

THE DYNAMICS OF ISLAMIC FAMILY LAW REFORM IN MOROCCO ON GUARDIANS OF MARRIAGE

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Abstract: : Islamic law reform must be carried out in response to the demands of change in society. One of the law's Islamic universalities comes from adaptability and flexibility. Morocco reformed Islamic family law in the twentieth century in connection with reform. The history states that between 1912-1956 Morocco was under French and Spanish political domination. The follow-up of efforts to develop the codification of family law was on August 19 1957, in Morocco, whose inhabitants were followers of the Maliki school of thought, codifying from 1957 to 1958, producing Mudawwamah al-Ahwal al-Syakhsiyyah. The history birth of Moroccan Law began on December 6, 1957 (13 Jumadil Awal 1377) with the issuance of the King's decree dated November 22, 1957 (28 Rabiul Thani 1377), announcing the distribution of the law on marriage and divorce. Morocco made history again in 2004, and Morocco carried out a reform of Islamic family law. It is one of the countries that give legal permission to a woman, both girl and widow marry herself without a guardian in its Mudawwah al-Usrah. Efforts to reform this law cannot be separated from the role of King Muhammad VI and the Progressive Feminism Movement.

Keywords: family, law reform, marriage guardian, Mudawwanah al-Usra

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Abstrak: Pembaruan hukum Islam harus dilakukan dalam memberikan respon terhadap tuntutan perubahan yang terjadi di tengah masyarakat. Dikatakan demikian karena salah satu bentuk dari universalitas hukum Islam dilihat dari daya adaptabilitas dan fleksibilitas hukum Islam itu sendiri. Berhubungan dengan pembaruan, Maroko melakukan pembaruan hukum keluarga Islam pada abad ke 20-an. Sejarah menyatakan bahwa antara tahun 1912-1956 Maroko ada di bawah dominasi politik Prancis dan Spanyol. Tindak lanjut dari upaya mengembangkan kodifikasi hukum keluarga adalah pada tanggal 19 Agustus 1957, Maroko, yang penduduknya adalah pengikut madzhab Maliki, melakukan kodifikasi selama tahun 1957 sampai 1958 menghasilkan *Mudawwanah al-Ahwal al-Syakhsiyyah*. Sejarah lahirnya UU Maroko berawal pada tanggal 6 Desember 1957 (13 Jumadil Awal 1377) dengan terbitnya dekret Raja yang bertanggal 22 November 1957 (28 Rabiul Thani 1377), mengumumkan akan lahirnya UU perkawinan dan perceraian. Maroko mencatat sejarah lagi pada tahun 2004, Maroko melakukan pembaruan hukum keluarga Islam yakni salah satu negara yang memberi izin legal kepada seorang wanita baik gadis maupun janda untuk menikahkannya sendiri tanpa wali di dalam *Mudawwanah al-Usrahnya*, upaya pembaruan hukum ini tidak dapat dilepaskan dari peran Raja Muhammad VI dan Gerakan Feminisme yang Progresif. Kata Kunci: pembaruan hukum, keluarga, wali nikah, *Mudawwanah al-Usra*

Introduction

Islamic law reform refers to something that has existed (existing) experiencing changes that cannot be measured (qualitative) as a product that interacts directly with society.¹

¹ Sutrisno, *Epistimologi Hukum Islam Kontemporer* (Yogyakarta: CV Pustaka Ilmu Group, 2019), 94.

Referring to existing legal products by adjusting the social conditions of society. As in the rules of fiqh:

تَغْيِيرُ الْفَتَاوَى وَاجْتِلَافُهَا بِحَسَبِ تَغْيِيرِ الْأَزْمَنِ وَالْأَمَكَيْنَةِ وَالْأَحْوَالِ وَالْعَوَائِدِ وَالْبَيِّنَاتِ

This means: "Changes and differences in legal fatwas, based on differences in time, place, conditions, customs (traditions) and purpose or intention."²

One of the Muslim countries that reformed Islamic family law is Morocco. Morocco is called al Mamlakah al-Maghribiyah, which is a royal state located in the North-West of Africa. Geographically, the northern part of the country borders the Mediterranean, the eastern part with Algeria, the southeast and south bordering the Sahara of France and Spain, the West borders the Atlantic Ocean.³

The indigenous people of Morocco have a lineage that goes back to the Prophet. The majority of the country's Muslim population follow the Maliki school of thought. In mid-1991, the total population amounted to about 27 people. And more than 99% of the population is Sunni Muslim. The Jewish

² Dusky Ibrahim, *al-Qowaid al-Fiqhiyyah* (Palembang: Noer Fikri, 2019), 203.

³ Atho' Mudhar dan Khairudin Nasution, *"Hukum Keluarga di Dunia Islam Modern"* (Jakarta: Ciputan Press, 2003), 96.

population is estimated to be less than 8,000, with the majority living in Casablanca and the coastal towns.⁴

Morocco gained independence from France in 1956 and Spain relinquished authority over most Moroccan possessions during the same period. The status of Western Sahara remains unresolved pending a UN-sponsored referendum. The colonial legal system influenced the development of Morocco's legal system. Whereas sharia courts continued to apply Maliki fiqh for family law, local courts applied customary law. After independence in 1956, the Personal Status Code (al-Mudawwana) was published, based on Maliki doctrine.⁵

The country was still under the political domination of Spain and France. During this period, the country's laws were still closely linked to the legal systems of these two countries, especially in civil law.⁶ The country declared its independence on August 19, 1957. Morocco's predominantly Muslim population then codified the law during 1957-1958 and produced a Mudawwanah Ahwal al-Syakhsyah. As a

⁴ Atho' Mudhar dan Khairudin Nasution, *"Hukum Keluarga di Dunia Islam Modern"* (Jakarta: Ciputan Press, 2003), 96-97.

