

**Guardianship in the marriage contract
between international conventions and Algerian family law**

الولاية في عقد الزواج بين المواثيق الدولية و قانون الأسرة الجزائري

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Abstract:

Although the Algerian legislator derived the provisions of family law countries, joined some international agreements concerned with human rights, which in their dimensions and objectives aim to achieve quality between the sexes without discrimination, Algeria found it self between two pressing forces ;The committees of these agreements and their recommendations on the one hand, and the principles and customs of Algerian society on the other hand,

Algeria, despite its reservations about some of the articles included in these agreements, their impact became clear in the amendment of the Algerian Family Code in 2005, as the legislator reduced the role of the guardian when he dropped the coercive guardianship and limited his presence only to marriages under the legal age and without preventing the signing of the contract. While approving the validity of the contract after consummation, the legislator did not adhere to the arrangement of guardians as stipulated in the schools of jurisprudence, but rather gave the adult woman the freedom to choose a specific guardian in the contract, and this is contrary to the norms of Algerian society.

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Keywords: guardianship ; Forcing ; minors ; age of marriage Sedwa Convention, CEDAW Agreement.

الملخص:

إذا كان المشرع الجزائري قد استمد أحكام قانون الأسرة من الشريعة الإسلامية كأصل عام، إلا أنه وبعد انضمام الجزائر كباقي الدول إلى بعض الاتفاقيات الدولية التي تعنى بحقوق الإنسان، والتي تهدف في أبعادها ومراميها إلى تحقيق المساواة بين الجنسين دون تمييز، فإنها وجدت نفسها بين حتميتين متناقضتين؛ حتمية اللجان المنبثقة عن الاتفاقيات وتوصياتها من جهة، وحتمية أعراف المجتمع الجزائري و مبادئه من جهة أخرى،

فالجزائر ورغم تحفظها على بعض المواد التي جاءت بها هذه الاتفاقيات، إلا أن تأثيرها بدأ جليا في تعديل قانون الأسرة الجزائري سنة 2005، حيث قلص المشرع دور الولي حينما أسقط ولاية الإيجار وحصر- وجوب حضوره فقط في الزواج دون السن القانونية للقصر ومن غير منع في إمضاء العقد، مع إقراره لصحة العقد بعد الدخول، كما لم يلتزم المشرع بترتيب الأولياء كما هو مقرر في المذاهب الفقهية، بل جعل للراشدة الحرية في اختيار ولي معين في العقد وهذا مخالف لأعراف المجتمع الجزائري.

الكلمات المفتاحية: الولاية، الإيجار، القصر، سن الزواج، اتفاقية سيداوا.

Introduction:

The guardian in the marriage contract is one of the most contentious topics that has sparked considerable debate among Islamic jurists on one hand, and legal scholars on the other, due to the discrepancy regarding the texts addressing guardianship in the marriage contract, both in terms of implication and evidentiary certainty. This debate and disparity emerged in Algeria prior to the enactment of Algerian Family Law No. 84-11¹, and persisted even thereafter. However, the conflict extended beyond the deficiencies, both substantive and formal, found within this law, evolving into a political struggle. This gave rise to two divergent camps, each with its own arguments, evidence, and unique perspective on Algerian Family Law.

The first trend argues that the old Family Law 84-11 is suitable for Algerian Muslim society because most of its provisions are derived from Islamic Sharia provisions. However, it acknowledges that there are some legal gaps that can be reconsidered and addressed in alignment with Islamic Sharia.

On the other hand, the second trend believes that Family Law 84-11 is not at all suitable for recent developments and does not align with the rights and

¹ - Law 84/11, dated June 9, 1984, which includes the Family Law, amended and supplemented by Order 05/02, Official Gazette, Issue No. 15, dated February 27, 2005.

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equality dictated by globalization between men and women. It calls for its complete abolition, oblivious to the dangers posed by globalization on families and society. Due to the intensified conflict between the two trends, the Algerian legislature intervened to amend some provisions of Family Law under Order 05/02, marking the first attempt by the Algerian legislator to put an end to the ongoing conflict.

