

Islamic and Middle Eastern Law

Part I

The Moroccan Family Code (Moudawana) was decreed in 2004. The Yemeni Law No. 12 concerning Crimes and Penalties was introduced in 1994 and deals with crimes that are punished according to religious jurisdiction and by retribution.

In your handout you will find an English translation of several provisions of the Moudawana and the Yemeni Law on the following topics:

- Option 1: Polygamy (Moudawana)
- Option 2: The Wife's Right to Divorce (Moudawana)
- Option 3: Child Custody (Moudawana)
- Option 4: Crimes and Penalties (Yemeni Law)

Please choose one option; write about the legal institutes concerned and describe how the actual norms relate to classical Islamic Personal Status or Criminal law.

Part II

Please discuss the concept of ijtihad and its meaning and relevance today. (around 1-2 pages)

Option 1: Polygamy (Moudawana)

Article 40

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

Article 41

The court will not authorize polygamy:

- If an exceptional and objective justification is not proven.
- If the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspects of life.

Article 42

In the absence of a stipulation by the wife in the marriage contract precluding polygamy, the husband wishing to resort to it must petition the court for authorization.

The authorization petition should include the exceptional and objective motives that justify the request, and attach a statement on the applicant's financial situation.

Article 44

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

The court may authorize polygamy in a well-founded decision not open to appeal once it establishes the existence of an objective and exceptional justification and puts into place conditions benefiting the first wife and her children.

Article 45

When the court confirms in the discussions that continuation of the conjugal relationship is impossible, and where the wife whose husband wants to take another wife persists in her request for a divorce, the court determines a sum of money corresponding to the first wife's full rights as well as those of their children that he is required to support.

The husband must pay the fixed sum of money within a maximum time limit of seven days. Upon submission of the requisite sum of money, the court issues the divorce decree. This decision is not open to appeal as concerns the dissolution of the marital relationship.

The non submission of the requisite sum of money within the fixed deadline is considered as a withdrawal of the polygamy authorization petition.

If the husband persists in his polygamy authorization petition, and the wife to whom he wishes to join a co-wife refuses to consent and does not ask for divorce, the court automatically applies the irreconcilable differences procedure in Articles 94 and 97 below.

Option 2: The Wife's Right to Divorce (Moudawana)

Article 98

The wife may petition for divorce on one of the following grounds:

- 1- Non respect by the husband of one of the conditions in the marriage contract;
- 2- Harm;
- 3- Non maintenance;
- 4- Absence;
- 5- Latent defect;
- 6- Abstinence and abandonment.

Article 99

Failure to respect any condition in the marriage contract constitutes a harm justifying a divorce request. Any ignominious behaviour by the husband or act against good character that causes the wife material or moral harm such that the continuance of the conjugal relationship is rendered unendurable shall be considered a harm justifying a divorce request

Article 102

The wife may petition for divorce on the grounds of non respect by the husband of his current maintenance obligations towards her, in accordance with the following situations and provisions:

- 1- If the husband has assets from which to award maintenance, the court may fix the means for paying the wife maintenance, and does not grant her petition for divorce.
- 2- In the event the husband proves his incapacity, the court shall fix, according to the circumstances, a deadline for the husband not to exceed thirty days to provide maintenance to his wife, under penalty of divorce, except in cases of force majeure or exceptional circumstances.
- 3- The court shall grant the wife's petition for divorce immediately if the husband refuses to provide maintenance and does not prove his financial incapacity.

Article 104

If the husband is absent from the conjugal home for more than one year, the wife may petition for divorce. The court shall verify the absence, its length, and his location by all means. If the husband's absence is established and his address of residence is known, the court shall inform him about the petition by formal notice to allow him to respond, and grant the divorce if he does not appear to cohabit with his wife or if he does not bring her to live with him.

Article 107

Defects that are considered as impacting the stability of conjugal life and that justify its dissolution are:

- 1- Any defect that prevents intimate conjugal relations;
- 2- Diseases that will endanger the life or the health of the other spouse and cannot be cured within one year.

Article 112

When the husband takes an oath of abstinence from his wife or abandons her, the wife may petition the court, which will set a deadline of four months, and if after this time the husband has not repented his oath, the court shall grant the divorce.

Option 3: Child Custody (Moudawana)

Article 163

Custody preserves the child from harm and ensures his or her education and the protection of his or her interests. The custodian must take all necessary measures to guarantee the physical and psychological security of the child in his or her custody, manage his or her interests in the absence of the legal tutor, and as necessary when then interests of the child in his or her custody are jeopardized.

Article 164

Custody is the parents' duty as long as the marriage relationship exists.

Article 165

If among the people entitled to be entrusted with custody no one accepts it or fulfils the required conditions, either the party concerned or the Public Prosecutor's Office may request the court to appoint whomever it deems fit among the child's relatives or other persons, or else selects an institution designated for this purpose.

Article 166

Custody is exercised until both the boy and the girl reach the age of legal majority. Following the termination of his or her parents' marriage, a child who completes fifteen years of age has the right to choose either the father or mother as custodian. A child without parents may choose one of the relatives cited in following Article 171, provided that his or her interests are not jeopardized and that the legal tutor consents. In the absence of agreement, the case shall be presented to the judge to settle the matter according to the interests of the minor.

Article 171

Child custody shall be awarded first to the mother, then to the father, then to the maternal grandmother of the child. If this proves difficult, the court shall decide, in light of the evidence before it and in view of what would serve the interests of the child, to award custody to the most qualified of the child's relatives, while guaranteeing the child suitable lodging as one of the custody obligations.

Option 4: Crimes and Penalties (Yemeni Law)

Article 259: Anyone who turns back from or denounces the religion of Islam, is punished by the death penalty after being questioned for repentance three times and after giving him a respite of thirty days. The Apostasy in public by speech or acts is considered contradictory to the principles of Islam and its pillars in intention and determination. If the intention or determination is not established and the guilty shows repentance, there will be no punishment.

Article 289: Anyone who defames a pure person by accusing the latter of adultery or refutes the lineage of a person, and failing to prove such claims shall be punished by the punishment of whipping of 80 lashes as ordained by religious law.

Article 307: Bandits shall be punished:

- i. by imprisonment for up to a maximum of five years if his Felony was confined to just threatening a roadway.
- ii. By amputation of the right hand from the wrist and the left foot from the ankle, if he took movable property owned by someone else, whereas his partners who do not take any property shall be punished by imprisonment of up to a maximum of ten years.
- iii. By execution, as a religiously ordained punishment if such coercion leads to killing a human being; any accomplices who do not take part in the killing shall be punished by imprisonment up to a maximum of fifteen years.
- iv. By execution and crucifixion, if he took property and killed an individual; the accomplices, who do not take part in the theft or the killing, shall be punished by a maximum of up to fifteen years imprisonment.