DEVELOPMENTS AND EVALUATION OF ISLAMIC FAMILY LAW IN LIGHT OF EXPERIENCES OF MUSLIM COUNTRIES

BY

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ABSTRACT

This study points to the problems inherent in transitioning from an era dominated by centuries of diverse family law provisions to a new era that has brought challenges. The complex issues and rapid transformations in Muslim countries' family laws have significant conflicts and repercussions for Muslims regarding marriage and divorce matters. This research's main objective is to conduct a comparative analysis of the codification of Islamic family laws in four prominent countries of the Islamic world and their development, spanning from the 19th century to the present, with a particular focus on Islamic jurisprudence. The countries under examination are Turkey, Jordan, Morocco, and Malaysia. Employing an inductive approach, the study delves into the intricate aspects of codification, *Tadwīn*, and family law directly pertinent to the subject matter. It extensively discusses the codification history of these four nations and examines the contemporary issues regarding Family Law. The research subsequently employs analytical and field approaches to assess contentious issues and elucidate divergent viewpoints within each country. During the field study phase, twenty-one experts were interviewed using a semi-structured method, comprising eight experts from Turkey, six from Jordan, two from Morocco, and five from Malaysia. A comprehensive set of five questions was posed to these experts, aimed at capturing their insights on the subject matter and its crucial implications for their respective nations. Additionally, the research highlights critical contemporary family law challenges, such as alimony throughout life, polygamy, conversion of spouses to another religion during the marriage, marriage registration, and the issue of arbitration in family law, all analysed from the perspective of *fiqh*. The findings of this research reveal that the Islamic family laws, previously codified, continue to undergo modification to address evolving issues within Muslim families and adapt to changing times and circumstances. Consequently, this study advocates for the indispensability of codification in fostering societal harmony and welfare. Furthermore, it emphasises the pivotal role of effectively implementing family law to promote unity. In this regard, alternative approaches, such as arbitration and mediation, are proposed to complement the existing legal framework.

خلاصة البحث

تُشير هذه الدّراسة إلى المشاكل الكامنة في الانتقال من هيمنة أحكام قانونِ الأسرة المتنوّعة على مرّ القُرون إلى عصر جديد من التّحدّيات. إنّ القَضايا المعَقَّدة والتَّحوُّلات السَّريعة التي تَشهدُها قوانينُ الأسرة في الدول الإسلاميّة لَها صِراعات وتَداعيات ملحوظة على المسلمين فيما يتعلق بشؤون الزّواج والطلاق. والهدف الرئيسي لهذا البحث هو السَّعيُ إلى إجراء تحليل مقارَن لتَقنين قوانين الأُسرة الإسلاميّة في أَربع دولٍ بارزةٍ في العالَمِ الإسلامي وتطورها، والتي تَمتدّ من القَرن التّاسعِ عَشَر إلى الوقت الحاضر، مع التَّركيز بشكلٍ خاصٍّ على الفقه الإسلامي. والبُلدان قيد الدراسة هي تركيا والأردن والمغرب وماليزيا. تَتعَمّق الدّراسةُ في الجوانب المعقّدَة لِلتّقنين، والتَّدوين، وقانون الأسرة التي تَرتبط ارتباطًا مُباشرًا بالموضوع من خلال استخدام المنهج الاستقرائي. ويناقش البحثُ تاريخَ تَقنينِ هذه الدول الأربع على نطاقٍ واسِع ويفحص القضايا المعاصرة المتعلقة بقانون الأسرة. يستعين البحثُ لاحقًا بالمنهجين التّحليلي والميداني لتقييم القَضَايا المثِيرة لِلجَدَل وتَوضيح وجهات النّظَر المتَباينة داخل كلِّ دولة. ومن خِلال مَرحلة الدّراسة الميدانيّة، تَمَّت مُقابلة واحد وعشرين خَبيراً باعتماد طَريقة شِبه المنظّم، بثمانية خُبَراء من تركيا، وستّة من الأردن، واثْنان من المغرب، وخمسة من ماليزيا. تم طرح مجموعة شاملة من خمسة أسئلة على هؤلاء الخُبراء بِهدف التقاط رؤاهم حول الموضوع وتَداعِياته الحاسمة على دُولهم. بالإضافة إلى ذلك، يُسلِّط البحثُ الضوءَ على التحديات الحَرِجَة لقانون الأسرة المعاصر، مثل النفقة مدى الحياة، وتعدّد الزوجات، وتحويل الزوجين إلى دين آخَر أَثناءَ الزواج، وتَسجيل الزواج، ومسألة التحكيم في قانون الأسرة، وكلّها تَمَّ تَحليلها مِن منظور فقهي. وتَكشف نتائجُ البحث أنَّ قوانين الأسرة الإسلاميّة، التي تَمّ تَقنينُها سابقًا، لا تزال تَخضع للتعديل لمعالجة القضايا المستجدّة داخل الأسَر المسلمة والتكيّف مع الأوقات والظروف المتغيرة. وبالتالي، تَدعو هذه الدراسة إلى ضرورة عدم الاستغناء عن التقنين في تعزيز الانسجام والرفاهية المجتمعيّة. وعلاوةً على ذلك، يُؤكّد على الدور المحوَرِي للتنفيذ الفعَّال لقانون الأسرة لتعزيز وحدة الأسرة، وفي هذا الصّدد، تم اقتراح مناهج بَدِيلة، مثل التحكيم والوَساطَة، لِتكملة الإِطار القانوني الحَالي.

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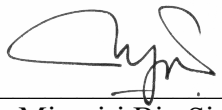

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I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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This study has been accomplished under the sponsorship of the Republic of Turkey's Ministry of National Education. This thesis is dedicated to my family members, who have always supported me.

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CHAPTER ONE

INTRODUCTION

1.1 RESEARCH BACKGROUND

The family, the most precious blessing bestowed upon humanity, is the smallest functional unit and dynamic of a society, which is very significant that when it is broken, it is inevitable that the community will also be damaged. Every human has responsibilities towards society, the most important of which is regarding their families. Hence, prioritising the establishment of the family on a solid foundation is deemed of utmost significance above all else. Indeed, the adventure of humanity on earth started with Ādam (peace be upon him) and his wife Hawwā (p.b.u.h). as a family.

Islām gave great importance to the family. Allah Almighty told in the Holy Qur'ān, in *Sūrat al-Rūm* Verse 21, that "And of His signs is that He created for you from yourselves mates that you may find tranquillity in them, and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought." Furthermore, narrated by Ibn ʿAbbās that the Prophet Muḥammad (p.b.u.h). said: "The best of you is the one who is best to his wife, and I am the best of you to my wives."[1]

There are many provisions concerning the family in the Qur'ān and the *Sunnah* of the Prophet Muḥammad (p.b.u.h). These provisions cover instructions about family ties, how good behaviour towards spouses should be, and how to educate children and new family members according to Islamic principles. This situation demonstrates the importance of family institutions in Muslim societies since the beginning of Islam.

In the past, Muslim states produced provisions for marriage and divorce matters such as alimony, impediments to marriage, polygamy, and arbitration based on Islamic

[1] Al-Shaykh Shuʿayb Arnā'ūṭ says: it is *Ṣaḥīḥ li ghairih*, and this is a weak *isnād* of narrators. Jaʿfar bin Yaḥyā bin Thawbān and his uncle ʿAmārah Ibn Thawbān are unknown, but the *ḥadīth* has evidence that it is *Ṣaḥīḥ*. It was included by al-Bazzār (1483 in *Kashf al-Astār*), Ibn Ḥibbān in his *Ṣaḥīḥ* (4186), and al-Ḥākim 4/173 from Abū Āsim al-Ḍaḥḥāk bin Mukhlad, with this chain of transmission. They mentioned the story of only the al-Ḥākim. The *ḥadīth* of ʿĀ'ishah is witnessed by al-Tirmidhī (4233) and Ibn Ḥibbān (4177), and its *isnād* of transmission is *Ṣaḥīḥ*. And see the continuation of the evidence in Musnad Aḥmad on the *ḥadīth* of Abū Hurayrah (7402). See: Ibn Mājah, Abū ʿAbd Allāh Muḥammad bin Yazīd Al-Qazwīnī, *Sunan Ibn Mājah*. Taḥqīq: Shuʿayb Arnā'ūṭ & ʿĀdel Morshed & Muḥammad Kāmel Qara Belli & ʿAbd al-Latīf Harzallah, (Dār al-Risālah al-ʿĀlemiyyah, 1st edn., 2009), Vol.3, Ḥadīth No: 1977.

Jurisprudence in family law. Malacca Sultanate, which ruled between 1400 and 1511, played an essential role in developing Islamic law. For instance, a written law from the Malacca Sultanate is known as the Malacca Laws (Hukum Kanun Melaka). It was formed as a Malay customary law following Islamic law.[2] However, each period's changing conditions and environment brought new legal regulations. One is *Majallah al-Aḥkām al-ʿAdliyyah*, known as the *Majallah* or the Ottoman Civil Code, legislated in the Ottoman State between 1868 and 1876. *Majallah* is the first civil code based on Islamic law, yet it did not include family law. Thus, the process overall revealed and proved the need for arrangements in this field. At this stage, there have been efforts to enact family law from the 19th century onwards. The Ottoman State was the first country to codify the Islamic family law, "the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*)," during the modern era in 1917.

Although the Ottoman Law of Family Rights was repealed in 1919 during the Ottoman era, it benefited some other Muslim countries, including Jordan, under Ottoman influence. It did not only inspire them to codify their personal status laws but also was applied wholly except for some minor changes.

The legalisation movements, which started at the beginning of the twentieth century, intensified in the middle, and blended with the Western legal system, have affected many Muslim countries. After the Ottoman State, the civil code of the Republic of Turkey, a slightly modified version of the Swiss Code, was adopted in 1926. While preparing the first examples of family law, Jordan was greatly influenced by the Ottoman State, a case that would change over time. After Morocco gained independence in 1956, it codified its family code under *Mudawwanah al-Aḥwāl al-Shakhṣiyyah* (the Code of Personal Status) in 1957-1958. In Malaysia, the approach was a hybrid adoption of Islamic Jurisprudence and modern administrative legislation embedded in the Islamic Family Law (Federal Territories) Act 1984 (Act 303).[3] Besides the given, other Muslim countries combine the Western's current system with their juristic legacies when codifying their family laws.

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[2] Zanirah Mustafa @ Busu, & Intan Nurul 'Ain Mohd Firdaus Kozako, "Malacca Laws: The Effect of Islam and Customs in the Aspect of Family Law", *Journal of Contemporary Social Science Research*, Vol. 3, No. 1 (2019): 37.

[3] Farid Sufian Shuaib, "The Islamic Legal System in Malaysia", *Washington International Law Journal*, Vol.21, No.1 (2012): 92.

The first codification examples in the Islamic world, which culminated in the codification of civil code and Muslim family law during the nineteenth and twentieth centuries, originated from the Turkish experience during the last phase of the Ottoman State. In order not to remain indifferent to the developments in family law and current issues today, this query has prompted the researcher to choose his topic as "Developments and Evaluation of Islamic Family Law in Light of Experiences of Muslim Countries."

1.2 STATEMENT OF THE PROBLEM

Transitioning from an era dominated by different family law provisions over the centuries to a new era has brought challenges. In particular, Middle Eastern countries and North African countries were influenced by French Civil Law, while the British and Dutch legal experiences impacted Asian countries. Turkey, in this case, is noteworthy as the new republic had adopted the legal systems of several Western countries in different fields. This rooted and radical transformation contains some glaring contradictions with the family laws of the countries mentioned above and its implications for Muslims on marriage and divorce matters, such as alimony, impediments to marriage, polygamy, registration of marriage, conversion to another religion, and arbitration in family law. A comparative analysis of these current issues will be made in the thesis.

Additionally, Islamic family law has a strong relationship with the codification. The codification of Islamic family law has been discussed and given importance from past to present. This research aims to conduct a comparative analysis of the codification of Islamic family laws in four prominent countries of the Islamic world and their development. The study delves into the codification and *tadwīn*. It extensively discusses the development of Islamic family law in these four nations and evaluates the development of family law in the light of Islamic Jurisprudence.

Every country examined in the study has its distinction regarding these topics. In contemporary Turkish society, one of the biggest problems for divorced people is to pay alimony indefinitely to their ex-spouses. After the reactions from the community, the Republic of Turkey's Ministry of Justice thought of bringing a proposal to limit the

alimony's duration to six years, with a lower limit of two years. Finally, the alimony arrangement, prepared to ensure justice between divorced spouses and eliminate grievances, will come to the agenda of the Grand National Assembly of Turkey this year.

Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī influenced Jordan in the family law field. This effect continued until the middle of the 20th century. After 1976, the influence of *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* began to decline and was destroyed in later regulations. Similarly to other Islamic societies, some problems have come to the fore in Jordan as the communities have changed and women's participation in business has increased. The delay in the age of marriage and conflict about the roles of spouses in the marriage, primarily because of feminism, are two examples.

Women's associations and organizations have been active in Morocco, demanding reform in family law. Their demands were fulfilled in 2004 with the last family law revision; however, the discussion about the issue of equality between men and women, particularly in inheritance, is still going on.

In Malaysia, polygamy is a legal form of marriage. However, it depends on some conditions, firstly, the first wife's permission. Nevertheless, some men perform their second marriages outside Malaysia, intending to eliminate the country's legal procedure. Then, they return to Malaysia and register the marriage before the *Sharīʿah* courts by paying the related fine. Even though the process takes a legal form in the end, the application causes some side problems, shaking the foundations of the family institution. Another example is when a person (wife or husband) converts to or from Islām. This case is the subject of a current debate in Malaysia that mainly covers children of this kind of family. The problem is about their status and who will have custody of them.

In view of the above examples, there is a need to touch on current issues and cases concerning family law for Muslim societies by drawing on countries' experiences that have blended family law.

1.3 RESEARCH QUESTIONS

This research seeks to answer the following questions:

1. Is it permissible to the codification of the Islamic law? What opinions and arguments are put forward on this issue?
2. How did the codification of Islamic family law start and evolve during the 19th and 20th Centuries in Turkey (Ottoman State), Jordan, Morocco, and Malaysia? Do they have any pitfalls, and how can their comparison, development, and evaluation be based on Islamic Jurisprudence?
3. What were the reasons for the disbandment of the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*), and how did the legal structure of the Republic of Turkey evolve after the Ottoman?
4. What are the contemporary issues in these countries regarding Family Law, and how can a comparative analysis be carried out between these? How are these issues being handled by these Muslim countries?

1.4 RESEARCH OBJECTIVES

This research aims to accomplish the following objectives:

1. To discuss the permissibility of codifying Islamic law and demonstrate opinions and arguments on this issue.
2. To evaluate the codification of Islamic family law, its beginning and evolution during the 19th and 20th Centuries in Turkey (Ottoman State), Jordan, Morocco, and Malaysia. To analyse whether they have any pitfalls and to evaluate their comparison and development based on Islamic Jurisprudence.
3. To examine the reasons for the disbandment of the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*), and how the legal structure of the Republic of Turkey evolved after the Ottoman State.
4. To appraise the contemporary issues in these countries regarding Family Law and to conduct a comparative analysis between them. To evaluate how these Muslim countries are handling these issues.

1.5 SIGNIFICANCE OF THE STUDY

The importance of the research lies in the following points:

1. It helps contemporary legislators identify Islamic countries' experiences and extract what is commensurate with today's reality to develop legalisation movements further.

2. This study is a comparative study in the field of family law. Therefore, the inferences from the research will provide insightful information about the developments in the area in the Islamic world.

3. These four countries are particularly significant as Malaysia, for example, inherited and combined the British legal experience with its Islamic culture. At the same time, Morocco, on the other side of the world, was under the French, thus European, influence in all matters, including the law-making. Turkey (Ottoman State) is an exceptional example in legal issues, with its journey from being an Islamic state to a unitary Republic. With its strategic location in the middle of the Islamic world, Jordan paves the way for tracing the impacts of the Ottoman State on family law. Furthermore, these countries adopted different *Sunnī madhāhib* of Islām.

1.6 SCOPE OF THE STUDY

The research selects Turkey (Ottoman State), Jordan, Morocco, and Malaysia as samples for the analysis. This study will focus on Islamic family law applications in those countries from the 19th century to the present.

In this thesis, the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*) along with the Turkish Civil Code, Jordan Personal Status Law (*Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdunī*), the Moroccan Family Code (*Mudawwanat al-Aḥwāl al-Shakhṣiyyah*), and Malaysia's Islamic Family Law (Federal Territories) Act 1984 (Act 303) were examined.

We chose those countries for the study because these four countries have their characteristics in terms of family law. First of all, Morocco more specifically represents *Mālikī fiqh*. Moroccan family law, named *Mudawwanat al-Usrah*, is essential;

moreover, Morocco is a role model for openness to reforms. Jordan mainly describes the *Shāfiʿī fiqh* while borrowing a great deal from the Ottoman Law of Family Rights decree as the family law's primary source. However, Malaysia represents the *Shāfiʿī fiqh* and has close and meaningful relations with the Ottoman State to the present, like other countries mentioned before. In applying Islamic law to the age requirements, Malaysia stands out in combining modernity with juristic heritage. Malaysia is also crucial due to its multicultural society; it has a dual legal system, Islamic and Civil Law.

Although most Muslims in Turkey are followers of the *Ḥanafī madhhab*, adoption from other *madhāhib* provides flexibility in the law. It was even the case in the Ottoman Law of Family Rights. Turkey has tried to apply a secular law practice in the last century. Until the previous century, the Ottoman State had affected many countries in various fields and had become a source of experience.

1.7 RESEARCH METHODOLOGY

This study uses a qualitative approach. It involves two methods: data collection and data analysis.

a. **Data Collection:** This was done via a library and interviews.

   a.1 Library research: Data collected from various sources, including books, laws, articles, news, websites, and journals.

   a.2 Interviews and field study: Semi-structured interviews conducted by interviewing experts in Islamic family law from Turkey, Jordan, Morocco, and Malaysia. It focuses on contributions, progress, and suggestions to codify Islamic family law. The research employs field approaches to assess contentious issues and elucidate divergent viewpoints within each country. During the field study phase, twenty-one experts were interviewed using a semi-structured method, comprising eight experts from Turkey, six from Jordan, two from Morocco, and five from Malaysia. A comprehensive set of five questions was posed to these experts, aimed at capturing their insights on the subject matter and its crucial implications for their respective nations. The professions of the people interviewed in these countries are as follows: minister, member of

parliament, lecturer, lawyer, mediator, and judge. The interviews were mainly held face to face, or when there was no opportunity to meet, via phone, WhatsApp, or Zoom application. The findings and opinions obtained from the interview questions are included in almost the entire thesis, in the subheadings of the relevant sections, and in aspects that intersect with the subject.

b. Data Analysis: This was done using content and thematic analysis. As for data analysis, the methods are as follows:

b.1 Historical: Tracing the historical degree in early Islamic family law codification attempts during the nineteenth and twentieth centuries.

b.2 Analytical: by analysing the methods in this field to examine solutions different countries produced in family law and enactment in the 19th and 20th centuries, it also explores the link among Turkey, Jordan, Morocco, and Malaysia on their family law codification issues.

b.3 Evaluative and critical: by benefiting from the codification experiences of Muslim countries in Islamic family law and studying the applicability of these experiences to be used today. Evaluative and critical methods will be employed to evaluate and analyze the Western and Islamic resources on family law.

1.8 LITERATURE REVIEW

There are numerous writings on the codification of Islamic law in general and the enactment of Islamic family law in particular. However, there is a scarcity of comparative studies on Islamic family laws. Some of the studies closely related to this research will be analysed here.

The book entitled "*ʿAqd al-Taḥkīm fī al-Sharīʿah wa al-Qānūn, Dirāsah li Taqnīn al-Fiqh al-Islāmī wa al-Ta'thīr al-Tashrīʿī li Majallah al-Aḥkām al-ʿAdliyyah* (The arbitration contract in *Sharīʿah* and Law: A study of the Codification of Islamic Jurisprudence and the Legislative Impact of the *Majallah al-Aḥkām al-ʿAdliyyah*)", has

been written by Fātimah Muḥammad al-ʿAvvā.[4] This book is originally a thesis by which the author obtained a doctorate in law from the Faculty of Law at the University of Alexandria.

The author deals with a study on *Majallah al-Aḥkām al-ʿAdliyyah*, its impact on Arab laws, and subsequent experiences with them. In some investigations, she also deals with Arab laws, i.e., the Jordanian Civil law, that relied on Islamic Jurisprudence during the legislative process. Then, she analyses the study of the arbitration contract, a jurisprudential research, comparing it with the law.

This book contains common points with the research to examine the impact of *Majallah al-Aḥkām al-ʿAdliyyah* and its influence on some countries in the Arab world. *Majallah* is a civil law introduced by the Ottoman State in the 19th century. Its power has affected many Islamic states. Nevertheless, *Majallah* does not include provisions about family law; moreover, the research will deal with *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* as it is a family law codification.

The PhD thesis entitled "Suriye'de Aile Hukuku Alanındaki Gelişmeler ve Bunlar Üzerine Osmanlı Tesirleri (Developments in the Syrian Family Law and Ottoman Impacts)," authored by Abdussamet Bakkaloğlu[5] discusses developments in the field of family law in Syria and Ottoman effects on these. It consists of an introductory chapter and four main chapters.

The introductory chapter discusses the research methodology, Ottoman legal system, and codification actions. This study deals with the Syrian *Aḥwal al-Shakhṣiyyah*. It analyses the Ottoman legal system and legalisation movements in one section. However, it is one of the most significant matters in the thesis; it tries to summarise this vital issue in only a few pages. The research briefly mentioned the developments regarding family law in Syria and the Syrian *Aḥwal al-Shakhṣiyyah*; it further provides a comparative analysis of Syrian family law and Ottoman law in around ten pages. Given that the primary aim of the thesis is to compare these two laws, it

[4] Fātimah Muḥammad al-`Awwā, *`Aqd al-Taḥkīm fi al-Sharī'ah wa al-Qānūn, Dirāsah li Taqnīn al-Fiqh al-Islāmī wa al-Ta'thīr al-Tashri`ī li Majallat al-Aḥkām al-ʿAdliyyah*, (Bayrūt: al-Maktab al-Islāmī, 1st edn. 2002).

[5] M.K. Abdussamet Bakkaloglu, "Suriye'de Aile Hukuku Alanındaki Gelişmeler ve Bunlar Üzerine Osmanlı Tesirleri", (PhD's Thesis, Faculty of Theology, Marmara University Turkey. 2005).

would have been expected to provide further information and a thorough, in-depth comparison.

Later, the study explains significant issues related to Syrian Family Law from the first chapter until the last. It examines marriage and engagement issues, the terms and provisions of the marriage contract, the marriage's consequences, the marriage's termination, the birth and its consequences, license, etc.; yet, as mentioned, it does not seriously compare these titles with the Ottoman Law of Family Rights. In contrast with Bakkaloğlu's thesis, this research is more comprehensive in its scope and topic; moreover, it aims to compare the family laws of four countries and touches on the contemporary issues in these laws.

The PhD thesis entitled "İslâm Hukukunda Kanunlaştırma Olgusu (The Phenomenon of Codification in Islamic Law)," authored by Muhammed Tayyib Kılıç[6] discusses the codification of Islamic law as a concept and movement. It consists of an introductory chapter, four main chapters, and a concluding chapter.

The introductory chapter lays down the general frame of the thesis and its research methodology. The first chapter includes the reception, imposition, transformation of a legal phenomenon, codification, and general enactment framework. In the second chapter, the researcher mentions legislative activities in the general history of law. For instance, he briefly explains the following codes: Hammurabi Codex, Laws of Manou, Twelve Tables, Corpus Juris Civilis, Code of Law Yassa- Genghis Khan, the Prussian Code, Code Napoleon, the Civil Code of Austria, the Civil Code of Netherlands, the Civil Code of Germany and Swiss Civil Code, and so on.

The third chapter deals with codification in Islamic Law. It examines Islamic Law based on revelation and interpretation. Therefore, codification in the history of Islamic Law is called formal codification, not substantive. The last main chapter deals with formal codification actions in the history of Islamic Law. However, very few pages were devoted to other Islamic states' legislative activities after the Ottoman State. These countries are Tunisia, Egypt, Bulgaria, and Russia. Only one page is spared for each state under Activities for the Islamisation of Law. These countries are Egypt, ʿIrāq,

[6] Muhammed Tayyib Kılıc, "İslâm Hukukunda Kanunlaştırma Olgusu", (PhD's thesis, Faculty of Divinity, Ankara University Turkey. 2008).

Syria, Jordan, Morocco, Tunisia, and Pakistan. It also briefly analyses the Islamisation of law in the late period of Islamic countries, which needed to be examined in more detail.

To summarise, this thesis deals with codification in general and draws the codification framework. It summarises the basic concepts of codification and then tries to pull a framework for codification. Finally, it examines the legalisation activities under individual titles in the history of general law. Then, it tries to summarise the fact of enacting Islamic law. Kılıc's study draws attention to *Majallah* and Muḥammad Qadrī Pāshā's actions, which also be mentioned in this thesis, and briefly examines the Ottoman Law of Family Rights. Kılıc completes his research with these individual studies and explores a vast area briefly. As distinct from his work, this thesis examines family law legislation at length and deals with the history of family law from the 19th century to the present in the four Muslim countries. One of the study`s goals is to put contemporary family law issues into words.

The book entitled "*Majallah al-Aḥkām al-ʿAdliyyah, Māṣādiruhā wa Atharuhā fī Qāwānīn al-Sharq al-Islāmi* (*Majallah al-Aḥkām al-ʿAdliyyah*, its sources and its impact on the laws of the Islamic East)," authored by Sāmir Māzin Sharīf al-Qubbaj[7] is a PhD thesis in Islamic Sciences. The author obtained a doctoral degree in Islamic sciences at the Higher Institute for the Fundamentals of Religion at al-Zaytūnah University.

In this research, the author deals with introducing *Majallah*, the reasons for its development, listing its explanations (*şurûḥ*), explaining its jurisprudential sources, and the methodology of its authors in dealing with the *Ḥanafī madhhab*, as they sometimes modified to adopt the preferred saying in the *madhhab*. Afterwards, he explains *Majallah*'s impact on the laws of the Islamic East and mentions the jurisprudential theories that *Majallah* did not cover.

This study focuses on *Majallah al-Aḥkām al-ʿAdliyyah* and its influence on Middle Eastern laws. It offers detailed and satisfying information about the *Majallah*;

[7] Sāmer Māzen Sharīf al-Qubbaj, *Majallat al-Aḥkām al-ʿadliyyah, Māṣādiruhā wa Athāruhā fī Qāwānīn al-Sharq al-Islāmī*, (ʿAmmān: Dār al-Fatḥ li al-Dirāsāt wa al-Nashr, 1st edn. 2008).

however, it does not entirely mention the relationship between *Majallah* and other civil laws, especially *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*.

Some commissions were established after *Majallah*. *Ḥuqūq al-ʿĀ'ilah* Commission was a sub-commission of the Civil Law Committee. Its mission was not to make changes in *Majallah* but to legislate a family law, which had been incomplete while Majallah had been prepared. The research does not point out the fact that the impact of *Qānūn Ḥuqūq al-ʿĀ'ilah* was as much inevitable as the impact of the Majallah on the laws in the Ottoman Geography.

The PhD thesis entitled "Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi (A comparison between the Ottoman Law of Family Rights and the Jordanian Personal Status Law)," written by Ibrahim Alhalalsheh[8] is a comparative study between the Ottoman Law of Family Rights dated 1917 and Jordan Personal Status Law (*Qanūn al-Aḥwal al-Shakhṣiyyah*) accepted in 1976 and modified in 2001. It consists of an introductory chapter, three main chapters, a concluding chapter, and an appendix. The introductory chapter discusses the thesis topic, methodology, references, and Jordanian history and politics.

The first chapter includes the Ottoman legal system, family law decree, and its nature in some Arab countries. However, its effects on the family laws in these countries are analysed in only a few pages, including Syria, Lebanon, Palestine, Jordan, Egypt, and *ʿIrāq*. In the second chapter, he mentions the development of Jordanian family law and its current state.

The last chapter compares Jordan's Personal Status Law and the Ottoman Law of Family Rights. This final chapter shows that there is a strong relationship between the two. The research concludes that seventy-three articles in the Jordanian Law of Personal Status have been quoted from the Ottoman Law of Family Rights Decree, twenty-two of which have been translated word for word. Nevertheless, fifty-one have been translated from the Ottoman Law of Family Rights Decree with some amendments. The twelve articles in the Jordanian Law of Personal Status are similar to

[8] Ibrahim Alhalalsheh, "Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi", (PhD's Thesis, Faculty of Theology, Marmara University Turkey. 2009).

the equivalent articles in the Ottoman Law of Family Rights Decree regarding both codes' rules, topics, and sentence structure.

This study concludes that there are two kinds of differences between the two codes: Firstly, they make different judgments on the same issue, which can be seen in six articles. Secondly, the Ottoman law contains matters not mentioned in the other code, forty-six articles regarding Jews and Christians, while Jordan's Personal Status Law does not include any. Furthermore, the Ottoman Law of Family Rights contains seven more articles that are not mentioned in the Jordan Personal Status Law. On the other hand, Jordan's Personal Status Law contains ninety-two articles that were not mentioned in the Ottoman Law of Family Rights Decree. The research determines the similarities and differences between the two codes and discusses the reasons beyond the contrasts. On the other hand, it explains all articles in both codes, other than those regarding non-Muslims, using reliable Islamic Jurisprudence sources.

The study of Ibrahim Alhalalsheh is significant in comparing the two Islamic family laws enacted in the Ottoman State and Jordan. It contains valuable information about Jordan and has been instrumental in reaching different sources that will be used in the thesis. Conversely, this study examines and compares all legislative family law movements in four countries from the 19th and 20th centuries up to the present.

The PhD thesis entitled "Yüzyıl Mısır'ında Kanunlaştırma Hareketleri (Codification Movements in Egypt of the 19th Century)," authored by Muhammed Hamidullah Agirakca,[9] includes the codification movements in Egypt in the 19th century legal history of Islām. The Mehmet ʿAlī Pāshā dynasty's efforts in law, which continued from the occupancy of Egypt by France in 1789 until the beginning of the 20th century, are viewed in the thesis. This study is more detailed and analytic than the thesis "Developments in the Syrian family law and Ottoman impacts." It reached more specific results as it targeted a particular country and an exact time.

A separate section examines the concept of codification and the enactment of Islamic law. It reviews the legalisation movements in Islamic law by limiting them to four periods: Umayyads, Abbasids, Seljuks, and Ottomans. Nevertheless, the

[9] Muhammed Hamidullah Agirakca, "19. Yüzyıl Mısır'ında Kanunlaştırma Hareketleri", (PhD's Thesis, Faculty of Theology, Marmara University Turkey. 2012).

legalisation movements that emerged in the history of Islām are not limited to these four states. Initially, there were studies similar to those on enactment in other states. Thus, it is a shortcoming that the study does not point out this fact.

Subsequently, the research examines the codification movements in Egypt. It talks about the judicial reform in Egypt; after reviewing the reasons and sources of the legalization movements, it is divided into three categories: expropriations made in public law in Egypt, confiscations made in criminal law, and codification of criminal procedure law. Later, studies in private law and civil law, such as Muḥammad Qadrī Pāshā's legal texts, civil procedure law, and commercial law, were examined. However, it mainly explains areas other than family law and does not make a general comparison.

Consequently, Agirakca's thesis is essential in codification and covers the codification of all areas of law in Egypt in the 19th century. The author mentions a draft prepared by Muḥammad Qadrī Pāshā in Egypt, a personal and family law draft dated 1881, one of the law's texts named *al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah*. Since the study deals with Egypt, an Arab country in the 19th century, it sets an excellent example for studying the Ottoman State and Jordan. However, since this study contains information on the codification field in Egypt, not much detail covers Islamic family law. Instead, this research focuses more on Islamic family law and covers specific areas and countries.

The article entitled "The Influence of Turkish Ottoman Islamic Civil Law in 19th century in the State of Johor Malaysia," authored by Abd Jalil Borham[10], explains Turkish Ottoman Islamic Civil Law's influence in the 19th century on the State of Johor.

The study talks about Sultan Abu Bakar's responsibility for his country's foreign policy and his different visits and diplomatic relations with European and Middle Eastern countries. It says Johor was the first Malaysian state to have its written constitution in 1895. Johor had good relations with the Turkish Ottoman Government. The most significant Turkish contribution to the administration of Islamic law in the province of Johor was the application of Islamic civil law called *Majallah Aḥkām* Johor. It was because *Majallah Aḥkām* Johor had been taken from *Majallah al-Aḥkām*

[10] Abd Jalil Borham, "The Influence of Turkish Ottoman Islamic Civil Law in 19th Century in the State of Johor, Malaysia", *American International Journal of Contemporary Research*, Vol. 3, No. 8 (2013).

alʿAdliyyah of the Ottoman Government, codified and applied in the Ottoman State since the 19th century. This influence is owing to the Johor Government's relationship with the Ottoman Government, especially during Sultanate Abu Bakar. Marital relations, business, culture, art, law, and others convince us that solid ties between the two countries are based on the past.

The introduction maintains that the Malaysian Johor Government's relationship with the Ottoman State began with a visit of Sultan Abu Bakar to European countries in 1893. The country opened to the Ottoman Government to establish a closer relationship with a Muslim country and was determined to make Islām its foundation. The relationship between Johor and the Ottoman State was very different from Johor's relations with other countries. The relationship with the Ottoman government as an Islamic country also positively affected the development of Islamic law in the province of Johor. It can be seen in applying *Majallah al-Aḥkām al-ʿAdliyyah* as Islamic civil law since 1893. Afterwards, during Sultan Ibrahim's reign, the code was translated into Malay and named "*Majallah Aḥkām* Johor." He made this law an official guide to Islamic law in Johor in 1913.

The research gives information about two versions of *Majallah Aḥkām* Johor's text with different introductions, but there are similarities in other parts. Both texts are written in Malay Jawi. Furthermore, both texts contain sixteen books or titles and 1,851 articles or numbers. Same as original *Majallah al-Aḥkām al-ʿAdliyyah* in the Ottoman State.

As a result, *Majallah Aḥkām* Johor's implementation had a massive impact on the history of Islamic law in Johor State. These close ties between the Ottoman State and the Johor resulted in translating the *Majallah* into Malay. Moreover, Egypt's *Kitāb al-Aḥwāl al-Shakhṣiyyah* was translated into the Malay language, which was named *Kitāb Aḥkām Sharī'ah* Johor. This book contained articles and sections related to family law and was later applied in the courts in Johor in 1935. This geography, which established strong ties with the Ottoman State for centuries, should be given the necessary importance today by researchers and should be beneficial for the application model of Islamic law, especially family law, as an example. In this respect, Malaysia is vital, and its Islamic family law should be examined in the thesis.

The article entitled "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars," authored by Najmaldeen K. Kareem Zanki,[11] sheds light on the codification problem in the Muslim world and explains the historical attempts made for the unification of Islamic law, and examines the factors that made these attempts inconclusive.

According to the study, the Islamic State offers different ways to consolidate laws, such as recognising limited law schools and appointing judges from specific law schools, then selecting particular *fiqh* books as the *fatwā* reference. The research talks about modernity challenges that had permanently posed the question of codification. It defines code and codification concepts in the introduction. The study, employing historical and analytical research methods, could have examined more studies and research regarding the topic in its literature review section.

According to the article, codification efforts back to the Abbasid (*al-ʿAbbāsidīn*) Caliphate era. Freedom of *Ijtihād* was one of the main hindrances, making the codification of Islamic law prohibitive. The research briefly mentions various codification movements in Islamic History. The part of the article that concerns the thesis is *Majallah* and its impact on most territories ruled by the Ottomans and drafting a code for family law, which was known as "*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*." Although this code was repealed in Istanbul only two years later, it was, for a long time, applied in Lebanon, Syria, Palestine, and Jordan. A direction toward Westernisation of the law in adopting foreign laws regarding French Codes broke the Islamic rulings in some aspects. The study exemplifies two dominant opinions concerning the issue of codification: those who defend it and those who do not accept it.

The article briefly summarises the codification subject. It also outlines the codification attempts in the Islamic world, from the Abbasid Caliphate to the Ottoman State. In conclusion, it points to a good matter: Before raising the controversy of codification in the West, the Muslim world from the Abbasid Caliphate era argued the issue. Further, the article recommends that within the framework of a broader campaign to harmonize *Sharīʿah* and positive law, Muslim countries must work together to create

[11] Najmaldeen K. Kareem Zanki, "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars", *International Journal of Humanities and Social Science*, Vol. 4, No. 9(1), (2014).

a uniform law derived from Islamic sources without jeopardising modern law requirements. In this thesis, the focus is on the codification of family law in four Muslim countries.

The book entitled, "*Naẓārāt fī al-Taqnīn al-Fiqh al-Islāmī: Tārikhuhu Fiqhuhu Ḍavābiṭuhu* (Glances at the codification of Islamic Jurisprudence, its history, Jurisprudence, regulations.)" authored by Rāfiʿ Layth Saʿūd Cāsem al-Qaysī[12] analyses reviews in the codification of Islamic Jurisprudence, its history, jurisprudence, and its controls. It consists of a bibliographic introduction, three main chapters, and references. The study does not contain a conclusion.

Chapter One lays down the concept and history of codification. It includes the definition of legalisation and law, then explains related terms such as *tadwīn, tajmīʿ*, and *thasrīʿ*; then, it contains the history of legalisation, its development, and the efforts made in it. It talks about the codification of laws beginning from the ancient peoples, besides the idea of codification and its applications in Islamic legislation history. For instance, it talks about *al-Fatāwā al-ʿĀlamgīrīyah*, *Multeqā al-Abḥur*, the codification of the legal provisions carried out by the Sultan of Morocco, *Muḥammad bin ʿAbd Allāh al-ʿAlawī*, *Majallah, Qadrī Pāshā*'s efforts, *Majallah Aḥkām* Johor, *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*.

The second chapter is entitled The Provision of Codification (*Ḥukm al-Taqnīn*). It mentions the legality of codification and the opinions of *al-Fuqāhā* on it. It gives evidence of those who prohibit legalisation, their arguments, proof of legalisation advocates, and their views. The last chapter deals with *Ḍavābiṭ al-Taqnīn*. It contains *al-Ḍavābiṭ al-ʿĀmmah*, *al-Ḍavābiṭ al-Sharʿiyyah*, legal sources, and their role in codification. It finishes with *al-Ḍavābiṭ al-Hāssah*.

As distinct from the book reviews here, this thesis includes the *Majallah*'s comprehensiveness and its effect on the *Majallah* in other Islamic countries. In addition, how it revealed the codification of family law is discussed in the thesis. Furthermore, it will examine the legislation related to family law at length and deal with what work had been done in family law in the previous centuries in four Muslim countries.

[12] Rāfiʿ Layth Saʿūd Cāsem al-Qaysī, "*Naẓārāt fī al-Taqnīn al-Fiqh al-Islāmī: Tārikhuhu Fiqhuhu Ḍavābiṭuhu*", (Bayrūt: Markaz Namā' li al-Buḥūth wa al-Dirāsāt, 1st edn. 2015).

The PhD thesis entitled "The Book of Sales in Majallat *al-Aḥkām al-ʿAdliyyah*: A Juristic Evaluation of its Contents And Their Contemporary Applications" authored by Md. Habibur Rahman[13] discusses the codification of Islamic law and the role of *Majallah* in codification and also aims to show how it can benefit the Islamic finance area. The study consists of an introductory chapter, six main chapters, and a concluding chapter. The introductory chapter lays down the general frame of the thesis and the research proposal.

The second chapter, titled codification of Islamic law, includes the concept of codification and its definition. It contains efforts to codify Islamic law in the past; for instance, Ibn al-Muqaffaʿ, an action of Sultān Muḥammad ʿĀlamgīr and the Ottoman Caliphate's effort. It also mentions the attempt to codify Egypt and Syria's family law and the effort to unify family law for Arab Countries, albeit for a few pages under this title. The following chapters of the study examine various issues related to sales. The third chapter deals with issues related to the sale's execution, such as mutual consent (*tarāḍī*) and the option of withdrawal before parting. (*Khiyār al-Majlis*).

The fourth chapter discusses issues related to the sold object and the price, followed by the fifth chapter, which concludes with matters related to delivery and possession. The sixth chapter analyses *khiyārāt* in the sale. Finally, the seventh chapter views sales: salam, manufacturing contract, and redemption sale. Then, the last chapter -the conclusion- consists of the study's main findings and some recommendations.

To sum up, this thesis deals with codification in general and deals with *Majallah* mainly. It summarises the concepts of codification and past efforts to codify Islamic law. It then addresses the topic "background and evaluation of the *Majallah*." Finally, other sections examine the law articles related to sales and sale types in *Majallah*. It concludes that the *Majallah* fulfilled an excellent legislative mandate and established its supremacy in the judiciary and legal proceedings, demonstrating the size and prestige of Islamic law against Western law. The research states that all Islamic law departments, such as civil, constitutional, judicial, criminal, international, etc., are suitable for coding except rituals. (*ʿibādāt*).

[13] Md. Habibur Rahman, "The Book of Sales in Majallat al-Aḥkām Al-ʿAdliyyah: A Juristic Evaluation of its Contents And Their Contemporary Applications", (PhD's thesis, Kuliyyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia. 2016).

The study draws attention to *Majallah*, which will be mentioned in this thesis; however, this thesis examines the legislation related to family law at length in our thesis. Besides, it compares the changes the four Muslim countries had seen in family law throughout the preceding centuries. One of the study's goals is to establish a ground to discuss possible solutions to the contemporary issues of Modernism and Westernism.

The article entitled "*Taqnīn al-Aḥkām al-Usrah fī al-Jazāir wa Bāqī Duwal al-Maghrib al-ʿArabī* (Legalisation of Family Provisions in Algeria and other Maghreb Countries)," authored by Elachi Nouara[14] aims to examine codifications and to explain the codification of family law, particularly in Algeria and other Maghrib countries. Another goal of this research is to question the compatibility between Islamic law and modern phenomena. This research uses the analytical method and examines the family law enactments in these countries. However, along with the article, there is a question mark about whether these goals are achieved. To what extent could family laws of all Maghrib countries be analysed in an article? Nevertheless, this study is crucial since it sheds light and provides a basis for examining Morocco.

Firstly, the research examines the phenomenon of codification in Algeria, including the first steps taken in 1984. Then, the study devotes a few pages to each one of the other Maghrib countries. It examines family law codifications in Tunisia and Libya and then reviews the enactments in Morocco and Mauritania. In conclusion, the author says that Islamic *Sharīʿah* is the source that organised the family in the Maghreb countries in the pre-codification stages. This matter greatly impacts the preservation and stability of Maghreb societies. In the Maghreb countries, the European colonial movement had a considerable influence on the Muslim peoples, but it was abolished due to their incompatibility. After gaining independence, every country tried to legislate a law according to its culture. Tunisia was the first Maghreb country to start the legalisation movement in 1956.

The article discusses the codification concept and movements and touches on family law in Morocco. This article provides many resources about that region through its bibliography. However, regarding North Africa, it should have talked about the

[14] Elachi Nouara, "Taqnīn al-Aḥkām al-usra fi al-Jazāir ve bāqī Duwal al-Maghrib al-'Arabī", *Majallah Dirāsāt wa Abḥās*, Vol. 11, No. 2 (2019).

family law of each country. The family law of the Moroccan, *Mudawwanat al-Usrah*, should also have been examined in detail.

The article entitled "Codification of Law," authored by Tarek A. Elgawhary,[15] defines Islamic law's enactment as follows: The codification of Islamic law is about how various provisions of *Sharīʿah* on a particular subject are collected and restated succinctly.

This study gives some examples of early attempts at Islamic law: Books of *Ikhtilāf al-Fuqahā'*, like that of Ibn al-Mundhir (d. 931), the *Bidāyat al-Mujtahid* of *Ibn Rushd* (d. 1198), *Fatāwā ʿĀlamgīrīyah*. However, the author does not call these efforts legal codification; according to him, they should more accurately be called legal consolidation.

The article continues with a title: "Early Efforts of Codification." The first recorded effort at legal codification of Islamic law was made by Ibn al-Muqaffaʿ (d. 759), the Abbasid political advisor. There were other efforts to consolidate Islamic law. The first experiment with the formal codification of Islamic law occurred under the British occupation of India. Another early experimentation in the codification of *Sharīʿah* occurred under the Dutch in Java. As was the case in British India, Dutch colonial officials controlled local *Sharīʿah* and *ādāt* courts, giving final authority to Dutch judges and Dutch law.

The study talks about judicial activities and legal reforms in the Ottoman State, such as the codification of penal laws based mainly on *Ḥanafī fiqh*, the code of commerce taken from Europe and *Majallah al-Aḥkām al-ʿAdliyyah*. After that, it mentions that Egypt was an important centre for legal reform during this period. Qadrī Pāshā (1821–1888), took an interest in codification and provided three works of codified Islamic laws: *al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah*, *Murshid al-Ḥayrān ilā Maʿrifat Aḥwāl al-Insān* and *Qānūn al-ʿadl wa al-Inṣāf li al-Qaḍā' ʿalā Mushkilāt al-Awqāf*.

[15] Tarek A. Elgawhary, "Codification of Law." *In The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online, <http://www.oxfordislamicstudies.com/article/opr/t349/e0033> (accessed 2 February, 2021).

This research discusses Personal Status Law in the Ottoman State, Egypt, and Morocco. Personal status laws were codified in 1917 as the Ottoman Law of Family Rights. In Egypt, the Code of Personal Status Law was subsumed into the national code, drafted by jurist ʿAbd al-Razzāq al-Sanhūrī (d.1971) in 1948. Moroccan reformers turned to legal codification in Morocco after independence from France in 1956. King Muḥammad V (r. 1927–1961) established a committee to produce a personal status code, headed by ʿAllāl al-Fāsī (d.1974). The initial code was completed in 1957 and titled *Mudawwanat al-Aḥwāl al-Shakhṣiyyah*.

Although the *ʿulamā* were primarily excluded from the various codification efforts of civil law (commercial codes, penal codes, etc.), they were heavily involved in the codification of personal status law, which became the last central area of law dominated exclusively by the *Sharīʿah*.

The study examines the effect of codification on *fiqh* in the last chapter. It says the modern codification of Islamic law drew criticism from conservative *ʿulamā* who viewed it as entirely incompatible with Islamic juristic norms but also stated some works like the *Majallah* and Qadrī Pāshā's writings were welcomed and studied in the Muslim world.

The study considers the Codification of Islamic law as a product of the modern world and arises mainly from the West's colonial influence. However, according to the article, in the middle of the twentieth century, many scholars in the Muslim world called for the Codification of Islamic law. Although it states that the codification of Islamic law is a product of the modern world and mainly stemmed from the West's colonial influence, it can be accepted that codification is a need that emerged over time and as the first step of enacting works created by Muslims centuries ago.

As a conclusion from the literature review above, it is clear that these studies are relevant to this thesis in several ways, mainly from the theoretical side and to a lesser extent on the practical side. Nevertheless, they do not address the study of codifying the Islamic family's provisions in the legislation of the Islamic world in the 19th and 20th centuries. Some studies generally dealt with legalisation, while others briefly summarised the subject. In addition to that, the studies related to the legalisation of family law for Turkey (Ottoman State), Jordan, Morocco, and Malaysia did not study

how to benefit from other states' experiences and how to possibly set a stage in search of a solution for contemporary issues regarding family law.

Islamic family law has a strong relationship with the codification. The codification of Islamic family law has been discussed from the past to the present, and it contains issues that still need to be examined. This research aims to conduct a comparative analysis of the codification of Islamic family laws in four prominent countries of the Islamic world and their development. The study delves into the codification and tadwin. It extensively discusses the development of Islamic family law in these four nations and evaluates the development of family law in the light of Islamic Jurisprudence. The research employs analytical and field approaches to assess contentious issues and elucidate divergent viewpoints within each country. During the field study phase, twenty-one experts were interviewed using a semi-structured method. A comprehensive set of five questions was posed to these experts, aimed at capturing their insights on the subject matter and its crucial implications for their respective nations. This is one of the features that distinguishes the study from previous studies. Additionally, the research highlights critical contemporary family law challenges, such as alimony throughout life, polygamy, conversion of spouses to another religion during the marriage, marriage registration, and the issue of arbitration in family law, all analysed from the perspective of *fiqh*.

Every country examined in the study has its distinction regarding these topics. In view of the above examples, there is a need to touch on current issues and cases concerning family law for Muslim societies by drawing on countries' experiences that have blended family law.

When looking at the references made about the Ottoman State and Turkey, the most cited work is the *Majallah al-Aḥkām al-ʿAdliyyah*. Besides, some studies also have little relation to the *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*. In studies between Turkey and Malaysia, the emphasis is placed on a vital link from past to present. Moreover, most studies related to Jordan's family law say that Jordan did not codify it until the 50s in the 20th century.

Lastly, examining Morocco, which stands out with its reforms in family law in North Africa, can add a different dimension to today's family law studies.

CHAPTER TWO

CODIFICATION CONCEPT AND ITS ORIGIN AND LEGISLATIVE PROOF VALIDITY

2.1 INTRODUCTION

Law is integrated into human life and is always related to society because it is an instrument of social control. No matter how advanced or primitive society is, a particular legal system controls it. However, sometimes, a society's perception of the law may differ. However, people's perceptions are influenced by philosophy and values, which will shape attitudes and awareness of the law. The perception of a moral society towards a legal system will create a sense of respect and positive legal compliance. The law is expected to become an agent of change or tool *al-taghyīr* (means of change, determinants, founders, and pioneers) toward social and community action. In the past, Muslim states provided remedies for marriage and divorce matters such as alimony, impediments to marriage, polygamy, and arbitration based on Islamic Jurisprudence. However, the changing conditions and surroundings of each age have introduced new legal regulations.

Majallah al-Aḥkām al-ʿAdliyyah was legislated in the Ottoman State between 1868 and 1876, and it is the first civil code based on Islamic sources. Besides being the first example of Islamic codification in the modern era, *Majallah* also revealed the need for new family law arrangements. At this stage, there have been efforts to enact family law from the 19th century onwards. With the first civil code *Majallah* and with the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*), known as the first Islamic family law, this codification movement inspired other Muslim countries to codify their laws regarding this field.

As a result, codification has become one of the modes of exercising *ijtihād*, interpretation, and re-interpretation of Islamic law in the contemporary age, like *Fiqh* Council, *ijmāʿ*, and so forth. This chapter discusses the codification of Islamic law, its definition, origin, legislative proof in *fiqh*, and disputes among scholars on the codification of Islamic law.

2.2 CODIFICATION CONCEPT

This subsection encompasses the definition of codification, its origin, and the perspectives on how Islamic scholars define codification. Additionally, it contains the correlation between *taqnīn* and *tadwīn*. Furthermore, the claims put forward by some researchers regarding the historical origins of the codification of Islamic law, dedicated to the period of Abū Jaʿfar al-Mansūr and Ibn al-Muqaffaʿ, were also analysed. Discussion is included on whether the codification of Islamic law and the works cited as examples of codification movements can be classified as codification activities. Finally, it was addressed that the British tried to systematise Islamic law while occupying India, the Dutch published laws regulating civil and criminal matters during their control of Java, and the Ottoman State implemented legal regulations and codification activities.

2.2.1 The Semantics of Codification

2.2.1.1 Definition of Codification

The process of initiating codes is referred to as codification. The Arabic word for codification is *Taqnīn.* The word *Taqnīn* is the maṣdar (source) of the *qannana* verb in Arabic, coming from the root of *qānūn.* The word *qānūn* is an Arabised word that comes from the Greek language. It is taken from the Greek word kanōn, which means straight stick, order, principle, or integrity in legal rules. This word has been transferred to several languages, including Arabic.[1] *Qānūn* was said that it was taken from the Persian language.[2] *Taqnīn* literally means placing and arranging the laws with the codes in its modern sense.[3] *Taqnīn* means making rules in the form of law. Codification in law refers to the process of developing a legal code. In general terms, it is expressed with the word *Taqnīn*. Codification, in a special sense, is described with the word *tadwīn*. It compiles the scattered legal rules in a country depending on the branch of law they belong to and brings them into systematic integrity.[4]

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[1] Ezzat Zāyed, *al-Mawsūʻah al-Thaqāfiyyāh fī maḥw al-Ummiyyah al-Qānūniyyah*, (al-Qāhirah: al-Hay'ah al-Miṣriyyah al-ʿĀmmah li al-Kitāb, 2006), Vol. 1, 13.
[2] Majmaʿ al-Lughat al-ʿArabiyyah, *al-Muʿjam al-Wasīt*, (Egypt: Maktabat al-Shurūq al-Duwaliyyah, 4th edition, 2004), 763.
[3] Ibid., 763; *al-Mu'jam al-Wajīz*, (al-Qāhirah: Ministry of Education, 1992), 918.
[4] Kemal Gozler, *Hukuka Giris (Introduction to Law)*, (Bursa: Ekin Yayınevi, 15th edition, 2018), 242.

According to al-Ashqar (d.2012), codification is the collection of lawful philosophies relevant to a particular area of law as a book, a code, or a compilation from an Islamic point of view. It would be done after evaluating and ordering these principles, removing contradictions, and then organising them by a topic to appear in judicial articles.[5] This definition paints a vivid picture of codification and briefly demonstrates its implementation.

As explained by al-Zuḥaylī (d.2015), the codification of Islamic law is turning *Sharī'ah* rulings on financial transactions and dealings into a simple legal article to facilitate reference for the court decision, consolidate legal choices and assist litigants in understanding the legal rulings and the basis for them.[6] According to his definition, codification entails giving *Sharī'ah* provisions on transactions and dealings in legal form. The goal is to streamline the judicial reference process by consolidating legal judgments and making it easier for litigants to understand the reasoning behind the decision.[7]

Further, al-Qaraḍāwī (d.2022) defines this as the systematic *Sharī'ah* rulings in the type of legislation materials, ordered and numbered, as was done for modern laws such as civil, criminal, and administrative laws, and so on, up to the point where it (*Sharī'ah*) becomes simple and a specific reference and guiding light for judges, lawyers, and the community.[8] This definition achieves the same objectives as the previous one but does not restrict the provisions codified to transactions and dealings. However, codified law will be binding on the state or relevant authorities; al-Sirāj defined it as a process of formulating *Sharī'ah* rulings in the form of legal articles, orderly, appropriate to the same subject matter so that it will be easy to refer to, provided that the state or authority obligates complying with that in dealings and judiciary.[9] As a result, al-Shatharī focuses on the nature of the binding, defining it as drafting *Sharī'ah*

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[5] 'Umar Sulayman al-Ashqar, *Tārīkh al-Fiqh al-Islāmī*, (Kuwait: Maktabat al-Falāh, 2nd edn., 1989), 187-188.
[6] Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, (Syria: Dār al-Fikr, 2nd edn., 1985), Vol. 1, 27.
[7] Md. Habibur Rahman & Muhammad Amanullah, "Dispute over the Legality of Codification of Islamic Law: A Critical Analysis (Perselisihan Tentang Kesahihan Kodifikasi Undang-Undang Islam: Analisa Kritikal)", *Journal of Islam in Asia*, Vol.15, No. 2 (2018): 434.
[8] Yūsuf al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, (Bayrūt: Mu'assasat al-Risālah, 1st edn., 1993), 259.
[9] Muḥammad Aḥmad Sirāj, *al-Fiqh al-Islāmi Bayna al-Nazariyyah wa al-Ṭatbīq*, (Alexandria University, 1997), 258; Yaḥyā Muḥammad Iwad al-Khilāyalah, "Taqnīn Aḥkām al-Sharī'ah al-Islamiyyāh Bayna al-Nazariyyah wa al-Tatbīq", (PhD. Thesis, International Islamic University Islamabad, 2002), 17.

provisions in binding terms and words to obligate the judges to pass the judgement accordingly.[10]

The language used to restate these laws and the code frequently overlap in the contemporary context with the language and outlines of Western European regulations. The legal code is structured to declare all other forms of law null and void and assert complete jurisdiction over itself. By applying the codification process to the various Islamic law provisions, Islamic law could be codified. It could also be codified according to a single *madhhab*. One will be chosen if multiple opinions on a particular issue exist within that *madhhab*. Thus, codifying Islamic law entails codifying the provisions of various *madhāhib* or single *madhhab* in civil exchanges when the state decides that the judiciary will only operate based on a single *madhhab*.[11] Codification was a sovereign act that enabled royals to organise and define permissible scopes in their domains.[12] Codification can also refer to systematically collecting and organising written rules and regulations, usually by a subject. Codification existed in the Muslim world in this broad sense, beginning with the canonical compilations of hadīth (Prophet's traditions) [...].[13]

As a result, no distinction can be drawn between these definitions. Others went into greater detail, while some defined the codification succinctly. Some definitions have demonstrated the objectives and process of codification. The definitions did not address whether all *Sharī'ah* provisions are equally important enough to be codified. Even though Ashqar discussed it under the codification of *fiqh*, some people did not associate it with the provision of Islamic law as he defined it.

Consequently, codification means making rules in the form of law, which refers to developing a legal code. Codification is compiling the scattered legal rules in a country depending on the branch of law they belong to and bringing them into

[10] ʿAbd al-Raḥmān Ibn Saʿad al-Shatharī, *Ḥukm Taqnīn al-Sharī'ah al-Islāmiyyah*, (Riyadh: Dār al-Sāmiʿī, 1st edn., 2007), 15.
[11] Muṣṭafā al-Zarqā, *Al-Madkhal al-Fiqhī al-'Āmm*, (Dimashq: Dār al-Qalam, 2nd edn., 2004), Vol. 1, 313-314.
[12] Guy Burak, "Codification, legal borrowing and the localization of 'Islamic law" In *Handbook of Islamic Law*, edited by Khaled Fadl & Ahmad Ahmad & Said Hassan (Oxon and New York: Routledge, 1st edn., 2019), 389-399.
[13] Maribel Fierro, "Codifying the Law: The Case of the Medieval Islamic West" In *Diverging Paths? The Shapes of Power and Institutions in Medieval Christendom and Islam*, edited by John Hudson & Ana Rodriguez (Leiden: Brill, 2014), 100–101.

systematic integrity. It helps facilitate reference for the court decision, consolidate legal choices, and assist litigants in understanding the legal rulings and their basis.

After the definitions mentioned by the scholars in the previous section, it is necessary to express the following distinction. The concept of *tadwīn* encompasses all these mentioned aggregation processes. Only *tadwīn* divides itself into two. The first is *tadwīn* in terms of codification. For example, Abū Jaʿfar al-Manṣūr's (d.775) desire to use Imām Mālik's (d.795) book *Muwaṭṭa'*, the proposal of Ibn al-Mukaffaʿ(d.759)[14], and the writing of *Fatāwā* books can be given. There is also *tadwīn* in the sense of legislation, and here, the aim is to legislate, that is, to put forward the rules that are obligatory for everyone to comply with by the state. *Majallah*, which we will discuss in the following subsection, is an example of civil law legislation.

2.2.2 Genus and Origin

Some researchers take the issue of the codification of Islamic law to the time of Ibn al-Muqaffaʿ[15] in the Abbasid Caliphate. Ibn al-Muqaffaʿ tried to convince Abū Jaʿfar al-Manṣūr to establish a centralised legal system at the beginning of the Abbasid era[16] in a letter he called *Risālah al-Ṣahābāh*.[17] However, it only aims to bring together the Islamic provisions that Ibn al-Muqaffaʿ was attempting to do and thus to provide a unity of judgment. Therefore, it cannot be considered a codification in the complete sense of the word. Subsequently, there was a sequence of communications between the Caliph Abū Jaʿfar al-Manṣūr and Imām Mālik. The Caliph wanted an epistle on the rules governing the Ummah. However, the Imām objected and then declined this request. The

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[14] See: Ismail Durmus, *Türkiye Diyanet Vakfı İslam Ansiklopedisi (Turkey Diyanet Foundation Encyclopedia of Islam)*, 1st edn., "Ibnü'l-Mukaffa", Vol. 21, 130-133.

[15] Najmaldeen K. Kareem Zanki, "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars", *International Journal of Humanities and Social Science*, Vol. 4, No. 9(1), (2014): 128; Elgawhary, "Codification of Law." In *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online, <http://www.oxfordislamicstudies.com/article/opr/t349/e0033> (accessed 2 February, 2021).; H.Y. Sonafist & Yasni Efyanti & Ramlah Ramlah & Ali Hamzah & Faizin Faizin, "Ibn Al-Muqaffa's Proposal for Taqnīn and its Synchronization with Islamic Law Codification in Indonesia", *SAMARAH Jurnal Hukum Keluarga dan Hukum Islam*, Vol. 4, No. 2 (2020): 504.; Sebghatullah Qazi Zada & Mohd Ziaolhaq Qazi Zada. "Codification of Islamic Law in the Muslim World: Trends and Practices.", *Journal of Applied Environmental and Biological Sciences,* Vol.6, No.12 (2016): 162.

[16] Al-Shatharī, *Ḥukm Taqnīn al-Sharī'ah al-Islāmiyyah*, 17.

[17] ʿAbd Allāh ibn al-Mukaffaʿ, *Āthār ibn Muqaffaʿ*, (Bayrūt: Dār al-Kutub al-ʿIlmiyyah, 1st edn., 1989), 309.

calls persisted until the reign of Hārūn al- Rashīd in 810. Nevertheless, Imām Mālik firmly declined the caliph's request.[18]

It is necessary to add the other laws if the abovementioned works are deemed codification; likewise, we cannot count works such as *al-Fatāwā al-Ālamgīrīyah*, an Arabic *fatwā* book collecting the views of the *Ḥanafī madhhab* dated 1707[19], as complete codification. These works aimed to ensure the unity of the *fatwā*; for example, during the Ottoman State, the fatwas of Ibn Kemâl Pāshā[20] or Kemâl Pāshāzâde (d.1534) and the *fatāwā* of Shaykh al-Islām Ebussuʿûd Efendī (d.1574)[21] can be given as examples. Thus, the previous codification attempts in Islamic law were based on bringing uniformity to law and providing ease to the subjects. The early attempts to "bring uniformity" can be attributed to the *mukhtaṣars* and *Fatāwā* compilations.[22]

French legal historian Jean Maillet distinguished three historical functions of codification.[23] First and foremost, codification by states is seen as a means to expose the law and present the existing or desired law in a comprehensive, rational, and systematic way. The second function of codification has long been to unify the law. The third function of codification lies in the desire of the national legislature to modify the nature of the law itself: the prevailing laws were no longer to be based on custom, foreign law, or supposed natural law. Instead, the law became the product of the nation-state and, therefore, a democratic matter.[24]

Islamic law and local customs reigned supreme until the eighteenth century in India and the early nineteenth century in the Ottoman State. However, during the 1600s, Britain began its penetration of India through the agency of the East India Company

[18] Luqman Zakariyah, "Codification of Islamic Law in the Muslim World: Political Intrusion and Professional Egoism", *The Islamic Quarterly*, Vol. 61, No.2 (2017): 303.
[19] See: Ahmet Ozel, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, 1st edn., "El-Âlemgîriyye", Vol. 2, 365.
[20] See: M. Esad Kilicer, "Kemâlpaşazade'nin Aile Hukuku ile İlgili Bazı Fetvaları (Some Fatāwā of Kamâl Pāshāzâde on Family Law)", *Ankara Üniversitesi İlahiyat Fakültesi Dergisi,* Vol. 19, (1973).
[21] See: Pehlül Düzenli, *Şeyhülislam Ebussuud Efendi ve Fetvaları (Sheikh al-Islam Ebûssuûd Afandī and his Fatāwā)*, (Osmanlı Araştırmaları Vakfı – OSAV, 2012). ; M. Ertuğrul Düzdağ, *Ebussuud Efendi Fetvalari (Fatāwā of Sheikh al-Islam Ebûssuûd Afandī)*, (Kapı Yayınları, 2012).
[22] Sidra Zulfiqar, "Islamization of Laws: Various Determinants, Modern State and Codification", *Islamabad Law Review Special Issue on Islamization of Laws in Pakistan*, (Islamabad: International Islamic University, Islamabad, Vol. 2, No. 1/2 (2018): 27.
[23] Jean Maillet, "The Historical Significance of French Codifications", *Tulane Law Review,* Vol.44, No.4 (1970): 681 et seq. at Jan Smits, "Of the Vocation of Our Age Against Codification: On Civil Codes in the Information Society", in *Tradition, Codification and Unification Comparative-Historical Essays on Developments in Civil Law*, edited by J.M. Milo & J.H.A. Lokin & J.M. Smits, (Cambridge-Antwerp: Intersentia, 2014), 240.
[24] Smits, Of the Vocation of Our Age Against Codification, 240-242.

