Cumhuriyet Theology Journal, 27(3): 809-825, 2023
DOI: 10.18505/cuid.1340204

Cumhuriyet Theology Journal

cuid.cumhuriyet.edu.tr | Founded: 1996 Available online, ISSN: 2528-9861 Publisher: Sivas Cumhuriyet Üniversitesi

A Mediator Between Sharia and State Law: Aḥmad al-Khamlīshī's Legal Thinking and Contribution to Reforms[1]

***Miyase Yavuz-Altıntaş*[1,a,*]**

[1] *Ankara Hacı Bayram Veli University, Faculty of Islamic Sciences, Department of Fiqh, Ankara/Türkiye*

**Corresponding author*

Research Article

History
Received: 09/08/2023
Accepted: 22/11/2023
Published: 15/12/2023
Pub Date Season: Aralık

Plagiarism:
This article has been reviewed by at least two referees and scanned via a plagiarism software.

Ethical Statement:
It is declared that scientific and ethical principles have been followed while carrying out and writing this study and that all the sources used have been properly cited

ABSTRACT

With the 2004 reforms on the Moroccan Personal Status Law, the Moroccan Family Code (*Mudawwanah*) is considered one of the most egalitarian codes in the Muslim World. The reforms was a product of long-lasting public debates for decades in Morocco. Aḥmad al-Khamlīshī has been actively involved in the debate since the beginning of the 1980s and explained that the Personal Status Law is man-made law open to interpretation, revision of which should be undertaken through *ijtihād*. Shortly after ascending to the throne, in 2001, the King Mohammed VI appointed the Royal Advisory Commission in charge to reform the Moroccan Personal Status Code. The King charged the commission for making a substantial change in the Code by respecting the main objectives of Sharia (*maqāsid al-Sharia*) and also responding to the necessities of the time and society by means of exercising *ijtihād*. He encouraged members of the commission to consider the public interest and to strive for consensus and moderation in any proposed changes. The commission worked for around two and a half years on the proposed changes, but could not reach a consensus on many issues. Everyone on the commission has, more or less, had some leaning towards either of the two main groups, namely, the reformists and traditionalists. Aḥmad al-Khamlīshī was one of the members of the Royal Advisory Commission. He was a person who shared views of the reformist group, but also used the language of the traditionalists. He became a reference point for reformist groups with his critical but moderate views that remain within the Islamic legal framework. In this paper, I argue that al-Khamlīshī was the mastermind behind the reforms of 2004. By applying data analysis method, this study primarly uses al-Khamlīshī's writings, his interviews and speeches. To reveal the difference and similarities of his understanding, the literature was consulted and comparisons were made. Following a brief background, this paper will discuss al-Khamlīshī's mediating role between text and context, his influence on the debate of family law reforms, and thus his stance on Sharia-state relations. This paper will then focus on his understanding of *ijtihād* with reference to his views on the concept of the closure of the gate of *ijtihād*, qualifications of *mujtahid* (one who is capable to deduce legal rulings from the revealed texts), and his suggestion on collective type of *ijtihād* (*ijtihād jamā'i*ʿ); as it was exercised by the Advisory Commission. Al-Khamlīshī's methods of legal reasoning will be examined with regard to family law.

Keywords: Islamic law, Family law reform, Maqāsid al-Sharia, Ijtihād, Collective ijtihād, Morocco, Aḥmad al-Khamlīshī.

[1] An earlier version of this paper is presented at the Annual Conference of the British Association for Islamic Studies (BRAIS), 11-13th April 2017, University of Chester.

Şeriat ve Devlet Hukuku Arasında Bir Arabulucu: Ahmed el-Hamlîşî'nin Hukuk Düşüncesi ve Reformlara Katkısı

Araştırma Makalesi

Süreç
Geliş: 09/08/2023
Kabul: 22/11/2023
Yayın Tarihi: 15/12/2023
Yayın Sezonu: Aralık

İntihal:
Bu makale, en az iki hakem tarafından incelendi ve intihal içermediği teyit edildi.

Etik Beyan:
Bu çalışmanın hazırlanma sürecinde bilimsel ve etik ilkelere uyulduğu ve yararlanılan tüm çalışmaların kaynakçada belirtildiği beyan olunur.

ÖZ

Fas Ahvâl-i Şahsiyye Kanunu üzerinde 2004 yılında yapılan reformlarla birlikte Fas Aile Kanunu (Müdevveneh), İslam dünyasındaki en eşitlikçi kanunlardan biri olarak kabul edilmektedir. Söz konusu reformlar, Fas'ta onlarca yıldır devam eden uzun soluklu kamuoyu tartışmalarının bir ürünü olarak ortaya çıkmıştır. Ahmed el-Hamlîşî 1980'lerin başından itibaren bu tartışmalara aktif olarak katılmış ve Ahvâl-i Şahsiyye Kanunu'nun yoruma açık insan yapımı bir kanun olduğunu ve revizyonunun ictihad yoluyla yapılması gerektiğini savunmuştur. Kral 6. Muhammed tahta çıktıktan kısa bir süre sonra, 2001 yılında, Fas Ahvâl-i Şahsiyye Kanunu'nda reform yapmak üzere Kraliyet Danışma Komisyonu'nu oluşturdu. Kral 6. Muhammed komisyonu, Şeriat'ın temel hedeflerini (makâsıdü'ş-Şeria) gözeterek ve aynı zamanda ictihad yoluyla zamanın ve toplumun ihtiyaçlarına cevap vererek Ahvâl-i Şahsiyye Kanunu'nda önemli değişiklikler yapmakla görevlendirdi. Bununla birlikte, komisyon üyelerini kamu yararını göz önünde bulundurmaya ve önerilen her türlü değişiklikte uzlaşma ve ılımlılık için çaba göstermeye teşvik etti. Komisyon üyeleri önerilen değişiklikler üzerinde yaklaşık iki buçuk yıl çalıştı ancak birçok konuda uzlaşmaya varamadı. Bu bağlamda, üyelerin komisyon içinde oluşan iki ana gruptan reformist ve gelenekçilerden birine, az ya da çok, meylettiği söylenebilir. Ahmed el-Hamlîşî, Kraliyet Danışma Komisyonu'nun üyelerinden biriydi. Komisyon üyeleri arasında reformist grubun değişiklik tekliflerini destekleyen ama aynı zamanda bunu gelenekçilerin benimsediği dili kullanarak yapan etkili ve önemli bir isim oldu. Nitekim, el-Hamlîşî İslam hukuku çerçevesi içinde kalan eleştirel ama ılımlı görüşleriyle aile hukukunun reformunu talep eden gruplar için bir referans noktası haline geldi. Bu çalışmada, Ahmed el-Hamlîşî'nin fıkhi temellendirme ve delillendirme açısından Fas 2004 aile hukuku reformlarının arkasındaki isim olduğu savunulmaktadır. Veri analizi yönteminin uygulandığı bu çalışmada, öncelikli olarak Hamlîşî'nin eserleri, çeşitli mecralardaki mülakatları ve konuşmaları kullanılmıştır. Hamlîşî'nin anlayışındaki farklılık ve benzerlikleri ortaya çıkarmak için literatüre başvurulmuş ve benzer görüşlerle karşılaştırmalar yapılmıştır. Fas Ahvâl-i Şahsiyye Kanunu'nun reformuna dair kısa bir arka plan açıklamasının ardından bu makale, Hamlîşî'nin metin ve bağlam arasındaki arabulucu rolünü, aile hukuku reformları tartışmasındaki yerini ve dolayısıyla Şeriat-devlet ilişkileri konusundaki duruşunu incelemektedir. Daha sonra, ictihad kapısının kapanması meselesi, müctehid olabilmenin şartları, müctehidin nitelikleri ve Kraliyet Danışma Komisyonu tarafından uygulandığı şekliyle kolektif ictihad türü (*cemâ'î ictihad*) hakkındaki görüşlerine atıfla Hamlîşî'nin ictihad anlayışına odaklanılmaktadır. Son olarak, Hamlîşî'nin akıl yürütme yöntemi ve ortaya koyduğu gerekçeler aile hukuku ile ilgili meseleler örnekliğinde gösterilmektedir.

