists for lawmakers. We will limit ourselves to a brief discussion of his analysis of ways in which legislation fails.

Goddard provides us with a taxonomy for grasping various types of failure in legislation, as follows:

a) "The Damp Squid"

Goddard uses this term to refer to laws that simply fail to produce the desired result. The reasons for this vary. One common reason is that the people whose behaviour the law is supposed to change "are not aware of it, or do not understand it."[26] A second reason is that those expected to benefit from the law lack the knowledge, skills, or resources to invoke it.[27] For example, in our case, poor rural women, or young girls, even if they knew the law, may not have the resources to pursue a court case to enforce their rights, and may be vulnerable to intimidation and harassment from the very persons they sue without any kind of state protection. Another reason is that the institutions responsible for administering the law are ineffective. These could be for example the courts or the law enforcement agencies that carry a backlog of cases, do not prioritize the subject of legislation, or are riddled with corruption.[28] Sometimes those supposed to implement the laws do not understand it. Tellingly, Goddard also notes that laws often fail "where they run counter to a society's deep-seated beliefs and customs." In such a situation only education and advocacy that changes attitudes

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Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?" *Northwestern Journal of International Human Rights* 5 (2) (2007), pp. 181-212.

[23] Ann Seidman and Robert B. Seidman, "Law, Social Change, Development: The Fatal Race – Causes and Solutions" in Ann Seidman et al (eds) *Africa's Challenge* (Asmara: Africa World Press 2007), pp. 19-50.

[24]Evan, W. M., "Law as an Instrument of Social Change" in Evan, W.M. (ed.), *The Sociology of Law: A Social-Structural Perspective* (New York: Free Press 1980), pp. 554-562.

[25] Goddard, D., *Making Laws that Work: How Laws Fail and How We Can Do Better* (U.K., Hart Publishing, 2022).

[26] Ibid p. 17

[27] Ibid pp 18-19

[28] Ibid p 19

and beliefs will facilitate effectiveness of the law.[29] We can think of the provisions around wife-beating in the proposed Kano code or the feeble attempt to regulate polygyny as candidates for damp squids. Later in this chapter, we will make recommendations aimed at enhancing the effectiveness of these provisions, largely through public enlightenment and the involvement of arbitral bodies.

b) "The Overshoot"[30]

This refers to situations where laws deliver what they intended to achieve but do not stop there- they overshoot. One example that comes to mind is the expansion of divorce rights for women in the *Mudawwana* of Morocco, which has led to an alarming escalation in divorce rates and the breakdown of families. This was clearly not the intended consequence. The objective was to provide women with the same ability to exit a marriage as men, the result was that the stability of the family was sacrificed on the altar of equality. By examining various angles to a policy and recognizing trade-offs involved, the law may deliberately sacrifice some benefit in favour of a higher goal. In the case of Morocco, for example, the strengthening of arbitral institutions that exhaust avenues for reconciliation before the court approves dissolution of the marriage would help reduce divorce rates.

c) "Nasty Surprises"[31]

These are like the "overshoot", where the law achieves its goals but comes with other unexpected consequences. Another example is where laws are imported or copied from other jurisdictions and imposed on systems that are not prepared for them. The group also involves situations where institutions like the courts refuse to implement the laws, as we saw in the work of Yakare-Oule Jansen above, when she refers to judges finding ways of ruling based on their personal convictions that may be inconsistent with the new legislation or reverting to classical law. The engagement of stakeholders, education, and enlightenment, are therefore necessary for laws to be effective.

d) "The Backfire"[32]

This happens when a law leads to results that are the opposite of its intent. Goddard gave the example of a bounty offered by proclamation of the British Raj in Delhi for cobra skins, the idea was to encourage the killing of cobras to reduce their population. But the bounty was so high it encouraged people to farm cobras and increase their population so they could make money from the skins. One can also look at the divorce regulations in the *Mudawwana* which we reviewed in chapter 6. To ensure that women receive substantial compensation when divorced, the husbands are compelled to deposit vested rights within a tight timeline or lose the right to register the divorce. However, husbands have resorted to making the lives of the wives miserable, compelling the wives to apply for judicial divorce due to irreconcilable differences, in

[29] Ibid p. 20
[30] Ibid. pp 20-22
[31] Ibid pp 22-24
[32] Ibid pp 25-27

which case they are not entitled to any compensation. The law therefore backfires because the women end up being divorced with no compensation.

The proposed Kano code, to be effective, must avoid falling into any of the above categories of failed laws and learn from past mistakes. The rest of this chapter aims at identifying areas in the draft which need to be amended or reconsidered to avoid these pitfalls, as well as reforms needed in wider society for the new law to be effective.

7.4 Towards an Effective Reform

Chapter 4 reviewed empirical data on marital problems before courts and arbitral institutions in Kano State. Based on analysis of court data from nine Sharia courts over five years (2016-2020), we noted the way postulates of *Qiwāma* and *Wilāya*, which underpin feminist discourses, affect the women of Kano. The Qur'anic verse (4:34) that provides for male leadership of the family *(qiwāma*) also makes men responsible for maintenance (*Nafaqah*) and discipline. Contrary to what obtains in global Muslim feminist discourses, there is no observable challenge in northern Nigeria to the *principle* of male leadership and authority in the *family*. In other words, northern Nigerian Muslim women are not significantly engaged in the discourse of dismantling "patriarchy". On the contrary, 41% of the cases had to do with claims for *Nafaqah*, with the bulk to do with the failure of husbands to provide food for wives and children. These claims related both to women who were still married to the husbands and to those who were seeking maintenance for children from the marriage post-divorce. The next highest category was *Ḍarar* or harm, which accounted for 26% of the cases. Under this category we found 1,340 cases of wife-beating, accounting for 45% of all claims for harm. The third major complaint had to do with *shiqaq* (discord/irreconcilable differences) which accounted for 18% of cases. It will be recalled that in this category, 67% related to women complaining of a lack of peace in the marital home, while 25% were women who had been expelled from the marital home but not divorced.

From the above, as has been noted previously, engagement with the *qiwāma* postulate remains pertinent. However, while in countries like Morocco, the advocacy of women is to impose a more egalitarian definition of the family, in northern Nigeria the focus is on men being made to live up to their responsibility as providers and restraining them from abusing the powers of discipline by resorting to violence and abuse. On *wilāya*, the cases identified have to do with consent, particularly where minors are involved.

The data also showed that, although polygyny is common and generally accepted in the culture as normal, women filed complaints of injustice and unfair treatment. Content analysis showed that many of these had to do with the husband's lack of financial capacity to maintain more than one wife. There were also many cases of injustice in sharing nights, and discord borne out of the wives living in the same space, including a disturbing case of a wife who was gang-beaten by her husband and co-wives but did not get justice because she could not lead evidence. We thus find that in northern Nigeria, there is at yet no evidence of a widespread opposition to polygyny. However, there is a clear recognition that the conditions of capacity and equity are not being enforced, which means polygyny is not being practiced in compliance with the conditions set out in the Qur'an and *Sunnah*.

Another finding was the high percentage of cases not judicially decided (64%), with many either struck out (24%) or dismissed (32%). This points to challenges of access to justice and resources to prosecute claims on the part of women, which in turn advise a need to look at administration and cost of justice and strengthen arbitral institutions. All of these were covered in chapter 4.