(EIC), whose sole goal was commercial profit. Until 1757, it had not asserted its almost total military dominance; subsequently, Britain embarked upon the massive project of colonising India economically and juridically. Most importantly for the British, the avid desire to reduce the economic costs of controlling the country led them to maximise the role of law. The law was more financially rewarding than brute power.[25] During the British occupation of India, an attempt was made to formalise Islamic law. The British colonial administration gradually developed a hybrid legal system[26] under the leadership of Governor-General Warren Hastings rather than replacing local laws with British ones.[27] Beginning with "Hastings Plan" in 1772, the Company developed the Adalat System in Bengal, in which they codified and applied Hindu and Muslim law to the respective religious populations with regards to civil law and a form of Muslim law to the entire indigenous population with regards criminal law.[28]

Warren Hastings commenced making considerable changes in the administration of justice. He adopted some provisions for criminal and civil courts, modified the system, and gave much attention to reforming the judicial system.[29] British legal administrators oversaw British judges, who conferred on Islamic law minutiae with local Muslim jurists; a parallel process took place with what the British defined as Hindu law. As this system became too complex for British administrators to manage, the renowned Orientalist Sir William Jones (1746-1794) proposed the creation of a code combining Islamic and Hindu law. A series of English translations of crucial *Ḥanafī* texts was launched to make Islamic law more accessible. In 1791, Charles Hamilton

[25] Wael Hallaq, *An Introduction to Islamic Law*, (Cambridge: Cambridge University Press, 2009), 85.
[26] In fact, there was another purpose behind this hybrid system: By replacing a significant part of the *Sharīʿah* with English law and gradually mutilating the remainder to create a hybrid legal system, they began referring to as "Muhammadan Law," in India stripped Muslims of their sense of identity. See: Syed Khalid Rashid, "Islamization of "Muhammadan Law" in India", *American Journal of Islam and Society*, Vol. 5, No. 1 (1988): 136.
[27] Elgawhary, "Codification of Law." In *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online, <http://www.oxfordislamicstudies.com/article/opr/t349/e0033> (accessed 2 February, 2021).
[28] James Bergin, "From Hastings to Macaulay: how the East India Company strategically created a legal order to consolidate power over the indigenous people of India 1765-1862", (Master thesis, Universität Wien, 2019), 3.
[29] Shaista Gohar & Summayya & Hina Rehman & Tasneem Sarwat & Muhammad Sohaib & Muhammad Hayat Khan, "Judicial Reforms in British India Case Study Of Warren Hasting Era (1772-85)", *Elementary Education Online*, Vol. 19, No.4 (2020): 5854.

translated al-Marghinānī's (d.1197) *Hidāyah;* in 1792*,* Jones translated *al-Sirājiyya* in inheritance law.[30]

Another early experiment in *Sharīʿah* codification occurred in Java during the Dutch occupation. Before 1835, *Shāfiʿī madhhab* was the only form of Islamic law and procedure used in Indonesia, and it was entirely under the full authority of the penghulu[31] and the head of the mosques. Dutch colonialists played little to no role in this process.[32] Javanese society, like Indian society, was syncretic. Adat (local customs and traditions) coexisted with Islamic law. In contrast with the British, the Dutch were not interested in a hybrid system or the codification of local laws. They planned to create rules governing Dutch settlers and, eventually, natives. As a result, the Dutch had issued codes governing civil and criminal guidelines by 1848. Later, in 1873, a penal code for natives was introduced, nearly identical to the Dutch national penal code. As in British India, local *Sharīʿah* and adat courts were controlled by Dutch colonial officials, giving Dutch judges and, thus, Dutch law final authority.[33]

With the notable exception of L. W. C. van den Berg's 1882 French translation of al-Nawawī's (d.1277) *Minhāj al-Tālibīn,* translated into English by E. C. Howard, in 1914, the Dutch preferred to promote adat law and courts over *Sharīʿah*. In the Netherlands, the study of adat law, known as Utrecht, was spearheaded by Dutch Orientalists such as Christiaan Snouck Hurgronje[34] (1857-1936). Adat's research and writings evolved into codes used by Dutch and Indonesian jurists. The Dutch government had formally recognised adat as law, rather than the *Sharīʿah*, by 1927.[35]

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[30] Elgawhary, "Codification of Law." In *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online, <http://www.oxfordislamicstudies.com/article/opr/t349/e0033> (accessed 2 February, 2021); Andrea Borroni & Marco Seghesio, "The Development of the Anglo-Muhammadan Law in India", *Journal of Malaysian and Comparative Law*, Vol. 41, No. 2 (2014): 88.

[31] Penghulu, ڤڠهولو also known as Pĕnghulu. It is a Malay word meaning "leader, president, chief" is the title of the officials responsible for the religious affairs of the people and the heads of religious courts on the island of Java. In addition, this title is also given to village headmen and tribal leaders called adat, who are representatives of traditions, in many places in the region. It is also seen in old Malay texts that the word is used as a term of respect for the Prophet Muhammad in the form of "penghulu para nebi" (leader of all prophets). See: Ismail Hakki Goksoy, Türkiye Diyanet Vakfı İslam Ansiklopedisi, "Penghulu", Vol.34, 231.

[32] Imam Mawardi, "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia", *Al Ihkam: Jurnal Hukum & Pranata Sosial*, vol.13, No.1 (2018): 12.

[33] Elgawhary, ibid..

[34] Snouck Hurgronje was the first to use the idea of adat law in 1893. See: Jan Michiel Otto, "Sharia and national law in Indonesia", in *Sharia Incorporated. A Comparative Overview of the Legal Systems in Twelve Muslim Countries in Past and Present*, edited by Otto, J. M., (Leiden: Leiden University Press, 2010), 440.

[35] Elgawhary, ibid.

Legal arrangements in the Ottoman State began in the early 19th century after Tanzīmāt[36]. These regulations have many historical, legal, social, and cultural factors. The first penal code of the *Tanzīmāt* Period was the 1840 Criminal Code in the Ottoman.[37] The second penal code is the Kanun-ı Cedid (*Qānûn-i Jadīd)*, dated 1851. This period's most essential penal code is the Penal Code of Law, dated 1858. This law brought together the French penal code of 1810 and local provisions.[38] In 1850, a commercial law known as *Kānunnāme-i Ticāret* was enacted; this law was entered into force by the reception way of the vital part of the French Commercial Code of 1807.[39] *Majallah al-Aḥkām al-ʿAdliyyah*, or the Ottoman Civil Code, was legislated in the Ottoman State between 1868 and 1876. Majallah is the first civil code based on Islamic law, yet it did not include family law. The Ottoman State was the first country to codify the Islamic family law, "the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*)," in 1917 in the modern era.

Most accounts of Islamic legal codification emphasise the importance of Ottoman codification experiments during the nineteenth century, beginning with the Land and Penal Codes of 1858 and ending with the well-known civil code, the *Majallah al-Aḥkām al-ʿAdliyyah*, two decades later. At the same time, scholars have argued over whether the codes were "authentically" Ottoman or responses to European codification projects. Avi Rubin recently argued that the Ottoman codification project should be understood as part of a global codification trend that occurred concurrently in several centres worldwide.[40] Nevertheless, it was subject to the world's codification movement because of a need. Jurists or *qāḍīs* were giving *fatāwā* by looking at the *fiqh* books. Only then, as the number of judges who had control over all the events decreased, Ottomans felt obliged to enact a law in which they collectively had opinions so that the judges could decide more comfortably in the courts. In other words, the needs of the

[36] Tanzīmāt was a period of reform in the Ottoman State that began with the Gülhane Hatt-ı Şerif (Supreme Edict of the Rosehouse) in 1839. However, it is controversial when it ended, but there is a general idea that the period ended with the closure of the parliament in 1878. See: Ali Akyildiz, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Tanzimat", Vol.40, 1.
[37] Mustafa Sentop, "Tanzimat Dönemi Kanunlaştırma Faaliyetleri Literatürü (Literature of Legalisation Activities in the Tanzimat Era)", *Türkiye Araştırmaları Literatür Dergisi*, Vol. 5, (2005): 652; Rabia Beyza Candan, "1840 Tarihli Ceza Kanunname-i Hümayunu İncelemesi (1840 Ottoman Criminal Code Analysis)", *Anadolu Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 1, No.1 (2015): 63.
[38] M. Akif Aydin, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Ceza", Vol.7, 481.
[39] Sentop, Tanzimat Dönemi Kanunlaştırma Faaliyetleri Literatürü, 655.
[40] Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification", *Journal of the Economic and Social History of the Orient*, Vol. 59, No.5 (2016): 828.

society rather than the current in the West caused this situation. However, it should be noted that these laws are similar to West's laws because they are written in article form.

The *Majallah* is significant in terms of Islamic legal history. It was compiled by a jurist committee led by the renowned jurist and statesman Aḥmad Jevdet Pāshā (d. 1895). It is widely regarded as the first state-sponsored attempt to codify Islamic Jurisprudence. While some Ottoman elite members proposed translating and implementing the French Civil Code throughout the empire, jurists who believed the Ottoman Civil Code should be based on Islamic Jurisprudence prevailed. The committee selected opinions mostly from the *Ḥanafī madhhab*'s[41] "most reliable works" and, in some cases, views that were "more suitable for the needs of our times."[42] Indeed, jurists all over the Islamic world were inspired by the *Majallah* and tried to build their codes in the decades and centuries that followed.[43]

The relationship with the Ottoman government as an Islamic country also positively affected the development of Islamic law in the province of Johor. It can be seen in applying *Majallah al-Aḥkām al-ʿAdliyyah* as Islamic civil law since 1893. Afterwards, during Sultan Ibrahim's reign, the code was translated into Malay and named "*Majallah Aḥkām* Johor." He made this law an official guide to Islamic law in Johor in 1913. As a result, *Majallah Aḥkām* Johor's implementation had a massive impact on the history of Islamic law in Johor State.[44]

The historiography reflects the historical interest in codification. Scholars of Islamic law codification have paid close attention to the emergence of legal codes in the Middle East and throughout the Islamic world. Scholars working on Islamic law codification have frequently sought a specific document making to European codes (such as the Napoleonic legal code). Opposing viewpoints and the multimodality of

[41] Contemporary researcher Md. Habibur Rahman proved in his Ph. D. thesis that the Majallah contains a sizeable number of opinions from other madhahib, too. For further information See: Md. Habibur Rahman, "The Book of Sales in Majallat al-Aḥkām Al-'Adliyyah: A Juristic Evaluation of its Contents And Their Contemporary Applications", (PhD's thesis, Kuliyyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia. 2016): 407.

[42] Samy Ayoub, "The Mecelle, Shari'ah, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Century", *Journal of the Ottoman and Turkish Studies Association,* Vol. 2, No.1 (2015): 121–126.

[43] Windi Afdal, "Islamic Law Codification: The Friction on Authority of Islamic Law Establishment", *Journal of Indonesian Legal Studies JILS*, Vol. 1, No.1 (2016): 35–46.

[44] Abd Jalil Borham, "The Influence of Turkish Ottoman Islamic Civil Law in 19th Century in the State of Johor, Malaysia", *American International Journal of Contemporary Research*, Vol. 3, No. 8 (2013): 59-62.

Islamic Jurisprudence are suppressed in such a document, and numbered articles are organised thematically. Furthermore, significant aspects of Islamic Jurisprudence were omitted from the code, notably rules governing rituals (*ʿibādāt*).[45] On the other hand, the extent to which different legal codes cover the remaining spheres of law varies.

Qadrī Pāshā's (d.1888) code, *al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah*, like the Ottoman *Majallah*, attempted to (re)construct *Ḥanafī* Jurisprudence in the form of positive law as a code. The code, designed as a reference manual for the newly established Mixed Courts, relied heavily on Qadrī Pāshā's dominant view of the *Ḥanafī madhhab (arjaḥ al-aqwāl)*. According to Kenneth Cuno, Qadrī Pāshā "eliminated the lack of uniformity of *Ḥanafī* Jurisprudence to make Muslim family law legible to foreigners and Egyptians trained in French law."[46] Qadrī Pāshā' code comprised 647 articles organised into chapters and sections (138 pages in the printed edition). More importantly, the code stated the preferred rule without delving into the perspectives of the various *Ḥanafī* traditions on the issue at hand or the jurists' reasoning that led to this decision.[47] Then, in the nineteenth century, with the Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀʾilah al-ʿUthmānī*), known as the first Islamic family law, this codification movement inspired other Muslim countries to codify their laws regarding this field.

Most nineteenth and twentieth-century histories of Islamic law codification portray the state as the driving force behind the codification project, whether it is a State ruled by Muslims (such as the Ottoman State), a colonial state (as in North Africa, much of South East Asia, Central Asia, and South Asia), or nation-states with varying political regimes. According to many Islamic law scholars, the emergence of a state as a central legislator is a watershed moment in Islamic legal history.

According to many narratives of Islamic legal codification, before the modern era (i.e., before the 19th century), Islamic Jurisprudence was primarily the domain of jurists (*ʿulamā' and fuqāhā'*). As a result, Islamic law is frequently referred to as jurists to distinguish it from other legal systems in which the ruler (the king, prince, or the people) is the legislator and a significant source of legislative authority and legitimacy.

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[45] Susan Gunasti, "The Late Ottoman Ulema's Constitutionalism", *Islamic Law and Society*, Vol. 23, No.1–2 (2016): 98–99.
[46] M. Cuno Kenneth, *Modernizing Marriage: Family, Ideology, and Law in Nineteenth- and Early Twentieth-Century Egypt* (Syracuse, NY: Syracuse University Press, 1st edn., 2015), 166.
[47] Ibid., 168-169.

According to this narrative, the dominance of jurists independent of the state/ruler in implementing law shaped Islamic jurisprudential discourse. The state's intervention significantly reduced the diversity of viewpoints.

In addition, Peters sees the project as an attempt to subjugate Islamic law to the state: "Codification [...] implies that only the state determines what constitutes law and that state law is the highest form of law."[48] In a similar vein, Aharon Layish has argued that "the codification of *Sharīʿah* by Muslim legislatures [...] resulted in the transformation of *Sharīʿah* from "jurists' law" [..] to "statutory law." [...] The most significant ramifications of this transformation are the loss of the *fuqāhā's* "legislative" authority and investment in the secular legislature.[49] In addition, as previously stated, the codification of Islamic law allowed rulers and states to carve out specific legal spheres and spaces in which the codified Islamic law could be applied, such as personal status law.

2.3 LEGISLATIVE PROOF VALIDITY IN FIQH

Scholars are divided on the legality of Islamic law codification. They have differing opinions and arguments regarding it. Some hold the view that the codification of Islamic Law is permissible and acceptable, while others think it is prohibited, and they refer to the Qur'an and Sunnah. This section demonstrates the arguments put out by both groups, followed by a discussion of their arguments. Finally, the researcher expressed his opinion by choosing between the arguments provided by the two groups.

2.3.1 Arguments of the Opponents of Codification

A group of scholars opposes the idea of codifying Islamic law, claiming that Islam forbids it. These are their names: ʿAllāl al-Fāsī (d.1974), ʿAbd Allāh ibn Bassām (d.2003), Bakr ibn Abū Zayd (d.2008), Muḥammad Saʿīd Ramaḍān al-Būṭī (d.2013), Saʿīd al-ʿAshmāwī (d.2013), ʿAbd al-Raḥmān al-ʿAjlān (d.2021), ʿAbd al-Raḥmān al-Shatharī, Sāleḥ al-Fawzān, ʿAbd Allāh al-Ghanīmān, ʿAbd al-ʿAzīz al-Rājihī, ʿAbd al-

[48] Rudolph Peter, "From Jurists' Law to Statute Law or What Happens When the Shariʿa is Codifed", in *Shaping the Current Islamic Reformation*, edited by B. A. Roberson (London: Frank Cass, 2003), 88.
[49] Aharon Layish, "The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World", *Die Welt des Islams,* Vol.44, No.1 (2004): 85-113.

Raḥmān al-Maḥmūd and ʿAbd Allāh Ālu Saʿd.[50] These scholars have expressed their reservations and concerns about the codification of Islamic law. Their rationale is as follows:

a. Scholars have revealed some evidence from the verses of the Qur'ān al-Karīm and the *ḥadīth* of our Prophet (p.b.u.h.).: "*If you judge, judge with equity between them," Allah (SWT) says,* "*For Allah loves those who judge with equity."* (*al-Mā'idah*: 42). So, judging with equity means judging by the truth revealed by Allah, rather than judging based on codified law, as the reality may be diametrically opposed to it. Furthermore, Allah (SWT) says, "*If you disagree among yourselves about anything, refer it to Allah and His Messenger, if you believe in Allah and the Last Day"* (*al-Nisā'*: 59). In the event of a disagreement, referring to anyone other than Allah and His Messenger is therefore prohibited. Also, Allah (SWT) says, "*But no, by the Lord, they can have no (true) faith until they make you judge in all their disputes, and find no resistance in their souls to your decisions, but accept them with the fullest conviction"* (*al-Nisā'*: 65). As a result, anyone who disregards the Prophet's (p.b.u.h.) decisions and is not satisfied with them may not have genuine belief. Furthermore, Allah (SWT) states that "*it is not fitting for a Believer, man or woman, to have any choice over Allah and His Messenger's decisions when a matter has been decided by Allah and His Messenger"* (*al-Aḥzāb*: 36). So, only what Allah and His Messenger have decided is obligatory to follow.[51]

b. Narrated by Buraydah bin al-Ḥaṣīb, the Prophet (p.b.u.h.), said: "There are three judges, one in Paradise and the other two in Hellfire. As for the one in Paradise, one who knew the truth and gave judgment accordingly. A man who knew the truth but was unfair in his judgement shall be in Hell; a man who judged people out of ignorance will be in Hell."[52] So, even if the judge decides under the codified law, he will be damned if he does so.[53]

c. The codification binds the judge to a specific opinion selected by legislators. In contrast, *fiqh* has diverse views and jurisprudent judgments from which a judge

[50] Habibur Rahman, Dispute over the Legality of Codification, 435-437.
[51] Al-Shatharī, *Ḥukm al-Taqnīn al-Sharī'ah al-Islāmiyyah*, 30-32.
[52] See: Abū Dāwūd, Sulaymān ibn al-Ash'ath al-Sijistānī, *Sunan Abū Dawūd*, (Dār al-Risālah al-ʿĀlemiyyah, 2009), Vol. 5, Hadith No. 3573.
[53] Al-Shatharī, *Ḥukm al-Taqnīn al-Sharī'ah al-Islāmiyyah*, 34.

can choose the predominant stand under his judgement and more per the situation. So, codified law confines and freezes the judge within the confines of the law, whereas *fiqh* allows him to choose the ruling based on the circumstances. As a result, one of *Sharī'ah's* fundamentals is that the judge be a mujtahid or someone who can extract *Sharī'ah* rulings from primary sources. In the absence of a *mujtahid* judge, scholars may appoint a blind follower to serve as a judge. However, in this case, he should be able to choose, prefer, and render a judgment appropriate for the situation and circumstances while keeping the reasons for giving a high proportion in mind.[54]

d. Since this forbids changing the *fatwā* in response to changes in time and place, the binding codification disallows exercising *ijtihād*.[55] The dangers of codification become clear when we see that applying a section of the code does not always meet the needs and demands of the circumstances. Depending on the application, it could be relevant to the situation. Still, the conditions may change, and the judge may be forced to make decisions that are not appropriate for the situation.[56]

e. Codification could alter *Sharī'ah* by increasing, decreasing, altering, modifying, et cetera. As a result, it may result in judgement outside of what Allah (SWT) has revealed.[57]

f. Aside from these considerations, codification may cause a judge to become idle and satisfied by simply relying on a current code and failing to refer to sources of *fiqh* and other proofs that support these directly related opinions.[58]

2.3.2 Arguments of the Proponents of Codification

Another group of scholars supports codifying Islamic law and believes it is permissible. They are as follows: Aḥmad Muḥammad Shākir (d.1958), Muḥammad Abū Zahrah (d.1974), Aḥmad ʿAbd al-Ghafūr al-Aṭṭār (d.1991), Muṣṭafā al-Zarqā (d.1999), ʿAbd

[54] Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 266; Bakr ibn ʿAbd Allāh Abū Zayd, *Fiqh al-Nawāzil*, (Bayrūt: Muassasah al-Risālah, 2006), 1, 98.
[55] Al-Khilāyalah, *Taqnīn al-Aḥkām al-Sharī'ah al-Islāmiyyah*, 202.
[56] Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 266; Abū Zayd, *Fiqh al-Nawāzil*, 1,86.
[57] Al-Shatharī, *Ḥukm al-Taqnīn al-Sharī'ah al-Islāmiyyah*, 38; Abū Zayd, *Fiqh al-Nawāzil*, 1,83.
[58] Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 267.

al-Karīm Zaydān (d.2014), Wahbah al-Zuḥaylī (d.2015), Yūsuf Al-Qaraḍāwī (d.2022), ʿAbd al-ʿAzīz Ālu al-Shaykh, Muḥammad ʿAbd al-Jawād, Muḥammad Zakī ʿAbd al-Barr.[59] This group debates legal policy (*al-Siyāsah al-Sharʿiyyah*), public interest (*al-Maṣāliḥ al-Mursalah*), general permissibility *(al-Ibāḥah al-Aṣliyyah*), and other issues. Their justifications are as follows:

a. The verses did not prohibit the codification; on the contrary, they show that obedience to authority and ruler is obedience to Allah and His Messenger (p.b.u.h.). Allah (SWT) declares, "O believers! "*Obey Allah, and obey the Messenger and those in authority among you*" (*al-Nisā'*: 59). As a result, as long as the ruler does not deviate from *Sharī'ah*, obeying the authority and ruler leads to obeying Allah and His Messenger. Having a ruler's binding codified law does not contradict any *Sharī'ah* provision. Instead, it conforms to *Sharī'ah's* goal because it benefits humanity and protects it from harm. As a result, such codified laws would be considered and followed.[60]

b. Codification is a modern and current issue, with no explicit legal text (*naṣṣ*) in the Qur'ān or the Sunnah prohibiting it.[61] As a result, it would be governed by the legal maxim "*al-Aṣl fī al-Ashyā' al-ʿIbāḥah*,"[62] which states that permissibility is the norm in any matter. Furthermore, the advocacy for Islamic law codification is based on *al-Siyāsah al-Sharʿiyyah*, which refers to the act that leads to benefit attainment and the removal of harm from humanity, even though there is no revelation about it and the Prophet (p.b.u.h) did not proclaim it.[63] Because codification aims to reform various issues and organise human society's affairs, it is regarded as one of the policies that result in the acquisition of benefits and the removal of disadvantages.[64]

c. Codification promotes public well-being and the noble goals of *Sharī'ah*. According to Abū Zahrah (d.1974), 'Alī al-Khafīf (d.1978), and others,

[59] Habibur Rahman, Dispute over the Legality of Codification, 438–441.
[60] Abū Zayd, *Fiqh al-Nawāzil*, 1,29.
[61] Ibid., 1,30.
[62] ʿAbd al-Karīm Zaydān, *al-Wajīz fī Sharḥ al-Qawāʿid al-Fiqhiyyah fī al-Sharī'ah al-Islāmiyyah*, (Bayrūt: Mu'assasat al-Risālah, 2003), 178.
[63] Ibn al-Qayyim al-Jawziyyah, *al-Ṭuruq al-Ḥukmiyyah*, (Al-Qāhirah: Mu'assasat al-ʿArabiyyah, 1961), 15.
[64] ʿAbd al-Wahhāb al-Khallāf, *al-Siyāsah al-Shar'īyah fi al-Shu'ūn al-Dustūrīyah wa-al-Khārijīyah wa-al-Mālīyah*, (Kuwait: Dār al-Qalam, 1988), 20.

codification is not only permitted but also required. It is necessary to ensure justice, public benefit, a fair social system, and so on, and there is no legal evidence against codification; instead, the absence of such a thing allows foreign law to intervene.[65]

d. Many of the provisions regarding transactions change with time and place. Therefore, Allah the Almighty (SWT) made its legislation in the form of general principles and comprehensive legislation to pave the way for the *Mujtahids* to decide partial and detailed rulings in a way that suits their time and place, provided that this does not contradict a legal text or an established jurisprudential rule. However, the codification is not rigid and does not accept change, but the legislator has the right to amend and change it if he sees a need for that.[66]

e. Due to technological advancements and societal progress, numerous emerging challenges arise daily. For instance, novel business transaction methods are introduced frequently, leaving scholars, judges, and businesspeople unfamiliar. This lack of familiarity poses difficulties for judges, as they lack the necessary understanding of contemporary practical jurisprudence in such cases. Therefore, the legislation serves as an effective solution in these circumstances.[67]

f. *Fiqh*'s codification helps standardize the judicial process by requiring *Sharī'ah* judges to base their decisions on specific legal clauses when dealing with family cases, regardless of their adherence to any particular *madhāhib*. This helps eliminate confusion and ensure consistency in resolving legal disputes.[68]

g. The fact that legalisation is uniform in the country is an advantage considered for legalisation, not against it, since it works to achieve justice among the

[65] See: ʿAbd al-Raḥmān ʿAbd al-ʿAzīz al-Qāsim, *al-Islām wa Taqnīn al-Ahkām fī al-Bilād al-Sa'ūdiyyah Mahbaṭ al-waḥy – wa 'arḍ al-ʿUrūbah*, (Kuwait: Dār al-Qalam, 1966).
[66] Hishām al-ʿArabī, *Taqnīn al-Fiqh al-Islāmī Bayn al-Mu'ayyidīn wā al-Muʿāriḍīn*, (Qāhirah: Dār al-Kutub al-Miṣriyyah, 2018), 81.
[67] Hafiz Muhammad Zubair, "Legislation of Islamic Jurisprudence: A Dialogue between Opponents and Proponents", *Journal of Rotterdam Islamic Social Sciences*, Vol. 2, No.1 (2013): 34.
[68] Mohammad Orwah Nasser Duwairi, "The Process of Codifying Fiqh Rulings and Its Legal Impacts on Amending Jordan's Family Law 36 of 2010", *Jordan Journal of Islamic Studies*. Vol.14. No. 2. (2018): 448.

members of one society, prevents tampering with rulings, and protects judges from being spoken ill of.[69]

h. Aḥmad Muḥammad Shākir (d.1958) also advises and advocates for Islamic law codification. He believes returning to rule in light of the revelation would be wise. Codifying the law based on the Qur'ān and Sunnah attracts people to *Islām*, unifies the judiciary system, and leads to governance guided by Allah.[70]

i. According to Muṣṭafā al-Zarqā (d.1999), the codification of Islamic law is necessary and must, and there is no reason to be concerned. It would not be based solely on principles of rights and justice but on Islamic legislation policies and their implementation systems. He argues that rulers and authorities have the right to do what they believe is best for the current time and people. Codifying *Sharī'ah* provisions is not wrong because it renews *Sharī'ah's* spirit and brings it closer to modern people and their understandings.[71]

j. Furthermore, Wahbah al-Zuḥaylī (d.2015) believes that the codification of Islamic law is permissible and necessary in today's world. *Sharī'ah* has no objection to presenting *fiqh* provisions simply as legal articles. This will make it easier for judges, lawyers, and the general public to refer to *fiqh* provisions when needed.[72]

k. According to al-Qaraḍāwī (d.2022), the codification of Islamic law is both necessary and obligatory based on *Sharī'ah* provisions. It would resurrect the practice of *ijtihād* through comparative studies of various schools of Islamic law and international laws. Codification is required to bring the Islamic judiciary back from the brink of chaos.[73] Furthermore, judges must be bound so that they are not concerned about the appropriateness of a ruling when deciding because not all judges are capable of evaluating or selecting a particular opinion. Some people are afraid to make decisions based on personal interests, even to the point of making one decision and then using a different opinion in another case.

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[69] al-ʿArabī, *Taqnīn al-Fiqh al-Islāmī Bayn al-Mu'ayyidīn wā al-Muʿāriḍīn*, 82.
[70] Aḥmad Muḥammad Shākir, *Ḥukm al-Jāhiliyyah*. (Al-Qāhirah: Maktabat al-Sunnah, 1992), 122.
[71] Al-Zarqā, *al-Madkhal al-Fiqhī al-'āmm*, 1:203.
[72] Wahbah al-Zuḥaylī, *Juhūd Taqnīn al-Fiqh al-Islāmī*, (Bayrūt: Mu'assasah al-Risālah, 1987), 26.
[73] Al-Qaraḍāwī, *al-Fiqh al-Islāmī bayna al-Aṣālah wa al-Tajdīd*, (Bayrūt: Mu'assasat al-Risālah, 2001), 55-57, Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 267.

l. According to Muḥammad ʿAbd al-Jawād, the project of codifying Islamic law is an immediate necessity to present it in a language and format widely understood worldwide. As a result, it may be a self-contained Islamic legal system capable of competing with entire global legal systems.[74]

m. Furthermore, the legitimacy of Islamic law codification is derived and compared to the Companions' (*al-Ṣaḥābah al-Kirām*) agreement on the compilation of the Qur'ān. Because they have validated Qur'ān's compilation in the light of its importance and role in public well-being, the validity of Islamic law codification could be compared to this, despite the differences in the importance and sensitivity of both matters.[75]

n. The structure of *Fiqh* allows for flexibility in the legislative process of codifying family law. Codification of family law serves as a method to establish state authority over the law and simplify the interpretation of the law for judges. Additionally, it functions as a tool for implementing changes and improvements to the legal system.[76]

2.3.3 Discussion of the Arguments

a. Opponents make their case by quoting Qur'anic and *Sunnah* verses.[77] Arguably, their central point is flawed. Making a decision based on codified law does not result in injustice. Similarly, referring to codified law does not simply refer to something not revealed by Allah. Allah revealed the *Sharī'ah* provisions and rulings to us. The mere enactment of these provisions has no bearing on their legality. Furthermore, making decisions and passing judgement under codified Islamic law does not contradict; instead, it is consistent with Allah's and His Messenger's judgments and decisions.

b. According to the *Sunnah*, anyone who judges using codified Islamic law does so under fact and fairness and thus is not damned. They can be codified when

[74] Muḥammad ʿAbd al-Jawād, *al-Taṭawwur al-Tashrī'ī fī al-Mamlakah al-'Arabiyyah al-Su'ūdiyyah*, (Al-Qāhirah: Maṭba'at Jāmi'ah al-Qāhirah wa al-Kitāb al-Jāmi'ī, 1977), 228.
[75] Al-Khilāyalah, *Taqnīn al-aḥkām al-Sharī'ah al-Islāmiyyah*, 190; Abū Zayd, *Fiqh al-Nawāzil*, 1,29.
[76] Duwairi, The Process of Codifying Fiqh Rulings and Its Legal Impacts, 448-449.
[77] Habibur Rahman, Dispute over the Legality of Codification, 441-442.

the provisions are valid and correct, and by the public good, the need of the time, and so on.

c. The claim that codified law paralyses judges, preventing them from exercising *ijtihād* and thus rendering them inactive, is false because the codification of *fiqh* does not require the judge to rely solely on reading and memorising the scripts and documents on the case. No self-respecting judge would do it even if he wanted to because he could not. This is because the law contains interpretations and elucidations that should be referred to clarify the points and explain the law's obscurity. This is evident in the case of ʿAbd al-Razzāq al-Sanhūrī (d.1971), who clarified the law in nine large volumes after the new Egyptian Civil Code was drafted. The first volume is 1500 pages long. This is known as *"al-Wasīṭ*," which translates as "medium." If he wishes to attempt a more extensive and voluminous elucidation, he refers to it as *"al-Mabsūṭ*," which translates as "extensive." Previously, the Ottoman Caliphate's *Majallah* contained more extensive and substantial elucidations regarded as one of the most important references for the *Ḥanafi madhhab*. As a result, there should be no fear that having codified law means that the judiciary will rely solely on it; rather, they will need to study the law's elucidation and sources.[78] In the researcher's opinion, there are examples of codification in Islamic countries. Codification has been experienced, and there is nothing to be afraid of.

d. Regardless of whether or not codified law exists, studying, conducting research, and practising *ijtihād* will continue to be necessary and required. Despite covering a wide range of articles, chapters, and clauses, the laws that have been codified in this world are not comprehensive enough to cover all cases or situations. What should a judge do if they cannot find textual evidence in a particular case? He must decide based on the information and arguments presented to him. Reliable sources must also guide him. In the absence of legal texts, the law must specify the reference sources. This is similar to Egyptian positive law, which defines references as customary practice, Islamic law, or natural justice law. Naturally, when *Sharīʿah* and *fiqh* laws are enacted, the obligation to refer to both must be mentioned to extract the *Shariʿah* ruling for

[78] Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharīʿah al-Islāmiyyah*, 267.

the case under consideration. So, once again, there is no reason to fear that the judge will be forced to adopt alternative points of view, abandon *fiqh* and its sources, or explore its hidden treasures and gems.[79]

e. Proponents argue about the necessity, the public good, and so on. It is believed there is a risk that the public good, benefit to humanity, and other concepts will be misapplied and misinterpreted. As a result, codification's validity cannot be generalised; rather, it must be subject to specific terms and conditions. For instance, significant aspects of Islamic Jurisprudence were omitted from this process like rituals (*ʿibādāt*). However, other areas of Islamic law, such as civil, constitutional, judiciary, penal, and international, are all eligible for codification. However, it should have the purpose of legislating, and the legislator must make compliance with these laws mandatory. *Fiqh* serves as both a legal framework and a genuine representation of Muslim society's social, cultural, and religious aspects. Hence, any endeavours seeking to codify *Fiqh* must consider these integrated aspects to achieve authentic and significant legal progress.[80]

2.4 CONCLUSION

According to the result of the discussed issues in this chapter, Islamic law codification affects and influences practical life because it contributes to producing appropriate solutions and fair judgments for litigation and disputes. Codification is a process that aids in improving the political, social, financial, and legal sectors. This improvement can be accomplished by codifying Islamic laws that adhere to the Muslim nations' principles, values, and customs. Furthermore, codification would help establish justice and equality, protect rights and liberties, and expand security and stability.

Based on the strength of the arguments and evidence, the researcher concludes that the codification of Islamic law is permissible and obligatory. This chapter confirms that Islamic law is codified under the legal policy, public welfare, and the fundamental rule of permissibility. Furthermore, the research shows that codifying Islamic law would be a timely solution for restoring Muslim unity and solidarity. Civil, constitutional,

[79] Al-Qaraḍāwī, *Madkhal li Dirāsāt al- Sharīʿah al-Islāmiyyah*, 268.
[80] Duwairi, The Process of Codifying Fiqh Rulings and Its Legal Impacts, 448.

judiciary, penal, international, and other areas of Islamic law, excluding rituals (ʿ*Ibādāt*), are all eligible for codification. Thus, codification in Islamic law refers to the codification of *fiqh* provisions rather than the *Sharī'ah* in its broadest sense and overall contents.

Furthermore, this research demonstrates that most Muslim jurists and contemporary scholars agree that the benefits and motivations for codification outweigh the risks identified by some scholars. Finally, it is concluded that the validity of Islamic law codification is also consistent with the noble objectives of *Sharī'ah* because it creates convenience for humanity and removes hardship from them.

CHAPTER THREE

CODIFICATION AND EXPERIENCE OF THE ISLAMIC FAMILY LAW IN THE ISLAMIC WORLD DURING THE 19TH AND 20TH CENTURIES

3.1 INTRODUCTION

This chapter focuses on the codification and development of Islamic Family Law in four significant countries in the Islamic world throughout the 19th and 20th centuries. Firstly, the discussion will provide an overview of the Ottoman Law of Family Rights, its legislation, distinctive characteristics, and selected provisions of The Ottoman Law of Family Rights. Additionally, it will identify the nations where this law was applied. Secondly, the Jordan Personal Status Law (*Qānūn Al-Aḥwāl Al-Shakhṣīyah Al-Urdunī*) was analysed, explicitly examining its historical background and phases of development. This encompasses an analysis of Islamic family laws and family law-related titles and articles of law. Furthermore, an analysis will be included on the influence of *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* on the Jordan Personal Status Law. Moreover, this chapter will encompass the chronological progression of Personal Status Laws in Morocco, specifically focusing on three distinct Moroccan family laws implemented at different times. The impact of women's movements on Islamic family laws and their contribution to reform movements will be evaluated. Next, the discussion focuses on the relevance of the existing Family Law in the judicial domain, its efficacy in resolving family issues, and the extent to which its implementation aids in decreasing the number of family-related lawsuits brought before the courts. Lastly, this text discusses the process of codifying Islamic Family Law in Malaysia, including its development. It also examines Malaysia's legal system and the various stages of codification movements that occurred before, throughout the British colonial period, and after Malaysia gained independence. In addition, provisions and articles of law relevant to family law will be incorporated. Answers will be sought regarding the applicability of the existing Family Law within the jurisdiction and the adequacy of Malaysian Family Law in solving Family-related problems.

3.2 THE OTTOMAN LAW OF FAMILY RIGHTS (QĀNŪN ḤUQŪQ AL-ʿĀ'ILAH AL-ʿUTHMĀNĪ)

3.2.1 Introduction

The reforms concerning family life that started with *Tanzīmāt*[1] finished with The Ottoman Law Of Family Rights. The legal regulations and reforms regarding marital laws started with *Majallah*[2], ratified in 1876. There were, however, no new laws or regulations on family life and inheritance.[3] The Ottoman Law of Family Rights, or *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* enacted on Muḥarram 8, 1336 (October 25, 1917), is one of the final instances of legalising initiatives that started in the Ottoman State immediately after the *Tanzīmāt* Decree.

This decree is considered the first example of Islamic Family law in the history of Islamic and Ottoman law in the modern era. Although it was only in effect for a year and a half in the Ottoman State, it lasted much longer in Syria, Jordan, Lebanon, and Palestine. Despite its brief existence, it had a significant impact on history.[4] The Ottoman Law of Family Rights was issued in 1917 and was abolished only one and a half years after it entered into force in the Ottoman State in 1919.[5] The Swiss Civil Code later superseded this law in 1926.

The Ottoman Law of Family Rights was enacted for some legal, social, and political reasons.[6] One of the leading legal reasons was that family law had not yet been codified. Beginning with the *Tanzīmāt* Decree period, the Land Code (1858) and the *Majallah* (1868-1876) constituted a large part of the civil law, yet this was not the case for family law. [7] However, *Majallah* was a law that mainly included the principles of debts, property, and trial law, and it did not cover family law.[8] Although there are many

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[1] Tanzīmāt was a period of reform in the Ottoman State that began with the Gülhane Hatt-ı Şerif (Supreme Edict of the Rosehouse) in 1839 and ended with the First Constitutional Era in 1876.
[2] *Majallah al-Aḥkām al-ʻadliyyah* is the law that was prepared between 1868-1876 in the Ottoman State and mostly includes the law of obligations, property and judicial law. See : Ali Akyıldız, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Tanzimat", Vol.40, 1.
[3] Saime Belkiz Akgunduz, "Reforms Concerning Women Rights in the Family Act of 1917 in the Ottoman Empire", *The Journal of Rotterdam Islamic and Social Sciences,* Vol. 2, No. 1. (2011): 1.
[4] M. Akif Aydin, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", Vol.18, 314.
[5] M. Akif Aydın, *Osmanlı Aile Hukuku (Ottoman Family Law)*, (Istanbul: Klasik Yayinlari, 2018), 158. S.B. Akgunduz, ibid. 24.
[6] In the fourth chapter, these reasons will be explained in detail under the title of "Reasons for the Establishment of the Ottoman Law of Family Rights"
[7] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi,* "Hukuk-ı Âile Kararnâmesi", Vol.18, 314.
[8] Cem Baygın, "Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış-A Quick Look Into the Family Law's Developmentfrom the Rescript of Gulhane to Present", *Marmara*

reasons for the rise of this decree, the most important one is the significant gap in the field of family law. Although there were partial attempts before, the first law text on family law emerged systematically. The features and innovations of the law, which will be discussed below, will provide a broad perspective on the subject of our study.

3.2.2 Preparation of the Ottoman Law of Family Rights

The Committee of Union and Progress (Neo-Ottomans) formed committees to prepare the family law and execute the scheduled changes in the Code of Provisions.[9] Only the Family Rights Law Commission was able to complete its mission. The commission consisted of Isparta deputy Maḥmūd Esʿad Efendī, one of the fatwāhāne veterans Ḥāfiẓ Şevket Efendī, Menteşe deputy Manṣûrîzâde Saʿīd Bey, a member of the Council of State Ali Baş Hanbe (Hampa) Efendī and the Evkāf Court Judge Muṣṭafa Fevzi Efendī.[10]

Separate provisions have been established for all adherents of the three religions. In law, legal provisions relating to Muslims were arranged, while separate arrangements were formed at various stages for Jews and Christians. The commission's draft was not sent to the Chamber of Deputies (*Majlis-i Mebūsān*) because it would cause tremendous controversy and prevent opponents. It was first enacted as temporary legislation. Although Western and national supporters played an essential role in preparing the law, its content mainly reflects the idea of Islamists. Thus, the prohibition of polygamy, divorce in the hands of the judge, and the payment of compensation to divorced women outside the dowry, such matters were not included in the text of the law.[11]

Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol. 22 No. 3 (2016): 454, Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", 314.

[9] Mehmet Ünal, "Medeni Hukukun Kabülünden Önce Türk Aile Hukuna İlişkin Düzenlemeler ve Özellikle 1917 Tarihli Hukuk-i Aile Kararnamesi (Regulations Regarding Turkish Family Law Before the Adoption of Civil Law Especially the Ottoman Law of Family Rights Of 1917)", *Ankara Üniversitesi Hukuk Fakültesi Dergisi,* Vol.34 No.1. (1977): 208-209.

[10] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi,* "Hukuk-ı Âile Kararnâmesi", Vol.18*,* 315; M.Akif Aydın, "Osmanlilarda Aile Hukukunun Tarihi Tekamülü (Historical Evolution of Family Law in the Ottomans)". In *Sosyo-Kültürel Değişme Sürecinde Türk Ailesi,* (Ankara: T.C. Başbakanlık Aile Araştırma Kurumu Yayınları, 1992), Vol.2, 449.

[11] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", Vol.18, 315.

3.2.3 Updates of the Ottoman Law of Family Rights

3.2.3.1 It is the First Law

It is the first legislation in the history of Islamic law dealing with family law.[12] Some efforts were made, but they were not completed. Muḥammad Qadrī Pāshā presented a draft[13], known as *al-Aḥkām al-Shar'iyyah fī al-Aḥwāl al-Shakhṣiyyah,* which was not legalised[14] in Egypt over forty years before the formation of the Ottoman Law of Family Rights. Shortly before the Ottomans, in 1916, some family law provisions were made in Sūdān under the British administration. However, they were far from family law. Later, family laws were prepared in other Muslim countries, taking the Ottoman Law of Family Rights as an example.[15]

3.2.3.2 Triple Character Provides Provision for non-Muslims

One of the essential features of the Decree is that it brought separate provisions in the field of family law for Muslims, Jews, and Christians. It may be true for other areas of law. However, in a state like the Ottoman that brought together communities with different religious and cultural backgrounds, it is incompatible with the legal reality to cast all sections of society in the same legal mould in an area such as family law.[16] Forty-one of the one hundred fifty-seven articles Decree is exclusively about non-Muslims. The provisions concerning non-Muslims were derived from the information their religious leaders, priests, and rabbis provided. However, no opposing clauses were put into practice despite them.[17]

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[12] Aydın, *Osmanlı Aile Hukuku*, 190 ; Abdurrahman Yazici, "Osmanlı Hukuk-ı Aile Kararnâmesi (1917) ve Sadreddin Efendi'nin Eleştirileri (the Ottoman Law of Family Rights (1917) and Criticisms of Sadreddin Afandī)", *EKEV Akademi Dergisi*, No. 62. (2015): 571. ; Ahmet Küçüktiryaki, "Osmanli Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aile Kararnamesi (Developments in the Field of Family Law in the Ottoman State after the Tanzimat and the Ottoman Law of Family Rights)", *Hitit Üniversitesi İlahiyat Fakültesi Dergis*i, Vol. 13, No. 26. (2014): 187; Unal, Medeni Hukukun Kabülünden Önce Türk Aile Hukuna İlişkin Düzenlemeler, 227.

[13] Muḥammad Qadrī Pāshā, *al-Aḥkām al-Shar'iyyah fī al-Aḥwāl al-Shakhṣiyyah*. See: Saad Abdulwahhab Alshekh & Raihanah Hj Abdullah & Mahamatayuding Samah, "Historical Development in The Documentation Of Marriage Contracts". *Jurnal Syariah*, Vol. 27, No. 1 (2019): 166.

[14] M.Akif Aydın, *Türkiye Diyanet Vakfi İslam Ansiklopedisi*, "Muhammed Kadri Paşa", Vol.30, 546. Küçüktiryaki, ibid. 187.

[15] Aydın, *Türkiye Diyanet Vakfi İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", 316.

[16] Aydın, *Osmanlı Aile Hukuku*, 191; Küçüktiryaki, Osmanli Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aıle Kararnamesi 188.

[17] Orhan Ceker, *Osmanli Hukuk-ı Aile Kararnâmesi (Ottoman Law of Family Rights)*, (Konya: Mehir Vakfi Yayınları, 2017), 13.

3.2.3.3 Provide Judicial Unity

An essential feature of the law is providing the courts with judicial unity. It abolishes the jurisdiction of the collective courts in family law and places non-Muslims in the jurisdiction of *Sharī'ah* courts.[18] Before that time, non-Muslims inside the Ottoman State could seek resolution through the *Sharī'ah* courts in family law matters, thereby governed by Islamic law. Alternatively, they might bring their problems before their community courts.[19] In the same cases, they were going to different judicial authorities, depending on whether the parties were Muslims or non-Muslims, which led to judicial duality. The decree abolished the jurisdiction of community courts and transferred all family law problems of Ottoman subjects to the *Sharī'ah* court.[20]

3.2.3.4 Benefitting from Other Madhāhib During Preparation

Perhaps the most important feature regarding the history of codifying Islamic legislation is that the *Ḥanafī madhhab* was adhered to during its preparation, benefitting from other maḏāhib by following an eclectic method. The Ottoman Law of Family Rights may benefit from the opinions of *madhāhib* and jurists other than the Ḥanafī madhab in marriage and divorce due to its selective nature.[21] For example, Article 36 mentioned that the marriage contract can only be concluded with *ṣarīḥ* (explicit) words. Decree took this opinion from the views of *Shāfiʿī* and *Ḥanbalī madhāhib*.[22]

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[18] Aydın, ibid., 192-193; Unal, Medeni Hukukun Kabülünden Önce Türk Aile Hukuna İlişkin Düzenlemeler, 227; Küçüktiryaki, Osmanli Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aile Kararnamesi. 190.

[19] Although some researchers acknowledge that issues regarding the civil status of non-Muslims in the Ottoman State were subject to their religious systems, they point out that this did not mean that they had separate courts and that religious communities were not autonomous as claimed. Substantiated evidence is necessary to address the issue of non-Muslim community courts in the Ottoman State employing their legal frameworks. Non-Muslims resorted to Islamic courts since they had no alternative options available. The assertion that non-Muslim societies own their judicial systems is entirely imaginary or misunderstood. Even non-Muslim community clergy members sought the services of Islamic courts to establish contracts such as suretyship and power of attorney. See: M. Macit Kenanoğlu, "Is Millet System a Reality or a Myth? The Legal Position of the Non-Muslim Subjects and Their Religious Leaders in the Ottoman Empire", *Türk Hukuk Tarihi Araştırmaları Journal of Turkish Legal History*, No.12 (2011): 19-36.

[20] Ekrem Buğra Ekinci, "Osmanlı Devletinde Mahkemeler Ve Kadılık Müessesesi Literatürü (Courts and Judgeship Institution Literature in the Ottoman State)", *Türkiye Araştırmaları Literatür Dergisi*, Vol.3, No. 5 (2005): 421; Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", 316.

[21] Aydın, *Osmanlı Aile Hukuku*, 191.

[22] Ceker, *Osmanli Hukuk-ı Aile Kararnâmesi*, 12. See 49-50 pages from the thesis for further examples of articles that benefitted from other *madhāhib* than *Ḥanafī*.

3.2.4 Some Articles and Provisions of the Ottoman Law of Family Rights

The Ottoman Law Of Family Rights consists of two books, each book consisting of chapters and each chapter consisting of subsection and 157 articles.

The law is divided into two parts: *munākaḥāt* and *mufāraqāt*, and the section on *munākaḥāt* is divided into *al-khitbah* (Engagement), *ahliyyah of nikāḥ*, marriage contract, *al-kafā'ah*, dowry and alimony. The *mufāraqāt* section is divided into revocable divorce, irrevocable divorce, separation option, and the *'iddah*. The provisions of the Jews and Christians are mentioned in every section.

Some articles can be cited here as an example:

> Article No. (1): Marriage is not munʿaqid[23] with engagement or promise.[24]
>
> Article No. (4): Marriage age is 18 for men and 17 for women.[25]
>
> Article No. (7) It is not permissible to marry a young child less than 12 and a young girl less than 9.[26]
>
> Article No. (9) The marriage of a crazy woman or a crazy man is conditional on necessity and subject to the judge's permission.[27]
>
> Article No. (34) The presence of two witnesses is a condition for the validity of the marriage.[28]
>
> Article No. (72) It is not permissible to accommodate the husband's relatives in the same house except with the consent of his wife.[29]
>
> Article No. (73) The husband is obliged to have good relations with his wife, and the wife is obliged to obey her husband in permissible matters.[30]
>
> Article No. (96) When the husband cannot provide alimony, the judge shall order the wife to borrow in the husband's name.[31]

[23] Munʿaqid means the establishment of a contract..
[24] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (1).
[25] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (4).
[26] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (7). This provision belongs to Ibn Shubrumah (d.761) and Abū Bakr al-Aṣam (d.892). See: Ceker, Osmanli Hukuk-ı Aile Kararnâmesi, 12.
[27] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (9). This article is based on the *Shāfiʿī* view. See: Ceker, ibid.
[28] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (34).
[29] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (72).
[30] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (73).
[31] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (96).

The Ottoman Law Of Family Rights says in Article 104 that the *Ṭalāq* of a drunkard is not valid[32], and in Article 105, *Ṭalāq* that occurs with *ikrāh* is not valid.[33] However, *Ḥanafī madhhab* says both of them are valid. Here, the Ottoman Law of Family Rights took an *ijtihād* except than *Ḥanafī madhhab*. The Decree included an important institution based on the *Mālikī madhhab* view and named it the "Family Council."[34] It has also been a role model for modern law today.

3.2.5 Shortcomings of the Ottoman Law of Family Rights

The Ottoman Law of Family Rights is not a complete law of family law, although it does bring new things. The decree does not regulate lineage, care, and custody of children in case of termination of marriage, guardianship, property regime, and alimony related to kinship. The commission members who prepared the law were also aware of this deficiency and were considering preparing these issues in separate books, as in the preparation of *Majallah*.[35]

3.2.6 Abolishing the Ottoman Law of Family Rights

The law was repealed by a law dated June 19, 1919, issued by the signature of Sheikh al-Islām Mustafā Ṣabrī Efendī. The influence of the two groups can be mentioned in cancelling the decree in a short period of one and a half years. One of them is the leaders of the non-Muslim community. The decision of the Constitutional Court to abolish the jurisdiction of the community courts and to include non-Muslims in the jurisdiction of the *Sharī'ah* courts (Article 156 of the Decree) was not welcomed by the non-Muslim spiritual leaders. They attempted to abolish the relevant provision of law by undertaking with the Allied and Western countries that occupied the Ottoman State and Istanbul. However, although this opposition explains the abolition of Article 156, it is not sufficient to entirely explain the decree's abolition. Perhaps the main reason for

[32] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (104).
[33] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (105).
[34] Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī, Article No. (140). See: Ceker, *Osmanli Hukuk-ı Aile Kararnâmesi*, 15.
[35] Aydın, Türkiye Diyanet Vakfı İslam Ansiklopedisi, "Hukuk-ı Âile Kararnâmesi", 317.

cancelling the decree was criticism from some Islamists because it benefited from other *madhāhib*. [36]

3.2.7 Application of the Law in Other Countries

Although the Ottoman Law of Family Rights was in force in the Ottomans for a very short time, it remained in force for a longer time in the countries that left Ottoman rule and became independent. It lasted in *ʿIrāq* and Syria until 1953 when the Syrian Personal Status Law in Syria replaced it. The law was implemented in Palestine and continued to be enforced in Jordan until 1951.[37] Subsequently, the Jordanian Personal Status Law was enacted. In Lebanon, the practice is still observed among Sunnī Muslims. It was implemented in Antakia till 1939. Subsequently, Antakia was incorporated into Turkey. [38]

3.3 JORDAN PERSONAL STATUS LAW (QĀNŪN AL-AḤWĀL AL-SHAKHṢĪYAH AL-URDUNĪ)

3.3.1 Introduction

This section explains the development of personal status laws in the Hashemite Kingdom of Jordan, an Arab Islamic state whose capital is ʿAmmān, founded by Prince ʿAbd Allāh bin Al-Ḥussein in 1921 in the *Bilād al-Shām*. It was initially the Emirate of Transjordan with Britain's help.[39] It was then subject to British rule in the Mandatory region of Palestine and became independent in 1946. Prince ʿAbd Allāh was named king over it. It has been known since then as the Hashemite Kingdom of Jordan. The Hashemite Kingdom of Jordan system is a constitutional monarchy with a representative government.

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[36]Aydın, *Osmanlı Aile Hukuku*, 197-200; Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", 317.

[37] For information on the first Islamic family law that came into force in Jordan and until which year the Ottoman Law of Family Rights remained in force, see page 55 of the thesis.

[38] Ceker, *Osmanli Hukuk-ı Aile Kararnâmesi*, 10; Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Hukuk-ı Âile Kararnâmesi", 318; Yazici, Osmanlı Hukuk-ı Aile Kararnâmesi (1917) ve Sadreddin Efendi'nin Eleştirileri, 568.

[39] Philips Robins, *A History of Jordan*, (Cambridge, U.K: Cambridge University Press, 2nd edition, 2019).; Cengiz Tomar, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Ürdün", Vol. 42, 354-356.

Jordan was part of the Ottoman caliphate since 1516. Jordan passed to the Ottomans during the campaign of Yavuz Sultān Selim to Egypt. Jordan came out of the administration of the Ottoman State at the end of 1918. From this period, it came under the rule of Faisal, the son of Sharīf Ḥussein.[40] The four-hundred-two years of Ottoman domination in Jordan have affected many areas, including law. Jordan's legal system consisted of *Sharī'ah* courts whose decisions were based on Islamic law and the same *Ḥanafī madhhab* that worked in the Ottoman Caliphate. After the Ottoman Law of Family Rights came into force, many Arab countries, including Jordan, were affected by this enactment. This law, enacted by the Ottoman State, showed its effect in other countries for longer than the Ottoman and remained in force.

In the first place, it can be said that Jordan's family law has gradually evolved over the years in line with the development of Jordan. Indeed, it has emerged with the appearance of Jordan as an independent state and has passed several phases of growth and progress in conformity with the evolution of sociological, political, and economic life in Jordan. However, it can be summed up that the major phases of the evolution of Jordan family law in Jordan are[41] Five family laws, dated 1927, 1947, 1951, 1976, and 2010, one amended law of 2001, and the last Jordanian Personal Status Law No. (15) of 2019 were enacted in Jordan. Especially in the laws of 1927, 1947, and 1951, the majority of the articles of the Ottoman Law of Family Rights, except for the 46 articles covering non-Muslims, were taken exactly or with minor changes and additions. In 1927, the enacted law was entitled *Ḥuqūq al-ʿĀ'ilah* (Family law). This law is quoted chiefly from the Ottoman Law of Family Rights; however, the two laws have different provisions.

On the other hand, the necessary conditions for marriage declaration in the Ottoman Law of Family Rights were not regulated by Jordan law in 1951. The number of articles in the Code of 1951 increased compared to the previous codes. This code also had some similar articles from the Ottoman Law of Family Rights, just like the earlier ones; nevertheless, some new provisions and articles of Ottoman decree were not included.

[40] Tomar, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Ürdün", Vol. 42, 355-356.
[41] Orwa Nasser Al-Duwairi, "Legal Mechanisms Employed in Modernising Islamic Family Law -The Case Study of Jordan", *Jordan Journal of Islamic Studies*, Vol.14 No.3 (2018): 450.

When it comes to 1976, although the effect of the Ottoman Law of Family Rights continues, it is seen that new provisions have been added with radical changes. The name of the Jordanian family law, in contrast to the previous laws, has evolved from the *Ḥuqūq al-ʿĀ'ilah* to the *Aḥwāl al-Shakhṣiyyah*. Some issues, such as inheritance and testament not included in the earlier laws, were added to this law. In 2001, there was an Amendment Law (*Qānūn al-Taʿdīl*); it was amended by changing the *Aḥwāl al-Shakhṣiyyah* law dated 1976. In 2010, a new *Aḥwāl al-Shakhṣiyyah* law was enacted. This law is more detailed than previous laws. It draws attention to the increase in the number of articles and the detail of its provisions. As with the law of 1976, this law is also referred to as the *Aḥwāl al-Shakhṣiyyah* law. It covers many provisions on testament (*al-Waṣiyyah* or plural al-*waṣāyā*), custody (*al-Walāyah*), legal capacity (*al-Ahliyyah*), and inheritance.[42] The *Aḥwāl al-Shakhṣiyyah* of 2010 has been made by considering society's needs and daily life circumstances. With unstable conditions of life and improvements in technological facilities, it is possible to see that new judgments are added to the law. This situation becomes one of the factors to secure a law to be broader.[43] Finally, the last Jordanian Personal Status Law No. (15) of 2019 were enacted in Jordan.[44]

3.3.2 History of Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdunī

Jordan remained under the Ottoman rule for nearly four hundred years. It remained a part of the Ottoman State until World War I and was then placed under an indirect form of British mandate rule. Consequently, Jordan was subjected to the Ottoman State's laws that were in force until 1927, including family law. Subsequently, Prince ʿAbd Allāh bin Al-Ḥussein established the Jordan on April 11^{th,} 1921, and formed the first civil government.[45]

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[42] Ahmet Temel, *İslam Ülkelerinde Aile Hukuku Uygulamaları (Family Law Practices in Islamic Countries),* (Istanbul: Kayihan Yayınları, 2020), 25-27.
[43] Ibid., 28-29.
[44] Aḥmad Youseef Tumah al-ʿAwāishah & Rudina Ibrāheem Al-Refāī, "Violation of the Jordanian Personal Status Law No. 15 of 2019 of the opinion of the Ḥanafīs in the ruling on forced divorce, pursuant to Sharia policy (a Comparative Jurisprudence Study)," *Journal of Social Sciences (COES&RJ-JSS)*, vol. 10(3). (2021): 317.
[45] Al-Duwairi, Legal Mechanisms Employed in Modernising Islamic Family Law-The Case Study of Jordan, 450.

Many Jordanian authors state that the Ottoman Law of Family Rights was implemented in Jordan until Law No. 26 was passed in 1947. Some sources indicate that the decree remained in force until 1951 with some changes; nevertheless, all the regulations must be examined to reach a definitive judgment on the first family law in Jordan.[46]

After the Ottoman rule in Jordan, six family laws were published: [47]

1. *Qānūn Ḥuqūq al-ʿĀ'ilah* (Family Rights Law) dated 1927.
2. *Qānūn Ḥuqūq al-ʿĀ'ilah*, No. 26, dated 1947. (Interim Family Rights Law)
3. *Qānūn Ḥuqūq al-ʿĀ'ilah*, No. 92, dated 1951.
4. *Qānūn al-Aḥwāl al-Shakhṣiyyah*, Law No. 61, dated 1976.
5. *Qānūn al-Aḥwāl al-Shakhṣiyyah*, Law No. 36, dated 2010.
6. *Qānūn al-Aḥwāl al-Shakhṣiyyah*, Law No. 15, dated 2019.

These family laws will be briefly examined in this section of the chapter.

3.3.3 Developmental Stages of Family Law in Jordan

This subsection examines the historical phases of Jordanian Family Law, the enacted family laws, their numerous aspects, and the changes they introduced. Jordan has enacted five family laws, specifically in 1927, 1947, 1951, 1976, and 2010. Additionally, one modification law from 2001 and the most recent Jordanian Personal Status Law No. (15) of 2019. Furthermore, it looks at the influence of the Ottoman Law of Family Rights (OLFR)[48] on the later family laws implemented in Jordan, a region under Ottoman rule for a significant duration.

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[46] Ahmet Bostanci, "Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri (Ottoman Influence on Jordanian Personal Status Laws)", *Marife Dergisi*, Vol. 3 No. 2 (2003): 121-122; Alhalalsheh, Ibrahim, "Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi (A Comparison between the Ottoman Law of Family Rights and the Jordanian Personal Status Law)," (PhD. thesis, Marmara University, 2009), 63.

[47] ʻAbd Allāh Aḥmad Al-Naʻīm, *Islamic Family Law in a Changing World: A Global Resource Book*. (London: Zed Books, 2002), 119; Alhalalsheh, p. 57; Al-ʿAwāishah, Violation of the Jordanian Personal Status Law.., 317.

[48] In the next sentences, Ottoman Law of Family Rights will be called OLFR.

3.3.3.1 Family Rights Law (Qānūn Ḥuqūq al-ʿĀ'ilah No. 114)[49] of 1927[50]

The first law enacted in the field of family law in Jordan was the Law of 1927. Prince ʿAbd Allāh bin Al-Ḥussein issued the first family law, the "Family Rights Law," promulgated in the official gazette on April 15th, 1927.[51] Many researchers, including many Jordanian authors, do not mention the existence of this law and state that the OLFR remained in force in Jordan until 1947.[52] Although the law of 1927 was enacted by the Jordanian government as a new law without reference to OLFR, when examined, it is seen that it is based mainly on OLFR, and even that most of its articles are obtained as they are from OLFR.[53] Moreover, according to some researchers, this law, dated 1927, is an unchanged version of the *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*.[54] The divergent viewpoints stem from the fact that the *Ḥuqūq al-ʿĀ'ilah* of 1927 was formulated mainly by directly translating the articles of the OLFR without any modifications. Furthermore, this can likely be attributed to a shortage of knowledge and the absence of widespread publications.[55] Compared the law to OLFR, it is possible to mention the following:

OLFR consists of 157 articles, while FRL consists of 104. None of the 46 articles concerning non-Muslims in OLFR are included in Jordanian law. Ahmet Bostancı claims that since there was a separate judicial system belonging to non-Muslims from the beginning in Jordan, these articles were not needed.[56] 84 out of 104 articles in FRL

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[49] In the next sentences, it will be called FRL.

[50] For the text of the law *Qānūn Ḥuqūq al-ʿĀ'ilah al-Nikāḥ wa al-Iftirāq* 1927, <https://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=276897> (accessed 15 December, 2021).

[51] Al-Duwairi, Legal Mechanisms Employed in Modernising Islamic Family Law -The Case Study of Jordan, 450.

[52] Maḥmūd Aḥmad ʿAbd al-Rahīm al-Ramāḍinah, "Niṭāq al-Daʿwah al-ʿāmmah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunīyyah", (PhD's thesis, Kuliyyat al-Dirāsāt al-ʿulyā, The World Islamic Science & Education University. Jordan 2017). 23; Muḥammad Bashīr Muḥammad Dakhl Allāh, "al-Ḥuqūq al-Qānūniyyah li al-Mar'ah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī", (Master's thesis, Kuliyyah al-dirāsāt al-ʿulyā, The University of Jordan. Jordan. 2001). 17; Judith E. Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917", *The Arab Studies Journal*, Vol. 4, No. 2 (1996): 4.

[53] Muḥammad Amīn al-Hindī, "Maṣādir Qawānīn al-Aḥwāl al-Shakhṣiyyah fī Filisṭīn wā al-'Urdun", (PhD's thesis, al-Maʿhad al-aʿlā li Uṣūl al-dīn, Jāmiʿat al-Zaytūnah. Tūnis 2004). 104; Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 123, Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 69-70.

[54] Zaynab ʿAlī Najm al-Sharʿ, "Ṭurūhāt Muʻāsirah Ḥawla Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī: Dirāsah Fiqhiyyah Naqdiyyah", (Master's thesis, Kuliyyah al-Sharī'ah wa al-Dirāsāt al-Islāmiyyah, Yarmouk University, Jordan. 2020). 17.

[55] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 124.

[56] Ibid., 123, Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 70.

were obtained from OLFR without any changes. Some other articles contain minimal changes, supplements, or removals.

As Mehmet Akif Aydin stated, the approach of the decree to the issue of polygamy was determined by the Westernism and Turkism movements. In fact, the Turkism movement has had more profound effects in this field.[57] Of course, such an issue has not become law in Jordan, where the Westernism and Turkism movements or the women's movements backing the article had not yet been effective.[58] According to Islamic Jurisprudence, although certain conditions have been stipulated, polygamy has never been prohibited. *Fiqh* acknowledges polygamy as a discretionary (*Rukhṣah*) provision, subject to specific justifications.

Very few articles in the FRL are not included in the OLFR. For example, article 102 of the Jordanian law stipulates that judges will apply to the books of the *Ḥanafī madhhab* in matters not included in the law. No such ruling is found in OLFR.[59] Likewise, the number of articles containing different provisions in the two laws is tiny. For example, in the law of 1927, the marriage age is 16, while in OLFR, the marriage age is 18 for the boy and 17 for the girl.[60] As a result, it is possible to say that the Jordanian law of 1927 was created mainly by translating the articles of OLFR as they are.[61]

3.3.3.2 Qānūn Ḥuqūq al-ʿĀ'ilah (Family Law No. 26 of 1947) [62]

The second law in the field of family law in Jordan is Law No. 26, dated 1947. This law was in force until Transjordan became a kingdom in 1947 when King ʿAbd Allāh bin Al-Ḥussein issued a new family law called the "interim Family Rights Law" and was

[57] Aydın, *Osmanlı Aile Hukuku*, 179.
[58] Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 70.
[59] Ibid. 71.
[60] Abū Ḥussein Yāsemīn Muḥammad Ṣāleḥ, "al-Mawād al-Muʿaddalah fī qānūn al-aḥwāl al-shakhṣīyah al-Urdunī Raqam (36) li sanah 2010: Bāb al-Ṭalāq Dirāsāh Muqāranah", (PhD's thesis, Kuliyyah al-dirāsāt al-ʿulyā, The World Islamic Science & Education University Jordan. 2012). 15.
[61] Alhalalsheh, ibid. 71.
[62] For the text of the law Qānūn Ḥuqūq al-ʿĀ'ilah, no.26, 1947, <https://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=276480> (accessed 15 December, 2021).

published in the official newspaper.[63] There are some differences between the 1947 law and the 1927 law. For instance, the marriage age was reduced to 15 in the 1947 law.[64] This law stipulated that the judge must be sure of the minor's consent when there is an age difference of more than 30 between spouses.[65] The provision regarding the marriage of an insane person (*majnūn*), which was included in the 1927 law[66], is not included in the 1947 law. While the law dated 1927[67] stated that there was an absolute expedition, the law dated 1947[68] stated that the woman was obliged to travel within the country with her husband. In addition, the 1947 Law stipulated that fees would be paid for more than one marriage without an excuse.[69] Moreover, if the *ṭalāq* is not registered, a fine is imposed.[70] According to Article 79 of the 1947 Law, if the husband returns during the *ʿiddah* period, it is obligatory to notify the judge of r*ujūʿ*.[71]

Compared to OLFR, the following can be said: [72] OLFR consists of 157 articles, while *Qānūn Ḥuqūq al-ʿĀ'ilah* consists of 107 articles. The articles contained in OLFR for non-Muslims are not included in *Qānūn Ḥuqūq al-ʿĀ'ilah*.[73] When non-Muslim-related articles are removed, the order and shape of the two laws are the same. 75 of the 107 articles in the Jordanian law were taken from the OLFR without any changes.[74]

Qānūn Ḥuqūq al-ʿĀ'ilah No. 26 contained some articles which OLFR did not have. Moreover, some articles in Law No. 26 were not taken from the OLFR, even though they were not related to non-Muslims. Furthermore, there were also articles in the two laws that contained different provisions. For example, while the 1947 law accepts the age of 15 on the marriage license, OLFR states that the male should be 18 and the female 17 for marriage.[75]

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[63] Al-Duwairi, Legal Mechanisms Employed in Modernising Islamic Family Law -The Case Study of Jordan, 451. al-Sharʿ, Ṭurūhāt Muʻāsirah ḥawla Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī, 17. Al-Ramāḍinah, Niṭāq al-Daʿwah al-ʿāmmah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunīyyah, 23.
[64] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 26 of 1947, Article 3.
[65] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 26 of 1947, Article 4.
[66] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 114 of 1927, Article 4.
[67] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 114 of 1927, Article 33.
[68] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 26 of 1947, Article 35.
[69] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 26 of 1947, Article 39.
[70] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 26 of 1947, Article 69.
[71] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 125.
[72] Bostanci, ibid., 123.
[73] Ṣāleḥ, Al-Mawād al-Muʿaddalah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī, 16.
[74]Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 72.
[75] Ibid. 72.