⁵ Islamic Family Law,"Morocco, Kingdom of (& Western Sahara)", di <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/morocco-kingdom-of-western-sahara/>, accessed on April 24, 2022.

⁶ Atho' Mudhar dan Khairudin Nasution, *"Hukum Keluarga di Dunia Islam Modern"* (Jakarta: Ciputan Press, 2003), 106.

forerunner of the birth of Moroccan Law. The process of codifying Moroccan law began on December 6, 1957 with the issuance of the "King's Decree on November 22, 1957 (28 Rabiul Thani 1377)". From this process, the birth of the marriage and divorce law or Code of Personal Status and Inheritance was also announced.⁷

Then, on August 19, 1957, a Law Reform Commission was established by royal decree. This commission was tasked with drafting a law that dealt with personal law and inheritance rights. The law was drafted and based on:⁸

1. The principles that apply in several schools of Islamic law (fiqh), particularly the Maliki school.
2. The main and most important doctrine of Mashlahah Mursalah.⁹
3. Some laws that have been used in some other Muslim countries.

⁷ Khairudin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim* (Yogyakarta: Academia + Tazzafa, 2013), 174-175.

⁸ Tahir Mahmood, *Family Law Reform in The Muslim World*, (Bombay: N. M. Tripathi, 1972), 115.

⁹ With referential syari' in legal determination was goodness which became iilat in its determination according to scholars of ushul it was called goodness of syari'.

After independence, Morocco began to legislate in the area of family law, which had previously been governed by Qadi Maliki thought. The codified form of civil status law, known as *mudawwana*, was drafted by a commission appointed by King Mohammad V and composed of scholars, including 'Allal al-Fasi (d. 1974), a leading figure of Moroccan Salafist reformism who in his writings dared to advance bold legal reforms related to women's rights, such as abolishing marital guardianship, prohibiting polygamy, and introducing compensation for divorced wives regardless of the reason for divorce, based on an attempt to interpret various religious texts (*ijtihad*) to suit the needs of contemporary social realities.

However, these innovative ideas were not accepted by other members of the commission, including learned scholars such as Mohammed Belarbi Alaoui (d. 1964) and Mukhtar as-Soussi (d. 1963). *Mudawwana*, which was later ratified in 1958, faithfully reproduced certain dogmatic legal rules devised by Maliki *fuqaha* for a past and a context that no longer suited the social context and realities of 20th century Morocco.

Regarding guardianship, there is a fundamental difference of opinion regarding the guardianship of mature and healthy women. The difference of opinion is between the Maliki school (followed by the majority of Moroccans) and the Hanbali school. The Hanbali school of thought states that a woman who

is mature and of sound mind is still considered a girl, so the right to marry rests with her guardian. But unlike a widow, the right belongs to her and her guardian. A guardian has no right to marry a widow without her consent. Conversely, a widow has no right to marry without the blessing of her guardian, and it is her guardian's right to make the marriage contract.

Contrary to the Hanafi view, an adult, healthy woman has the right to choose her future husband and also to solemnize her own marriage, whether she is a virgin or a widow. So there is no difference in the right to choose between a virgin and a widow. With proof that there must be intact blood ties between her and her prospective husband.

Regarding guardianship, in the first mudawwanah of family law reform in 1957-1958 A.D. it was stipulated that

مدونة الأحوال الشخصية قبل التعديل تنص على ضرورة الويل لكل من الرشيدة وعتما يف الفصل

الثاني عشر.¹⁰

Mudawwanah ahwal al-syakhsiyyah 1957-1958 CE, which determined the need for a guardian for every woman of sound mind. After the amendment process, there was a qanun mudawwanatil usrah that abolished female guardianship.

¹⁰ أ.د. الم كي اقلانية، من مدونة الأحوال الشخصية المغربية إلى مدونة الأسرة، كلية الشريعة والدراسات الإسلامية جامعة قطر، 3

Morocco undertook another Islamic family law reform, becoming one of the few countries to grant legal permission for a woman, whether a girl or a widow, to marry without a guardian. The country's Islamic family law was amended in 2004, stating only that the presence of a guardian is optional for adult women, regardless of whether they have a father or are orphans. - Usra revoked guardianship and/or gave legal permission for a woman to marry without the guardian's consent. One of the reforms was:

المادة 24: الولاية حق للمرأة، تمارسه الزادة حسب اختيارها ومصلحتها¹¹

Article 24: guardianship of marriage is a right that women have. Adult women have this right according to their choice and interests.

المادة 25: للراشدة ان تعقد زواجها بنفسها, اوتفوض ذلك لأبيها لو لاحد افا ربها¹²

Article 25: An adult woman may solemnize her own marriage or may appoint her father or delegate one of her brothers to do so.