The findings from this analysis, which were corroborated by cases before the *Hisbah* and the Emir's court, provide us with indicators of what the law must address to be effective and relevant to the needs of women, in a manner that takes cognizance of the need to preserve the marital institution in line with the overall objectives of the *Shari'ah*. We set out below analyses and recommendations on areas of the code that need review.[33] We will discuss five areas: Registration Requirements, Maintenance, Domestic Violence, Polygyny and Divorce. The final sub-section on social reform will have recommendations with a bearing on these and other areas such as age of marriage and dispute resolution.

7.4.1 Registration Requirements

There are no formal requirements in Kano for registration of births, deaths, marriages, and divorces. Unlike other parts of the colonized world, this system was not established by either the colonial power or the post-independent state. Registration requirements come with many benefits, but also with jurisprudential challenges. Writing on official requirements for registration of marriage and divorce, Lynn Welchman notes that these (hold)…

> "…the potential for ensuring that other laws issued by the central authority are being upheld. This refers to the enforcement, for example, of rules on the minimum age of marriage, consent of the parties, judicial oversight of the conditions related to polygyny, and a woman's rights on divorce."[34]

Despite these benefits, the consensus in classical jurisprudence is that the absence of registration shall not render marriage or divorce invalid such that making it mandatory is confronted with the challenge of acceptance and legitimacy. Welchman writes that states have taken different approaches to encourage registration, including penal sanctions, fee waivers, and the establishment of an official document as standard proof of marriage.[35]

The importance of registration to the implementation of family codes is therefore established. There is no way of implementing a law on minimum age of marriage if, for example, births are not registered and thus age cannot be established, nor can the law be enforced without a requirement for registering marriages even if births were registered. Similarly, as noted in chapter 5, the conditions laid down for polygyny are meaningless if the marriage can be conducted before going through scrutiny.

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[33] To avoid repetition, all references are to the Kano Code which can be found here: https://drive.google.com/file/d/1nXVhOfNxBz1hF1pAQs4OPzRdjG0OX-bd/view?usp=sharing

[34] Welchman, L. *Women and Muslim Family Laws*, supra p. 53

[35] Ibid p, 55

The drafters of the Kano code seem to have been aware of the importance of registration. Article 126 of the code requires all marriages contracted after the promulgation of the law to be recorded in a marriage certificate (in a format provided in the code) and article 127 requires that these are documented in a register to be kept by the ward head in every ward in which marriage is contracted. However, article 35 provides that the existence of a marriage is proven by the testimony of two witnesses and article 125 clarifies that witnessing takes the form either of being present "at the point of conclusion of the contract, or by the endorsement of witnesses on a marriage certificate." Similarly on divorce, article 311 requires the issuance of a divorce certificate to be registered with ward head of the area where the divorce occurred, "witnessed by two male persons of good character."

It is difficult to imagine that this code could have gone further than this. Invalidating a marriage or divorce because it is not registered will run into a crisis of legitimacy, especially in an environment where most transactions - including purchases and sales in the market - are not registered or documented. By pointing in a direction, however, a process of education and enlightenment, and the strong commitment of ward, village, and district heads as well as state and local government officials can, over time, lead to the normalization of registration. The state can provide incentives, such as tying conditional cash transfers and certain benefits to registration of families. The social register, which is used as a basis for these transfers, could be tied to the registered marriages and births with the ward head as incentive. More effectively, the State could simply pass a law requiring all births, deaths, and marriages to be registered, and enforce same. This would not be a family law but a civil law which, however, creates the conditions for more effective laws on marriage age, divorce, inheritance etc

In creating an enabling environment for effective implementation of family law, therefore, the state will have to undertake, in collaboration with religious and traditional leaders, a mass enlightenment project, as well as set up all the necessary bureaucratic machinery for recording, registering, collating, digitizing and centralizing records of birth, marriage, divorce and death. Explanatory notes to help with implementation of these requirements may be added to the draft code at this stage. The system can neither control nor monitor what it does not know.

7.4.2. Maintenance/*Nafaqah*

We have seen how maintenance is considered the most serious problem facing married and divorced women in Kano. This is due to the high levels of poverty in the state, as indicated by the data provided in chapters 4 and 5. The proposed code makes comprehensive provisions, in articles 171-194 detailing the right of wives to maintenance, the obligatory maintenance, the treatment of maintenance for wives who work in or outside the home, maintenance accommodation for wives in polygyamous homes and circumstances under which maintenance may or may not be forfeited. Also provided for are steps to be taken to enforce maintenance rights when a husband has the means. These provisions are very sound and consistent with protecting maintenance rights for women.

The challenge comes with articles 195-199, where the code deals with situations where the husband is *unable* to provide maintenance. In the event the husband is adjudged incapable of meeting his maintenance obligations, and consistent with the classical Maliki position, the

obligation is extinguished. Also, the wife now has grounds for seeking divorce unless she was fully informed of his financial incapacity before agreeing to the marriage.[36] In such an event the court orders the husband to discharge his maintenance responsibilities within a limited period of grace, failing which he is ordered to divorce her and on his refusal the court effects a revocable (*raj'ī*) divorce. If the husband finds an improvement in his financial situation or the wife decides to return despite his lack, the marriage can be restored within the waiting period. If the period has expired, then this will have to be with a new marriage contract if that option is still available.

In discussing the techniques of codification in chapter 3, we mentioned *takhyīr*, or selection from among several juristic precedents in the same or different schools of law. It appears that the drafters of the code did not avert their minds to other approaches to dealing with this situation, which show empathy to what may be a temporary difficulty faced by a husband, and do not punish the family by ending the marriage before exhausting all alternatives. We will present below two positions that differ from the famous one in Mālikī law which, in keeping with the spirit of reform and addressing the problems of Kano should have been considered.

The jurists of the Hanafī school do not consider the financial incapacity of the husband as grounds for divorce. They say that according to the Qur'an:

> "Let the man of wealth provide according to his means. As for the one with limited resources, let him provide according to whatever Allah has given him. Allah does not require of any soul beyond what He has given it. After hardship, Allah will bring about ease."[37]

Also:

> "If (the debtor) is in difficulty, grant him time till it is easy to repay. But if you remit it by way of charity, that is best for you, if you only knew."[38]

Marriage is an institution based on love and mercy and should not just be broken up because a man, who provided for his family when he had the means, finds himself in dire straits, a situation which may change in the future. The Hanafi view is that if the wife has means she should be compelled to maintain herself as a debt on her husband for him to repay when his condition improves. If both husband and wife have no means, then if any member of the wife's family has means she shall borrow from that family member and maintain herself as a debt on her husband to repay when his condition permits. The court shall compel that relative to grant the loan if necessary.[39] From the above, the Hanafī jurists do not relieve the husband of the obligation to maintain his wife but oblige the wife and/or her relatives to provide the maintenance as a debt to be repaid whenever the husband has means. This clearly meets the

[36] The position of the Maliki school in such a case is she is not entitled to divorce since she was aware but she is entitled to *khul'* if she insists on exiting the marriage. See Dawūdī, Maqāsid, supra, p 350
[37] Qur'an: 65:7
[38] Qur'an 2: 280
[39] Ibn Hammam, Kamaluddin, *Fath al-Qadīr: Sharh al-Hidāya*, (Beirut, Dar al-Fikr, 1981), 4:389

need of the wife for maintenance, preserves the marriage, and allows the husband to meet his obligations whenever he finds ease.