Consequently, Law No. 26 of 1947 was primarily based on OLFR, too. It is possible to say that the law was the translation of OLFR.[76] However, it is also possible to say that the similarity between the law and OLFR decreased relatively compared to the previous law and that different provisions increased relatively.[0020]

3.3.3.3 Qānūn Ḥuqūq al-ʿĀ'ilah, No. 92 of 1951[77]

Qānūn Ḥuqūq al-ʿĀ'ilah (Family Law No. 26) was soon altered on August 16th, 1951, when King ʿAbd Allāh issued a new law and was then ratified by both the parliament and the House of Lords.[78]

In 1951, law No. 92 was passed due to developments in Jordanian social life requiring changes in the family law. The reason why it was as little as four years between the previous law and the new law may be because of Jordan's independence in 1946; it may be aimed at establishing its order in political, military, financial, social, and other fields and resolving new situations that have changed. Compared to OLFR, it is possible to say the following:[79]

OLFR consists of 157 articles, while *Qānūn Ḥuqūq al-ʿĀ'ilah* No. 92 consists of 131.[80] 68 of the 131 articles were fully taken from OLFR. There are articles in the 1951 Law that OLFR did not have. Further, some articles of OLFR were not added to the 1951 Law. There are also different provisions in both laws. For example, according to Article 95 of Law No. 92, the second marriage of a woman whose husband is ruled dead is not dissolved with the arrival of the husband; however, it is terminated according to Article 129 of OLFR. The OLFR was based on the famous opinion of the *Mālikī*, *Shāfiʿī,* and *Ḥanbalī madhāhib,* while the Jordanian law of 1951 was based on the opinion of Imām Mālik.[81]

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[76] Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 72.
[77] For the text of the law Qānūn Ḥuqūq al-ʿĀ'ilah 1951, <https://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=214915&MasterID=214915> (accessed 15 December, 2021).
[78] Al-Duwairi, Legal Mechanisms Employed in Modernising Islamic Family Law -The Case Study of Jordan, 451; al-Sharʿ, Ṭurūhāt muʻāsirah hawla qānūn al-aḥwāl al-shakhṣīyah al-Urdunī, 17.
[79] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 126.
[80] Ṣāleḥ, al-Mawād al-Muʿaddalah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī, 16.
[81] Alhalalsheh, ibid., 74.

It is possible to say that Law No. 92 was enacted under the influence of OLFR since the amendments are minor.[82] The Law of 1951 has some differences compared to the previous laws. For example, the marriage age was 16 in the law of 1927, while it was 15 in the law of 1947. The law of 1951 set the marriage age as 18 for males and 17 for females. The law of 1947 stated that single and widowed girls who have reached the age of 18 and whose parents prevented them from marrying could be married to an equivalent person by the judge according to their wishes. The same provision is included in the 1951 law but stipulates that the girls in question should be 17, not 18.[83] The provision in the 1947 law that the judge must be sure of the minor's consent if an age difference of more than 30 years between the spouses has been reduced to 20 years in the new law.[84] While the previous law stipulated that those who wanted to have more than one marriage without excuse had to pay a fee to the court, it was abolished in the 1951 law. While there was a provision in the 1947 law that alimony would be determined according to the status of the spouses, the new law stipulated that it would be determined according to the husband's status. Moreover, while in the previous law, there was a provision that a woman whose husband was sentenced to more than five years of imprisonment could apply to the court for divorce, in 1951, a provision was made that the wife of a woman who was sentenced to three years of imprisonment could apply to the court after one year had passed.[85]

3.3.3.4 Personal Status Law No. 61 of 1976[86]

The Jordanian Personal Status Law was instituted in 1976, replacing the *Qānūn Ḥuqūq al-ʿĀ'ilah*, No. 92 of 1951.[87] *Qānūn al-Aḥwāl al-Shakhṣīyah* was the first time that the Jordanian legislator used the term *al-Aḥwāl al-Shakhṣīyah* in Jordan.[88] In contrast to the

[82] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 92 of 1951, included in Article (129) that in the event that there is no naṣṣ on some issues, the most likely opinion from the *madhhab* of Imām Abū Ḥanīfah al-Nuʿmān will be referred to. See: Ṣāleḥ, al-Mawād al-Muʿaddalah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī, 16.
[83] Alhalalsheh, ibid. 74.
[84] Qānūn Ḥuqūq al-ʿĀ'ilah, No. 92 of 1951, Article 6.
[85] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 126.
[86] For the text of the Jordan Personal Status Law No. 61 of 1976, <https://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=74777&related> (accessed 15 December, 2021).
[87] al-Sharʿ, Ṭurūhāt muʻāsirah hawla qānūn al-aḥwāl al-shakhṣīyah al-Urdunī, 17.
[88] ʿAdnān Tawfīq Aḥmad al-Musāʿafah, "Taṭbīqāt al-Maṣlaḥah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī al-Mu'akkat li Āmm 2010", (PhD's thesis, Kuliyyah al-dirāsāt al-ʿulyā, The World Islamic Science & Education University. Jordan. 2014). 10. Ṣāleḥ, Al-Mawād al-Muʿaddalah fī qānūn al-aḥwāl al-shakhṣīyah al-Urdunī, 17.

previous laws, Law No. 61, which has been amended in some articles, does not only settle for four *madhāhib* but also includes the views of Dāwūd al-Ẓāhirī and Ibn Ḥazm. The provisions which were only included in this law compared to the previous ones:

The law stipulated that the man must have completed 16 and the girl must be 15 for the marriage license.[89] In the marriage of a widow over 18, the law did not require the approval of a legal guardian (*walī*).[90] The bride has the right to include provisions in the marriage contract prohibiting her husband from compelling her to leave the country and marry another woman. She may also seek to include a provision granting her the right to divorce.[91] It is stated that the husband has the right of three *ṭalāqs* on his wife in three separate *majlis*.[92]

In the cases of *shiqâq* and *nizāʿ*, it is stated that the arbitrators are obliged to put the investigations into a written document signed by the spouses,[93] that the child custody (*ḥaḍānah)* belongs to the mother when the marriage continues, that this right will continue until the end of the separation.[94] A woman who marries someone else after her husband's death is sentenced; it turns out that her ex-husband is alive, and her new marriage will not be annulled after the consummation (intercourse).[95] Compared to OLFR, this law consists of 187 articles, while OLFR has 157. Of these 187 articles, 49 were taken from OLFR as they were. Many new articles and provisions not included in OLFR were added to the law of 1976. Other than these, some differences can be considered insignificant.[96]

When a general evaluation is made, it is possible to see that the 1976 law, followed mainly by the article order of the OLFR, contains more details as it was a new law. This suggests that the articles of the law were taken from OLFR and developed according to the existing conditions, and a new law was created by adding new articles. Since the Law of 1976 is called Personal Status Law, not Family Law, it touches on more issues such as inheritance and will than OLFR. In light of these assessments, it is

[89] Jordan Personal Status Law No. 61 of 1976, Article 5.
[90] Jordan Personal Status Law No. 61 of 1976, Article 13.
[91] Jordan Personal Status Law No. 61 of 1976, Article 19.
[92] Jordan Personal Status Law No. 61 of 1976, Article 30.
[93] Jordan Personal Status Law No. 61 of 1976, Article 132.
[94] Jordan Personal Status Law No. 61 of 1976, Article 154.
[95] Jordan Personal Status Law No. 61 of 1976, Article 179.
[96] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 129-130.

possible to say that the influence of OLFR in Jordan has decreased relatively and that the law of 1976 further reflects social developments in Jordan.[97]

3.3.3.5 Law No. 82 of 2001 on Amending the Personal Status Law[98]

The Personal Status Law No. 61, dated 1976, remained in effect until it was amended following Law No. 82, dated 2001. One of the most prominent justifications for this law is keeping up with the changes and data of life and the reality of society in all social, economic, and other aspects of life. This is in addition to the reality of the *Sharīʿah* courts and their case records, which confirm the existence of family problems that were not known before in terms of type.[99] It was also stated in the reasons for these amendments that most of them were based on the principle of restricting what is permissible and regulating it to achieve the interest and that these amendments were under Islamic law principles and compatible with people's social and economic circumstances.[100] Some changes were made in Law No. 61, dated 1976, with this amendment law by the Jordanian government. These changes are as follows:[101]

According to the previous law, the age of marriage was 16 for boys and 15 for girls,[102] but it was increased to 18 with the amendment made in 2001.[103] However, the provision that the judge can grant marriage permission for those who have completed the age of 15 and if the judge saw the benefit of their marriage has been adopted. The age of marriage is the only article amended in every new law.[104]

The amended law stipulates that the judge must verify the husband's financial ability to pay dowry and maintenance. By referring to the books of *fiqh*, it can be found that some *fuqāhā'* stipulated that the husband be able to afford dowry and maintenance

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[97] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 130-131.
[98] For the text of the Jordan Personal Status Law No. 82 of 2001, <http://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=1406653> (accessed 15 December, 2021).
[99] Al-Ramāḍinah, Niṭāq al-Daʿwah al-ʿĀmmah fī Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunīyyah, 23.
[100] ʿAwnī Muḥammad Ḥussein Al-Sufūḥ, "Daʿwah al-tafrīq li al-iftida' fī qānūn al-aḥwāl al-shakhṣīyah al-Urdunī Raqam (36) li sanah 2010: Dirāsah Fiqhiyyah Qānūniyyah Taṭbīqiyyah", (PhD's thesis, Kuliyyah al-dirāsāt al-ʿulyā, The World Islamic Science & Education University. Jordan. 2015). 19.
[101] Bostanci, Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri, 131.
[102] Jordan Personal Status Law No. 61 of 1976, Article 5.
[103] Jordan Personal Status Law No. 61 of 1976, Article 5.
[104] ʿAlāʿuddīn Ḥusayn Raḥḥāl & Aḥmad al-Saʿd., "āl-Taʿdīlāt al-Akhīrah ʿalā Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdunī ʿām 2001: Dirāsah Fiqhiyyah Qānūniyyah", *Jerash for Research and Studies Journal*, Vol.10, No.2 (2007): 83.

when talking about financial competence in general, without talking specifically about second marriage.[105] Furthermore, the provision that the judge informs the second wife about the husband's economic situation and that he is married has been added.[106] Such a provision did not exist in the OLFR.

The provision that the wife who works without permission cannot receive alimony has been amended as she receives alimony on the condition that the work is legitimate and the husband's consent explicitly or implicitly; it is not permissible for him to withdraw his consent except for a legitimate reason and without causing harm to her.[107] OLFR did not have articles related to the work of women.

Article 126 of the old law was also amended by adding the following paragraphs (b) and (c) to it: In paragraph (b), the wife, before consummation or seclusion, may ask the judge to separate her from her husband if she prepares to return the dowry and the marriage expenses she received from him. (c) The spouses may agree on *khul'* after consummation or seclusion. If they disagree and the wife files her claim requesting *khul'*, the court attempts to reconcile the spouses. Still, if it cannot do so, it sends two arbitrators to continue the reconciliation efforts between them within a period not exceeding thirty days. If reconciliation was not achieved, the court ruled to divorce her irrevocably.[108]

The provision is that if a husband divorces his wife arbitrarily, as if he divorced her without a reasonable reason, and she asks the judge for compensation, he will grant her compensation to her divorced woman of no less than one year's maintenance and no more than three years' maintenance.[109] It was in the old law not more than one year's maintenance. These provisions were not included in the OLFR.

[105] Raḥḥāl & al-Saʿd, āl-Taʿdīlāt al-Akhīrah ʿalā Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdunī ʿām 2001: Dirāsah Fiqhiyyah Qānūniyyah, 86.
[106] The Amended Jordanian Personal Status Law, No. 82 of 2001, Article 6.
[107] The Amended Jordanian Personal Status Law, No. 82 of 2001, Article 68.
[108] The Amended Jordanian Personal Status Law, No. 82 of 2001, Article 126. paragraphs (b) and (c).
[109] The Amended Jordanian Personal Status Law, No. 82 of 2001, Article 134.

3.3.3.6 Personal Status Law No. 36 of 2010[110]

The Personal Status Law, dated 2010, covers the vast majority of matters and issues related to personal status. Because this new law declares its issues in detail, it is separated from the previous law. For instance, while the previous law briefly addressed the arrangements related to marriage and divorce, this law provides detailed information on these issues.[111] The law of 2010 contains 328 articles, while the law of 1976 covers 187 articles. This means an apparent increase in objectivity in the new draft law, as the committee was keen for the latest draft to be relatively comprehensive, such that it includes all personal status topics in the text without reference to a specific madhab, to narrow the circle of disagreement as much as possible upon application. Judicial jurisprudence necessitated the addition of sections and chapters on topics not stipulated in the applicable law.[112]

This law has the following characteristics, apart from the previous one.[113] Matters related to the *waṣiyyah, ahliyyah*, and inheritance have been added. This law includes custody and guardianship. Provisions related to nasab are discussed in more detail. *Tafrīq* (separation) is allowed due to reasons that constitute sexual defects such as Aids. The woman has the right to be separated from the man because he cannot have children because of his infertility.[114]

3.3.3.7 Personal Status Law No. 15 of 2019[115]

Personal Status Law No. 15 of 2019 is Jordan's latest family law. The announcement came per Article (94) of the Constitution, which included the referral of Temporary Law No. (36) of 2010, published in the Official Gazette No. (5061) to the National Assembly. The Council made some amendments to it, and after the amendments were

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[110] For the text of the Jordan Personal Status Law No. 36 of 2010, <http://sub.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=1569019> (accessed 15 December, 2021).

[111] Rahīl Moḥamad Gharāyibe, Aḥmad Yāsīn al-Qarālah, "al-Siyāghah al-Thasrī'yyah li al-qānūn al-aḥwāl al-shakhṣiyyah al-Urdunī Dirâsah muqāranah", *Ulum al-Sharī'ah wa al-Qānun*, Vol.43 No.1 (2016): 259.

[112] Al-Sufūḥ, Daʿwah al-tafrīq li al-iftida' fī qānūn al-aḥwāl al-shakhṣīyah al-Urdunī, 19-20.

[113] Gharāyibe, al-Siyāghah al-Thasrī'yyah li al-Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdunī, 260

[114] Temel, *İslam Ülkelerinde Aile Hukuku Uygulamaları*, 54.

[115] For the text of the Jordan Personal Status Law No. 15 of 2019, <http://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=1943564> (accessed 15 December, 2021).

made, the law was published in the Official Gazette No. (5578) No. (15) of the year (2019), after the Royal Decree was issued to approve it to replace Personal Status Law No. (36) of the year (2010). Among the most prominent amendments brought about by this law were:[116]

1- It expands legitimacy in modern technologies in proving lineage and giving broader jurisdiction to the courts. Approval of DNA testing is to achieve the child's best interest in establishing his lineage.

2- Divorce is not taken into account in cases where the husband is under the influence of drugs, taking tranquillisers, or the like, as he is not aware of the words he utters that may lead to divorce.

3- Article (172) of the 2010 law relating to the custody of a non-Muslim mother has been cancelled. The matter is left to the court's discretion and the *Sharīʿah* judge in a way that achieves the child's best interest.

4- The law gives the child without a custodian the authority to stay overnight for five consecutive days or separate during the month.

5- Article (196) gives the custodian the right to represent herself in court without seeking the help of a lawyer and the right to litigate in cases of sighting and watching on behalf of her children.

3.3.4 Marriage

3.3.4.1 Engagement

The engagement is a request or promise of marriage.[117] According to Jordan's Personal Status Law, "Marriage is not established by engagement, by reciting *al-Fātiḥah*, by receiving anything at the expense of the dowry, nor by the accepting a gift."[118] If one of the parties withdraws from the engagement or the engagement ends in death, the man or his heirs have the right to ask for the same if the money paid for the *mahr* or his

[116] Ma'mūn Aḥmad Najīb al-Shīshān, "Taʿdīlāt Qānūn al-Aḥwāl al-Shakhṣīyah al-Urdunī li Sanah 2019 wa Madā Taḥqīquhā li al-Maṣlaḥah al-Sharʿīyyah", (Master's thesis, Kuliyyah al-Sharīʿah, Jāmiʿat Āl al-Bayt, Jordan. 2023). 16-17.
[117] Jordan Personal Status Law No. 15 of 2019, Article 2.
[118] Jordan Personal Status Law No. 15 of 2019, Article 3.

property in kind remains or to demand its value if it is not possible to get the same.[119] If the woman has received the money given as *mahr* and bought a dowry with this money, the woman will be free if the man withdraws from the engagement. She has the choice to return what she has taken or to deliver what she has received as a dowry. If a woman breaks the engagement, she has to give back what she took from the man.[120] In the event of the conclusion of the engagement with death without the intervention of the parties, the parties are not obliged to return the gifts.[121]

3.3.4.2 Marriage Age

In the law of 1927, the age of marriage is 16, while in the law of 1947 it is 15. According to the 1951 law, a boy's marriage age is 18 years, while the age for girls is 17. The law of 1976 stipulated that the man must have completed the age of 16, and the girl must be 15 for the marriage license. In the marriage of the widow, who is over 18 years old, parental consent was not mentioned. In 2001, the marriage age was raised to 18, but for those who have reached the age of 15, the provision that the judge can issue marriage licenses has been adopted.[122]

In Article 10 of the 2010 law, the marriage age was accepted as 18, as in the 2001 law, and the judge's ability to grant a marriage capacity for those who completed the age of 15 was adopted.[123] Article 10 of the 2019 law accepted the marriage age as 18 as in previous laws. However, the judge's ability to grant a marriage capacity for those who completed 16 was adopted.[124] Article 11 states it is prohibited to perform a contract on a woman if her suitor is more than twenty years older than her unless the judge verifies her consent and choice.[125]

[119] Jordan Personal Status Law No. 15 of 2019, Article 4/b.
[120] Jordan Personal Status Law No. 15 of 2019, Article 4/c.
[121] Jordan Personal Status Law No. 15 of 2010, Article 4/h.
[122]Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 71-73.
[123] Jordan Personal Status Law No. 36 of 2010, Article 10.
[124] Jordan Personal Status Law No. 15 of 2019, Article 10/a.
[125] Jordan Personal Status Law No. 15 of 2019, Article 11..

3.3.4.3 Polygamy

With the addition made in 2001 to Article 6 of the 1976 law, it was stipulated that the judge notify the second wife of the husband's financial situation and that he is married. This kind of provision is not found in the OLFR. According to Islamic Jurisprudence and the fatawa issued by the fatwa councils, the husband's obligation is not required to notify his first wife; it is only stipulated that the husband must fulfil the financial and housing responsibilities towards both spouses equitably.

Jordan's Personal Status Law (2010) and (2019) both regulated polygamy marriage in Article 13 and made arrangements for polygamy in several other articles. Before allowing a married man to apply for another marriage, the judge must look at the following:

- The power to pay mahr (dowry),
- Making sure that he can afford the alimony of people under his responsibility,
- Notifying fiancée that her fiancé is married to someone else,
- After performing the contract, the court shall notify the existing spouse or spouses.

Article 37/a states that in the marriage contract, the woman may stipulate that the man should not remarry. According to Article 75, the husband cannot force his wives to live together against their wishes. Article 79 declares that men with more than one wife must be fair between their spouses in matters of overnight and alimony.[126]

3.3.4.4 Maintenance

Considering that marriage support, which is included in more than twenty articles, is considered in detail, it will be better understood that it has an essential place in society because many problems between spouses are due to alimony.[127]

[126] Ismail Yalcin, "Limitations on Polygamy in Today's Islamic Family Law Laws", *Journal of Human and Social Sciences Research*, Vol.6, No. 3 (2017): 1717.
[127] Temel, *İslam Ülkelerinde Aile Hukuku Uygulamaları*, 60.

The wife's alimony belongs to the husband even if she is rich. The woman's alimony includes food, clothing, residence, health, and maid.[128] While the *fuqāhā* agreed to include food, clothing, and residential services in the woman's alimony, they disagreed about the doctor and the maid.[129]

If the husband has a fault in paying alimony or avoids spending on his wife, he is forced to pay alimony. Even if the woman is not a Muslim, she deserves alimony from her marriage with a valid contract. Even if the woman resides with her family, the situation does not change. If the husband asks his wife to move into their house and refuses for an illegitimate reason, she does not deserve alimony. The wife has the right not to stay with her husband if he does not pay for the pre-matrimonial dowry or provide a legitimate place to stay.[130]

A woman who works outside the house deserves alimony provided she works in a legitimate job and the husband explicitly approves of his wife's work. The husband who approves of his wife's work can only withdraw from his decision on a legitimate ground that does not harm his wife.[131]

3.3.4.5 Dowry (Mahr)

As for the consequences of non-payment of dowry, the laws have not separated from the principles of the *madhāhib* to which they are affiliated. Only the Jordanian Family Law Code of 1951, article 55, granted the woman the right to terminate the marriage before the end of the marriage if the pre-matrimonial dowry was not paid, as in the *Mālikī madhhab*. According to the *Mālikī madhhab*, the woman may terminate the marriage before the bridal chamber if the pre-matrimonial dowry is not paid in whole or part. The *Ḥanafī madhhab* did not give the woman this opportunity.[132]

If the man imposes a condition that is in his best interest and is not against religion, for example, if he stipulates that she does not work outside the house and that she lives together in the city where he works, the condition is authentic. It is necessary

[128] Jordan Personal Status Law No. 15 of 2019, Article 59.
[129] Muḥammad Aḥmad Ḥasan al-Quḍah, *al-Vāfī fī Sharḥ Qānun al-Aḥwāl al-Shakhṣiyyah al-Urdunī al-jadīd Raqam 36 li sanah 2010 'Aqd al-Zawāj wa Āthāruhu (min al-mâddah 1-79)*, Kulliyat al-Sharī'ah al-Jāmiʿat al-Urduniyyah 2012, s. 206-207.
[130] Jordan Personal Status Law No. 15 of 2019, Article 60.
[131] Jordan Personal Status Law No. 15 of 2019, Article 61.
[132] Temel, *İslam Ülkelerinde Aile Hukuku Uygulamaları*, 61.

to comply with the conditions. If the woman does not live with her husband, the male dissolves the marriage, and the claim of alimony will be reduced with the dowry.[133]

If a period has been determined for the *mahr*, the woman cannot claim her dowry before this period expires. This is the case even if *ṭalāq* occurs. However, the specified period is reduced in case of the husband's death. If the determined period is unknown (*jahālah fāḥishah*), it will not be valid, and the *mahr* becomes *mahr al-muʿajjal*.[134] If the mahr is not determined, it becomes *mahr al-mu'ajjel* [135] when *ṭalāq* occurs or when one of the parties dies.[136]

3.3.5 End of Marriage and its Consequences

3.3.5.1 Registration of Ṭalāq

The man registers his *ṭalāq* and *rijʿī ṭalāq* in front of a judge. If he divorces his wife out of court and does not register it, he will go to court within a month and register it. Those who fail to do so will be punished. The court is required to deliver the *ṭalāq* and *rijʿī ṭalāq*, which took place without the woman's knowledge, within a week of them being registered.[137]

3.3.5.2 Period of 'Iddah

The *'iddah* of a woman whose husband died (except for a pregnant woman) is four months and ten days, whether they were together or not. The *'iddah* of a non-pregnant woman, except death, is as follows: Three menstruations. It is three months for a woman who has never menstruated or has stopped menstruating. *Mumtaddah al-ṭuhr*, that is, a woman who has menstruated once or twice and then does not menstruate, waits for nine months.[138]

In the family laws made in the 20th century, inspired by the principles of the *Ḥanafī madhhab*, the *'iddah* alimony was limited for a certain period. Circular No. 28,

[133] Jordan Personal Status Law No. 15 of 2019, Article 37/b.
[134] Mahr paid on account.
[135] Delayed mahr, mahr paid in advance.
[136] Jordan Personal Status Law No. 15 of 2019, Article 42.
[137] Jordan Personal Status Law No. 15 of 2019, Article 97.
[138] Jordan Personal Status Law No. 15 of 2019, Article 147.

published in Sūdān in 1927, accepted this period as twelve months. The 1951 Jordanian law and the 1953 Syrian law adopted the same principles.[139]

In article 152 of Jordanian law of 2019, *'iddah* alimony is declared as follows: ***'Iddah*** alimony is like marriage alimony. If the divorced woman does not have marital alimony, ***'iddah*** alimony is ruled from the date the ***'iddah*** starts. If she has alimony, it will continue until the end of ***'iddah***. The period of ***'iddah*** should not exceed one year.[140]

3.3.5.3 Nasab (Lineage)

The lineage of the child belongs to the mother at birth. Belonging to the father is as follows:

- By marrying a woman,
- With *iqrār,*
- With *bayyinah*,
- In a way that proves that he is married by scientific methods.[141]

The court must prove the paternity of the newborn to his father by definitive scientific means, taking into account the provisions of establishing paternity in the marital bed (*Firāsh al-Zawjiyyah*).[142]

3.3.5.4 Goods Regime

Article 320 of the Law, dated 2019, states that each spouse has separate financial liability. No explanation was made by including only this phrase in the law. It is understood from the article's content that the principle of separation of property in Islamic law is applied.

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[139] Halil Cin, *İslam ve Osmanlı Hukukunda Evlenme*, (Ankara, Ankara Üniversitesi Hukuk Fakültesi Yayinlari, 1974), 205.
[140] Jordan Personal Status Law No. 15 of 2019, Article 152.
[141] Jordan Personal Status Law No. 15 of 2019, 157.
[142] Jordan Personal Status Law No. 15 of 2019, 157/c.

3.3.6 Efficacy and Applicability of Family Law within the Country

The legislation governing matters related to family law in the Hashemite Kingdom of Jordan is known as the Personal Status Law. A comprehensive overview of this legislation has already been provided. Interviewees have similar views on implementing the Personal Status Law in Jordan, which this section discusses.

Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah[143],ʿAlāʿuddīn Ḥusayn Raḥḥāl[144], Muʿādh Saʿīd Ḥawwā, Āḥmad Muḥammad Dāwūd al-Saṭrī, Anas Muḥammad ʿIwaḍ al-Khalāylah[145], Mālik Suʿūd al-Jubūr[146] affirm the effectiveness and relevance of family law within the country. The efficient implementation of the Jordanian Personal Status Law in Jordan is facilitated through its application within the Jordanian Sharī'ah courts. These courts possess the authority to judge disputes of personal status, enforce their decisions, and oversee the distribution of inheritances and other matters related to personal status.[147]

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[143] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah is a *Qāḍi sharʿī* who possesses a PhD in *Sharī'ah*. He served as a Judge in the Amman *Sharī'ah* Court. Subsequently, the individual assumed the role of the *Sharī'ah* Public Prosecutor within the *Sharī'ah* courts located in the governorates of Amman and Madaba. Following that, Dr. Ṣuhayb was assigned to the position of Inspector of *Sharī'ah* Courts.

[144] ʿAlāʿuddīn Ḥusayn Raḥḥāl is a Jordanian professor, born in 1969. He studied BA in *Sharī'ah* and Law at the International Islamic University, Islamabad, from 1988 to 1992, with distinction. He studied master's degree in Jurisprudence and its principles at the International Islamic University, Islamabad, from 1992 to 1996, with an excellent grade. He studied a doctorate in Jurisprudence and its principles, at the International Islamic University Malaysia, from 1997 to 2001, graduated with an excellent grade. He began as a part-time lecturer in the Department of Jurisprudence and its Principles at Yarmouk Universit|y then He became an assistant professor in the same Department. He travelled to Saudi Arabia and worked as an associate professor in the Department of Principles of Jurisprudence at Qassim University. He also worked as an associate professor in the *Sharī'ah* Department at Umm Al-Qura University. He worked as a professor in the Department of Islamic World Studies at Zayed University in Abu Dhabi. Currently, he is a Professor in the Department of Jurisprudence and its Principles at Yarmouk University. He has books and research related to family jurisprudence and personal status laws, such as The Muslim Family: A Jurisprudential and Educational Vision, The Recent Amendments to the Jordanian Personal Status Law in 2001, and A Jurisprudential Legal Study. The courses he teached: Family System in Islam, Marriage contract in Islamic Jurisprudence, personal status jurisprudence, differences in marriage in Islamic jurisprudence, civil law jurisprudence, marriage and divorce in Islamic Jurisprudence.

[145] Anas Muḥammad ʿIwaḍ al-Khalāilah. He graduated from the World Islamic Sciences and Education University in 1996, then studied master's degree at Āl al-Bayt University in 2004 and completed his doctorate at the World Islamic Sciences and Education University in 2010. Currenty He is a Professor and Dean of the Faculty of *Sharī'ah* at Zarqa University. He has research related to family jurisprudence and law. For example: Deception between spouses and its impact on the marriage contract and beyond, Importance Independence of the Judiciary and Riskiness Interference the Governor to it, Amnesty and its Impact on Dropping the Death Penalty Punishment: Fiqh Maqasid Study, The importance of the independence of the judiciary and the danger of the ruler's influence over it.

[146] Mālik Suʿūd al-Jubūr is a *Qāḍi sharʿī* who possesses a PhD in In the *Sharī'ah* judiciary (*āl-Qaḍā' al-Sharʿī*). He served as a Judge in the Amman *Sharī'ah* Court. Subsequently, the individual assumed the role of the *Sharī'ah* Public Prosecutor within the *Sharī'ah* courts located in the governorates of Amman and Madaba. Following that, Dr. Ṣuhayb was assigned to the position of Inspector of *Sharī'ah* Courts.

[147] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022).

The Hashemite Kingdom of Jordan was established in 1920. Throughout history, the country has enacted numerous revisions to its legal framework. Finally, the last law was applied in 2019. The foundation of the legal framework may be traced back to the *Ḥanafī madhhab*, which most of the law is derived from the *Ḥanafī madhhab*. However, certain aspects have been incorporated from *Shāfiʿī*, *Mālikī*, and *Ḥanbalī* madhhab. The perspectives of other *madhāhib* deemed appropriate within the prevailing cultural norms were adopted.[148]

al-Shākhānibah and Raḥḥāl accentuate attention to civil and *Sharīʻah* courts in Jordan. *Sharīʻah* courts in Jordan are not affiliated with the Ministry of Justice. The Ministry of Justice is responsible for the civil courts. As for the *Sharīʻah* courts, they have the Department of the Supreme Judge, and they are independent. The *Sharīʻah* judge has a high status in society.[149]

Raḥḥāl adds that Muslims can only marry and divorce in *Sharīʻah* courts. There is no alternative. They do not have a civil marriage contract at all. It is invalid or recognized by a man who agrees with a woman and writes a civil contract. This does not exist in Jordan and is not permitted. Instead, it is punishable because whoever concludes a marriage contract and does not register it in the Sharīʻah court shall be punished with imprisonment or a fine, etc.[150]

Upon analysing the responses to the inquiries, it is evident that all participants believe implementing Islamic family law in Jordan is effective. Participants' perspectives vary regarding the factors contributing to this phenomenon in Jordan. Some argue that it can be attributed to the prolonged impact of the Ottoman State, while others contend that it results from the implementation of this law by the Sharīʻah courts in Jordan.

[148] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[149] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022); Raḥḥāl, ibid.
[150] Raḥḥāl, ibid.

3.3.7 The Impact of Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī on the Qanūn al-Aḥwal al-Shakhṣiyyah al-Urdunī

Since Jordan was under the rule of the Ottoman State for many years, the effect of the Ottoman Law Family Rights is observed in the laws that emerged even after gaining its independence.

Raḥḥāl says the impact of Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī is tremendous, and he draws attention to Jordan's ties with the Ottoman and explains the similarities and interaction in family law. Jordan was historically affiliated with the Ottoman caliphate, and the legislation is the old Jordanian personal status law; it is the same law that worked in the Ottoman caliphate according to the Ḥanafī madhab. He asserts that Jordanian family law and articles of the law are Ottoman family law articles.[151] In contrast, al-Saṭrī[152] believes the effect of *Qānūn Ḥuqūq al-ʿĀ'ilah Al-ʿuthmānī* is relative and limited in Jordan.[153] Muʿādh Saʿīd Ḥawwā[154] also adheres to the impact of *Qānūn Ḥuqūq al-ʿĀ'ilah Al-ʿuthmānī* is enormous, but after the issuance of the Personal Status Law 2010, its effect became less and decreased in the 2019 Personal Status Law.[155]

Anas al-Khalāylah,[156] like Raḥḥāl thinks, *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* is the basis for the Jordanian Personal Status Law, and it derived from Ottoman family law. He states that they teach this interaction and similarity to their students in classes: that the Jordanian personal status law has undergone several stages, including that it was initially the OLFR. After that, it developed into the temporary personal status law. There were several amendments according to time developments, so the OLFR was in

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[151] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).

[152] Āḥmad Muḥammad Dāwūd al-Saṭrī is a *Qāḍi sharʿī*. He was a clerk in the Amman *Sharī'ah* Court, then appointed as a *Sharī'ah* judge in the Petra *Sharī'ah* Court. Then, he was appointed judge in the ʿAyn al-Bāsha al-Ibtidāiyyah *Sharī'ah* Court. He served as a judge in the Wādi al-Sayr al-ibtidāiyyah *Sharī'ah* Court, then was transferred as a *Sharī'ah* judge in the Amman al-Ibtidāiyyah *Sharī'ah* Court in 2023.

[153] Āḥmad Muḥammad Dāwūd al-Saṭrī, Interviewed by Selman Zahid Ozdemir, Jordan, (12.05.2022).

[154] Muʿādh Saʿīd Ḥawwā was born in Medīnah in the year 1969. His father, the Imām and 'ālim Saʿīd Ḥawwā (d. 1989), is one of the most famous contemporary ulama who significantly impacted the process of Islamic thought. Sheikh Muʿādh began his studies in Syria and then completed his studies in Amman, Jordan. He was interested in *Sharī'ah* Knowledge from his youth, and his father and mother greatly influenced this, and he benefited greatly from them. Sheikh Muʿādh sought *ʿulūm al-sharʿiyyah* from several sheikhs and *ʿulamā'*. He studied *Sharī'ah* at the Faculty of *Sharī'ah* at the University of Jordan - Amman/Jordan and obtained a Bachelor's degree there. Then, he completed his studies at the same university, studying for his master's and doctorate there. The Sheikh has been teaching at the World Islamic Sciences and Education University, Faculty of Ḥanafī Jurisprudence, since the beginning of the academic year 2018-2019.

[155] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022).

[156] Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022).

Jordan. Jordan was affiliated with the Ottoman State until 1918. These laws in force in the Ottoman State were applied to it until 1921, when the Emirate of East Jordan was formed, and there became a law called the Jordanian Family Rights Law. Still, before that, it meant the OLFR, the law that applies in the state and is based on the OLFR. After that, personal status laws were issued initially.

According to Raḥḥāl,[157] The vast majority of additions were not *madhabī* views. That is, they left the *madhāhib*. Moreover, the additions were related to things closer to the *maṣlaḥah* and customs in the society and were newly emerging. They tried to change some of the law texts, but these are very few. That is, when it was changed in 1976 or when it was changed in 2001, only six articles were changed, which is considered less if compared to 186 articles. So far, the basic structure and the origin of the law is the Ottoman law family decree.

The findings from the interviews conducted with university professors in Jordan indicate that the legal framework implemented in Jordan is consistent with the law of the former Ottoman State. As mentioned earlier, the process unveiled the enduring impact of the Ottoman State over an extended period. Until Jordan has its legal framework, based on the conducted interviews, it can be observed that the fundamental basis of the law is derived from the Ottomans and the Ḥanafī madhhab. However, several scholars have argued that the influence of Ottoman family law experienced a slow decline after 2001.

3.3.8 Adequacy of Jordan Family Law in Solving Family-Related Problems

According to al-Saṭrī and al-Khalāilah, the Jordanian family law is deemed satisfactory in addressing family issues. Al-Khalāilah further asserts that the personal status law adequately resolves family-related problems,[158] with a provision granting judges or judiciary judges the authority to make decisions on matters not explicitly addressed in the law. This provision aligns with the *Ḥanafī madhhab's* correct interpretation, ensuring the effective resolution of family-related problems.

[157] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[158] Āḥmad Muḥammad Dāwūd al-Saṭrī, Interviewed by Selman Zahid Ozdemir, Jordan, (12.05.2022); and Anas Muḥammad ʿIwaḍ al-Khalāilah, Interview by Selman Zahid Ozdemir, Jordan, (18.05.2022).

In contrast, Muʿādh Ḥawwā, al-Shākhānibah, Mālik Suʿūd al-Jubūr, and Raḥḥāl hold the viewpoint that family law alone is inadequate in addressing familial issues.[159] Muʿādh Ḥawwā elucidates the insufficiency of this law as follows and says some of the regulations have made the situation worse: Insufficient measures have been taken to address the government's involvement in education and moral development, which should ideally serve as the guiding force in preparing educators for societal needs. It is worth noting that recent legislative actions, such as the implementation of counting the three divorces as one, the requirement for an explicit declaration of divorce by the husband, and the postponement of the age of marriage, were enacted to mitigate familial and divorce-related issues. However, these measures have proven ineffective in alleviating problems or reducing divorce rates, inadvertently exacerbating the situation.[160]

According to al-Shākhānibah, the efficacy of the personal status legislation in addressing family-related issues is deemed insufficient in isolation. He argues that including family mediation institutions inside the framework of *Sharīʿah* courts has proven to be an effective approach to resolving such matters. Hence, the legislative body in Jordan has established family conciliation and reform offices within the *Sharīʿah* courts to address disputes outside the litigation framework. This initiative has proven to be a successful endeavour within the Jordanian context. Furthermore, establishing the *Sharīʿah* Public Prosecution inside the *Sharīʿah* courts serves the purpose of intervening in family issues and matters of the rights and welfare of minors and others lacking legal capacity.[161]

On the other hand, Raḥḥāl and Muʿādh Ḥawwā converge on the notion that the state ought to assume a guiding role in society and serve as a moral exemplar.[162] Furthermore, Raḥḥāl asserts that implementing these rules will safeguard the institution of the family. However, Rahhal underlines that laws alone do not protect the family. The family must have a comprehensive system to ensure its protection. Furthermore, it

[159] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022); Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022); Mālik Suʿūd al-Jubūr, Interview by Selman Zahid Ozdemir, Jordan, (21.05.2022), and ʿAlāʿuddīn Ḥusayn Raḥḥāl, Jordan, Interview by Selman Zahid Ozdemir, (16.08.2022).
[160] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022).
[161] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022).
[162] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022) and ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).

underscores the need for society to attribute the requisite value to the family, encompassing all its constituent units. Typically, legal principles are conceptual and designed for practical implementation. The protection of the family, encompassing the entire state, all state laws, and all state agencies, as well as educational institutions, places of worship, such as mosques, and other entities contributing to the development of the family, is a matter of concern. The assertion that the law safeguards the institution of the family is a viewpoint that is not universally accepted, even within Western societies. The legal framework plays a crucial role in protecting the institution of the family. However, a comprehensive and interconnected societal system must be established for the family to get adequate protection.[163]

3.3.9 Applying Islamic Family Law to Reduce the Number of Family Cases Brought to the Courts

According to most respondents, applying family law does not directly reduce the number of family cases presented before the courts. Ḥawwā explains this phenomenon, identical to their response to the preceding inquiry: per his perspective, the issue does not lie inside the laws themselves but rather stems from a moral and educational deficiency.[164]

In contrast, al-Shākhānibah asserts that the courts employ personal law to resolve conflicts between the parties involved while also advocating for the utilisation of family mediation principles to minimise the number of cases brought before the judiciary. He highlights the significance of the legal system, emphasising that the agreements established within these mediation offices, specifically in *Sharīʿah* courts, also encompass the principles of family law.[165]

On the contrary, al-Khalāilah argues that the implementation of personal law will result in a reduction in the number of cases. The author highlights the recurrence of societal problems and emphasises that prevention rather than cure is the most effective approach to mitigating their prevalence. It is imperative to prioritise preventive

[163] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[164] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022).
[165] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022).

measures rather than relying solely on legal interventions, which primarily remedy such issues to reduce the prevalence of family cases.[166]

Raḥḥāl also intersects with Ḥawwā at some points. According to Raḥḥāl, the presence of societal factors, as well as economic, social, and educational complexities, contributes to the escalation of various issues. However, they contend that the comprehensive implementation of legal provisions can effectively address emerging societal challenges. Consequently, in his affirmative response to this inquiry, he asserts that implementing the law will not decrease the number of cases but rather mitigate future complications. The legal framework is not directly relevant to the matter, yet personal status regulations are extensively implemented as they frequently address societal issues and resolve potential problems. It might be argued that while reducing cases may not be directly achieved, the outcome of lowering future difficulties or presented cases remains valid.[167]

3.3.10 Public Acceptance of the Implementation of the Personal Status Law

Based on the prevailing consensus among the participants,[168] it can be inferred that implementing the Jordanian Personal Status Law is widely accepted within Jordanian society. According to Ḥawwā, the exceptions to this are some scholars who reject laws that contradict *ijmāʿ* and some who see injustice in some of the laws. An example of this is laws that have increased problems and caused new issues that did not exist before, such as the law of *khul'* without the consent of the husband and the law of compensation for abuse in divorce.[169] According to al-Khalāilah, the law was accepted and respected by all classes of Jordanian society.[170]

According to Raḥḥāl, civil marriage does not exist within the societal framework of Jordan, and the sole avenue for a legally recognised marriage is through the *Sharīʿah* court. According to the author, a significant portion of individuals inside the community

[166] Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022).
[167] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[168] Āḥmad Muḥammad Dāwūd al-Saṭrī, Interviewed by Selman Zahid Ozdemir, Jordan, (12.05.2022):; Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022); Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022); Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022);.and ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[169] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022).
[170] Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022).

knows the Jordanian personal status, rather than their *madhhab*, and therefore adhere to its principles. In the geographical areas of Irbid and ʿAjlūn, it can be observed that a significant proportion of individuals self-identify as adherents of the *Shāfiʿī madhhab*. However, in the urban centre of ʿAmmān, there appears to be a lack of familiarity or recognition of both the *Shāfiʿī* and *Ḥanafī madhāhib*. Individuals enrol in a programme focused on Islamic education, displaying a lack of concern or indifference towards the subject matter. Religious culture is a conventional framework distinct from any specific *madhhab* within a religious tradition. This implies that it is generally acknowledged and embraced by the collective society.[171]

3.3.11 Impact of the Ḥanafī Madhhab on the Jordanian Personal Status Law

According to all participants, the *Ḥanafī madhhab* is the predominant influence in the law.[172] The influence of the *Shāfiʿī madhhab* is limited and relative.[173] As per Ḥawwā, the prevailing law is predominantly influenced by the Ḥanafī madhab, including around eighty per cent of its content. However, he notes that specific provisions incorporate the viewpoints of the *Shāfiʿī madhhab*, such as revocable divorce.[174] According to al-Jubūr, the Personal status law draws upon the principles and teachings of several *madhāhib*, incorporating the most suitable provisions from each *madhhab* to address the needs and dynamics of families.[175]

According to al-Khalāilah, even if the *Shāfiʿī madhhab* is preferred when issuing a *fatwā* in Jordan, the *Ḥanafī madhhab* is selected in the family law. The fact that the Jordanian personal status law is mainly derived from the *Ḥanafī* Jurisprudence, although the *fatwā* they have is in the *Shāfiʿī madhhab*, meaning the *Fatwā* Department prefers the *Shāfiʿī madhhab* in the fatwā, Jordan has the Jordanian Personal Status Law that chooses the *Ḥanafī madhhab*. There is cooperation in the matter of deciding, meaning in the matter of divorce, between the *Fatwā* Department and the judge's

[171] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[172] Āḥmad Muḥammad Dāwūd al-Saṭrī, Interviewed by Selman Zahid Ozdemir, Jordan, (12.05.2022); Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022); Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022); Mālik Suʿūd al-Jubūr, Interviewed by Selman Zahid Ozdemir, Jordan, (21.05.2022).; Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022).and ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[173] Āḥmad Muḥammad Dāwūd al-Saṭrī, Interviewed by Selman Zahid Ozdemir, Jordan, (12.05.2022).
[174] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022).
[175] Mālik Suʿūd al-Jubūr, Interviewed by Selman Zahid Ozdemir, Jordan, (21.05.2022).

department. The judges represent there is an agreement. There is no difference in this matter.[176]

Raḥḥāl thinks that there is no influence of the *Shafi'i madhhab*, but there is an influence of the rest of the non-*Ḥanafī madhāhib*. Raḥḥāl approaches this issue from a different perspective and thinks that it was preferred because people at that time had a ready-made text of the law, not the *Ḥanafī madhhab*: The original was taken from the OLFR, not because it is *Ḥanafī*, but because it is present and ready, and it was one of the remnants of the Ottoman caliphate, so they took it because it was ready.[177]

Raḥḥāl highlights the significance of revisions in contemporary times. When a modification is deemed necessary, it is implemented periodically based on the perspective that aligns most appropriately with societal customs rather than any sectarian standpoint.

3.3.12 Applicability of Family Law in Other Countries

According to all participants, Jordanian personal status law can also be applied in other countries.[178] Al-Saṭrī stated the unified personal status law as an example on this subject: the personal status laws in the Arab countries are very close, and there is a unified personal status law for the Arab countries issued by the League of Arab States and another unified for the Gulf Cooperation Council countries.

On the other hand, Ḥawwā prioritizes the exemplary-ness of the law in force before 2010 and does not contain opinions contrary to the *ijmāʿ*, rather than the law, including the last legal orders made in Jordan. He has an objection to the regulations made in recent years: he prefers the laws before 2010, with the need for minor amendments, and to benefit from the new ones while not contradicting the *ijmāʿ*.[179]

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[176] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022).
[177] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[178] Āḥmad Muḥammad Dāwūd al-Saṭrī, Interviewed by Selman Zahid Ozdemir, Jordan, (12.05.2022); Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022); Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022); Mālik Suʿūd al-Jubūr, Interviewed by Selman Zahid Ozdemir, Jordan, (21.05.2022); Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022);.and ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).
[179] Muʿādh Saʿīd Ḥawwā, Interviewed by Selman Zahid Ozdemir, Jordan, (23.05.2022).

Al-Shākhānibah argues in favour of the law's exemplariness by emphasising the organisational framework of the courts in Jordan and the overall functioning of the judiciary. The Jordanian *Sharīʿah* judiciary system is comprehensive and encompasses various specialised courts, such as case courts, execution courts, documentation courts, inheritance courts, and family reform offices. Additionally, there is a public legal prosecution and a two-tier litigation process consisting of a court of first instance and an appellate court. Furthermore, the *Sharīʿah* Supreme Court is the highest authority in law matters.[180]

al-Khalāilah stated that society needs a law, that Jordanian family law is essential for the stability of the community and the family, and that the law is a pioneering experience. There are many problems, but most of them have been solved through the Personal Status Law and resorting to the Jordanian Personal Status Law.[181]

Raḥḥāl cites Saudi Arabia as a vivid example of this issue, as he has been a visiting university lecturer in many different countries, including Saudi Arabia. He explains that Saudi Arabia has no family law and that the decision is left to the discretion of muftis or judges, and they also prefer the *Ḥanbalī madhhab*. Nevertheless, the problem is that they do not have texts agreed upon by everyone. Because of that, he believes that codification is useful.[182]

While arranging the law, the interest and the current custom were considered. For example, uttering the three divorces, the majority's opinion is that divorce takes place three times (four *madhāhib*), but Jordan does not take this, and it counts as one divorce only. One benefit of enactment is that it provides unity. In other words, a judge in a court in Jordan has to give a verdict according to the official opinion in Jordanian law in the matter of divorce in three words. However, when he is asked about a *fatwā* on this subject when he appears on a television program, there is no problem expressing his opinion. Nevertheless, he cannot rule by this in his jurisdiction in the *Sharīʿah* Court. The existence of the law unites a lot and alleviates many problems; at least, it regulates the matter. Applying the law to countries that do not have a law, whether they are Muslim or non-Muslim, is beneficial.

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[180] Ṣuhayb ʿAbd Allāh Bashīr al-Shākhānibah, Interviewed by Selman Zahid Ozdemir, Jordan, (26.05.2022).
[181] Anas Muḥammad ʿIwaḍ al-Khalāilah, Interviewed by Selman Zahid Ozdemir, Jordan, (18.05.2022.
[182] ʿAlāʿuddīn Ḥusayn Raḥḥāl, Interviewed by Selman Zahid Ozdemir, Jordan, (16.08.2022).

3.3.13 Conclusion

The 402-year Ottoman rule in Jordan (1516-1918) significantly impacted various aspects, notably the legal system. The legal system of Jordan comprised *Sharī'ah* courts that derived their verdicts from Islamic law, which was also employed in the Ottoman caliphate. The development of Islamic family law in Jordan has a solid connection to the Ottoman state and cannot be evaluated alone.

In the beginning, it can be summarised that Jordan's family law has progressively transformed throughout the years in line with Jordan's development. Since the establishment of Jordan as an independent state, it has undergone several stages of development and advancement in line with the changes in the country's sociological, political, and economic aspects of life. Jordan implemented six family laws in 1927, 1947, 1951, 1976, and 2010, with an amending law introduced in 2001. The Jordanian Personal Status Law No. (15) of 2019 was recently enacted in Jordan.

Especially in the laws of 1927, 1947, and 1951, the majority of the articles of the OLFR, except for the 46 articles covering non-Muslims, were taken exactly or with minor changes and additions. Compared to the OLFR, fundamental changes occurred only in the 1976 law. The name of the Jordanian family law, unlike the previous laws, has evolved from the *Ḥuqūq al-ʿĀ'ilah* to the *Aḥwāl al-Shakhṣiyyah*. However, even with this law, it is possible to see the profound impacts of OLFR. Thus, it is possible to assess that OLFR remained in force in Jordan until the law of 1976. Moreover, this law, which continues to be applied with minor renovations, also has a significant OLFR effect.[183] With the Law No. 82 Amending Personal Status Law in 2001, some changes were made in the law dated 1976.

The effect of OLFR on Jordanian Family law laws has been in the form of taking its articles. In addition, the understanding of benefiting from the provisions of other madhāhib along with *Ḥanafī madhhab*, brought by the OLFR, has been continued in the Jordanian laws. It is also known that Jordanian laws have adopted many OLFR-based innovations, such as limiting the age of marriage.

[183] Bostanci, "Ürdün Ahvâl-i şahsiye (Hukûk-ı âile) Kanunlarında Osmanlı Tesiri", 131.

The law of 2010 detailed the vast majority of matters and issues related to the person. It is separated from the previous law by adding topics such as *ahliyyah*, inheritance, custody, and *waṣiyyah*.[184]

The recent amendments to the last Jordanian Personal Status Law of 2019 are increasing the legitimacy of using contemporary technologies to establish ancestry and granting the courts more authority. When a husband is under the influence of drugs, divorce is not considered since he may say something that could cause divorce. The 2010 law's article 172 regarding a non-Muslim mother's custody has been repealed. Lastly, according to Article 196 of the Jordanian Personal Status Law of 2019, the custodian is entitled to defend herself in court without the assistance of a lawyer and to file a lawsuit on behalf of her children in sighting and watching circumstances.

According to Jordan's Personal Status Law, "Marriage is not established by engagement, by reciting *Al-Fātiḥah*, by receiving anything at the expense of the dowry, nor by the accepting a gift.[185] Various numbers have been given over the years about the minimum age for marriage in Jordan, beginning with the first enactment of the family law in 1927 and concluding with the most recent legislation in effect as of 2019. The first family law determined the minimum marriage age to be 16, while in the law of 1947, it was 15. According to the 1951 law, a boy's marriage age is 18 years, while the age for girls is 17. The law of 1976 stipulated that the man must have completed the age of 16, and the girl must be 15 for the marriage license. The marriage age was accepted as 18 in 2001, 2010, and 2019; in 2001, the judge's ability to grant a marriage capacity for those who completed 15 was adopted. Article 10 of the 2019 law adopted the judge's ability to grant a marriage capacity to those who completed the age of 16.

According to Jordanian Islamic family law, polygamy is legal, but it is subject to some conditions. With the addition made in 2001 to Article 6 of the 1976 law, it was stipulated that the judge notify the second wife of the husband's financial situation and that he is married. Jordan's Personal Status Law (2010) and (2019) both regulated polygamy marriage in Article 13 and made arrangements for polygamy in several other articles. Before allowing a married man to apply for another marriage, the judge must look at the power to pay mahr, making sure that the husband can afford the alimony of

[184] Temel, *İslam Ülkelerinde Aile Hukuku Uygulamaları*, 69-70.
[185] Jordan Personal Status Law No. 15 of 2019, Article 3.

people under his responsibility, notifying the fiancée that her fiancé is married to someone else and after performing the contract, the court shall notify the existing spouse or spouses.

The wife's alimony belongs to the husband even if she is rich. The woman's alimony includes food, clothing, residence, health, and maid. If the husband has a fault in paying alimony or avoids spending on his wife, he is forced to pay alimony. Even if the woman is not a Muslim, she deserves alimony from her marriage with a valid contract. If the husband asks his wife to move into their house and refuses this for an illegitimate reason, she does not deserve alimony. If the woman does not live with her husband, the male dissolves the marriage, and the claim of alimony will be reduced with the dowry.

The man registers his *ṭalāq* and *rijʿī ṭalāq* in front of a judge. If he divorces his wife out of court and does not register it, he will go to court within a month and register it. Those who fail to do so will be punished. The lineage of the child belongs to the mother at birth. Lineage belongs to the father by marrying a woman with *iqrār*, or *bayyinah*. The court must prove the paternity of the newborn to his father by definitive scientific means, taking into account the provisions of establishing paternity in the marital bed.

The efficient implementation of the Jordanian Personal Status Law in Jordan is facilitated through its application within the Jordanian *Sharīʿah* courts and the prolonged impact of the Ottoman State. These courts possess the authority to judge disputes of personal status, enforce their decisions, and oversee the distribution of inheritances and other matters related to personal status. The Muslims can only marry and divorce in *Sharīʿah* courts. They do not have a civil marriage contract at all.

3.4 THE STAGES OF CODIFICATION OF ISLAMIC FAMILY LAW IN MOROCCO AND ITS DEVELOPMENT

3.4.1 Introduction: Overview of Morocco and its History

This section examines the *Mudawwanat al-aḥwāl al-shakhṣiyyah* in Morocco, an Arab Islamic country located in the far West of North Africa. Its capital is *Rabāṭ*, from which the conquering Muslims set out for the land of Andalusia. The Strait of Gibraltar separates them, and the governmental system of Morocco is a constitutional

monarchy.[186] Morocco's strategic location in the Atlantic Ocean and the Mediterranean Sea has made this country the target of Western imperialists. Although the history of Morocco, under French colonial rule until it gained independence in 1956, dates back to ancient times, our study will focus on the development of Islamic family law in Morocco, especially from the 19th century to the present.

The initial known inhabitants of Morocco were Amazighs and diverse tribal communities. In the beginning, the majority of Amazighs followed the Christian faith. However, when they interacted with Arabs, starting from the 7th century, many embraced Islām. Consequently, their informal legal systems began to incorporate more Islamic principles. Their legal framework was established by informal systems predominantly rooted in Islamic and non-Islamic customary law.[187]

Subsequently, the harsh policies of some governors sent to the region, and their strict attitude in collecting taxes led to the rebellion of the tribes; therefore, the spreading of Islām was interrupted for a while. The Idrisid dynasty/*al-Adārisah*, with a *Shīʿī* structure, was established in the region between the 8th and 10th centuries. On the other hand, the Almoravids/*Al-Murābiṭūn* were the driving force of the religious ideas developed based on the *Mālikī madhhab* against the *Shīʿī* tendencies in the region between the 11th and 12th centuries. Moreover, some states were established in Morocco, like Almohad Caliphate/*al-Muwaḥḥidūn* during the 12th century and Marinid Sultanate/*al-Marīniyyūn* from the mid-13th to the 15th century.[188] The most remarkable one, which emerged after the collapse of these states and has survived to the present day, is the Alawi Sultanate/Sharifian Sultanate. During the early sixteenth century, sharifism became the dominant source of political authority in Morocco, and since then, sharifian dynasties have continuously governed the country.[189]

Another significant factor shaping Morocco, apart from the dominant Arabic-Islamic majority, is the impact of European colonialists starting from the 15th century. Portugal, Spain, and France were interested in Morocco.[190] The country suffered major

[186] Sırrı Erinç, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, Physical and Human Geography in "Fas", Vol.12, 185.
[187] Leila Hanafi, "Contextualised Analysis of Access to Justice in Morocco", *Arribat – International Journal of Human Rights*, Vol. 1, No. 1 (2021): 42.
[188] Ibrahim Harekat, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, History in "Fas", Vol.12, 188-189.
[189] Richard Pennell, Morocco: From Empire to Independence, (Oxford: Oneworld Publications, 2003),79.
[190] Hanafi, Contextualised analysis of access to justice in Morocco, 45.

effects due to the effective Christian Reconquista of Iberia in 1492 and the continuous conflicts.[191]

French colonial researchers posited that before the mandate, Morocco was divided into two distinct political regions: the *Bilād al-Sībah*, encompassing the Berber-speaking mountains and deserts, characterised by rebellious tribes challenging the authority of the makhzan, and *bilād al-makhzan*, comprising the Arabic-speaking plains where the sultan exercised tax collection and military control.[192]

Bilād al-Makhzan has jurisdiction of the *qāḍī* or the *rabbī*, the authority of the *qāid* or the Pacha, and the jurisdiction of foreign consulates, which adjudicated cases regarding their nationals and Moroccan protégés and gained significance in the 19th century. Customary law was enforced in the rural areas known as *Bilād al-Sībah*. The *qāḍī* handled all types of cases. He was adhering to the principles of the *Mālikī fiqh*. The *qāḍī* possessed exclusive authority over all matters related to family law, encompassing the supervision of orphans and issues of blood money.[193]

The *Bilād al-Sībah* was beyond the Sultan's jurisdiction, and it is the region where the tribal councils enforced customary law. The *jamāʿah*, the tribal council, was responsible for overseeing all matters related to the community and arbitrating disputes between opposing parties.[194]

Before the French and Spanish protectorates were established in 1912, Morocco had two jurisdiction systems: *Sharīʿah* and Makhzen courts. The judges in the *Sharīʿah* courts implemented Islamic *fiqh*. The judges were usually grads of the Qarawiyyīn in Fes, selected through a Sultanic proclamation (*ẓahīr*), and adhered to the *Mālikī madhhab*. The Makhzen courts, first limited to handling penal cases, gradually expanded their authority to include civil and commercial cases. In this judicial system,

[191] Stephen Cory, Sharīfian rule in Morocco (tenth–twelfth/sixteenth–eighteenth centuries), in The New Cambridge History of Islam, edited by Maribel Fierro (Cambridge: Cambridge University Press, 2010), 453.
[192] Richard Pennell, Morocco Since 1830: A History, (London: Hurst & Company, 2000), 28.
[193] Dörthe Engelcke, "Colonial Legal Legacies and State-Building" In *Reforming Family Law: Social and Political Change in Jordan and Morocco*, (Cambridge: Cambridge University Press, 2019), 50.
[194] Engelcke, Colonial Legal Legacies and State-Building, 52-53.

decisions were rendered by administrative governors, *bāshās* in urban areas, and *qā'ids* in rural regions.[195]

In pre-mandate Morocco, the legal system was characterized by a plurality of legal frameworks, and the boundaries between different types of jurisdiction were not well-defined due to the limited central authority.[196]

The Treaty of Fez, ratified on March 30, 1912, recognised Morocco as a French protectorate through a settlement between Morocco and France.[197] This Treaty promised the sultan's religious authority and supremacy while granting all executive power to the French.[198] The local law underwent significant alteration during the French Occupation of Morocco (1912–1956).[199] After the French protectorate over Morocco in 1912, the French increased governmental authority, partly through legal reforms. In October 1912, a judicial vizier was established to oversee the courts and consolidate all authorities related to the *qādīs*. Makhzen and *Sharī'ah* courts were preserved; however, the French limited the authority of the *Sharī'ah* courts only to handle matters pertaining to family law and property rights, significantly reducing their previous wide-ranging jurisdiction. The procedures of the shariʿa courts underwent reforms.[200]

During the period of French control, the Moroccan judicial system underwent a significant transformation by implementing two crucial decrees. The first was the *Ẓahīr* of 7 July 1914, followed by the *Ẓahīr* of 16 May 1930. These decrees transferred authority over most 'Berber' tribes to customary courts. Consequently, this action would exclude them from the authority of *Sharī'ah* courts. The 1930 Berber *Ẓahīr*, also known as the Berber Decree, sparked significant resistance and can be seen as a pivotal moment in the Moroccan nationalist struggle.[201] The French initially failed to recognise the crucial importance of custom in Islamic law across the Muslim world,

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[195] Baudouin Dupret & Adil Bouhya & Monika Lindbekk & Ayang Utriza Yakin, "Filling Gaps in Legislation: The Use of Fiqh by Contemporary Courts in Morocco, Egypt, and Indonesia", *Islamic Law and Society*, Vol. 26, No. 4 (2019): 5.
[196] Engelcke, Colonial Legal Legacies and State-Building, 53.
[197] Muannif Ridwan, Ahmad Syukri Saleh, Abdul Ghaffar, "Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law", ARRUS Journal of Social Sciences and Humanities, Vol. 1, No. 1 (2021): 17.
[198] Pennell, Morocco: From Empire to Independence, 136.
[199] Katherine E. Hoffman, "Berber Law by French Means: Customary Courts in the Moroccan Hinterlands, 1930-1956", *Comparative Studies in Society and History*, Vol.52, No. 4, (2010): 853.
[200] Engelcke, Colonial Legal Legacies and State-Building, 53-54.
[201] Dupret, et al., Filling Gaps in Legislation, 5.

especially in agricultural and rural matters. They also underestimated the substantial impact of *fiqh* on Berber customary law, mainly concerning personal status.[202]

Afterwards, resistance movements emerged against the French colony. Meanwhile, some parties were established to support the resistance. In May 1934, the Nationalist Front Party was founded. However, France dissolved this three years later. Then, in 1943, the ʿAllāl al-Fāsī led Istiqlal Islamic Party was formed, calling for Morocco to become an independent nation with a constitutional system of governance. In late 1946, the Istiqlāl party changed its direction to the Mass Party. However, the French exiled Muhammad V. in 1955, Sultan Muhammad V returned from exile, unexpectedly ending the French protectorate government on March 2, 1956; Morocco gained its independence from France.[203]

Family law was not codified throughout the protectorate era from 1912 to 1956. Upon achieving independence in 1956, the prioritization of legal reform was crucial. The implementation of family law reform was among the initial reforms undertaken in independent Morocco. The Berber dahirs were abolished on August 25, 1956.[204] The first personal status law of the country was enacted in 1957-1958. In 1993, the Moroccan Code of Personal Status was accepted. This Code remained in force until the last personal status law was adopted in 2004, Mudawwanat al-Usrah; it is adopted to this day.

This section aims to demonstrate these three personal status laws and the reasons for their enactment and repeal of the first two. Further, it focuses on the developments and amendments made by Mudawwanat al-Usrah.

3.4.2 The Stages of Development of Personal Status Laws in Morocco

This subsection reviews the codifications of Islamic family law in Morocco. It discusses the initial phases of the historical evolution of regulations: *Mudawwanat al-Aḥwāl al-Shakhṣiyyah* and *Mudawwanat al-Aḥwāl al-Shakhṣiyyah al-Maghrebayya*, which pertain to Islamic family law. The First Laws have garnered attention due to the

[202] Hoffman, Berber Law by French Means, 854.
[203] Ridwan, et al., Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law, 17.
[204] Engelcke, Colonial Legal Legacies and State-Building, 59-60.

significant impact of the *Mālikī* madhhab. Furthermore, the ongoing calls for Islamic family law reform by women's associations after implementing these laws and the subsequent reactions they have received were deliberated about. Moreover, it discusses the preparation process, legalisation processes, and various characteristics and clauses of the New *Mudawwanat al-Usrah*, implemented in 2004, highlighting its differences from prior laws.

3.4.2.1 Mudawwanat al-Aḥwāl al-Shakhṣiyyah (1957 Morocco Personal Status Law)

Al-Mudawwanat, a new family law, emerged after Morocco gained independence from French rule. While some researchers state that the first family law in Morocco was implemented in 1957, some researchers point to 1958. The truth of the matter is that the abolished Personal Status Code was issued on the day after Morocco's independence by five royal *Ẓahīrs*[205], the first of which was dated November 22, 1957, and the last of which was dated April 3, 1958.[206]

The first stage in the series of the historical development of the Mudawwanat began on 19th August 1957, a few months after independence, when King Mohammed V appointed the First Royal Committee to prepare a code regulating the family sphere. King spoke with *'ulāmā*[207] and utilised his religious position to codify the Mudawwanat based on historical *Mālikī fiqh*.[208] Morocco's first personal status was gained after a long struggle for its sovereignty and independence in legislation. Morocco has refused to dissolve into a different value system like all ancient countries. It was natural in such

[205] Ẓahīr (ظهير) or Royal Ẓahīr is a decree issued by the King of Morocco in his capacity as a supreme authority and a supreme representative of the nation.
See: <https://ar.wikipedia.org/wiki/ظهير_(المغرب)#الظهير_الشريف_التنفيذي> (Accessed on 26 February 2023). Royal Marsūm means that a royal decree issued by the king regarding state issues, including appointments and decisions. See: <https://www.almaany.com/ar/dict/ar-ar/ظهير-شريف/> (Accessed on 26 October 2023).