Anahtar Kelimeler: İslam hukuku, Aile hukuku reformu, Makâsıdü'ş-şerîa, İctihad, Kolektif ictihad, Fas, Ahmed el-Hamlîşî.

[a] *miyase.yavuzaltintas@hbv.edu.tr* *orcid.org/ 0000-0002-5338-3266*

How to Cite: Yavuz Altıntaş, Miyase. "A Mediator Between Sharia and State Law: Aḥmad al-Khamlīshī's Legal Thinking and Contribution to Reforms". Cumhuriyet Theology Journal 27/3 English Special Issue (December 2023), 809-825. https://doi.org/10.18505/cuid.1340204
Atıf: Yavuz Altıntaş, Miyase. "A Mediator Between Sharia and State Law: Aḥmad al-Khamlīshī's Legal Thinking and Contribution to Reforms". Cumhuriyet İlahiyat Dergisi 27/3 English Special Issue (Aralık 2023), 809-825. https://doi.org/10.18505/cuid.1340204

Introduction

Debate over family law reform was an issue reflecting the tension between the parameters of modernity and traditionalism from the first promulgation of the Moroccan Personal Status Law in 1958.[2] Several attempts took place to reform the law following the codification. Although, it is considered to be quite limited, the first fruitful attempt was the 1993 reforms. The 2004 reform of the law has become the most remarkable and comprehensive step in this process. The change of the reformist discourse's reference system with an increased emphasis on the necessity of exercising *ijtihād* was the key element that secured the reform. Aḥmad al-Khamlīshī was one of the members of the Royal Advisory Commission in charge to reform the Moroccan personal Status Code. Reformist and conservative groups were the main groups in the commission. Al-Khamlīshī was the one who reconciled the arguments of both groups.

Aḥmad al-Khamlīshī (b. 1935) is a prominent legal scholar and intellectual. He is currently the director of the *Dar al-Hadith al-Hassania* (2000-present) which is a higher institute for the education of imams, religious preachers and guides.[3] He is one of the most frequent lecturer at the religious sessions held during Ramadan (*al-Durūs al-Ḥasaniyya*), which is a quite prestigious occasion hosted by the king. Recently, al-Khamlīshī is appointed as member of the High Council of Judiciary, 6 April 2017.[4] He is appointed by the King as being a notable person, recognized for his competence, his impartiality and his probity, as well as for his distinguished contribution in favour of the independence of justice and of the primacy of the law in accordance with the Constitution of 2011, article 115.[5] This can be considered as a good example showing his mediating role between Sharia law and state law locating him in higher religious and state law authorities, namely presidency of *Dar al-Hadith al-Hassania* and membership in the High Council of Judiciary.

---

[2] For details of the reform debate see Léon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere" *Islamic Law and Society* 10/1 (2003), 70-131; Su'ad Akhrisi, *Min Mudawwanah al-Ahwal al-Shakhsiyya ila Mudawwanah al-Usra: Masar al-Ta'dilat wa Matalib al-Harakah al-Nisa'iyya* (al-Rabāṭ: Dār al-Salam, 2005); Zhor al-Horr, *Islah Qanun al-Usra bi-l-Maghrib: Al-Masar wa-l-Manhajiyya* (Dar al-Bayda': al- Najāh al-Jadīda, 2015).

[3] It is the highest institution for Islamic studies founded in 1964 in Morocco.

[4] Morocco World News, "King Mohammed VI Appoints Members of Judiciary Supreme Council" (Accessed 21 November 2023).

[5] The High Council of Judiciary is designed according to the Constitution of 2011, article 115: It is presided over by king and composed of: of the First-President of the Court of Cassation in the status of President-Delegate [President-delegue]; of the Procurator General of the King before the Court of Cassation; of the President of the First Chamber of the Court of Cassation; of 4 representatives elected, from among them, by the magistrates of the courts of appeal; of 6 representatives elected, from among them, by the magistrates of the jurisdictions of first instance [degree]; a representation of [women] magistrates must be assured, from among the ten members elected, in proportion to their presence in the corps of the magistrature; of the Mediator; of the President of the National Council of the Rights of Man [Conseil national des droits de l'Homme]; of 5 notable persons [personnalites] appointed by the King, recognized for their competence, their impartiality and their probity, as well as for their distinguished contribution [apport] in favor of the independence of justice and of the primacy of the law, of which one member is proposed by the Secretary General of the Superior Council of the Ulema. *The constitution of Morocco of 2011*, trans. William S. Hein & Co., (2012) (Accessed 21 November 2023).

Al-Khamlīshī was raised in an Islamic traditional household in Al-Hoceima, North of Morocco. His father was a follower of the Nasiriyya Sufi order. He memorized the Qur'ān at the age of ten with his father's guiding. Al-Khamlīshī acknowledges that his father, the Qur'anic and spiritual atmosphere in the family and the peaceful Bedouin lifestyle became very influential in his life and led him to research further in Islamic studies. Al-Khamlīshī studied law at the university; following graduation he served as judge in the Court of Appeal (1960-1970). Following this occupation, he served as law professor at the University of Muhammad V for nearly thirty years in Rabat (1971-2000).[6]

Al-Khamlīshī extensively researches and writes on Islamic legal thought and personal status law. His commentary on the Personal Status Law titled *Ta'līq ala Qānun Al-Akhwal al-Shaksiyyah I-II* (1994) has a great importance in understanding the changed subjects of the Personal Status Law. Among others, the series of book under the title *Wijhat an-Nazar Hawla Naqd Fikr al-Fiqhī al-Islāmī wa Wasāil al-Tajdīdi* [Point of View about Criticism of Islamic Legal Thought and Tools of Renewal] which was first published at 1990s has become very influential on family law reform debate and 2004 reforms.[7] His latest remarking contribution to the literature is a commentary series on 2004 reforms titled *Min Mudawwanah al-Ahwal al-Shakhsiyya 'ila Mudawwanah al-Usra* [From the Personal Status Code to the Code of Family]. The first volume of the series deals with the issues of marriage and the second volume is about the dissolution of the marriage.[8] The commentary is especially precious as it sheds light on the discussions of the Royal Advisory Commission who drafted the changes of 2004 family code.

Aḥmad al-Khamlīshī's legal thinking and his contribution to the issue of renewing Islamic law are extensively studied in Morocco. Many seminars, workshops have been held to pay tribute to al-Khamlīshī's contribution to Islamic legal thought and improvement of legal status of women. In 2011, in an conference themed *Ijtihād: Reading in the works of Professor Aḥmad al-Khamlīshī,* the participants affirmed that al-Khamlīshī is "one of the pioneers of Moroccan law reform and symbolic figure of Islamic thought and *ijtihād*". He is considered to be "one of the first scholars to develop progressive solutions from the Sharia" to improve legal position of Moroccan women and he has "contributed to the qualitative development of legal texts relating to family" and also his research shown that "there is no contradiction between Sharia and human rights, nor between Sharia and the institutions of modern civilization with economic, political and scientific".[9] Aḥmad al-Khamlīshī has become a mediator between Sharia law and state law. He has become a pioneer

[6] Rahma TV Channel, "Barnāmaj Aʿlāmu'l-Umma: Allāma Doctor Ahmad al-Khamlīshī" *YouTube* (Accessed 21 November 2023), 00:01:00-00:14:29.