However, the Algerian legislator was not successful in amending Family Law because it sided with correctness in many of the provisions introduced in the 2005 amendment, which now require another new amendment that does not deviate this time from the provisions of Islamic Sharia.

The debate surrounding the topic of this study, which is guardianship in the marriage contract, is significant. It considers whether guardianship is obligatory in the marriage contract or merely a condition of the contract's validity, and whether it should be retained or removed from the elements and conditions of the marriage contract. This debate has taken on an ideological character due to the influence of Western cultures and legislation advocating for equality between men and women in a manner that removes all the specificities and values that distinguish each society.

Study Problem:

This study aims to address an important issue covered by the CEDAW Convention, which targets families in the area of guardianship in marriage. It aims to clarify the position of Islamic Sharia on the CEDAW Convention, the dangers inherent in its adoption, and its implementation in that field. Therefore, this study seeks to answer the following questions:

What is the concept of guardianship, and what is the extent of authority granted to it in marrying someone under its guardianship, according to the provisions of Islamic jurisprudence and Algerian Family Law? How compatible are these provisions with what the CEDAW Convention stipulates in this regard? Did the Algerian legislature, in amending the latter, comply with the provisions of guardianship in marriage?

To answer these questions, we will adopt a mixed analytical-inductive-comparative method, with this study divided into two sections:

Section One: The meaning of guardianship in the marriage contract

Section Two: Aspects of the impact of international agreements on guardianship in the marriage contract

Chapter One: The Meaning of Guardianship in the Marriage Contract

In this chapter, we will discuss the definition of guardianship in the marriage contract by first elucidating its linguistic meaning, then specifying its technical and Sharia meanings, followed by an overview of the provisions of guardianship in Algerian Family Law. In the first section, we will address the concept of guardianship, while in the second section, we will outline the conditions and the Sharia ruling regarding guardianship.

Section One: Concept of Guardianship

Through this section, we aim to understand the concept of guardianship in the marriage contract, while highlighting its legitimacy evidence from the Quran and "Sunnah".

1. Linguistic Definition of Guardianship:

Guardianship, pronounced with a 'kasrah' on the letter "waaw" (وَلَايَةٌ), encompasses the notions of leadership, authority, and sovereignty. Linguistically, it signifies love and support, as reflected in the Quranic verse: "And whoever allies with Allah and His Messenger and those who have believed - indeed, the party of Allah - they will be the predominant." (Quran, 5:56).

According to linguistic scholars, "guardianship" (ولايَةٌ) in its verbal form conveys the idea of managing, having authority, and taking action. If these elements are not present, the term "guardianship" is not applicable.

Scholars such as Ibn al-Atheer and others have stated: "Anyone who takes charge of a matter concerning another person is considered their guardian." Thus, guardianship, in its general sense, is the authority held by an individual to oversee the affairs of others. However, it only becomes a legitimate authority when it is exercised for the welfare of others in accordance with Sharia principles.

Therefore, Sharia defines guardianship as a legitimate authority granted to someone capable of managing the affairs of others, thereby encompassing general guardianship, such as the authority of a ruler over his people, who acts as their representative in safeguarding their interests according to Sharia law¹.

Ibn Fares stated: "The root letters (waaw, laam, yaa) indicate closeness." From this, we understand that a "guardian" (ولي) is someone who is close, as

¹ - Bin Raja Al-Oufi, Awad. "Guardianship in Marriage," Part One. Islamic University Publications, Al-Madinah Al-Munawwarah, 1423 AH / 2002 AD, pp. 24-25.

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in the phrase "getting closer after a guardian", meaning to draw near. For instance, "the guardian" refers to the rain that comes after the "wasmi", so named because it follows closely.

Furthermore, in the category of the master, the emancipator, the companion, and the ally, all of these are considered guardians, as they are closely related. Whoever acts as a guardian for another person is their guardian, and one person may be deemed more appropriate for a certain task, meaning they are more deserving of it.