An even stronger view is held by the Zāhirī school as articulated by Ibn Hazm.[40] For them, the obligation of the husband to maintain his wife is extinguished when he is unable to, because of the verse quoted above which says Allah does not impose on a soul beyond that which He has given it. They then insist that, if the wife has the means, she is obliged to maintain herself and her husband without recourse to him, even where he later finds the means to repay. Exceptions are where the man is a slave, then the primary responsibility falls on his owner and where he is free-born and has either a living son or father with means, in which case they take primary responsibility. Failing this, it becomes the obligation of the wife. Reliance is placed on the following verse of the Qur'an:

> "The mothers shall give suckle to their offspring for two whole years, if the father desires to complete the term. And he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be Treated unfairly on account of her child. Nor father on account of his child. **And an heir shall be chargeable in the same way**. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear Allah and know that Allah sees well what ye do."[41]

The highlighted part of the verse ("and an heir shall be chargeable in the same way"/ *"wa 'alā al wārithi mithlu dhālika"*) imposes on the heirs the responsibility of maintenance in place of the husband. This is why the slave-owner, or the father or son (who are all heirs) are compelled to step into his shoes and provide maintenance. Since the wife would inherit the husband in the event of his death if he left any wealth, she is also an heiress and steps into his shoes on maintenance if he and his other heirs are unable to meet the obligation.

Although Libya is a Mālikī dispensation, its personal status law adopted the Zahiri position thus:

> "If the husband is poor and the wife wealthy, she shall have the duty of maintaining the husband and her children."[42]

As Dawūdī shows, there is no evidence from the sunnah that poverty and financial difficulty was a basis for annulling marriage. In fact, the evidence is of the subsistence of marriage in times of hardship.[43]

Considering the levels of poverty in the north and the frequency with which poor men may run into financial difficulty, the drafters, had they averted their minds to these options, may have considered the Hanafi position which broadens the possible sources of support by bringing in the wife and her relatives. The code, were it to be amended in this way, would provide for the judge to order first the son, then the father, then the wife (if she has means), then her relatives (if she is poor), to provide the maintenance as charity, or alternatively, (in

[40] Ibn Hazm, Ali ibn Ahmad, *Al-Muhalla bi al-Āthār*, (Beirut, Dar al-Kutub al-Ilmiyya, 1st edition, 2002), 9:254
[41] Qur'an 2:233
[42] Libyan Personal Status Law (1984), Art. 40(b)
[43] Dawūdī, Maqaṣid, supra p 351

the case of the wife and her relatives), as a loan in line with the Qur'anic guidance quoted above. (Q 2:280)

The State may also consider following the example of Morocco and setting up a family support fund, which should step in if the wife and relatives are all poor and, at the instance of the court, provide the maintenance payment as a loan to the husband, or a social security transfer. The point in all this is that the biggest problem faced by marriages, maintenance, is not a purely legal problem. It is an economic and financial problem best addressed by building support mechanisms for poor families rather than opening the door to a hasty divorce.

An interesting dimension to this is that in addressing maintenance of a divorcee or widow, the Kano jurists adopted a position of the Hanbali school[44] that is not found in Maliki law. Article 392 of the code provides as follows:

> (1) Maintenance of a woman reverts to her father after divorce or death of her husband, where she can neither take care of herself nor have a son who can bear her maintenance.
>
> (2) Where the woman in Sub-section (1) of this Section has neither a father nor a son to take care of her maintenance, **any person entitled to inherit her either by fixed share or residue shall provide her maintenance depending on the closeness of their relationship, and in the absence of heirs, any other relatives.**
>
> (3) Where the heirs, or other relatives in Sub-section (2) of this Section are many they shall provide the maintenance collectively each depending on his financial capability.

The jurists have already imposed the burden of maintenance of the divorcée or widow on her son, then her father, then heirs, then all relatives individually or collectively. What is proposed, therefore, is to bring this support in *before* divorce, thus providing a safety net to the family when the husband falls on hard times.

7.4.3 Domestic Violence

In chapter 5, we reviewed the provisions of the code on wife-beating. The jurists, as we noted, did their best to restrict the power of the husband to hit his wife by codifying all the restraints and safeguards in Maliki law. The code also makes non-compliance with these guidelines grounds for divorce and even compensation.

Given that domestic violence is so rampant as evidenced by the data in chapter 4, it is somewhat disappointing that the jurists insisted on retaining a provision which, as we showed in chapter 3, the Prophet himself considered repulsive. The code should remove the provisions allowing wife-beating in any manner whatsoever and this should be grounds for divorce and compensation.

This amendment should then send a clear signal from the scholars and the authorities that beating wives is prohibited, unacceptable and un-Islamic and the state should make laws criminalising domestic violence and punishing it. Wife-beating is not a family matter but a criminal infringement on rights and, as jurists have noted, when a society's values do not accept it, it should be forbidden. The provision for flogging husbands by the court for

[44] See Ibn Qudama, *Al-Mughni*, 11:380-381

recalcitrance should be similarly expunged. Keeping these provisions displays a lack of sensitivity to the social problems bedevilling Kano society which the code seeks to ameliorate. It also, unwittingly, exposes the entire religion of Islam to ridicule in a world where violence against women in any form is totally unacceptable.

7.4.4 Polygyny

Polygyny is pervasive and one of the cultural markers of Hausa Muslim society. This is endorsed by article 170 of the code which states that:

> "A man is entitled to marry from one to four wives, provided he satisfies the following conditions stipulated by the Shari'ah:
> a. Ability to maintain justice among the wives; and
> b. Ability to provide maintenance for the wives."

As noted in chapter 4 and in this chapter, the biggest social problem with polygyny is that men generally do not abide by the conditions set for its permissibility. Court filings show complaints about men marrying more than one wife despite a lack of financial capacity to maintain multiple spouses and their children. Also, because wives are compelled to share facilities there are cases of serious discord and conflict, often involving bullying and physical violence. Ability to maintain justice, as noted in chapter 5, is a matter that cannot be determined in advance, although the ability to provide maintenance can be assessed objectively. To further address a recurring problem, article 194 provides as follows:

> "Where a husband has more than one wife, he shall not make them share accommodation in a single house with common facilities such as toilet, kitchen and the like, except with their individual consent."

These provisions, at face-value, aimed to address the issues raised in chapter 4. However, their effectiveness is very much in doubt. There are no provisions identifying the party responsible for assessing financial capacity, for instance, or ensuring that consent of wives is obtained in the context of art. 194. Because there is no role for the judiciary in contracting a marriage, it is not practical to require judicial approval for a second or third marriage. However, the establishment of the *Zauren Sulhu*, which is likely to be accepted being a customary arbitration panel, opens the door to vetting polygyny and ensuring compliance. The panel could be given the power to vet the husband and approve before marriage is contracted, and where the husband insists on violating guidelines, provisions in the Act could empower the *Zauren Sulhu* to escalate the matter to the courts. There is no provision anywhere in the proposed draft requiring a man to obtain permission from the court or even the *Zauren Sulhu* (arbitration council at ward level) before contracting a second marriage, and there is no indication of any consequences for violating these laws.

As proposed, this law will be a "damp squid". Yet, it is difficult to propose major changes beyond the above that are feasible now. It is certainly not possible to declare the new marriage invalid under the law, and even if such a declaration were made, it is unlikely to be viewed as legitimate.

In these circumstances, one would recommend that the first wife or her guardian have the right(directly or through the *Zauren Sulhu*) to appeal for judicial intervention where it is established that the husband is unable to meet the maintenance or accommodation requirements in articles 170 and 194. The court shall, in such a situation, order him not to marry until he is able to fulfil those conditions. In the alternative, the court may impose huge and punitive financial compensation for the first wife and grant her a divorce. Such a penalty may be, for instance, forfeiture of the house to her and her children in addition to alimony (*mut'ah*) payments. In this way, at least the law will have some "teeth" and move society, even if in small steps, in the right direction.