[7] Some of the books included in this series as follows: Aḥmad al-Khamlīshī, *Usra wa-l-Tifl wa-l-Mar'a Usūl al-Fiqh wa al-Fikr al-Fiqhi* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 1998); Id., *al-Fikr al-Fiqhī wa Muntalaqāt Usūl al-Fiqh* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2000); Id., *Khalal yajib al-wa'yu bih* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2002); Id., *Limāzā Lā Narbid Bayna at-Tanzīr wa-l-Mumārasa* (Dār al-Bayda': al-Najāh al-Jadīda, 2004); Id., *Jumūd al-Dirāsāt al-Fiqhiyya* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2010); Id., *al-Ijtihād: Taṣawwurān wa-Mumārasa* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2010); Id., *Afkār li Munaqasha I-II-III* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2013, 2015, 2016); Id., *Limāzā Lam Yatahaqqaq al-Islāh al-Marghūb fīhi fī Fiqh al-Mu'āmalāt* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2020).

[8] Aḥmad al-Khamlīshī, *Min Mudawwanah al-Ahwal al-Shakhsiyya 'ila Mudawwanah al-Usra I-II* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2012, 2016).

[9] Maghress, "Hommage au Pr. Ahmed El Khamlichi: Un pionnier de la réforme de la pensée et de l'Ijtihad" (Accessed 21 November 2023).

proposing a *middle/third* way between reformist and conservative groups as well as between state and religion. It may be argued that he is the one who laid the theoretical foundations for *moderate Islam* which is the official discourse of Morocco. Considering that this discourse, especially in the west, is well received and shown as a model to the Muslim world and promoted in Africa by the Kingdom of Morocco[10], Aḥmad al-Khamlīshī's role in showing possibility of co-existence of religion and state in a modern state cannot be overlooked. Indeed, since 2004 he has been participating in current public debates on abortion and inheritance law by offering a middle ground.[11]

There is a growing interest in his writings and views in the English literature. Nayel A. Baderin dedicated two chapters to al-Khamlīshī's critics of the Personal Status Law and qualifications of mujtahid in Islamic legal theory in his PhD thesis *Identity and Authority: Changes in the Process of Debates over the Islamic Marriage Contract among Contemporary Muslim-Arab Intellectuals* (2014). Baderin's short article "The Moroccan Jurist al-Khamlishi: Can a Woman Become a Legislator (Mujtahid)?" (2016), based on his thesis, can also be mentioned as a detached study on al-Khamlīshī. Felicitas Opwis discusses recent developments in the interpretation of the *maqāṣid al-sharīʿa* in her article "New Trends in Islamic Legal Theory: Maqāṣid al-Sharīʿa as a New Source of Law?" (2017). She examines al-Khamlīshī's understanding and interpretation of *maqāṣid al-sharīʿa* alongside prominent scholars such as Ibn Āshūr, Yûsuf al-Qaradâwî, Yahyä Muhammad, and Jamāl al-Dīn 'Ati. Opwis's work particularly important in terms of the possibility of comparison among proposals and between classical doctrine and modern conceptions as well as for locating al-Khamlīshī in the debate over renewing Islamic law.

The present study aims to determine al-Khamlīshī's stance between text and context, and his influence on the debate of family law reforms in Morocco. To do this, it examines his understanding of *ijtihād* with reference to his views on the concept of the closure of the gate of *ijtihād*, qualifications of *mujtahid*, and his suggestion on collective type of *ijtihād* (*ijtihād jamā'iʿ*). To reveal the difference and similarities of his understanding, the literature was consulted and comparisons were made with similar proposals. Woman and family law related issues are stuedied with regard to Al-Khamlīshī's methods of legal reasoning. This study concludes that al-Khamlīshī proposes a middle ground among various groups by utilising a collective type of *ijtihād* in national/regional character. The 2004 reforms demonstrated arguably the most remarkable example of this proposal.

1. Aḥmad al-Khamlīshī's Legal Thinking and His Salient Views

The main purpose of Aḥmad al-Khamlīshī is to find a middle ground to eliminate the tension between state and religion. His legal thinking revolves around to show the co-existence of state

[10] See Miyase Yavuz, "Allah (God), al-Watan (the Nation), al-Malik (the King), and the Role of Ijtihād in the Family Law Reforms of Morocco" *Journal of the Middle East and Africa* 7/2 (2016), 207-227.

[11] He calls for a middle/third way between secular/feminist and Islamist/traditionalist groups proposing the Qur'anic injunction "*When death approaches one of you who leaves wealth, it is prescribed that he should make a proper bequest to parents and close relatives –a duty incumbent on those who are mindful of God*" should be made a legal requirement. *The Qur'an*, trans. M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2010), al-Baqara 2/180. For a glimpse of on-going debates demanding legal changes in women's right related issues in Morocco, see Morocco World News, "Public debates on Moroccan abortion and inheritance law" (Accessed 21 November 2023).

and religion rather than a complete separation. For him, "it would be unwise for the state to see itself as wiser than community" adopting a complete separation between religion and the state and "it would be unwise for those who manage public affairs to disregard the values and wishes of the majority of the community, who find the spirit of their existence in their religious creed, and require them to abandon everything passed down from their fathers and forefathers".[12] As opposed to Islamists and secularist claims on the relationship between state and religion, he argues that "the intervention of the state, and its institutional system, in religious affairs constitutes a protection of religion and the system of co-existence which is rejected by those groups that either excludes religion totally or restrict it to the teachings they provide to their followers".[13] In his legal thinking, this will be possible through the institution of the Commander of the Faithful (*Amir al-Mu'minin*) and *ijtihād*, which was seen in the 2004 reforms.[14] He relies on the concept of *Amir al-Mu'minin* as it represents the highest religious and political authority with reference to the legal maxim *the rule of law resolves conflict* (*hukm al-hākim yarfa al-khilāf*). And *ijtihād* plays the key instrumental role in combining these two realms.

2. Institutional System of Decision-Making and the Function of Ijtihād

Al-Khamlīshī argues that the modern critic of Islamic law and allegations against it such as violation of human rights and women's rights is due to absence of *updating fiqh* and lack of precision in specifying the authority entitled to formulate Islamic rulings (*ahkām al-Sharia*). [15] By "updating" he means linking interpretation and the lived reality by abiding "the principle of *usūl al-fiqh* urging for the consideration of the consequences of law application on peoples' lives" as he views that context and prevailing culture of that specific time and place mostly affected jurisprudential rulings recorded in *fiqh* corpus we refer today.[16] However, he acknowledges "updating *fiqh* does not mean completely discarding the inherited *fiqh* corpus and building up a new one...besides, the multiplicity of opinions and interpretative judgments allow for a wider choice in order to select the most appropriate one, even if only few uphold it".[17] It can be argued that his legal reasoning starts with an understanding of the ruling and its context, if it is not applicable today, searching for an alternative ruling among the existing jurisprudential views either through *takhayyur* (selection of an opinion within one of the schools of Islamic jurisprudence) or *talfīq* (selection of an opinion among the schools), and if the question is still unanswered practicing *ijtihād* according to needs and necessities of time, place and society. Needless to say, he does not uphold sectarian bigotry.

[12] Ahmed Al Khamlichi, "The Relationship between Religion and the State: the Institution of 'Commandment of the Faithful' in Morocco" *Contemporary Arab Affairs* 7/1 (2014), 67-68.

[13] Khamlichi, "The Relationship between Religion and the State", 69.

[14] Khamlichi, "The Relationship between Religion and the State", 75.