After conducting the family law reform process in 2004, the results obtained; the position of the marriage guardian which was regulated in the previous article 24, it can be concluded that; the right of guardianship in marriage becomes

¹¹ القانون رقم 03.70 بمثابة مدونة الأسرة

¹² القانون رقم 03.70 بمثابة مدونة الأسرة

the right of an adult woman without having to ask for the consent of the guardian and may marry herself without a guardian.

The existence of article 25 is that a woman who is about to enter into marriage may perform her own marriage with a man of her choice or appoint a guardian to marry her. The provisions of article 25 have abolished the position of marriage guardian who is also wali adhol because wali adhol arises from the right of guardianship for parents to their daughters, while in the new rule that the marriage contract is in the hands of the bride even though the existence of a guardian is due to the will of the woman to submit guardianship to her parents or guardian.¹³

Looking at the Islamic family law in Jordan, it follows the Hanafi way of thinking about marriage guardians. It seems that the Moroccan state is trying to be bolder and different in its decision by enacting a law on the authority of women in marriage. The Moroccan state considers custody not the absolute right of the guardian, but the patent right of the girl herself.

Looking at the current course of legal history in Morocco, the majority of Muslims in the country adhere to the Maliki

¹³ Nasiri, "Perkawinan di Maroko," *Pendidikan dan Pranata Islam*, no.1 (March, 2017):19.

school of thought, while in marriage guardianship is only one of the conditions for the validity of the marriage contract. And in the Mudawwanah al-Usra decision, the Law of Wives no longer follows the Maliki school of thought. Although in general, Maliki thought is a guideline in the daily life of the local community. And the results of the Moroccan family law reform, but taking into account the opinion of the Hanafi school, namely; legalizing women to marry without a guardian.

In terms of the nature of the reform, then the family law reform carried out by the Moroccan government is included in the category of educational reform, namely. modernization of Islamic family law, which is carried out by combining several madhhabs. Adopting the thoughts or opinions of other pesantren. With this in mind, researchers are interested in conducting in-depth research on how the rationale for the renewal of the law in Morocco on marriage; and How is the renewal of Islamic family law on marriage guardians in Morocco.

Research Method

This research deploys qualitative method with Normative Legal research, where Normative Legal research is also called Doctrinal Legal research. The approaches used are statute approach, historical approach, conceptual approach.

Discussion

1. Rationale for the reform of Moroccan law on marriage guardians

History states between 1912-1956 Morocco was under the political domination of France and Spain. The legal systems of these two countries colored many local laws in Morocco, especially in civil law. As for Islamic family law, it still refers to the Maliki madzhab. However, due to the large influence of Spanish and French laws, Islamic family law is also slightly colored by the two legal systems in addition to the existing local laws. Seeing the condition of Islamic family law, the state is called to codify the law as well as to reform the family law, this is very intense when Morocco can release from the shackles of colonialism.¹⁴

Moroccan obtained its independence in 1956. Following the efforts to develop the codification of family law on August 19, 1957, Morocco, whose population is followers of the Maliki madhhab, codified during 1957 to 1958 resulting in *Mudawwamah al-Ahwal al-Syakhsiyyah*.

¹⁴ Fahroodin, *Pembaruan Hukum Keluarga di Maroko (Studi atas Perempuan tidak Membutuhkan Izin Wali untuk Menikah dalam Kajian Sosio-Historis)*, (Pekalongan: Pascasarjana STAIN Pekalongan, 2014), 83.

The history of the birth of Moroccan law began on December 6, 1957 (13 Jumadil Awal 1377) with the issuance of the King's decree dated November 22, 1957 (28 Rabiul Thani 1377), announcing the birth of a marriage and divorce law (Code of Personal Status and Inheritance). Finally, the first family law covering marriage and divorce came into force throughout the kingdom on January 1, 1958, named *Mudawwanah al-Ahwal al-Syahiyyah*, which consists of 300 paragraphs and six sections.

This is the result of the work of a committee established on August 19, 1957 (22 Muharram 1377) by a royal decree to draft a family law law, including inheritance.¹⁵ The drafting of this law is based on three main sources;¹⁶

- 1) Some of the legal principles of the madhhabs of Islamic law (fiqh), particularly the Maliki madhhab that Moroccan Muslims follow.
- 2) The doctrine of *maslahah mursalah*
- 3) Laws enacted in several other Muslim countries.

¹⁵ Khairudin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim* (Yogyakarta: Academia + Tazzafa, 2013), 174-175.

¹⁶ Atho' Mudhar dan Khairudin Nasution, *"Hukum Keluarga di Dunia Islam Modern"* (Jakarta: Ciputan Press, 2003), 107-108.

This plan officially became law in 1958 and was named *Mudawwanah al-Ahwal al-Syakhsiyyah*. Most of the rules in the law are based on the Maliki madhhab which is generally and long-established in Morocco.

Throughout the times, Morocco has recorded history again in early February 2004, because it managed to revise the *Mudawwanah al-Ahwal al-Syakhsiyyah* which has been running for almost half a century. This legal reform effort cannot be separated from the role of King Muhammad VI who has inherited the leadership of his father King Hasan II since July 1999.¹⁷

Initially, the need to revise family law was intended to ensure justice for both men and women. But this only became a discourse that was always discussed everywhere up to the kingdom. And after a long process, the demand for changes to the family law received a positive response from the King.