It is further noted that article 162 provides the right to spouses to engage in child-spacing and temporarily stop childbirth, using methods that are "not contrary to the *Shari'ah*". One way of mitigating the huge economic and financial cost of polygyny is investment in sex-education and family planning. Having proposed section 162, it is incumbent on jurists to make clear to the public that family planning, relying on both natural methods and contraception, is not contrary to the *Shari'ah*. They also need to stress that while it is true that God provides, Muslims have an obligation to apply reason and intelligence and not produce children they know they cannot cater for as this is sinful. Ignorance of the teachings of Islam and misconceptions about destiny (*qadr*) lie behind many harmful cultural practices. Only education will separate the culturally determined from the religiously ordained.

Ultimately, polygyny is best regulated by the planned evolution of values. Widespread education, public enlightenment on Islamic values, and empowerment of girls and women are crucial to this process. Educated and empowered women will enter or remain in polygamous marriages only voluntarily, as opposed to poor women who perhaps accept the practice because they have no choice, being their means of escaping hunger and destitution. Educated women are also far more likely to be aware of the importance of family planning and how to go about it. Like maintenance, this matter must be viewed as a developmental issue that is best solved through implementation of policies raising levels of human capital and per capita income.

7.4.5 Divorce

In chapter 6, we noted that divorce provisions in the Moroccan *Mudawwana* of 2004 were aimed at achieving three objectives. First, eliminating the powers of husbands to unilaterally divorce wives without judicial supervision and narrowing the scope of what constitutes a valid divorce; second, improving access of women to divorce and removing provisions hampering the ability of a wife to exit a marriage if she so desires; and finally protecting women financially after divorce by granting them vested rights. We also noted that these provisions contained elements of "overshooting", "nasty surprises", and "back-fires" (to use Goddard's terms), and some of them will most likely be the subject of future revision.

The Kano code, on the other hand, remained faithful to the *mashhūr* in Mālikī jurisprudence as far as the first two of these objectives are concerned. It departed from the school by prescribing alimony payments, *mut'ah al-* ṭ*alāq*, and making these obligatory rather than recommended, to protect divorcées financially. One area of reform that has been generally taken up in the Muslim world is "the position that a ṭ*alāq* accompanied in word or sign by a number or by any other expression of finality gives rise only to a single revocable ṭ*alāq*."[45] As noted in chapter 5, the drafters of the Kano code remained faithful to the consensus of classical *sunni* schools, retaining the view that this is an irrevocable "triple ṭ*alāq*". One would have wished the jurists examined dispassionately the arguments around simultaneous triple divorce, considering the need to preserve the marriage institution, and followed the example of other jurisdictions based on *maṣlaḥah*. This is a matter that ought to be revisited, especially as this position is a call to return to what obtained in the time of the Prophet, as earlier elaborated.

The provisions in articles 350-357 on mut'ah al-ṭ*alāq* are very progressive and radical, and address a major problem, which is the injustice of leaving women who are divorced (often arbitrarily) without any kind of financial compensation. Also, the specific requirements (in article 351) that "the gift shall be sufficient to save the divorcee from vulnerability", and that "the gift shall be reasonable (sic) to console the divorcee" are excellent provisions. What is recommended here is that a timeline should be placed for payment of mut'ah al-ṭ*alāq* and, where a husband fails to pay, he shall be compelled to take the wife back into marriage if the divorce is a *raj'ī* divorce. If it is not, or if he refuses to take her back, then he should be treated as a defaulting debtor and the court, as in the case of the husband who travels without paying maintenance (art. 186), shall have the power to dispose of his assets or wealth and pay the wife. A constant refrain in northern Nigeria is women being divorced and having to leave the marital home with their children, usually to their parental home. Suitable accommodation for the wife to live in with the children should be part of *mut'ah* provisions including, where deemed just, confiscation of the husband's house and transfer to the wife and children. One of the reasons for frequent divorce is the ease of divorce for men, with women left suffering the brunt. Focusing on this provision and enforcing it will force men to reflect on the cost of arbitrary and frivolous divorce, as well as correct this injustice. We saw in chapter 4 the large number of cases relating to women whose previous husbands failed to live up to responsibilities for their children. All of these, pursued diligently, should reduce the divorce rate and add to marital stability.

7.5 Social Reforms

In this final part of the chapter, we will briefly outline some of the issues that need to be addressed in the wider society to improve the effectiveness of codification of family laws as an instrument of social reform.

[45] See L. Welchman, Women and Muslim Family Laws, supra p. 108

7.5.1 Training and Public Enlightenment

At several points in this research, we have encountered evidence that laws targeting the family tend to face implementation difficulties because they relate to a core of people's beliefs and custom. The problems faced by women in marital relations cannot be divorced from cultural attitudes towards women, in general, and this cannot be addressed solely by legislation. Marriage of young girls is encouraged in many segments of society as the antidote for immorality; polygyny is considered normal; having many children is viewed as a blessing; and the right to discipline wives, including beating them, is taken for granted in certain circles and accepted as legitimate even by the women.

A structured approach to public enlightenment, backed by the state but delivered by religious and traditional leaders with legitimacy is a necessary part of reforms. The society needs enlightenment on the benefits of girl-child education, child spacing, a focus on quality of life and not just quantity of children, and mutual love and respect between spouses and the disapproval by the Prophet (PBUH) of wife-beating and domestic abuse.

On the question of training and enlightenment, the judicial officers and law enforcement officials are primary targets. The laws will only be effective if judges and law enforcement agents accept them as legitimate, in addition to families and social networks. Wide consultation and engagement before finalizing the law would help address any concerns and contribute to making the law more effective.

7.5.2 Basic Education

The Nigerian legislature passed the Compulsory, Free Universal Basic Education Act (2004)[46] which provides for Early Childhood Care and Education (ECCE), Primary and Junior Secondary Education, and makes financing of basic education the responsibility of states and local governments. Section 2 of the Act requires government to provide education, parents to ensure their children go to school, and even prescribes punishment in terms of fines and prison terms for parents who do not comply. Section 3 states clearly that education services at primary and junior secondary levels are to be provided free of charge.

Children are expected to start six years of primary education at age 6 and then proceed to three years of Junior Secondary. This means if only the Nigerian governments operated by the provisions of the Law, every child would be in full time basic education until at least age 15. This takes us back to the arguments in chapter 5 by some scholars that the root cause for continuation of child marriage is the failure of government to provide free and compulsory basic education to all children due to lack of adequate schools amongst other problems, and that when we blame the parents we are actually blaming victims.

[46] Enacted on 26th May, 2004

One of the main problems in the way of girl-child education in Kano is the very low representation of women in education decision making positions in the state. In 2018, UNICEF and UKAID commissioned a "Report of Rapid Assessment on Women Participation in Education Decision Making Positions in Kano State, Nigeria"[47] The report notes that although the National Policy on Gender in Nigeria stresses the benefits of women education, women issues remain largely unaddressed especially at community level because of negative stereotyping and discrimination. In Northern Nigeria the situation is worse because of the low number of women in "elective and appointive" positions.[48] Disparities between boys and girls begins with access to primary education, and the poor quality of education for those with access. According to the authors of the report:

"Discrimination in girls' education persists here because of customary attitudes, early marriages, religious misconception, inadequate and gender biased teaching, educational materials, and lack of adequate accessible schooling facilities. Other issues include the requirement by girls to help families with household chores, care for younger siblings and the elderly and sick family members.