Al-Fayruzabadi stated: "The guardian refers to closeness and nearness, like rain following rain, and it is linked to the earth with a 'dhammah' (a short vowel mark indicating a "u" sound). The guardian is the one who loves, supports, befriends, and helps. The guardian of something is the one who has authority over it, either actively or passively. In its verbal form, with a 'kasrah' (a short vowel mark indicating an "i" sound), it signifies leadership, authority, sovereignty, and being in charge. The guardian is responsible for its affairs. Guardianship also denotes ownership, servitude, emancipation, companionship, proximity (such as a paternal cousin), neighborliness, alliance, offspring, paternal uncle, guest, partnership, niece/nephew, guardian, lord, supporter, beneficiary, lover, follower, and son-in-law."

Secondly: Guardianship in Technical Terminology:

In Sharia terminology, guardianship refers to executing decisions on behalf of others and overseeing their affairs. It is the authority to enter into contracts without requiring permission from anyone else. Guardianship is divided into three categories: guardianship over oneself, guardianship over wealth, and guardianship over both oneself and wealth.

Thirdly: Interpretation of Guardianship in Algerian Family Law:

The Algerian legislator addressed guardianship in marriage under Family Law according to Article 11 of Order 84/11, without differentiation between compulsory and chosen guardianship, or between the marriage of minors and adults, or between virgins and non-virgins. The term "woman" was used to encompass all these categories. The marriage of an adult woman, whether she was a minor or an adult, was initially entrusted to her father or one of her relatives, and in their absence, guardianship passed to the judge¹.

¹ - Mahmoud Al-Zaqeeli, "The Ruling on Requiring a Guardian in the Marriage Contract: A Comparison with Personal Status Laws, Arab Laws, and the CEDAW Convention," in Studies and Research Papers, Humanities and Social Sciences Series, Volume 27, Issue 6, 2012, p. 06; Iman Al-Zahra Hamidi, "The Role of the Guardian in

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However, through the amendment of Family Law in 2005 under Order No. 05/10, it is observed that the legislator specifically addressed two clauses. In the first clause, it allowed adult women to contract their own marriages and exercise guardianship. If they wish to grant guardianship to their father, a relative, or any other person of their choosing, in case of opposition from their father who is considered their legal guardian, without following the prescribed order. In the second clause, protection was provided for minor girls in concluding marriage contracts, maintaining the general principle whereby their guardian, usually their father, a close relative, or the judge, acts as their guardian in the absence of a designated guardian.

It is worth mentioning that through the amendment, it becomes evident that the guardian no longer plays a role as a condition in marriage contracts as long as the woman chooses her guardian. Additionally, the guardian is deprived of the right to express himself when necessary, in the interest of the woman. In terms of gender equality, this provision has not been achieved as effectively as it should, as it places women in a vulnerable position. For example, if the woman makes a poor choice due to her lack of experience, she may not be able to seek refuge with her father for protection, as she has excluded him from guardianship and chosen another guardian. This scenario is concerning because, as a general rule, the guardian has always been vigilant and guiding in building the future of his children. Therefore, it cannot be said that compassion for the daughter is present without her father, as the principle of compassion is fundamentally rooted in parental care and is often not realized outside of the parental relationship, which frequently leads to negative consequences for family cohesion.

Furthermore, the Algerian legislator abolished the provisions of Article 12 and amended Article 13 to state: "The guardian, whether the father or another, is not allowed to force a minor under his guardianship into marriage, nor is he allowed to marry her without her consent."

Thus, it can be said that the Algerian legislator made guardianship a condition for the validity of marriage contracts; however, he left the choice to the woman to exercise guardianship. She can grant it to her father, one of her relatives, or any other person she chooses. The presence of her guardian is merely a formal requirement that does not invalidate the contract. With this amendment, the Algerian legislator abolished the role of the guardian in

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the marriage of his ward. The mature woman directly contracts her marriage as a genuine party, and the consent or refusal of her guardian is not considered. His role is limited only to being present at the contract ceremony.

In conclusion, according to the aforementioned texts, the condition of guardianship in marriage has not been entirely abandoned by the Algerian legislator. The amendments introduced regarding guardianship focus on the voluntary guardianship instead of compulsory guardianship. Therefore, these amendments, while aimed at aligning the provisions of this law with the Convention on the Elimination of All Forms of Discrimination against Women of 1979, have not departed from the realm of jurisprudence in Islamic law. Consequently, they have not established an equal legal position for women in marriage outside of jurisprudential interpretation¹.