[206] See: Muḥammad Al-Kashbūr, *al-Wasīṭ fī Sharḥ Mudawwanat al-Usrah*, (Maghreb, Maṭbaʿat al- Najāḥ al-Jadīdah, al-Dār al-Bayḍā', 2nd edition, 2009). 11.

[207] The 1957–1958 Mudawwanat, which was developed by a commission consisting of ten male jurists and religious experts ('ulāmā) in collaboration with the royal court and the Ministry of Justice, updated the principles of the traditional Maliki Jurisprudence. See: Fatima Harrak, "The History and Significance of the New Moroccan Family Code", Working Paper No. 09 002, Institute for the Study of Islamic Thought in Africa (ISITA), The Roberta Buffet Center for International and Comparative Studies, Northwestern University, 2.

[208] Rachel Salia, "Reflections on a Reform: Inside the Moroccan Family Code, (Senior's thesis, Department of History", Columbia University. 2011). 24.

a context to re-codify the laws in all areas of life following the nation's nation's identity and the country's specificity.[209]

Al-Mudawwanah is the first of three regulations. This law faithfully followed the *Mālikī madhhab's* rules.[210] At first, the marriage law in Morocco was not significantly different from that in other Islamic countries, which the paradigm of the scholars in classical fiqh had strongly influenced.[211]

The provisions have been determined as law. It has been decided that references to the *Mālikī madhhab* will be made on matters not included in the text. If the code can not provide a solution, one must turn to the *Mālikī madhhab*. The new law's name hinted at its adherence to the classical *fiqh* tradition. The name *Al-Mudawwanat al-Kubrā* of Saḥnūn (d.854), one of the most well-known *Mālikī madhab'* works, literally means collection or code of laws.[212] The first Mudawwanah governs various aspects of family law, including marriage, divorce, inheritance, and child custody. Under Mudawwanah, men were permitted to engage in polygamy without obtaining their wife's agreement, while married women were legally obligated to comply with their husbands' commands.[213]

The majority of the distinctive features of the traditional *Mālikī madhhab* were included in the code. For instance, in a slightly altered form, the guidelines of *wilāyat al-nikāḥ*, guardianship in marriage, and the authority to force a daughter into marriage were included. In Morocco, a woman would never be able to consummate a marriage on her own; instead, she would always require the help of a male guardian for marriage (*Walī* or tutor). A judge's approval is needed with the Code before a parent can force a daughter to marry. The minimum age of marriage was determined by Mudawwanat, which is eighteen for boys and fifteen for girls. The Mudawwanat only accepted the sunnah method of divorce as being legitimate legally. Although polygamy was regarded as legal, it might cause the wife damage, or *ḍarar*, and thus constitute grounds for a

[209] Aḥmad Kāfi, al-Aḥwāl wa al-Usrah : "al-Ṣiyāqhah al-Madhabiyyah", *Majallah al-Furqān*, Vol.50, (2004): 44.
[210] Muḥammad al-Qāsimī. "Mazāhir al-Thābit wa al-Mutaghayyir wa al-Khuṣūṣiyyah wa al-Umamiyyah fī Taqnīn al-Aḥwāl al-Shakhṣiyyah al-Maghribyyah", *Majallah al-Bāhith lī al-Dirāsāt al-Qānūniyyah wa al Qaḍāiyyah*, No.8. (2018): 65.
[211] Sheila Fakhria & Siti Marpuah, "A Discourse of Mudawanah al-Usrah; Guaranteeing Women's Rights in Family Law Morocco's", *Tribakti: Jurnal Pemikiran Keislaman*, Vol. 33. No. 2 (2022): 309.
[212] Léon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere", *Islamic Law and Society*, vol. 10, no. 1 (2003): 73.
[213] Fakhria, ibid., 311.

court divorce.[214] Additionally, a woman could not initiate a divorce without her husband's approval. In contrast, a man does not need the court's consent to divorce his wife; he merely has the exclusive right to do so.[215]

After implementing the law, feminist groups urged the government to change the statute as it violated the concept of gender equality since it went into effect. According to Fatima Sadiqi, the women's movement was bitterly disappointed by the first Mudawwanat.[216] Sadiki calls the period from 1956 to the present the birth of Moroccan modern feminism.[217] Four years after issuing the Personal Status Code, the committee of court presidents submitted a draft amendment. On January 26, 1965, following the issuance of the Judiciary Unification Law, it presented another draft, but the two were not investigated. After that, a ministerial committee emanating from the Ministry of Justice was formed in 1974. It did not succeed in amending it, which is the same fate that sealed the work of the Royal Commission appointed on May 5, 1981.

Perhaps the reason for these successive failures is due to the absence of a national consensus among the various components of the political field and jurisprudential affairs activities in Morocco and the marginalisation of the role of civil society activities in the reforms of the women's movement in Morocco, which led to the unification of its ranks and entry into serious coordination work that would enable it to transform into a pressing force that has its weight in The country, which led to the amendment of the Personal Status Code on September 10, 1993.[218]

In brief, the debate over women and family status has occupied the central stage since 1958, when the first Code of Personal Status (Mudawwanat al-Aḥwāl al-Shakhṣiyyah) was implemented in Morocco.

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[214] Buskens, Recent Debates on Family Law Reform in Morocco, 74.
[215] Fakhria, A Discourse of Mudawanah al-Usrah; Guaranteeing Women's Rights in Family Law Morocco's, 313.
[216] Fatima Sadiki, "Morocco", In *Women's Rights in the Middle East and North Africa: Progress Amid Resistance*, edited by Sanja Kelly, Julia Breslin, (New York: Rowman & Littlefield Publishers, 2010), 311.
[217] Fatima Sadiki, "Aspect of Modern Moroccan Feminism", *Majallat al-Nawʿ al-Ijtimāī wa al-Tanmiah*, University of ʿAdan, No.1 (2007): 65.
[218] Fāṭimah Malūl, "Masār Ṣiyāghāh wa al-Taʿdīl Mudawwanat al-Usrah Al-Maghrebayyah", *Majallat al-Manārah li Dirāsāt al-Qānūniyyah wa al-Idāriyyah*: Special Issue on Family Law. (2019): 12-13.

3.4.2.2 Mudawwanat al-Aḥwāl al-Shakhṣiyyah al-Maghrebayya (1993 Moroccan Personal Status Code)

The Mudawwanat has been the subject of reform requests dating back to its codification. The government set up an official commission in 1965. It began looking for ways to change the family law by recognizing shortcomings in the family law, such as in its rules concerning marriage guardianship and maintenance. The first significant reform call movement started in 1982, but it was not until the 1990s that these demands turned into a contentious discussion.[219] To support the revision of the Family Code, Moroccan women's rights organizations started voicing their opinions on a new reading of the Qur'ān and ḥadīth with the development of Islamism in the 1980s and 1990s. The One Million Signatures campaign, a petition calling for amendments to the Family Code, was started in 1992 by the Union de l'Action Féminine (UAF).[220] Opposite of this, Islamist organizations criticized this, viewing it as a severe threat to Islam in Morocco. One Islamist movement, Jama'at al Islah wa al Tajdid (Association for Reform and Renewal), even produced a fatwa calling the campaign apostasy.[221]

The 1990s are considered the most significant years in the development of the Mudawwanat due to the great movement, which culminated in the issuance of the Personal Status Code on 10th September 1993. The Moroccan monarchy, understanding the significance of women's rights in the divisive struggle between the secular and Islamist opposition, implemented a limited but symbolic change in 1993.[222]

Regulations were made in the law on the following issues: the right to guardianship of children, divorce, polygamy, arbitration and conciliation (*muṣālaḥah*), custody, and alimony.[223] The removal of the institution of the *Walī* for orphaned women and the establishment of the public explicit consent of the bride to marriage were the two most significant improvements to the Mudawwanat in Morocco.[224] Polygamy and

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[219] Leila Hanafi, "Moudawana And Women's Rights In Morocco: Balancing National And International Law", *ILSA Journal of International & Comparative Law*: Vol. 18 No. 2 (2012): 517.
[220] Rachel Olick-Gibson, From the Ulama to the Legislature: Hermeneutics & Morocco's Family Code, Independent Study Project (ISP) Collection. 3362. (2020): 7. <https://digitalcollections.sit.edu/isp_collection/3362> (accessed 18 January, 2022).
[221] Harrak, The History and Significance of the New Moroccan Family Code, 3.
[222] Emanuela Dalmasso &Francesco Cavatorta, "Reforming the Family Code in Tunisia and Morocco – the Struggle between Religion, Globalisation and Democracy", *Totalitarian Movements and Political Religions*, Vol. 11. No. 2. (2010): 18.
[223] Muḥammad al-Azhar, *Sharḥ Mudawwanat al-Usrah*, (Maghreb, al-Dār al-Bayḍā',7th edition, 2015), 9.
[224] Emanuela Dalmasso, Reforming the Family Code in Tunisia and Morocco, 18.

a husband's unilateral rejection of his wife are now subject to judicial approval, and financial compensation procedures for repudiation are made more strict. Legal guardianship of children is now granted to the mother, with custody laws clarified in her favour.[225]

However, these reforms did not meet the aspirations of the women's associations that escalated their demands.[226] Furthermore, these amendments, which were initially cheered, soon became the subject of harsh criticism, as in the eyes of the critics, they were only red herring and cheating. According to them, these amendments were unhelpful and useless, and what was required, in their view, was to reconsider the Personal Status Code in a radical way that put an end to the inferiority of women in the context of their relationship with their husbands or with men in general. However, these associations have recorded that the amendment had only one positive effect: removing immunity of the *Mālikī* provisions from change and rejection.[227]

The stage lasted from the 1970s to the beginning of the 1990s, when the demands of the women's movement were towards granting radical change to some provisions in the Code, especially those related to settlement of inheritance, abolition of polygamy, and guardianship. The reactions to these demands were sharp and sometimes harsh, mainly when focused on the provisions constituting the Islamic system's legislative specificity.[228] As a result, the desired goal was not achieved.

It is necessary to mention the organization called CEDAW[229] because it affected the events after this period. CEDAW is an international legal document that mandates governments to end all forms of discrimination against women and girls and supports equal rights for women and girls. The United Nations General Assembly approved the Convention on the Elimination of All Forms of Discrimination Against Women on December 18, 1979. It became an international convention on September 3, 1981, after the twentieth country approved it.[230]

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[225] Harrak, The History and Significance of the New Moroccan Family Code, 3.
[226] Elachi Nouara, "Taqnīn al-Aḥkām al-usrah fī al-Jazāir wa bāqī Duwal al-Maghrib al-ʿArabī", *Majallah Dirāsāt wa Abḥās*, University of Djelfa, Vol. 11, No. 2 (2019): 306.
[227] Muḥammad Al-Kashbūr, *al-Wāḍiḥ fī Sharḥ Mudawwanat al-Usrah*, (Maghreb, Dār al- al-Āfāq al-Maghrebayya, 3nd edition, 2015). Vol.1, 12.
[228] Khadījah Mufid, "Mudawwanat al-Usrah: 'Ay Jadīd", *Majallat al-Furqān*, No.50. (2004): 13.
[229] Convention on the Elimination of All Forms of Discrimination Against Women.
[230] Convention on the Elimination of All Forms of Discrimination against Women <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (accessed 30 October, 2023).

Morocco ratified this agreement in June 1993; nonetheless, it was never published in *al-Jarīdah al-Rasmiyyah* (Official Gazette)[231] and subsequently pledged to embody the principle of equality between men and women in the Constitution and its legislative system by amending or abolishing existing laws, regulations, customs and practices that constitute discrimination against women by the requirements of Article 2 of the Convention, to eliminate all other practices based on the idea of the inferiority or superiority of one sex over the other as required by the first paragraph of Article Five of the Convention on the Elimination of All Forms of Discrimination Against Women.[232] Furthermore, Morocco preserved some objections to the Convention, preventing it from being wholly ratified.[233]

The reform pressures on Muslim countries from outside and the efforts of women's movements and associations within them revealed the need for a new reform for the third time. However, scholars who stood against this argued that these regulations should be under the umbrella of Islām and following society. According to them, their opposition does not mean that the family's conditions did not need reform. Instead, Aḥmad Kâfî says, the requirements of the family, politics, economy, society, culture, and thought are all spurs that need accurate, rational reforms under the umbrella of the nation's reference, identity, and constitution, which is Islām. Citing from ʿAllāl al-Fāsī, "There is no doubt that it is the remnants of the colonial influence that prevents us from imposing national law, especially in the private-public order, on foreigners and the Jewish minority." Moreover, they considered it an anomaly in that the patriots belonging to the non-Islamic religious groups continued to maintain judicial exceptions, which, in many cases, were a sign of chaos and disorder. [234]

Despite opposition from the *ʿulamā* and Islamist groups, women's movements prompted public debate on the subject. In response to this pressure, King Hassan II formed a commission of male judges and religious officials to review the Family

[231] Rachel Salia, Reflections on a Reform: Inside the Moroccan Family Code, 10.; Olick-Gibson, From the Ulama to the Legislature: Hermeneutics & Morocco's Family Code, 8.
[232] Hay'at Al-Taḥrīr, Taṭawwur al-Waḍʿ al-Ḥuqūqī li al-Mar'at Al-Maghrebayyah min Mudawwanat Al-Aḥwāl Al-Shakhṣiyyah li Sanat 1957 ilā Mudawwanat Al-Usrah li Sanat 2004 : Mudakhalat fī al-Nadwat Al-Duwaliyyah al-Munazzamah min Taraf Muassasat Al-Bayt Al-ʿArabī bi Madrid bi Isbānyā Yawm 4/11/2009, (Maghreb, Oujda, Kulliyyat al-ʿUlūm al-Qānūniyyah wa al-Iqtiṣādiyyah wa al-Ijtimāʿiyyah bi Oujda -Mukhtabar al-Bahth fī Qānūn al-Usrah wa al-Hijrah, 2008): 291.
[233] Rachel Salia, Reflections on a Reform: Inside the Moroccan Family Code, 10.
[234] Kāfi, al-Aḥwāl wa al-Usrah : al-Ṣiyāqhah al-Madhabiyyah, 44-45.

Code.[235] Consequently, The Mudawwanat was amended by Royal Decree (Ẓahīr) as a law issued on September 10, 1993, at the request and insistence of women's associations and with the support of the country's King Hassan II.[236]

3.4.2.3 The History of Personal Status Law Development in Morocco (Mudawwanat al-Usrah) in 2004[237]

When King Mohammed VI assumed the throne in 1999, he vowed to improve gender equality in Moroccan society.[238] There were firm hopes that his government would advance human and women's rights. Indeed, ʿAbd al-Raḥmān el-Youssoufi, Prime Minister in the rotational government, which the Socialist Union of Popular Forces led at the time, prioritized gender equality in his government. In this favourable environment, women's non-governmental organizations (NGOs) started a massive push to encourage women's involvement in public life and development with World Bank funding.[239] Following the government statement announced on April 17, 1998, presented by Al-Youssoufi, a gradual reform of the Personal Status Code was promised within the framework of respect for the values of the true Islamic religion.[240]

In 1999, a draft national plan was launched for integrating women in the development process.[241] This action plan heightened the discussion, beginning with concrete initiatives from education to reproductive health and economic empowerment.[242] Without going into the details of the draft plan -which, according to its authors, aims to improve the social and financial status of women- it is only mentioned that the part related to personal status had caused a significant uproar within Moroccan society, as a trend emerged that strongly supported it and another that

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[235] Olick-Gibson, From the Ulama to the Legislature, 8.
[236] Al-Kashbūr, *al-Wāḍiḥ fī Sharḥ Mudawwanat al-Usrah*, 12.; Harrak, The History and Significance of the New Moroccan Family Code, 3.
[237] For the text of the law See: Mudawwanat al-Usrah (Moroccan Family Law of 70.03). (2004). <https://cassation.cspj.ma/uploads/files/maktaba/07/20%الأسرة20%مدونة(1).pdf> (Accessed on 26 February 2023).
[238] Olick-Gibson, ibid.
[239] Harrak, The History and Significance of the New Moroccan Family Code, 4. Because the initiative was backed by the World Bank, Islamists claimed that the changes were a neocolonial endeavor to secularize Moroccan society. Thousands of women marched with Islamists in Casablanca. See: Olick-Gibson, From the Ulama to the Legislature, 8.
[240] Al-Kashbūr, *al-Wasīṭ fī Sharḥ Mudawwanat al-Usrah*, 12.
[241] Harrak, The History and Significance of the New Moroccan Family Code, 4.
[242] Fakhria, A Discourse of Mudawanah al-Usrah; Guaranteeing Women's Rights in Family Law Morocco's, 314.

strongly opposed it. This project constituted a decisive turning point in the material and psychological preparation for the emergence of the Mudawwanat. Moreover, this policy led to a new turning point that resolved the dispute immediately after the royal announcement.[243]

Perhaps the point that became the final straw is what was stated in the French text of the plan: Referring to Islamic legal traditions will not be acceptable unless those traditions prove their ability to take care of social transformations, conditions of economic development, and the requirements of democracy. These statements sparked violent reactions from opponents of the civil or secular model of family law, and this applies to the report of the Scientific Committee of the Ministry of Endowments (Awqāf) and Islamic Affairs (May 15, 1999), which saw that the divine rule of *Sharī'ah* makes it above conditions and circumstances, whether they have a social, economic, or political dimension.[244]

It was no secret that when the conflict over the family raged locally, this came within the framework of global pressure on Islamic countries, including Morocco, as was witnessed by the raging conflict at the Cairo Population Conference and the Beijing Conference for other international conferences and agreements. It must be pointed out that no one dared to call for its reform in the Code of Conditions for Jews in Morocco, and the Muslim Code was not published for several reasons. It was no longer considered an abomination in the era of Zionist arrogance.[245]

Finally, Sultan Muhammad VI formed a commission to revise the Mudawwanat al-Aḥwāl al-Shakhṣiyyah a year after the demonstrations in Casablanca and Rabat in 2001 in response to these critiques and ideas. Politicians, judges, clergy, women's activists, intellectuals, and academics made up the commission.[246] At the same time, the King enhanced the public stature of women by appointing ten women to key posts

[243] Madhal li dirāsah qānūn al-aḥwāl al-shakhṣiyyah, 12.
[244] Al-Kashbūr, *al-Wasīṭ fī Sharḥ Mudawwanat al-Usrah*, 13.
[245] Kāfi, al-Aḥwāl wa al-Usrah: al-Ṣiyāqhah al-Madhabiyyah, 44.
[246] The Royal Commission's work was divided into three stages. First, it received presentations from civil society members from various sectors. Following that, it examined the family laws of other Muslim-majority nations. Finally, the Royal Commission debated the statutes' fundamental foundation. Some members suggested that the new code should be based on international human rights accords, while others underlined the need to base the new code on *Shari'ah*. Following these discussions, the Royal Commission made recommendations to the King. Instead of issuing the reforms by royal decree, as previous monarchs did, King Mohammed VI submitted the revisions to Parliament in October 2003. See: Olick-Gibson, From the Ulama to the Legislature, 9.

in government.[247] However, the final push for reform came after the May 2003 terrorist attacks in Casablanca stoked widespread antifundamentalist sentiment.[248] After that, the rest of Parliament, on 10th October 2003, announced the fundamental amendments to the Family Code.[249]

The final version of the new Mudawwanat al-Usrah was approved in January 2004. The law entered into force on February 3, 2004.[250] It established numerous significant rights for women, including the right to self-guardianship, divorce, and child custody. It also imposed additional limitations on polygamy, raised the legal marriage age from 15 to 18, and made sexual harassment a crime. On the other hand, the New law did not wholly eliminate polygamy, unilateral husband divorce of wife, separation by khulʿ, or inequality in inheritance regulations.[251] The changes also eliminated the legal obligation of a wife's submission to her husband and stated that both the husband and the wife are joint leaders of the family; moreover, it recognises their collective responsibility in raising the children. Nevertheless, according to *Fiqh*, the husband is still legally compelled to support his wife financially.[252]

According to women's movements demanding reform for years, establishing the Moroccan Family Law of 2004 is a triumph for women's rights and a step toward changing the husband-wife power dynamics in the home because women have had restricted access to their rights since independence. Since independence in 1956, the role of women in the public sphere of post-colonialism in France has experienced considerable transformations.[253] So, Morocco's new family law is unquestionably a progressive piece of legislation for Moroccan women due to the two characteristics of family law that distinguish it. First, it recognizes marriage equality by rethinking the concept of power in the family within an Islamic context. Second, the reforms came about due to decades of Moroccan women's agitation for improved access to justice.[254]

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[247] Fakhria, A Discourse of Mudawanah al-Usrah, 314.
[248] Sadiki, Morocco, 312.
[249] Madhal li Dirāsah Qānūn al-Aḥwāl al-Shakhṣiyyah, 12.
[250] Al-Kashbūr, *al-Wasīṭ fī Sharḥ Mudawwanat al-Usrah*, 21.
[251] Sadiki, ibid., 313.
[252] Hanafi, Moudawana And Women's Rights In Morocco, 518-519.; al-Qāsimī. Mazāhir al-Thābit wa al-Mutaghayyir wa al-Khuṣūṣiyyah wa al-Umamiyyah fī Taqnīn al-Aḥwāl al-Shakhṣiyyah al-Maghribyyah, 70.
[253] Fakhria, A Discourse of Mudawanah al-Usrah, 315.
[254] Hanafi, ibid., 515.

The Moroccan society accepts the application of the Mudawwanat al-Usrah. Everyone accepted this family law after a long discussion and heated debate between opinion and societal currents. The King played a significant role in resolving this issue.[255] Hallaoui further asserts that family law enjoys widespread acceptance, attributing this to its legal authority and the judiciary's role in its enforcement. He adds that there exist individuals who do not endorse this legislation, a circumstance that is observed in all nations. Nevertheless, the prevailing consensus among the general populace and diverse perspectives has primarily embraced the broad principles articulated in the legislation. Given that it adhered to Islamic sources and maintained impartiality within the family, except for the other party involved.[256]

3.4.2.4 The Applicability of the Existing Family Law within the Jurisdiction and Efficacy of in Addressing Familial Challenges

The application of the Family Code is predominantly proportionate due to the occasional conflict between law provisions and their interpretations in practical contexts. All contracts on familial matters reference the Mudawwanat and are subject to its governance when resolving legal disputes.[257] Hilawi drew attention to the fact that Family Law has been effectively implemented since 2004. He was a judicial regular in the attorneys' courts, and he was watching applied in all its clauses. [258]

There has been a demand for reform in the family law in Morocco for years, so every king who took over the administration has issued a new family law. Finally, the 2004 Family law reform calls did not go unanswered, especially since the women's movements effectively included their wishes in the law. Despite this, the participants stated that this law is not sufficient to solve the problems concerning the family. ʿAbd Allāh Yāsir states that family problems are very diverse and complex, and the legal approach alone is not adequate to solve family problems. Therefore, he suggests

[255] ʿAbd Allāh Yāsir al-Ghurmūl, Interviewed by Selman Zahid Ozdemir, Morocco, (04.01.2023). ʿAbd Allāh Yāsir al-Ghurmūl is a Moroccon Lecturer holding PhD in *Sharīʿah/Fiqh* and *Usūl al-Fiqh*. Currently working in Université Sidi Mohamed Ben Abdellah de Fès.
[256] Saʿīd Hallaoui, Interviewed by Selman Zahid Ozdemir, Morocco, (29.10.2022). Saʿīd Hallaoui has been a qualified Professor of higher education at the Faculty of Arts at Mohammed V University in Rabat since 2011 after spending eleven years as a judicial delegate at the Ministry of Justice. Now, he is a professor of family sociology at the same university. He attended meetings and gave many interviews about family mediation and Mudawwanat al-Usrah.
[257] ʿAbd Allāh Yāsir al-Ghurmūl, Interviewed by Selman Zahid Ozdemir, Morocco, (04.01.2023).
[258] Saʿīd Hallaoui, Interviewed by Selman Zahid Ozdemir, Morocco, (29.10.2022).

consolidating diverse initiatives and organisations to mitigate familial challenges. For instance, these endeavours include the Mosque Foundation and Scholars, diverse media platforms, family mediation facilities, and other similar initiatives.

Hallaoui, similar to ʿAbd Allāh Yāsir, contends that reliance solely on legal measures will prove insufficient. Hallaoui proposes further recommendations, including promoting family awareness and supporting families. Additionally, it implies the necessity of establishing supplementary societal frameworks to assist the family unit. The law constitutes a pillar of resolving family problems, but other structures must support the family, including educational institutions, rehabilitation, and others.

3.4.2.5 To What Extent Does the Application of Family Law Contribute to the Reduction of Family Cases Brought Before the Courts?

ʿAbd Allāh Yāsir asserted that relying on legal measures is insufficient to mitigate family issues. Sometimes, it may worsen the situation, resulting in family breakdown, disharmony, and marital dissolution. The foundation of law is inherently rooted in conflict and disagreement. The institution of the family encompasses the values of benevolence, compassion, collaboration, and fondness. He claims that enacting the Mudawwanat has resulted in a notable increase in divorce cases, as seen by several media reports highlighting the escalating divorce rates within the judicial system, particularly in recent times. Consequently, before initiating legal proceedings, he proffers a suggestion, underscoring arbitration's efficacy in resolving disputes between married individuals. Hence, it is imperative to establish alternative avenues before resorting to legal proceedings, primarily focusing on initiating the arbitration process between married partners. To reconcile and safeguard the integrity of the family unit, the individual aims to address the existing division and prevent its potential dissolution.[259]

Hallaoui shares the same points of intersection with Yāsir. Hallaoui assumes that the reduction of issues is not causally linked to the deployment of the Code. Preexisting problems have been collected. He points out that the law is beneficial and contributes to Mudawwanat's presence in finding channels to resolve these problems. At this juncture, he also underscores the significance of the family mediation institution.

[259] ʿAbd Allāh Yāsir al-Ghurmūl, Interviewed by Selman Zahid Ozdemir, Morocco, (04.01.2023).

Developing a family mediation apparatus can potentially decrease the number of cases. This can be achieved by establishing a legal framework that governs family mediation. Within this framework, judges can utilise mediators as experts in family matters, enabling them to facilitate reconciliation processes and similar interventions.[260]

As a result, the law will not reduce the number of cases. However, it will reduce the problems of other things, such as family mediation and family experts. More importantly, there is an urgent need to implement different measures before taking cases to the courts.

3.4.3 Provisions of the Mudawwanat Al-Usrah of 2004

This subsection discusses whether the new Mudawwanat is similar to the preparation process of the two previous family laws and whether it is under the influence of the *Mālikī madhhab*. The new family law features distinct provisions compared to the earlier family laws. It grants women several rights, such as self-guardianship, divorce, and child custody. These rights continue to be a topic of ongoing discussion.

3.4.3.1 Is it Different from the Previous Personal Status Laws in Morocco?

As stated in the above sections, the Mudawwanat al-Aḥwāl al-Shakhṣiyyah of 1957 did not deviate from the general context of Islamic countries, so they chose the Moroccan school of thought, the *Mālikī madhhab*. The report of the Royal Committee in 1957 stated the following: If we want to codify jurisprudence in Morocco to bring it closer to the Moroccan courts, we must take into account the Maliki madhab as much as possible, taking into account the general principles, especially *al-Maṣlaḥah al-Mursalah*.[261] This confession was translated in the eighty-second chapter by saying: Everything that is not covered by this law is referred to the most correct (*al-Rājiḥ*) or well-known (*al-Mashūr*), or what was done in the doctrine of Imām Mālik.[262]

The members of the First Committee were aware of the non-adherence to the madhab, as it was more likely to seek the *maṣlaḥah* wherever it was and to bring ease

[260] Saʿīd Hallaoui, Interviewed by Selman Zahid Ozdemir, Morocco, (29.10.2022).
[261] Kāfi, al-Aḥwāl wa al-Usrah : al-Ṣiyāqhah al-Madhabiyyah, 46.
[262] Harrak, The History and Significance of the New Moroccan Family Code, 2.

to the nation and remove difficulty from it. This is the exact course followed by the Committee of 1993 and the Committee of the Mudawwanah al-usrah of 2004.[263] As for the law in 2004, whatever is not included in this code should be referred to *Mālikī* Jurisprudence, which considers the realization of the Islamic values of justice, equality, and good relations (Article 400).[264]

In general, the new Code did not depart from the circle of Islamic law, according to many *'ulamā, fuqahā*, organizations, and associations led by Aḥmad Al-Raysūnī. All political and scientific organizations unanimously welcomed the new Mudawwanah and considered it a historical turning point in the history of Morocco. They expressed this by engaging in a wide-ranging awareness-raising campaign among the Moroccan people. Despite all this, some small women's associations are still trying to pressure parliamentarians to obtain gains and achieve some desirable adjustments.[265]

3.4.3.2 The Provisions of the Mudawwanat Al-Usrah of 2004

The new family law has different provisions on some issues from the two previously in-force family law laws. It established numerous significant rights for women, including the right to self-guardianship, divorce, and child custody. It also imposed additional limitations on polygamy, raised the legal marriage age from 15 to 18, and made sexual harassment a crime.[266] The changes also eliminated the legal obligation of a wife's submission to her husband and stated that both the husband and the wife are joint leaders of the family; nevertheless, according to *Fiqh*, the husband is still legally compelled to support his wife financially.[267]

3.4.3.2.1 Polygamy

The issue of polygamy has caused fierce debate in Morocco for many years and has always remained on the agenda. It has been desired to abolish polygamy since the first family law was enacted with the support of women's movements and international

[263] Kāfī, al-Aḥwāl wa al-Usrah: al-Ṣiyāqhah al-Madhabiyyah, 46.
[264] Al-Kashbūr, *al-Wasīṭ fī Sharḥ Mudawwanat al-Usrah*, 22.
[265] Madhal li Dirāsah Qānūn al-Aḥwāl al-Shakhṣiyyah, 12.
[266] Sadiki, Morocco, 313.
[267] Hanafi, Moudawana And Women's Rights In Morocco, 518-519.

organizations. However, it was not abolished even in the new law in 2004. Only some restrictions have been introduced.

Polygamy is addressed in the 1958 Family Law Code Article 30 paragraph (1), which states that "having more than one wife is not permitted if it is feared that there will be injustice between the wives." However, the 1958 legislation does not provide the authority to evaluate a husband's competence to practice polygamy; this capacity is entirely reliant on the husband; if the husband believes he will not be able to act honourably, he can only practice monogamy.[268]

Polygamy is still legal in Morocco. Nevertheless, unlike previous family laws, polygamy is now subject to stringent legal conditions: a prospective wife can stipulate that the contract of marriage is conditional on the husband-to-be's pledge not to take a second wife; the wife's consent is required before any new marriage can be contracted; the wife has the right to divorce if she does not accept the polygamous situation; and the Family Judge is in charge of verifying that there is no presumption of iniquity and that the husband is capable of guaranteeing fair treatment of wives.[269] Although there is no statement from a woman regarding the monogamy clause, the court has the authority to break their marriage if both marriages cause the first wife harm.[270]

Consequently, as stated between articles 40 and 45, polygamous marriages now require judicial approval rather than the husband's discretion. Second, the spouse must show that he needs a second marriage. Third, the woman has the right to add in the marriage contract the requirement that her husband not take another wife (monogamy clause).[271] Besides all these, the husband's marital status must also be disclosed to the prospective new spouse.[272]

Polygamy is not prohibited and punished by the *ʿulamā* of the *madhāhib*, including the *Mālikīs*. All scholars merely need obligatory criteria for being fair to polygamous actors. If prospective polygamous actors are concerned about their ability to perform justice, the majority of ʿulamā advise them to stay monogamous. From a

[268] Ridwan, Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law, 20-21.
[269] Harrak, The History and Significance of the New Moroccan Family Code, 7.; Hanafi, Moudawana And Women's Rights In Morocco, 519.
[270] Nasiri Nasiri, "Marriage in Morocco: A Practices of The Mudawwanatul Usrah Law in The Land of Guardians", *International Journal of Islamic Thought and Humanities*, Vol. 1. No. 1 (2022): 35.
[271] Fakhria, A Discourse of Mudawanah al-Usrah, 317.
[272] Sadiki, Morocco, 319.

certain point of view, in the matter of permitting polygamy, family law reform in Morocco does not depart from the classical Mālikī madhab that it adheres to because polygamy is still allowed. Family law in Morocco requires the husband's ability to act fairly if he wants to be polygamous.[273]

3.4.3.2.2 Legal Marriage Age

According to the legislation, the minimum age to marry is eighteen years, and both men and women must now be eighteen years old.[274] Article 19 states that men and women gain the ability to marry when they reach eighteen, overturning the 1957 Mudawwana's assertion that women may marry at the age of fifteen.[275] However, the judiciary was authorised to allow marriages under eighteen due to specific conditions.[276]

3.4.3.2.3 Matrimonial Guardianship (The Role of Walī)

One of the most important developments of the new law for women is that it eliminates the necessity for a woman to obtain the authorisation of a *Walī* before making a marriage contract. The position of *Walī* enters the picture only when the woman requests it herself. So, this right is optional for women. According to the law, a woman of legal age can marry off her own free will, without or with a tutor of her choice. Article 24-25 of this law stated: "Marital tutelage is a woman's right that she can exercise after she reaches majority, according to her preferences and interests."[277] Furthermore, "A woman of legal majority may sign her marriage contract alone or transfer this authority to her father or a relative."[278]

This modification to the Mudawwanah is based on the legal view of the *Ḥanafī madhhab*, which holds that women are not required to have a *Walī*. Even though Morocco and the family code are traditionally founded on the *Mālikī fiqh*, which

[273] Ridwan, Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law, 21.
[274] The 2004 Mudawwanat al-Usrah, Article 19.
[275] Salia, Reflections on a Reform: Inside the Moroccan Family Code,39.; Nasiri, Marriage in Morocco, 29.; Harrak, The History and Significance of the New Moroccan Family Code, 7.
[276] In response to Article 19, Article 20 states that any Family Affairs Judge may permit a marriage under this legal age of marriage after hearing the parents or legal tutor of the minor who has not yet achieved the age of competence. See: The 2004 Mudawwanat al-Usrah, Article 20.
[277] The 2004 Mudawwanat al-Usrah, Article 24.
[278] The 2004 Mudawwanat al-Usrah, Article 25.

mandates marital guardianship for women, the new family law reforms base their judgment on the legal opinion of the *Ḥanafī madhhab* on this topic.[279] At this point, Khadījah Mufid states that, despite the concerns expressed by most parents and girls in society, removing the guardian requirement in the marriage of an 18-year-old individual will cause some problems. For example, if an individual who gets married at 18 has issues with her husband, the state does not care about this individual until the age of 25, and she needs the care of her family, which is a contradiction.[280]

Nonetheless, at 15, any youngster may still marry under the supervision of a tutor based on a sociological inquiry.[281] Article 21 of the new Mudawwanah states, "A minor's marriage is subject to the approval of their legal tutor. The legal tutor's permission is conveyed by signing the marriage authorisation petition with the minor and being present during the marriage contract's signing. If the minor's legal tutor refuses to consent, the Family Affairs Judge decides the subject."[282] As a result, a judge/court can still approve a minor's marriage.

3.4.3.2.4 The Equality Between Spouses and the Woman's Obedience to Her Husband

The calling for equality that has been going on for more than forty-five years has found its response in the new Mudawwanah. After Morocco signed the international convention called CEDAW in the early 90s and the plan aimed at integrating women into society in 1999, equality between men and women was achieved in the new 2004 Mudawwanat provisions with the support of the New King. These amendments are significant because they position Morocco second in the Arab world in terms of gender equality in family law. 2004 Mudawwanat changes also modified the legal formulation of gender roles inside the family.[283]

The most striking of these changes are related to the authority issues between husband and wife, which women's movements also emphasize. Previous family codes

[279] Olick-Gibson, From the Ulama to the Legislature, 20-21.
[280] Mufid, Mudawwanat al-Usrah: 'Ay Jadīd, 16.
[281] Salia, Reflections on a Reform: Inside the Moroccan Family Code,39-40.; Fakhria, A Discourse of Mudawanah al-Usrah, 316.
[282] The 2004 Mudawwanat al-Usrah, Article 21.
[283] Mounira M Charrad, "Family Law Reforms in the Arab World: Tunisia and Morocco", Report for the United Nations Department of Economic and Social Affairs (UNDESA), Expert Group Meeting, New York, (2012): 2.

in Morocco authorized only the husband to organize the marriage and demand obedience from the woman. Because earlier laws were based on the idea of *qiwāmah*,[284] it granted husbands sole power in family issues.[285] However, the new Family Code constitutes a landmark in the history of Moroccan women's struggle for equality.[286] This new legislation upholds the principle of equality between men and women by introducing joint and equal responsibility within the family, equality in rights and obligations within the household, and suppression of guardianship of a male family member. It resulted in removing Moroccan women's legal need to obey their husbands.[287] However, financially, the husband is still legally compelled to support his wife.[288] The law approved the principle of sharing money between spouses.[289] Another issue is that the law allowed the granddaughter and grandson on the daughter's side the right to inherit from their grandfather, just as the grandchildren on the son's side, in keeping with the principles of *Ijtihād* and justice in the compulsory legacy.[290]

Sharīʿah brings about partial and total transformations; on the one hand, the transition from the supervision of the man alone over the family to the formation of the family under the supervision of the spouses, as stipulated in the Mudawwanah. After that, it can be expected that the family will move on two scales. The family is no longer under the man's leadership alone but under the spouses' leadership. The application of the Code means that it has brought about a kind of compatibility with transformations in society and compatibility with international conventions. It came to satisfy the expanse between men and women, but it also returned a kind of balance within the family.[291]

According to ʿAbd Allāh Yāsir, implementing the Family Law brought about many changes in families, foremost of which is the improper understanding of the Law on the part of a significant percentage of women. He points out a misunderstanding in this regard. Hence, women understood that the law rebelled against men, glorifying

[284] The new law deleted the terms *Ṭāʿah* (obedience) and *Qiwāmah* (marital guardianship), and the law also abolished some phrases that established the inferiority of women and affected their humanity and dignity. See: Hay'at al-Taḥrīr, Taṭawwur al-Waḍʿ al-Ḥuqūqī li al-Mar'at Al-Maghrebayyah min Mudawwanat Al-Aḥwāl Al-Shakhṣiyyah li Sanat 1957 ilā Mudawwanat Al-Usrah li Sanat 2004, 317.
[285] Olick-Gibson, From the Ulama to the Legislature, 21.
[286] Harrak, The History and Significance of the New Moroccan Family Code, 7.
[287] Fakhria, A Discourse of Mudawanah al-Usrah, 316.; Sadiki, Morocco, 316.
[288] Hanafi, Moudawana And Women's Rights In Morocco, 519.
[289] Nouara, Taqnīn al-Aḥkām al-Usrah fī al-Jazāir ve bāqī Duwal al-Maghrib al-ʿArabī, 306.
[290] See: Preamble of the Mudawwanat 2004.
[291] Saʿīd Hallaoui, Interviewed by Selman Zahid Ozdemir, Morocco, (29.10.2022).

equality and making women dare against men and family institutions. There has been a change in the level of understanding and digestion on many issues, such as family leadership, rights, and participation in family funds.[292]

3.4.3.2.5 Divorce

The 2004 revisions further safeguard women in divorce cases by putting unilateral repudiation (still legal for males and without requiring justification) under court scrutiny. A wife must now be there for her to understand that she is being divorced. Under the previous code, a husband might divorce his wife orally and without the need for court permission.[293]

Articles 53-58 of the 1957 text stated that the only means for a woman to get a divorce was by mutual repudiation, and only if the wife paid her husband compensation (*khulʿ*).[294] A wife's choices for divorce in the 1957-58 Mudawwana needed sufficient proof of the reason for desertion, failure to give financial support, damage, absence, or incarceration. However, in addition to the previous kinds of divorce, there are now two additional ones: mutual consent, started by both couples (consensual divorce), and irreconcilable differences (*shiqāq*), launched by any spouse. Most importantly, women may now file for divorce lawfully.[295] That means that women now have the right to divorce on their own.[296] In Article 49[297], the Moudawana laws allowed spouses to pre-agree on how marital assets would be distributed in the event of a divorce.[298]

One of the other advantages of the Code is that the harm added is moral, and before, there was material harm only. The wife can ask for divorce due to moral damage, such as if the husband has terrible manners, such as being a gambler, or if he is not in the woman's religion, or is one of those who break the fast in *Ramaḍān*, this was

[292] ʿAbd Allāh Yāsir al-Ghurmūl, Interviewed by Selman Zahid Ozdemir, Morocco, (04.01.2023).
[293] Olick-Gibson, From the Ulama to the Legislature, 22.
[294] Salia, Reflections on a Reform: Inside the Moroccan Family Code,40-41.
[295] Charrad, Family Law Reforms in the Arab World: Tunisia and Morocco, 8.
[296] Salia, ibid.,40.
[297] Each of the two spouses owns an estate distinct from the other. However, the two spouses may agree on their investment and distribution under the asset management framework throughout the marriage. This agreement is stated in a separate written document from the marriage contract. At the time of the marriage, the public notaries advise the two parties of these requirements. In the absence of such an agreement, general standards of evidence are applied, taking into account the labour of each spouse, the efforts made, and the obligations accepted in the growth of the family assets. See: The 2004 Mudawwanat al-Usrah, Article 49.
[298] Olick-Gibson, ibid., 21.

added.[299] Law with, all divorces must undergo a reconciliation phase and be finalised within six months, but in practice, divorce is a time-consuming process that might take months.[300]

3.4.3.2.6 Hukm Abortion for Rape and Incest

Morocco makes abortion for rape and incest lawful. In circumstances of rape and incest, the Moroccan government permits abortion. Before the decision to legalise abortion, in some instances, the country declared abortion illegal. The law is the same as the law forbidding abortion after the spirit has been blown into the fetus. While the abortion has not reached the age of 40 days, then the law is allowed.[301]

3.4.3.2.7 Child Custody

The Mudawwanat of 2004 also brings the notion of the child's best interests into Moroccan family law and broadens women's and children's rights in paternity issues.[302] If a woman remarries in the unreformed Mudawwanat, she loses custody of her children. However, some amendments have been made to the new code, subject to certain restrictions. Provisions regarding custody are regulated between Articles 173 and 179 of the new code.

In the following circumstances, the custodial mother's marriage shall not result in the loss of her custody of the child, as stated in Article 175[303]:

a. If the kid is under the age of seven or if the separation would cause him or her harm,

b. If the kid has a disease or a disability that makes custody difficult for anybody other than the mother,

[299] Muṣṭafā bin Ḥamzah, "Naẓarāt fi Mudawwanat al-Usrah". In *Qawāʿid Fiqh al-Usrah fī Fiqh al-Mālikī*, (Maghreb, al-Rābiṭah al-Muḥammadiyyah li al-ʿUlamā: Markaz al-Buhūth wa al-Dirāsāt fi Fiqh al-Mālikī, 2013): 423.
[300] Sadiki, Morocco, 320.
[301] Ridwan, Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law, 19.
[302] Olick-Gibson, From the Ulama to the Legislature, 23.
[303] See: The 2004 Mudawwanat al-Usrah, Article 175.

c. If her husband is in a degree of kinship relations precluding marriage or is the child's legal representative;

d. If she is the legal guardian of the child.

Another change is that, following the dissolution of his or her parent's marriage, a child over fifteen has the right to choose either the father or the mother as custodian. Boys could make this option under the preceding Mudawwana at twelve, while girls could not until age fifteen.[304]

The Mudawwanat also establishes a procedure for determining the paternity of a kid born out of wedlock for the first time. Previously, twelve witnesses were necessary to testify in court and provide evidence to judges to prove the father of a child born to unmarried parents.[305] Children born out of wedlock now have immediate legal recognition, and courts can employ scientific testing to determine paternity issues and accept a wider variety of evidence to establish filial relationships.[306] Acknowledging fatherhood from an unregistered marriage is made simpler by broadening the scope of the legal proof required to be given to the judge, with a five-year term for resolving pending paternity cases.[307]

Finally, one of the articles that need to be examined is Article 271, which says: The testamentary or court-appointed guardian is prohibited from engaging in the following actions without obtaining consent from the Court overseeing the Guardianship.[308] In the 1st paragraph of this article: "Sell any of the ward's immovable or movable property whose value exceeds 10,000 dirhams or perform any transaction that creates in rem rights on the property"[309] So, the guardian only disposes of the amount of 10,000 dirhams[310], those who used to write these numbers do not realise.[311]

[304] Farid Afif Syahputra Rinaldi, "Mudawwana Reformation (A Study of the Literature of Religious Courts in Morocco)", *Taqnin : Jurnal Syariah dan Hukum*, Vol.4. No.2. (2022): 167.
[305] Fakhria, A Discourse of Mudawanah al-Usrah, 320.
[306] Charrad, Family Law Reforms in the Arab World: Tunisia and Morocco, 8.
[307] Harrak, The History and Significance of the New Moroccan Family Code, 7-8.
[308] The 2004 Mudawwanat al-Usrah, Article 271.
[309] Ibid.
[310] 10000 Moroccan dirham equals 4.621,07 Malaysian Ringgit today.
[311] Ḥamzah, Naẓarāt fi Mudawwanat al-Usrah, 425.

3.4.4 Conclusion

This section discussed the development of the *Mudawwanat al-aḥwāl al-shakhṣiyyah*, which refers to personal status laws in Morocco focusing on the period from the 19th century to the present. The strategic positioning of Morocco in both the Atlantic Ocean and the Mediterranean Sea has rendered this nation a prime target for Western imperial powers. Before the mandate, French colonial researchers proposed that Morocco was geographically divided into two political regions. The first region, *Bilād al-Sībah*, consisted of the Berber-speaking mountains and deserts. This area was characterised by rebellious tribes who challenged the central government's authority. The second region, *Bilād al-Makhzan*, encompassed the Arabic-speaking plains, where the sultan controlled tax collection and military affairs.

Bilād al-Makhzan has *qāḍī* or the *rabbī* jurisdiction and has the authority of the *qāid* or the *Pacha*. Customary law enforcement was prevalent in the rural regions referred to as *Bilād al-Sībah*. The *qāḍī* handled all types of cases. He was following the ideas of the *Mālikī fiqh*. The *qāḍī* had sole jurisdiction over all cases of family law. However, the *Bilād al-Sībah* was outside the Sultan's legal authority, where the tribal councils implemented customary law. Before establishing the French and Spanish protectorates in 1912, Morocco operated under two distinct legal systems: *Sharī'ah* and Makhzen courts. The judges in the *Sharī'ah* courts applied Islamic *fiqh*. The Makhzen courts initially focused on adjudicating criminal issues, but they progressively broadened their jurisdiction to encompass civil and commercial matters over time. Within this legal framework, judgments were issued by administrative governors, known as bāshās in urban areas and qā'ids in rural districts.

In October 1912, a judicial vizier was appointed to supervise the courts and consolidate all powers of the *qādīs*. The Makhzen and *Sharī'ah* courts were maintained, but the French restricted the power of the *Sharī'ah* courts to only deal with issues concerning family law and property rights. This limitation resulted in a significant reduction of their prior extensive jurisdiction. Reforms were implemented in the procedures of the *Sharī'ah* courts.

Subsequently, there were uprisings against the French colony. Concurrently, several factions were formed to assist the resistance movement. Nevertheless, in 1955, Muhammad V was banished from France. However, he returned from exile, abruptly

terminating the French protectorate government on March 2, 1956. Consequently, Morocco achieved its independence from France. The first stage in the series of the historical development of the Mudawwanat began on 19th August 1957, a few months after independence.

The first Mudawwanat is based on historical *Mālikī fiqh*. Because Morocco has refused to be absorbed into a value system other than its own, it was natural in such an environment to re-codify the rules in all spheres of life in line with the nation's identity and distinctiveness. It has been decided that references to the *Mālikī madhhab* will be made on matters not included in the law. The new legislation's name alluded to its commitment to the traditional *fiqh* tradition. The initial Mudawwanah regulates several facets of family law, encompassing marriage, divorce, inheritance, and child custody. Under the Mudawwanah, males were granted the right to practice polygamy without requiring the consent of their wives, while married women were legally obliged to obey their husbands' instructions.

The majority of the distinctive features of the traditional Mālikī madhhab were included in the code. For instance, the guidelines of *wilāyat al-nikāḥ* (guardianship in marriage) and the authority to force a daughter into marriage were included. In Morocco, a woman would never be able to consummate a marriage on her own; instead, she would always require the help of a male guardian for marriage (*Walī*). The minimum age of marriage was determined by Mudawwanat, which is eighteen for boys and fifteen for girls. The Mudawwanat only accepted the sunnah method of divorce as being legitimate legally. Although polygamy was regarded as legal, it might cause the wife damage, or *ḍarar*, and thus constitute grounds for a court divorce. Additionally, a woman could not initiate a divorce without her husband's approval. In contrast, a man does not need the consent of the court to divorce his wife.

After the law went into force, feminist groups urged the government to modify it since it contradicted the notion of gender equality. Until 1993, many committees established to correct the law were successful, and none of them reached their goals. These successive failures are due to the absence of a national consensus among the various components of the political field and jurisprudential affairs activities in Morocco, as well as the marginalization of the role of civil society activities in the reforms of the women’s movement in Morocco.

Moroccan women's rights organisations started voicing their opinions on a new reading of the Qur'ān and *ḥadīth* with the development of Islamism in the 1980s and 1990s to support the revision of the Family Code. Islamist organizations criticised this, viewing it as a severe threat to Islām in Morocco. The 1990s are considered the most significant years in the development of the Mudawwanat due to the great movement, which culminated in the issuance of the Personal Status Code on 10th September 1993.

Regulations were made in the law on the following issues: the right to guardianship of children, divorce, polygamy, arbitration and conciliation (*muṣālaḥah*), custody, and alimony. The removal of the institution of the *Walī* for orphaned women and the establishment of the public explicit permission of the bride to marriage were the two most significant improvements to the Mudawwanat in Morocco. Polygamy and a husband's unilateral rejection of his wife are now subject to judicial approval, and financial compensation procedures for repudiation are made more strict. Legal guardianship of children is now granted to the mother, with custody laws clarified in her favour.

However, these reforms did not meet the aspirations of the women's associations that escalated their demands. According to them, these amendments were unhelpful and useless, and what was required, in their view, was to reconsider the Personal Status Code in a radical way that put an end to the inferiority of women in the context of their relationship with their husbands.

When King Mohammed VI assumed the throne in 1999, he vowed to improve gender equality in Moroccan society. In 1999, a draft national plan was launched for integrating women in the development process. Finally, Sultan Muhammad VI formed a commission to revise the *Mudawwanat al-Aḥwāl al-Shakhṣiyyah* a year after the demonstrations in Casablanca and Rabat in 2001 in response to these critiques and ideas. Politicians, judges, clergy, women's activists, intellectuals, and academics made up the commission. At the same time, the King enhanced the public stature of women by appointing ten women to key posts in government. However, the final push for reform came after the May 2003 terrorist attacks in Casablanca stoked widespread antifundamentalist sentiment. After that, the rest of Parliament, on 10th October 2003, announced the fundamental amendments to the Family Code.

The final version of the new Mudawwanat al-Usrah was approved in January 2004. The law entered into force on February 3, 2004. It established numerous significant rights for women, including the right to self-guardianship, divorce, and child custody. It also imposed additional limitations on polygamy, raised the legal marriage age from 15 to 18, and made sexual harassment a crime. On the other hand, the New law did not eliminate polygamy, unilateral husband divorce of wife, separation by *khul'*, or inequality in inheritance regulations. The changes also eliminated the legal obligation of a wife's submission to her husband and stated that both the husband and the wife are joint leaders of the family; nevertheless, according to *Fiqh*, the husband is still legally compelled to support his wife financially.

According to women's movements that have been demanding reform for years, establishing the Moroccan Family Law of 2004 is a triumph for women's rights and a step toward changing the husband-wife power dynamics in the home. Since independence in 1956, the role of women in the public sphere of post-colonialism in France has experienced considerable transformations. So, Morocco's new family law is unquestionably a progressive piece of legislation for Moroccan women due to the two characteristics of family law that distinguish it. First, it recognises marriage equality by rethinking the concept of power in the family within an Islamic context. Second, the reforms came about due to decades of Moroccan women's agitation for improved access to justice.

3.5 THE STAGES OF CODIFICATION OF ISLAMIC FAMILY LAW IN MALAYSIA AND ITS DEVELOPMENT

3.5.1 Introduction: Overview of Negara Malaysia

Malaysia is a sovereign nation in Southeast Asia, characterised as a federal state with thirteen states and three federal territories. It spans an expansive land area measuring around 329,847 square kilometres. Kuala Lumpur serves as Malaysia's capital city, but Putrajaya functions as the administrative hub for the federal government. The country of Malaysia is comprised of thirteen Federated States, namely Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Perak, Perlis, Penang, Sabah, Sarawak, Selangor,

and Terengganu. Additionally, there are three federal territories: Kuala Lumpur, Labuan, and Putrajaya.[312]

Malaysia saw periods of Portuguese and Dutch dominion before transitioning into a British colony in the late 18th century. The population of the country surpasses 32 million individuals. The nation is geographically divided into West Malaysia and East Malaysia by the presence of the Natuna Islands, located within Indonesia's territorial waters in the South China Sea. The executive leader of Malaysia is a monarch, referred to as the Yang di-Pertuan Agung, who holds the title of King or Sultan. This individual is selected through a rotational process every five years. The exclusive prerogative to appoint a representative to assume the position of the King of Malaysia is solely with the states governed by the Sultan.[313]

On August 31, 1957, the Federation of Malaysia achieved independence from British colonial rule. Approximately sixty-one per cent of Malaysia's overall population comprises followers of Islām. The majority of Muslims in the country subscribed to the *Shāfiʿī madhhab*, while a smaller number followed the *Ḥanafī madhhab*. Additional religious traditions in Malaysia encompass Buddhism, originating from China and India, Hinduism, and Christianity.[314] According to the provisions outlined in Article 3 of the Malaysian constitution, *"Islām is the religion of the Federation,"* but other religions are accepted and allowed.[315] According to the Malaysian constitution, it is specified that the Head of State assumes the role of the leader of the Islamic faith.[316] According to Article 11, Malaysia affirms its adherence to the principle of the freedom of religion.[317] The interesting point of the Malaysian Constitution enshrined religious

[312] Saw Swee-Hock, Population Trends and Patterns in Multiracial Malaysia. In Saw Swee-Hock & K. Kesavapany (eds.) *Malaysia: Recent Trends and Challenges*. (Singapore: Institute of Southeast Asian Studies, 2006): 7.
[313] Ong Argo Victoria and Fadly Ameer, *System and political development in Malaysia*, (International Journal of Law Reconstruction, 2018) vol. 2, Iss. 2, 134.
[314] Ibrahim Abubakar, *The Religious Tolerance in Malaysia: An Exposition*, (Advances in Natural and Applied Sciences, 2013) vol. 7, no.1, 90.
[315] The Federal Constitution of Malaysia, Article (3) 1, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." See: <https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf> (accessed 3 June, 2022).
[316] Ibrahim Ahmad, *Towards an Islamic law for Muslims in Malaysia*, (Journal of Malaysian and Comparative Law, 1985): Vol. 12, 50. Kristen Stilt, *Contextualizing Constitutional Islam: The Malayan experience*, International Journal of Constitutional Law, (2015) vol. 13, no.2: 409.
[317] Mohd Azizuddin Mohd Sani, *Islamization policy and Islamic bureaucracy in Malaysia*, (Singapore, ISEAS Publishing, Institute of Southeast Asian Studies, 2015): 17.; Stilt, *Contextualizing Constitutional Islam: The Malayan experience*, vol. 13, 425.

and ethnic identity as an exclusive position for Islām, the Sultan, and the Malay Muslims.[318] According to Article 160 of the Malaysian constitution, Malays are defined as "people who profess to embrace Islām, are accustomed to speaking the Malay language, and conform to Malay customs."[319] The individuals in question possess certain entitlements, such as implementing the Malay quota system within education, government, and business.[320] The concept of Ketuanan Melayu can provide insight into the understanding of this particular circumstance.[321]

In Malaysia, before the arrival of British colonial rule, the prevailing legal system consisted of a combination of Islamic Law and customary Law. During British colonial rule, Islām influenced various local legislative policies on state functions. This influence extended to establishing and operating *Sharī'ah* judicial institutions responsible for implementing Islamic Law. Additionally, administrative regulations governing Islamic socio-legal institutions, including marriage law, divorce law, and inheritance law, were enforced across the country. As mentioned above, the circumstance persisted until the nation of Malaysia achieved independence.[322]

3.5.2 Socio-Politics of the Malaysian State

Malaysia is known as a multi-communal country; however, from the beginning, with the existence of the Melaka Sultanate, this region has been known as Malay Land.[323] Malay community had already established the notion of being the rightful inhabitants of the land, commonly referred to as sons of the soil, as well as the geopolitical entity known as Tanah Melayu, well before the arrival of the foreign influences. Several foreign authors have expressed this viewpoint. It is erroneous to conjecture that these concepts are of recent origin and exclusively attributed to modern Europeans, as ample evidence from Indigenous sources indicates that these terminologies predate the arrival

[318] Stilt, ibid., 426.
[319] Wan Norhasniah Wan Husina, Haslina Ibrahim, "Religious Freedom, The Malaysian Constitution and Islam: A Critical Analysis," *Procedia - Social and Behavioral Sciences,* Vol. 217, (2016): 1217.
[320] Stilt, *Contextualizing Constitutional Islam: The Malayan experience*, vol. 13, 410.
[321] Ketuanan Melayu (كتوانن ملايو): Its root word, tuan, means master. The Ketuanan Melayu refers to Malay dominance or Malay supremacy and, as a political concept, emphasises Malay preeminence in contemporary Malaysia. See: Ooi Keat Gin, *Historical Dictionary of Malaysia*, (Scarecrow Press, 2009): 154.
[322] Farid Sufian Shuaib, "Administration of Islamic Law and Human Rights: The basis and its trajectory in Malaysia", *Al-Jāmi'ah: Journal of Islamic Studies*, Vol.56. No.2 (2018): 282-284.
[323] The term Tanah Malayu (الأرض الملايو in Arabic) refers to the region commonly known as The land of Malay, Malay homeland. See: Gin, *Historical Dictionary of Malaysia*, 342.

of Western powers and were widely recognised among the Malay locals. Numerous Malay classical works have employed the phrase "Tanah Melayu" well before the arrival of Western influences. For instance, Taj al-Salatin (1603), Warisan Warkah Melayu (1625-1899), Hikayat Hang Tuah (1796-1849).[324]

According to numerous scholarly sources, the historical origins of Islām in Southeast Asia are commonly attributed to the 10th or 11th centuries.[325] However, many scenarios and timeframes are referenced when examining the historical trajectory of Malaysia's engagement with Islām. The historical trajectory of this region has witnessed several pivotal moments of significance, tracing its origins from the pre-Islamic era to the contemporary period, driven mainly by its role as a commerce route. The arrival of Islām in this region has been subject to multiple interpretations. It is widely acknowledged that Islām was introduced through peaceful means, primarily facilitated by trade interactions with Muslim traders and the influence of *Sūfīs* from ʿArabia. This process commenced during the 13th century on the Malay Peninsula and gradually disseminated across the region by the 14th century.[326] They were undertaking the process of Islamisation.[327]

It is worth mentioning that Kedah is historically recognised as the emergence of Islām occurred during the 12th century. The introduction of Islām to the Malay peninsula may be attributed to Sultan Muzaffar Shah I of Kedah, recognised as the first ruler to have embraced Islām, having been exposed to the religion by Indian traders who had recently converted. Besides, one of the stories is that in 1136 AD, Sheikh ʿAbd Allāh[328] made his way to Qalha from Yemen, where he successfully converted Seri Paduka Maharaja Derbar Raja to the Islamic faith. As a result of this conversion, Seri Paduka Maharaja Derbar Raja assumed the new title of Sultan al-Muzaffar Shah. Qalha underwent a renaming process and was designated as Kedah Darul Aman. 1136 AD

[324] See: Od. M. Anwar & Wan Ahmad Fauzi Wan Husain & Junaidi Abu Bakar &Zulayti Zakaria, "Legitimacy of the Malays as the Sons of the Soil", *Asian Social Science*, Vol. 9. No. 1 (2013): 75-80.
[325] Max L. Gross, A Muslim Archipelago: Islam and Politics in Southeast Asia, (Washington, DC: National Defense Intelligence College Press, 2007), 5.
[326] Selman Zahid Ozdemir & Miszairi Bin Sitiris & Mohamad Sabri B Zakaria. "Codification of Islamic Family Law in Malaysia", *BALAGH - Journal of Islamic and Humanities Studies, Vol.* 2 No.2 (2022): 101.
[327] Ammar Fadzil, "Religious Tolerance in Islam: Theories, Practices and Malaysia's Experiences as a Multi Racial Society", *Journal of Islam in Asia,* Vol.8. No.3 (2012): 355.
[328] According to some researchers, The religious conversion of the royal family and other individuals in Kedah cannot be solely attributed to the acts of the Sheikh Abd Allāh. A multifaceted approach facilitated the consolidation of authority during this period. See: Maziar Mozaffari-Falarti, "Kedah : the Foundations and Durability of Malay Kingship", (PhD. thesis, Queensland University of Technology, 2009), 81.

predates the Inscribed Stone of Terengganu (Batu Bersurat Terengganu) in 1303 AD and the arrival of Islām in Malacca.[329] Nevertheless, when examined from a legal perspective, the earliest documented evidence of Islamic law in Malaysia is derived from it. This historical artefact provides valuable insights into the presence and application of Islamic legal principles within the region.[330]

Malacca Sultanate (Kesultanan Melayu Melaka)[331], which ruled between 1400 and 1511, played an essential role in developing Islām and Islamic law. For instance, a written law from the Malacca Sultanate is known as the Malacca Laws (Hukum Kanun Melaka). It was formed as a Malay customary law following Islamic law.[332]

[329] See: Jelani Harun, "Al-Tarikh Salasilah Negeri Kedah: A Malay World Literary Heritage", *Malay Literature*, Vol.32. No.2 (2019): 174; Sharifah Zaleha binte Syed Hassan, "History and the Indigenization of the Arabs in Kedah, Malaysia", *Asian Journal of Social Science*, Vol. 32, No. 3 (2014): 404.
[330] Mohd Roslan Mohd Nor & Ahmad Termizi Abdullah & Abdul Karim Ali, "From Undang-undang Melaka to federal constitution: the dynamics of multicultural Malaysia", Vol.5, No.2 (2016): 2; Syed Muhammad Naquib Al-Attas, *The Correct Date of the Terengganu Inscription: Friday, 4th Rejab, 702 A.H./Friday, 22nd February, 1303*, (Kuala Lumpur, Sun U Book Co. Sdn bhd, 2nd edn., 1984), 1.
[331]<https://en.wikipedia.org/wiki/Malacca_Sultanate#/media/File:Malacca_Sultanate_en.svg> (accessed 13 September, 2023).
[332] Zanirah Mustafa @ Busu, & Intan Nurul 'Ain Mohd Firdaus Kozako, "Malacca Laws: The Effect of Islam and Customs in the Aspect of Family Law", *Journal of Contemporary Social Science Research*, Vol. 3, No. 1 (2019): 37.

During the early 15th century, while Malacca functioned as a Malay Sultanate, the ruling authority commissioned a compendium of legal statutes.[333] The Malacca Laws, established by Sultan Muhammad Shah (1424-1444 AD), represent the initial implementation of Islamic law within the region of Malacca.[334] It is the first Islamic law introduced by the Sultan to be used in the Sultanate of Melaka.[335] The Hukum Kanun Melaka comprises a collection of regulations that can be construed as a code of ethical behaviour for the state, reinforcing adat's preeminence, an example of the customs and traditions observed by the Malay people. Simultaneously, it also incorporates and integrates specific Islamic provisions. The Malacca Laws encompass a collection of six distinct texts: (1) The Undang-undang Melaka, (2) The Maritime Law (partly), (3) Muslim Marriage Law, (4) Muslim Law of Sale and Procedure, (5) The Undang-undang Negeri, (6) The Undang-undang Johor.[336] So, Undang-Undang Melaka was a complete law legislation, including family law, *muʿāmalāt*, and even *jināyāt*. The most important thing is the country's administration, like the function of the Sultan, syahbandar, and followed the *Shāfiʿī madhhab*.

In addition, during the reign of Sultan Muhammad Shah, it is worth noting that in conjunction with the Hukum Kanun Melaka mentioned above, there is another legal framework inside the Sultanate of Melaka, namely the codified law of the maritime known as the Undang-Undang Laut Melaka, which can be translated as the Melaka Law of the Sea. The document encompasses the stipulations about maritime matters.[337] The presence of codification movements in Tanah Melayu is evident from these laws.

The Sultanate of Malacca fell to the Portuguese in 1511. Sultan Mahmud Shah I (1488-1511) sought refuge in Kampar, a region in Sumatra[338], while entrusting the governance to his son, Prince Sultan Alauddin Riayat Shah II. The prince established

[333] Mohd Nor, From Undang-undang Melaka to federal constitution: the dynamics of multicultural Malaysia, 3.
[334] Zanirah, Malacca Laws: The Effect of Islam And Customs in the Aspect of Family Law, 37.
[335] Zanirah Mustafa @ Busu & Suhaida Binti Abu Bakar &Affendi Ismail, Hukum kanun Melaka dari aspek undang-undang kekeluargaan, in: ICOMHAC2015 eproceedings, 16-17 December 2015: 22.
[336] Mohd Nor, From Undang-undang Melaka to federal constitution: the dynamics of multicultural Malaysia, 3.
[337] Zakaria M. Yatim, "The Development of the Law of the Sea in Relation to Malaysia", *Malaysian Management Journal (MMJ),* Vol. 1 No. 1 (1992): 87.
[338] Mohd Afendi Daud & Abd Aziz A'zmi & Fazurah Mustaffa & Mohd Sufiean Hassan, "Continuity of Malacca Sultanate", *Jurnal 'Ulwan,* Vol 6, No 1 (2021): 40.

the Sultanate of Johor in 1528[339] and ruled the Johor until 1564.[340] Malacca remained under Portuguese control for 130 years until the Dutch eventually took over in 1641. The Dutch maintained control over the region of Malacca until the year 1824[341], except for two brief intervals of British governance from 1795 to 1801 and 1807 to 1818. Subsequently, authority was transferred to the British following the provisions outlined by the Anglo-Dutch Treaty of 1824.[342] This particular occurrence served to enhance British influence in the region.