[15] Ahmed Khamlichi, *Compatibility of Maqasid al-Sharia (Finalities and Purposes of the Islamic Law) with International Legislation on Refugees,* trans. Fatima Laaouina (Rabat: Islamic Educational, Scientific and Cultural Organization, 2014), 9.

[16] Khamlichi, *Compatibility of Maqasid al-Sharia*, 12-13.

[17] Khamlichi, *Compatibility of Maqasid al-Sharia*, 17-18.

For al-Khamlīshī "lack of precision in the reference or authority entitled to formulate *ahkām al-Sharia*" is a more serious gap than the updating issue.[18] He remarks danger of contradictory and extremist fatwas in that sense. Al-Khamlīshī considers today's fatwas as cause of *fitna* (chaos; civil strive) and misrepresentation of Islam. He also uses this as a base of his justification of state law and state authority in regulation and implementation of Islamic law and proposes "a shift from a culture of individual jurisprudence to a system of institutional decision-making". He explains as follows

"The new system neither supersedes individual jurisprudence nor refutes it. On the contrary, the institutional decision-making would be based on individual jurisprudence rulings favoring opinions that are closest to truth and reason. Institutional decision-making would spare the Muslim society the chaos of *fatwas*, manifested in contradiction and obstination in opinions. Likewise, it would shield the Ummah against the negative impact of the argument considering *Sharia* "rulings" as contradictory to "positive law". The identification and the organization of this institution (or institutions) to be entrusted with this task would take into consideration the situation of each Muslim country."[19]

On the necessity of the proposed shift, al-Khamlīshī also draws attention to the distinction between *ibadāt* (worships) and *mu'āmalāt* (inter-human relations; civil and commercial acts). He states that contradictory individual fatwas do not cause social problem in the fields of worship and ethics but they do in fields of organising society and relationships between its individuals. Multiplicity of these rulings "leads to breaking up social cohesion and ruining religious unity".[20] Therefore *mu'āmalāt* realm cannot be regulated by different individual opinions; there must one law for all within state.

He does not accept *ijmā'* (consensus of jurists) as an absolute and separate source of law and argues that it must be restricted by place and time thus being only local or maybe regional. *Ijtihād* can be practiced for all issues of *mu'āmalāt* regardless of existence *ijmā'* and it can/should be revised over time and place. The principle of *promoting public welfare and preventing harm* applies all issues in the realm of *mu'āmalāt*.[21] According to him, *ijmā'* must include opinions of men and women as both can practice *ijtihād*.[22] By holding this view, al-Khamlīshī challenges and diverges from the classical mainstream approach on *mujtahid* as well as establishment of legal and religious authority. He justifies the necessity of this shift with reference to Qur'anic principle *taklīf* (responsibility; obligation for the individual to obey the law), and *shūrā* (consultation) as it will be explained in his collective *ijtihād* proposal below.

In this proposed shift, al-Khamlīshī's conception of *ijtihād* plays the instrumental key role. He adopts *maqāsid* (general objectives of Sharia) based Sharia understanding and *maqāsid* based *ijtihād*

[18] Khamlichi, *Compatibility of Maqasid al-Sharia*, 13.

[19] Khamlichi, *Compatibility of Maqasid al-Sharia*, 15.

[20] Khamlichi, *Compatibility of Maqasid al-Sharia*, 16-17.

[21] Khamlīshī, *al-Ijtihād,* 24.

[22] See for details Nayel A. Badereen, "The Moroccan Jurist al-Khamlishi: Can a Woman Become a Legislator (Mujtahid)?" *Mathal* 5/1 (2016), 1-8.

maintains it.[23] For him, the function of *ijtihād* is to fulfill general principles of Sharia and return to Qur'anic principles, and its nature is continuous. The ultimate objective of Sharia is to bring beneficence and ward off evil. More specifically, he refers to the general provisions of Qur'ān such as *adālah* (justice), *ma'rūf* (acceptable, in a fair manner), *musāwāh* (equality), *islāh* (reform) and reliability as guiding principles of interpretation.[24] For al-Khamlīshī the interpretation of *maqāsid al-Sharia* "does not necessitate the norms of *tafsir* (exegetic effort) provided for in *usūl al-fiqh* and applicable only in explaining specific texts. The explanation of general principles and the way they should be applied on the realities of life can be accomplished by anyone with enough knowledge to understand the reality and present ideas to solve its problems."[25] The competency of this type of *ijtihād* is generally granted to those in charge of governing Muslim community, i.e. *ulu'l-amr*, *amir al-mu'minin*, *imam* and others, for handling state institutions and policies, in the scope of *Siyāsāh al-Sharia* (Legitimate governmental policy based on the Sharia). Hence, according to him, in Moroccan context, the institution of *amir al-mu'minin* regulated by constitution and law will make *ijtihād* based decisions binding for all. He also remarks the existence of various types of *ijtihād,* such as *ijtihād al-'urfī* alongside *Siyāsāh al-Sharia,* which are not binding for providing linguistic evidences from the texts (*naṣṣ* pl. *nuṣūṣ*). Al-Khamlīshī here refers to *ijtihād* of *al-muhtasib* (who is in charge of enforcing public morality, monitoring public welfare and supermarkets as an administrative officer of the ruler) as an example.[26]

Al-Khamlīshī calls revision of out-dated opinions, as they are pure product of *ijtihād*. The nature of *ijtihād* is *zannī* that is un-explicit and conjectural as, he explains, "the *mujtahid* is influenced by the surrounding conditions and circumstances, as well as by intellectual and personal characteristics through which he discerns the best signs of a sound ruling".[27] If there is no explicit (*qat'ī)* ruling of Sharia on a matter it will be subject to *ijtihād* and will be open to revision. As *ijtihād* is open to revision as its own nature, here, al-Khamlīshī draws attention to the lived realities consisting of, such as culture, social relations, human rights and freedoms related discourses as a necessary part of *ijtihād*.[28] He uses the concept of *ijtihād al-wāqi',* that is *ijtihād* based on the occurrence or the reality. He believes that *ijtihād al- wāqi'* and consideration of reality and people' needs are necessary, and a combination of social reality and ideals/ambitions is needed rather than

[23] *Maqāsid*-based approach to Sharia and *maqāsid*-based *ijtihād* are also adopted by many other scholars, such as Muḥammad al-Ṭāhir ibn 'Āshūr, 'Allāl al-Fāsī, Aḥmad al-Raysūnī, Yusūf al-Qaradāwī, Attia, Auda, Kamali and so on, since the last century. There has been increasing number of studies dealing with *maqāsid*-based approach discussing its philosophy, methodology, practice, and foundation and scope i.e. whether it is a part of *usūl al-fiqh* or it is a different branch of study. See for example Aḥmad al-Raysūnī, *Muḥāḍarāt fī Maqāṣid al-Shari'ah,* (al-Qāhira: Dār al-Kalimah, 2010); Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law: Maqāṣid al-Sharī'ah: A Functional Approach* (London: International Institute of Islamic Thought, 2007); Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2007); Mohammad Hashim Kamali, *Maqāṣid al-Sharī'ah, Ijtihad and Civilisational Renewal* (London: International Institute of Islamic Thought, 2012).

[24] Khamlīshī, *al-Ijtihād,* 38.

[25] Khamlichi, *Compatibility of Maqasid al-Sharia,* 64.

[26] Khamlīshī, *Jumūd al-Dirāsāt al-Fiqhiyya*, 179.

[27] Khamlichi, *Compatibility of Maqasid al-Sharia,* 44-45.