People had high hopes that a new era of reform was about to begin in Morocco. Six months into his reign, Muhammad VI was troubled by demonstrations demanding or rejecting the enforcement of women's rights

¹⁷ Khairudin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim* (Yogyakarta: Academia + Tazzafa, 2013), 175.

in the cities of Casablanca and Rabat. In the face of this open confrontation between liberals and conservatives, the King played his traditional role as arbitrator and mediator.¹⁸

On March 5, 2001, King Muhammad VI met with women's representatives from political parties and human rights organizations, and announced the establishment of a royal commission tasked with preparing to reform family law. The commission was chaired by a Supreme Court Justice, and included the elite of society, men and women, clerics, representatives of traditional and liberal intellectual political parties, independent groups, human rights activists and women's NGOs.¹⁹

The reform of family law in a country is claimed to realize the equal wishes of all Moroccan citizens, both men and women by adopting Islamic principles of tolerance in protecting human dignity and proving that Islam can develop dynamically and contextually throughout the ages.

¹⁸ Fatima Harrak, *"The History and Significance of the New Moroccan Family Code"*. (Institut for the Study of Islamic Thought in Africa, (Northwestern University: Working Paper Series No. 09-002 March 2009), 5-6.

¹⁹ Fatima Harrak, *"The History and Significance of the New Moroccan Family Code"*. (Institut for the Study of Islamic Thought in Africa, (Northwestern University: Working Paper Series No. 09-002 March 2009), 6.

On October 10, 2003, the King officially delivered his speech on the process of reforming the more modern family law. King Muhammad VI said that the new family law was meant to free women from injustice, protect the rights of children, and preserve the dignity of men in accordance with the principles of the Maliki school of thought and the tradition of *ijtihad*.

As the leader of all Moroccan society, King Muhammad VI did not legislate for a particular stratum of society or party. Instead, he seeks to pass laws that reflect the general will of the nation he considers his family.²⁰

The new family law was ratified in January 2004 after lengthy discussions and with some changes. The reform of the family law in 2004 was the most important event in the area of Islamic law in Morocco since the codification of the *Mudawwanah* in 1957-1958. The symbolic continuity of the new law with tradition, as well as the changes, has been expressed under the name *Mudawwanah al-Usra*.

Mohammad VI established the relatively liberal reforms of *Mudawwanah*. He announced it in a speech at

²⁰ Fatima Harrak, “*The History and Significance of the New Moroccan Family Code*”. (*Institute for the Study of Islamic Thought in Africa*, (Northwestern University: Working Paper Series No. 09-002 March 2009), 6.

the opening of the new parliamentary year in the fall of 2003. And for the first time, Islamic family law in Morocco became the subject of parliamentary debate. PJD Islam representatives proposed several amendments, but in the end both parties unanimously decided on the new family law. On February 3, 2004, King Muhammad VI inaugurated the new *Mudawwanah al-Usra* through an official government bulletin, and the new family law had an immediate impact on society.²¹

2. Polemics over Family Law Reform in Morocco

Morocco's family law (*Mudawwanah al-Usrah* 2004) became controversial among the population itself. Initially, Islamists such as the Minister of Waqf and Islamic Religious Affairs and traditional Moroccan clergy faced many challenges when these reforms in Morocco were loaded with significant benefits and foreign aid.

At the same time, feminists support and fight for its implementation. The tug of war over some family law concepts seems endless. The state and society interpret some concepts of family law reform differently. All claim to

²¹ Leon Buskens, "Sharia and National Law in Morocco," dalam *Sharia Incorporated, A Comparative Overview of the Legal System of the Legal System of Twelve Muslim Countries in Past and Presen*, Jan Michiel Otto (Leiden: Leiden University, 2010), 109.

be intellectually and actively behind the debate on the reform and authorship of Moroccan family law.

a) Legal self-help group reform

The group defines the universal mandate as human rights treaties and international agreements to eliminate all forms of discrimination against women in family law reform. They belong to a coalition of modernist movements, women's organizations, human rights organizations and left-wing political parties, which are highly skeptical of the ability of Islamist groups to keep up with the development of Moroccan society and, in particular, seek modernization in all areas related to equality between men and women to guarantee women.

Through the UAF (United Organization for Women's Action), they carried out activities such as starting a family law reform campaign on March 3, 1992, lobbying the World Bank during 1995, and establishing Le Plan d'Action National pour l'Integration de la Femme au Development (PANIFD, Action Plan for the Integration of Women in Development) in 1999 that laid out a strategic plan for how

The Dynamics of Islamic Family Law Reform in Morocco on Guardians of Marriage and why Moroccan women were making changes to family law.²²

The protection of women's rights can only be achieved through modernization, by purging family law of religious influence and abolishing all national laws that contradict human rights, as stipulated in human rights treaties and international conventions. They reject the claim that ulama have the exclusive right to interpret Islam.