When Malays were colonised by the British, Islamic values, as mentioned above, were disturbed because British colonialism was politically divisive; besides that, there were also British attempts to separate them between religion and the State. This was realised by introducing civil administration and a legal system different from the Islamic legal and judicial systems.[343] At the same time, society has also become more pluralistic due to the massive immigration of Chinese and Indian non-Muslims. The Malays rejected the British proposals for the Malay union to unite with equal citizenship rights for all, concerning population growth, economic strength, and the influence of the Chinese and Indian communities.[344]

Nowadays, Malaysia is known as a multi-communal country, but the reason for their arrival in this territory can be attributed to the British. The British colonial administration facilitated the migration of Chinese and Indian labourers to the region for employment. One of the prerequisites for achieving independence is for the Malays to acknowledge and embrace their citizenship.

When examining the historical context, it is evident that the presence of Chinese and Indian communities in Malaya attributed to migration patterns throughout the 18th and 19th centuries. During the early 19th century, individuals from China migrated to Malaya to engage in labour-intensive activities within the tin mining industry. In the

[339] Muzaffar Husain Syed & Syed Saud Akhtar & Babuddin Usmani, *A Concise History of Islam*, (New Delhi, Vij Books India, 2011): 318.
[340] Daud et al., Continuity of Malacca Sultanate, 41.
[341] Sharifah Suhanah Syed Ahmad, "Introduction to the Sources of Law in Malaysia", *International Journal of Legal Information*, Vol. 40, No. 1-2 (2012): 177.
[342] Muslihah Hasbullah Abdullah & Najibah Mohd Zin, "Historical Developments of Financial Rights after Divorce in the Malaysian Islamic Family Law", *Asian Culture and History*, Vol.1, No.2 (2009):152.
[343] Stilt, Contextualizing Constitutional Islam: The Malayan experience, Vol. 13, 413-416.
[344] Mohd Helmi Abd Rahim & Normah Mustaffa & Fauziah Ahmad & N. Lyndon, "A Memoryscape Malayan union 1946: The Beginning and Rise of Modern Malay Political Culture", *Asian Social Science*, Vol.9, No.6 (2013): 39-40.

early 19th century, the British government facilitated the migration of a substantial population of Indians, primarily Tamil ethnic groups from India and Sri Lanka, to Malaya. This initiative addressed the labour requirements, particularly in the rubber industry. After attaining independence, the Chinese and Indian ethnic communities underwent a transformative process, adopting a fresh sense of identity as citizens within the Federation of Malaya.[345]

Since the earliest period in Malaysia, Islām has had close ties to politics and society; traditionally, in the Malay states, all aspects of government, if not drawn directly from religious sources and principles, are imbued with spiritual holiness. Islām is a core element of Malay identity and culture, providing an integrated awareness of religion, traditional values, rural life, and family life. Furthermore, it was said that Islām was a source of legitimacy for the sultans, who held roles as religious leaders, defenders of the faith, and protectors of Islamic Law, as well as education and traditional values. Islām and Malay identity are intertwined; being a Malay means being Muslim.[346]

3.5.3 Codification of Islamic Family Law in Malaysia

This subsection analyses the development phases of Islamic family law. Initially, it has been indicated that there is a prevailing *fiqh* madhab in Malaysia, a defined fatwa procedure, and each state has its own distinct Islamic family law. Furthermore, the presence of a dual legal system in Malaysia is evident. Moreover, this subsection involves the legal system in Malaysia before the arrival of the colonialists. The discussion covered the involvement of family law in the British Colonial period and the subsequent codifications of family law in Malaysia after gaining independence.

3.5.3.1 Islamic Family Law Enactments in Malaysia

The prevailing understanding is that the Muslim population in Malaysia predominantly adheres to the *Sunnī madhhab*. The predominant choice of the Malaysian populace is

[345] Silllalee S.Kandasamy & Rajantheran Muniandy & Tamil Arasi Muniandy & Manimaran Subramaniam & Bharathi Mutty, "The Influence of Chinese Cultural Practices among Malaysian Indians", *Psychology and Education Journal*, Vol. 57. No. 8 (2020): 167.
[346] Jaclyn Ling-Chien Neo, "Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia", *International Journal on Minority and Group Rights*, Vol.13, No.1 (2006): 101.

often the *Shāfiʿī madhhab* of Islamic Jurisprudence.[347] Nevertheless, in cases where there is a lack of explicit clarification on a specific matter, Muslims are allowed to rely on any of the principles of Islam as practised in the four recognised *Sunnī madhāhib*, as observed in Malaysia. The influence of Malay practices and traditions is evident in personal affairs, as well as in wedding formalities and customs within the country.[348] The application does not exhibit any form of *madhhabī* bias (*al-Ṭaʿaṣṣub al-Madhabī*) towards a certain *madhhab*. The legal system in Malaysia could potentially derive advantages from incorporating alternative perspectives of the other *madhāhib*. In summary, the *fatwā* issuance procedure in Malaysia adheres to the following order: Firstly, the Fatwā Council, when making a decision (*ḥukm*), refers to the *Muʿtamad* of *Shāfiʿī madhhab*. If the *Muʿtamad* within the *Shāfiʿī madhhab* fails to adequately address the needs of the people (the *Maṣlaḥah*), it is permissible to seek guidance from alternative sources.

Malaysia operates under a federal system consisting of thirteen states, referred to as Negeri, and three federal territories, known as Wilayah Persekutuan. West Malaysia, or the Malay Peninsula, has eleven states. Eight of them have Sultan. East Malaysia, comprising the Malaysian states of Sabah, Sarawak, and the Federal Territory of Labuan, is an integral component of Malaysia situated on the island of Borneo. In the context of Malaysia, the title of Yang di-Pertua Negeri is bestowed upon the individual who serves as the constitutional head of state in regions lacking a traditional monarch. Specifically, this title applies to the Penang, Malacca, Sabah, and Sarawak states. In contrast, a Raja is a constitutional title bestowed upon kingdoms with hereditary monarchs. These states include the Sultans of Johor, Kedah, Kelantan, Pahang, Perak, Selangor, and Terengganu, as well as the Raja of Perlis and the Yang di-Pertuan Besar of Negeri Sembilan.[349] In the conventional sense, the governing authority, commonly referred to as the Sultan in most of these regions, assumes the role of overseeing their State and, as a result, assumes responsibility for safeguarding the religious observance inside said State. Consequently, diverse legislative measures have

[347] Azizah binti Mohd, "An Appraisal of the Application of Fiqh al-Hanafi Under Islamic Family Law (Federal Territories) Act 1984", *IIUM Law Journal*, Vol. 27, No.2 (2019): 323.
[348] Yusuf Abdul Azeez & Luqman Zakariyah & Syahirah Abdul Shukor & Ahmad Zaki Salleh, "Codification of Islamic Family Law in Malaysia: The Contending Legal Intricacie", *Science Internaional (Lahore),* Vol. 28, no.2 (2016): 1754.
[349] See: Raja Tun Azlan Shah, "The Role Of Constitutional Rulers A Malaysian Perspective For The Laity", *Journal of Malaysian and Comparative Law*, Vol.9 (1-2) (1982): 1.

been implemented in each jurisdiction to govern the administration of Islamic Law.[350] The planned enactments have been outlined below:[351]

1. Enactment of the Islamic Family Law, Kedah, 1979 (No 1 of 1984).
2. Enactment of the Islamic Family Law, Kelantan, 1983. (No 1 of 1983)
3. Enactment of the Islamic Family Law, Malacca, 1983. (No 8 of 1983)
4. Enactment of the Islamic Family Law, Negeri Sembilan, 1983. (No. 8 of 1983)
5. Islamic Family Law (Federal Territories) Act 1984 (Act 303).
6. Enactment of the Islamic Family Law, Selangor, 1984. (No. 4 of 1984)
7. Enactment of the Islamic Family Law, Perak, 1984. (No. 13 of 1984)
8. Enactment of the Islamic Family Law, Penang, 1985. (No. 2 of 1985)
9. The Administration of the Islamic Family Law, Terengganu, 1985. (No. 2 of 1985)
10. Enactment of the Islamic Family Law, Pahang, 1987. (No.3 of 1987)
11. Enactment of the Islamic Family Law, Perlis (1992). (No. 4 of 1992)
12. Islamic Family Ordinance, Sarawak, 1991.
13. Enactment of Islamic Family Law, Sabah, 1992 (No. 15 of 1992).

The state mentioned above legislations establish Islamic religious bodies known as "Majlis Agama Islam" at the state level, delineating their respective roles and powers.[352] These legislative measures also include provisions for establishing the *Sharī'ah* Courts, which are responsible for administering the *Sharī'ah* laws commonly known as *Hukum Sharī'ah*. By way of example, section 45(2)(b) of the Selangor State Management of Islamic Law Enactment 1989 provides that *"the Sharī'ah High Court*

[350] Nora Abdul Hak, "Role Of The Conciliatory Committee And Hakam (Arbitrator): The Practice And Provisions Of The Islamic Family Law In Malaysia", (Singapor, In Meeting the Challenges of Law in Asia–Second Asian Law Institute (ASLI) Conference, 2005): 2-3.
[351] N. Abdul Hak, Role Of The Conciliatory Committee And Hakam, 2-3; Mogana Sunthari Subramaniam, Judicial Dilemma: Secular or Syariah for Inter-Faith Family Disputes in Malaysia, Center for Asian Legal Exchange (CALE), (2018): 9-10.
[352] Shuaib, Administration of Islamic Law and Human Rights, 284.

shall, in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which matters relate to":

a) Betrothal, marriage, divorce, nullification of marriage *(faskh)* or judicial separation *(firāq)*;

b) Any disposition of, or claim to, property arising out of any of the matters set out in paragraph (a);

c) The maintenance of dependents, legitimacy or guardianship or custody of infants:

d) The division, or claims to *harta sepencarian*[353] (marital property); etc.[354]

3.5.3.2 Malaysia Legal System

Malaysia's legal system consists of two distinct frameworks, *Sharī'ah* and Civil Law. These frameworks are specifically tailored to address the legal requirements of two separate religious communities. It governs different personal status law matters, including marriage, divorce, child custody (*ḥaḍānah*), alimony, and *qiwāmah,* etc.

These jurisdictions are delineated and operate independently from one another. Applying the Law of non-Muslims takes place within the civil courts, while the Law controlling Muslims, known as Islamic *Sharī'ah* Law, is administered within the religious courts, commonly referred to as the *Sharī'ah* courts. Non-Muslim family issues are resolved in civil court by judges who have received training in civil law due to the presence of a dual-legal system. In contrast, disputes within Muslim families are addressed within the framework of *Sharī'ah* courts, presided over by *Qāḍīs*, who are Islamic Religious Judges possessing extensive knowledge of Islamic law. Family cases involving non-Muslim families are often brought at the Civil High Court, specifically in its Family Division.[355]

[353] According to Islamic Family Law (Federal Territories) 1984 (Act 303): "Harta sepencarian" means property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syarak." See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 2 (1).
[354] Abdul Azeez et al., Codification of Islamic Family Law In Malaysia, 1754.
[355] Subramaniam, Judicial Dilemma: Secular or Syariah, 8-10.

It is important to note that Malaysia encompasses three primary legal sources: Written law, Unwritten law, and Islamic law. The priority of written law is evident due to its encompassment of federal and state constitutions, federal and state parliamentary legislation, and additional legislation in the form of laws and regulations. An authorised agency or individual enacts additional legislation following federal parliamentary law or state legislation.[356]

In addition, it is noteworthy to mention that Malaysia was the pioneering nation in Southeast Asia to undertake significant reforms in the realm of Family Law in the 19th century. This milestone was achieved by the establishment of the Muhammad Marriage Ordinance No. V 1880, within the jurisdiction of the Straits Settlements.[357] Thus, the initial implementation of the Marriage and Divorce Law took place in the Straits Settlements of Penang, Malacca, and Singapore before Malaysia attained independence.[358] At this particular moment, it is beneficial to express a noteworthy argument. Indeed, it has been shown that legislative measures were enacted in this specific geographic area before the periods mentioned above. The British government enacted legislation that specifically targeted the Muslim community, imposing a new legal framework.

Following the attainment of independence, Malaysia underwent a comprehensive legal reform, establishing distinct Islamic family laws in each state. The Islamic family law in Malaysia is widely regarded as a progressive and enlightened legal framework governing personal status matters within the Muslim community, positioning it as one of the most evolved systems among Muslim-majority countries.[359]

3.5.3.3 Before British Colonisation

During 1400, the Sultanate of Malacca emerged as the primary maritime hub, facilitating the influx of Chinese merchants engaging in trade activities alongside their Indian and Arab counterparts. The commercial links in question have diverse effects on

[356] Ahmad, Introduction to the Sources of Law in Malaysia, 183.
[357] M Noor Harisudin & Muhammad Choriri, "On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective", *SAMARAH Jurnal Hukum Keluarga dan Hukum Islam*, Vol. 5, No.1 (2021): 484-486.
[358] Ahmad, Introduction to the Sources of Law in Malaysia, 179.
[359] Raihanah Abdullah & Soraya Khairuddin, "The Malaysian Sharī'ah Courts: Polygamy, divorce and the Administration of Justice", *Asian Women*, Vol. 25, No.1 (2009): 40-43.

the geographical region of Malaysia. In the early days, Hinduism significantly influenced Malay customs and the development of Customary Law. Subsequently, a recurring pattern of Islam's profound influence takes precedence. The impact of Islam on Malay customary law is of great significance and serves as a fundamental component within the framework of contemporary Malaysian Law. As stated before, the Hukum Kanun Melaka was enforced in the Sultanate of Melaka, comprising a complete set of laws that cover a wide range of subjects, including restrictions concerning family law.[360]

Upon the Portuguese's seizure over the kingdom of Malacca in 1511, the manuscripts encompassing the Malay laws were taken and subsequently modified to several Malay states, including Pahang and Kedah. The Johore laws were also derived from the Undang Undang Melaka. The governance structure of Malaya predominantly relied on religious principles for guidance. The incorporation of *Sharī'ah*, often known as Islamic law, into the legal systems of several states is seen.[361]

The Sultanate of Malacca remained under Portuguese control for 130 years until the Dutch eventually took over in 1641. The Dutch ruled Malacca until 1824[362], except for 1795 to 1801 and 1807 to 1818, a period of British rule. Then, power passed to Britain according to the Anglo-Dutch Treaty of 1824.[363] This occurrence enhanced British influence in the region, where British settlements had already been established at Penang (1876) and Singapore (1819).[364]

Before the colonisers' introduction, Malaysia's legal system consisted of a combination of Islamic Law and customary Law.[365] The legal systems that were in place in the Malay state ahead of British intervention can be categorised as the Adat Perpatih,[366] which Malays predominantly followed in Negeri Sembilan, Masjid Tanah,

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[360] See 114-115 pages from the thesis for further information on Hukum Kanun Melaka.
[361] Mohd Nor, From Undang-undang Melaka to federal constitution: the Dynamics of Multicultural Malaysia, 1.
[362] Sharifah Ahmad, Introduction to the Sources of Law in Malaysia, 177.
[363] Abdullah, Historical Developments of Financial Rights after Divorce in the Malaysian Islamic Family Law, 152.
[364] Sharifah Ahmad, Introduction to the Sources of Law in Malaysia, 179.
[365] Abdullah & Khairuddin, The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice, 22.
[366] The term adat in Malay, derived from the Arabic word ādāt, meaning custom, refers to a collection of laws that prescribe and regulate social interactions, sometimes in a codified manner. Adat perpatih (عادت فرفاتيه) refers to the traditional Minangkabau customary rules that have their origins in West Sumatra, Indonesia. The arrival of this culture to Negeri Sembilan originated from Minangkabau. See: Alexander Wain & Norliza Saleh, "Adat Perpatih in Malaysia: Nature, History, Practice, and Contemporary Issues",

and certain regions in Malacca, and the tradition of Temenggung, which was prevalent in other parts of the Peninsula. It is worth noting that specific historical texts suggest that the Temenggung custom exhibited certain resemblances to Islamic laws.[367] During the traditional era, the Sultan held the esteemed position of the foremost religious and political authority while also assuming a significant role in the governance of legal matters.[368] The rural scholars played a crucial role in representing Islam throughout the Malacca Sultanate. This was mostly due to the appointment of several religious advisers as *qāḍīs*, who, therefore, gained considerable authority and influence in enforcing Islamic law. As *qāḍīs*, they exercised their influence over the general population and the ruling elite.[369]

It may be contended that the impact of Portuguese and Dutch legal systems on the whole legal framework, beyond political and administrative structures, was relatively constrained. In contrast to the Portuguese and Dutch, the British enacted legislation that specifically targeted Muslims, so imposing a new regulation and jurisdiction.

3.5.3.4 British Colonial Period

The assumption of authority by the British over the port metropolises of Penang (1786), Singapore (1819), and Malacca (1824) was driven by their desire to establish and facilitate other routes and trade. The establishment of the Straits Settlements resulted from a collaborative endeavour that included three colonies, which were then transformed into a fully-fledged Crown colony by 1867.[370] In a seemingly unrelated manner, the British established protectorates in a region that may be identified as the

in *Matrilineal, Matriarchal, and Matrifocal Islam: The World of Women-Centric Islam*, edited by Abbas Panakkal & Nasr M. Arif, (Palgrave Macmillan, 2024), 44.

[367] Jowati binti Juhary, "Abstraction and Concreteness in Customary Practices in Malaysia : A Preliminary Understanding", *International Journal of Humanities and Social Science,* Vol. 1, No. 17 (2011): 281.

[368] Vincent Lowe, "Symbolic Communication in Malaysian Politics—The Case of the Sultanate", *Southeast Asian Journal of Social Science*, Vol. 10, No. 2 (1982): 87-88.

[369] Abdullah, Historical Developments of Financial Rights after Divorce in the Malaysian Islamic Family Law, 149.

[370] Andrew Abraham, "The Transfer of the Straits Settlements: A Revisionist Approach to the Study of Colonial Law and Administration", *Journal of the Hong Kong Branch of the Royal Asiatic Society*, Vol. 42 (2002): 1.

"Federated Malay states of Perak, Negeri Sembilan, Pahang, and Selangor," alongside the "Unfederated Malay States of Johor, Kedah, Kelantan, Perlis, and Terengganu."[371]

As early as the 20th century, all the territories within the Malay landmass were subjected to similar agreements. This occurred as Britain sought to expand its control over Malay while local rulers sought to consolidate their influence concerning neighbouring rivals. In 1880, the British government acknowledged the presence of Islamic marriage and divorce law by implementing the Muhammadan Marriage Ordinance in the Strait region.[372]

In the context of the Malay Federated States, including Perak, Selangor, Negeri Sembilan, and Pahang, it is remarkable that the Muhammadan Marriages and Divorces Enactment was officially established in 1885. Similarly, Johor implemented its divorce rule in 1907.[373] Nevertheless, the establishment of codified regulations, new legal principles and classifications, and the introduction of English legal institutions collectively represented a significant break from the customary practises that had varied dramatically over the Malay Peninsula. The newly implemented regulatory norm exhibited notable divergence from the prominent philosophical viewpoints of *Usul al-Fiqh*.

3.5.3.5 After Independent

Following Malaysia's attainment of independence, the federal constitution of the country declared Islam as the state's official religion in 1957 and 1963.[374] Islamic Law and its administration are officially enforced throughout Malaysia's region, including

[371] Wan Kamal Mujani & Wan Hamdi Hamdi Wan Sulaiman, "Historical Development of the Federalism System in Malaysia*:* Prior to Independence", *Advances in Social Science, Education and Humanities Research (ASSEHR),* Vol. 75, (2016): 514-515.
[372] Abdullah, Historical Developments of Financial Rights after Divorce in the Malaysian Islamic Family Law, 152.
[373] Basyiroh, Marwa Atika, "The implementation of marriageable age provision in Malaysia and Indonesia: Comparative Study of Regulation number 1 year 1974 and Enactment Islamic Family Law of Malacca number 12 year 2002", (Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim, 2018), 3.
[374] Farid Sufian Shuaib, "The Islamic Legal System in Malaysia", *Washington International Law Journal*, Vol.21, No.1 (2012): 92; Mohd Nor, From Undang-undang Melaka to federal constitution: the dynamics of multicultural Malaysia, 1.

Perak, Selangor, Negeri Sembilan, Pahang, Perlis, Kelantan, Terengganu, Kedah, and Johor.[375]

In the states of Sabah and Sarawak, the Muslim community constitutes a minority. In 1971, the state of Sabah implemented the administration of Islamic Law despite having a Muslim population smaller than Sarawak's. The state of Sarawak continues to enforce the Court Law Malay 1915. The family law laws in Malaysia have undergone multiple revisions throughout its history, with a particular emphasis on amendments following the country's attainment of independence; the period from 1976 to the post-1980 period witnessed notable developments in matters of family affairs. The Law Reform (Marriage and Divorce) Act of 1976 governs the legal framework for non-Muslims in Malaysia. Subsequently, in the early 1980s, Malaysia implemented a distinct legislation specifically addressing matters of the Islamic family.[376]

The recent endeavours in family law reform have encompassed a comprehensive range of matters about marriage and divorce, surpassing the scope of prior legislation that just focused on registering marital unions and dissolutions. The initiative was begun in 1982 by the Melaka, Kelantan, and Negara Sembilan governments, subsequently joined by additional states.[377]

The Islamic Family Law Act of several states in Malaysia can be broadly categorised into two distinct groups. Initially, certain states adopted the Islamic Family Law (Federal Territories) Act 1984, albeit with minor alterations. These states include Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak, and Sabah. The second classification pertains to those states that implemented substantial modifications to the initial draught that the Council had approved of Rulers. The variations mainly lie in the organisation of sections, legal provisions, and procedural aspects between Kelantan, Johor, Malacca, and Kedah states. Presently, there is an ongoing endeavour to standardise Islamic Family Law across all states in Malaysia.[378]

The Islamic marriage legislation in Malaysia adheres to the provisions outlined in state law. The existing family Laws include: Islamic Family Law (Federal Territories)

[375] Shuaib, The Islamic Legal System in Malaysia, 90.
[376] Raihana Abdullah, "A study of Islamic Family Law in Malaysia: A Select Bibliography", *International Journal of Legal Information*, Vol. 35, No.3 (2007): 514-516.
[377] Ibrahim, Towards an Islamic law for Muslims in Malaysia, 51.
[378] Abdul Hak, Role Of The Conciliatory Committee And Hakam, 1.

Act, 1984 known as (IFLA Act 303), Sarawak Islamic Family Law Ordinance 2001, the Islamic Family Law (State of Kelantan) Enactment 2002, the Islamic Family Law (State of Malacca) Enactment 2002, Islamic Family Law (Negeri Sembilan) Enactment 2003, Islamic Family Law (State of Selangor) Enactment 2003, Islamic Family Law (State Of Johore) Enactment 2003, Islamic Family Law (Perak) Enactment 2004, Islamic Family Law Enactment (Sabah) 2004, Islamic Family Law (State of Penang) Enactment 2004, The Islamic Family Law Enactment (State of Pahang) 2005, Islamic Family Law Enactment (Perlis) 2006, Islamic Family Law (Kedah Darul Aman) Enactment 2008 and Islamic Family Law (Terengganu) Enactment 2017. These are current Islamic family law enactments in the Malaysian region and other states. As can be seen, each state has its family law with its name. There may be differences between these state laws on some issues.

As mentioned before, *Shāfiʿī Madhhab* is, in principle, the recognised *madhhab* practised in Malaysia. As a result, the society bases numerous religious activities and customs on the tenets of *fiqh al-Shāfiʿī*. However, all Malaysians freely adhere to the beliefs of other Sunnī *madhāhib*. Moreover, four *Sunnī madhāhib* serve as the foundation for the codification of Islamic law in the State Enactments of every State in Malaysia. As stated by Azizah binti Mohd, Malaysian Islamic law is not exclusively founded on the *Shāfiʿī madhhab*; instead, it frequently adopts the *Ḥanafī madhhab*, depending on how well-suited the viewpoint is to the local community.[379]

Below is an attempt to examine some of the most recent changes made to Malaysia's Islamic family law system, focusing on Muslim laws about marriage, polygamy, divorce, and other pertinent topics.

3.5.4 Various Views on the Application of Family Law in Malaysia

3.5.4.1 The Applicability of the Existing Family Law within the Jurisdiction

In the context of the historical development of family law codification in Malaysia, it was mentioned that Malaysia is a federation consisting of states, each having its judiciary in some ways. Consequently, most interviewees offered reflections on this

[379] Azizah binti Mohd, An Appraisal of The Application of Fiqh al-Hanafi Under Islamic Family Law (Federal Territories) Act 1984, 1.

matter; furthermore, each individual highlighted the nationwide application of Islamic Family Law.

Mohamad Sabri B. Zakaria[380] expressed that the Law is generally adequate but acknowledged its limitations in certain instances, such as "the three divorces in one word." The individual stated that the term 'three divorces in one word' is seen as a triple divorce within our context. He emphasised that this occurrence resulted from adhering to and relying on the *Shāfiʿī madhhab*. Gaining advantages from alternative *madhāhib* would have more potential for preserving familial relationships.[381]

According to Khairul Fahmi Bin Jamaludin[382], the law is highly effective as it regulates family concerns and issues such as custody, alimony, and maintenance. He emphasised the existence of two tiers of governance in the country, namely the federal government and state governments. Each state independently governs its own Islamic Family Law within its respective jurisdiction, and these laws generally exhibit comparable provisions. Additionally, the nation possesses a dual legal system comprising Islamic and Civil laws. Within this framework, familial affairs are encompassed by the jurisdiction of the *Sharī'ah* courts. [383]

Mohd. Fuad B. Md. Sawari[384] states that the legal framework governing family matters in Malaysia exhibits variations between different states. However, the variations between the states are minimal, primarily limited to certain procedural aspects.

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[380] Mohamad Sabri bin Zakaria is presently serving as an Assistant Professor in the Department of *Fiqh* and *Usūl al-Fiqh* at the Kulliyyah of Islamic Revealed Knowledge and Human Sciences at the International Islamic University Malaysia. He holds a Bachelor's Degree from the Faculty of *Sharī'ah* of Al-Azhar University (1992), a Master's Degree in Islamic Economics from Yarmouk University (1999), Doctorate in *Fiqh* and *Usūl al-Fiqh* from the International Islamic University of Malaysia. He possesses extensive knowledge of *Usūl al-Fiqh* and Malaysian Muslim Families. He has held positions as a member of the *Sharī'ah* Committee at many banking and *Takāful* institutions.

[381] Mohamad Sabri B Zakaria, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (05.07.2022).

[382] Khairul Fahmi Bin Jamaludin is an Assistant Professor in the Department of *Fiqh* and *Usūl al-Fiqh* at the Kulliyyah of Islamic Revealed Knowledge and Human Sciences at the International Islamic University Malaysia. He holds a Bachelor's Degree in the Bachelor of Laws (Honours) and Bachelor of Laws (*Sharī'ah*), a Master's Degree in Master of Comparative Laws and a PhD in Doctor of Philosophy (Law) from the International Islamic University of Malaysia.

[383] Khairul Fahmi Bin Jamaludin, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia (15.07.2022).

[384] Dr. Mohd Fuad bin Md Sawari is the Head of the Department and Associate Professor in the Department of *Fiqh* and *Usūl al-Fiqh* at the Kulliyyah of Islamic Revealed Knowledge and Human Sciences. In 1991, he earned his undergraduate degree in *Sharī'ah* from the Faculty of *Sharī'ah* University of Malaya. In 1995, he completed his Master's in *Fiqh* and *Usūl al-Fiqh* from the Faculty of *Sharī'ah* at the University of Jordan in Amman. He then obtained a PhD in *Fiqh* and *Usūl al-Fiqh* from the International Islamic University Malaysia.

Regarding the fundamental elements, there exists no discernible distinction among them. He also underscored the prevalence of the *Shāfiʿī madhhab* within the context of Malaysian Islamic Family Law, particularly in matters of divorce and *al-muḥarramāt* within the institution of marriage.[385] Sabri B. Zakaria contends that the country needs to benefit from other *madhāhib*. Furthermore, more unity in the Law should be promoted since too many laws may lead to conflict between them and the existence of differences.[386] The interviews reveal that applying the Law in the country is generally effective; however, certain aspects require attention and improvement.

3.5.4.2 The Adequacy of Malaysian Family Law in Solving Family-related Problems

According to the participants, the prevailing perception is that the existing legal framework is generally adequate in effectively resolving matters. Nevertheless, it is necessary to assess the effectiveness of the legal matter individually. The Indira Gandhi case serves as an illustrative example.

Based on their observations, Sabri B Zakaria believes the law is adequate. Nevertheless, he asserts that periodic revision is necessary because issues are renewed with the days, and previous issues may differ from current issues. In problems of this nature, it would consider adopting approaches similar to those implemented by Arab countries such as Egypt and Palestine. In the nations mentioned above, the term three divorces is regarded as equivalent to a single divorce.[387]

Khairul Jamaludin prefers examining the issues case by case; he states that he can not conclude that the Law can figure out all issues. However, he says, the *Sharīʿah* court judges would try their best to make a judgment or sentence; they protect Muslim interests. According to him, sometimes interference from an authority and civil court judges gives rise to more complicated situations.[388]

Sawari, who offers an alternative viewpoint, is that there are some cases in which there is nothing to do with the law. In many instances, individuals who fail to fulfil their

[385] Mohd. Fuad B. Md. Sawari, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (05.07.2022).
[386] Mohamad Sabri B Zakaria, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (05.07.2022).
[387] Mohamad Sabri B Zakaria, ibid.
[388] Khairul Fahmi Bin Jamaludin, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia (15.07.2022).

financial obligations towards their children, specifically fathers who neglect to pay alimony, are identified as the primary issue.[389]

Arif Ali Arif[390] expresses an alternative viewpoint, positing that the number of judges is insufficient concerning the volume of cases. He adds that a small quantity was inadequate to meet the more considerable demand. Consequently, the establishment of an arbitration institution becomes imperative. The allocation of hundreds of judges by the state is not feasible. He advises making arbitration before going to court.[391] Azizah Bt Mohd[392] does not think that the number of cases has reduced. She says that the cases will undoubtedly increase when you apply the law.[393]

Sabri Zakaria acknowledges the coexistence of *Sharīʿah* courts and civil courts. However, it is essential to note that this straightforward division alone does not offer a comprehensive solution to the issues faced by the Malaysian population. This phenomenon arises due to the presence of familial dynamics involving individuals adhering to both Muslim and non-Muslim faiths. Initially, the family members were non-believers at the beginning; however, over time, one of the wives decided to undergo a conversion to Islām. The Indira Gandhi case serves as a notable exemplification. The male member of the family underwent a religious conversion to Islām, while the female

[389] Mohd. Fuad B. Md. Sawari, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (05.07.2022).
[390] Prof. Dr. Arif Ali Arif has been a Professor in the Department of *Fiqh* and *Usūl al-Fiqh*, International Islamic University Malaysia (IIUM) since 1994. He has been teaching, supervising, and publishing in *Fiqh* and *Usūl al-Fiqh* for many years. He has to his credit ten original books and eleven edited books published by international publishers, including Dār al-Kutub al-ʿIlmiyyah, Bayrūt, and IIUM Press. He has published 23 articles in international refereed journals. The number of papers presented at international conferences is 38 so far. He has successfully supervised more than two dozen PhD students from different parts of the world, besides supervising around 50 Master theses and evaluating 38 PhD theses from other universities, national and international.
[391] Arif Ali Arif, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (04.07.2022).
[392] Azizah Bt Mohd is a Professor in the department Ahmad Ibrahim Kulliyyah Of Laws at the International Islamic University Malaysia. She obtained her LLB, LLB.S, MCL and PhD degrees from Ahmad Ibrahim Kulliyyah of Laws, IIUM. She began her academic career at the same university 1993 as an Assistant Lecturer. She was confirmed as a permanent lecturer at Ahmad Ibrahim Kulliyyah of Laws, IIUM, in 1996 after she completed her Master's degree. From then, she was assigned to teach the Islamic Law of Succession and Islamic Family Law. At present, she is teaching Islamic Family Law and *Usūl al-Fiqh*. She has been involved in paper presentations since 2005 and has published a book entitled Protection and Adoption of Abandoned Children in Malaysia. She also co-authored a book on Family Law in Malaysia, published in 2012. She has published several articles, including Legitimacy of a Child through Acknowledgement (Al-Iqrār) Under Islamic Law: The Extent to Which Acknowledgement Establishes Paternity of An Illegitimate Child (2006). She has also been the recipient of several awards from IIUM Research, Invention and Innovation Exhibition from 2010 to 2014.
[393] Azizah Bt Mohd, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (21.01.2023).

member opted to maintain her existing religious affiliation. The individual unilaterally compelled their offspring to undergo a conversion to *Islām*. Nevertheless, the civil court subsequently adjudicated in favour of restoring custody of the Muslim children to their non-Muslim mother. The case continued for years.[394]

3.5.4.3 The Public Acceptance of the Implementation of the Islamic Family Law

Another indicator of an effective judicial system is its adoption and approval by the public. Azizah Bt Mohd believes that the public has so far adopted the Islamic Family Law; nevertheless, some cases do not abide by the law, and laymen who are unaware of the law's existence or requirement, for example, *ṭalāq* to be pronounced in court. Sabri B Zakaria thinks that most of the population accepts the law.

Jamaludin says that the law is acceptable all over Malaysia by the Muslim community in whatever topics, marriage, divorce, alimony, custody, or maintenance. Muslims bring their cases to *Sharīʿah* courts. The provisions of the Islamic family law are taken *aḥkām al-fiqh* and *fatāwā*. Thus, people feel that they must obey and accept the judgment from the *Sharīʿah* court but also respect it because it is also actually made of religion; this is Islamic law, and the Qur'ān and Sunnah back that. So, he contends that the law is quite effective in Malaysia. Furthermore, non-Muslims respect the Islamic family law even though they do not use it as a fact.[395]

3.5.5 Some Provisions and Examples in Malaysian Islamic Family Law

This subsection covers several provisions of Malaysian Islamic Family Law, including marriage registration, limits on the minimum age for marriage, matrimonial guardianship (*Walī*), and different types of divorce in Family Law such as *ṭalāq, khuluʿ* (Cerai Tebus Talak), *taʿlīq, liʿān, fasakh*, and death.

[394] Mohamad Sabri B Zakaria, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia, (05.07.2022).
[395] Khairul Fahmi Bin Jamaludin, Interviewed by Selman Zahid Ozdemir, Malaysia, International Islamic University Malaysia (15.07.2022).

3.5.5.1 Marriage Registration

Malaysian marriage law mandates that marriages be registered. As a result, in theory, the recording procedure happens after the marriage contract. In actuality, though, there are three different kinds of recording procedures:

First: For individuals who reside in their home countries, the recording takes place right away following the signing of the marriage contract, which requires that two witnesses and the registrant, as well as a guardian, attend the recording.[396] As in the Islamic Family Law (Federal Territories) 1984 (Act 303) Section 22 (1)[397], it is stated: *"Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other ta'liq of the marriage in the Marriage Register."*

Second: Malaysian citizens who enter into marriage in Malaysian embassies located overseas. In this scenario, the registration procedure is almost identical to that followed by Malaysians who solemnize marriages within their nation. The distinction lies solely in the registrar, namely the registrant appointed at the Malaysian embassy or consulate in the respective country, rather than the original registrar appointed in Malaysia. As in the Islamic Family Law (Federal Territories) 1984 (Act 303) Section 24, it is stated: *"(1) Subject to subsection. (2) a marriage may be solemnized in accordance with Hukum Syarak[398] by the Registrar appointed under subsection 28(3) at the Malaysian Embassy, High Commission, or Consulate in any country that has not notified the Government of Malaysia of its objection to solemnization of marriages at such Embassy, High Commission, or Consulate."*

Article 28 Paragraph 3 states: "The Yang di-Pertuan Agong may, by notification in the Gazette, appoint any member of the diplomatic staff of Malaysia in any country

[396] Islamic Family Law (Federal Territories) 1984 (Act 303) Section 22 (2).
[397] The identical clauses can be found in the family laws of Kelantan and Selangor. See: Islamic Family Law (State of Kelantan) Enactment 2002, Section 22 (1), <https://www.slideshare.net/slideshow/kelantan-islamic-family-law-enactment-2002/23932250> (Accessed 25 July 2023) ; Islamic Family Law (State of Selangor) Enactment 2003, Section 22 (1), <https://www.mais.gov.my/wp-content/uploads/2020/10/ENAKMEN-UNDANG-UNDANG-KELUARGA-ISLAM-NEGERI-SELANGOR-2003.pdf> (Accessed 25 July 2023).
[398] According to Islamic Family Law (Federal Territories) 1984 (Act 303): "Hukum Syarak" means Hukum Syarak according to the Mazhab Shafie or according to one of the Mazhab Maliki, Hanafi or Hanbali." See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 2 (1).

to be the Registrar of Muslim Marriages, Divorces, and Ruju' for this Act in that country."

Third: In the scenario of Malaysian citizens residing overseas who enter into marriage outside the purview of the Malaysian embassy or consulate in the respective host nation, the procedure entails that the individual who enters into matrimony within six months after the marriage agreement proceeds to officially record the marriage with a registrar designated by the nearest embassy and consul. If the individual in question returns to Malaysia before the conclusion of the six-month duration, they will have the opportunity to undergo registration procedures inside the Malaysian jurisdiction.

> Article 35 defines: Any person required by section 31 to appear before a Registrar, fails to do so within the prescribed time, commits an offence, and shall be punished with a fine not exceeding one thousand ringgit or imprisonment not exceeding six months or both.[399]

3.5.5.2 Restrictions on the Age of Marriage

The minimum marriage age in Malaysia is sixteen for the bride and eighteen for the groom. Based on Malaysian family law, this clause states that a woman must be 16 years old to marry, and a man must be 18. Consequently, it is essential first to ascertain the *Sharī'ah* judge's truth if one or both couples seeking marriage are younger than the applicable age restriction.[400] Islamic Family Law (Federal Territories) 1984 (Act 303):

> Section 8 states: It is not permissible to solemnise a marriage or register a marriage where the age of marriage is under 18 years for men and under 16 years for women unless a *Sharī'ah* judge allows it to be recorded under certain conditions.[401]
>
> Section 37 states: Unless permitted under Hukum Syarak, any person who uses any force or threat (a) to compel a person to marry against his will or (b) to prevent a man who has attained the age of eighteen years or a woman who has attained the age of sixteen years from contracting a valid marriage, commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.[402]

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[399] Islamic Family Law (Federal Territories) 1984 (Act 303), Section 35.
[400] Basyiroh, The implementation of marriageable age provision in Malaysia and Indonesia, 50; "Reddy Rita, Marriage and Divorce Regulation and Recognition in Malaysia", *Family Law Quarterly,* Vol. 29, No. 3, (1995): 620.
[401] See: Islamic Family Law (Federal Territories) 1984 (Act 303), Section 8.
[402] See: Islamic Family Law (Federal Territories) 1984 (Act 303), Section 37.

On the other hand, the Malaysian government first brought up the issue of raising the minimum marriage age many years ago. The Malaysian Islamic Development Department (JAKIM) wants to change the Islamic Family Law (Federal Territories) 1984 (Act 303) to make it 18 years old for Muslims to marry. As per the remarks made by Datuk Seri Dr Wan Azizah Wan Ismail, the 12th Deputy Prime Minister and Minister of Women, Family, and Community Development during that period, the department is collaborating with other states to adjust their different Islamic family laws similarly. However, seven states had opposed the federal government's plan to increase the legal marriage age to eighteen.[403]

Some states officially raised the marriage age to 18, including for girls. Selangor is the first state in Malaysia to raise the marriage age to 18. The Islamic Family Enactment (State of Selangor) Enactment 2003 (Amendment 2018) was adopted by the Selangor State Assembly on September 6, 2018. It sets a minimum age limit for Muslim marriages to 18 in the state. Before this, the Islamic Family Law Enactment (State of Selangor) 2003 stipulated in Section 8 that Muslim women could marry at the age of sixteen and Muslim men at the age of eighteen. In his royal speech at the start of the 14th Selangor Legislative Assembly's second session, Sultan Sharafuddin Idris Shah, the Sultan of Selangor, announced that he and Mais, as well as the Selangor Islamic Religious Department (JAIS), had reached an agreement to set the minimum age limit at 18.[404]

While the marriage age in Islamic Family Law (Kedah Darul Aman) Enactment 2008 was the same as IFLA, now the Islamic Family Law (Kedah Darul Aman) (Amendment) Enactment Bill 2022, which amends the laws of polygamy and marriage age limits, was approved by the state assembly of Kedah. With this change, women's marriageable age was raised from 16 to 18.[405] Selangor and Kedah are the only states that have implemented a legal amendment to raise the minimum age of marriage to 18.

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[403] Teoh Pei Ying, "Seven states against increasing minimum marriage age to 18," New Straits Times, <https://www.nst.com.my/news/nation/2019/09/522946/seven-states-against-increasing-minimum-marriage-age-18> (Accessed 20 November 2023).

[404] Samantha Khor, "Selangor May Soon Be The First State In Malaysia To Raise Minimum Age Of Marriage To 18," SAYS, <https://says.com/my/news/selangor-s-islamic-bodies-have-decided-to-raise-minimum-age-for-marriage-to-18> (Accessed 20 November 2023); Bernama, "S'gor passes bill to raise minimum Muslim marriage age to 18," malaysiakini, <https://www.malaysiakini.com/news/441897> (Accessed 20 November 2023).

[405] Bernama, "Kedah increases marriage age for girls to 18," malaysiakini, <https://www.malaysiakini.com/news/628747> (Accessed 20 November 2023); Adie Zulkifli, "Kedah

3.5.5.3 Matrimonial Guardianship (Walī)

According to Malaysian family law, the consent of a girl's guardian is required for marriage. This opinion is according to the *Sunnī madhāhib* except the *Ḥanafī madhhab*. The legal provisions about marriage guardianship can be found in paragraphs a and b of Article 13 of the legislation. It is stated: (1) the wali of the woman has consented to that under Hukum Syarak; or (2) the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorised on that behalf by the Syariah Judge has, after a due inquiry in the presence of all parties concerned, granted his consent to it as wali Raja following Hukum Syarak; such consent may be given wherever there is no wali by nasab by Hukum Syarak available to act or if the wali cannot be found or where the wali refuses his consent without sufficient reason.[406]

3.5.5.4 Divorce

Currently, the legal framework regarding Muslim divorce in Malaysia is subject to the jurisdiction of individual states, as previously stated. Different types of divorce are observed by Islamic law in the Federal Territory of Kuala Lumpur. These often practised forms include *Ṭalāq, khulʿ, taʿlīq*, and *fasakh*. IFLA[407] recognises these are kinds of recognising practise of dissolution of marriage.[408] Classical jurists have delineated three further types, which, in contemporary times, hold minimal practical significance: *Ẓihār, Īlā',* and *Liʿān*.[409] [410]

raises minimum marriage age for Muslim women to 18," New Straits Times, <https://www.nst.com.my/news/nation/2022/07/814457/kedah-raises-minimum-marriage-age-muslim-women-18> (Accessed 20 November 2023).

[406] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 13 (a) and (b).

[407] The 5th part of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) contains dissolution of marriage.

[408] Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia*, (Kuala Lumpur, International Islamic University Malaysia Cooperative, 1998): 144.

[409] *Liʿān* also recognizes by IFLA after amendment made in 1994.

[410] Zaleha Kamaruddin, *Divorce Laws in Malaysia*, (Selangor Darul Ehsan: LexisNexis; Malayan Law Journal Sdn Bhd, 2005): 161-162.

3.5.5.4.1 Talāq

The most common type of divorce in Malaysia is *ṭalāq*.[411] The term "*Ṭalāq*" usually refers to terminating a legally recognised marriage. Traditionally, under the framework of Islamic Jurisprudence, the prerogative to initiate divorce is typically vested with the husband. Nevertheless, IFLA has made significant advancements in this matter by elucidating that both parties have the opportunity to apply for divorce through the court:[412] *"A husband or a wife who desires divorce shall present an application for divorce to the Court in the prescribed form, accompanied by an iqrar containing-"*[413]

Upon applying, the Court possesses the authority to initiate an inquiry regarding the permission of the other party involved in the divorce procedures.[414] In the event of mutual agreement between the parties involved, after a comprehensive inquiry and investigation conducted by the court, if it has been ascertained that the marital union has undergone an irreversible decline, the Court will issue an order requiring the husband to declare one *ṭalāq* within the Court's premises formally.[415]

In cases where one party does not consent to the divorce or if the court determines a reasonable chance of reconciliation, the Court will promptly designate a conciliatory committee. This committee will comprise a Religious Officer serving as the Chairman and two additional individuals representing the husband and wife. The Court will then refer the case to this committee.[416] The committee will try to achieve reconciliation within six months from its establishment or a more extended period as permitted by the Court.[417] When the committee submits a report to the Court indicating reconciliation has been achieved, the Court dismisses the divorce application.

If the conciliatory committee struggles to accomplish reconciliation and fails to convince the parties to restore their marital relationship, it will issue a certificate indicating this outcome.[418] In cases where the committee presents a certificate to the

[411] Abdullah & Khairuddin, The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice, 43; Kamaruddin, *Introduction to Divorce Laws in Malaysia*, 152.
[412] Kamaruddin, *Divorce Laws in Malaysia*, (LexisNexis, Malaysia, 2005): 169.
[413] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (1).
[414] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (2).
[415] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (3).
[416] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (5).
[417] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (8) and (9).
[418] Additionally, the committee may include recommendations in the certificate about matters such as the financial support and custody of any children from the marriage, the division of property, and other relevant aspects related to the marriage. See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (11).

Court indicating the inability to reconcile, the Court advises the husband to pronounce one *Ṭalāq* in the presence of the Court.[419]

It is a requirement for all divorces to be officially recorded in a court of law. Notwithstanding section 54, a man who has divorced his wife by the pronouncement of talaq outside the Court and without permission of the Court shall report to the Court within "seven days" of the pronouncement of the *ṭalāq*.[420] Individuals who, while obligated to report following the provisions of this legislation, intentionally ignore or fail to fulfil this obligation are in violation of the law and shall be subject to penalties, including a fine of up to one thousand ringgit, imprisonment for a maximum period of six months, or both.[421] The same penalty applies to an act of divorcing one's wife by *ṭalāq* outside the jurisdiction of the Court, and without obtaining the Court's authorisation, it constitutes an offence.[422]

Following the prescribed guidelines established by Allah and outlined in (IFLA), it is advised that an individual seeking to dissolve their marital union should adhere to the practice of pronouncing "one *ṭalāq*" at a time. He can exercise his right to divorce. Alternatively, if he chooses not to exercise his right of revocation, his wife will be legally divorced upon completing the *'iddah*.[423] If the wife is found to be pregnant at the moment, the *ṭalāq* is said, or the order is issued, it is stipulated that the *ṭalāq* or the order shall not be able to dissolve the marriage until the conclusion of the pregnancy.[424] IFLA does not include explicit provisions for electronic divorce. The *Sharī'ah* court's recognition of divorce between spouses through Short Message Service (SMS) technology in Malaysia during the early 2000s garnered attraction from local women's organisations. The result rendered by the Islamic *Sharī'ah* court aligns with a previous ruling made by a Dubai court in 2001.[425] The issue in question has no specific provision within the IFLA. Nevertheless, as previously mentioned, in an extrajudicial divorce, it is feasible to formalise the divorce by providing notification to the court within seven days and paying the appropriate penalty.

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[419] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (14).
[420] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 55A.
[421] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 125 (1).
[422] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 124.
[423] Kamaruddin, *Divorce Laws in Malaysia*, (LexisNexis, Malaysia, 2005): 171.
[424] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 124 (17)
[425] Divorce by text message in Malaysia, <https://www.pinsentmasons.com/out-law/news/divorce-by-text-message-in-malaysia> (Accessed 22 November 2023).

3.5.5.4.2 Khuluʿ (Cerai Tebus Talak)[426]

There is a common misperception that Islām disregards wives' rights by granting husbands the authority to exercise *ṭalāq*. In Islamic doctrine, it is acknowledged that the wife possesses the entitlement to seek the termination of her marriage in cases when there exists a genuine concern that she may exceed the boundaries set by Allah. When she deeply detests her husband and can no longer perform the marital duties prescribed by the divine laws, she may take steps to dissolve the marriage union.[427] One prominent sort of divorce that evolves in this particular scenario is *Khuluʿ*.

Divorce by redemption, referred to as *khuluʿ* or cerai tebus *ṭalāq* in Malay, is a recognised legal procedure for terminating a marriage.[428] The wife offers, and the husband accepts compensation for her property to release his marital rights. The breaking up of marriage is finalised through the pronouncement of *ṭalāq*. The classification of divorce as a *ṭalāq bā'in (sughra)* is justified due to its irrevocability.[429] Given the current circumstances, it is unlikely for the husband to reconcile with his wife through the process of *rujuʿ*. Instead, a new marriage contract and a new mahr (mas kahwin) must be established.

In cases where the husband does not consent to a divorce through redemption or fails to comply with the Court's instructions, or when the Court determines that there is a reasonable chance of reconciliation, the Court is obligated to designate a conciliatory committee by section 47. The provisions of that section shall be applicable.[430]

3.5.5.4.3 Taʿlīq

The term "*taʿlīq*" refers to a state of being suspended or attached. The concept involves the occurrence of an event under specific circumstances. In divorce, the implementation of *ṭalāq* will occur if any of the conditions outlined in an agreement or *sūrat taʿlīq* are not met or violated. In order to fulfil the requirements, it is imperative to establish an agreement or obtain the *sūrat taʿlīq*. This arrangement is formalised during the

[426] Cerai tebus means divorce by redemption in Malay.
[427] Kamaruddin, *Introduction to Divorce Laws in Malaysia*, 169.
[428] Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur, Malayan Law Journal Sdn. Bhd. 1999): 133; Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 49 (1).
[429] Ahmad Ibrahim, *Family Law in Malaysia*, (Kuala Lumpur, Malayan Law Journal Sdn. Bhd, 3rd edition 1997): 244.
[430] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 49 (4).

solemnisation of the marriage or the *ʿakad nikāḥ*. The conditions are enumerated in a designated format and mutually consented to by both parties.[431] Section 50 of the IFLA is reserved for divorce by *taʿlīq*. A woman who is married has the option to seek a divorce through the legal process outlined in a *taʿlīq* certificate. Following this certificate, she can approach the Court to declare the occurrence of the divorce officially. The Court will assess the application and investigate the legitimacy of the divorce. If it is determined that the divorce adheres to Hukum Syarak, the divorce will be officially validated and documented.[432]

3.5.5.4.4 Liʿān

Liʿān, known as an imprecation, refers to a legal procedure in which a husband makes a sworn statement alleging that his wife has engaged in adultery and further asserts that the child born to her is not his own. Conversely, the woman, also under oath, denies these allegations.[433] In a situation where a husband was to make allegations of infidelity against his wife, he would be subject to the *gadhf (slander)* punishment unless he substantiated his claims.[434] The wife and husband must testify on four separate occasions, swearing the name of Allah to affirm their truthfulness. Additionally, they must testify a fifth time, invoking the curse of Allah upon themselves should they have provided false information.[435]

The Islamic Family Law (Federal Territories) Act 1984 (Act 303) incorporated a novel provision in 1994, section 50A[436], which pertains to divorce through *Liʿān*. According to 50A (1), in cases where the individuals involved in a marriage have sworn an oath known as *Liʿān* under hukum syarak before a *Sharīʿah* judge, the judge is obligated to issue a judgement that mandates their separation, requiring them to live apart permanently.[437]

[431] Majid, *Family Law in Malaysia*, 135.
[432] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 50 Paragraph 1 and 2.
[433] Kamaruddin, *Divorce Laws in Malaysia*, 162.
[434] Ibrahim, *Family Law in Malaysia*, 274.
[435] Majid, *Family Law in Malaysia*, 137.
[436] See: Islamic Family Law (Federal Territories) Amendment Act 1994 (Act 902).
[437] Ibrahim, *Family Law in Malaysia*, 274 ; Majid, *Family Law in Malaysia*, 137. See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 50 (1-2).

3.5.5.4.5 *Fasakh*

Fasakh can be defined as the act of annulling a deed or rescinding an agreement. Within the framework of a marital union, the term signifies the legal process by which a court nullifies or terminates the marriage agreement after an application made by the wife. Therefore, while the husband possesses the right of *ṭalāq*, the wife possesses the option of fasakh to terminate the marital union.[438] In the Islamic Family Law (Federal Territories) Act 1984, section 52 and its sub-sections were introduced as the reasons for applying to the court for faskh. A woman who enters into marriage by Hukum Syarak is eligible to seek a decree for the dissolution of marriage or fasakh based on one or more of the following grounds:[439]

> (a) that the husband's whereabouts have not been known for more than a year, (b) the husband has not fulfilled his responsibility to meet his wife's financial needs for three months, (c) the husband has been sentenced to three years or more in prison, (d) and the husband has not fulfilled his marital obligations (nafkah batin) without a reasonable justification for one year. (e) if the husband is impotent during the marriage and this situation continues, and the woman is unaware of this situation before marriage; (f) the husband has been insane for two years, or he is ill with leprosy or vitiligo or suffers from an infectious venereal disease. (g) that she, having been given in marriage by her wali Mujbir before she attained the age of baligh, repudiated the marriage before reaching the age of eighteen years, the marriage not having been consummated; (g) that she, having been given in marriage by her wali Mujbir before she attained the age of baligh, repudiated the marriage before reaching the age of eighteen years, the marriage not having been consummated; (h) that the husband treats her with cruelty, that is to say, inter alia— (i) habitually assaults her or makes her life miserable by cruelty of conduct; or (ii) associates with women of evil repute or leads what, according to Hukum Syarak, is an infamous life; or (iii) attempts to force her to lead an immoral life; or (iv) disposes of her property or prevents her from exercising her legal rights over it; or (v) obstruct her in the observance of her religious obligations or practice; or (vi) if he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syarak; (i) that even after the lapse of four months the marriage has still not been consummated owing to the wilful refusal of the husband to consummate it; (j) that she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syarak.

[438] Majid, *Family Law in Malaysia*, 137.
[439] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 52, (1-4).; Abdul Azeez et al., Codification of Islamic Family Law In Malaysia, 1757.

However, two further requisites must be satisfied before the court approves her request. For a divorce by fasakh to be valid, there must be an absence of consent or mutual plan between the husband and wife. Additionally, there must be substantiating evidence or admission provided by two witnesses in cases involving impotence or evidence presented under oath. The option of fasakh is accessible to both spouses, although instances of husbands seeking it are infrequently reported due to the prevailing availability of talaq for husbands.[440]

Three aspects should be taken into consideration based on the reasons mentioned above. Firstly, it is essential to note that while all legal frameworks incorporate specific subjective characteristics as grounds for divorce, Negara Sembilan, Pulau Pinang, Selangor, and Sarawak legislation mandates a minimum duration of two years of illness as a prerequisite for divorce. In contrast, the legislation of Kelantan, Pahang, and Perak does not stipulate a minimum threshold. Furthermore, it is significant to note that all laws encompass further justifications for Faskh. In addition, forced marriage is recognised as a valid ground for divorce under the Kelantan Law, Negeri Sembilan, the Pulau Pinang, Selangor, and Sarawak association.[441]

3.5.5.4.6 Death

In the event of the demise or presumed demise of a woman's spouse, or if there has been a prolonged absence of communication from the spouse lasting four years or longer, and the circumstances are such that he ought to enable the woman to remarry, to be presumed by Hukum Syarak to be dead In such cases, the Court has the authority to issue a certificate of presumption of death of the husband upon the woman's application and after conducting a suitable inquiry. Additionally, the Court may grant the dissolution of marriage or fasakh, as outlined in section 52, upon the woman's request.[442]

[440] Majid, *Family Law in Malaysia*, 137.
[441] Abdullah & Khairuddin, The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice, 43.
[442] See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 53 (1).

3.5.5.4.7 Polygamy

According to the Marriage Law in Malaysia, it is legally possible for a male individual to engage in the practice of polygamy. However, the topic of whether or not a man can engage in polygamy necessitates a discussion of three key aspects: (i) the specific conditions under which polygamy may be permissible, (ii) the underlying grounds for evaluating the permissibility of polygamy, and (iii) the procedural considerations involved in the practice. The requirement for individuals seeking to engage in polygamy, specifically obtaining written authorisation from a judge, is a clause that is present in the majority of state marriage laws.[443] Nevertheless, particular distinctions can be categorised into broader groups:

First, which is the majority group (Ninth State Law Article 23 paragraph 1, Pulau Pinang Law Article 23 paragraph 1, Selangor Law Article 23 paragraph 1, Pahang Law Article 23 paragraph 1, the Federal Territory Law Article 21 paragraph 1, the Perak law Article 21 paragraph 1 in these articles, it is stated: "*No man may marry another while he is still married to his existing wife except by first obtaining the truth in writing from the judge. Shari'ah, and if he marries in such a way without the truth, then the marriage may not be registered under the enactment of the Shari'ah."* In the Perak law article 21, paragraph 1, there is an additional sentence: "*Obtaining prior approval from the judge that he will be fair to his wives."*

Second, polygamy without permission from the court may be registered on the condition that it first pays a fine or undergoes a sentence that has been delayed.[444] As stated in Section 123 of IFLA: "*Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both."*

Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or imprisonment not exceeding six months or both. From the perspective of the wife and husband, the

[443] Abdul Azeez et al., Codification of Islamic Family Law In Malaysia*,* 1754.
[444] Raudlotul Firdaus Fatah Yasin, Analysis of polygamy provision under the Islamic Family Law (Federal Territories) Act 1984; with referrence to the Qur'an and Sunnah, *IIUM Law Journal*, Vol. 18 No.2 (2012): 280.

court's considerations are whether to give permission or not. Some of the reasons that the husband can put forward, among others, are infertility, physical ageing, not being physically fit to have intercourse, crazy wife.[445] In comparison, some reasons that wives can put forward include financial ability, fairness, and a marriage that does not endanger the religion, life, body, mind, or property of the wife who was married first.

3.5.6 Conclusion of the Codification of the Malaysian Islamic Family Law

Malaysia is a sovereign nation in Southeast Asia. It operates under a federal system consisting of thirteen states, referred to as Negeri, and three federal territories, known as Wilayah Persekutuan. Malaysia saw periods of Portuguese and Dutch dominion before transitioning into a British colony in the late 18th century. In Malaysia, before the arrival of British colonial rule, the prevailing legal system consisted of a combination of Islamic Law and customary Law. On August 31, 1957, the Federation of Malaysia achieved independence from British colonial rule. After attaining independence, Malaysia underwent a comprehensive legal reform, establishing distinct Islamic family laws in each state.

Since the earliest period in Malaysia, Islām has had close ties to politics and society; traditionally, in the Malay states, all aspects of government, if not drawn directly from religious sources and principles, are imbued with spiritual holiness. Islām is a core element of Malay identity and culture, providing an integrated awareness of religion, traditional values, rural life, and family life. Islām and Malay identity are intertwined; being a Malay means being Muslim. The majority of Muslims in the country subscribed to the *Shāfiʿī madhhab*. Islām is the religion of the Federation, but other religions are accepted and allowed.

The application of the Law about non-Muslims takes place within the civil courts, while the Law controlling Muslims, known as Islamic *Sharīʿah* Law, is administered within the religious courts, commonly referred to as the *Sharīʿah* courts presided over by *Qāḍīs*.

The minimum marriage age in Malaysia is sixteen for the bride and eighteen for the groom. On the other hand, the Malaysian government first brought up the issue of

[445] Abdul Azeez et al., ibid.; Fatah Yasin, ibid., 272.

raising the minimum marriage age many years ago. Selangor and Kedah are the sole states that have implemented a legal amendment to raise the minimum age of marriage to 18. According to Malaysian family law, the consent of a girl's guardian is required for marriage.

The legal framework on Muslim divorce in Malaysia is subject to the jurisdiction of individual states, as previously stated. Different types of divorce are observed following Islamic law in the Federal Territory of Kuala Lumpur. These often practised forms include *Ṭalāq, khulʿ, taʿlīq*, and *fasakh*. IFLA recognises these are kinds of recognising practise of dissolution of marriage.[446] Classical jurists have delineated three further types, which, in contemporary times, hold minimal practical significance: *Ẓihār, Īlā',* and *Liʿān*. The most common type of divorce in Malaysia is *Ṭalāq*.

According to the Marriage Law in Malaysia, it is legally possible for a male individual to engage in the practice of polygamy. However, polygamy without permission from the court may be registered on the condition that it first pays a fine or undergoes a sentence that has been delayed. Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or imprisonment not exceeding six months or both.

The Islamic family law in Malaysia is widely regarded as a progressive and enlightened legal framework governing personal status matters within the Muslim community, positioning it as one of the most evolved systems among Muslim-majority countries.

Along with changes in time and conditions, Islamic family law that has been codified continues to undergo innovation to address the problems that arise in the family of the Muslim community of Malaysians. Without a doubt, there are at least some aspects of the Islamic family law undergoing reform and changes in Malaysia, which include problems: age limit for marriage, restriction on the role of guardians in marriage, marriage registration, financial ability in marriage, restriction of polygamy, family maintenance, restriction of husband's right to divorce wife, rights.

[446] The 5th part of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) contains dissolution of marriage.

3.5.7 Conclusion

Most historical accounts from the 19th and 20th centuries regarding the codification of Islamic law depict the state as the primary catalyst behind this project. This includes states governed by Muslims like the Ottoman State, colonial states such as those in North Africa, Southeast Asia, Central Asia, and South Asia, and nation-states with different political systems.

Establishing legal frameworks in the Ottoman State commenced throughout the 19th century with the *Tanzīmāt* reforms. The *Majallah al-Aḥkām al-ʿAdliyyah* was enacted in the Ottoman State from 1868 to 1876, making it the earliest instance of its kind. *Majallah* is the inaugural civil code founded upon Islamic law but does not encompass family law. The Ottomans implemented legislation that required them to collectively express their thoughts to facilitate the decision-making process for judges in the courts. In other words, it was generated by the requirements of society rather than developments in the West. Although certain members of the Ottoman elite suggested translating and adopting the French Civil Code over the entire state, the prevailing view among jurists was that the Ottoman Civil Code should be grounded on Islamic Jurisprudence.

The first successful codification of Islamic family law, known as the OLFR (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*), was established in 1917 during the modern era. However, an earlier attempt was made by Qadrī Pāshā in Egypt in 1882 to govern personal status, family, and inheritance but not legislated. The OLFR served as a model for other Muslim countries to codify their regulations in the area of family law.

Even though *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* was only enforced for a year and a half in the Ottoman State, its implementation persisted for a significantly longer duration in countries such as Syria, Jordan, Lebanon, and Palestine. It introduced distinct regulations in the area of family law for Muslims, Jews, and Christians. Providing the courts with the law ensures the courts' judicial coherence. It gained advantages from previous madhāhib by adopting an eclectic approach. The document was enacted in 1917 and repealed after a year and a half of its implementation in the Ottoman State. In 1926, the Swiss Civil Code replaced this statute.

Jordan's legal system comprised *Sharī'ah* courts that rendered judgments based on Islamic law, following the *Ḥanafī madhab*, also employed in the Ottoman caliphate.

Jordan's family law has progressively transformed over time to align with the growth and Jordan's of the country.

There is a debate among authors on the earliest codification in the field of family law in Jordan. Some suggest that it was the 1927 Family Law, while the majority think that the Ottoman Family Rights Law was the initial law until it was replaced by Law No. 26 in 1947. The prevailing consensus is derived from the fact that 84 out of the 104 provisions in the 1927 family law were directly adopted from the Ottoman family law without any modifications. Nevertheless, despite its firm reliance on the Ottoman Family Rights Decree, the law established in 1927 must be considered independent legislation as the Jordanian government introduced it as a distinct statute without any explicit connection to the Ottoman family law.

Although the Ottoman impact on Jordanian family law was initially significant, it eventually declined in line with the transformations and advancements in Jordanian society. In 1976, an important change occurred in terms of Ottoman influence. The Jordan Family law was replaced by the *Aḥwāl al-Shakhṣiyyah* Law, which introduced essential provisions regarding inheritance and testament will. Additionally, this law of 1976 also reflects the social advancements in Jordan. However, the *Ḥanafī madhhab* exerts the primary influence in law.

For decades, there has been an ongoing need for reform in Morocco's family law. As a result, each successive king who assumed power has enacted a new set of regulations on family matters. The initial phase of the historical progression of the Mudawwanat commenced on August 19th, 1957, shortly after achieving independence. This law adhered strictly to the regulations of the *Mālikī madhhab*. The code incorporated most of the distinguishing characteristics of the traditional *Mālikī madhhab*. Following the law's implementation, feminist organisations called on the government to modify the law due to its infringement on the principle of gender equality upon its enactment.

The second *Mudawwanat*, which was implemented in 1993, is referred to as *Mudawwanat al-Aḥwāl al-Shakhṣiyyah al-Maghrebayya*. The elimination of the *Walī* institution for orphaned women and the introduction of the express permission of the bride to marriage were the two most notable enhancements to the *Mudawwanat* in Morocco. The last family law, *Mudawwanat al-Usrah,* was officially ratified in January

2004. It granted women some essential rights, such as the ability to self-guardianship, divorce, and child custody. Furthermore, it implemented further restrictions on polygamy, elevated the minimum legal age for marriage from 15 to 18, and criminalised sexual harassment. However, the new law did not wholly eradicate practices such as polygamy, unilateral divorce by husbands, separation through *khulʿ*, or unequal inheritance restrictions. The modifications abolished the legal requirement for a wife's subordination to her husband and declared that both spouses were equal leaders of the home. The family is now governed not solely by the guy but by both wives.

Another benefit of the *Mudawwanat* is the inclusion of moral harm as a factor for divorce, in addition to the material loss mentioned. The wife may seek a divorce on the grounds of the husband's immoral behaviour, such as engaging in gambling, practising a different religion than the woman, or violating the fast during *Ramaḍān*.

The *Mudawwanat* also outlines a protocol for ascertaining the biological father of a child born to unmarried parents for the initial occurrence. In the past, it was required to have twelve witnesses in court who would testify and present evidence to the courts to establish the paternity of a child born to unmarried parents. Illegitimate children now receive a rapid legal acknowledgement, and courts can utilise scientific testing to resolve questions of paternity and consider a broader range of evidence to establish legitimate links.