"Exclusion of girls in education is multi-dimensional and largely draws from a religious and cultural belief system which makes girls direct recipients of a crucial form of injustice. Girls' school enrolment figures especially in Northern Nigeria continually attest to below average enrolment, retention and completion leading up to the junior secondary and senior secondary levels."[49]

The report goes on to provide data that show the very low level of representation of women in education decision making positions. We will refer only to the report on women representation at zonal level in the State Universal Basic Education Board (SUBEB). There were no women at all in decision-making positions in Wudil, Tudun wada, Gwarzo, Gaya, and Dambatta zones. 4% was the percentage in Minjibir, 4.4% in Rano, and 4.8% in Bichi zones. The highest representation was in the metropolitan zones with 20.5% in Kano Municipal and 39% in Nassarawa zones.[50] In local education authorities it was the same thing with even head teachers being dominated by men. When we consider that education and health tend to be the areas where women perform strongest, these numbers give a sense of the overall marginalization of women in decision-making. Parents are not comfortable sending their female daughters to girls' schools where the principal and most key decision-makers and teachers are male. There is a need therefore to pay attention to Basic education and State must live up to its commitments. This will have to take the form of building schools, training teachers, and increasing the participation of women in decision-making positions affecting education.

[47] The Draft of the full report, prepared by the High-level Women association (HILWA), is available on https://docs.google.com/document/d/1Ef8qq4nuQxCNSJuxiOlleJh2EmgxwfGC/edit?usp=sharing&ouid=103574690661711321715&rtpof=true&sd=true

[48] ibid p 8
[49] ibid
[50] Ibid pp 31-38

7.5.3 Civil Society and Women's Rights

One of the major findings in chapter 6 was the key role of the Moroccan feminist movement in securing the reforms in the *Mudawwana* of 2004. This, as we also noted, provided an inspiration for *Musawah*, a global Muslim feminist movement for a more egalitarian Muslim society and a family law that reflects modern conceptions of gender equality. The learning from this is that major reforms of the Family law in Kano will only happen when women (and feminist men) actively raise their voices against existing injustices. A strong civil society, actively advocating and promoting the protection and advancement of rights of women, is what will create the environment that compels the State to push through reforms. Related to this is the need for increased female representation in politics. Of the 40 members of the Kano State House of Assembly elected every four years since 1999, not a single member has been female. This is the legislature tasked with making laws and it is no surprise that women issues are not a priority of lawmakers. The proposed draft has been ready since 2019 but, as at the time of writing, it had not even been presented to the legislature and the House has not asked for it. Women's rights must be elevated to the realm of political and social discourse until reform becomes a mass agenda with popular support. Women and men with Islamic and Western education have the responsibility for this if there is genuine commitment to fostering gender equality and women's rights.

7.3.4 Social Security and Welfare Nets

The final learning from Morocco is the need for a social security ecosystem to support reform. The family fund is an excellent innovation which, as noted earlier, can provide support for paying maintenance where husbands are unable to meet obligations. In Morocco, apart from building schools all over the country, the state invested in school transportation to take children to distant schools where not available in their communities. The state also provides financial support for very poor families who have children of school-going age. This reduces the pressure to take children out of school to support family incomes through trade or early marriage.[51] This is a clear recognition of the link between social reform and poverty alleviation, a link that is missing to Nigerian authorities.

An important recommendation therefore is to set up a social welfare fund targeted at family and basic education matters. This will operate as a last point of support for maintenance, but also promote school transportation, school feeding and financial support for families who keep their children in school until basic education is complete. This in turn goes a long way in dealing with problems of child-marriage, and rampant divorce due to lack of maintenance. It can also serve as an incentive tool to limit and space children by supporting only a fixed maximum number of children per father.

[51] This was mentioned in Chapter 6, in the interview with Judge Hameed Belmaki in Sefrou

7.6 Conclusion

This chapter represents an attempt to bring together recommendations based on the findings of this research, with the objective of making the proposed Kano State Code of Muslim Personal Status a more effective tool of social reform. It recognized that reform is necessarily gradual and must be rooted in the concrete experiences and realities of the society. The chapter started by examining the pitfalls of a wholesale adoption of global discourses (whatever merit there may be in them), without accounting for wide variations in the conditions of Muslim women, reflecting diverse histories, cultures, economic classes, exposure, education, values, political environments, and other factors that recommend caution in applying a universalized and essentialized category of “Muslim woman”.

We followed this caveat with a discussion on the theory of law and social change, identifying often overlooked factors in the process of legislation. This was then followed with specific recommendations aimed at addressing selected parts of the code, with a view to making the code more relevant to the needs of contemporary Kano and more likely to be effective when passed. A more complete coverage of the Kano and Morocco codes would bring up many more areas, and this should be the subject of future research. We have limited ourselves to the main areas of focus identified in the research plan and believe we have answered the principal research questions mentioned there.

We have come to the end of this thesis and the next chapter summarizes key research findings, recommendations, and suggestions for future research.

Chapter Eight: Conclusion and Recommendations

8.1 Introduction

In chapter 1 of this thesis, we laid out the central and subsidiary research questions we hoped to answer in the following terms:

> The central question the research will address is: what is the *justification* for reform in the marriage institution in Kano, Northern Nigeria, *from a women's rights perspective*, and how likely are these reforms to be achieved through the proposed *codification* of the Muslim Law of Personal Status?
>
> Answering this question will require defining subsidiary questions as follows:
>
> 1. What are the major problems faced by women in Muslim marriages in Kano that need to be addressed in the interest of justice and equality?
> 2. What has been the traditional approach of institutions like the *Shari'a Courts,* the *Hisbah* Corps, and the Emir of Kano's Court to the resolution of these issues?
> 3. How can codification of the Muslim Law of Personal Status assist in defining rights, obligations, and privileges in the marriage institution?
> 4. What was the process followed in producing the draft Kano code; who were the key drivers; who were the drafters; and what guidelines were adopted and followed?
> 5. How does the work of Kano scholars compare with similar reform efforts in Muslim-majority states, with Morocco as the selected comparator? What can we learn from this comparative analysis about ideological positioning and similarities/differences in viewpoints around gender equality and women's rights between the Moroccan and the Nigerian scholars?
> 6. What are the developmental issues that need to be considered in addressing these social problems and what are the prospects and challenges that the code faces as an instrument of reform?

The first two subsidiary questions were answered in chapter 4, where we reviewed data from nine Sharia courts in Kano state, as well as data from the Hisbah corps and Emir's court, to identify the major problems facing women in Kano with respect to family law. Question 3 was answered in chapter 3 which dealt with codification of Islamic family law as a reform tool, the relationship between law reform and gender equality, legislative techniques employed in codification, and examples of application to specific reform objectives. Question 4 was answered in chapter 5 which was a comprehensive analysis of the proposed Kano code, covering its history, key players, sources, procedures, and output. The last two questions were answered in chapters 6 and 7 where the comparative analysis was carried out between the 2019 draft code prepared by the Kano Emirate and the 2004 *Mudawwana* of the Kingdom of Morocco, followed by specific recommendations based on learnings from the research in the context of the theory of law as an instrument of social change. Chapters 4 to 7 were all written against the backdrop of chapters 1 to 3, which laid the theoretical foundation for the study, covering gender equality and Muslim feminist thought (chapter 1), the legal theory and sources of the Mālikī school, to which both Kano and Morocco subscribe (chapter 2) and how codification serves as a tool for integrating feminist concerns into Muslim jurisprudence (chapter 3).