This legal reform advocacy group believes that family law originates from a sacred source of law and then becomes a legal construction and human understanding. This law is a product of fiqh developed by previous jurists in certain historical, social and economic situations at that time. The product of fiqh is open to ijtihad and reinterpretation according to the needs of time and place. The rules contained in the CEDEW are a clear international legal mandate to eliminate gender discrimination. It is more in line with Sharia law than the family laws prevailing in Muslim countries today. The construction of the rights of those who experience marital inequality is due to an

²² Global Non-violent Action Database 2012. "Moroccan Feminist Group Campaign to Reform Moudawana (Personal Status Code/Islamic Family Law), 1992-2004, dalam <http://nvdatabase.swarthmore.edu/content/moroccan-feminist-groups-campaign-reformmoudawana-personal-status-codeislamic-family-law-19>, diakses 20 desember 2019.

inaccurate reading of the text through patriarchal language and concepts, which are considered the sacred plan of society. Although family law reforms have not met all the demands of liberal or secular feminist groups, these efforts are very important and interesting to watch because they dismantle the old belief that family law cannot be reformed. Finally, family law reform must be implemented to realize the ideals of population reform.

a) Groups that oppose family law reform

Despite the support of secular or liberal feminist groups, Morocco's family law reform has not been without opposition from certain groups. This group uses Islam and core Islamic values as a framework for family law reform. They belong to a coalition of Islamic movements and traditional clerics who, in the name of cultural authenticity and religious identity, reject the idea of the universality of human rights written into international treaties.

Despite support from secular or liberal feminist groups, Morocco's family law reforms have not been without opposition from certain groups. These groups use Islam and core Islamic values as a framework for family law reform. They belong to a coalition of Islamic movements and traditional clerics who, in the name of cultural authenticity and religious identity, reject the notion of

universality of human rights written into international treaties.

Their rejection of feminist groups also targeted the references that those feminist groups used to update the new project on family law. It is this disagreement about the framework that ultimately creates an ideological clash between Islamists and liberals or cell feminists in Morocco.

They accused the king of succumbing to pressure from Europe and the United States. Nadia Yassin, spokeswoman for the women's group *al-'adl wa al-ihsan*, said these reforms will only satisfy the wishes of foreigners and the feminist movement, but will not bring real change in the lives of Moroccan women.

The king is the only one who has the right to change the family law after consulting with the "Ulama" beforehand, on the other hand, the emergence of Islamic law is the result of various differences of opinion in response to controversies, shortcomings and current problems in Islamic law according to the following rules of *fiqh*:

حُكْمُ الْحَاكِمِ يَرْفَعُ الْخِلَافَ

Which means: "Government decisions eliminate dissent"²³

The disappearance or elimination of differences of opinion (Khilaf which then brings harm) is because the standard of maslahat (which is guided by shara' and reason) of the people is put forward, instead of the ego of each group and group. This is in line with what is stated by other fiqh rules:

تَصَرَّفُ الْإِمَامُ عَلَى رَعِيَّةٍ مُنَوَّطٍ بِالْمَصْلَحَةِ

Which means: "The ruler's policy towards his people depends on maslahat."²⁴

In addition, the Islamic group al-'adlwa al-ihsan claims to be the first group to support family law reform and is also responsible for its legal products. This view is consistent with the theory that law reflects political and social pressures and values that have developed over time in a given society.

Although Moroccan feminists often equate this with traditionalist, anti-reform groups. But in reality, this group keeps repeating the slogan of returning to sharia in all

²³ Miftahul Huda, *Hukum Keluarga*, (Malang: Setara Press, 2018), 28.

²⁴ Dusky Ibrahim, *al-Qowaid al-Fiqhiyyah* (Palembang: Noer Fikri, 2019), 109.

aspects of public life. This puts them squarely in the feminist camp to compete for public relations and government. The above groups are technically banned. They use religious and national identity claims that position feminist groups as outsiders. They do not oppose the integration of women in development, but reject Westernization and Western status. Believing that PANIFD violated Sharia law, they persuaded the government to withdraw its support for the family law reform plan due to Sharia violations. Based on the theory put forward earlier, it seems that the aim of the groups constructed above is to unify society through conservative Islamic ideology.

3. Islamic Family Law Update on Wali Nikah in Morocco

The provisions for marriage guardians are contained in several articles, including the following:

المادة 13: يجب أن تتوفر في عقد الزواج اشروط الاتية:

1. أهلية الزوج والزوجه,
2. عدم الاتفاق على إسقاط الصداق,
3. ولي الزواج عند الاقتضاء,
4. سماع العدلين التصريح بالإيجاب والقبول من الزوجين وتوثيقه,

Article 13

(3) A guardian in marriage is not a necessity, but is present only when such a guardian is required.²⁵

المادة 17

يتم عقد الزواج بحضور أطرافه، غير أنه يمكن التوكيل على إبرامه، بإذن من قاضي الأسرة،

المكلف بالزواج وفق الشروط الآتية:

1. وجود ظروف خاصة، لايتأتى معها للموكل أن يقوم بإبرام عقد الزواج بنفسه.
2. تحرير وكالة عقد الزواج في ورقة رسمية أو عرفية، مصادق على توقيع الموكل فيها.
3. أن يكون الوكيل راشدا متمتعا بكامل أهلية المدنية، وفي حالة توكيله من الولي يجب أن تتوافر فيه شروط الولاية.
4. أن يعين الموكل في الوكالة اسم الزوج ومواصفاته، والمعلومات المتعلقة بهويته، وكل المعلومات التي يرى فائدة في ذكرها.