The territory currently corresponding to the Malay Peninsula has historically been called “Tanah Melayu.” It is incorrect to assume that these ideas are recent and only associated with modern Europeans. Plenty of evidence from indigenous sources shows these terms existed before Western powers arrived and were well-known among the local Malay population. Before introducing Western influences, several Malay classical works had extensively utilised the term Tanah Melayu. The historical context reveals that the presence of Chinese and Indian groups influenced the migration patterns in Malaya throughout the 18th and 19th centuries.

The introduction of Islām in this area has been the subject of various interpretations. The introduction of Islām is usually recognized to have occurred through peaceful methods, primarily through economic relations with Muslim traders and the influence of *Sūfīs* from ʿArabia. The Malacca Sultanate, also known as Kesultanan Melayu Melaka, significantly influenced the advancement of Islām and

Islamic Jurisprudence throughout its reign from 1400 to 1511. One example of a written law from the Malacca Sultanate is the Malacca Laws (Hukum Kanun Melaka). It originated as a legal system based on Malay customs and Islamic law.

The application is impartial and does not show any *madhhab* bias towards any *madhhab*. Malaysia's legal system could benefit from adopting the perspectives of the other *madhāhib*. To summarise, the process of issuing a *fatwā* in Malaysia follows a specific sequence: Firstly, the *Fatwā* Council bases its decisions (*ḥukm*) on the *Muʿtamad* of the *Shāfiʿī madhhab*. Suppose the Muʿtamad, which is the authoritative text within the Shāfiʿī madhab, does not sufficiently meet the needs of the people (the *Maṣlaḥah*). In that case, it is permitted to seek guidance from additional sources.

Before the arrival of colonisers, the legal system in Malaysia was comprised of a blend of Islamic Law and Customary Law. The legal systems that existed in the Malay states before British intervention can be classified into two categories: the Perpatih custom, which Malays primarily practised in Negeri Sembilan, Masjid Tanah, and certain areas in Malacca, and the tradition of Temenggung, which was more widespread in other parts of the Peninsula. The specific historical documents indicate that the Temenggung custom displayed considerable similarities to Islamic regulations. One could argue that the influence of Portuguese and Dutch legal systems on the overall legal framework, beyond political and administrative frameworks, was somewhat limited. Unlike the Portuguese and Dutch, the British implemented laws that specifically targeted Muslims, so establishing a distinct set of rules and legal authority.

Malaysia experienced a thorough legal reform, which led to the creation of separate Islamic family laws in each state.

Between 1976 and the post-1980 period, significant advancements occurred in the realm of family matters. The legal framework for non-Muslims in Malaysia is regulated by the Law Reform (Marriage and Divorce) Act of 1976. In the early 1980s, Malaysia introduced a separate law that mainly dealt with issues related to the Islamic family. Every state has its unique family law legislation, which is designated by its distinct nomenclature. There could be variations in these state laws regarding some matters.

The Islamic Family Law Act (IFLA) has made notable progress by clarifying that both parties can seek divorce through the court. According to the standards set by

Allah and outlined in (IFLA), it is recommended that an individual who wishes to end their marriage should follow the practice of pronouncing "one *ṭalāq*" at a time. There is a widespread misconception that Islam exclusively neglects the rights of wives by giving husbands the power to practice *ṭalāq*. According to Islamic doctrine, it is recognized that a wife has the right to seek divorce if there is a legitimate concern that she may violate the limits established by Allah. Suppose a woman has a strong aversion towards her husband and cannot fulfil the obligations of marriage as dictated by religious rules. In that case, she can initiate the dissolution of the marriage.

The Islamic Family Law Act of several states in Malaysia can be broadly categorised into two distinct groups. Initially, certain states adopted the Islamic Family Law (Federal Territories) Act 1984, albeit with minor alterations. These states include Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak, and Sabah. The second classification pertains to those states that implemented substantial modifications to the initial draught that the Council had approved of Rulers. The variations mainly lie in the organisation of sections, legal provisions, and procedural aspects between Kelantan, Johor, Malacca, and Kedah states. Presently, there is an ongoing endeavour to standardise Islamic Family Law across all states in Malaysia.

The advantages of codifying Islamic family law can be observed through the benefits of legal codification. Legal codification promotes public adherence to the Law by establishing legal consequences, such as sanctions, for violations of the Law. The community will reap the benefits of adhering to the Law. For instance, establishing a connection with marital legislation about the rights and responsibilities among family members will create a more favourable environment for the partnership. Furthermore, it will streamline the process for law enforcement to address the challenges presented, as they will not have to exert excessive effort in locating relevant legal provisions of the concerns at hand.

From the preceding discourse, it can be concluded that efforts to codify Islamic family law in the Muslim world are essential due to three factors: First, Islamic Family Law holds a more prominent and significant role than other laws in the clump of Islamic *muʿāmalāt* law. Second is the effort's positive value for codifying Islamic family law. Furthermore, Islamic Law is more acceptable and applied in society than other legal systems.

CHAPTER FOUR

OTTOMAN LAW OF FAMILY RIGHTS DECREE: IT'S ABOLITION AND LEGAL STRUCTURE OF THE MODERN REPUBLIC OF TURKEY

4.1 INTRODUCTION

As stated in the third chapter of the thesis, *Majallah al-Aḥkām al-ʻAdliyyah* was legislated in the Ottoman State between 1868 and 1876. It is the first civil code based on Islamic law.[1]

Completing the unfinished work of *Majallah,* the Ottoman Law of Family Rights is one of the last examples of the legalisation movements that started shortly after the *Tanzīmāt* in the Ottoman State, which was prepared during the troubled days of the First World War. The Decree was accepted as a temporary law, benefiting from Article 36 of the *Qānūn al-Asāsī* (Constitutional Law of the Ottomans). This decree is considered the first example in the field of family law in the history of Islamic Law and Ottoman law. Although it remained in force for about a year and a half in the Ottoman State, it remained in force for extended periods in countries such as Syria, Jordan, Lebanon, and Palestine. Despite its short life, it significantly impacted the history of Islamic law.[2]

The decree, which does not include the issues of parentage and guardianship of family law, consists of nine chapters (*bāb*) and twenty-one sections in two books. The first book is about marriage, and the second is about divorce. The decree contains separate provisions for Jews and Christians in cases with different legal principles. Even if it was delayed, including the family law field in the legalisation movement enabled the piecemeal regulations in question in the previous process to become more essential.[3]

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[1] Hasan Elek, "Osmanlida Kanunlaştirma Hareketler Ve Mecelle (Legalisation Movements and Majallah in the Ottoman)", *Gümüşhane Üniversitesi İlahiyat Fakültesi Dergisi*, Vol.3 No.6 (2014), 120.; M. Akif Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, "Mecelle-i Ahkâm-i Adliyye", Vol.28, 231.

[2] M. Akif Aydın*, Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", Vol.18, 314. Cihan Osmanagaoglu Karahasanoglu, "İsviçre Medeni Kanunu'nun Türkiye Cumhuriyeti Tarafından Resepsiyonuna Uzanan Sürece İlişkin Genel Bir Değerlendirme (A General Evaluation of the Process Leading to the Reception of the Swiss Civil Code by the Republic of Turkey)", In *I. Türk Hukuk Tarihi Kongresi Bildirileri*, edited by Fethi Gedikli (Istanbul: On İki Levha Yayınları, 2014), 48.

[3]Ahmet Yasin Küçüktiryaki, Osmanlı Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aile Kararnamesi (Developments in the Field of Family Law in the Ottoman State after the Tanzimat and the Ottoman Law of Family Rights), *Hitit Üniversitesi İlahiyat Fakültesi Dergisi*, Vol. 13, No. 26 (2014): 181-182.

Although it included many provisions, it remained in force for about a year and a half in the Ottoman State.

At the beginning of the republican period, the new administration gave the impression that it would be reconciled to a certain extent with the past. The Family Law drafts of 1923 and 1924 were mainly based on Islamic law. However, later on, the idea of benefiting from these drafts and various *Fiqh* provisions was abandoned, and all of the fundamental laws, including civil law, were translated from several Western states, thus breaking all ties with the past and the philosophy that dominated this past. The process initially hoped to present a unique example of modernisation but eventually departed from this goal, resulting in the "reception" of Western laws and institutions.[4]

While the Ottoman State left its place to the Republic of Turkey, Ottoman law gave its place to the law of the Republic of Turkey with the said legal revolution.[5] This chapter evaluates the reasons for establishing the Ottoman Law of Family Rights Decree, its abolition, the costs for Muslim families, and the legal structure of the Modern Republic of Turkey.

4.2 REASONS FOR THE ESTABLISHMENT OF THE OTTOMAN LAW OF FAMILY RIGHTS

There is a close relationship between the legal systems implemented by societies and their political, social, and economic conditions. Here is the Ottoman Law of Family Rights, which entered into force on 25 October 1917 and consists of one hundred and fifty-seven articles, providing vital information about the period when it came into force and the social structure of the period. The information presented by the decree also shows the main reasons for the emergence of such a decree. The first and perhaps the most important one is that family law was not enacted until then. To evaluate the reasons for the emergence of this decree, it would be appropriate to briefly touch on the position and history of family law in the Ottoman legal system before the decree came into force.

[4] M.Akif Aydın, Türkiye'nin Hukuki Modernleşmesi (Turkey's Legal Modernisation), In *Modernleşme Islam Dunyasi ve Turkiye*, (Istanbul: Ensar Publications, 2000), 339.
[5] Karahasanoglu, İsviçre Medeni Kanunu'nun Türkiye Cumhuriyeti Tarafından Resepsiyonuna Uzanan Sürece İlişkin Genel Bir Değerlendirme, 45.

Several political, economic, social, cultural, and legal factors are behind the preparation of the decree, and also feminism movements are mentioned.[6] As mentioned above, one of the leading legal reasons was that family law had not yet been codified. Beginning with the *Tanzīmāt* Decree period, the Land Code (1858) and the Majallah (1868-1876) constituted a large part of the civil law, yet this was not the case for family law. [7]

The *Tanzīmāt* period includes two different understandings regarding law since it is of domestic and Western origin. After the declaration of the *Tanzīmāt* in 1839, various laws and regulations, which took their roots from Islamic law and European law, began to be implemented.[8] *Majallah al-Aḥkām al-'adliyyah* was published in 1876 and entered into force after various laws on trade, enforcement, and land issues. However, *Majallah* was a law that mainly included the principles of debts, property, and trial law, and it did not cover family law.[9] For this reason, Majallah was criticised by the judges and professors of the period and today's researchers.[10] This idea of lack has made it necessary to publish a decree on family law.

Another important reason for the birth of the decree was the need for legal texts to assist the judges in the courts and the proliferation of family law cases.[11] It was sometimes difficult for the judges of the *Sharī'ah* courts to find the rules of family law they were looking for in classical *fiqh* books.[12] The current political situation and emerging problems have resulted in the necessity of a consistent text to which the judges will apply. The most striking issue that causes this is undoubtedly the current debates about the position of women in society. Western-supported feminism movements[13] that emerged after the proclamation of the *Tanzīmāt* to protect women's rights, the increase in women's social and economic activities in society, and the acceptance of women to

[6] Abdurrahman Yazıcı, "19. Osmanlı Hukûk-ı âile Kararnâmesi (1917) ve Sadreddin Efendi'nin eleştirileri", *Ekev Akademi Dergisi*, Vol.19, No. 62 (2015): 569.
[7] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", Vol.18, 314.
[8] Yazıcı, ibid. 569-570.
[9] Cem Baygın, "Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış (A Quick Look Into the Family Law's Developmentfrom the Rescript of Gulhane to Present)", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi,* Vol. 22 No.3 (2016): 454, Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", 314.
[10] Yazıcı, ibid. 570., Aydın, ibid., 314.
[11] Küçüktiryaki, Osmanlı Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aile Kararnamesi, 183.
[12] M. Akif Aydın, *Osmanlı Aile Hukuku (Ottoman Family Law)*, (Istanbul: Klasik Yayinlari, 2018), 159; Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", 314.
[13] Küçüktiryaki, ibid. 186-187.

educational institutions from primary school to university, some of the factors that emerged as a result of wars and directly affected women's family and economic status. These problems should be accepted as one of the most important reasons for enacting family law.[14]

In the Ottoman state, the relations of Muslims regarding family law were arranged according to the *Sharī'ah* provisions in the books of *fiqh* and *fatwā* journals. In these regulations, based on the *ijtihāds* of *Ḥanafi madhhab*, the official *madhhab* of the Ottoman state, the strict application of *ijtihāds* sometimes caused some difficulties in legal life. An example of this is the acceptance of women's divorce in minimal circumstances.[15]

In preparing the decree, the idea was also to eliminate the duplication of the judicial system in family law. Previously, non-Muslims could apply to the *Sharī'ah* courts and their community courts in legal matters. In cases of the same type, they were going to different jurisdictions depending on whether the parties to the case were Muslims or non-Muslims led to judicial duality.[16] Eliminating this confusion is one of the most important reasons for enacting the decree. The reform thought of the Committee of Union and Progress on this issue is remarkable. At the beginning of their actions is the attempt to close the consular and community courts belonging to non-Muslims.[17]

The Westernisation movement in the Ottoman State, which began in the nineteenth century, led to significant social and other changes. Radical changes in the family structure were observed during this period as well. Concomitantly, the role and effectiveness of women in social life increased, and they began to participate in various social activities indirectly resulting from the ongoing wars. As a result, women began labouring in multiple industries, from factories to workshops and constructing roads to cleaning streets, essentially after World War I.[18]

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[14] Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 455; Küçüktiryaki, Osmanlı Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aile Kararnamesi, 185-186.

[15] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", 314-315.; Aydın, *Osmanlı Aile Hukuku*, 159-160.

[16] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", 315; Baygın, ibid.

[17] Yazıcı, "19. Osmanlı Hukûk-ı âile Kararnâmesi (1917) ve Sadreddin Efendi'nin eleştirileri" 570.; Aydın, *Osmanlı Aile Hukuku*, 160.

[18] Aydın, ibid., 161-162.

Besides increasing their participation in social and economic life, these successive wars, resulting in the martyrdom of men, caused additional significant societal challenges for women. Wives of the soldiers, for example, who did not return from the frontlines, were unable to get remarried since they could not prove that their husbands had died. All these factors influenced women's status and legal position in the social structure.[19]

Another reason for establishing the law was the cultural changes and women's movements in Ottoman society after the *Tanzīmāt* decree. In addition, there was interest in establishing girls' schools and electing female instructors in the educational sphere. A special department for female students was opened at the university (*Dār al-Funūn*). The growth in educational and cultural levels has resulted in profound shifts in the idea of femininity as women become more involved in social and economic life. The discussion of women's rights in newspapers, magazines, and books played an equally important role. [20]

This era contains three ideological groups: Westerners, Islamists, and Turks (nationalists). Despite having differing remedies for this question, they were all concerned about women's rights. Westerners said women were at a lower level in society due to a lack of education. Moreover, they strongly opposed polygamy. For Islamists, the inferiority of women in society was caused by a misunderstanding and misapplication of Islām. Islām has given women the status they deserve. Lastly, nationalists stand in between the two other groups.[21]

The Ottoman Law of Family Rights, which was put into effect for the legal, social, and political reasons mentioned so far, is the first example of enactment in the field of family law. Although there are many reasons for the emergence of this decree, the most important one is the significant gap in the field of family law. Although there were partial attempts before, the first law text on family law emerged systematically.

[19] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", 314.; Belkıs Konan, "Hukuk-ı Aile Kararnamesi'nde Kadının Hukuki Durumu İle İlgili Düzenlemeler (Regulations Regarding the Legal Status of Women in the Ottoman Law of Family Rights)", In *II.Türk Hukuk Tarihi Kongresi Bildirileri*, edited by Fethi Gedikli (Istanbul: On İki Levha Yayınları, 2016), 326.
[20] Aydın, ibid, 315.; Konan, ibid.
[21] Aydın, *Osmanlı Aile Hukuku*, 163-164.

4.3 REASONS FOR ABOLITION OF THE DECREE

The family law decree, the first in its field and included many innovations, had a concise life in the Ottoman State. The decree was worn out before it was two years old, and it was repealed with a temporary law dated 19 June 1919 as a result of the intervention of the occupation forces following the occupation of Istanbul.[22] Some of the main reasons for the annulment process can be summarised as follows:

4.3.1 Violent Opposition by Non-Muslim Spiritual Leaders and Conservative Muslims

The decree took radical steps on issues that concern both Muslims and non-Muslims. In this respect, it has been strongly criticised by non-Muslims and jurists with Islamist views, even though the people generally accepted it. In particular, the criticisms of ʿAbd al-Qādir Ṣadr al-Dīn Afandī were directed towards the articles that were put according to the opinions received from outside the *Ḥanafī madhhab*. The number of such articles was quite large.[23]

Article 156, criticized by non-Muslims, could have been abolished alone; however, the annulment of the articles that did not comply with the views of the *Ḥanafī madhhab* was almost the same as cancelling the decree. As mentioned above, the two groups created an environment against the decree, and the political situation of the Ottoman State significantly increased the influence of the conservatives in the government and the non-Muslim spiritual leaders in the eyes of the Allied Powers. For this reason, it is generally accepted that the reason for the repeal of the decree is the influence and efforts of the two groups in question.[24]

The decree was thought to be abolished during the first Damat Ferid Pāshā government. However, the opposition that emerged against the abolition prevented this, and it was considered to make some changes in the decree that would eliminate the objections of non-Muslims. The influence of the conservatives increased during the second Damat Ferid Pāshā government, and Damat Ferid Pāshā, who went to Paris on

[22] Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 456.
[23] Küçüktiryaki, Osmanlı Devletinde Tanzimat Sonrası Aile Hukuku Alanındaki Gelişmeler ve Hukuk-ı Aile Kararnamesi, 197.
[24] Küçüktiryaki,ibid. 199.

6 June 1919, left Shaykh al-Islām Mustafa Sabri Efendī to his place also facilitated the work of this group.[25]

4.3.2 Adoption of Westernism and Secularism as a Policy

The idea of Westernisation prevailed in every field, including law, to save "the sick man" in the previous period and to give dynamism and strength to the young Republic in the following period. Following a hesitant path initially, this trend gradually became a preference for adopting Western law.[26]

With the influence of the Lausanne negotiations, the reception of the Swiss Civil Code was decided, and the speech of the Minister of Justice Mahmut Esat Bozkurt before the *Aḥkām-i Shakhṣiyyah* and *Vācibāt* Commissions reveals this adopted policy:

> The Turkish Revolution's decision is to adopt Western civilization unconditionally. This decision is based on such determination that those who oppose are doomed to be destroyed by iron and fire. We must take our laws from the West as they are regarding this principle. Thus, we will act following the will of the Turkish nation. We owe it to succeeding in business not according to our pleasures and wishes but according to the wishes of our nation. I want to thank you for your services so far and terminate the duties of the commissions.[27]

Not only in the field of civil law but also in other fields of law, the laws of Western countries have been turned into domestic laws by the political power, which is the representative of the Republic of Turkey, and the principle that the legitimacy of legal rules to be based on divine sources has been abandoned.[28]

4.3.3 Western Pressure in Favour of Foreigners and Non-Muslims

During the Lausanne negotiations, the criticisms, which had previously been directed to the Ottoman State by the Western countries, that "it could not apply Islamic law to its non-Muslim citizens" were also put forward against the representatives of the new Turkish Republic. This is one of the factors that has driven the Turkish government to

[25] Aydın, *Türkiye Diyanet Vakfı İslam Ansiklopedisi* "Hukuk-ı Âile Kararnâmesi", 318.
[26] Aydın, ,Türkiye'nin Hukuki Modernleşmesi, 345.
[27] Karahasanoglu, İsviçre Medeni Kanunu'nun Türkiye Cumhuriyeti Tarafından Resepsiyonuna Uzanan Sürece İlişkin Genel Bir Değerlendirme, 49.
[28] Karahasanoglu, Ibid.

a full reception in law. In a sense, the government tried to get rid of the pressure in favour of foreigners and non-Muslim minorities during the Lausanne peace negotiations by accepting Western laws. In order to avoid Western interference, the laws of the West were taken by way of full reception. [29]

This perception also shows itself in the justification of the Turkish Civil Code of 1926:

> …in order for a single law to be applicable to the whole community, it must cut off ties with religion in states containing subjects belonging to various religions, which is also imperative for national sovereignty. …If the laws are based on religion, in a state that must accept the freedom of conscience, it is necessary to make separate laws for its citizens with various religions. This situation is entirely against the political, social, and national unity, which is the basic condition in the current century state. The state is in contact not only with its own subjects but also with foreigners.[30]

4.3.4 Changing Sociology and the Classical ʿUlamā's Inability to Offer Their Modernisation Model

On the other hand, the nineteenth century was not a century in which essential developments were seen only in commercial and economic activities. In addition, radical changes are seen in social and cultural life. These changes had a significant impact on the understanding of family, women, marriage, and divorce and changed them. It was inevitable that this would reflect on areas such as marriage, divorce, lineage, and inheritance. In fact, the Land Code of 1858, the Ottoman Law of Family Rights of 1917, and the Civil Code of 1926, which were later adopted, made radical changes in these areas.[31]

Although Westernists and especially Turkish intellectuals played a role in the preparation of the Decree, the changes brought by other *madhāhib* regarding the more expansive right to divorce for women, the invalidity of forced marriages and divorces, and the invalidity of marriage and divorce by a drunkard, were aimed at solving legal and social problems revealed by six centuries of historical experience. In this process,

[29] Karahasanoglu, İsviçre Medeni Kanunu'nun Türkiye Cumhuriyeti Tarafından Resepsiyonuna Uzanan Sürece İlişkin Genel Bir Değerlendirme, 49.
[30] Hıfzı Veldet Velidedeoğlu, *Türk Medeni Hukukunun Umumi Esaslari (General Principles of Turkish Civil Law)*, (Istanbul, Istanbul Matbaacılık, 6th edn., 1959), Vol. 1, 83.
[31] Aydın, Türkiye'nin Hukuki Modernleşmesi, 341.

it was customary to solve these problems partly by introducing other legal remedies and partly by resorting to unlawful means.[32] These various groups had influenced the preparation of the decree; however, the decree was accepted more to reflect Islamist ideas.[33]

Another reason is that classical Islamic and Ottoman jurists do not have the mentality and necessary knowledge to present a unique modernisation model in this century. Unlike the West, the nineteenth century was not the period of Islamic and Ottoman law development. As a matter of fact, Cevdet Pāshā attributes the failure of the text, which was the attempt to legislate before the *Majallah*, to be completed and unfinished due to the lack of knowledge of the people forming the committee.[34]

4.3.5 Decreasing Influence of the ʿUlamā

Since Mahmud II, it is a fact that the *ʿIlmiyyah* class (the educational institution) lost power and ground in favour of *Qalamiyyah* (the administrative institution) within the *ʿIlmiyyah*, *Sayfiyyah* (the military institution) and *Qalamiyyah* trio. It can be said that the abolition of the Janissary Corps disrupted the balance between these three centres in favour of bureaucracy. For this reason, the *ʿUlamā* did not take an active part in the assemblies such as the *Majlis-i Vālā* and the *Majlis-i Tanzīmāt*, which carried out the reforms of the *Tanzīmāt* period. [35]

4.4 POLITICIANS' AND LAWYERS' VIEW OF THE QĀNŪN ḤUQŪQ AL-ʿĀ'ILAH AL-ʿUTHMĀNĪ AND CONSEQUENCES OF ITS REMOVAL

Those of the participants who expressed their opinions in detail focused on the reasons for the emergence of the *Qānūn Ḥuqūq al-ʿĀ'ilah Al-ʿuthmānī* and stated that the *Qānūn Ḥuqūq al-ʿĀ'ilah* is a legalisation based on Islamic Law but containing various innovations in a way that does not neglect the necessities of the day. The parts of the right that are expressed as “innovation” are laws that aim to solve society's various problems in the early twentieth century by going beyond the views of the *Ḥanafī*

[32] Aydın, Türkiye’nin Hukuki Modernleşmesi, 344.
[33] Yazıcı, 19. Osmanlı Hukûk-ı âile Kararnâmesi (1917) ve Sadreddin Efendi’nin eleştirileri, 570.; Konan, Hukuk-ı Aile Kararnamesi'nde Kadının Hukuki Durumu İle İlgili Düzenlemeler, 329.
[34] Aydın, ibid., 342.
[35] Aydın, Ibid., 346.

madhhab. For example, the opinion of *Mālikī scholars* about the situation of the *mafqūd* was respected since the time required for the wife of a *mafqūd* person to be considered divorced from him would be too long by *Ḥanafīs* jurists, the ruling that the husband will be ruled dead after one year if he is lost in a dangerous environment or four years if he is lost in a normal environment, and his wife can marry someone else after waiting for *ʿiddah* (Art. 127) has belonged to the *Malikis*. Again, in the *Qānūn Ḥuqūq Al-ʿĀ'ilah*, some provisions were accepted based on the views of *Ḥanbalī* jurists. For instance, it was against the *Ḥanafī madhhab* that his wife could impose a condition not to marry the second wife and that this condition would be valid. Giving a share of inheritance to a grandfather orphan is another issue accepted in the *Qānūn*. The participants expressed the examples mentioned above, and it was stated that the *Qānūn* is a legal text that includes such dispositions and, therefore, should be given importance. Sentop[36] draws attention to the following point in particular: The fact that the Ottoman state respected the views of *madhāhib* other than the *Ḥanafī madhhab*, which was almost the official *madhhab*, focused on eliminating the grievances of the period and solving its legal problems -for this reason, despite all the criticisms directed at - it is a saving that makes *Qānūn Ḥuqūq al-ʿĀ'ilah* valuable and vital. The participants' evaluations of *Qānūn* are generally that it is organised with a pluralistic understanding and, therefore, it is an essential legal text.[37]

Ozkaya also stated that *Qānūn* can be considered an essential and innovative legal text for eliminating legal problems. In addition to this, He reminded that the *Qānūn* was subject to criticism by scholars who have a strict attitude towards the issue of respecting the views of the *Ḥanafī madhhab*, as well as Jewish and Christian subjects and that for these reasons, it could only remain in force for two years. Therefore, we could not find the opportunity to develop the text of the law in question. He stated that the effect of the *Qānūn*, which remained in force for two years, was limited, implying that its abolition did not significantly impact.

[36] Mustafa Sentop, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (21.04.2022).
[37] Yilmaz, & Ozkaya & Unal, & Aydogdu, & Participant E, & Tunc, & Sentop, Interviewed by Selman Zahid Ozdemir.

4.5 LEGAL STRUCTURE OF THE MODERN REPUBLIC OF TURKEY

An understanding of imported law, entirely based on citations from Western law, was developed with the proclamation of the Republic and the implementation of many reforms and changes in Turkish Civil Law. The impact of these legislative laws on family law has been the topic of extensive disputes. Post-1920, a series of profound alterations were implemented, which radically transformed family law. The decision to postpone the event until these specific dates was motivated by the social structure of the Ottoman State and its underlying dynamics, which were not yet ready to accept such a drastic change.[38]

The Ottoman State has wanted to make amendments to this civil code since the enactment of *Majallah* because there were issues that were not included in this civil code. *Qānūn-i Madanī* (Civil Code) commission was established in 1916 to make *Majallah* a law that reflects not only the views of the *Ḥanafī madhhab* but also all Islamic law and uses European Laws on this subject. The purpose of the Commission was to carry out the necessary work so that *Majallah al-Aḥkām al-ʿAdliyyah* could become a civil code suitable for the needs of the time.[39]

This commission was divided into sub-commissions such as the *Majallah Taʿdīl* (Amendment) Commission and the *Ḥuqūq al-ʿĀ'ilah* Commission.[40] The *Ḥuqūq al-ʿĀ'ilah* Commission prepared and published the *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* in 1917 due to the severe deficiency caused by the Majallah not covering the provisions of family law. Still, this decree was abolished in 1919 due to the pressure of the Allied Powers. The commission's work continued uninterruptedly during the First World War until 1922. However, the slow continuation of the commission's activities and the

[38] Aydın Aktay, "Türk Modernleşmesinin Özgünlüğü Sorunu: Türk Aile Hukuku Örneği (The Problem of Originality of Turkish Modernisation: The Example of Turkish Family Law)", *Akademik İncelemeler Dergisi*, Vol. 7. No. 2 (July 2014): 95-97.

[39] Osman Kaşıkcı, "Mecelle'nin Hazırlanışı, Özellikleri ve Üzerinde Yapılan Değişiklik Çalışmaları (Preparation of Majallah, Its Features and Changes Made on It)", (PhD's thesis, Social Sciences Institute, İstanbul University, Turkey. 1995). 171; Ahmet Akgunduz, 1920-1924 Yılları Arasında Yapılan Mecelle Ta'dilleri ve Mezhepleraras Mukayese Uygulaması (Majallah Amendments Made Between 1920-1924 and Inter-Madhhab Comparison Application). In *International Majalla Symposium Book (Codification, Practice And Contemporary Effects)*, (Bursa: Star Matbaacılık, 2021), 25-26.

[40] Kaşıkcı, Mecelle'nin Hazırlanışı, 171.

victory of the War of Independence caused the commission's activities to be abandoned.[41]

4.5.1 Legal Structure Envisaged in the (*Teskîlât-i Esâsîye*) Constitution of 1921

With the repeal of the *Qānūn Ḥuqūq al-ʿĀ'ilah Al-ʿuthmānī* in 1919, the provisions in the field of family law returned to the pre-Decree. However, since the legal and social needs that led to the preparation of the Decree did not disappear, the necessity of preparing a family law to replace the Decree continued. However, the Ottoman state no longer had an environment to do this. The Constitution of the new Turkish state, established in Ankara in 1921, laid down the first principles regarding the legal structure of the new state. According to this, The new Turkish state will follow an eclectic structure like the *Tanzīmāt* period codifications and benefit from Islamic and Western law.[42]

As soon as the war ended, a series of commissions were established to determine the legal structure of the new Turkish state and prepare the necessary laws. The commissions that concern civil law are the *Majallah Wācibāt* (Obligations) Commission and *Majallah Aḥkām-i Shakhṣiyyah*[43] commissions.[44]

4.5.2 Aḥkām-i Shakhṣiyyah Commission and 1923 Family Law Draft

At the beginning of the republican period, the new administration gave the impression that it would be reconciled to a certain extent with the past. In fact, the Family Law

[41] Erhan Taş, "Medeni Hukuk ve Türkiye'de Medeni Hukukun Tarihi Üzerine bir Inceleme (1923-1927) (A Study on Civil Law and the History of Civil Law in Turkey (1923-1927))", (Master thesis, Social Sciences Institute, Fırat University, Turkey. 2014). 44.
[42] Aydın, *Osmanlı Aile Hukuku*, 207.
[43] While some authors state the name of this commission as *Aḥkām-i Shakhṣiyyah*, some authors mention it as *Aḥwāl-i Shakhṣiyyah*. In fact, the name of the commission was recorded in two different ways in different works of the same authors.
[44] Aydın, *Osmanlı Aile Hukuku*, 207-208; Taş, Medeni Hukuk ve Türkiye'de Medeni Hukukun tarihi üzerine bir inceleme, 45; Nilüfer Uğurlu Şenel, "Türk batılılaşmasında Medeni Kanun'un önemi (The importance of the Civil Code in Turkish Westernisation)", *Atatürkçü Bakış*, Vol.2. No.4. (2003): 79; Elif Dursunüst, "Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi (Turkish Civil Code in the Process of Adoption)", *Usul İslam Araştırmaları*, No. 12. (2009): 161; Ercan Karaismailoğlu, "Ahkâm-ı Şahsiye Komisyonunca Aile Hukukuna Dair Yapılan Çalışmalar (Studies Conducted by the Aḥkām-i Shakhṣiyyah Commission on Family Law)", *Adalet Dergisi*, No.71. (2023): 528.

drafts of 1923 and 1924 were mainly based on Islamic law, with a greater weight in the first one.[45]

In 1923, commissions to prepare the necessary drafts for the law amendment were established by the Ministry of Justice to modernise the laws in force. *Majallah Aḥkām-i Shakhṣiyyah* Commission was among these commissions which worked in civil law. This commission would continue its work as the successor to the commission established in 1916 and prepared the Ottoman Law of Family Rights.[46] The work of the commissions in question was expected to be based primarily on the provisions of *fiqh* and law and to benefit from legal solutions and practices adopted by other nations.[47] These commissions also include legal concepts and expressions. Instructions were published stating the working style and method of the commissions, how to work with the Ministry, and their duties. If necessary, new legal rules can be made, and the Ministry of Justice will resolve problems between the commissions.[48]

The *Aḥkām-i Shakhṣiyyah* Commission held its first meeting in Istanbul on May 2, 1923.[49] It was discussed whether the laws to be prepared would be based on *Sharī'ah* principles, and the following solution was found: Whichever provision the Commission deems to be beneficial, that article will be taken, and those with a religious basis will be specified with their source. This Commission held only sixteen meetings for new personal and inheritance laws. As a result of these studies, a law draft similar to the 1917 Ottoman Law of Family Rights was prepared and presented to the Parliament at the end of 1923 by the Deputy of the Courthouse, Seyit Bey.[50] The draft in question was referred to the courthouse and shariah committees for their opinions by the parliament. Both councils accepted the draft with some changes. While waiting for its turn to become law, in the session dated April 3, 1924, the new deputy of the court, Necati Bey, withdrew the draft on behalf of the mandate because it would be discussed again.[51]

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[45] Aydın, Türkiye'nin Hukuki Modernleşmesi, 339.
[46] Halil Cin, *İslam ve Osmanlı Hukukunda Evlenme (Marriage in Islamic and Ottoman Law),* (Ankara, Ankara Üniversitesi Hukuk Fakültesi Yayınları, No.341, 1974), 306; Dursunüst, Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi, 162.
[47] Şenel, Türk batılılaşmasında Medeni Kanun'un önemi, 79.
[48] Taş, Medeni Hukuk ve Türkiye'de Medeni Hukukun tarihi üzerine bir inceleme, 46.
[49] Cin, İslam ve Osmanlı Hukukunda Evlenme, 307; Dursunüst, Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi, 162.
[50] Taş, Medeni Hukuk ve Türkiye'de Medeni Hukukun tarihi üzerine bir inceleme, 47.
[51] Aydın, *Osmanlı Aile Hukuku*, 209; Dursunüst, Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi, 162.

The features of the 1923 draft: It is supportive of the Ottoman Law of Family Rights. It has the same value as it contains in terms of its form and substantive law. This triple character brings separate provisions for Muslims, Christians, and Jews. Because other *madhāhib* were also used in the draft, this draft was prepared with the understanding of reducing the tripartite judicial system to a single one. It also includes the innovations brought by the Ottoman Law of Family Rights: State control over marriage and divorce, granting women the right to judicial divorce in some instances, limiting polygamy, and introducing a minimum age limit for marriage.[52]

After the proclamation of the Republic on October 29, 1923, civil law studies continued. However, no positive results were obtained from the commission's work, and the work was temporarily stopped. Afterwards, the National Assembly abolished the Ottoman Caliphate on 3 March 1924. After the abolition of the *Shariah* and Foundations Ministry, negotiations were held on April 8, 1924, to abolish the *Sharī'ah* Courts and determine the courts to be established instead. Then, all of them were put to vote and accepted. Thus, *Sharī'ah* Courts were abolished. [53]

4.5.3 1924 Family Law Draft

There is also the Family Law Draft, dated 1924. With a regulation issued in May 1924[54], *Taʿdīl-i Qawānīn* (amendment of laws) commissions were re-established and, like the ones in 1923, were divided into *Wācibāt* (dealing with the law of obligations) and *Aḥkām-i Shakhṣiyyah* (responsible for regulating personal and family law) commissions and worked for about two years. (1924-1925) In contrast to the preceding ones, in the 1924 instructions, there are no provisions regarding compliance with the principles of *fiqh*. The new directive was prepared with a more pragmatist approach and a very different spirit than the old one, and the main purpose was to prepare contemporary laws that would meet the state's legal needs. For this purpose, existing legislation can be used, or if necessary, the laws of Western states can be used.[55] After the commissions

[52] Ebru Kayabaş, Hukuk-ı Aile kararnamesi (The Ottoman Law of Family Rights), (Master's thesis, Social Sciences Institute, Istanbul University, Turkey. 2002). 145.
[53] Taş, Medeni Hukuk ve Türkiye'de Medeni Hukukun tarihi üzerine bir inceleme, 48.
[54] Cin, İslam ve Osmanlı Hukukunda Evlenme, 307; M. Akif Aydın, "Türk Hukukunun Laikleşme Sürecinde Lozan'ın Oynadığı Rol (The Role Played by Lausanne in the Secularisation Process of Turkish Law)", *Islam Arastırmaları Dergisi*, Vol.3. No.4 (1995): 171; Dursunüst, Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi, 164.
[55] Taş, Medeni Hukuk ve Türkiye'de Medeni Hukukun tarihi üzerine bir inceleme, 49.

resumed work, they prepared a draft Family Law comprising 142 articles.[56] This draft includes provisions regarding marriage and divorce in two books.[57] To summarize the innovations brought by the draft compared to the previous Decree and the 1923 draft:

On the contrary, it brought the same provisions for all Turkish citizens. In this way, the triple ruling technique of Muslim-Christian-Jewish was abolished.[58] New reasons for divorce were legalised, and equality with Western Laws was achieved. According to Article 45, marriage contracts that are not concluded before the civil servant are void. This shows the Swiss influence before the Swiss Civil Code. The draft also grants both parties the right to request a separation. Apart from this, the draft also includes an explicit provision limiting the husband's authority to divorce. This means that the husband can testify about his wife before the judge or the arbitral tribunal (Art. 88). There are also some regulations regarding polygamy. When Article 12 is examined, the only way to take the second wife is for the husband to prove that he needs the second wife and will ensure justice and equal treatment between both wives. The first wife's approval is obtained, and the judge allows this.[59]

When the work of the commissions took so long, causing several complaints, both the Deputy of the Courthouse, Seyyid Bey, and Mustafa Necati, who served as the Deputy of the Courthouse for a short time after Seyyit Bey, defended the work of the commissions and stated that it was natural for it to take a long time to make new laws. However, the slow work of these commissions was not found satisfactory or radical enough by the revolutionary circles. In 1925, the duties of these commissions were terminated at the request of the Deputy of the Court of Justice, Mahmut Esat.[60]

However, later on, the idea of benefiting from these drafts and various *Fiqh* provisions was abandoned, and all of the fundamental laws, including civil law, were translated from several Western states, thus breaking all ties with the past and the philosophy that dominated this past. The process initially hoped to present a unique example of modernisation but eventually departed from this goal, resulting in the "reception" of Western laws and institutions.[61]

[56] Cin, İslam ve Osmanlı Hukukunda Evlenme, 308, Aydın, *Osmanlı Aile Hukuku*, 210.
[57] Dursunüst, Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi, 164.
[58] Kaşıkcı, Mecelle'nin Hazırlanışı, 212.
[59] Kayabaş, Hukuk-ı Aile kararnamesi, 147.
[60] Şenel, Türk batılılaşmasında Medeni Kanun'un önemi, 79-80.
[61] Aydın, Türkiye'nin Hukuki Modernleşmesi, 339.

It is essential to recognise that the Ottoman State developed unique political concepts, legal documents, administrative structures, and political attitudes of significant constitutional value throughout its history, contrary to many historical narratives and interpretations that show Ottoman modernization due to the Westernisation experience. The lack of mentions of this particular feature of the Ottoman State, coupled with the intense external pressure from Western powers during the period of constitutional monarchy, had a significant impact on the mindset of intellectuals who were involved in promoting Westernisation domestically and internationally. Contrary to popular belief, the Ottoman State had already implemented the concept of separation of powers and restrictions in family law, both in its administrative structure and legal framework, even before Western countries.[62]

4.5.4 Old Civil Code (Turkish Civil Code No. 743)

In late 1924 and 1925, the idea of quoting a civil code applied in the West as the Turkish Civil Code, instead of making a civil code based on old legal principles, became more widespread among the country's intellectuals. When it was thought that no results could be obtained from the work of the commissions established to adapt the *Majallah* to the conditions of the day and to make new laws, the Minister of Justice of the period, Mahmut Esat, dissolved the commissions. In his speech, he specifically stated that one of the Western laws would be adopted.[63]

Mahmut Esat was both the implementer and the most prominent advocate of new laws suitable for the new Turkey. Immediately after the decision to adopt Western laws by the quotation method, commissions were created; first, the Civil Code and the Code of Obligations were quoted, followed by the Criminal Code, the Commercial Code, the Code of Civil Procedure, the Code of Criminal Procedure, the Code of Maritime Trade and the Laws of Execution and Bankruptcy. [64]

On 17.2.1926, the Turkish Grand National Assembly adopted a new Civil Code. Indeed, this new Civil Code was translated from the French version of the Swiss Civil

[62] Aktay, Türk Modernleşmesinin Özgünlüğü Sorunu: Türk Aile Hukuku Örneği, 101.
[63] Karahasanoglu, İsviçre Medeni Kanunu'nun Türkiye Cumhuriyeti Tarafından Resepsiyonuna Uzanan Sürece İlişkin Genel Bir Değerlendirme, 49; Taş, Medeni Hukuk ve Türkiye'de Medeni Hukukun tarihi üzerine bir inceleme, 50-53.
[64] Şenel, Türk batılılaşmasında Medeni Kanun'un önemi, 80-82.

Code. After making only minor changes to this translation, it was presented to the Turkish Grand National Assembly. This Law, accepted unanimously in the Grand National Assembly of Turkey, came into force on 4.10.1926, six months after its acceptance.[65]

However, significant difficulties were encountered in the implementation of foreign law. Many institutions in the Swiss Civil Code had no equivalent in Islamic law. The most critical responsibility for establishing the new legal system fell on theory and legal education. The fact that a limited number of jurists who graduated from the Faculty of Law in Istanbul had received only Islamic law education raised concerns about implementing the new Civil Code. For this reason, establishing a law school that carries the spirit of Ankara was deemed very important. Meanwhile, intensive legal exchange programs were organized with other European countries. Swiss civil law commentaries have been translated into Turkish many times.[66]

The Civil Code is based on the principle of secularism. For this reason, it does not contain regulations according to people's religion and beliefs. It foresees marriage as an official transaction carried out by the State. The duty of allowing the parties to marry and ensuring their marriage is given to the marriage officers. The marriage officer is appointed as the mayor in places with a municipality, or the officer assigned to this duty is appointed as the village headman. Religious officials are not included among these, depending on the religious beliefs of the parties. Moreover, the validity of marriage does not depend on the religious ceremony. One of the most important innovations is that it brought equality between men and women.[67] Polygamy was prohibited, and women were given equal rights with men regarding inheritance.[68]

The adoption of the Turkish Civil Code has caused many reactions as well as applicability concerns. Society showed the harshest response to the new regulations on family law. The expected progress in equality between men and women, sharing of inheritance, and women's rights in general has not been fully achieved. The Turkish

[65] Arzu Oğuz, "Türk Medenî Hukuku'nun Gelişim Çizgisi ve Karşılaştırmalı Hukukun Rolü (The Development Line of Turkish Civil Law and the Role of Comparative Law)", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol.55. No.1. (2006): 200-201.
[66] Oğuz, Türk Medenî Hukuku'nun Gelişim Çizgisi ve Karşılaştırmalı Hukukun Rolü, 203.
[67] Ahmet M. Kılıçoğlu, "Medeni Kanunumuzu Nasıl Değiştirdik (How We Changed Our Civil Code)", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, Vol.22. No.3. (2006): 1725-1729.; Dursunüst, Kabul Edilme Sürecinde Türk Kanun-ı Medenîsi, 169.
[68] Şenel, Türk Batılılaşmasında Medeni Kanun'un Önemi, 86.

Civil Code, which tried to implement equality between men and women, contradicted itself at some points, partly by necessity, under the influence of traditions and customs. For example, the article "A wife can engage in a business or an art with the explicit or implicit permission of the husband" confirmed men's existing dominance in the field of work. In addition, acceptances such as the obligation of the family to carry the father's surname, the acceptance of headship in marriage and its belongs to the man, and the superiority of men in custody are also examples.[69]

4.5.5 New Civil Code (Turkish Civil Code No. 4721)

The new conditions that emerged in parallel with the social change that took place since the second half of the 20th century led to the questioning of the position of women in the family.[70] Equality policies gained momentum due to the "women's movement" that emerged in connection with feminism in the 1960s. In fact, these women's movements, which were influential in the 1900s, also found their echo in Turkey.[71] In societies where democratisation is experienced, the family gradually loses its patriarchal structure and is transformed into a life partnership based on equal rights. In European countries, the family understanding based on fixed roles was abandoned. Marriage was handled as a life partnership based on equal rights. The privileged and superior status of the man was abolished in the decisions regarding the marriage union, and both spouses were given equal rights in this regard. In most legal arrangements, specific roles are not imposed on women and men by law. In the new regulations, separate and specific duties are not assigned to each spouse. [72]

Moreover, comprehensive needs emerged over the past seventy years, especially developments in the Turkish language, the language of the Civil Code being complex for new generations, and the idea of enacting a new Civil Code instead of preserving

[69] Erhan Taş, "Kabul Sürecinde Türk Medeni Kanunu'na Yönelik Bazı Eleştiriler (Some Criticisms of the Turkish Civil Code During the Adoption Process)", *Bingöl Üniversitesi Sosyal Bilimler Enstitüsü Dergisi,* Vol.8. No.16 (2018): 666.
[70] Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 460.
[71] Sera Reyhani Yüksel, "Türk Medenî Kanunu Bakımından Kadın-Erkek Eşitliği (The Equality between Men and Women in Terms of the Turkish Civil Code)", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 18, No.2 (2014): 176.
[72] Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 460.

and amending the Civil Code prevailed.[73] Furthermore, the new law aimed to bring contemporary solutions to emerging problems and new needs.[74]

In this context, considering the efforts to prepare a new civil code, two separate civil code drafts were prepared in 1971 and 1984; however, they could not be put into force.[75] 1994, the commission established a new civil code and started its work.[76] This commission benefited greatly from the 1971 and 1984 drafts. The new Civil Code Draft studies had reached Article 620, Property Law. However, the Civil Code Draft Commission studies stopped due to the government's resignation. Hikmet Sami Türk, who served as the Minister of Justice in the 57th government, attempted to accelerate the draft of the new civil code and make it law. The Grand National Assembly Justice Commission repeatedly discussed the Civil Code Draft.[77] Afterwards, the new Civil Code was accepted on 22.11.2001 and published in the Official Gazette on 8.12.2001.[78]

While preparing the Civil Code, foreign sources were taken as a basis. These sources are explained in the general justification as the Swiss Civil Code, the French Civil Code, and partly the Italian Civil Code.[79] This law changed many provisions of the old Civil Code, both in form and content.[80] However, it is possible to say that most of the changes in question are provisions aimed at achieving equality between men and women.[81]

The new Turkish Civil Code numbered 4721, which entered into force on January 1, 2002, adopted the life partnership based on the equal rights model regarding

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[73] Kılıçoğlu, Medeni Kanunumuzu Nasıl Değiştirdik, 1731.
[74] Oğuz, Türk Medenî Hukuku'nun Gelişim Çizgisi ve Karşılaştırmalı Hukukun Rolü, 204.
[75] Veysel, Başpınar, "Türk Medeni Kanunu İle Aile Hukukunda Yapılan Değişiklikler ve bu Konuda bazı Önerilerimiz (Changes made in the Turkish Civil Code and Family Law and some of our Suggestions on this Subject)", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 52, No.3 (2003): 79.
[76] Kılıçoğlu, Medeni Kanunumuzu Nasıl Değiştirdik, 1731.
[77] Ibid., 1737-1742.
[78] Turkish Civil Code, 2002, No: 4721 dated 22/11/2001 and published on Official Gazette: 8/12/2001. See: <https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=4721&MevzuatTur=1&MevzuatTertip=5> (Accessed on 18 March 2023).
[79] Sevgi Kayak, "Türk Hukuk Tarihinde Medeni Hukuk Alanındaki Resepsiyon Sürecinin Meşruluğu (The Legitimacy of the Reception Process in the Field of Civil Law in Turkish Legal History)", In *I. Türk Hukuk Tarihi Kongresi Bildirileri*, edited by Fethi Gedikli (Istanbul: On İki Levha Yayınları, 2014), 62.
[80] Başpınar, Türk Medeni Kanunu İle Aile Hukukunda Yapılan Değişiklikler ve bu Konuda bazı Önerilerimiz, 79-80.
[81] Ayhan Uçar, "4721 Sayılı Medeni Kanun İle Evliliğin Genel Hükümleri Alanında Yapılan Bir Kısım Değişiklikler Üzerine Düşünceler (Thoughts on some Changes Made in the Field of General Provisions of Marriage with the Civil Code No. 4721)", *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi*, Vol.6, No. 1-4. (2002): 317; Başpınar, Türk Medeni Kanunu İle Aile Hukukunda Yapılan Değişiklikler ve bu Konuda bazı Önerilerimiz, 83; Oğuz, Türk Medenî Hukuku'nun Gelişim Çizgisi ve Karşılaştırmalı Hukukun Rolü, 205.

marriage provisions. The Civil Code no longer gives men and women fixed roles[82] based on tradition but allows spouses to determine their roles in the family. Thus, the spouses will establish a division of labour relationship among themselves to ensure the welfare and happiness of the marriage union.[83]

With the new regulation, the new Civil Code abolished the title of head of the husband.[84] The previous regulation included the provision, "The husband is the head of the union."[85] This arrangement was also criticised because it created inequality between husband and wife.[86] The new law changed this so the spouses could manage the union together.[87] Thus, spouses have equal say and rights in managing the marriage union.[88]

According to the provisions of the new Civil Code, the marriage union creates common rights and obligations for both spouses, namely: "the spouses are obliged to ensure the happiness of the marriage union together, to take care of the care, education, and supervision of the children together, to live together, to be faithful to each other and to help."[89] In addition, "the spouses choose the house they will live in together,"[90] and each of the spouses represents the marriage union for the constant needs of the family during the continuation of the common life."[91]

On the other hand, the New Civil Code has adopted the principle that the spouses participate in the expenses of the marriage union with their labour in proportion to their power and their assets; the woman is also obliged to participate, and this participation

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[82] Murat Doğan, "Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler (Innovations Brought by the Turkish Civil Code in Terms of General Provisions of Marriage)", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 52, No. 4 2003): 97.

[83] These arrangements are based on the principle of "Family is the foundation of Turkish society and is based on equality between spouses", which is expressed in article 41 of the Constitution as amended by Law No. 4709 of October 3, 2001. See: Law on Amending Certain Articles of the Constitution of the Republic of Turkey, 2001, (Law No: 4709) <https://www.resmigazete.gov.tr/eskiler/2001/10/20011022m1.htm> (Accessed on 18 March 2023); Constitution of the Republic of Turkey, < https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf> (Accessed on 18 March 2023). <>

[84] Doğan, "Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler, 99.

[85] Turkish Civil Code, 1926, No: 743, Article: 152/1.

[86] Yüksel, Türk Medenî Kanunu Bakımından Kadın-Erkek Eşitliği, 189.

[87] Turkish Civil Code, 2002, No: 4721, Article: 186.

[88] Osman Gökhan Antalya & Murat Topuz, *Medeni Hukuk, Giriş, Temel Kavramlar Başlangıç Hükümleri (Civil Law, Introduction, Basic Concepts, Preliminary Provisions),* (Ankara: Seçkin Yayıncılık, 3rd edn. 2019), 89.

[89] Turkish Civil Code, 2002, No: 4721, Article: 185.

[90] Turkish Civil Code, 2002, No: 4721, Articles: 186. In the previous law, the husband chose the house to live in. See: Turkish Civil Code, 1926, No: 743, Article: 152/1.

[91] Turkish Civil Code, 2002, No: 4721, Article: 188; Antalya & Topuz, Medeni Hukuk Giriş, 89; Doğan, Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler, 117.

can be realized by dedicating her wealth or labour to the family.[92] However, in the old regulations, the husband was obliged to meet the expenses of the marriage union[93], even if the woman was wealthy. For example, the spouse who does the housework, takes care of the children, or works unpaid in the other spouse's business is deemed to have contributed to the expenses of the marriage union with her labour.[94] However, in cases where the husband's economic power was insufficient to support the household and the woman had a certain income, the husband could ask his wife to contribute an appropriate amount to the family expenses. Here, the power of the spouses is taken as a basis and measure. In this regard, a contribution beyond their power cannot be expected or demanded from spouses.[95]

In the previous Civil Code, it was accepted that the husband would be responsible for the legal actions to represent the marriage union.[96] The woman was held secondary responsible for such debts.[97] According to the new Civil Code[98], both spouses are jointly and severally liable for the liabilities arising from legal transactions carried out by one of the spouses with third parties within their authority of representation.[99]

The new law contains a vital provision not included in the Civil Code No. 743. The Law, which accepts the principle of the freedom of the spouses in legal proceedings, has linked the validity of some legal transactions of the spouses to the consent of the other spouse, namely, For one of the spouses to transfer the ownership of the family residence, limit the rights on the family residence or terminate the rental agreement regarding the family residence, the other spouse's explicit consent must be obtained.[100]

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[92] Turkish Civil Code, 2002, No: 4721, Article: 186/3.
[93] Turkish Civil Code, 1926, No: 743, Article: 152/2
[94] Turkish Civil Code, 2002, No: 4721, Article: 196.
[95] Doğan, Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler, 113-114.
[96] Turkish Civil Code, 1926, No: 743, Article: 154 and 155.
[97] Doğan, Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler, 113.
[98] Turkish Civil Code, 2002, No: 4721, Article: 189.
[99] Serkan Ayan, *Evlilik Birliğinin Korunması (Protection of the Marital Union),* (Ankara, Türkiye Barolar Birliği Yayınları, No.58, 2004), 218; Yüksel, Türk Medenî Kanunu Bakımından Kadın-Erkek Eşitliği, 191-192.
[100] Turkish Civil Code, 2002, No: 4721, Article: 194/1; See; Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 461; Doğan, Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler, 105-107; Antalya & Topuz, Medeni Hukuk Giriş, 89-90; Uçar, 4721 Sayılı Medeni Kanun ile Evliliğin Genel Hükümleri Alanında Yapılan Bir Kısım Değişiklikler Üzerine Düşünceler, 322-323.

In the new Civil Code, the age of marriage is 17 for men and women has been determined. On the other hand, the extraordinary marriage age has been defined as 16, regardless of gender.[101] With this article, the difference between men and women in marriage age has been eliminated.[102]

Another issue seen as inequality between men and women is that the woman must take her husband's surname. Old civil code stipulated that the married woman would bear her husband's surname.[103] Afterwards, with the addition to this provision by Law No. 4248 on 14.5.1997, the woman was allowed to carry her previous surname before her husband's surname.[104] However, the obligation of the married woman to bear her husband's surname continues under the new Turkish Civil Code.[105] The Constitutional Court previously rejected the lawsuits demanding the annulment of Article 187 of the civil code on the grounds of public order.

On the other hand, the Constitutional Court annulled this provision of the civil code on February 22, 2023, as it was found to be contrary to Article 10 of the Constitution. The cancellation decision was published in the Official Gazette on April 28, 2023, and the entry into force of the decision was postponed for nine months. Thus, the annulment decision regarding Article 187 of the civil code entered into force on January 28, 2024.[106]

According to Article 159 of the previous Civil Code, which was annulled by the Constitutional Court decision dated 29.11.1990 and numbered 1990/30-31, a woman could only engage in a profession or art with her husband's permission. If the husband did not give permission, the wife could request that the judge give it.[107] The new civil law also includes the provision that each spouse is not obliged to obtain the consent of

[101] Turkish Civil Code, 2002, No: 4721, Article: 124; Başpınar, Türk Medeni Kanunu İle Aile Hukukunda Yapılan Değişiklikler ve bu Konuda bazı Önerilerimiz, 82..
[102] Antalya & Topuz, Medeni Hukuk Giriş, 88.
[103] Turkish Civil Code, 1926, No: 743, Article: 153.
[104] Doğan, Türk Medenî Kanunu'nun Evliliğin Genel Hükümleri Bakımından Getirdiği Yenilikler, 124; Yüksel, Türk Medenî Kanunu Bakımından Kadın-Erkek Eşitliği, 183.
[105] Turkish Civil Code, 2002, No: 4721, Article: 187.
[106] Seda, Baş & Sezgin Baş. "Anayasa Mahkemesi'nin TMK m. 187 Hükmüne İlişkin İptal Kararından Sonra Evlenen Kadinin Soyadi (Surname of the Woman Who Married After the Constitutional Court's Annullation Decision Regarding Article 187 of the Turkish Civil Code)", *Kırıkkale Hukuk Mecmuası*, Vol. 4, No.2 (2024): 495.
[107] Ayan, *Evlilik Birliğinin Korunması,* 168-169; Yüksel, Türk Medenî Kanunu Bakımından Kadın-Erkek Eşitliği, 192; Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 461.

the other in choosing a job. However, spouses must consider the marital union's peace and benefits when choosing a job. [108]

The new Civil Code adopted the principle of state intervention in establishing and terminating family law relations and its continuation. It is foreseen that spouses can apply to the judge in case of not fulfilling the obligations arising from the marriage union or in case of disagreement on an important issue regarding the marriage union.[109]

According to the old law, if the spouses did not choose by signing a marriage contract among the property regimes specified in the law before or during the marriage, the "separation of property" regime was valid due to the law.[110] The new Civil Code adopted the regime of participation in acquired property as the legal property regime.[111] Thus, if the marriage ends with death or divorce, the parties have the right to receive half the share of the assets other than their personal property obtained by the other spouse during the marriage.[112] This regime acts on the assumption that the increase in the assets of each spouse occurs with the contribution of the other spouse; in other words, this increase occurs as a result of the division of labour and cooperation of the spouses in the marriage union, and when the marriage ends, these increases are shared equally among the spouses who have a common destiny.[113]

4.5.6 The Adequacy of the Existing Legal Legislation in the Country to Solve Family-Related Problems

The formation of new conditions coincided with the societal changes observed since the latter half of the 20th century, resulting in novel situations. Implementing civil law in 1926 resulted in the abolition of the previous legal framework. The Turkish Civil Code, officially designated as Law No. 4721, was implemented on January 1, 2002. The civil code has been in effect for almost a century and has significantly impacted society. Certain factions have levied criticism of the law.

[108] Turkish Civil Code, 2002, No: 4721, Article: 192.
[109] Turkish Civil Code, 2002, No: 4721, Article: 195.
[110] Antalya & Topuz, Medeni Hukuk Giriş, 90; Başpınar, Türk Medeni Kanunu İle Aile Hukukunda Yapılan Değişiklikler ve bu Konuda bazı Önerilerimiz, 86.
[111] See: Turkish Civil Code, 2002, No: 4721, Article: 202.
[112] Yüksel, Türk Medenî Kanunu Bakımından Kadın-Erkek Eşitliği, 193.
[113] Baygın, Tanzimattan Günümüze Aile Hukukunun Gelişim Sürecine Kısa Bir Bakış, 462.

Based on the assertions made by the interview participants, it may be inferred that the existing legal legislation is inadequate in addressing family matters. Ismet Yilmaz[114] commences his address by referencing Article 41 of the Turkish constitution, which asserts that the family is the cornerstone of Turkish society and is predicated upon the principle of spousal equality.[115] Nonetheless, he declares that in practical terms, the attention is predominantly directed toward addressing the immediate challenges faced by the family without adequate consideration for fostering their long-term development, well-being, and security.[116]

The interview's most striking and notable statement asserts that the existing Family Law statute and practises are inadequate in addressing the issues. In some instances, the law itself gives rise to further complications. The recent emergence of the Istanbul Convention[117] and the enactment of Law No. 6284[118] have revealed these issues.

According to Yilmaz, the discussions around family, women, and children primarily revolve around Western values, which are distant from the cultural and religious values of the country. Even religious people sometimes approach these issues through Western and feminist practices. The author asserts that there is clear evidence that feminist women's associations exert influence on the general public on family-

[114] Ismet Yılmaz, a Turkish politician, served as a member of the Grand National Assembly from 2011 until 2023. He was born on December 10, 1961. He graduated from Istanbul University Faculty of Law in 1987 and completed his PhD in Private Law at Ankara University Social Sciences Institute. He had previously held the positions of Minister of National Defence and Minister of National Education. Yılmaz also had a temporary position as the Speaker of the Grand National Assembly.

[115] See: The Constitution of the Republic of Turkey, Article 41: The family is the foundation of Turkish society and is based on equality between spouses. The State shall take the necessary measures and establish the necessary organisation to protect the peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice. (Paragraph added on September 12, 2010; Act No. 5982) Every child has the right to protection and care and the right to have and maintain a personal and direct relation with their mother and father unless it is contrary to their high interests. (Paragraph added on September 12, 2010; Act No. 5982) The State shall take measures for the protection of the children against all kinds of abuse and violence.

[116] İsmet Yılmaz, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (02.04.2022).

[117] The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence is better known as the Istanbul Convention. As a result of the Presidential decision numbered 3718 published in the Official Gazette on March 20, 2021, President Recep Tayyip Erdoğan decided to terminate the contract. Following Article 80 of the Istanbul Convention, any parties may terminate this agreement. See: Presidential decision numbered 3718 published in the Official Gazette on March 20, 2021: https://www.resmigazete.gov.tr/eskiler/2021/03/20210320-49.pdf (Accessed on 18 March 2023).

[118] Law on the Protection of the Family and Prevention of Violence Against Women was accepted on March 8, 2012. It was published in the Official Gazette on March 20, 2012. See: https://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm. (Accessed on 18 March 2023).

related matters and manipulate the agenda through social media. Yilmaz's proposition entails comprehensive preparations involving various stakeholders to fortify and safeguard the Turkish family system. After these investigations, establishing legal arrangements in the relevant domains will be considerably more suitable.[119]

According to Ali Özkaya[120], it can be argued that the present legislation is enough, in contrast to Yılmaz's perspective. He says contemporary family law is governed by civil law and the legislation known as Law No. 6284, which aims to safeguard the institution of family and mitigate domestic violence. However, he highlights the matter of indefinite alimony. Ozkaya asserts a solid opposition to the concept of indefinite alimony. It is noted that before 1988, indefinite alimony support was restricted to one year, but presently, it has become unrestricted in terms of time. One further concern pertains to the protracted and sluggish nature of the decision-making process within family courts when handling divorce cases, particularly when addressing matters such as alimony, custody arrangements, and the equitable distribution of assets that need compensation concerning the divorce proceedings. The author asserts that there are criticisms regarding this matter and emphasises the need for its resolution.[121]

Mahir Unal[122] argues that the inclusion of a clause in the constitution to safeguard the family in addressing familial issues is overshadowed by the significant error of decriminalising adultery in 2005 as part of the European harmonisation laws. Furthermore, the speaker asserts that Law No. 6284, operating within the confines of

[119] İsmet Yılmaz, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (02.04.2022).

[120] Ali Özkaya is a Turkish politician, lawyer, and member of the Grand National Assembly of Turkey from 2015 until today. He was born on April 20, 1970. He graduated from Ankara University Faculty of Law in 1992. Özkaya has served as the legal advisor of the Justice and Development Party Headquarters and the lawyer of the Chairman and Prime Minister Recep Tayyip Erdoğan since 2012. During the 26th parliamentary term of the Turkish Grand National Assembly, Ozkaya assumed the role of chairperson for the Commission on the Protection of Family Integrity and Investigation of Divorce Cases.

[121] Ali Özkaya, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (01.04.2022).

[122] Mahir Ünal was born on July 1, 1966. The individual obtained a degree from the Faculty of Theology at Marmara University. 1997, he received a master's degree from the Institute of Social Sciences at Istanbul University. Ünal became a Justice and Development Party (AKP) member in 2003. He actively participated in the AKP Political Academy by delivering lectures and contributed to strategically planning the party's election campaigns in all subsequent elections starting from 2004. Mahir Unal has also held positions within strategy teams overseeing political campaigns in various nations, including Iraq, Malaysia, Cyprus, Lebanon, and Egypt. He served in the Turkish Grand National Assembly as Kahramanmaraş Deputy in the 24th, 25th, 26th and 27th terms. Ünal was appointed Minister of Culture and Tourism in the 64th government of Turkey.

the Istanbul Convention, represents a significant error. The speaker contends that individuals holding the position of family ministers predominantly focus on women's issues and women's rights, thus neglecting discussions on the family as a whole.[123]

Cengiz Aydogdu[124] said he does not find the current legislation sufficient. According to him, family law must align with the prevailing cultural and historical context of society while also adequately addressing the evolving demands of the contemporary era. In this regard, he presents two criticisms. Firstly, they argue that some aspects of family law within the country are incompatible with the traditional texture of society and occasionally clash with established norms. Second, not being able to find out how to continue social and temporal developments by the structure of society. They could not establish this harmony. The decision to adopt civil law marked a significant turning point during the initial years of the Republic. The family issue is the area that will be the most important when the revolution is made, even the area that will not be the subject of the revolution. He asserts that the family sphere has remained untouched or unaffected by historical social change. In summary, it may be contended that the current state of family law in Turkey falls short of adequately addressing family requirements. Under legal provisions, the establishment and alteration of a family unit occur. It is imperative to establish a state of concordance between these two entities.[125]

Participant E[126] considers that legal regulation is not a final or definitive form of regulation, as there will always be inadequacies and disruptions. There will always be unseen aspects; that is why there are laws. The legislative body, or Parliament, engages in the continuous lawmaking process daily. Its primary objective is to incorporate novel ideas, rejuvenate its functioning, and align state authority and legal framework with

[123] Mahir Unal, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (24.03.2022).
[124] Cengiz Aydoğdu was born on January 1, 1958. He graduated from Ankara University's Faculty of Political Sciences. He is a Turkish bureaucrat, politician, and Justice and Development Party deputy. He served as Governor of Kırklareli province between 2009 and 2010 and as Governor of Artvin province between 2006 and 2009. He has been serving as AK Party Aksaray deputy since 1 November 2015.
[125] Cengiz Aydogdu, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (16.04.2022).
[126] Participant E is a lecturer, obtained a degree from the Ankara University politician and a member of the Turkish Grand National Assembly from the Justice and Development Party in the 25th, 26th and 27th terms and has carried out studies on women and family issues. He was a member of the Commission for the Investigation of Violence Against Women in the Turkish Grand National Assembly.

evolving circumstances. Hence, it is contrary to the nature of things to claim that the existing laws are sufficient.[127]

Yılmaz Tunc[128], the incumbent Minister of Justice of Turkey, asserts that the existing legislation can be deemed enough, echoing the sentiments expressed by Ozkaya. The minister declares that the current state is satisfactory, although shortcomings in its implementation may exist. Tunc also asserts that family law is governed by civil law, with the specific protection of the family being ensured by Law No. 6284. He states that within their political party, a significant emphasis is placed on the value of the family unit, which is regarded as the fundamental cornerstone of society. Since the inception of the political party, there has been a consistent emphasis on the indispensability of a harmonious family unit in fostering a tranquil societal environment. Individuals are influenced by the dynamics and harmony inside their familial unit, leading them to modify legislative measures as deemed appropriate. Indeed, it is evident that the dynamism of society can give rise to various challenges, including those stemming from evolving technological advancements, emerging requirements, and newfound opportunities. To address these issues, it may be necessary to implement new legislative reforms.[129] The Minister of Justice reinforced this idea with his statement to the media in 2023 that the renewal of the Constitution is essential:

> Although we have made significant progress with the renewal of our laws and the reforms we have made in the Constitution, it is clear that we still need a new Constitution. It is essential that the current Constitution, which was prepared during the coup period, be renewed within the framework of rights and freedoms with an understanding based on the rule of law. To date, there have been 19 amendment packages in our Constitution, 184 amendments have been made, and more than 200 points have been touched upon. Over time, the uniformity of our Constitution has been disrupted and has become a patchwork bundle. This is a fact accepted by everyone. It is a democratic, encompassing, fundamental rights and freedoms priority in every part of society. "It is our duty to our

[127] Participant E, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (26.03.2022).