[28] Khamlīshī, *al-Ijtihād,* 22-23; Khamlichi, *Compatibility of Maqasid al-Sharia,* 46.

isolation of one another.[29] Therefore, he recommends taking inspiration from ethical dimensions of out-dated juristic opinions and transmitting them in a modern legal ruling. The only condition of new rulings is that they "do not contradict an express text of Sharia or one of its decisive and conclusive ruling (*qat'ī*) or one of its fundamental tenants. This leaves a vast room for *ijtihād* and for the choice of rulings that ensure welfare (of society/parties/issue)".[30] As in al-Khamlīshī's understanding, *ijtihād al-wāqi'* is a context-centred practice of *ijtihād*; it relies on knowledge of facts and surrounding conditions of the case, rather than knowledge of texts, as in the text-centred *ijtihād. Ijtihād al-ḥukm,* that is *ijtihād* based on the ruling, strictly applies the principles and methods of *uṣūl al-fiqh*.[31] This type of practical jurisprudence, *fiqh al-wāqi'*, and its tool *ijtihād al-wāqi'* is not only called by al-Khamlīshī but also other contemporary legal scholars.[32]

3. Collective Type of Ijtihād (ijtihād jamā'i'): National/Regional Collective Ijtihād

The foundation of al-Khamlīshī's collective *ijtihād* proposal lies in his critic of classical conception on the qualifications of *mujtahid* (who is capable of exercising *ijtihād* based on the sources and methods of Islamic law). For him, the qualification of being *mujtahid* is extensively discussed in the legal theory; however, the practicability of this definition has never been debated, at least in Sunni schools. The issue of his recognition by the Ummah and availability of a method for implementing his opinions are also ignored, in a way, they were properly untested.[33] This negligence, as he argues, was also the reason for various discourses on the qualifications of *mujtahid*, accordingly different types of *ijtihād* and their being fruitless.[34]

Al-Khamlīshī argues that the reading of the revealed texts in the light of reality and experience of human civilization has clearly influenced the evolution of political thought within Muslim societies. But "we still talk about the "*mujtahid*" without paying any attention to his actual presence or absence, let alone expounding the way he should practice the issuing of binding texts with respect to all aspects and needs of society or to some of them in the event there are several legislative instances for a single society".[35] Accordingly, he examines the conditions of being *mujtahid* in two aspects: Firstly, it is impossible to check practically whether the quality and nature of the specified conditions fulfilled; and secondly, there is limited way or tool to declare the fulfillment of the specified conditions. This is why, he argues, there is no example of self-declaration of being *mujtahid* in Islamic legal history and having a consensus of his contemporaries and the Ummah. He further explains that the end of declaration of being *mujtahid* crated a new term *alim* (pl. *ulama*), since then *ijtihād* had been rarely practiced but ulama spread through *tafsir*,

[29] Rahma TV Channel, "Barnāmaj Aʿlāmu'l-Umma: Allāma Doctor Ahmad al-Khamlīshī", 00:27:33-00:30:00.

[30] Khamlichi, *Compatibility of Maqasid al-Sharia,* 46, 61.

[31] Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), 119.

[32] See for example Aḥmad al-Raysūnī, *al-Ijtihād: al-Naṣṣ, al-Wāqi', al-Maṣlaḥah* (al-Qāhira: Dār al-Kalimah, 2013).

[33] Khamlichi, *Compatibility of Maqasid al-Sharia,* 58.

[34] Khamlichi, *Compatibility of Maqasid al-Sharia,* 61.

[35] Khamlichi, *Compatibility of Maqasid al-Sharia,* 58.

hadith, *fiqh* and religious studies. This was the case started following Imam Shāfiī (d. 204/820) period and resulted with stagnation of *fiqh* and decline of *ijtihād* practices.[36] He also remarks that opinions of *mujtahid*s are considered as divine law, absolute and unable to change and so early works (7-10 centuries A.D.) became primary sources for debates of today. He explains that in theory there is a principle which states that change of *ijtihādi* provision if it does not fulfill the intended *maslaha* (benefit, interest) with it. However, there is no sign of this principle in practice as it is accepted that no *ijtihād* can repeal any other *ijtihād*. This practice constituted schools of jurisprudence (*madhhab* pl. *madhahib)* that rule the Muslim world since then.[37] Al-Khamlīshī basically critics *taqlīd* (acting upon the word of another without asking for specific proof) and argues that this unrealistic approach and unachievable conditions of being *mujtahid* created *taqlīd*. He calls this blind following of *madhhab* as the cause of closure of the gate of *ijtihād*.[38] For him, although everything has changed in the past ten centuries *fiqh* has not changed.[39]

As mentioned before *shūrā* (consultation) is called for by al-Khamlīshī in applicability of *ijtihād* today. He states "the concept of consultation that places decision-making in general matters under the competence of every member of society. They can exercise it in the way they choose in accordance with changing circumstances."[40] Within this context he proposes collective type of *ijtihād* explaining that "joined efforts in the understanding of texts and seeking the assistance of those who are more familiar with them and whom we nowadays call 'specialists'" is needed". This collective effort to interpret the text, as he argues, ensures common agreement in society and fits in custom. [41] Needless to say, in his conception, collective *ijtihād* can be exercised by man and woman, as well as ulama and non-religious scholars/professional/experts.[42]

The collective type of *ijtihād* has been called by many scholars, such as Muhammad Abduh (d.1905), Rashīd Ridā (d.1935), Muhammad Iqbal (d. 1938) and so on, starting from the beginning of 20th century. Although they all call for *ijtihād* to be exercised collectively, their proposal differed

[36] Khamlīshī, *al-Ijtihād,* 13-15.

[37] Khamlīshī, *al-Ijtihād,* 23.

[38] His views on *ijtihād*, *taqlīd* and *mujtahid* are shared not only by early reformists but also his contemporaries who call for change in Islamic jurisprudence and revival of *ijtihād*. It should also be noted that their arguments have been challenged particularly in last decades. Actually, there is a growing literature approaching the subject from different angels. See, for example, Wael B. Hallaq, "Was the Gate of Ijtihād Closed?" *International Journal of Middle East Studies* 16/1 (1984), 3-41; Id., "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihād" *Studia Islamica* 63 (1986), 129-141; Id., "Ifta' and Ijtihād in Sunni Legal Theory: A Developmental Account", *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Muhammad Khalid Masud et al. (Cambridge, MA: Harvard University Press, 1996) 33-43; Sherman Jackson, "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Muṭlaq* and *'Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī" *Islamic Law and Society* 3/2 (1996), 165-192; Haim Gerber, "Rigidity Versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Muftī Khayr al-Dīn al-Ramlī" *Islamic Law and Society* 5/2 (1998), 165-195; Ahmed Fekry Ibrahim, "Rethinking the *Taqlīd-Ijtihād* Dichotomy: A Conceptual-Historical Approach" *Journal of the American Oriental Society* 136/2 (2016), 285-303.

[39] Badereen, "The Moroccan Jurist" 4.

[40] Khamlichi, *Compatibility of Maqasid al-Sharia*, 57.

[41] Khamlichi, *Compatibility of Maqasid al-Sharia*, 16.