8.2 Original Contributions of the Study

Unlike in other parts of the Muslim world, Islamic family law has not yet been formally codified in Nigeria, despite its formal application, especially in the northern states of the country. This study makes significant original contributions to the subject in many ways.

First, the data presented in this work has not been previously accessed and analyzed for the purpose of understanding social problems and identifying how the law can better protect the rights of Muslim women in the family. Second, the proposed Kano State code of Muslim Personal Status is the first attempt in Nigeria, and perhaps in the whole sub-Saharan Africa, to produce, through the agency of a committee of Islamic jurists, a comprehensive Islamic family code that takes explicit cognizance of the need for reform. The data sets available, including transcripts of committee deliberations, debates, and symposia, were gathered for the first time in this work. This is in addition to the details gathered on the membership of the committee and its *modus operandi.* Third, the data in chapter 4 also represent an original contribution to knowledge on the subject. The Kano Sharia Courts have no structured records of data apart from the handwritten record books and information registered in individual courts. Nowhere can one find data such as number of cases in each year or their classification by category. Gathering the data, separating family law from other civil and criminal cases, structuring the diverse and inconsistent headings into the established family law categories of Islamic *fiqh*, and transcribing and translating the records into English were all done as part of this research for the first time. The same applies to our analysis of family law data before the Emir's court and the Hisbah. Thus, the arrangement and analysis of the data herein cannot be found in any previous work. The study has shed light on traditional and quasi-formal arbitration processes and how effective they are in settling marital disputes.

Another original contribution is bringing to light the role of religious and traditional institutions in Northern Nigeria and the potential in them for spear-heading reform. Although they have no formal political powers, Emirs retain legitimacy as custodians of religious and traditional values. They are therefore in the best position to inspire a review of the law and adopt a more progressive and egalitarian approach to women's rights and should be politically empowered to facilitate that. In a sense, this is precisely what has happened in Morocco, with the King, as Commander of the Faithful (*Amīr al-Mu'minīn*), leading the process of legal reform on family law and issuing the guidance to the royal committee set up for that purpose. The changes to the law in Morocco would never have happened without the authority of the King. The difference here is that the King is a constitutional monarch with the real powers of a Head of State while the Emirs of Northern Nigeria are totally deprived of political authority and must, therefore, rely on their traditional influence and the powers of persuasion, advocacy, and moral suasion.

The sections relating to Morocco represented another original contribution to knowledge. While a lot has been written on the Moroccan *Mudawwana,* this work involved interviewing a host of relevant stakeholders such as Islamic jurists, legal scholars, academics, judges, and human rights activists, in addition to reviewing secondary literature on the subject. Some of

those interviewed were involved in drafting the *Mudawwana*. Others make a living by teaching and researching it as academics, while others are involved in its interpretation as judges. This diversity of views enriched the analysis, shedding light on perspectives not found in already published material, including those resulting from reflections on the outcome of implementation of the code for almost two decades. The study engaged with the code on several levels, including its location in a global Muslim feminist discourse on gender equality and patriarchy; the specific characteristics and attributes of Moroccan society and how they impacted the reforms; the challenges of implementation and unanticipated negative consequences of some provisions on the marriage institution, etc.

This study began with an implied premise that the Moroccan code was an ideal which should be adopted by other Muslim states and ended up with different conclusions based on the evidence. The critical engagement with the *Mudawwana* led to the adoption of a more cautious approach, one that situates every code in context and suggests that there is no universal ideal, as the law is an imperfect tool further constrained by the socio-temporal context of its creation and implementation. The thesis however escaped the meaningless binary debate on whether a law is Islamic/unIslamic by relying on recent research on the logic of law making in Islam, which shows that the *a priori* adoption of a set of values and positions and their legitimization, *a posteriori,* through reconciliation with Islamic sources, has always been a feature of the jurisprudence of (some) traditional schools of Islamic law.

Finally, this is the first work comparing Islamic family law in a sub-Saharan African country to what obtains in an Arab country. Studies thus far have compared the law among Arab states[1] or compared these with South Asia.[2] Studying Islamic family law in northern Nigeria in such a comparative format is an original contribution to the field.

As a result of our critical engagement with the material, the conclusion was not that the law in Kano should aspire to be the same as that in Morocco, but that the law should aim to address the concrete realities and experience of the majority of Kano women in a manner that protects their rights and enhances their social position, grant them greater autonomy and agency while protecting the marriage institution and preserving moral and religious values. These are the considerations underlying recommendations in chapter 7.

8.3 Impact of the Study on the Kano Sharia Court

In the process of conducting this research, there was close collaboration with the Grand Kadi of Kano State. Several problems were encountered which in turn led to the introduction of changes aimed at improving Sharia Court procedures and administration. The Grand Kadi was

[1] For example, Welchman, L., *Women and Muslim Family Laws in Arab States*: *A Comparative Review of Textual Development and Advocacy*, (Amsterdam, Amsterdam University Press, 2007); and Engelcke, D., Reforming Family Law: Social and Political Change in Jordan and Morocco,Cambridge, Cambridge University Press, 2019).
[2] For example, Esposito, J., Women *in Muslim Family Law* (New York: Syracuse Press, 2001)

kind enough to direct his staff[3] to prepare a brief report on the identified problems and remedial steps.

The first problem identified was the haphazard record keeping in the court register that left too many gaps and lacunae, especially in the subject-matter mode of entry. For example, a vague and general heading, *Neman Taimakon Sharia* (seeking assistance of the court), was used in all the courts for a wide range of cases without specifying the subject. This study had to go through the records to classify these into categories of issues such as maintenance, harm, discord, etc, as well as sub-categories like maintenance for food, clothing, accommodation, children, or breast-feeding; wife-beating or sexual abandonment, etc, which are among the traditional classifications of marital problems in classical Islamic jurisprudence. As a result of this problem, the Grand Kadi has now included in the appendix to a new draft of the Civil Procedure Rules 2023, which has already been forwarded to the State House of Assembly for passage into law, guidance on specifying claims along the lines developed and used in this study.

During the data collection, we also identified a problem of all court staff having access to the case register, leading to irregularities and even omission of entries. As a result, an administrative order has been issued appointing in each court a "record registrar", who now has exclusive charge of the register and will be held responsible for any irregularity or omissions relating to the entries.

Prior to this research, attempts to prepare the annual statistical report of cases were based on a completely manual process of collation of "inspectors' quarterly reports" which aimed at bringing up a quantum of cases within the year without analytical categories. Having observed our use of the "Kobo Collect" analytical tool and the kind of reports in chapter 4, the Court has now adopted our automated process. Now the data from all Sharia Courts as well as reports of cases by subject matter, nature of the case, gender, duration, etc can be categorised using software at a much higher level of precision. The information in this form is extremely useful for strategic planning, identification of social problems, monitoring caseloads, etc.

Finally, the reports obtained from "Kobo Collect" data across 9 selected courts highlighted the high proportion of family law cases that were not judicially decided. The data collected had also covered the length of time it takes to decide cases. The Grand Kadi, based on this, set up a committee to ascertain the backlog of cases from 2000, when Sharia Law was introduced, to 2021. This exercise was concluded in September 2023. According to the report presented, "the result was alarming, and actions were taken accordingly"[4]. The Sharia Court of Appeal has formally adopted "Kobo Collect" to obtain at-a-glance information on predominant cases

[3] The report on which this section is based was prepared by Barrister Muhammad Aminu Fagge, (Director, Sharia), and Nasiru Wada Khalil (Director, Research and ICT) on 26th October 2023. It is available on this link:

https://drive.google.com/file/d/1vCStXzZ2vgYvQvvb5XkglQm-CUjQonX1/view?usp=sharing

[4] ibid p 2

by subject-matter, plaintiff/respondent ratio by gender, geographical distribution, longevity of cases, etc.