[128] Yılmaz Tunc was born on February 1, 1971. He graduated from Istanbul University Faculty of Law in 1995. He is a Turkish Minister of Justice and politician and served as Bartın Deputy in the Turkish Grand National Assembly in the 23rd, 24th, 25th, 26th and 27th terms. From 2007, he served as a member, spokesperson and Deputy Chairman of the Justice Commission for 16 years in the Turkish Grand National Assembly; after that, he was elected as the Chairman of the Justice Commission in 2020. He was appointed Minister of Justice in the cabinet established after the second round of the Presidential elections held on May 2023.

[129] Yılmaz Tunc, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (08.04.2022).

> nation to make a new and civil constitution that includes the views of all segments of society and will be accepted with remarkable consensus.[130]

Mustafa Sentop[131], former Turkish Grand National Assembly speaker, does not find current legislation sufficient. He thinks that the reason for this is that law is an area of regulation closely related to morality, customs, and the culture of the country, and it should originate from the same roots. In addition, when the gap between the regulations in law and customary traditions and moral understandings is widened, problems arise in the functioning of legal rules. Numerous instances of this phenomenon are observed within the context of Turkey. Simultaneously, people endeavour to abide by legal regulations; on the one hand, everyone strives to uphold their familial dynamics under their comprehension, moral insight, and customary practises. In this respect, it can be observed that every discipline within the realm of law exhibits a profound interconnectedness with the principles of morality and tradition. Still, personal and family law, marriage, and divorce are intertwined with moral values and societal conventions. Turkey has had frequent discussions about several topics, including the payment of alimony and the protracted duration of divorce proceedings. Subsequently, extensive deliberations ensue on property laws across various regions, including allocating custody for children. The regulations of this particular domain ought to be formulated in a manner that duly considers this aspect.[132]

Hasibe Ozlem Cepni[133] contends that the existing legal legislation is inadequate and has numerous deficiencies. She adds that numerous inadequacies might be

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[130] Ismet Karakaş, "Adalet Bakanı Tunç: Yeni bir Anayasaya ihtiyaç duyduğumuz açıktır" Anadolu Ajansı, <https://www.aa.com.tr/tr/politika/adalet-bakani-tunc-yeni-bir-anayasaya-ihtiyac-duydugumuz-aciktir/3060248> (Accessed 24 November 2023).

[131] Mustafa Şentop, the former Speaker of the Grand National Assembly of Turkey, was born on August 6, 1968, in Tekirdağ; he completed his studies at the Faculty of Law at Istanbul University. He obtained a master's and doctorate in Public Law from Marmara University. In 2011, he assumed the position of a professor. He has held the position of Member of Parliament during the 24th, 25th, 26th, and 27th parliamentary sessions. In the 26th Term, he assumed the role of Chairman of the Constitutional Commission. On February 24, 2019, he was chosen as the Speaker of the Turkish Grand National Assembly, assuming the position of the 29th Speaker. On July 7, 2020, he was re-elected as the Turkish Grand National Assembly speaker.

[132] Mustafa Sentop, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (21.04.2022).

[133] Hasibe Ozlem Cepni is a lawyer and politician who graduated from Selçuk University Faculty of Law in 1997. She has been active in various non-governmental organizations, especially the Legal Research Association (HUDER). To improve herself in her nearly 24-year career as a lawyer, she received her certificates by attending training in many areas such as Refugee Law, European Union, European Court of Human Rights and Application Ways, and Individual Application to the Constitutional Court. In addition, she received the mediation certificate from the first team to complete the mediation training, which was recently added to the legal literature.

identified within our civil code. In recent years, everything has begun to be regulated in detail in the law.[134] This is perceived as a deficiency in the existing legislation. The shortcomings mentioned above are increasingly exploited by legal professionals, judiciary members, or anyone with malevolent intent. Hence, She advocates for implementing more generalised legislation, exemplified by the context of fundamental rights and freedoms. Judges are inherently vested with discretionary power. The family law judges within their jurisdiction undergo a rigorous selection process. It needs to provide discretionary power to these family judges, which is determined by the law. Unfortunately, our predicament lies in the constraints imposed by legislation on their discretionary powers. That is why she finds the legislation insufficient.[135]

Most of the statements indicate that the current legal legislation is inadequate in addressing problems with families. Ozkaya, who asserts the adequacy of the legislation, highlights specific challenges by underscoring the matter of "indefinite alimony" as a prominent concern within his discourse, emphasising the need for its resolution.[136] Tunc, in conjunction with Ozkaya, expressed the adequacy of the legislation and referred to Law No. 6284, highlighting its objective of preventing violence against women.[137] In contrast to Tunc's perspective, Unal posits that Law No. 6284 failed to effectively serve its intended purpose of safeguarding the institution of family and neglected to consider the holistic nature of the family unit. This is attributed to the law's exclusive emphasis on addressing "women's rights" as the sole resolution to the issue at hand. [138]

Participants[139] who do not find the current legislation sufficient to solve family-related problems explain the reasons for this: a) the presence of conflicts between legislation that is rooted in Western values and the societal customs and traditions to which communities are accustomed., b) It is the acceptance of some regulations that threaten the family, such as "acceptance of the Istanbul Convention." In addition, it has been stated that Law No. 6284 is a regulation aimed at protecting "woman" against

[134] One by one, a case-based method it's called making a law with the caustic method in law.
[135] Hasibe Ozlem Cepni, Interviewed by Selman Zahid Ozdemir, Konya, Turkey, (29.03.2022).
[136] Ali Özkaya, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (01.04.2022).
[137] Yılmaz Tunc, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (08.04.2022).
[138] Mahir Unal, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (24.03.2022).
[139] Yilmaz, & Unal, & Aydogdu, & Participant E, & Sentop, & Cepni.

“man” instead of focusing only on women's rights and protecting the family as a whole. As a result, it has been emphasized that some “rights” centered solutions have been made. However, there has been a lack of adequate measures implemented to guarantee the ongoing sustainability and well-being of the entire family unit.

4.5.7 The Acquisition of a Civil Law from a Different Cultural Context

Aydogdu states that since the first day of the civil law translation and implementation, it has been tried to adapt to our social structure with some interventions at various times. He says this can be brought to a certain extent. He expects it to get better in the process. On the other hand, other participants believe that the translation and implementation of the Swiss Civil Code in Turkey caused destruction in the social structure and created various legal problems.[140] Unal states that those with Islamist and conservative identities as a society try to position themselves in the face of other ideologies and, in the same way, have reflexes such as being victorious or defeated or recruiting supporters. In this process, they have a secular point of view, like the ideologies they are trying to position themselves against. According to Unal, the society's and Islām's relationship has been reduced to an ideological level. The essential thing is to get rid of this situation and accept Islām as the basis of existence. Improving the current situation is also possible from the perspective of Turkish society towards the religion of Islām. This is possible in terms of the family when society defines itself with the larger family structure instead of defining itself with a minor structure. Family is not only mother, father, and child, but grandfather, grandmother, aunt, etc. family as it is included.[141]

Participant E exemplifies the problem brought about by translating and implementing Swiss civil law in Turkey through a divorce. Accordingly, the Civil Code acquired from Switzerland, which strictly adheres to the principles of Catholicism, does not prohibit divorce as required by the principles of the aforementioned Christian sect but makes it extremely difficult. Turkish society, which is not accustomed to this

[140] Cengiz Aydogdu, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (16.04.2022).
[141] Mahir Unal, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (24.03.2022).

situation, has experienced significant problems due to protracted divorces due to the effect of the Civil Code.[142]

Another point it needs to express is that Islamic Law is a whole "legal system." If some of those, as mentioned earlier, proposed and under-study regulations are implemented, and some are not, perhaps these regulations may cause more significant harm than benefit. For example, a woman's half share of inheritance is related to her societal position. According to Islamic law, a woman is kept under material and moral support by her husband, children, uncle, or the state, even if her father has passed away on various occasions, and -especially regarding her material needs- she is not left alone. Taking half a share of the inheritance is also related to this situation. A positive intention, such as applying Islamic law principles, may lead to negative consequences if the inheritance-related practice is carried out before the legal position of women in the social structure, as required by Islamic law, is legally determined. In short, the rules and principles of Islamic law regarding the family should be considered and applied as a whole.

4.5.8 Adopting Muslim Families in Turkey Islamic Law as a Guiding Principle to Protect the Integrity and Functionality of the Family Institution

Participants agree that there is a lack of consideration of Islamic law regarding the functioning of the family institution in Turkey. That is to say, a significant majority act sensitively in matters that do not conflict with the legislation in force, such as *"Imām Marriage,"* and imām marriages are also signed in addition to the official marriage. However, the situation takes place from a cultural point of view and does not stand out as a sensitivity to fulfill the requirements of Islamic Law. In cases where divorced women have the right to alimony indefinitely, women receive a full share from the inheritance, not half, and the right to mahr, and the practice is usually as required by the legislation in force. Therefore, it does not seem possible to say that Islamic law is fully taken into account in the issue of the functioning of the family.

[142] Participant E, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (26.03.2022).

Yilmaz[143] stated that by granting muftis the right to civil marriage, partial solutions were produced for some contradictions between Islamic law and the legislation in force. However, even if it is not officially registered by the state as required by Islamic law, people's mahr, witnesses, etc. The validity of the marriages concluded following the conditions of Islamic law, such as marriage. On the other hand, the ability of muftis to make a marriage contract gains the quality of appointing the mufti instead of the mayor in the official marriage, rather than conforming the official marriage to the requirements of Islamic law, so the state does not give up on official registration. In this respect, giving muftis the authority to marry does not seem like a way of acting under the requirements of Islamic law related to family law. Instead, it means applying the practice known as "*Imām Marriage*" in the social structure to the official marriage. Recognition of the right to mahr for women, alimony, etc., of the woman's menstrual period. It is impossible to say that Turkish society establishes the family per the requirements of Islamic law and makes the family functional unless situations such as making it temporary with such limits and sharing the inheritance according to the requirements of Islamic law are widely accepted by the society.

4.5.9 The Various Aspects of Historical Practises and Contemporary Experiences Concerning Resolving Familial Issues

All respondents[144] believed in the potential for deriving advantages from previous practises and experiences of other Islamic nations. Some of them drew attention to different details. One crucial aspect to highlight pertains to the efforts made in reconfiguring the "Istanbul Convention" as the "Ankara Convention" by collaboration with Islamic countries.

Unal argues that implementing the law, as mentioned earlier, will shift the perspective from viewing women as distinct entities within the family unit to safeguarding the rights of the entire family, encompassing men, women, and children collectively.[145] The research, known as the Ankara Convention, can be assessed as an

[143] İsmet Yılmaz, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (02.04.2022).
[144] Yilmaz, & Ozkaya & Unal, & Aydogdu, & Participant E, & Tunc, & Sentop.
[145] Mahir Unal, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (24.03.2022).

initiative to address the specific challenges of regulating women's rights, as discussed above in the section analysing the legislation's adequacy.

Sentop[146] drew attention to three crucial issues. In our country, what we call family law, the civil law's regulations regarding marriage, divorce, and family functioning, are mainly German-dominated. The first of these is the participant's statements that the Civil Code, which is in force and acquired from countries such as Switzerland and Germany, contains some elements based on the Christian faith, and it is possible to see the traces of the Catholic family structure, especially in the steps to make divorce difficult. As it is known, in Islamic law, the court does not intervene in divorce, except in certain situations, and divorce is possible with the man's initiative or mutual agreement of the spouses. Although there is no harm in registering this by the state, it is contrary to our customs, traditions, and past legal experience that the state makes regulations that make divorce difficult and do not take into account the initiative of the spouses related to divorce. Sentop states that this situation brings various problems related to the family structure within the social structure in our country. A second point Sentop draws attention to is that although it is not included in the legislation, the understanding based on custom, tradition, and Islamic family law still continues within the social structure. In other words, although not included in the legislation, some established rules from the past regarding the rights of family members, such as the establishment, termination, and continuity of the family, still maintain their vitality in our country. Considering this situation, it is necessary to make new regulations. As an example of the above rules and laws, “milk kinship” can be mentioned. Although milk kinship is not seen as an obstacle to marriage in the current legislation, most of our country's population accepts milk kinship as a marriage barrier. From this point of view, a regulation should be made, and milk kinship realized under the necessary conditions should be included in the legislation as a marriage barrier.

4.6 CONCLUSION

Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī as completing the unfinished work of Majallah al-Aḥkām al-ʿAdliyyah. It is one of the last examples of the legalisation movements that

[146] Mustafa Sentop, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (21.04.2022).

started shortly after the *Tanzīmāt* in the Ottoman State. This decree is regarded as the initial instance in the field of family law within the history of Islamic Law and Ottoman law. Several political, economic, social, cultural, and legal factors are behind the decree's preparation. The first and perhaps the most crucial one is that family law had not yet been codified. In preparing the decree, the idea was also to eliminate the duplication of the judicial system in family law. Moreover, the need for legal texts to assist the judges in the courts, the proliferation of family law cases, and Western-supported feminism movements can be given as other reasons for the birth of the decree.

The enforcement of the law in the Ottoman State lasted for approximately eighteen months before it was abolished. This repeal was due to strong opposition from non-Muslim spiritual leaders and conservative Muslims, as well as the adoption of Westernism and secularism as official policies. Western pressure in support of foreigners and non-Muslims, changing social dynamics, and the inability of traditional religious scholars to provide a model for modernization also contributed to its demise.

During the early stages of the republican period, the new government gave the notion that it would somewhat reconcile with the past. The Family Law drafts of 1923 and 1924 were predominantly derived from Islamic jurisprudence. Subsequently, the idea of capitalising on these preliminary versions and diverse legal principles of Islamic jurisprudence was discarded, and instead, all of the foundational statutes, encompassing civil law, were translated from many Western nations. Although the early republican jurists generally accepted that the laws should comply with the social structure, they said that the modernisation of the republican period was an exception to this and that the aim here was not to abide by the social structure.

As the Ottoman State transitioned to the Republic of Turkey, the law of the Republic of Turkey replaced Ottoman law through a significant legal revolution. The decision to adopt civil law, dated 1926, marked an important turning point during the initial years of the Republic. A key evolution was the establishment of gender equality, outlawing polygamy, and women were granted equal rights to men in terms of inheritance with this law. In societies where democratisation is experienced, the family gradually loses its patriarchal structure and transforms into a life partnership based on equal rights. In this context, the new Turkish Civil Code numbered 4721, which entered into force on January 1, 2002, adopted the life partnership based on the equal rights

model regarding marriage provisions. The privileged and superior status of the man was abolished in the decisions regarding the marriage union. Thus, the new Civil Code eliminated the position of the husband as the head of the household. There were no longer fixed roles for either side. The preparation of the Civil Code drew heavily from the Swiss Civil Code, the French Civil Code, and, to some extent, the Italian Civil Code.

Some interviewees think that the translation and implementation of the Swiss Civil Code in Turkey caused destruction in the social structure and created various legal problems. The discussions around family, women, and children primarily revolve around Western values, which are distant from the cultural and religious values of the country. Even religious people sometimes approach these issues through Western and feminist practices. There is clear evidence of feminist women's associations exerting influence on the general public on family-related matters and manipulating the agenda through the use of social media.

Most of the statements indicate that the current legal legislation is inadequate in addressing problems with families. Those who do not find the current legislation sufficient from interviewees explain the reasons for this: conflicts between legislation rooted in Western values and the societal customs and traditions to which communities are accustomed. It is the acceptance of some regulations that threaten the family, such as the acceptance of the Istanbul Convention. In addition, it has been stated that Law No. 6284 is a regulation aimed at protecting women against men instead of focusing only on women's rights and protecting the family as a whole. Moreover, interviewees agree that Islamic law is not fully considered in the functioning of the family institution in Turkey. However, specific conflicts between Islamic law and existing legislation were partially resolved by providing muftis the authority to perform civil marriages.

Finally, a significant point is that although it is not included in the legislation, the understanding based on custom, tradition, and Islamic Family Law continues within the social structure. In other words, although not included in the civil code, some established rules and rules from the past regarding the rights of family members, such as the establishment, termination, and continuity of the family, still maintain their vitality in our country.

CHAPTER FIVE

CONTEMPORARY ISSUES IN FAMILY LAW

5.1 INTRODUCTION

In contemporary times, it is a prevailing norm for each state and civilisation, with certain exceptions, to own its own set of regulations about family law. Laws, in essence, do not solely serve the purpose of resolving all occurrences but rather aim to establish a framework for communities to adhere to in a more consistent and organised manner. Hence, due to the dynamic nature of the Earth and the interconnectedness of human societies, the range of events experienced by individuals is boundless. In contrast, the legal framework governing these events and laws has a limited structure. Consequently, contemporary challenges have arisen in the domain of family law, characterised by intricate regulations that pose difficulties in their resolution. According to the prevailing perspective in Islamic Family Law, it is widely held that a husband who pronounces divorce upon his wife three times within the same majlis is generally precluded from the possibility of reconciliation unless he subsequently enters into a *Nikāḥ al-tahlīl/tahlīl* marriage. According to Ibn Taymiyyah, it is his perspective that the phrase divorce thrice-repeated pertains exclusively to a single instance of divorce. In today's society, the issuance of Ibn Taymiyya's *fatwā* is employed to promote *maṣlaḥah* to enable the reconciliation of a married couple. *'Ulamā', fuqāhā*, and judges frequently encounter intricate scenarios involving divergent perspectives on these and analogous matters. This section will comparatively examine many issues in the field of family law, such as alimony, polygamy, converting to Another Religion, Arbitration in Family law (*Taḥkīm*) and Family Mediation, Comparison of Minimum Marriage Age in Family Laws, and lineage Establish and Legal Status of Children Born Out of Marriage.

5.2 ALIMONY

5.2.1 Poverty Alimony in the Turkish Civil Code

One of the prominent challenges faced by divorced individuals in contemporary Turkish society pertains to the perpetual obligation of providing alimony to their former partners. A judge's determination of spousal maintenance typically results in an

unlimited duration, making it challenging to terminate. As per Article 144 of the Turkish Civil Code No. 743, the provision stipulates a restriction on the duration of alimony payments made by the male party to his former spouse, who is experiencing financial hardship, was limited to one year until 1988.[1]

Nevertheless, the Turkish Civil Code has included an amendment establishing a lifetime duration for the alimony payments to the former spouse, starting from May 1988.[2] According to Article 175 of the existing Turkish Civil Code, both partners in a marriage must provide financial support to one another based on their respective capacities. In cases where divorce leads to one party facing significant financial hardship, that party may request ongoing alimony to sustain the other party as long as the requesting party is not primarily responsible for the dissolution of the marriage. The duration and amount of alimony are subject to the parties' financial means. No fault shall be sought for the party incumbent to pay alimony.[3]

The topic of indefinite alimony has been a subject of extensive discourse over an extended period, eliciting significant societal responses. Following these societal reactions, the Republic of Turkey's Ministry of Justice put the issue of alimony back on its agenda in 2019. The Ministry of Justice began to consider limiting the maximum duration of alimony to six years. The lower limit was stipulated as two years at the Ministry's suggestion.[4] This issue was expected to be discussed jointly with the Ministry of Justice and Family and Social Services. However, the regulatory proposal brought by the Ministry of Justice has not yet been enacted. In 2021, the Turkish government has once again prioritised the legal control of poverty alimony, also known as indefinite

[1] The repealed Turkish Civil Code numbered 743, Article 144. For this law, See: <https://www.mevzuat.gov.tr/mevzuatmetin/5.3.743.pdf> (Accessed on 20 October 2023). The first version of the article in question is as follows: If a blameless husband or wife falls into great poverty as a result of divorce, the other may be sentenced to alimony for a period of one year in a manner appropriate to his power, even if the other has not caused the divorce.

[2] Subsequently, Article 144 underwent modifications with the implementation of Law No. 3444 on May 4, 1988. According to Article 144 of Law No. 743, in conjunction with Article 6 of Law No. 3444, it is stipulated that in divorce cases, the spouse at risk of experiencing financial hardship may seek ongoing financial support, known as alimony, from the other spouse. The amount of alimony awarded should be determined based on the paying spouse's financial capability while considering the severity of fault attributed to the requesting spouse. However, for the man to ask for alimony from the woman, the woman must be on welfare. “The fault of the alimony obligor is not sought.” See: Abolished Provisions Of Turkish Civil Code <https://www.mevzuat.gov.tr/mevzuatmetin/5.3.743.pdf> (Accessed on 20 October 2023).

[3] Turkish Civil Code, 2002, No: 4721. See: Article 175.

[4] Elvan Kılıc, “Nafakanın Süresinin Sınırlandırılması” Hurriyet, <https://www.hurriyet.com.tr/aile/yazarlar/elvan-kilic/nafakanin-suresinin-sinirlandirilmasi-41646277> (Accessed 20 October 2023).

alimony, in divorce cases. This issue had previously been set aside due to the objections raised by women's organisations and concerns over the potential victimisation of women. According to the information obtained from Ministry sources, this study focuses on the formula that the spouse who has to pay alimony must pay alimony for the duration of the marriage, and at the end of this period, the state is obliged to pay alimony.[5] However, the regulatory plan put forth by the Ministry of Justice has yet to be implemented.

In 2022, the Ministry of Justice examined the alimony issue, focusing on two key aspects: establishing a maximum duration for alimony payments and implementing a system where the amount of alimony is determined based on the length of the marriage. There is a proposed plan to provide alimony for five years in marriages lasting less than two years, seven to eight years in marriages lasting less than five years, and twelve years in marriages lasting between five and ten years. If the recipient spouse continues to have financial difficulties upon the conclusion of the designated period, an "interim period" will be implemented, allowing for the continuation of alimony payments for an additional duration of two to three years.[6]

In July 2023, a flash statement came at a meeting where the Minister of Family and Social Policies met with representatives of press organizations in Ankara, and it was stated that indefinite alimony is not a fair situation. Even the Minister said that some women came to her and complained about this practice. She adds that a practice such as paying alimony indefinitely is not acceptable.[7]

The consecutive statements regarding the indefinite alimony made by the present Minister of Justice have garnered significant notice. In the TV program he attended, the Minister talked about people who stayed married for one year and paid alimony for decades.[8] He added that regulation was needed to prevent women from being

[5] Ayse Sayın, "Hükümet, devlet destekli yeni nafaka düzenlemesi üzerinde çalışıyor" BBC News Türkçe, <https://www.bbc.com/turkce/haberler-turkiye-59778197> (Accessed 20 October 2023).

[6] Gizem Karakış, "Taslak tamam: Evlilik yılına göre nafaka süresi" Hurriyet, <https://www.hurriyet.com.tr/gundem/taslak-tamam-evlilik-yilina-gore-nafaka-suresi-41999181> (Accessed 20 October 2023).

[7] Aile Bakanı Mahinur Özdemir Göktaş'tan süresiz nafaka açıklaması: Adil bir durum değil. Yenisafak <https://www.yenisafak.com/video-galeri/gundem/aile-bakani-mahinur-ozdemir-goktastan-suresiz-nafaka-aciklamasi-adil-bir-durum-degil-4548228> (Accessed on 20 October 2023).

[8] Adalet Bakanı Yılmaz Tunç'tan nafaka düzenlemesine ilişkin açıklama, NTV <https://www.ntv.com.tr/turkiye/adalet-bakani-yilmaz-tunctan-nafaka-duzenlemesine-iliskin-aciklama,DDpgQ8rVjkKqeIw3eZnj7A> (Accessed on 20 October 2023).

victimised; the Minister pointed out mediation in resolving the alimony issue. He said that the Ministry is carrying out extensive work on family law.[9] The last statement from the Minister of Justice on 6th November 2023 was clear: While the payment period for alimony was one year until 1988, it has become indefinite since this year. He continued: The fact that alimony is indefinite as a rule is a highly criticised issue by the public. Ordering alimony payments indefinitely is not considered fair, especially in short-term marriages. The problem must be regulated following justice, considering the rights and interests of the alimony creditor and the debtor.[10]

Providing indefinite alimony payments to individuals who were married for a short time and then divorced may be perceived as stringent, as the party responsible for the divorce has already been mandated to provide financial restitution.[11] The news story highlights a notable case when an individual remains married for ten days but must provide alimony for 29 years. As of 2019, a significant number of individuals have been identified as victims of indefinite alimony, totalling over 2 million[12] individuals. Furthermore, it instils fear and apprehension in individuals who aspire to enter into matrimony.

In interviews with parliament members and lawyers who hold important positions in the field of law in Turkey, the dominant opinion is that this alimony should be paid. Still, it is not indefinite, and the judge reaches an appropriate decision by looking at the parties' situation.

During the conversation with the Minister of Justice of Turkey, it was conveyed that each legal case may include distinct characteristics. Indefinite alimony is sometimes unfair, but some cases need to be indefinite. In the context of alimony

[9] Adalet Bakanı Yılmaz Tunç'tan 'süresiz nafaka' açıklaması, Hurriyet <https://www.hurriyet.com.tr/gundem/adalet-bakani-yilmaz-tunctan-suresiz-nafaka-aciklamasi-42323410> (Accessed on 20 October 2023); Adalet Bakanı Tunç'tan süresiz nafaka açıklaması: Aile hukukunu sil baştan ele alacağız, Yenisafak <https://www.yenisafak.com/gundem/adalet-bakani-tunctan-suresiz-nafaka-aciklamasi-aile-hukukunu-sil-bastan-ele-alacagiz-4556737> (Accessed on 20 October 2023).

[10] Adalet Bakanı Tunç'tan süresiz nafaka açıklaması, NTV <https://www.ntv.com.tr/turkiye/adalet-bakani-tunctan-suresiz-nafaka-aciklamasi,VDMPO1Gyikux1IpnJr3xww> (Accessed on 7 November 2023).

[11] Turkish Civil Code, 2002, No: 4721, Article 174 stated that: The party at less fault or with no fault whose current or expected interests are damaged by divorce can demand pecuniary damages of an appropriate amount of the party at fault. The party whose personal rights are attacked due to events leading to divorce can demand an appropriate amount of money to be paid in the form of non-pecuniary damages.

[12] Ayşe Mine Alioğlu, "2 milyon nafaka mağduru" Yenisafak, <https://www.yenisafak.com/gundem/2-milyon-nafaka-magduru-3430598> (Accessed on 20 October 2023).

determination, a reasonable approach would involve granting the Judges discretionary authority, enabling distinct rulings for each case.[13] Ali Özkaya highlights the matter of indefinite alimony. Ozkaya asserts a solid opposition to the concept of indefinite alimony. It is noted that before 1988, indefinite alimony support was restricted to a duration of one year, but presently, it has become unrestricted in terms of time; it asserts that there are criticisms regarding this matter and emphasises the need for its resolution.[14]

Undoubtedly, the matter of alimony presents significant challenges. There was no lifetime alimony in Turkey before. Recently, there has been a tendency among judges in our nation to take responsibility and initiative. This is seen in their propensity to render a verdict and persist with it until its conclusion. There exist concerns and complaints about this issue. In considering the duration of alimony, it is recommended that judges have broad discretion by examining the individual circumstances of the parties, including the victimisation context and the level of need. The potential resolution of this matter may be facilitated through the proliferation of specialised family courts.[15]

5.2.2 Alimony in the Jordan Personal Status Law

The alimony issue is *'iddah* alimony, governed by articles 151 to 154[16] of Jordanian Family Law. Under legal provisions, it is incumbent for the husband to provide financial support to the wife during the period of separation leading up to divorce or termination of the marriage. In contrast to the Turkish Civil Code, Jordan legislation does not reference the concept of indefinite alimony. Article 151 states that the husband is obliged to support his waiting wife, whether divorce or annulment, taking into account the provisions of chapter two of part two of this law. Article 152 establishes that *'iddah* alimony is the same as marital alimony, and it is judged from the date of the *'iddah* period if the divorced woman does not have obligated marital alimony. If she has

[13] Yılmaz Tunc, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (08.04.2022).
[14] Ali Özkaya, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (01.04.2022).
[15] Mustafa Sentop, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (21.04.2022).
[16] Jordan Personal Status Law No. 15 of 2019, Articles 151-154.

alimony, it extends until the end of the *ʿiddah* period, provided that the duration of the *ʿiddah* period does not exceed one year. The claim for alimony for the *'iddah* period shall not be heard after one year since the wife is notified of the divorce. Article 154 states that A woman whose husband has died is not entitled to maintenance for the *'iddah* period, whether she is pregnant or not.[17] Notwithstanding what is stated in paragraph (A) of this article, when the husband of the woman with whom sexual intercourse has passed away, she may reside in the husband's residence or the marital home given to him for temporary use for the period of *ʿiddah*.[18]

5.2.3 Alimony in the Mudawwanat al-Usrah

One of the articles concerning alimony is Article 83: If the attempts to reconcile the spouses fail, the court shall fix a sum of money that the husband must deposit at the court within a maximum delay of thirty days to discharge all vested rights due to the wife and dependent children as provided for by the two following articles. The amount due to the wife includes the delayed dowry, if appropriate, maintenance for the *'iddah*, and the consolation gift. During the *'iddah* period, the wife remains in the marital home, or if need be, in a suitable home based on her and the husband's financial situation. Failing this, the court shall fix an amount of money to cover housing expenses to be deposited with the court as part of the vested rights due to the wife.[19]

Other articles that cover the issue of alimony regarding women are articles 195 and 196: 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 wife does not lose her right to maintenance unless she has been ordered to return to the marital home and has refused. A wife who has been revocably repudiated shall lose her right to accommodation but not to maintenance if she leaves the house where she is required to observe the legal waiting period without the consent of her husband or a good reason. A pregnant wife who has been irrevocably repudiated shall be entitled to maintenance. She has a right to alimony until she gives birth to her child. If she is not pregnant, she is entitled to accommodation until her legal waiting period ends.

[17] Jordan Personal Status Law No. 15 of 2019, Articles 154 (a).
[18] Jordan Personal Status Law No. 15 of 2019, Articles 154 (b).
[19] The 2004 Mudawwanat al-Usrah, Article 83-84.

5.2.4 Alimony in the Islamic Family Law (Federal Territories) Act 1984 (IFLA)

According to Section 59 of the Islamic Family Law (Federal Territories) Act 1984, the Court may, subject to Hukum Syarak, order a man to pay maintenance to his wife or former wife.[20] The second paragraph of this section states in which cases the woman cannot receive alimony. Following Hukum Syarak and subject to validation by the Court, a wife's entitlement to maintenance shall be revoked in instances of being nusyuz[21] or her unreasonable refusal to comply with her husband's lawful requests or demands. This includes, among other things, when she withholds her association with her husband, leaves her husband's home against his will, or refuses to move with him to another house or place without any valid reason, according to Hukum Syarak.[22]

In determining the amount of any maintenance to be paid, the Court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion the maintenance bears to the income of the person against whom the order is made.[23]

5.2.4.1 Right to Maintenance or Pemberian[24] after Divorce

Provisions regarding the right to alimony after divorce are mentioned in section 65 of the law: The right of a divorced wife to receive maintenance from her former husband under any order of the Court shall cease on the expiry of the period of ʿ*iddah* or on the wife being nusyuz (disobedient). The right of a divorced wife to receive a pemberian

[20] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 59 (1).
[21] The term nusyuz, originated from the Arabic word nushūz. It indicates a rise and height, then it was borrowed, so it was said: The woman became disobedient and difficult for her husband. Likewise, her husband became disobedient: he forced her away and hit her. See: Aḥmad Ibn Fāris bin Zakariyyah al-Qazwīnī. *Muʿjam Maqāyīs al-Lughah*, (Dār al-Fikr, 1979): Vol.5, 431. In the 2nd paragraph of the 59th section of the Malaysian Islamic Family Law, titled "The court's authority to decide on spousal support and the effect of nusyuz", the situations in which men and women will be nusyuz are mentioned: "Subject to Hukum Syarak and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia— (a) when she withholds her association with her husband; (b) when she leaves her husband's home against his will; or (c) when she refuses to move with him to another home or place, without any valid reason according to Hukum Syarak. (3) As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be nusyuz."
[22] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 59 (2).
[23] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 61.
[24] According to Islamic Family Law (Federal Territories) 1984 (Act 303): "pemberian" means a gift whether in the form of money or things given by a husband to a wife at the time of the marriage." See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 2 (1).

from her former husband under an agreement shall cease on her remarriage.[25] When this *ʿiddah* period expires, alimony is paid to the woman, who is responsible for the care of the children, due to the children. According to Section 79 of the same law, the alimony responsibility of fathers towards their children ends when the girl child gets married when the boy is eighteen.[26]

In summary, in Jordan, Morocco, and Malaysia, except Turkey, it is impossible to give indefinite alimony to the divorced spouse. Only during the *'iddah* period is alimony mentioned.

The researcher has agreed that necessary arrangements should also be made in Turkey. Otherwise, the divorced husband's possibility of a new marriage becomes more complex, or he may be imprisoned because he cannot pay alimony.

However, suppose the divorced woman does not have a profession that can continue her life after the divorce or does not have anyone to help. In that case, the government should extend a helping hand to these people, or if there is an unfair divorce situation, alimony can be determined by looking at the economic situation of the former spouse. Because a woman lives by trusting her husband and serving him until a certain age, for example, it should not be overlooked that it will be difficult for a woman who divorces after the age of fifty to find a job and continue her life with her means. On the other hand, the question comes to mind: how much economic trouble will the husband have to pay alimony for life after the end of the short-term marriage? In this regard, the government must urgently find a middle way. Furthermore, in Islamic law, alimony has never been indefinite.

5.3 POLYGAMY

Polygamy (*Taʿaddud al-Ẕawjāt*) means that a man marries more than one woman simultaneously. Islamic law also accepted polygamy as a *Rukhsah* if certain conditions and justifications exist, limiting its number to four. Although polygamy is permissible in Islamic law, it is not an absolute right that every man can use according to his own will. When the relevant texts are examined, polygamy is permissible in Islamic law; it

[25] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 65.
[26] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 79.

is seen that it is tied to two primary conditions: to observe justice between the spouses and to be able to maintain the spouses' maintenance.[27]

5.3.1 Polygamy in the Turkish Civil Code

Polygamy is not mentioned based on Article 130 of the Turkish Civil Code. In the article, The person who wants to remarry shall be obliged to prove that their marriage has ended. According to this provision, the marriage of a person who has made a second marriage is considered void by the law. So, people who want to marry a second woman in Turkey cannot register this contract in court. Therefore, he gets married in the presence of two witnesses, as the marriage contract in Islamic law is concluded. However, after the divorce of this second spouse, the wife faces the problem of being deprived of some of her rights since she does not have legal status. At this point, although there is a possibility of establishing a lineage bond between the father and the children born, the legal status of this second spouse is not solid, and there are concerns about her rights.

5.3.2 Polygamy in the Jordan Personal Status Law

Article 6 of the 1976 statute was amended in 2001 to include a provision requiring the judge to inform the second wife about the husband's financial status and his existing marriage. Jordan's Personal Status Law (2010) and (2019) both regulated polygamy marriage in Article 13 and made arrangements for polygamy in several other articles. Before allowing a married man to apply for another marriage, the judge must look at the following:

- The husband's financial ability to pay the mahr (dowry),
- Making sure that he can afford the alimony of people under his responsibility,
- Notifying fiancée that her fiancé is married to someone else,

[27] Ibrahim Yilmaz, "İslâm Hukukunda Çok Eşliliği Meşru Kılan Şartlar Ve Buna Ruhsat Veren Özel Durumlar", *Bilimname*, No.37 (2019): 559.

- After performing the contract, the court shall notify the existing spouse or spouses.

Article 37/a states that in the marriage contract, the woman may stipulate that the man should not remarry. According to Article 75, the husband cannot force his wives to live together against their wishes. Article 79 declares that men with more than one wife must be fair between their spouses in matters of overnight and alimony.[28]

5.3.3 Polygamy in the Mudawwanat al-Usrah

The topic of polygamy has sparked intense controversy in Morocco for an extended period and has consistently remained a prominent concern. Since the inception of family law, there has been a strong desire to eliminate polygamy, which women's groups and international organizations have supported. However, it remained in effect even after enacting the new law in 2004. Only a limited number of restrictions have been implemented. First of all, polygamy is regulated by Article 30, paragraph (1) of the 1958 Family Law Code, which prohibits having many wives if there is a concern that it may result in unfair treatment among them. The 1958 law lacks the power to assess a husband's ability to engage in polygamy; the husband solely determines this capability.[29]

Polygamy remains legally permissible in Morocco. Polygamy is regulated by strict legal conditions that differ from previous family laws. A potential wife can include a condition in the marriage contract prohibiting the husband from marrying another woman. Additionally, the wife's consent is necessary for any subsequent marriages. If the wife does not agree to the polygamous arrangement, she has the right to seek a divorce. The Family Judge is responsible for ensuring that there is no unfair treatment of wives and that the husband can treat them fairly.[30] While there is no testimony from

[28] Ismail Yalcin, "Günümüz İslam Aile Hukuku Kanunlarında Çok Eşlilik Üzerindeki Sınırlamalar (Limitations on Polygamy in Today's Islamic Family Law Laws)", *Journal of Human and Social Sciences Research*, Vol.6, No. 3, (2017): 1717.
[29] Muannif Ridwan, Ahmad Syukri Saleh, Abdul Ghaffar, "Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law", *ARRUS Journal of Social Sciences and Humanities*, Vol. 1, No. 1 (2021): 20-21.
[30] Fatima Harrak, "The History and Significance of the New Moroccan Family Code", Working Paper No. 09 002, Institute for the Study of Islamic Thought in Africa (ISITA), The Roberta Buffet Center for International and Comparative Studies, Northwestern University, 7.

a woman regarding the provision of monogamy, the court possesses the jurisdiction to dissolve the marriage if both unions inflict injury upon the first wife.[31]

Accordingly, according to the provisions outlined in articles 40 and 45, polygamous marriages now necessitate judicial authorization instead of being solely at the husband's discretion. Furthermore, the spouse must demonstrate a genuine necessity for entering into a subsequent matrimonial union. Thirdly, the woman possesses the prerogative to include in the marital agreement the stipulation that her spouse shall refrain from entering into further marriages (monogamy provision). In addition to the abovementioned considerations, disclosing the husband's current marital status to the potential new spouse is imperative.[32]

Despite ongoing attempts for many years, the complete eradication of polygamy in Morocco has not been achieved. However, limitations on polygamy are still perceived as preferable to the absence of any constraints. Potentially, there may be a rise of novel reform movements about this matter in the forthcoming years.

5.3.4 Polygamy under the Islamic Family Law Act 1984 (IFLA)

According to the Family Law of Malaysia, it is legally permissible for a male individual to practise polygamy. The question of whether or not a man can practise polygamy requires an examination of three main factors: (i) the specific circumstances in which polygamy may be allowed, (ii) the fundamental reasons for determining if polygamy is permissible, and (iii) the procedural factors involved in the practice. The majority of state marriage laws include a clause that requires individuals who wish to engage in polygamy to acquire formal authorisation from a judge.[33] However, specific differentiations can be classified into more general categories.

Firstly, provisions regarding polygamy are in section 23 of the Islamic Family Law Act 1984 (IFLA): No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another

[31] Nasiri Nasiri, "Marriage in Morocco: A Practices of The Mudawwanatul Usrah Law in The Land of Guardians", *International Journal of Islamic Thought and Humanities*, Vol. 1. No. 1. (2022): 35.
[32] Sadiki, Morocco, 319.
[33] Yusuf Abdul Azeez & Luqman Zakariyah & Syahirah Abdul Shukor & Ahmad Zaki Salleh, "Codification of Islamic Family Law in Malaysia: The Contending Legal Intricacie", *Science Internaional (Lahore),* Vol. 28, no.2 (2016): 1754.

woman nor shall such marriage contracted without such permission be registered under this Act: Provided that the Court may if it is shown that such marriage is valid according to Hukum Syarak order it to be registered subject to section.[34] Similar to IFLA, other states, Penang, Selangor, Pahang, and Perak, also contain the same provision in section 23. In the Perak law article 21, paragraph 1, there is an additional sentence: "*Obtaining prior approval from the judge that he will be fair to his wives."*

Second, polygamy without permission from the court may be registered on the condition that it first pays a fine or undergoes a sentence that has been delayed.[35] As stated in Section 123 of IFLA:

> Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or imprisonment not exceeding six months or both.

Any man who enters a second marriage while still married without obtaining written authorisation from the Court is committing an offence. The punishment for this violation is a fine of up to one thousand ringgit, imprisonment for a maximum of six months, or both.[36] The court's deliberations revolve around whether to grant consent or not, considering the viewpoints of both the wife and husband. Some reasons that a husband may provide include infertility, physical ageing, inability to engage in sexual activity due to physical fitness, and having a mentally unstable wife. Some reasons that wives may present include financial capacity, striving for equity, and ensuring that the subsequent marriage does not threaten the first wife's faith, life, physical well-being, mental health, or possessions.

Accordingly, polygamy is legal in Malaysia and permissible under the (IFLA) special provisions and several states, Section 23, Part II.[37] Of course, this was not

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[34] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 23 (1).
[35] Fatah Yasin, Analysis of polygamy provision under the Islamic Family Law (Federal Territories) Act 1984; with referrence to the Qur'an and Sunnah, 280.
[36] The Kedah state lawmakers passed an amendment to increase the fine to RM3,000 and a jail term of up to one year for those entering polygamy without court approval. See: Adie Zulkifli, "Kedah raises minimum marriage age for Muslim women to 18," New Straits Times, <https://www.nst.com.my/news/nation/2022/07/814457/kedah-raises-minimum-marriage-age-muslim-women-18> (Accessed 20 November 2023).
[37] No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act: Provided that the Court may if it is shown that such marriage is valid according to Hukum Syara' order it to be registered subject to section 123. For other states : Selangor (Enactment 2 Section 23), Negeri Sembilan (Enactment 7 Section 23),Perak (Enactment 6 Section 23), Pahang (Enactment 3 Section 23) , Perlis (Enactment 7 Section 23),Kedah (Enactment 11 Section 23),

released unconditionally; however, some conditions were put forward. This section, which consists of eight subsections, generally focuses on the administration, management of the application, registration, and general conditions of the proposed marriage to gain the Court's permission, which is compulsory before the proposed marriage takes place. Meanwhile, the latest amendments of the IFLA introduced under the Amendment of 2005 enable the first wife to claim her share of the matrimonial property upon her husband's polygamy. Another amendment requiring the man, his existing wife, his prospective wife, and her guardian to appear before the court further protects women because it allows the judge to determine the suitability of the application.[38]

There exists a legal gap that exempts Muslim males from obtaining their first wife's consent in order to marry another wife. However, he must obtain written authorisation from the Court for the second marriage. In 2010, the politician Bung Mokhtar, who got married for the second time without the permission of the court, was sentenced to one month's prison sentence by the Sharī'ah court in Malaysia in May. The lawyer said an Islamic High Court ruled jailing Parliamentarian Bung Mokhtar Radin was too harsh. Then, instead of jail, the court outside Kuala Lumpur allowed him to pay the maximum fine of one thousand ringgit.[39]

As a result of the interviews, some people had a second marriage without informing the first wife, only in the state of Perlis or Thailand, then registered in the *Sharī'ah* court in Malaysia and paid a certain fine.[40] In addition, in the report containing the statistical data published by the Sisters in Islam organisation in Malaysia, the following statement is stated: "... first wives were not notified of the application made in court."[41]

Kelantan (Enactment 6 Section 23) ,Terengganu (Enactment 12 Section 22), Johore (Enactment 17 Clause 23) ,Penang (Enactment 3 Section 23), Malacca (Enactment 12 Section 23) , Sabah (Enactment 8 Section 23) | Sarawak (Ordinance 43 Section 21).

[38] Raudlotul Firdaus Fatah Yasin, "Analysis of polygamy provision under the Islamic Family Law (Federal Territories) Act 1984; with referrence to the Qur'an and Sunnah", *IIUM Law Journal*, Vol. 18 No.2 (2012): 263.

[39] The court imposed the jail sentence to set an example and caution individuals to uphold Islamic law and regard marriage with utmost seriousness. See: Polygamous politician avoids jail term, Irish Examiner, <https://www.irishexaminer.com/world/arid-30468786.html> (Accessed on 20 October 2023).

[40] Mohamad Sabri B Zakaria, Interviewed by Selman Zahid Ozdemir, International Islamic University Malaysia, (05.07.2022)..

[41] Sisters in Islam, Telenisa Statistics & Findings, 2021, 10. https://sistersinislam.org/wp-content/uploads/2022/04/Telenisa_Statistics_and_Findings_2021_ENGLISH.pdf (Accessed on 20 October 2023).

The research sees no harm in this matter if the first wife permits her husband to make a second marriage, and this marriage does not harm the unity between the family. As discussed by scholars in Islamic Law, the issue that is understood as ensuring justice between spouses appears in the 3rd verse of *Sūrat an-Nisā*. Even if this condition is not fulfilled from the heart, a judgment is made by looking outward.

5.4 CONVERTING TO ANOTHER RELIGION

Under Islamic law, it is prohibited for a woman to enter into marriage with a non-Muslim. Contrarily, there is no harm in a Muslim man getting married. If the husband has embraced a religion other than Islām, his marriage with his wife will be deemed null and void. If a spouse who is not a Muslim converts to Islām, how would this situation be legally determined?

5.4.1 Under the Turkish Civil Code

Article 129 of the Turkish Civil Code No. 4721 includes provisions regarding marriage impediments. Marriage is prohibited between the following people due to kinship:

1. Between ascendants and descendants, between siblings, and between paternal uncle, maternal uncle, paternal aunt, maternal aunt, and their nephew/nieces,
2. Even if the marriage that created affinity has ended between one of the spouses and the ascendants or descendants of the other,
3. Between the adopter and the adopted child, or between one of them and the descendants and spouses of the other,[42]

As can be seen, there are no impediments to marriage arising from differences of belief in Turkish Civil Law. However, when considering Turkey as a whole, it is evident that it is uncommon for a woman to marry a non-Muslim man. This is due mainly to the enduring impact of Islamic customs (*ʿurf*).

[42] Turkish Civil Code, 2002, No: 4721, Article 129.

5.4.2 Under Mudawwanat al-Usrah

There are provisions in the Mudawwanat al-Usrah regarding invalid marriage, and its effects are mentioned in the 2nd chapter of Mudawwanat al-Usrah, Article 57 states: The marriage is null and void when:

1. One of the fundamental conditions cited in Article 10 is not fulfilled;
2. If one of the marriage impediments cited in preceding Articles 35 to 39 exists between the spouses,
3. Absence of congruence between the offer and the acceptance.[43]

When articles 35 to 39 of Mudawwanat al-Usrah are examined, the provisions of marriage Impediments emerge. For instance, it is prohibited that degrees of blood kinship relations, including a man's ancestors, ascendants, and descendants. Impediments to marriage resulting from kinship by breastfeeding are the same as those prohibited through blood and kinship by marriage. In article 39, existing temporary impediments to marriage: Marriage simultaneously to two sisters or to a woman and her paternal or maternal aunt be; marriage to more than the legally authorized number of wives.

The fourth paragraph of Article 39 mentioned the marriage of a Muslim woman to a non-Muslim man and the marriage of a Muslim man to a non-Muslim woman unless she is of the Christian or Jewish faith as a temporary impediment to marriage. This means that marriage is not prevented when these temporary obstacles are eliminated. However, no provision has been found regarding one of the spouses changing religion while the marriage continues.

5.4.3 Under Jordan's Personal Status Law

Jordan Personal Status Law has legislated the provisions of separation between spouses due to religious conversion in Article 140:

a. If the spouses are non-Muslims and convert to Islām together, their marriage remains.

[43] The 2004 Mudawwanat al-Usrah, Article 57, Paragraph 1-3.

b. If the husband alone converts to Islām and his wife is an *Ahl al-kitāb* (People of the Book), the marriage remains. If she is a non-*Ahl al-kitāb*, he offers her Islām. If she converts to Islām or becomes an *Ahl al-kitāb*, the marriage remains, and if she refuses, the marriage is annulled.

c. If the wife converts to Islām alone, Islām is offered to the husband. If he converts to Islām, the marriage remains, and if he refuses, the marriage is annulled.

d. Whoever refuses shall be given ninety days from the date on which Islām was offered to him if he is of sound mind and adult. If he is not, the contract shall be annulled immediately.

In the case of *irtidād* (apostasy), if the apostasy occurred before consummation, the judge shall rule to annul the marriage contract between them as of the date of the apostasy. Nevertheless, if the apostasy occurred after consummation, and the apostate insisted on it and refused to return from his apostasy. In that case, the judge shall rule to annul their marriage contract.[44]

5.4.4 Under the Islamic Family Law Act 1984 (IFLA)

Matters related to this issue are mentioned in the Islamic Family Law Act under the title of change of religion. The apparent provision in the relevant section is that the conversion cannot end the marriage without being approved by the court: The renunciation of Islām by either party to a marriage or his or her conversion to a faith other than Islām shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court. The conversion to Islām by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.[45]

5.4.4.1 Indira Gandhi Case and Similar Cases

In the past decade, child custody cases among Muslim convert and non-Muslim parents have remained controversial in Malaysia. The recent court verdict for the Indira Gandhi

[44] Jordan Personal Status Law No. 15 of 2019. Article 142, Paragraph 1 and 2.
[45] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 46 (1-2).

Case highlights the problem while generating heated arguments nationwide. On 30 December 2015, the Court of Appeal overturned the 2014 High Court verdict, which quashed the conversion of Indira's three children to Islām. Indira's ex-husband filed the unilateral conversion, Muhammad Riduan (formerly Patmanathan), soon after he left their residence in 2009. As a result, the three children were officially Muslims again, omitting the eldest daughter due to her coming of age.[46]

The appellant, Indira Gandhi a/p Mutho, married the respondent, Patmanathan. Their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 (Civil marriage), and they had three children. The respondent converted to Islām subsequently. A dispute arose when the respondent converted the children to Islām without the appellant's consent and obtained custody of the children from the Syariah Court. Three certificates of conversion to Islām were delivered to the appellant. The Registrar had registered the children as Muslims. However, the children were not present before the Registrar. They did not utter the two clauses of the Affirmation of Faith required by the Administration of the Religion of Islām (Perak) Enactment 2004. The following year, the wife's divorce petition was allowed by the Ipoh High Court on the ground that the husband had converted to Islām. The Civil Court granted the wife custody orders over all three children. This resulted in two contradictory custody orders from the Syariah and Civil Court.[47]

While Indira's two eldest children stay with her, Prasana, who was only 11 months when her father took her, remains missing. In 2016, the Federal Court ordered the arrest of Ridhuan and handed Prasana to Indira.[48] The Federal Court had, in 2018, unanimously ruled that the unilateral conversion of the three children was null and void, holding that the consent of both parents was needed to convert a minor.[49] After all these events, the mother, Indra Gandhi, claimed that her youngest child was still with his

[46] Wan Naim Wan Mansor, "The Indira Gandhi Case and the Advocacy of Justice", *ICR Journal*, Vol.7, No.1. (2016): 124.
[47] Lim Wei Jiet & Abraham Au Tian Hui, "Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545: From Conflict of Jurisdictions to Reaffirmation of Constitutional Supremacy", *Journal of Malaysian and Comparative Law*, vol. 45, No 1 (2019): 74–75.
[48] Jason Thomas, "Indira's lawyers can't understand IGP's delay in arresting ex-husband" FMT, <https://www.freemalaysiatoday.com/category/nation/2020/01/31/indiras-lawyers-cant-understand-igps-delay-in-arresting-ex-husband> (Accessed on 20 Ocotober 2023).
[49] Abdul Fareed Abdul Gafoor, "Press Release | Respect Separation of Powers — Enforce Pronouncement of the Federal Court in the Indira Gandhi Case Without Delay" Malaysian Bar, <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-respect-separation-of-powers-enforce-pronouncement-of-the-federal-court-in-the-indira-gandhi-case-without-delay> (Accessed on 20 Ocotober 2023).

father and filed a lawsuit in 2020 worth RM 100 million, holding the Inspector General of Police (IGP) responsible for not locating the child and bringing him back.[50] However, the High Court has rejected Indira's RM100 million lawsuit against the Inspector General of Police (IGP) and the government.[51]

In summary, the Indira Gandhi case is a notable example of exemplification. The male member of the family underwent a religious conversion to Islām, while the female member opted to maintain her existing religious affiliation. The individual unilaterally compelled their offspring to undergo a conversion to Islām. However, the civil court subsequently adjudicated in favour of restoring custody of the Muslim children to their non-Muslim mother.

On 26 January, the Federal Court unanimously rejected the Selangor Islamic religious bodies' final bid to restore a Muslim convert father's unilateral move in 2018 to convert his five children -when they were still aged around nine to three - to *Islām* without the non-Muslim mother's knowledge, declaring the Indira ruling as the correct approach which had settled the same issue.[52] On 12 April, the Federal Court unanimously rejected a Buddhist-turned-Muslim mother's bid to appeal to restore her unilateral conversion in 2016 of her two children - then aged eight and three- to Islām without the Buddhist father's consent.[53] In similar cases on the religious status of children born when both parents were still non-Muslims, the Federal Court affirmed that the ruling in Indira's case still applies.

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[50] Rahmat Khairulrijal, "Indira Gandhi files RM100 million suit against IGP, government" New Straits Times, <https://www.nst.com.my/news/crime-courts/2020/10/636013/indira-gandhi-files-rm100-million-suit-against-igp-government> (Accessed on 20 Ocotober 2023). She identified Abdul Hamid, the Royal Malaysian Police, the Home Ministry, and the government as the defendants in the order of first, second, third, and fourth, respectively.

[51] Rahmat Khairulrijal, "High Court dismisses Indira's RM100 million suit against IGP and govt" New Straits Times, <https://www.nst.com.my/news/nation/2024/06/1069558/high-court-dismisses-indiras-rm100-million-suit-against-igp-and-govt> (Accessed on 30 June 2024); Nurbaiti Hamdan, "High Court dismisses RM100mil lawsuit by Indira Gandhi against IGP and government" The Star, <https://www.thestar.com.my/news/nation/2024/06/28/high-court-dismisses-rm100mil-lawsuit-by-indira-gandhi-against-igp-and-government> (Accessed on 30 June 2024).

[52] Kenneth Tee, "Mais loses final appeal to restore five kids' unilateral conversion to Islam, Federal Court upholds Indira decision where both parents' consent needed" Malaymail, <https://www.malaymail.com/news/malaysia/2022/01/26/mais-loses-final-appeal-to-restore-five-kids-unilateral-conversion-to-islam/2037643> (Accessed on 20 October 2023).

[53] Kenneth Tee, "Citing Indira Gandhi precedent, Federal Court rejects Muslim convert mum's bid to restore kids' unilateral conversion" Malaymail, <https://www.malaymail.com/news/malaysia/2022/04/12/citing-indira-gandhi-precedent-federal-court-rejects-muslim-convert-mums-bi/2053091> (Accessed on 20 October 2023).

If the children are not at the age of appeal, they can not distinguish the good from the bad. In that case, it will be more beneficial for the development of the children to stay with the mother because a child who is not even one year old can be given the best care by his mother. Later, when the child becomes an adult, he should be allowed to choose a religion. If children are older, they should also be given a choice.

When examining other countries, no adjustments have been made in the Turkish Civil Code or Moroccan family law regarding conversion or its effect on existing marriages. However, the Jordanian Personal Status and Malaysian Islamic Family Law mentioned provisions.

5.5 ARBITRATION IN FAMILY LAW (*TAḤKĪM*) AND FAMILY MEDIATION

5.5.1 Turkish Civil Code

There is no mention of family mediation or arbitration in the Turkish Civil Code; only in recent years has family mediation come to the fore, and it is expected that a regulation will be put forward in the relevant Turkish Parliament. Member of Parliament Unal says they are currently working on a family mediation. The Ministry of Justice is also working on this issue. An interim process should be established where the family can apply before the court and resolve their disputes. We are doing a study on this.[54]

Participant E also says that we are currently trying to adapt the system in Western law to our law. It can be noted that the Mediation practice called Ombudsman is precisely the same as the arbitration practice today. This will come into play in family disputes. As clearly stated in the Holy Qur'ān, in disputes, the arbitrator from both sides will be experienced, respect the family's word, and contribute significantly to resolving the conflict because they know both families and individuals. As long as their role as referees is accepted, they will approach the issue objectively and positively, especially in striving to continue family unity. It is possible to say that registering the decision of such an arbitrator in modern courts and putting it into effect will genuinely bring an innovation in family law.[55]

[54] Mahir Unal, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (24.03.2022):
[55] Participant E, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (26.03.2022)..

Minister of Justice Turkey[56] says the mediation has entered our law recently. In many countries worldwide, mediation is practised both in the conciliation of criminal cases and in civil cases. This practice is a system that is very suitable for social peace, and they have made essential regulations to develop mediation in law in Turkey. First of all, we have introduced compulsory mediation in labor law. This application has achieved much success. Turkey has no mediation system in family law, but many European countries have mediation in family law. In fact, family law is the most suitable section for mediation. Therefore, he believes mediation will end many bad situations, especially divorce cases. When there is no mediation in family law, an argument between spouses can, unfortunately, lead to divorce. In the courthouse processes, especially the family's private lives of the individuals are completely disclosed in the courthouse halls, a situation that victimizes both the children and the parties involved. Therefore, the family may be reunited through mediation, or the conflict may be resolved without litigation. This issue can be resolved through mediation without going to court. Therefore, He thinks that mediation is necessary in the family.

Hasibe Özlem Cepni approaches the situation differently; She claims this mediation concept is unsuitable for family law. This is because mediation is about allowing the parties to express their problems without fully proving their rightness. However, family law is not suitable for this. There is no interest-based approach to issues in family law. Sometimes, even if people are right, they can accept the other party's injustice and continue the marriage for the sake of the children. Therefore, these cannot be solved with the current concept of mediation; a different idea of mediation must come. In any case, she advises that mediation should be mandatory in family law matters. This mediation should be made by lawyers, psychologists, and sociologists together. Perhaps after applying to the court, it should be done with the judge's approval, and the judge should be able to control this.[57]

In Jordan's Personal Status Law, Islamic Family Law Act (IFLA), and Mudawwanat al-Usrah, the application of an arbitrator for the settlement of disputes between husband and wife is mentioned in detail.

[56] Yılmaz Tunc, Interviewed by Selman Zahid Ozdemir,Grand National Assembly of Turkey, (08.04.2022).
[57] Hasibe Ozlem Cepni, Interviewed by Selman Zahid Ozdemir, Konya, Turkey, (29.03.2022).

5.5.2 Jordan Personal Status Law

In Jordan's Personal Status Law, if the husband or wife claims that he or she has suffered verbal or actual bodily harm, which makes it impossible to continue the married life, he may request separation due to incompatibility.[58] There are stages of arbitrator practice in Jordanian family law. These stages can be summarized as follows:

5.5.2.1 Judge's Referral of the Case to Two Arbitrators when Failure to Reach Reconciliation

Under the sub-headings of Article 126, if a woman or a man comes to the court with a request for divorce, if the demand for separation is from the wife, and the judge verifies the validity of her claim, the court will make every effort to reconcile them. If reconciliation is not possible, the judge will warn the husband to intervene in his situation with her and adjourn the case for no less than one month. If reconciliation is not reached between them and the wife insists on her claim, the matter shall be referred to two arbitrators. Likewise, if the case comes from the husband's side, the judge still follows the same steps.[59]

5.5.2.2 Arbitrators' Investigation of the Causes of the Dispute

The two arbitrators discuss the causes of disagreement and conflict between the spouses with them or with any person the two arbitrators deem helpful in discussing with him. They must write down their investigations in a report that he signs. If they see the possibility of good conciliation and reconciliation, they read it and write it down in a record submitted to the court.[60]

5.5.2.3 In Case of Arbitrators are Unable to Reconcile the Couple

In case arbitrators can not reconcile, it appears to them that all the abuse is from the wife, so they decide to separate them on the compensation they see, provided that it does not exceed the dowry and its accessories. If the abuse is entirely from the husband,

[58] Jordan Personal Status Law No. 15 of 2019. Article 126.
[59] Jordan Personal Status Law No. 15 of 2019. Article 126, a and b sub-section.
[60] Jordan Personal Status Law No. 15 of 2019. Article 126, d sub-section.

in that case, they decide to separate them with an irrevocable divorce, provided that the wife has the right to demand from him what is not received from her dowry and its accessories and her *ʿiddah* alimony.[61] If it appears to the two arbitrators that the abuse is on the part of the spouses, they decide to separate them over a portion of the dowry in proportion to the abuse of each of them. Suppose the situation is unknown, and they cannot estimate the offence's extent. In that case, they decide to separate them based on the compensation they see from either of them, provided that it does not exceed the amount of the dowry and its accessories.[62]

5.5.2.4 In the Dispute between Two Arbitrators and Present Reports

If the two arbitrators dispute, the judge appoints another arbitrator or joins them as a third arbitrator. In the latter case, the majority's decision is made.[63] The two arbitrators shall submit the report to the judge with the conclusion they reached, and the judge shall rule accordingly if it is by the provisions of this article.[64]

5.5.3 Under the Mudawwanat al-Usrah

According to Article 79, whoever wishes to repudiate must petition the court for authorization to certify the repudiation by two adouls (public notaries) accredited for this purpose in the judicial district of the marital domicile, the wife's domicile or place of residence, or the place where the marriage contract was issued, in that order.[65]

5.5.3.1 First Reconciliation Attempts

Article 81 states that the court shall subpoena the two spouses for a reconciliation attempt. If the husband personally receives the summons and does not appear, this is considered a withdrawal of his petition.[66] According to Article 82, when the two spouses appear, the discussions occur in the consultation room, including hearing

[61] Jordan Personal Status Law No. 15 of 2019. Article 126, h sub-section.
[62] Jordan Personal Status Law No. 15 of 2019. Article 126, v sub-section.
[63] Jordan Personal Status Law No. 15 of 2019. Article 126, h sub-section.
[64] Jordan Personal Status Law No. 15 of 2019. Article 126, t sub-section.
[65] The 2004 Mudawwanat al-Usrah, Article 79.
[66] The 2004 Mudawwanat al-Usrah, Article 81.

witnesses and any other person the court deems useful to hear. The court may take all necessary measures, including appointing two arbitrators, a family council, or whomever it considers qualified to reconcile the couple. In the existence of children, the court undertakes two reconciliation attempts separated by a minimum of thirty days. If the attempts to reconcile the spouses succeed, an official report is written and filed at the court. If the attempts to reconcile the spouses fail, the court shall fix a sum of money that the husband must deposit at the court within a maximum delay of thirty days to discharge all vested rights due to the wife and dependent children as provided for by the two following articles.[67]

If the husband has assigned his right of repudiation to his wife, she can exercise this right by petitioning the court according to the preceding Articles 79 and 80 provisions. The court shall verify that the conditions for the assignation of the right of repudiation as agreed upon by the two spouses are fulfilled and attempt reconciliation according to the provisions of preceding Articles 81 and 82. If the reconciliation attempt fails, the court shall authorize the wife to petition for the certification of the repudiation and rule on her vested rights, and if appropriate, those of her children, following preceding Articles 84 and 85. The husband cannot prevent his wife from exercising the right of repudiation that he has previously assigned to her.[68]

5.5.3.2 Spouse's Ask the Court to Resolve the Dispute

Article 94 states: If either or both spouses ask the court to settle a dispute that risks breaking their marriage, the court must make all efforts to reconcile them according to the provisions of preceding Article 82.[69]

5.5.3.3 Two Arbitrators Activation

The two arbitrators or two persons who can assume this role shall investigate the causes of the dispute between the spouses and do their best to resolve the conflict. If the two arbitrators reconcile the two spouses, they shall write a report, make three copies of it, signed by them as well as the spouses, and submit the three copies to the court, which

[67] The 2004 Mudawwanat al-Usrah, Article 82.
[68] The 2004 Mudawwanat al-Usrah, Article 89.
[69] The 2004 Mudawwanat al-Usrah, Article 94.

remits a copy to each spouse and files one in the record and certifies it.[70] Article 96 declares that when the two arbitrators disagree on the report's content or in the attribution of responsibility or do not submit the report within the requisite deadline, the court may conduct an additional investigation by all means it judges appropriate.[71]

5.5.3.4 Unable to Compromise

If the reconciliation is impossible to reach, and the conflict between the spouses persists, the court shall make written mention of this in an official report of the proceedings and grant the divorce as well as fix the vested rights to be paid according to the preceding Articles 83, 84 and 85, taking into account each spouse's responsibility for the cause of the separation when considering measures, it will order the responsible party to take in favour of the other spouse. The irreconcilable differences suit shall be settled within a deadline not to exceed six months from the date the petition was filed.[72]

5.5.4 Under the Islamic Family Law Act 1984 (IFLA)

The application of an arbitrator for the settlement of disputes between husband and wife is mentioned in detail in law as mentioned in the stages as follows:

5.5.4.1 Apply to Court for Divorce and Judge's Decision to Divorce

A husband or wife seeking a divorce applies to the Court for divorce, accompanied by a statement containing the details of the marriage, an explanation of the reasons for the divorce, and a statement as to whether any steps have been taken to achieve reconciliation. [73] If the other party consents to the divorce, and the Court is satisfied after inquiry and investigation that the marriage has irretrievably broken down. In that case, the Court shall advise the husband to pronounce one ṭalāq before the Court. Then, the Court shall record the fact of the pronouncement of one ṭalāq.[74]

[70] The 2004 Mudawwanat al-Usrah, Article 95.
[71] The 2004 Mudawwanat al-Usrah, Article 96.
[72] The 2004 Mudawwanat al-Usrah, Article 97.
[73] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (1-2).
[74] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47 (1-2).