[42] Badereen, "The Moroccan Jurist" 3.

from each other. Al-Khamlishi's conception of collective *ijtihād* is a distinct one as it differs at various shared points, i.e. formation of the commission entitled to exercise *ijtihād*, the issues that subjected to collective *ijtihād* on, and the scope of its forcefulness. For instance, Qaradāwī calls *ijtihād* to be practiced only on issues without clear evidence and if there is no *ijmā'*. As mentioned earlier, for al-Khamlīshī it can be exercised on the subjects that there is an *ijmā'* on. Al-Qaradāwī calls collective type of *ijtihād* formed of Muslim ulama while retaining the individual *ijtihād* as parallel practice. However, similar to Ridā and Iqbal, al-Khamlīshī thinks that collective commission can include experts from outside of ulama. Al-Khamlīshī especially discusses two common characters of the proposed collective *ijtihād* commissions: independence of ulama who entitle to exercise collective *ijtihād* and their authority.[43] Within this context, al-Khamlīshī examines Muhammad Tāhir Ibn Āshūr and Yūsuf al-Qaradāwī's collective *ijtihād* proposals. For the sake of showing integrity in their proposals and the points where al-Khamlīshī argued something different, whole of the relevant text is provided below. Ibn Āshūr explains his understanding of collective *ijtihād* as follow:

"The first step that should be taken toward this crucial intellectual and scholarly objective is to form a specialist body of eminent Sharia scholars from all the juristic schools (*madhahib*) in the Muslim countries. The task of these scholars must be to study and discuss the vital needs of the Ummah so as to produce agreed upon resolutions on how the Muslim community should act in their respect. Then, they ought to convey their resolutions to all Muslim countries, and I do not have any serious doubt that Muslims will abide by their recommendations. Another duty of the members of this suggested body is to identify the Sharia scholars around the world who have attained or nearly attained the level of *ijtihād*. Once this is done, Muslim scholars must choose the best qualified among themselves to take the leading role in exercising *ijtihād*. In electing this group of scholars, special attention must be given to the following matter. Besides knowledge, this group of scholars must combine integrity and observance of the Sharia in their personal lives so that the Ummah has full confidence in their scholarly erudition and there will be no suspicion concerning the truthfulness and soundness of their recommendations."[44]

Al-Khamlīshī does not accept pan-Islamic and global character of collective *ijtihād* as proposed by Ibn Āshūr as well as early reformist Rashīd Ridā. According to al-Khamlīshī, it is not possible to limit or define "eminent Sharia scholars" or "skilled fuqaha in Sharia" from all over the world. As understood by now he is very critical about the issue of qualified authority to exercise *ijtihād* thus states 'the more important question is who is going to decide who is 'eminent and skilled Sharia scholars'"?[45] For him, this criterion is unrealistic and unpractical, as well as not suited to the socio-political structures of modern Muslim societies i.e. modern nation states where every state has own institutions and law-making authorities. Similar to Ibn Āshūr, al-Qaradāwī also emphasizes that collective *ijtihād* should be a global effort that above any limitation considering the Ummah, such as region, school of thought and nationality. He further explains as follows:

[43] Khamlīshī, *al-Ijtihād,* 17.

[44] Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Sharia,* trans. Mohamed el-Tahir el-Mesawi (London, Washington: The International Institute of Islamic Thought, 2006), 225.

[45] Khamlīshī, *al-Ijtihād,* 17.

Collective ijtihād is a collective Islamic scientific and global effort which is honourable responsibility for Muslim jurists in the world regardless of their region or madhhab or nationality. A member who is nominated to this committee, his understanding (*fiqh*) and his devotion is not for government, the system and his closeness is not for the hakim or the leader. The committee should be completely free from any influence, threat or pressure from government or power groups in society in order to produce its decision clearly and fearlessly. It should be free from any political or social pressures. The reality is most of time there is no freedom for the committee. Members of the committee are chosen by the regional/national government or the committee is funded by the government or, at least, there is no guarantee for freedom. Government generally choses one who is close to government or if they are not in favour of the government, it does not fund the committee. Therefore, it is better to gather Muslim scholars from all around the world in a conference in a specific time and place where they can choose the best and strongest opinion among them. This is going to be the scientific academy/gathering [*majma al-ilmi*] which we desired. If this committee agrees on an opinion about an ijtihādi issue, this will be accepted as consensus (*ijmāʿ*) of contemporary mujtahids. This is the authoritative opinion and shall be obliged for fatawa and law-making (*tashrī*). If they cannot reach consensus, the opinion of majority is preferred and there is no other place to find its shari answer.[46]

Al-Khamlīshī suspects about the independence of ulama appointed in a commission as such and more importantly the authority of their decisions argued to be binding the Ummah considering *ijmāʿ*.[47] He discusses that if only consensus and majority of opinion are considered to have *sharʿī* authority, does this mean that minority opinion has no *sharʿī* authority and *sharʾī* bases? Furthermore, when there is a disagreement and "there is no any other *sharʿī* authority to consult" who "decides" whether the minority opinion has *sharʿī* authority or not. The answer for al-Khamlīshī is the rulers [*hukkām*] depending on the legal principle in Islamic political legal history "The rule of law resolves conflict" [*hukm al-hākim yarfa al-khilaf*]. The rulers have the authority to decide and enforce the outcome of the commission mediating between different opinions.[48] By this understanding his collective *ijtihād* conception appears to be national or regional rather than being global character.

Al-Khamlīshī also questions the expertise of ulama commission in terms of its organisation and their expertise on discussed topic. Al-Khamlīshī emphasizes that an ulama commission is not the only way to exercise *ijtihād*. He refers to the concept of *ahl al-hall wa'l-aqd* here (those qualified to elect or depose a caliph on behalf of the Muslim community) and its capacity of covering all *ijtihād* related issues.[49] He refers to the Qur'anic principles *shūrā*[50] and *taklīf*[51]to critic ulama commission.

[46] Yūsuf al-Qaradāwī, *Ijtihād fi Sharia al-Islami,* (Kuwait: Darul Qalam, 1996), 183-184.

[47] Khamlīshī, *al-Ijtihād,* 17.

[48] Khamlīshī, *al-Ijtihād,* 19.

[49] Khamlīshī, *al-Ijtihād,* 20.

[50] "*[who] conduct their affairs by mutual consultation*", al-Shūrā 42/38.

[51] "*We have bound each human being's destiny to his neck. On the Day of Resurrection, We shall bring out a record for each of them, which they will find spread wide open, 'Read your record. Today your own soul is enough to calculate your account'. Whoever accepts guidance does so for his own good; whoever strays does so at his own peril. No soul will bear another's burden, nor do We punish until We have sent a Messenger*", al-Isrāʾ 17/13-15.

He asks "What is the shar'ī and logical base to release Muslim community from their *taqlīfī* responsibilities and isolate them from their religious beliefs and understanding of texts and to regulate their life and social affairs, and to transfer all these to a "ulama commission" in the name of "*ijtihād*" and to make them binding for all Muslims without any discussion pretexting the necessity of *taqlīd*?"[52] Al-Khamlīshī also believes that it is not possible to imagine that Muslim societies will easily positively response to this decision of the ulama commission and they will leave their constitutional institutions and its regional organizations. In any other case, it will cause disruption of social cohesion and spreads seeds of *fitna*[53], which is very much of the reality of Muslim societies.

Today, there are different councils, commissions and official bodies practicing collective type of *ijtihād* such as the International Islamic Fiqh Academy (*Majma' al Fiqh al-Islāmī ad-Duwalī)* established in 1981 in Makkah affiliated to the Organization of Islamic Cooperation, in global character as proposed by Qaradawi mentioned above. The practice of collective *ijtihād* can also be directly linked to a state such as *Majlis al-iftā'* located in University of Azhar in Egypt and the High Boards of Religious Affairs within the Presidency of Religious Affairs of Türkiye. It can be practiced linked to a Non-Governmental Organizations such as Muslim World League of Ulama in Saudi Arabia. The commission may be lack of any link to state such as *Fatwa Majlis* in Europe.[54] In fact, today's technolohical opportunities faciliate exercising collective *ijtihād* without any specific institutioal affiliation as seen in various online platforms.[55] Al-Khamlīshī criticizes all these initiatives as not being functional and useful for Muslims hence they do not bring any real change. For him, it is because all the organizations mentioned are in the opinion that new rulings should not be contradictory to existing rulings and should apply classical legal theory. Besides, their decisions are not binding and any Muslim state can browse and adopt if they wish to do so.[56] On the other hand, contradictory independent *fatwas* have increased in number causing tension and chaos in society as well as the gap between positive law and Sharia rulings deepened.[57] This is why he proposes collective *ijtihād* to be an instrument to combine Sharia law and positive law in state's institutional decision-making system by making law for all. It should be highlighted that unlike the others, his understanding of collective *ijtihād* is *national/regional ijtihād* that is confined to the demands of local issues within each individual state. It must be conducted continuously throughout the ages and in every region using the consensus of the Muslim community.