²⁵ *Mudawwanah al-Usrah* Pasal 13: suggesting that some features to be completed in a marriage are as follows: (1) both parties are legally reliable; (2) No intention to break the dowry (mahar); (3) A wali (escort) is relatively required; (4) Two male adults as witnesses (also MORA officer to legally notes the marriage) of tie-the-knot occasion declared by both bride & groom; (5) No specific constraints to legally proclaim the marriage.

5. أن تتضمن الوكالة قدر الصداق، وعند الاقتضاء المعجل منه والمؤجل. وللموكل أن يحدد

الشروط التي يريد إدراجها في العقد والشروط التي يقبلها من الطرف الآخر.

6. أن يؤشر القاضي المذكور على الوكالة بعد التأكد من توفرها على الشروط المطلوبة.

Article 17

Marriages in which a guardian is used must be expressed by a power of attorney from the prospective bride and groom.

المادة 18

ليس للقاضي أن يتولى بنفسه، تزويج من له الولاية عليه من نفسه ولا من أصوله ولا من فروعهم.

Article 18

A guardian may not marry the woman for whom he is guardian.

المادة 24: الولاية حق للمرأة، تمارسه الزادة حسب اختيارها ومصلحتها²⁶

Article 24

²⁶ القانون رقم 03.70 بمثابة مدونة الأسرة

Guardianship in marriage is a woman's full right, where she can make her own choice without any intervention from others regarding her future husband.

المادة 25: للراشدة ان تعقد زواجها بنفسها, او تفوض ذلك لأبيها لو لاحتد افارها²⁷

Article 25

A woman who is legally competent may give herself in marriage to another man or delegate her marriage to her guardian (father or one of her relatives).

The following is a detailed discussion of the position of the marriage guardian in *Mudawwanah al-Usrah*:

a. Escort / father (Wali Nikah) if Required

Establishing the laws and regulations regarding guardianship, Islam refers to the words of Allah SWT regarding the importance of maintaining property, especially the maintenance of the property of orphans who have been abandoned by their parents. In this case Allah says:

وَأَتُوا الْيَتَامَىٰ أَمْوَالَهُمْ وَلَا تَتَبَدَّلُوا الْخَبِيثَ بِالطَّيِّبِ وَلَا تَأْكُلُوا أَمْوَالَهُمْ إِلَىٰ أَمْوَالِكُمْ إِنَّهُ كَانَ
خُوبًا كَبِيرًا

²⁷ القانون رقم 03.70 بمثابة مدونة الأسرة

Which means: "And give to the orphans (who have reached puberty) their property, and do not exchange good for bad, and do not eat of their property with your own. Verily, these acts (of exchanging and eating) are grave sins." (Q.S. An-Nisa' [4]: 2)²⁸

This verse becomes a legal basis for anyone to be fully responsible for the orphan's property, not to use arbitrarily the inheritance of the orphan's parents. Explicitly, it can be understood that the verse confirms that the maintenance and protection of orphans' property is very necessary and important until they are able to manage and use their property properly (adulthood). So, if the orphans are not yet able to use their money according to their needs, then the management and protection of their property is left entirely to their guardians. As explained in the next word of Allah Swt:

وَبُنْتُلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ ءَانَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَن يَكْبَرُوا وَمَنْ كَانَ غَنِيًّا فَلْيَسَّ تَعْفِيفٌ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهَدُوا عَلَيْهِمْ وَكَفَىٰ بِاللَّهِ حَسِيبًا

²⁸ Kementerian Agama RI, *Al-Qur'an dan Terjemahnya*, (Jakarta: Darussunnah, 2017), 77.

Which means: "And test the orphans until they are old enough to marry. Then if you think they are of sound mind, then distribute to them their property. And do not eat the orphan's wealth beyond the limits of propriety and (do not) be hasty (in spending it) before they come of age. Whoever (of the guardians) is able, let him refrain (from consuming the orphan's property) and whoever is poor, let him eat of it as he sees fit. Then, when you dispose of their property, you shall appoint witnesses for them of the disposition. And Allah is sufficient as a supervisor (of the transfer)." (Q.S. An-nisa' [4]: 6)²⁹

Based on the explanation of the verse, it is clear that in the management of the property of orphans who are adults can be taken responsibility for the use of their own property. Thus we can draw the qiyasnya (orphan affairs) that an adult woman can be responsible and take care of herself, allowing her to depend on a guardian, including in matters of marriage.

The existence of a guardian is necessary for women who are not mature or legally capable for certain reasons that have been justified by the judge,

²⁹ Kementerian Agama RI, *Al-Qur'an dan Terjemahnya*, 77.

because Moroccan women can marry if they are 18 years old.³⁰

b. Power of Attorney for Marriages Involving a Guardian

One of the requirements for couples who are getting married is that they must be legally competent, mature and at least 18 years old. Considering this requirement is one proof of a woman's ability and readiness to build a household in Morocco. However, there is a possibility for the prospective bride to delegate the marriage guardian with a power of attorney. In marriage, this power of attorney serves as an indication that the woman uses a guardian and a form of marriage registration. It also serves to prevent the guardian from being overly restrictive in his authority to approve his daughter's marriage.³¹

In detail and contextually, there is no explicit evidence, either in the Qur'an or Hadith, which states that the power of attorney for a marriage using a guardian is one of the measures of the validity of the

³⁰ Pasal 19, *Mudawana Al-Usrah*.