Second Matter: Provisions of Guardianship in Marriage Contract and Its Conditions

First: Necessary Conditions for the Guardian

The conditions for the guardian in the marriage contract can be divided into two branches:

1. Agreed-upon conditions:

- **Islam:** It is stipulated for the guardian to be a Muslim, as there is no guardianship for a non-Muslim over a Muslim woman by consensus, based on the Quranic verse "And never will Allah give the disbelievers over the believers a way [to overcome them]" [Quran 4:141]², and the verse "O you who have believed, do not take the Jews and the Christians as allies. They are [in fact] allies of one another. And whoever is an ally to them among you—then indeed, he is [one] of them. Indeed, Allah guides not the wrongdoing people" [Quran 5:51]³. Establishing guardianship for a non-Muslim over a Muslim woman is perceived as humiliating for the Muslim in relation to the non-Muslim, which is not permissible. Hence, Muslim women are prohibited from marrying non-Muslims.

¹ -Aoumar Saeed Shabeha, Issa Amaiza, "The Legal Status of Women in Contracting Marriage in Algerian Family Law," *Journal of Legal and Social Sciences*, University of Djelfa, Volume 03, Issue 01, 2018, p. 495. Awlal Ali Hassan, "Guardianship in Marriage Contracts between Divine Legislation Sovereignty and Dominance of Positive Law," *Mediterranean Journal of Law and Economics*, University of Tlemcen, Volume 7, Issue 2, 2022, p. 61. Aoumar Saeed Shabeha, *Ibid*, p. 495.

² - Surah An-Nisa, verse 141

³ - Surah Al-Ma'idah, verse 51

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- **Sanity and maturity:** Insane individuals and minors do not have guardianship over themselves. Therefore, it is preferable for them not to have guardianship over others.

2. Different conditions:

There are different conditions, according to jurisprudence, regarding the guardian's qualifications:

- **Soundness of mind:** Abu Hanifa, and most of Malik's followers, who represent the predominant opinion in the school, hold that soundness of mind is not a condition for guardianship. Therefore, it is permissible for an incompetent person to act as a guardian. Ibn Rushd stated, "As for soundness of mind, the predominant opinion in the school is that it is not a condition." However, Imam Malik and Al-Shafi'i stipulated soundness of mind for the guardian.

The reason for the difference of opinion is the analogy between this guardianship and financial guardianship. Those who argue that soundness of mind may not be required for this guardianship, despite it being required for financial guardianship, say that it is not a condition because it is not a prerequisite for financial guardianship. However, those who argue that it is necessary assert that soundness of mind is a fundamental requirement for financial guardianship.

- **Justice:** Abu Hanifa, Malik, and one of Al-Shafi'i's opinions agree that a morally corrupt person (*fasiq*) can act as a guardian. Al-Kasani stated, "There is a consensus among scholars that people from different backgrounds, especially Arabs, Kurds, and Turks, marry off their daughters without objection from anyone, especially since this guardianship is discretionary. Moral corruption does not affect the ability to oversee marriage, nor does it affect the guardian's compassion. Similarly, it does not affect inheritance, so it should not affect guardianship, like justice. Since the morally corrupt person is responsible for himself, he can also be responsible for others, similar to a just person.

The jurists, including Imam Shafi'i and Imam Ahmad, who is the most reliable in both schools of thought, are of the opinion that it is not permissible for a *fasiq* (a person who openly commits sins) to act as a guardian (*wali*) in marriage. This is based on the statement: "There is no marriage without a guardian and two upright witnesses," because it involves discretionary authority, and a *fasiq* cannot be entrusted with the responsibilities associated with managing wealth.

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C. Unity of Religion: Allah says: "Let not believers take disbelievers as allies rather than believers." The implication of this verse is that a non-Muslim cannot be a guardian over a Muslim. Furthermore, there is no guardianship of a Muslim over a non-Muslim, as stated: "Those who disbelieve are allies of one another." Thus, the unity of religion between the guardian and the bride is necessarily reflected in their perspectives on estimating benefits. Moreover, the guardianship in marriage is linked, in a subsidiary manner, to inheritance, as there is no inheritance in the event of a difference in religion. However, this condition does not apply to the general guardianship of the ruler, which extends even to his non-Muslim subjects¹.