[52] Khamlīshī, *al-Ijtihād,* 20.

[53] Khamlīshī, *al-Ijtihād,* 21.

[54] For a non-conclusive list of current collective *ijtihād* institutions, see Sajila Kausar, "Collective Ijtihad: History and Current Perspective" *International Journal of Humanities&Social Sciences* 3/5 (2017), 151-163.

[55] For instance see International Centre for Collective Ijtihad (ICCI), "Collective Ijtihad" (Accessed 18 November 2023).

[56] Khamlīshī, *al-Ijtihād,* 21-22.

[57] Khamlichi, *Compatibility of Maqasid al-Sharia,* 14.

4. Ijtihād in Practice: Woman and Family Law Related Issues

In order to see al-Khamlīshī's *ijtihād* conception in practice, his general view on woman's status in Islam and definition of marriage will be examined as they are already heatedly debated issues in modern Muslim world. To begin with, for al-Khamlīshī, the on-going debate on status of Muslim woman in social life is a part of faulty approach to Sharia and undermining the distinction of its general (*kullī*) and particular (*juzī*) rulings. Particular provisions should be understood in consideration of the general (*kullī*) provisions and the main objectives of Sharia. Thus, a return to the main principles and general provisions of Sharia is needed. He states the concept of *ma'rūf* (literally; well known), which means natural way, religious and humanistic value as he defined, is used more than 20 times in the Qur'ān in relation to woman and family issues. The use of *ma'rūf* in this context, he argues, shows that *fiqh* should not make harder the relations between woman and man in society as *ma'rūf* changes with time and place. He states that there is not only religious responsibility but also social responsibility for people. Social and ontological rights and responsibilities are not only for man but also for woman. His idea of equality revolves around the idea of perfection (*takamul*) between man and woman through supporting and balancing each other. He notes traditional views on woman's education and work and argues that today *ijtihād* should be practiced on these issues in consideration of general principles of Sharia. He explains that man and woman both are *mukallaf* (who is obliged to observe religious obligations and prohibitions) and *taklīf* includes not only religious responsibility but also social responsibilities, such as work and education. Another example would be his approach to woman dressing as he emphasizes *zannī* and *wāqi'* nature of the ruling. He explains that the problem is not about what is *shar'ī* dressing and what is not but it is about its definition and limitation. Dressing is not an essential (*aslī*) issue but it is social issue depending on reality (*wāqi'*) and showing cultural and particular features. Therefore, all various opinions about dressing are *zannī*. In that case, for al-Khamlīshī, consultation (*shūrā*) as demanded by the Qur'ān is needed for formulating rules that fit into society.[58]

With the 2004 reforms in the Moroccan family law, known *Mudawwanah*, the definition of marriage changed as follows: **"**Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue and the creation of a stable family, under the supervision of both spouses according to the provisions of this *Mudawwanah"* (article 4). It is one of the main changes, which also regulates the rights and responsibilities of the spouses in family, introduced within the scope of 2004 reforms. In the previous code, it was defined as "a lawful pact between a man and a woman to unite and remain together in a permanent manner, its aim being integrity and chastity and the growth of the population of the nation by the founding of a family under the care of the husband, based on stable foundations, and requiring the contracting parties to bear its burdens in trust, peace, affection and respect" (article 1 of the Personal Status Law). Al-Khamlīshī states the marriage contract is defined in accordance to the Qur'ān "*But if you want to replace one wife with another and you have given one of*

[58] Rahma TV Channel, "Barnāmaj Aʿlāmu'l-Umma: Allāma Doctor Ahmad al-Khamlīshī", 00:18:12-00:27:31.

them a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin? And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant? [mīthāqan qhalīẓā]".[59] Al-Khamlīshī argues that the definition of marriage in classical jurisprudence is weak (*shādh*) and most of the rulings established based on this definition, such as *bud'* (vulva) and *milk al-mut'ah* (exclusive possession of pleasure) are weak (*shudhūdh*) as well. He draws attention to the current conditions of society and the issue of equality between spouses. For him, providing equality, justice and balance in spouses' rights and responsibilities is an implication of marriage being *mithāq* (covenant) and it is a way of practicing the Qur'ān (2: 187): "they are [close as] garments to you, and you are [close as] garments to them".[60]

Conclusion

Considering post independence Morocco, Aḥmad al-Khamlīshī is one of a few scholars who really worked on unification in country's legal system by showing that state law and Sharia could exist together and there is no need to eliminate the one for the other. It has not been an easy task for modern Muslim-majority states, actually there is none apart from Turkey that eliminated Sharia from their legal system or a state that does not comply with the reality of positive law. Seeing the 2004 Moroccan family law reforms introduced on the base of *ijtihād*, it can be said that al-Khamlīshī successfully delivered his task. Furthermore, he acted as a mastermind particularly in terms of the content of the reforms and their religious justifications. He adopts contextual and holistic approach by reading the revealed text in the light of reality thus acknowledging historical context of some Qur'anic injunctions. He differentiates *fiqh* and Sharia (divine law) and opposes consideration of *fiqh* as eternal part of Sharia. Within this context, al-Khamlīshī critics classical conception of *ijtihād* as well as qualifications of *mujtahid*. Like many other contemporary reformist scholars, he agrees with the claim of closure of gate of *ijtihād* and calls for revival of Islamic jurisprudence by exercising *maqāsid*-based *ijtihād* according to the lived reality and the needs and necessities of today. As *ijtihād* should be exercised continuously over time and place, *ijmā'* cannot constitute a source of law for al-Khamlīshī; therefore, the issues that jurists agreed on are open to *ijtihād* today, especially in the realm of *mu'āmalāt.* For him, every Muslim who has religiously responsible should express his/her view in a debated issue, in a way he seeks for a consensus of local Muslim community not a consensus of Muslim jurists. But only an authorized constitutional institution delivers rulings by considering different parties and views in the community as well as hearing the specialists on the subject. Al-Khamlīshī highlights *shūrā* principle and adopts it in relation to his collective *ijtihād* proposal. The commission charged with exercising *ijtihād* should include people from outside the ulama class, i.e. experts, professionals without gender specification. This is another point where his *ijtihād* understanding differs from his contemporaries. Al-Khamlīshī recognizes that one of the biggest challenges in modern Muslim societies is the authority that is entitled to formulate *shar'ī* rulings thus preventing chaos created by individual religious opinions (*fatwa*) and the clash between state law and Sharia rulings. Here,

[59] al-Nisāʾ 4/20-21.

[60] Khamlīshī, *Min Mudawwanah al-Ahwal al-Shakhsiyya 'ila Mudawwanah al-Usra I*, 71-73.

he acknowledges that the ruler plays a mediating role among different views in society and collective *ijtihād* commission as well. Thus, the ruler's ruling will be the final say on the debated subject. In the light of his views, one may argue that al-Khamlīshī's mediating role between state law and Sharia sometimes tends to lean towards the first one, that is by undermining the legal maxim "One legal interpretation does not destroy another" for the sake of another one "The lesser of the two evils is preferred". Nevertheless, Aḥmad al-Khamlīshī is a remarkable scholar with his critic of classical doctrine and his proposal for renewal of Islamic law today which diverge from his contemporaries in a number of points. Considering his contribution to family law reforms of 2004, it appears to be clear that al-Khamlīshī's views and writings need more attention and scrutiny.