Although this was not one of the objectives set out for this research, it is gratifying to note that it has contributed, in a modest manner, to a more efficient and evidence-based administration of justice in Sharia Courts in Kano state.

8.4 Research Findings

We now turn to key findings of the research. The first major finding, in chapter 4, related to how high levels of extreme poverty are reflected in the major social problems faced by women in marriage in Kano. The highest claims were for maintenance obligations against husbands, with food being the major item. This was followed by harm (mainly wife-beating) and irreconcilable differences/discord. Cases of forced marriage of minors were more frequent before arbitration councils than courts, reflecting a preference for settling family disputes traditionally, but also this could be due to lack of protection and safety nets for minor girls and women in general. We found that the major pre-occupation of feminist thought with altering the patriarchal family structure and allowing women to marry without the participation of a male guardian if they so wish were not the major concerns in public debate or advocacy, reflecting limited penetration of western modernist discourse among most women in Kano, and northern Nigeria in general.

On *qiwāma* therefore, the emphasis in Kano was on ensuring that husbands lived up to their responsibilities for *Nafaqah* (maintenance), while restraining them from abusing their disciplinary powers in cases of *nushūz*. Their leadership and control of the family was not challenged. On *wilāya* as well, the necessity for a guardian was not challenged, while there was a clear need for regulating the powers of tutelage and ensuring that the guardian's position is not used to constrain the agency of the woman.

Content analysis of court cases showed that the courts generally protected the rights of women in matters of maintenance and harm and custody, but women were frequently compelled to resort to *khul`* due to difficulty in leading evidence. The high number of cases struck out or dismissed is an area in need of deeper study as this has implications for access to justice. We also saw that the arbitral institutions of *Hisbah* and the Emirate system play a major role in resolving family disputes, thus limiting the need for escalation to the law courts for litigation, but these roles need to be formalised and their links to the courts strengthened by legislation.

Findings in chapter 5 included how the preponderance of jurists in the drafting committee led to a traditional approach to reforms, remaining largely faithful to classical Islamic law. In addition, low levels of socio-economic development and, especially, investment in education, are constraints to reform. We found that attempts were made to incorporate rulings from other schools in, for example, abrogating the right of the father to compel an adult daughter

to marry, even if she is a virgin. We also found that the provisions in the existing draft need to be strengthened to address concrete problems revealed by empirical research more effectively. The effort to circumscribe the power of a husband to physically discipline his wife does not go far enough. The provisions on maintenance and the right of women to divorce where the husband is unable to provide maintenance could also have benefited from a broader range of sources.

The introduction of obligatory *mut'ah al-ṭalaq* (compensation for divorced women) is positive but needs tighter definition for implementation. Baderin reports that countries like Jordan, Morocco and Malaysia have provided for *Mut`ah* or compensation where the woman is arbitrarily divorced, with Jordan specifying maintenance between one and three years. He notes however that none of the family codes averts itself to where the wife is wealthier than the husband and suggests that a position on this depends on if the *mut'ah* is aimed at supporting the wife financially or consoling her for the divorce.[5] We noted that the Kano code explicitly aims at both. In such a case therefore, the wife being wealthy does not stop her receiving a "consolation" payment. This research has also raised the possibility of securing a residence for divorced wives who have custody of children as part of *mut'ah*.

There was also a brave attempt by the Kano drafting committee to place regulations around polygyny which, however, were likely to be ineffective in practice. On the other hand, the proposed introduction of a local arbitration council (*Zauren Sulhu*) is a major strength of the proposed law, when compared to the *Mudawwana*, and the research considers how this institution can be leveraged to address some identified weaknesses relating to implementing the law.

In chapter 6 we studied relevant sections of the Moroccan family law and compared same with the proposed Kano code. The law in Morocco was inspired by a clear commitment to gender equality as understood in the modern and European world and contained in international treaties on women's rights. The composition of the committee, the ideological leanings of the King, and the stronger incorporation of Moroccan society into European feminist discourses, provided the impetus for a focus on addressing the *qiwāma* and *wilāya* postulates, bringing divorce under judicial supervision, limiting the scope of valid divorces, and broadening rights of women to initiate divorce without paying ransom. Morocco has strong provisions protecting the financial rights of women in marriage and on divorce and placing the family under joint leadership of the husband and the wife. We examined strengths and weaknesses of the law, including some internal contradictions and negative, unanticipated consequences of some provisions, but also identified areas of learning for the proposed Kano code, including a focus on policies around education and social welfare nets.

Chapter 7 was concerned with how the proposed Kano code could be an effective reform tool based on all the findings above, and recommendations were made around registration requirements, a review of maintenance provisions, the prohibition of all forms of physical

[5] M. A. Baderin, *Islamic law: A very Short Introduction*, (Oxford, OUP,2021), pp 70-71

discipline and wife-beating no matter how light, recommendations strengthening effect of regulations around polygyny as well as financial compensation for women after divorce. The chapter also made recommendations for reforms in the wider society, and the formalisation of customary arbitral institutions.

8.5 Recommendations

The specific recommendations on what needs to be done to make the proposed Kano code effective are covered in chapter 7. Here we will present recommendations of a general nature emanating from the findings of the study.

1. Muslim majority states should be encouraged to continue adopting codification of family law as a tool of social reform. The exercise allows for reinterpretation of the law based on changing values of a society and makes Islamic law maintain its relevance as society evolves.
2. Although global discourses and international treaties on women's rights and gender equality are crucial as drivers of reform, these must be combined with considerations of the overall objectives (*Maqāsid*) of Islamic family law especially regarding the stability of the family, the attribution of roles based on the best interest of offspring and the preservation of Islamic sexual mores.
3. Legislation in any Muslim state should be based on a "bottom-up" approach to reform. In other words, the concrete realities and experiences of women living in the given society should determine the priorities of reformers. As these realities change, priorities change, and reforms therefore take on a gradualist character.
4. Designing legislation is a serious exercise. Learning from laws that have succeeded and failed is crucial to avoid legislation that is ineffective, too costly, counter-productive, or associated with negative unanticipated consequences such as over-shooting targets. This is more so in areas like family law where the customs and religious beliefs of people are involved.
5. Codification is an important tool, but only a part of a total reform package. Legislation itself is not sufficient if unaccompanied by education and enlightenment, enforcement mechanisms and institutional arrangements supporting implementation of the law.
6. Proper conceptualization of the root cause of social problems as opposed to symptoms is essential. For example, where poverty and a lack of investment in education and social services is a root cause, legislation that targets religion and culture is likely to fail unless there is a serious effort to address questions of socio-economic development.
7. The question of the treatment of women in the family cannot be divorced from a general societal attitude towards women. For Muslim societies, there is a need to foster a culture based on Islamic values of love and compassion for women, respect for them as mothers and daughters, and zero tolerance for harassment, assault, abuse, and violence of any form against them accompanied by appropriate sanctions.