³¹ Nelli Fauziah, *Pembaruan Hukum Keluarga di Indonesia dan Maroko (Studi Komparasi atas kedudukan wali nikah)* (Yogyakarta: UIN Sunan Kalijaga, 2018), 100.

marriage. This is to emphasize that the guardian should not impose his will and should not be arbitrary in using his role towards the woman who authorizes it. From this, the importance of a power of attorney for marriages using a guardian is very important and necessary.

c. The guardian is not allowed to marry the woman for whom he is guardian

This position warns that the wali of marriage cannot act arbitrarily because he is the wali or guardian. Because if the person who is the guardian can marry her (the woman who is the guardian), the freedom of the guardian is not respected. In addition, it also makes sense for there to be excessive restrictions on the trustee.

An example of such a breakdown would be a daughter, and then she was adopted. In general, there is no obstacle at all for a person who has the right to refuse marriage to his adopted child, and the law can legally do so. For example, a guardian (uncle) can marry a woman under his care, such as the daughter of an uncle (niece of the guardian). However, this (Moroccan) law severely restricts this, because if he

were normally allowed to do so, the guardian would act arbitrarily towards his ward.

d. The right to marriage guardianship becomes a woman's right

As mentioned in the previous chapter, there are a number of circumstances in which it is permissible for a person to be a marriage guardian, namely:

- a. Kinship, both close (father, grandfather and sons) and distant kinship (such as sons of uncles).
- b. Relationship due to ownership from master to slave (servant).
- c. *Mawaalii*, an agreement between two people to inherit from each other and bear the burden if one of them commits a criminal offense.
- d. Relationship due to freeing a slave.
- e. The ruler of the state to his people. According to the hadith narrated by Sayyidah Aisha RA, the Sultan or ruler becomes the guardian of a woman who does not have a guardian.

It can be concluded from the explanation above, the order of marriage guardians from the beginning to

the end, none of which mentions women or female parties. All guardianship paths originate from the male side and lead to men as well. It can be concluded that parents have a firm duty to provide protection and accountability for the continuity of their child's marriage. However, today the function of the guardian seems to be blurred, only a mere complement (formal rules) in fulfilling the legal status of marriage. In fact, the main essence of the existence of a guardian is to guide and direct within reasonable limits for the good and sustainability of his child's household. And this is the real function of the guardian.

e. Adult Women Submitting to Their Guardian or Marrying Themselves

Based on the outline of the Moroccan State Law mentioned earlier, it is clear that initially family law in Morocco was only oriented and adopted from the Maliki school of Jurisprudence, then there was an update. And some articles in Mudawanah al-Usrah are influenced by human rights issues, gender equality, and other issues, so they are very different from the thoughts of the scholars' scholars contained in classical fiqh books. In accordance with the rules of fiqh:

إِخْتِلَافُ الْأَحْكَامِ الْإِجْتِهَادِيَّةِ بِإِخْتِلَافِ الْبَيِّنَاتِ وَالْأَقْطَارِ

Meaning: "Differences in *ijtihadiyya* rulings are due to differences in environment and region."³²

This difference creates a large separation between the legal products of the two, including women's rights in family law. However, there is one thing that is interesting to review, because a common thread can be drawn between these two legal products, namely; marriage guardian according to the Hanafi madzhab view.

The Hanafiyah view often relies on rationality in making legal decisions, including this marriage guardian issue. According to him, the marriage guardian is only a condition of marriage and not a pillar of marriage. Marriage is considered like buying and selling, it is enough that there is *ijab* and *qabul*. And the marriage guardian plays a role for prospective married couples who are still not pubescent. According to the Hanafis, both the Koran and the hadiths used as evidence regarding the guardian as a pillar of marriage, do not clearly indicate that the guardian is a pillar of marriage. And emphasized by the Hanafis, that the Koranic source related to the discussion of guardians is

³² Dusky Ibrahim, *al-Qowaid al-Fiqhiyyah* (Palembang: Noer Fikri, 2019), 103.

contained in Q.S. Al-Baqarah verse 232 does not specifically explain whether the guardian is a pillar or not.³³

The Hanafis are of the view that the permission of the guardian is not obligatory for the marriage of the daughter. This madhhab does not recognize the right of permission of the guardian to his daughter, except for girls who are still immature or unfit (insane). The guardian has the status of being a condition for the validity of marriage, especially for the marriage of a child who is still a child or who is not of sound mind (even if he is an adult), male or female.