Bibliography

Akhrisi, Su'ad. *Min Mudawwanah al-Ahwal al-Shakhsiyya ila Mudawwanah al-Usra: Masār al-Taʿdilāt wa Matālib al-Harakah al-Nisa'iyya.* al-Rabāṭ: Dār al-Salām, 2005.

Attia, Gamal Eldin. *Towards Realization of the Higher Intents of Islamic Law: Maqāṣid al-Sharīʿah: A Functional Approach.* London: International Institute of Islamic Thought, 2007.

Auda, Jasser. *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach.* London: International Institute of Islamic Thought, 2007.

Badereen, Nayel A. "The Moroccan Jurist al-Khamlishi: Can a Woman Become a Legislator (Mujtahid)?". *Mathal* 5/1 (2016), 1-8.

Badereen, Nayel A. *Identity and Authority: Changes in the Process of Debates over the Islamic Marriage Contract among Contemporary Muslim-Arab Intellectuals*. Arizona: University of Arizona, The School of Middle Eastern and North African Studies, PhD Thesis, 2014.

Buskens, Léon. "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere". *Islamic Law and Society* 10/1 (2003), 70-131.

Gerber, Haim. "Rigidity Versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Muftī Khayr al-Dīn al-Ramlī". *Islamic Law and Society* 5/2 (1998), 165-195.

Hallaq, Wael B. "Was the Gate of Ijtihād Closed?". *International Journal of Middle East Studies* 16/1 (1984), 3-41

Hallaq, Wael B. "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihād". *Studia Islamica* 63 (1986), 129-141.

Hallaq, Wael B. "Ifta' and Ijtihād in Sunni Legal Theory: A Developmental Account". *Islamic Legal Interpretation: Muftis and Their Fatwas*. ed. Muhammad Masud et al. 33-43. Cambridge, MA: Harvard University Press, 1996.

Horr, Zhor. *Islāh Qānūn al-Usra bi-l-Maghrib: Al-Masār wa-l-Manhajiyya*. Dār al-Bayda': al-Najāh al-Jadīda, 2015.

Ibn Ashur, Muhammad al-Tahir. *Treatise on Maqasid al-Sharia,* trans. Mohamed el-Tahir el-Mesawi. London, Washington: The International Institute of Islamic Thought, 2006.

Ibrahim, Ahmed Fekry. "Rethinking the *Taqlīd-Ijtihād* Dichotomy: A Conceptual-Historical Approach". *Journal of the American Oriental Society* 136/2 (2016), 285-303.

International Centre for Collective Ijtihad (ICCI). "Collective Ijtihad". Accessed 18 November 2023. https://www.collectiveijtihad.org/

Jackson, Sherman A. "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Muṭlaq* and *ʿĀmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī". *Islamic Law and Society* 3/2 (1996), 165-192.

Kamali, Mohammad Hashim. *Maqāṣid al-Sharīʿah, Ijtihad and Civilisational Renewal.* London: International Institute of Islamic Thought, 2012.

Kausar, Sajila. "Collective Ijtihad: History and Current Perspective". *International Journal of Humanities&Social Sciences* 3/5 (2017), 151-163.

Khamlīshī, Aḥmad. *Usra wa-l-Tifl wa-l-Mar'a Usūl al-Fiqh wa al-Fikr al-Fiqhi.* al-Rabāṭ: Dār Nashr al-Maʿrifah, 1998.

Khamlīshī, Aḥmad. *al-Fikr al-Fiqhī wa Muntalaqāt Usūl al-Fiqh*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2000.

Khamlīshī, Aḥmad. *Khalal yajib al-wa'yu bih*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2002.

Khamlīshī, Aḥmad. *Limāzā Lā Narbid Bayna at-Tanzīr wa-l-Mumārasa*. Dār al-Bayda': al-Najāh al-Jadīda, 2004.

Khamlīshī, Aḥmad. *Jumūd al-Dirāsāt al-Fiqhiyya*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2010.

Khamlīshī, Aḥmad. *al-Ijtihād: Taṣawwurān wa-Mumārasa*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2010.

Khamlīshī, Aḥmad. *Min Mudawwanah al-Ahwal al-Shakhsiyya 'ila Mudawwanah al-Usra I*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2012.

Khamlīshī, Aḥmad. "The Relationship between Religion and the State: the Institution of 'Commandment of the Faithful' in Morocco". *Contemporary Arab Affairs* 7/1 (2014), 54-81.

Khamlīshī, Aḥmad. *Compatibility of Maqasid al-Sharia (Finalities and Purposes of the Islamic Law) with International Legislation on Refugees. trans. Fatima Laaouina*. Rabat: Islamic Educational, Scientific and Cultural Organization, 2014.

Khamlīshī, Aḥmad. *Afkār li Munaqasha I-II-III*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2013, 2015, 2016.

Khamlīshī, Aḥmad. *Limāzā Lam Yatahaqqaq al-Islāh al-Marghūb fīhi fī Fiqh al-Mu'āmalāt*. al-Rabāṭ: Dār Nashr al-Maʿrifah, 2020.

Magress. "Hommage au Pr. Ahmed El Khamlichi: Un pionnier de la réforme de la pensée et de l'Ijtihad". Accessed 21 November 2023. http://www.maghress.com/fr/albayane/7695

Morocco World News. "King Mohammed VI Appoints Members of Judiciary Supreme Council". Accessed 21 November 2023. https://www.moroccoworldnews.com/2017/04/213248/king-mohammed-vi-appoints-members-judiciary-supreme-council/

Morocco World News. "Public debates on Moroccan abortion and inheritance law". Accessed 21 November 2023. https://www.moroccoworldnews.com

Opwis, Felicitas. "New Trends in Islamic Legal Theory: Maqāṣid al-Sharīʿa as a New Source of Law?". *Die Welt des Islams* 57/1 (2017), 7-32.

Qaradāwī, Yūsuf. *Ijtihād fi Sharia al-Islami*. Kuwait: Darul Qalam, 1996.

Rahma TV Channel. "Barnāmaj Aʿlāmu'l-Umma: Allāma Doctor Ahmad al-Khamlīshī". *YouTube*. Accessed 21 November 2023. https://www.youtube.com/watch?v=Xk9pCXcnTx4

Raysūnī, Aḥmad. *al-Ijtihād: al-Naṣṣ, al-Wāqiʿ, al-Maṣlaḥah*. al-Qāhira: Dār al-Kalimah, 2013.

Raysūnī, Aḥmad. *Muḥāḍarāt fī Maqāṣid al-Shariʿah*. al-Qāhira: Dār al-Kalimah, 2010.

The constitution of Morocco of 2011. trans. William S. Hein & Co., 2012. Accessed 21 November 2023. https://www.constituteproject.org/constitution/Morocco_2011?lang=en

The Qur'an, trans. M. A. S. Abdel Haleem. Oxford: Oxford University Press, 2010.

Vogel, Frank. *Islamic Law and Legal System: Studies of Saudi Arabia*. Leiden: Brill, 2000.

Yavuz, Miyase. "Allah (God), al-Watan (the Nation), al-Malik (the King), and the Role of Ijtihād in the Family Law Reforms of Morocco". *Journal of the Middle East and Africa* 7/2 (2016), 207-227.