5.5.4.2 The Judge Forming a Conciliation Committee

Where the other party does not consent to the divorce, or it appears to the Court that there is a reasonable possibility of a reconciliation between the parties, the Court shall appoint a conciliatory committee consisting of a Religious Officer as Chairman and two other persons, one to act for the husband and the other for the wife and refer the case to the committee. The Court may give directions to the conciliatory committee on the conduct of the conciliation. The committee shall endeavour to effect reconciliation within six months from the date it is constituted or such further period as may be allowed by the Court. If the conciliatory committee is unable to effect reconciliation and is unable to persuade the parties to resume their marital relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children of the marriage if any, regarding the division of property, and other matters related to the marriage. Where the committee reports to the Court that reconciliation has been affected and the parties have resumed their marital relationship, the Court shall dismiss the application for divorce. When the committee submits to the Court a certificate that it cannot effect reconciliation and persuade the parties to resume the marital relationship, the Court shall advise the husband to pronounce one talaq before the Court.[75]

5.5.4.3 Referral the Case to Arbitration

Where the Court cannot procure the presence of the husband before the Court to pronounce one ṭalāq, or where the husband refuses to pronounce one ṭalāq, the Court shall refer the case to the Hakam for action according to section 48.[76]

1. If satisfied with constant quarrels (*shiqāq*) between the parties to a marriage, the Court may appoint by Hukum Syara' two arbitrators or Hakam to act for the husband and wife respectively.

2. In appointing the Hakam under subsection (1), the Court shall, where possible, give preference to close relatives of the parties knowing the circumstances of the case.

[75] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47.
[76] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 47.

3. The Court may give directions to the Hakam regarding the conduct of the arbitration, and they shall conduct it per such directions and Hukum Syarak.

4. If the Hakam can not agree, or if the Court is not satisfied with their conduct of the arbitration, the Court may remove them and appoint another Hakam.

5. The Hakam shall endeavour to obtain from their respective principal's full authority, if their authority extends so far, pronounce one *ṭalāq* before the Court if so permitted by the Court, and in that event, the Court shall record that pronouncement of one *ṭalāq*, and send a certified copy of the record to the appropriate Registrar and the Chief Registrar for registration.

6. If the Hakam think that the parties should be divorced but are unable for any reason to order a divorce, the Court shall appoint other Hakam and shall confer on them authority to order a divorce and shall, if they do so, record the order and send a certified copy of the record to the appropriate Registrar and the Chief Registrar for registration.

7. Unless he is a close member of the parties' family, no person or Peguam Syarie shall be allowed to be present or represent any of the parties in the presence of the Hakam.[77]

The inclusion of arbitration and mediation in the family laws of Jordan, Morocco, and Malaysia has been observed as a means to address conflicts between spouses and foster reconciliation before deciding to divorce proceedings. Despite the absence of an arbitrator or family mediation system in Turkey, governmental authorities are actively developing mechanisms that align with the cultural norms of Turkish society. This endeavour involves a comprehensive exploration of international practises and experiences to inform the establishment of an effective arbitrator or family mediation system. The consideration of the institution of mediation should be duly provided, as it appears to be a more suitable approach for mitigating divorce rates and not revealing confidential information between spouses inside a courtroom setting. When considering the selection of mediators, it may be advantageous to involve a joint commission comprising specialists in psychology, sociology, and religion sciences and legal professionals since family members are also involved in the incident.

[77] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 48.

5.6 COMPARISON OF MINIMUM MARRIAGE AGE IN FAMILY LAWS

Allah Almighty encouraged marriage in the Holy Qur'ān, in *Sūrat al-Nūr* Verse 32, that, "Marry off the free singles among you, as well as the righteous of your bondmen and bondwomen. If they are poor, Allah will enrich them out of His bounty. For Allah is All-Bountiful, All-Knowing." Furthermore, Allah Almighty defines spouses, children, and grandchildren as *niʿmat*/blessing for humans in *Sūrat al-Naḥl*.[78] Moreover, a *ḥadīth* narrated by Ibn Masʿūd from our Prophet urged young people to enter into marriage once they can assume that the Prophet Muḥammad (p.b.u.h). said: "O young men, those among you who can support a wife should marry, for it restrains eyes and preserves one from immorality."[79]

Upon examining the historical progression, it becomes evident that the institution of marriage and its associated customs exhibit significant variations across diverse nations, societies, and religious beliefs. The marriage of the Prophet Muḥammad (p.b.u.h.) and ʿĀʾishah bint Abī Bakr (p.b.u.h.) has been a topic of intense scrutiny and critique in contemporary discourse. Many people with ulterior motives are criticising Islām over this age issue and see this issue as an opportunity to attack the Prophet Muḥammad. They fall into anachronism[80] because they try to separate this event from its context and place it within the framework of today's time and place.

A great deal of space is devoted to the marriage section in Islamic law. Several conditions have been mentioned for the ability to marry. However, considering all this information, being forced to marry is not among the conditions. Those who want to get married can decide to do so with their own free will. Nowadays, people agree that having the capacity to carry marital responsibilities is the basic condition for a healthy

[78] Allah Almighty told in Sūrat al-Nahl Verse 72, that "Allah has created spouses from among you and created sons and grandsons for you from your spouses, and gave you provision from good things. Is it, then, the falsehood that they believe in, and the blessing of Allah that they reject?."

[79] Muslim, Abū al-Ḥusayn Muslim ibn al-Ḥajjāj al-Qushayrī al-Naysābūrī, *Ṣaḥīḥ Muslim*. Taḥqīq: Muḥammad Fū'ād ʿAbd al-Bāqī , (Dār iḥyā' al-turāth al-ʿarabī bi Bayrūt, 1st edn, 2010), Vol.1, Ḥadīth No:1400.

[80] An anachronism is an error of chronology in which something, such as an object or event, is placed at the wrong time. Anachronism has its roots in the Greek Chronos, "time," and ana-, a Greek prefix meaning "up," "back," or "again." Anachronisms historically were sometimes distinguished from parachronisms, which are chronology errors in which an event is placed later than it occurred. See: <https://www.merriam-webster.com/dictionary/anachronism#:~:text=%3A%20an%20error%20in%20chronology,is%20chronologically%20out%20of%20place> (Accessed on 20 November 2023).

marriage to begin and continue. When the laws of the modern period are examined, it is concluded that the marriage ages are almost similar, with minor differences.

5.6.1 Turkish Civil Code

In the Turkish Civil Code, the legal age of marriage is determined as 18 by the legislator. Article 124 of the Turkish Civil Code states, “A man or woman cannot marry unless they completed seventeen years old.” In the second paragraph of the same article, the extraordinary marriage age is stated: “However, in extraordinary circumstances and for a crucial reason, the judge may allow a man or woman completed the age of sixteen to marry. Whenever possible, parents or guardians are heard before the decision.”

The issue that comes to the fore in Turkish society regarding the age of marriage is that people who marry before the legal marriage age, even with their consent, are considered to be committing a crime. Because unofficial marriage with children is deemed as child abuse under the Turkish Penal Code No. 5237, these violations are subject to legal consequences, including imprisonment. State organisations, healthcare, and educational institutions, as well as non-governmental organisations have a legal obligation to notify the Turkish authorities about children who are in danger and need protection. Furthermore, it is obligatory for everyone who observes the transgression to inform the appropriate authorities.

The present circumstances can be elucidated in the following manner: The spouses enter into matrimony while they are below the legal age of consent. Nevertheless, they cannot complete the registration process due to legal restrictions. Despite familial consent, public litigation is currently being initiated due to an illicit marriage. Given the protracted duration of this instance, their marriage can persist. As a consequence of the litigation, the husband is incarcerated. His spouse and offspring are experiencing hardship in their residence.

At this point, many people demand legal regulation, but another severe issue needs to be paid attention to in this discussion. If a regulation is put into effect without careful attention, those who are genuinely guilty may benefit, which will strike society's conscience. Forcing someone to have sexual intercourse against their consent, regardless of their age, that is, rape, is an inhumane crime that should never be tolerated.

Minister of Justice Tunc and Ozkaya, one of the members of parliament, describes this issue as a bleeding wound in our country. Ozkaya states that a law was prepared several times regarding this issue but never finalised. Although the law was accepted at the last minute in the general assembly, the deputy speaker of the parliament that day said it was not accepted. This law remained like this. He later stated that it was discussed more than once in the Parliamentary committee he was a member of, but it was never concluded.[81]

The Minister of Justice mentioned that this issue has been brought up in parliament several times to solve it. However, the opposition party is conveying this issue incorrectly to the society. There is a perception that those who marry at an early age commit sexual abuse against children. This perception is wrong, and this needs to be resolved. However, the victims here are the children because they are now officially married; they have children, but unfortunately, as a result of long trials, a decision was made after ten years, and a family that was established is disintegrating. Here, if the woman does not have a job, she is deprived of income, and the children are left without a father because their husband is in prison. They bring this issue to the agenda from time to time. However, unfortunately, society is also affected by the opposition party's propaganda based on the perception that you are encouraging child abuse, and the press always tries to misrepresent this. However, it is a problem that needs to be solved. There must be a regulation that does not encourage child marriages; otherwise, children will be forced into marriages at a young age. To avoid this, it may be possible to resolve the current issues with a temporary clause.[82]

Sentop states that in the current regulation, there is an age requirement of 18 for marriage, and he does not find it suitable to marry young. He especially considers that it takes more time for children to grow up and mature in the present. It is necessary to make decisions by considering the incident's situation and the individuals involved.[83]

Cepni points out that the trials also take a long time to end in Turkey. Even though the trials in the criminal courts lasted about two years, the citizens remain

[81] Ali Özkaya, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (01.04.2022).
[82] Yılmaz Tunc, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (08.04.2022).
[83] Mustafa Sentop, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (21.04.2022).

outside for one or two years and spend time with their families. Afterwards, there is also a higher court process. Unfortunately, once it goes to the Supreme Court, a criminal file does not arrive for four to five years. In fact, while the court was trying to protect a small child at that time, after a while, it victimised a married man or woman over the age of 18. This is entirely related to the delay in implementation and trial. There is no solution because there is a situation where people who are harassed are forced to marry by family force or with different promises, and they do not want to open the door to this. She thinks this is something that can be resolved more with the discretion of the judges.[84]

Zengin[85], on the other hand, says that they determined the number of families affected by this incident to be 252 two years ago. She finds the public news that thousands of families are affected by this incident to be an exaggeration. She says that this law works, and no one gets married at fourteen anymore. In this regard, she advises those who want to get married to wait because it is clear that marriage is legally allowed at the age of sixteen.[86]

According to the report shared by the Turkish Statistical Institute, when the average age at first marriage was examined by years, it was seen that the age at first marriage increased for both genders. The average age at first marriage was 28.2 for men and 25.6 for women in 2022.[87] Likewise, it was seen that the first marriage age increased for both genders this year. According to the report published in 2024, the average age at first marriage was 28.3 for men and 25.7 for women in 2023.[88]

Even though the marriage age is delayed, it is necessary to find solutions to the problems and heal the wounds of these families, who seem to be exceptions in society. Even though it appears to be a temporary method, it can be considered to allow

[84] Hasibe Ozlem Cepni, Interviewed by Selman Zahid Ozdemir, Konya, Turkey (29.03.2022).
[85] Ozlem Zengin is a Turkish lawyer and politician. She graduated from Istanbul University Faculty of Law and completed her master's degree in Sociology of Religion at Marmara University Social Sciences Institute. She is a member of parliament in the 25th, 27th and 28th legislative terms.
[86] Ozlem Zengin, Interviewed by Selman Zahid Ozdemir, Grand National Assembly of Turkey, (01.06.2022).
[87] Turkish Statistical Institute, Marriage and Divorce Statistics, 2022, <https://data.tuik.gov.tr/Bulten/Index?p=Evlenme-ve-Bo%C5%9Fanma-%C4%B0statistikleri-2022-49437&dil=1> (Accessed 10 April 2023).
[88] Turkish Statistical Institute, Marriage and Divorce Statistics, 2023, <https://data.tuik.gov.tr/Bulten/Index?p=Evlenme-ve-Bosanma-Istatistikleri-2023-53707> (Accessed 13 May 2024).

marriages of couples who have married with their consent and do not have a large age gap.

5.6.2 Jordan Personal Status Law

In the law of 1927, the age of marriage is 16, while in the law of 1947 it is 15. According to the 1951 law, a boy's marriage age is 18 years, while the age for girls is 17. The law of 1976 stipulated that the man must have completed the age of 16, and the girl must be 15 for the marriage license. In the marriage of the widow, who is over 18 years old, parental consent was not mentioned. In 2001, the marriage age was raised to 18, but for those who have reached the age of 15, the provision that the judge can issue marriage licenses has been adopted.[89]

In Article 10 of the 2010 law, the marriage age was accepted as 18, as in the 2001 law, and the judge's ability to grant a marriage capacity for those who completed the age of 15 was adopted.[90] Article 10 of the 2019 law accepted the marriage age as 18 as in previous laws. However, the judge's ability to grant a marriage capacity for those who completed 16 was adopted.[91] Article 11 states it is prohibited to perform a contract on a woman if her suitor is more than twenty years older than her unless the judge verifies her consent and choice. [92]

5.6.3 Mudawwanat al-Usrah

According to the legislation, the minimum age to marry is eighteen years, and both men and women must now be eighteen years old.[93] Article 19 states that men and women gain the ability to marry when they reach eighteen, overturning the 1957 Mudawwana's

[89]Alhalalsheh, Ürdün Ahvâl-i Şahsiyye Kanununun Osmanlı Hukuk-i Aile Kararnamesi ile Mukayesesi, 71-73.
[90] Jordan Personal Status Law No. 36 of 2010, Article 10.
[91] Jordan Personal Status Law No. 15 of 2019, Article 10/a.
[92] Jordan Personal Status Law No. 15 of 2019, Article 11..
[93] The 2004 Mudawwanat al-Usrah, Article 19.

assertion that women may marry at the age of fifteen.[94] However, the judiciary allowed marriages under eighteen due to specific conditions.[95]

5.6.4 The Islamic Family Law Act 1984 (IFLA)

The minimum marriage age in Malaysia is sixteen for the bride and eighteen for the groom. Based on Malaysian family law, this clause states that a woman must be 16 years old to marry, and a man must be 18. Consequently, it is essential first to ascertain the *Sharī'ah* judge's truth if one or both couples seeking marriage are younger than the applicable age restriction.[96] Islamic Family Law (Federal Territories) 1984 (Act 303):

> Section 8 states: It is not permissible to solemnise a marriage or register a marriage where the age of marriage is under 18 years for men and under 16 years for women unless a *Sharī'ah* judge allows it to be recorded under certain conditions.[97]
>
> Section 37 states: Unless permitted under Hukum Syarak, any person who uses any force or threat (a) to compel a person to marry against his will or (b) to prevent a man who has attained the age of eighteen years or a woman who has attained the age of sixteen years from contracting a valid marriage, commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both. False declaration or statement for procuring marriage.[98]

On the other hand, the Malaysian government first brought up the issue of raising the minimum marriage age many years ago. The Malaysian Islamic Development Department (JAKIM) wants to change the Islamic Family Law (Federal Territories) 1984 (Act 303) to make it 18 years old for Muslims to marry. As per the remarks made by Datuk Seri Dr. Wan Azizah Wan Ismail, the 12th Deputy Prime Minister and Minister of Women, Family, and Community Development during that period, the department is collaborating with other states to adjust their different Islamic family laws identically.

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[94] Salia, Reflections on a Reform: Inside the Moroccan Family Code,39. ; Nasiri, Marriage in Morocco, 29. ; Harrak, The History and Significance of the New Moroccan Family Code, 7.

[95] In response to Article 19, Article 20 states that any Family Affairs Judge may permit a marriage under this legal age of marriage after hearing the parents or legal tutor of the minor who has not yet achieved the age of competence. See: The 2004 Mudawwanat al-Usrah, Article 20.

[96] Basyiroh, The implementation of marriageable age provision in Malaysia and Indonesia: Comparative Study of Regulation number 1 year 1974 and Enactment Islamic Family Law of Malacca number 12 year 2002, 50. Reddy, Rita. Marriage and Divorce Regulation and Recognition in Malaysia. *Family Law Quarterly,* Vol. 29, No. 3, (1995): 620.

[97] See: The Islamic Family Law (Federal Territories) Act 1984, Section 8.

[98] See: The Islamic Family Law (Federal Territories) Act 1984, Section 37.

However, seven states had opposed the federal government's plan to increase the legal marriage age to eighteen.[99]

Some states officially raised the marriage age to 18, including for girls. Selangor is the first state in Malaysia to raise the marriage age to 18. The Islamic Family Enactment (State of Selangor) Enactment 2003 (Amendment 2018) was adopted by the Selangor State Assembly on September 6, 2018. It sets a minimum age limit for Muslim marriages to 18 in the state. Before this, the Islamic Family Law Enactment (State of Selangor) 2003 stipulated in Section 8 that Muslim women could marry at the age of sixteen and Muslim men at the age of eighteen. In his royal speech at the start of the 14th Selangor Legislative Assembly's second session, Sultan Sharafuddin Idris Shah, the Sultan of Selangor, announced that he and Mais, as well as the Selangor Islamic Religious Department (Jais), had reached an agreement to set the minimum age limit at 18.[100]

While the marriage age in Islamic Family Law (Kedah Darul Aman) Enactment 2008 was the same as IFLA, now the Islamic Family Law (Kedah Darul Aman) (Amendment) Enactment Bill 2022, which amends the laws of polygamy and marriage age limits, was approved by the state assembly of Kedah. With this change, women's marriageable age was raised from 16 to 18.[101] Selangor and Kedah are the sole states that have implemented a legal amendment to raise the minimum age of marriage to 18.

5.7 LINEAGE ESTABLISH OF CHILDREN BORN OUT OF MARRIAGE AND THEIR LEGAL STATUS

The situation of children born out of wedlock caused long discussions before being included in the legal regulations of the countries. This fact has social, legal, moral, and Islamic law aspects. If looked at the issue from the perspective of Islamic law, this issue

[99] Teoh Pei Ying, "Seven states against increasing minimum marriage age to 18," New Straits Times, <https://www.nst.com.my/news/nation/2019/09/522946/seven-states-against-increasing-minimum-marriage-age-18> (Accessed 20 November 2023).

[100] Samantha Khor, "Selangor May Soon Be The First State In Malaysia To Raise Minimum Age Of Marriage To 18," SAYS, <https://says.com/my/news/selangor-s-islamic-bodies-have-decided-to-raise-minimum-age-for-marriage-to-18> (Accessed 20 November 2023).

[101] Bernama, "Kedah increases marriage age for girls to 18," malaysiakini, <https://www.malaysiakini.com/news/628747> (Accessed 20 November 2023); Adie Zulkifli, "Kedah raises minimum marriage age for Muslim women to 18," New Straits Times, <https://www.nst.com.my/news/nation/2022/07/814457/kedah-raises-minimum-marriage-age-muslim-women-18> (Accessed 20 November 2023).

concerns the provisions of lineage. Because *ḥifz al-nasl* or *ḥifz al-nasab* has been considered within the scope of *ḍarûriyyât*, which expresses the indispensable values and benefits in the classification made according to the importance of the benefits the Islamic legislation aims to protect. The strict prohibition of adultery and the banning of regulations that will lead to the mixing of lineages are among the primary measures taken to preserve the lineage humanely.

Another issue that concerns illegitimate children is whether they have a right to inherit. The first group of jurists is that an illegitimate child should be treated legally as a child with genuine birth and that equality should be ensured between these children and those born within marriage. According to them, whether a child is the product of a relationship within or outside marriage is not within their control. They think that it is not a fair solution for a child out of wedlock to receive no inheritance from his father. On the contrary, there is a second group, which keeps the situation of children born from extramarital relationships separate based on the idea of preventing illegitimate unions, avoiding the deterioration of general moral rules, and not overshadowing the view that the institution of marriage. It is the concerned that if illegitimate children are granted the same rights given to children within marriage, the number of parents committing this act will increase, and the respect and need for the family institution will disappear. There are special provisions regarding this issue in the family law of the countries discussed.

5.7.1 Turkish Civil Code

Turkish Civil Code stipulates that the lineage between the child and the mother will be established by birth, and the lineage between the child and the father will be established through marriage with the mother, recognition or by the judge's decision, and apart from these, lineage will also be established through adoption.[102] Anything other than these conditions is considered invalid (not *ṣaḥiḥ*) lineage.

[102] Turkish Civil Code, 2002, No: 4721, Article 282.

5.7.1.1 Determination of Lineage within the Marriage Union and after Divorce

According to the civil code, the husband is the father of the child born during the marriage or within three hundred days after the marriage ends. The child born after this period can be bonded to the husband by proving that the mother was pregnant during the marriage.[103] The husband can refute the presumption of paternity by filing a lawsuit to reject paternity. This lawsuit is filed against the mother and child. The child also has the right to sue. This lawsuit is filed against the mother and husband. However, if the child was conceived within marriage, the plaintiff must prove that the husband is not the father.[104]

Article 290 states different provisions during the second marriage of the women: If the child is born within three hundred days from the end of the marriage and the mother remarries in the meantime, the husband in the second marriage is considered the father. If this presumption is refuted, the husband in the first marriage is regarded as the father.

5.7.1.2 Lineage of a Child Born Outside of Marriage

Article 292 states that a child born outside of marriage is automatically subject to the provisions regarding children born within marriage if the parents are married. Spouses are obliged to notify the civil registry officer in their place of residence or where the marriage occurred, during or after the marriage, about their common children born outside of marriage. Failure to notify does not prevent the child from being subject to the provisions regarding children born within marriage.[105] Article 294 explains who can object to this lineage: The legal heirs of the mother and father, the child, and the public prosecutor may object to establishing lineage through subsequent marriage.

In the Civil Code drafts dated 1971, 1984, and 1998, there is a ban on recognising children born from the relationship of blood relatives who are prohibited from marrying. In the preliminary draft and justification of the Turkish Civil Code dated 1984, the article in question was regulated as “Recognition of children born from sexual

[103] Turkish Civil Code, 2002, No: 4721, Article 285.
[104] See: Turkish Civil Code, 2002, No: 4721, Article 285. Futher paragraph states: A child born at least one hundred and eighty days after marriage and at most three hundred days after marriage is deemed to have been conceived within the marriage.
[105] See: Turkish Civil Code, 2002, No: 4721, Article 293.

relations between blood relatives who are prohibited from marrying each other is prohibited (Art. 281/IV)". This ban was abolished by the new Civil Code No. 4721, adopted on 22.11.2001, following Article 260 of the source Swiss Civil Code. The article's justification states that the ban was lifted because it was not in the child's best interests.[106]

5.7.1.3 Determination of Lineage with Recognition and Court Decision

Recognition enables the establishment of lineage; the conditions and form of recognition are regulated in Article 295 of the Turkish Civil Code. Recognition can be done by a written application made by the father to the civil registry office or the court, by an official deed to be drawn up at the notary, or by a declaration of recognition to be made in the will. The competent court to which the declaration of recognition will be addressed is the civil court of peace in the father's residence or registration. A child related to another man cannot be recognised unless this relationship is invalidated.[107] The mother and the child may request the court to determine the lineage between the child and the father. The lawsuit is filed against the father and, if the father is dead, his heirs. The fact that the defendant had sexual intercourse with the mother between the three hundredth day and the one hundred and eightieth day before the birth of the child is considered a presumption of paternity.[108]

5.7.1.4 Inheritance of a Child Born Out of Wedlock

As mentioned earlier, according to the Turkish Civil Code, a lineage is established between the mother and the child at birth, even if the child is born outside of marriage.[109] In other words, there is no need to take any action to establish the paternity of the child born outside of marriage with the mother, which is established automatically at birth. For this reason, the child will inherit from his mother at birth. For the biological bond between the father and the child born out of wedlock to be converted into legal paternity,

[106] See: Sevgi Usta Sayıta, "Ensest İlişkiden Doğan Çocuğu Tanıma Yasağının Kaldırılmasına Eleştirel Bir Bakış (A Critical Look at the Lifting of the Ban on Recognizing Children Born of Incest)", *Türkiye Barolar Birliği Dergisi*, No.88 (2010): 177.
[107] See: Turkish Civil Code, 2002, No: 4721, Article 295.
[108] See: Turkish Civil Code, 2002, No: 4721, Article 301-302.
[109] Turkish Civil Code, 2002, No: 4721, Article 282.

marriage with the mother, recognition, or a judge's decision is required.[110] The court determines the inheritance of a child born out of wedlock from the father's side.

5.7.1.5 Custody of a Child Born Outside of Marriage

According to Article 337 of the Turkish Civil Code No. 4721, the custody of a child born outside of marriage belongs to the mother. If the mother is young, restricted, dead, or has custody taken away from her, the judge appoints a guardian or gives custody to the father, depending on the child's best interests. If the father's lineage with the child is established later, it will not affect the mother's sole custody and will only cause the child's surname to change.[111] There would be joint custody if the mother and father were married when the child was conceived or born.

5.7.2 Jordan Personal Status Law

5.7.2.1 Determination of Lineage within Marriage Union and Divorce

The lineage of the baby to his mother is proven by birth. The proving of a child's lineage to his father with the following conditions: in the conjugal bed, by acknowledgement (Iqrār), or with evidence (*Bayyinah*).[112] Article 156 states that the minimum duration of pregnancy is six months, and the maximum is one year. The court must prove the paternity of the newborn to his father by definitive scientific means, taking into account the provisions of establishing paternity in the marital bed.

In these cases, the paternity case is not accepted by the court: Upon denial, a claim of paternity shall not be heard for the child of a wife who has been proven to have had no contact with her husband since the marriage contract, nor for the child of a wife whom she brought after a year of the husband's absence from her unless it is proven by comprehensive scientific means that the child is his. Upon denial, the claim of paternity shall not be heard for the child of the divorced woman if she had him for more than one

[110] Turkish Civil Code, 2002, No: 4721, Article 282.
[111] Turkish Civil Code, 2002, No: 4721, Article 337.
[112] Jordan Personal Status Law No. 15 of 2019. Article 157, sub-section 1-2.

year from the date of divorce, nor the child of the deceased husband if she had him for more than one year from the date of death.[113]

The child belongs to the owner of the bed (*Ṣāḥib al-Firāsh*) if the minimum period of pregnancy has been concluded after the valid marriage contract. The lineage of the child born in a void contract or of suspected intercourse is proven if he was born for the minimum period of pregnancy from the date of consummation or of suspected intercourse.[114] The lineage of the newborn to his father is established if the wife brings him within one year from the date of separation through divorce, annulment, or death.[115]

5.7.2.2 Acknowledgment (Iqrār)

Article 160 declares the lineage of the child to his father is proven by declaration, even in *maraḍ al-mawt*, under the following conditions:[116]

a. The person to whom the recognition is made is alive and of unknown lineage.
b. That the appearance of the situation does not lie to him.
c. The applicant must be a sane adult.
d. The age difference between the declarant and the person for whom it was declaring makes it possible for the declaration to be valid.
e. That the adult, sane person confirming it confirms it.

Article 162 declares that paternity is not proven by adoption, even if the adopted child is of unknown lineage.[117]

5.7.2.3 Refuse of Lineage with Liʿān

Provisions on *Liʿān* explained in the articles. The first paragraph of Article 163 declares that the lineage established in the marriage union disappears only when the husband completes the *Liʿān*. Nevertheless, it is forbidden for a husband to *Liʿān* to deny the

[113] Jordan Personal Status Law No. 15 of 2019. Article 157, sub-section d-h.
[114] Jordan Personal Status Law No. 15 of 2019. Article 158, sub-section a-b.
[115] Jordan Personal Status Law No. 15 of 2019. Article 159.
[116] Jordan Personal Status Law No. 15 of 2019. Article 160, sub-section a-h.
[117] Jordan Personal Status Law No. 15 of 2019. Article 162.

lineage of a pregnancy or child in any of the following cases: Sixty days after learning of the birth; if he acknowledges the lineage explicitly or implicitly; if it is proven by definitive scientific means that the pregnancy or child is his.

Liʿān occurring between spouses results in the *faskh* of their marriage contract. If *liʿān* were to deny lineage and the judge ruled accordingly, the man's lineage of the child would be rejected, and he would not obligated to support him, and neither of them would inherit from the other. If the husband himself lies, even after a ruling denying paternity, the child's paternity is proven to be his.[118]

5.7.3 Mudawwanat al-Usrah

The Mudawwanat established a procedure for determining the paternity of a kid born out of wedlock for the first time in 2004. Previously, twelve witnesses were necessary to testify in court and provide evidence to judges to prove the father of a child born to unmarried parents.[119] Children born out of wedlock now have immediate legal recognition, and courts can employ scientific testing to determine paternity issues and accept a wider variety of evidence to establish filial relationships.[120] Acknowledging fatherhood from an unregistered marriage is made simpler by broadening the scope of the legal proof required to be given to the judge, with a five-year term for resolving pending paternity cases.[121]

When the filiation of a child of unknown paternity is established by acknowledging paternity or by judicial decision, the child shall become legitimate, acquire his father's name and religion, and mutually inherit from each other. Such filiation impedes marriage and results in paternity and filiation rights and duties. Filiation with the mother produces the same effects regardless of whether the children are the result of a legitimate or illegitimate relationship.[122]

Mudawwanat al-Usrah, like Jordan, does not accept the adoption of legal value, and this does not result in any of the effects of legitimate filiation. The marital bed

[118] Jordan Personal Status Law No. 15 of 2019. Article 165.
[119] Sheila Fakhria & Siti Marpuah, "A Discourse of Mudawanah al-Usrah; Guaranteeing Women's Rights in Family Law Morocco's", *Tribakti: Jurnal Pemikiran Keislaman*, Vol. 33. No. 2 (2022): 320.
[120] Charrad, Family Law Reforms in the Arab World: Tunisia and Morocco, 8.
[121] Harrak, The History and Significance of the New Moroccan Family Code, 7-8.
[122] The 2004 Mudawwanat al-Usrah, Article 145-146.

establishes paternity acknowledgement and is different from the Jordan, with sexual relations by error.[123]

5.7.4 Islamic Family Law Act 1984 (IFLA)

Islamic Family Law Act 1984 states in Section 110 of the law: in cases where a child is born to a woman who is married to a man more than six *qamariah* months after the marriage or within four *qamariah* years after the dissolution of the marriage due to the man's death or divorce, and the woman has not remarried, the paternity of the child or lineage is attributed to the man. However, the man can disavow or reject the child through a legal process called *Liʿān* or imprecation, which can be done before the Court.

If a child is born more than four *qamarī* years after the marriage has ended due to the death of the man or divorce, the man's paternity of the child will not be recognised unless he or one of his heirs claims that the child is his offspring.[124]

If a woman who has not remarried declares that she has completed the waiting period (*ʿiddah*) after either the death or divorce of her husband, and she later gives birth to a child, her husband will not be considered the father of the child unless the child was born within four qamariah years from the date of the marriage dissolution. [125]

If a man has syubhah sexual intercourse[126] with a woman and she gives birth to a child during a period of six *qamariah* months to four *qamariah* years following the intercourse, the man will be considered the father of the child.[127] Section 114 discusses how a man can establish filiation by *iqrār*. Where a man accepts another, either directly or impliedly, as his lawful child, the paternity of the kid shall be proved in the man, under requirements that are fulfilled.

If the acknowledgor is a married woman or a woman in the *ʿiddah* period, her husband cannot be assumed to be the father of the acknowledged individual until her acknowledgement is confirmed by him or by evidence.[128] Once an acknowledgement

[123] The 2004 Mudawwanat al-Usrah, Article 152.
[124] The Islamic Family Law (Federal Territories) Act 1984, Section 111.
[125] The Islamic Family Law (Federal Territories) Act 1984, Section 112.
[126] "Syubhah intercourse" means intercourse performed on erroneous impression that the marriage was valid or intercourse by mistake and includes any intercourse not punishable by Had in Islam." See: Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 2 (1).
[127] Islamic Family Law (Federal Territories) Act 1984, Section 113.
[128] Islamic Family Law (Federal Territories) Act 1984, Section 116.

or confirmation has been made concerning paternity or relationship, the acknowledgement or confirmation shall become irrevocable.[129]

In summary, the child's lineage from the mother's side is determined at birth according to the four countries. Regarding the child's lineage with the father, there are some minor differences between the family laws of the countries: in the Turkish Civil code, the lineage between the child and the father will be established through marriage with the mother, recognition, or by the judge's decision, and apart from these, lineage will also be established through adoption. In Jordan, it is proving the child's lineage to his father with the following conditions: in the conjugal bed, by acknowledgement (*iqrār*), or with evidence (*Bayyinah*). Mudawwanat al-Usrah, like Jordan, does not accept the adoption of legal value, and this does not result in any of the effects of legitimate filiation. The marital bed establishes paternity in Mudawwanat, acknowledgement, and different from the Jordan, with sexual relations by error. In Malaysia, where a child is born to a woman who is married to a man more than six *qamariah* months after the marriage or within four *qamariah* years after the dissolution of the marriage due to the man's death or divorce, and the woman has not remarried, the paternity of the child or lineage is attributed to the man.

Regarding pregnancy periods, which are essential for determining lineage, all three laws set the minimum period as six months. However, regarding the maximum period, Jordan and Morocco have taken one year, and Malaysia has taken four *qamariah* years as the basis. At the same time, all three laws accept the relationship of descent as a result of sexual intercourse with suspicion (mistake) as valid.

5.8 CONCLUSION

In modern times, it is a common practice for each country, with certain exceptions, to have its own set of legislation regarding family law. In this context, each of the four countries discussed in the thesis has problems in family law practices. An ongoing difficulty for divorced individuals in modern Turkish society is the enduring responsibility of paying alimony to their ex-partners. Indefinite alimony cannot be awarded to the divorced spouse in Jordan, Morocco, and Malaysia. Alimony is only

[129] Islamic Family Law (Federal Territories) Act 1984, Section 119.

mentioned throughout the *'iddah* period. The concept of indefinite alimony has been the topic of intense discussion for a long time, resulting in significant societal reactions. Following these societal reactions, although the Ministry of Justice of the Republic of Turkey and the Ministry of Family and Social Services put it on the agenda, none of the regulations discussed to solve this problem have been enacted.

Another current family law issue is polygamy. Although permissible in Islamic law, it is subject to certain conditions. Currently, variations exist among nations concerning the practice of polygamy. According to the Turkish Civil Code, the practice of polygamy is explicitly prohibited. An individual seeking to enter into a second marriage must provide evidence that their former marriage has been legally terminated. Men desiring to engage in polygamy are prohibited from registering more than one marriage at the court. Thus, they engage in polygamy after undergoing a conventional marriage ceremony known as *Nikāḥ al-Imām*, which involves the presence of two witnesses. Nevertheless, in these unregistered polygamous unions, if the pair chooses to separate, the woman is permanently barred from asserting any entitlement to inheritance or other privileges from her husband due to the marriage being deemed an utter nullity. While it is possible to prove a familial connection between the father and the children, the legal position of the second spouse is uncertain, and there are issues over her rights.

The Personal Status Law of Jordan, enacted in both 2010 and 2019, imposed regulations on polygamous marriages under Article 13 but imposed some requirements on such unions. The judge must assess the husband's financial capacity to fulfill the dowry payment and ensure he can afford the alimony for individuals under his care. Additionally, the judge informs the fiancée that her fiancé is already married to another person. Despite persistent efforts over a prolonged period, the total elimination of polygamy in Morocco has not been accomplished. Polygamy is still legally allowed in Morocco. Currently, polygamy is subject to stringent legal regulations that deviate from the prior statutes governing family matters.

Nevertheless, restrictions on polygamy are still considered more desirable than having no restraints at all. In Malaysia, it is legally permissible for a man to engage in polygamy. Most state marriage laws often stipulate that anyone seeking to practise polygamy must obtain formal authorisation from a judge.

The interfaith marriage between Muslims and non-Muslims, as well as the conversion of spouses to a religion other than Islam while being married, is a subject of controversy. According to Turkish Civil Law, differences in belief do not pose any obstacles to marriage. However, when examining Turkey as a whole, it is apparent that it is atypical for a woman to wed a guy who is not of the Muslim faith. This is mainly attributed to the lasting influence of Islamic traditions. Similarly, Morocco has no provision regarding a spouse changing their religion while the marriage remains intact. Article 140 of the Jordan Personal Status Law has established regulations for separating spouses when one converts to a different religion. The article states that only Muslim men can marry a woman who belongs to the people of the book. This provision will determine the case's outcome if the marriage occurs before the conversion to Islām or any other religion. The Islamic Family Law Act of 1984 in Malaysia addresses the problem of changing one's religion. A marriage will not be dissolved only based on the renunciation of Islam or the conversion of either partner to another faith unless validated by the Court.

The Indira Gandhi case is a prominent example. The male family member embraced Islām through a religious conversion, whereas the female retained her current religious affiliation. The person unilaterally forced their children to convert to Islam. However, the civil court ultimately ruled in favour of returning custody of the Muslim children to their non-Muslim mothers. Following Malaysian family law, the marital union between the husband and wife has been terminated upon the court's approval. Additionally, deliberations have taken place regarding the religious affiliation of the children and the determination of their custodial arrangements.

Arbitration and mediation are most suitably applied within the realm of family law. Therefore, they efficiently handle multiple adverse situations, especially in divorce cases. Without the intervention of these methods in family law, a marital dispute can regrettably lead to divorce. In court processes, especially in family issues, the private lives of the individuals involved are entirely revealed in the public courts, causing harm to both the children and the parties involved.

The incorporation of children born to unmarried parents into the legal frameworks of nations has ignited substantial discussions. This fact contains social, legal, moral, and Islamic law dimensions. From an Islamic jurisprudential perspective,

this issue concerns the rules and procedures governing ancestry. *Ḥifz al-nasl*, also known as *Ḥifz al-nasab*, is considered to be a component of the *ḍarûriyyât*, which are the fundamental principles and benefits that Islamic law aims to protect due to their importance. Imposing a total prohibition on adultery and enacting regulations that prohibit the mixing of family bloodlines are crucial measures intended to protect the lineage with empathy.

CHAPTER SIX

CONCLUSION

The family is the most basic and essential element in society. When it becomes fragmented or disrupted, the community inevitably experiences negative consequences. Prioritising the establishment of a strong family unit is more important than any other endeavour. To achieve this, it is crucial to cultivate societal consciousness regarding family matters from a young age and to enforce family legislation efficiently without any loopholes.

The law is an inherent part of human existence and is intrinsically linked to society since it serves as a mechanism for regulating social behaviour. Irrespective of societal development, every society is controlled by a specific legal framework.

The transition from a historical period characterised by diverse family law regulations across the centuries to a contemporary era has presented specific challenges. French Civil Law significantly influenced Middle Eastern and North African countries, while British and Dutch legal experiences impacted Asian countries. Turkey stands out in this situation due to its adoption of the legal systems of several Western countries across numerous domains. In this thesis, the Ottoman Law of Family Rights Decree (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*) along with the Turkish Civil Code, Jordan Personal Status Law (*Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdunī*), the Moroccan Family Code (*Mudawwanat al-Aḥwāl al-Shakhṣiyyah*), and Malaysia's Islamic Family Law (Federal Territories) were examined comparatively due to their characteristics in terms of family law.

The process of initiating codes is referred to as codification. The Arabic word for codification is "*Taqnīn*". *Taqnīn* means placing and arranging the laws with the codes in its modern sense. *Taqnīn* means making rules in the form of law. Codification in law refers to the process of developing a legal code. In general terms, it is expressed with the word Taqnīn. Codification, in a special sense, is described with the phrase tadwīn. It compiles the scattered legal rules in a country depending on the branch of law they belong to and brings them into systematic integrity.

The concept of *tadwīn* encompasses all these mentioned aggregation processes. Only tadwin divides itself into two. The first is *tadwīn* in terms of codification. For example, Abū Jaʿfar al-Mansūr's desire to use Imām Mālik's book *Muwaṭṭa'*, the work of Ibn al-Mukaffaʿ, and the writing of Fatāwā books can be given. There is also tadwīn in the sense of legislation, and here, the aim is to legislate, that is, to put forward the rules that are obligatory for everyone to comply with by the state. *Majallah*, which we will discuss in this section, is an example of civil law legislation.

Some researchers take the issue of the codification of Islamic law to the time of Ibn al-Muqaffaʿ in the Abbasid Caliphate. However, it only aims to bring together the Islamic provisions that Ibn al-Muqaffaʿ was attempting to do and thus to provide a unity of judgment; the only law is to be asked to apply in the courts. Therefore, it cannot be considered a codification in the complete sense of the word. We cannot count works such as *al-Fatāwā al-Ālamgīrīyah*, an Arabic *fatwā* book collecting the views of the *Ḥanafī madhhab* dated 1707, as complete codification. These works aimed to ensure the unity of the fatwā; for example, during the Ottoman State, the fatwas of Ibn Kemâl Pāshā or Kemâl Pāshāzâde (1534) and the *fatāwā* of Shaykh al-Islām Ebussuʿûd Efendī (1574) can be given as examples. Thus, the previous codification attempts in Islamic law were based on bringing uniformity to law and providing ease to the subjects. The early attempts to "bring uniformity" can be attributed to the *mukhtaṣars* and *Fatāwā* compilations.

Scholars are divided on the legality of Islamic law codification. Some believe it is permissible, while others think it is not. Scholars have revealed some evidence from the verses of the Qur'ān *al-Karīm* and the *ḥadīth* of our Prophet (p.b.u.h.). Codified law confines and freezes the judge within the confines of the law, whereas *fiqh* allows him to choose the ruling based on the circumstances. Codification could alter *Sharīʿah* by increasing, decreasing, altering, modifying, et cetera. As a result, it may result in judgment outside of what Allah (SWT) has revealed.

Another group of scholars supports codifying Islamic law and believes it is permissible. This group debates legal policy (*al-Siyāsah al-Sharʿiyyah*), public interest (*al-Maṣāliḥ al-Mursalah*), general permissibility (*al-Ibāḥah al-Aṣliyyah*), and other issues.

The codification of Islamic law is permissible, and it is a process that aids in improving the political, social, financial, and legal sectors. This improvement can be accomplished by codifying Islamic laws that adhere to the Muslim nations' principles, values, and customs. Furthermore, codification would help establish justice and equality, protect rights and liberties, and expand security and stability. In this context, the validity of Islamic law codification is also consistent with the noble objectives of *Sharīʿah*. Civil, constitutional, judiciary, penal, international, and other areas of Islamic law, excluding rituals (*ʿIbādāt*), are all eligible for codification. The research shows that codifying Islamic law would be a timely solution for restoring Muslim unity and solidarity.

Most nineteenth and twentieth-century histories of Islamic law codification portray the state as the driving force behind the codification project, whether it is a State ruled by Muslims (such as the Ottoman State), a colonial state (as in North Africa, much of South East Asia, Central Asia, and South Asia), or nation-states with varying political regimes. Legal arrangements in the Ottoman State began in the 19th century after *Tanzīmāt*. *Majallah al-Aḥkām al-ʿAdliyyah*, or the Ottoman Civil Code legislated in the Ottoman State between 1868 and 1876, is the first example of civil law. *Majallah* is the first civil code based on Islamic law, yet it did not include family law. Ottomans felt obliged to enact a law in which they collectively had opinions so that the judges could decide more comfortably in the courts. In other words, the needs of the society -rather than developments in the West- caused this situation.

The committee led by Aḥmad Cevdet Pāshā (d. 1895) is widely regarded as the first state-sponsored attempt to codify Islamic (specifically *Ḥanafī*) Jurisprudence. While some Ottoman elite members proposed translating and implementing the French Civil Code throughout the state, jurists who believed the Ottoman Civil Code should be based on Islamic Jurisprudence prevailed.

Although an attempt was made by Qadrī Pāshā in Egypt in 1882 to regulate personal status, family, and inheritance, the first codification of the Islamic family law, "The Ottoman Law of Family Rights (*Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī*)," was regulated in 1917 in the modern era. With the Ottoman Law of Family Rights, this codification movement inspired other Muslim countries to codify their rules regarding this field.

Even though *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* was only in effect for a year and a half in the Ottoman State, it was in effect for much longer in countries such as Syria, Jordan, Lebanon, and Palestine. It brought separate provisions in the field of family law for Muslims, Jews, and Christians. An essential feature of the law is providing the courts with judicial unity. It benefitted from other *madhāhib* by following an eclectic method. It was issued in 1917 and abolished only one and a half years after it entered into force in the Ottoman State. The Swiss Civil Code later superseded this law in 1926.

The Ottoman rule in Jordan, which spanned 402 years from 1516 to 1918, profoundly impacted several fields, particularly the legal system. Jordan's legal system consisted of *Sharīʻah* courts whose decisions were based on Islamic law and the same *Ḥanafī madhhab* that worked in the Ottoman caliphate. Jordan's family law has gradually evolved over the years in line with the development of Jordan.

Jordan passed six family laws in 1927, 1947, 1951, 1976, and 2010, along with an amending law adopted in 2001. The Jordanian Personal Status Law No. (15) of 2019 was recently implemented. There is a debate over which family law was first applied in Jordan. Some authors argue that the 1927 Family Law was the first codification in this area, while the majority believe that the Ottoman Family Rights Decree was the first law until Law No. 26 was passed in 1947. The widespread opinion is based on the fact that 84 of the 104 articles in the 1927 family law were taken from the Ottoman family law without any changes. However, although the law dated 1927 is based mainly on the Ottoman Family Rights Decree, it has to be evaluated as a separate law since the Jordanian government enacted it as a new law without any reference to the Ottoman family law.

While the Ottoman influence in Jordanian family law was initially quite strong, this influence gradually diminished in parallel with the changes and developments in Jordanian society. 1976 was a turning point in terms of Ottoman influence because, with the regulation made in 1976, the Jordan Family Law was transformed into the *Aḥwāl al-Shakhṣiyyah* Law. Some essential provisions such as inheritance and testament were added, and changes were made that the law of 1976 further reflects social developments in Jordan. Nevertheless, the *Ḥanafī madhhab* holds the predominant influence in law.

The 2010 law comprehensively addressed the majority of topics about persons. Adding subjects like *ahliyyah*, inheritance, custody, and *waṣiyyah* distinguishes it from the prior law. The new revisions to the 2019 Jordanian Personal Status Law are enhancing the acceptance of utilising modern technologies for verifying lineage and empowering the courts with greater jurisdiction. When a husband is under the influence of drugs, divorce is not considered.

There has been a continuing demand for reform in the family law in Morocco for years; therefore, every king who took over the administration issued a new family law. The initial phase of the Mudawwanat's historical progression began on August 19th, 1957, shortly after achieving independence. The first Mudawwanat is based on historical *Mālikī fiqh.* The initial Mudawwanah regulates several facets of family law, encompassing marriage, divorce, inheritance, and child custody. Under the Mudawwanah, males were granted the right to practice polygamy without requiring the consent of their wives, while married women were legally obliged to obey their husbands' instructions. A woman cannot perform a marriage alone; instead, she always needs the help of a male guardian, a *Walī*. Furthermore, a woman can not initiate a divorce without obtaining her husband's consent. In contrast, a man does not need the court's approval to divorce his wife.

Following the implementation of the law, feminist organisations called upon the government to amend it because it was inconsistent with the principle of gender equality. The 1990s are considered the most significant years in the development of the Mudawwanat due to the great movement, which culminated in the issuance of the Personal Status Code is referred to as *Mudawwanat al-Aḥwāl al-Shakhṣiyyah al-Maghrebayyah* on 10th September 1993. However, these reforms did not meet the aspirations of the women's associations that escalated their demands.

The last and new Mudawwanat al-Usrah was approved in January 2004. It established numerous significant rights for women, including the right to self-guardianship, divorce, and child custody. Furthermore, it implemented additional restrictions on polygamy, elevated the minimum age for lawful marriage from 15 to 18, and criminalised sexual harassment. However, the new law did not abolish polygamy, the husbands to unilaterally divorce their wives, separation through khulʿ, or the unequal restrictions regarding inheritance. The amendments repealed the legal

requirement that a wife obeys her husband and declared that both spouses are home leaders. The family is now under joint leadership, with both couples sharing the responsibility.

Another advantage of the Mudawwanat is that moral damage is added to the material damage mentioned among the reasons for divorce. The woman may request a divorce due to the husband's bad morals, such as gambling, a different religion from the woman's, or breaking the fast during Ramadan.

The Mudawwanat also establishes a procedure for determining the paternity of a kid born out of wedlock for the first time. Previously, twelve witnesses were necessary to testify in court and provide evidence to judges to prove the father of a child born to unmarried parents. Children born out of wedlock now have immediate legal recognition, and courts can employ scientific testing to determine paternity issues and accept a wider variety of evidence to establish filial relationships.

The lands corresponding to what is now the Malay Peninsula have long been called Tanah Malayu. It is erroneous to conjecture that these concepts are of recent origin and exclusively attributed to modern Europeans, as there is ample evidence from Indigenous sources indicating that these terminologies predate the arrival of Western powers and were widely recognised among the Malay locals. Numerous Malay classical works have employed the phrase “Tanah Melayu” well before the arrival of Western influences. When examining the historical context, it is evident that the presence of Chinese and Indian communities in Malaya attributed to migration patterns throughout the 18th and 19th centuries.

The arrival of Islām in this region has been subject to multiple interpretations. It is widely acknowledged that Islām was introduced through peaceful means, primarily facilitated by trade interactions with Muslim traders and the influence of Sūfīs from ʿArabia.

Malacca Sultanate (Kesultanan Melayu Melaka), which ruled between 1400 and 1511, was essential in developing Islām and Islamic law. For instance, a written law from the Malacca Sultanate is known as the Malacca Laws (Hukum Kanun Melaka). It was formed as a Malay customary law following Islamic law.

The application does not exhibit any form of sectarian bias (*al-Ṭaʿaṣṣub al-Madhabī*) towards a certain *madhhab*. The legal system in Malaysia could potentially derive advantages from incorporating alternative perspectives of the other *madhāhib*. In summary, the fatwā issuance procedure in Malaysia adheres to the following order: Firstly, the *Fatwā* Council, when making the decision (*ḥukm*), refers to the *Muʿtamad* of *Shāfiʿī madhhab*. If the *Muʿtamad* within the *Shāfiʿī madhhab* fails to adequately address the needs of the people (the *Maṣlaḥah*), it is permissible to seek guidance from alternative sources.

Before the colonisers' introduction, Malaysia's legal system consisted of Islamic and Customary Law. The legal systems that were in place in Malay states before British intervention can be categorised as the Perpatih custom, which was predominantly followed by Malays in Negeri Sembilan, Masjid Tanah, and certain regions in Malacca, and the tradition of Temenggung, which was prevalent in other parts of the Peninsula. It is worth noting that specific historical texts suggest that the Temenggung custom exhibited certain resemblances to Islamic laws.

It may be contended that the impact of Portuguese and Dutch legal systems on the whole legal framework, beyond political and administrative structures, was relatively constrained. In contrast to the Portuguese and Dutch, the British enacted legislation that specifically targeted Muslims, so imposing a new regulation and jurisdiction.

The period from 1976 to the post-1980 period witnessed notable developments in matters about family affairs. The Law Reform (Marriage and Divorce) Act of 1976 governs the legal framework for non-Muslims in Malaysia. Subsequently, in the early 1980s, Malaysia implemented a distinct legislation specifically addressing matters of the Islamic family. Malaysia underwent a comprehensive legal reform, establishing distinct Islamic family laws in each state. There may be differences between these state laws on some issues.

The Law governing non-Muslims is enforced in civil courts. In contrast, Islamic *Sharīʿah* Law, which applies to Muslims, is administered in religious courts known as *Sharīʿah* courts, presided over by *Qāḍīs*. Islamic Family Law Act (IFLA) has made significant advancements in this matter by elucidating that both parties can apply for divorce through the court. By the prescribed guidelines established by Allah and

outlined in IFLA, it is advised that an individual seeking to dissolve their marital union should adhere to the practice of pronouncing "one *ṭalāq*" at a time.

There exists a common misperception that Islām only disregards the rights of wives by granting husbands the authority to exercise *ṭalāq*. In Islamic doctrine, it is acknowledged that the wife possesses the entitlement to seek the termination of her marriage in cases when there exists a genuine concern that she may exceed the boundaries set by Allah. When she deeply detests her husband and can no longer perform the marital duties prescribed by the divine laws, she may take steps to dissolve the marriage union.

Only Selangor and Kedah states have enacted a legal amendment to increase the minimum age for marriage to 18. In accordance with Malaysian Islamic Family law, a girl's marriage requires the agreement of her guardian. Various forms of divorce are practised in accordance with Islamic law in the Federal Territory of Kuala Lumpur. The commonly practiced forms of divorce are *ṭalāq, khulʿ, taʿlīq*, and *fasakh*. IFLA acknowledges these as forms of recognition of the practice of dissolution of marriage. The most prevalent form of divorce in Malaysia is *ṭalāq*.

In the initial phase of the republican era, the new government indicated a willingness to partially reconcile with the past. The drafts of the Family Law in 1923 and 1924 were based mainly on Islamic legal principles. However, the decision was later made to abandon the idea of employing these early versions and diverse legal principles of Islamic jurisprudence. Instead, all of the fundamental laws, including civil law, were translated from various Western countries. As the Ottoman State transitioned to the Republic of Turkey, the law of the Republic of Turkey replaced Ottoman law through a significant legal revolution. The decision to adopt civil law marked an important turning point during the initial years of the Republic.

A significant development occurred with the introduction of gender equality, which included the prohibition of polygamy and the granting of equal inheritance rights to women on par with males. In nations that undergo democratisation, the family undergoes a progressive shift away from its patriarchal structure and evolves into a life partnership that is founded on principles of equal rights. The new Turkish Civil Code, known as Law 4721, was implemented on January 1, 2002. It introduced the concept of life partnership, which is based on the principle of equal rights in relation to marriage

requirements. The man's privileged and superior status was eliminated in the judgments concerning the marriage union. Consequently, the revised Civil Code abolished the role of the husband as the primary authority in the household. Both sides no longer had defined roles.

The discourse surrounding family, women, and children predominantly centers on Western norms, which are divergent from the nation's cultural and religious values. Occasionally, even religious individuals may address these matters through Western and feminist methodologies. Feminist women's associations have a compelling ability to influence the public on family-related issues and shape the agenda by utilising social media.

The interviewees suggest that the existing legal legislation in Turkey is insufficient to deal with issues concerning families effectively. Interviewees who found the current legislation insufficient cite contradictions between Western principles and social customs and traditions as the leading causes. Furthermore, respondents concur that the implementation of Islamic law is not adequately taken into account in the operation of the family institution in Turkey. Nevertheless, some difficulties arising from the disparities between Islamic law and current legislation were largely overcome by granting muftis the power to officiate legal marriages.

Another notable aspect of Turkey is that, despite not being formally recognised in laws, the social system nonetheless upholds customs, traditions, and Islamic family law. In other words, several established rules from the past pertaining to family members' rights, such as the creation, dissolution, and ongoing existence of the family, continue to hold significance in Turkey despite not being explicitly included in the legislation.

One of the prominent challenges faced by divorced individuals in contemporary Turkish society pertains to the perpetual obligation of providing alimony to their former partners. On the contrary, giving indefinite alimony to the divorced spouse is impossible in Jordan, Morocco, and Malaysia. Only during the *'iddah* period is alimony mentioned in these countries. Indefinite alimony has been a subject of extensive discourse over time, eliciting significant societal responses. Following these societal reactions, the Republic of Turkey's Ministry of Justice put the issue of alimony back on its agenda in 2019. This issue was discussed jointly with the Ministry of Justice and Family and

Social Services. However, the regulatory proposal brought by the Ministry of Justice has not yet been enacted. Similar situations continued in 2021, 2022, and today. Consequently, none of the regulations discussed to solve this problem have been implemented. As of 2019, a significant number of individuals have been identified as victims of indefinite alimony, totalling over 2 million individuals. Furthermore, this issue causes fear and apprehension towards marriage in individuals.

Although polygamy is permissible in Islamic law, it is not an absolute right that every man can use according to his own will. Today, there are differences between countries regarding polygamy. Polygamy can not be mentioned based on Article 130 of the Turkish Civil Code. The person who wants to remarry shall be obliged to prove that his previous marriage has ended.

Men who want to marry polygamise can not register more than one marriage at the court. Therefore, they polygamise following the traditional marriage, which is performed in the presence of two witnesses, and this is called *Nikāḥ al-Imām*. However, in these unregistered polygamous marriages, if the couple decides to divorce, the wife can never claim any inheritance or other rights from her husband since the marriage is considered absolute nullity (*buṭlan*). Although there is a possibility of establishing a lineage bond between the father and the children, the legal status of this second spouse is not solid, and there are concerns about her rights.

Both Jordan's Personal Status Law (2010) and (2019) regulated polygamy marriage in Article 13, but they subjected it to some conditions. The judge is required to evaluate the husband's financial capability to meet the dowry payment and ascertain his ability to provide the alimony for dependents under his responsibility. In addition, the judge notifies the fiancée that her fiancé is already married to another individual. Despite ongoing attempts for many years, the complete eradication of polygamy in Morocco has not been achieved. Polygamy remains legally permissible in Morocco. Polygamy is now regulated by strict legal conditions that differ from previous family laws. However, limitations on polygamy are still perceived as preferable to the absence of any constraints. In Malaysia, it is legally permissible for a male individual to practise polygamy. The majority of state marriage laws include a clause that requires individuals who wish to engage in polygamy to acquire formal authorisation from a judge. Based

on the readings and observations, polygamous marriages can be healthier only if the first wife approves and ensures that the second marriage will not harm family unity.

The marriage of Muslims with non-Muslims and the conversion of spouses to a religion other than Islām during the marriage is a contentious topic. There are no impediments to marriage arising from differences of belief in Turkish Civil Law. However, when considering Turkey as a whole, it is evident that it is unusual for a woman to marry a non-Muslim man. This is due mainly to the enduring impact of Islamic customs (*ʿurfs*). Likewise, in Turkey and Morocco, no provision has been found regarding one of the spouses changing their religion while the marriage continues. Jordan Personal Status Law has legislated the provisions of separation between spouses due to religious conversion in Article 140. According to the article, only Muslim men can marry a woman who is from the people of the book. If the marriage is performed before conversion to Islām or other religions, the case is judged by this provision.

In Malaysia, matters related to this issue are mentioned in the Islamic Family Law Act 1984 under the title of change of religion. The renunciation of Islām by either party to a marriage or his or her conversion to a faith other than Islām shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

The Indira Gandhi case serves as a notable exemplification. The male member of the family underwent a religious conversion to Islām, while the female member opted to maintain her existing religious affiliation. The individual unilaterally compelled their offspring to undergo a conversion to Islām. Yet, the civil court subsequently adjudicated in favour of restoring custody of the Muslim children to their non-Muslim mother. According to family law in Malaysia, the marriage bond between husband and wife has ended with the court's approval, and the children's religion and who will have custody of them have been discussed. However, a solution has still not been found.

The field of family law is the most appropriate domain for the practice of arbitration and mediation. Hence, they will effectively resolve numerous unfavourable circumstances, particularly in divorce. Unfortunately, disagreements between spouses can result in divorce without mediation in family law. In courtroom proceedings, particularly in family cases, the personal lives of the individuals involved are fully exposed in the public courthouse, which harms both the children and the parties concerned.

Including children born out of wedlock in the legal norms of countries has sparked extensive debates. This fact encompasses social, legal, moral, and Islamic law dimensions. From an Islamic legal standpoint, this matter pertains to the regulations surrounding lineage. Ḥifz al-nasl or ḥifz al-nasab is regarded as part of the *ḍarûriyyât*, which refers to the essential values and advantages that the Islamic legislation seeks to safeguard based on their significance. Enforcing a complete ban on adultery and implementing regulations that prevent the intermingling of lineages are key steps aimed at compassionately protecting the lineage.

Significant current family law matters are highlighted and evaluated in the research within the context of *fiqh*, such as permanent alimony, polygamy, religious conversion of spouses during marriage, marriage registration, and the subject of arbitration in family law. Laws are not created to address every problem but to establish the standards that communities must adhere to more consistently and organized. Due to the dynamic nature of the globe and human society, individuals encounter countless events, whereas rules have a limited framework.

Based on the findings, Islamic family law, codified a considerable time ago, is still being revised to address emerging challenges in Muslim families and adapt to evolving times and situations. The research revealed that codification is a crucial requirement for the tranquillity and well-being of society, and the enforcement of family law plays a significant role in guaranteeing the unity of families. Furthermore, embracing other methods, such as arbitration and mediation, is imperative to achieve this objective.

It is essential to recognise that the family institution, being distinct from a modern corporation, cannot be sustained through the employment of rewards and punishments. Instead, it is crucial to establish precise boundaries for rights and obligations and to enforce appropriate sanctions in cases of their violations.

6.1 RECOMMENDATIONS

1. Given the aim of conducting a comparative study on the development of family law in four countries from the 19th century to the present day, certain details in this field may have been omitted. This is primarily because of worries about the

thesis's length and the time restrictions imposed by the researcher's scholarship program. Additional research may address this deficiency and fill this gap.

2. Given the vast scope of family law, it is not feasible to encompass all its aspects in a thesis. Therefore, this study aimed to provide a comprehensive overview of the evolution and changes in family law within Islamic nations, focusing on a specific historical period up to the current day.

3. Several contemporary family law matters, which are not addressed in the thesis, also exert influence. These difficulties may be thoroughly examined individually, case by case.

4. In Turkey, a detailed examination of alimony from past to present and its evolution into indefinite status can be discussed from different aspects. Women's movements and polygamy can be studied in Morocco and Malaysia. After accessing the court decisions, a thematic study can be carried out on divorce cases in these countries. Sui generis circumstances of Jordanian society and the Ottoman influence can be studied in depth better to comprehend the evolution of family law in that country.

5. These countries can benefit from each other's experiences, and joint family law commissions can be established to ensure the transfer of experience between them on specific issues.

6. Although implementing family law will decrease the number of cases, prevention rather than treatment is the most effective approach to reduce the prevalence of social problems that arise regarding the family. To mitigate the prevalence of family cases, it is imperative to prioritise preventive measures rather than relying solely on legal interventions, which primarily serve as a remedy for such issues.

7. More unity in Malaysian states' family laws can be promoted since too many laws may lead to conflict between them and entanglement.

8. Although milk kinship is not seen as an obstacle to marriage in Turkish Civil Code legislation, most of Turkey's population accepts milk kinship as a marriage barrier. Thus, further studies regarding the sociology of Turkish people can address the clash between the legal system and people's values.

9. The research has concluded that Turkey should also implement the required measures, similar to other countries, to ensure that assistance provided to children continues based on the husband's economic condition. Alternatively, the divorced husband's likelihood of entering into a new marriage becomes more intricate, or he may face incarceration due to his inability to fulfill alimony payments if the divorced lady lacks a viable occupation to sustain herself post-divorce or lacks a support system. Under such circumstances, the government should assist these individuals. Additionally, in cases of unjust divorce, the determination of alimony should be based on the financial circumstances of the former partner.

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APPENDIX: INTERVIEW QUESTIONS

INTERVIEWING QUESTIONS DIRECTED TO JUDGES, LAWYERS, AND ACADEMICS

A- The Turkish Experience

1. Do you find the current legal legislation in your country sufficient to solve problems related to the family?
2. Do you think some aspects can be taken as an example from our past practices and current experiences and practices in other Islamic countries to solve the problems related to the family?
3. Can you evaluate the results of the Family Decree and its abolition, which is accepted as the first Islamic Family Law enactment in the Islamic world of the 19th century?
4. As you know, the principle of appointing an arbitrator is applied in Islamic law to resolve disputes between husband and wife. Do you think it is possible to use this principle today?
5. Do you think Muslim families in Turkey adopt Islamic Law to maintain the family institution's functioning? What would you like to say about this adoption's compatible and contradictory aspects with the legal system in force?

B- The Jordanian Experience

1. Do you think that *Qanūn al-Aḥwal al-Shakhṣiyyah al-Urdunī* is effectively applied in your country?
2. How do you evaluate the impact of *Qānūn Ḥuqūq al-ʿĀ'ilah al-ʿUthmānī* on the *Qanūn al-Aḥwal al-Shakhṣiyyah al-Urdunī*?

3. Do you think implementing Islamic family law can solve family-related problems, and its application can reduce the number of family cases brought to the courts?
4. Was the application of Islamic family law accepted by the public?
5. Do you think the application and experience of the *Qanūn al-Aḥwal al-Shakhṣiyyah al-Urdunī* is a beautiful example for countries that do not have Islamic family law?

C- The Morocco Experience

1. Do you think that *Mudawwanah al-Usrah* is effectively applied in your country, and is there an influence of the *Mālikī madhab* on the *Mudawwanat al-Usrah*?
2. Do you think implementing *Mudawwanat al-Usrah* can solve family-related problems, and its application can reduce the number of family cases brought to the courts?
3. What kind of changes has the implementation of *Mudawwanat al-Usrah* brought about in the country? Did the public accept its application in Morocco?
4. Can Islamic countries that do not have an Islamic family law benefit from Morocco's experience in implementing Islamic family law? What are the advantages of the family code so that these countries can benefit from their experience, and what is different from other Islamic countries?
5. Do Muslim families in Morocco take Islamic law as a measure while preserving the institution of the family? What do you want to say about the compatibility and contradiction of this with the legal system?

D– The Malaysian Experience

1. Do you think that Islamic family law is effectively applied in your country? Is the Shafi'i madhab impacted by Malaysian Islamic family law?

2. Do you think implementing Islamic family law is sufficient to solve family-related problems, and its application can reduce the number of family cases brought to the courts?
3. What kind of changes has the implementation of Islamic family law brought about in the country? Did the public accept its application in Malaysia?
4. Can Islamic countries that do not possess Islamic family law benefit from your experience in implementing Islamic family law?
5. Do you think Muslim families in Malaysia take Islamic law as a measure while maintaining the functioning of the family institution? What do you want to say about the compatibility and contradiction of this with the legal system?