Adults who have reached mas baligh are entitled to marry even if the guardian does not agree, widowhood or virginity are not within the jurisdiction of the guardian. It is sufficient for them to marry their candidate (Ishab and Qabul). There is a (suitable) note between the two sequences. If the conditions of sekufu are not met, the guardian has the right to cancel the marriage or annul the marriage. (Morocco) restricts

³³ Muhammad Jawad Mughniyah. *Fiqih Lima Madzhab*. Terjemah. Masykur A. B., (Jakarta: Penerbit Lentera, 2011), 374-375.

this strictly because if it were normally allowed, the guardian would act arbitrarily towards his ward.³⁴

The Hanafis are of the opinion that the hadith that indicates that it is not permissible to marry without a guardian is: *إِنَّمَا امْرَأَةٌ تَكَتُّ بِغَيْرِ إِذْنٍ وَلَيْسَ بِهَا فَتَكَاحُهَا بَاطِلٌ* and *لَا تُزَوَّجُ الْمَرْأَةُ الْمَرْأَةُ وَلَا تُزَوَّجُ الْمَرْأَةُ نَفْسَهَا* It is a dhaif Hadith because one of the narrators (az-Zuhri) when asked about the matter replied that he did not know. According to him, the guardian in the Hadith is the guardian of a child who clearly does not know the laws of muamalah. A marriage contract is like a sale and purchase, and it is valid as long as there is an Ijab and Qabul. And a free, mature woman already has the freedom of will, whether buying or selling or when she will need guidance.³⁵

Mudawanah al-Usrah comes as a solution to the problem of marriage guardians in accordance with the Hanafiyah view, namely sekufu' and understanding the dowry according to custom. In its articles 24 and 25, it is explained that a woman can marry without a guardian. This is adapted to the development of

³⁴ Abdurrahman al-Juza'iri, *al-Fiqh 'ala Madzahib al-Arba'ah*, Juz 4, (Beirut: Dar al-Fikr), 46.

³⁵ Ibn Rusyd, *Bidayatul Mujtahid*, (Surbaya: al-Miftah), 109.

Moroccan women's maturity, as well as giving them the freedom to choose.³⁶

As for the legal reform of the Moroccan Law, it is a legal reform whose nature falls into the category of Intra-doctrinal reform, because this law carries out the process of combining madzhab opinions or taking the opinion of another madzhab other than the main madzhab that until now the majority of Muslims used there, namely the Maliki Madzhab. And taking the popular opinion of the Hanafi Madhhab regarding marriage guardian affairs, it is allowed to marry without a guardian.³⁷

Then the Moroccan family law reform is also included in the extra-doctrinal reform category, because this legal reform is carried out by providing a new interpretation (far different from the existing text), then providing support both in terms of changes in society and the political system that occurred in Morocco at that time.

³⁶ Aicha al-Hajjami, "Argumen Kegamaan dalam Perdebatan tentang Reformasi Undang-undang Keluarga Maroko." Dalam *Reformasi Hukum Keluarga Islam: Perjuangan Keadilan Gender di berbagai Negeri Muslim*, (Yogyakarta: LKis, 2017), 131-135.

³⁷ Miftahul Huda, *Hukum Keluarga*, (Malang: Setara Press, 2018), 137.

Law is interpreted as a means to justify the political opinions of the ruler and serves as a tool or instrument of social planning at the community level.³⁸ This interpretation can create injustice if it is done with unfair assumptions and by unfair subjects. However, it can also give birth to and guarantee justice when it is done by those in authority and has a fair perspective on men and women. In the context of Maliki and Hambali thought, the marriage guardian is a pillar of marriage, so marriage without a guardian is considered invalid.

Researchers reconciled their naivety with their children being young, mentally ill or mentally ill. However, when his son reached puberty and became sane, Imam Abu Hanifah contradicted other scholars. According to Abu Hanifah, those who have reached puberty have the right to divorce themselves in widowhood.

According to the opinion of the majority of scholars, marriage is valid if there is a guardian, whether the child is young, mature, adult, or widowed. According to the Hambali madhhab, the permission of the guardian must remain whether the child is a widow or a girl, while according to the Maliki madhhab and

³⁸ Mahfud MD, *Membangun Politik Hukum*, 63.

the Shafi'i madhhab, ijab is only for widows if they are virgins, then there is no need to ask for the consent of the child, if consent is obtained, it is better to marry the judged.³⁹

Abu Hanifah and Abu Yusuf, however, said that although the guardian's permission is not required for marriage, if the marriage of the child is to an unmarried man, the guardian has the authority.

In contrast, the significant difference between the opinions of the jurists and Imam Abu Hanifah is due to differences in the methodology of derivation of the law. The marriage contract in Abu Hanifah's madhhab is equated with a sale and purchase contract. Therefore, ijab and kabul are all that is required, and the position of guardian is only reserved for couples who are still young. On the other hand, Hanafiyah scholars view that there are no explicit provisions regarding the status of guardians in either the Koran or hadith.

Abu Hanifah's opinion was later adopted by Moroccan law in *Mudawwanah al-Usrah*, because it was considered in accordance with the mission of gender equality voiced by

³⁹ Wahbah az-Zuhaili, *al-Fiqh al-Islam wa Adillatuhu jilid 9* (Jakarta: Gema Insani, 2011), 192.

feminist groups, bringing justice to men and women, and in accordance with the values promoted in human rights.

Conclusion

The reform of Islamic family law in Morocco by the Wali nikah is a significant reform and goes further, the position of the wali nikah in Usrah Mudawwanat 2004: 1) marriage guardian, if necessary, 2) power of attorney for marriage with the guardian, 3) the guardian does not marry the woman who is his guardian, 4) the right of marriage guardianship belongs to women, 5) adult women leave them to their guardians or marry themselves.

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