8. Girl-child education is the single most important enabler of reform. Keeping girls in school has a major impact on the age at which marriage is contracted, economic opportunities and financial independence for women, child spacing and population control, and advocacy and awareness about women's rights in society.
9. Real change will happen in Muslim societies when women move into decision making positions with real authority. Increasing the representation of women in the executive, legislative and judicial arms of government, and in areas like education, health, and financial intermediation, will empower women to demand the changes necessary to free them from discrimination and injustice.
10. Finally, the primacy of politics needs to be recognized. Real reform only happens with political will and commitment on the part of those who hold the reins of power. Reformers interested in real change must form alliances and convince political authorities to push through reforms. Without political support, reform efforts are doomed or, at the very least, likely to be tepid and ineffective.

8.6 Suggestions for Future Research

The nature of this research necessitated limiting it to a narrow range of central issues. As the study evolved, areas emerged that are clearly in need of further study. Beginning from the data sets collected in chapter 4, for example, each of the three institutions studied (the Sharia Courts, the Emir's court and the *Hisbah*), is worthy of study. For example, the arbitration methods of the traditional institutions warrant more in-depth research. On the court data, qualitative analysis comparing approaches of different judges to marital issues, for example, or a deep dive into a single issue like domestic violence across a broader range of courts, should yield deeper insights.

A more complete comparative analysis of the laws of personal status in Morocco and Kano, would bring in many areas not covered in this study. For example, the *Mudawwana* introduces treatment of wealth earned during the pendency of marriage and how it may be shared at the point of dissolution. There are also differences on the permissibility and limitations of the use of modern scientific methods, especially DNA, in establishing paternity. In the area of inheritance, the grand-child through a daughter is given the same rights as the grand-child through a son in the new Moroccan Law, etc. A complete comparative analysis is therefore another area of future research.

The thesis also brought up the question of the influence of the "social imaginary" on legislation. A deeper study of the construction of this imaginary, through colonial experience, western and Islamic education, migration and interaction with other cultures, family structures and upbringing, income levels, etc, and how the right social policies can alter this imaginary, would be a major contribution to the discourse on reform.

Another area of future research is the actual experience of countries that have adopted new laws after implementation. Understanding success and failure, strengths and weaknesses and

comparing experiences across dispensations will be beneficial to those societies lagging as they step up their reform efforts. Such research must avoid idealizing any model and be prepared to engage discourses in a confident and critical manner, especially when these discourses are part of a conversation in a world of unequal power. All too often, we forget that the current discourse of modernity is essentially the discourse of one part of the world, the part with a history of being an imperialist and colonial power, of economic and military dominance, and control of multi-lateral institutions and processes. Research that critically exposes the hidden values, pre-conceptions, and ideologies behind some of the reform advocacy, (while challenging the teleological assumption that romanticizes and idealizes the West as a lodestar), is an important area to be pursued.

It is important, however, to recall Miriam Cooke's argument that it is difficult to find a word better than "feminism" that captures the broad range of struggle by women to improve their situation and claim their rights. As such, our reservations about the ideologically loaded content of globalized discourse ought not blind us to the reality of injustice meted to women in Muslim-majority societies. (This is not restricting this phenomenon to these societies, but this study is focused on Muslim states). We have seen in chapter 4 how women in Kano are deprived of maintenance rights, and subjected to harm including abuse, violence, and sexual abandonment. We have seen unequal and unjust treatment of wives in polygamous marriages. We have shown the existence of cases of forced marriage of girls and women, and frivolous exercise by husbands of their right to unilateral repudiation is often accompanied by refusal to make the necessary provisions to protect the wives from penury and vulnerability and other forms of financial insecurity. To pretend that these injustices do not exist is to be in denial, and failure to address them decisively amounts to complicity in injustice.

At the very least, law reform must aim at eradicating these practices and giving women their rights as unanimously agreed under the *Shari'ah*. Traditional jurists have focused on the Qur'anic verse structuring the family based on the principle of male leadership and obedience by wives. It is time to give the same, indeed even weightier, attention to the following Qur'anic verse:

> **Q:30:21** "And Among His signs is that He created mates for you from your own kind **that you may find peace in them** and **He has set between you love and mercy**. Surely there are Signs in this for those who reflect."

It may well be argued that reform of Islamic family law is ultimately one that aims at bringing the Muslim family closer to this ideal of being characterised throughout by love and compassion.

8.7 Conclusion

This study started with setting out research questions to be answered, identifying the theoretical currents impacting the subject area, reviewing the relevant literature, and laying

out a clear methodology. In addition to relying on, and engaging with, existing works, the core of the research represents an original contribution to the fields of Islamic family law and socio-legal studies, being focused on a jurisdiction that is rarely given attention, sub-Saharan Africa. Most of the work done on Islamic family law is focused on the Arab world, Europe, and South Asia.

The comparative analysis between the Emirate of Kano and the Kingdom of Morocco has provided insights into how the codification of family law in Kano can be fine-tuned to serve as an effective tool of relevant social reform. In addition, the research has highlighted the limitations of a narrow focus on legislation as the once and final solution, drawing attention to a broader eco-system of reforms in which the law is but one, if very important, element.

It is hoped that this study has made a modest contribution to the field and shown the way for further research that will build on its foundation, with the objective of bringing the Muslim family closer to the Qur'anic ideal of being based on the twin foundations of Love and Compassion.

Glossary of Key Arabic Terms[1]

'aib	defect
'*amal*	action, normative practice, precedent, judicial practice
ānis	spinster
'aql	intellect, the faculty of reason
'*iddah*	prescribed period of waiting for a previously married woman after divorce or death of husband
'*illa*	underlying reason, effective cause, *ratio legis*
ahkām	plural of *hukm*; laws, values, ordinances
asl	pl. *usūl*; root on whose basis analogy is sought, primary principle, textual basis
athar	pl.*āthār;* reports, deeds ,precedents of companions
bikr	virgin
ḍarar	harm
ḍarura	overriding necessity
ḍarūrī	pl. *ḍarūriyyāt*; indispensable, necessary *maṣlaḥah*
fahwā al-khitāb	superior meaning (also *mafhūm al aulawī*)
fatwā	authoritative statement on a point of law
fiqh	Islamic positive law
haqq	pl.*huqūq*; right (of Allah, or a person, or public)
harām	prohibited/unlawful in the *Shari'ah*
ijbār	Compulsion
ijmā'	Consensus
ijtihād	to strive, to exercise personal judgement on matters of law
istihsān	to deem something good
istis-hāb	presumption of continuity
istislāh	consideration of public interest
jumhūr	dominant majority
khabar wāhid	isolated hadith
Lahn al-khitāb	parallel meaning (also *mafhūm al musāwī*)
madhhab	pl. *madhahib;* school of law
mafhūm al-mukhālafa	divergent inferred meaning
mafhūm al-muwāfaqa	harmonious inferred meaning
mash-hūr	famous, widely ascribed to
maṣlaḥah	pl. *masālih;* public interest
maṣlaḥah mulghā	nullified or discredited benefit
mujmal	ambivalent
muqayyad	restricted, qualified
mushtarak	homonym
mutawātir	a hadith reported through many independent channels
muṭlaq	unrestricted, unqualified

[1] Where available, I have adopted translations from Bewley, A., *A Glossary of Islamic Terms*, (London, Ta-Ha Publishers, 1998)

naskh	abrogation
naṣṣ	pl. nuṣūṣ; unequivocal, apodictic
qaṭʿī	definitive, decisive
qawāʿid	sing. Qā'ida; foundations, general legal precepts
qiyās	logical deduction by analogy
rājih	preponderant, preferable
takhyīr	choosing between two or more alternatives
talfīq	legal eclecticism
taqlīd	Imitation
tarjīh	preponderance
ẓāhir	apparent, probabilistic

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