D. Masculinity: There is a difference of opinion among jurists regarding the necessity of the condition of masculinity for the person who undertakes the marriage contract on behalf of another. The majority of scholars from the Maliki, Shafi'i, and Hanbali schools hold that it is not established for a female, basing this on the premise that since guardianship is not established for a woman over herself, whether she is an adult or a minor, it is preferable not to establish it for her over others. As for the Hanafi school, they have established guardianship for the mother, granddaughter, sister, aunt, and other female relatives, provided there are no male relatives, according to the famous opinion of Imam Abu Hanifa. Thus, guardianship is extended to all eligible relatives for inheritance, whether male or female.

Second: The Rules of Guardianship in the Marriage Contract:

It was previously mentioned that jurists unanimously agree that a guardian is a condition in the marriage contract, but they differ on whether it is a condition for the validity of the contract or for its completeness. The reason for their difference, as Ibn Rushd states, is that there is no explicit evidence from the Quran or the Sunnah that clearly stipulates guardianship in marriage. Moreover, the verses and traditions commonly cited as evidence by those who stipulate it are open to interpretation, and likewise, the verses and traditions cited by those who oppose it are open to interpretation, and the traditions, despite their potential interpretations, differ in their validity as well. Therefore, we will attempt to mention the evidence for each position.

¹ - Mohammed Bajaq, "The Role of the Guardian in the Marriage Contract: Jurisprudence, Law, and Judiciary Perspectives," *Journal of Jurisprudence and Judicial Studies*, University of El Oued, Volume 1, Issue 1, December 2015, p. 148.; Surah Al Imran, Verse 28; Surah Al Anfal, Verse 73; Mohammed Mustafa Shalabi, "Family Laws in Islam," Dar Al-Jami'a, Beirut, Lebanon, 4th edition, 1983, p. 274.; Wahba Al-Zahili, "Islamic Jurisprudence and its Evidence: Personal Status," Dar Al-Fikr, Damascus, Syria, Volume 7, 2nd edition, 1985, p. 197.

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The scholars have debated the ruling of the guardian (wali) in the marriage contract, with two main schools of thought:

1. **The first school**, followed by the Maliki, Shafi'i, and Hanbali schools, asserts that the guardian is a necessary condition for the validity of the marriage contract. They argue that the marriage contract is not valid without a guardian, and it is not permissible for a woman to marry herself off or to marry someone else, whether she is a virgin or not. Furthermore, she cannot authorize someone else to establish this contract on her behalf.

Evidence: Supporters of this school cite various evidence from the Quran, Sunnah, and rationale. From the Quran, they refer to the verse: "When you divorce women and they have fulfilled their term, do not prevent them from remarrying their [former] husbands if they agree among themselves on an acceptable basis" (Surah Al-Baqarah, 2:282). The indication from this verse can be interpreted as either prohibiting guardians from preventing women from marrying or as emphasizing the need for their permission for the marriage to be valid.

Response: Critics argue that this verse only addresses the rights of women in divorce and does not explicitly mandate the requirement of guardian consent for marriage. Additionally, they suggest that the verse could be interpreted differently, indicating that guardians have no authority over women in marriage matters.

2. **The second school**, followed by the Hanafi school, does not consider the guardian's presence as a prerequisite for the marriage contract. Instead, they view it as preferable (mustahabb) but not obligatory. According to this view, marriage without a guardian is valid, and the guardian cannot object to the marriage unless the choice is not proper or if the woman marries without observing customary dowry or conditions.

Evidence: Supporters of this view cite various Quranic verses and hadiths. For example, they refer to the verse: "And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation" (Surah An-Nisa, 4:24).

Response: Critics argue that while these verses mention marriage, they do not explicitly address the issue of guardianship. They contend that the

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absence of specific mention of guardianship in these verses implies that it is not a requirement for marriage.

In conclusion, while both schools provide evidence to support their positions, the debate over the necessity of the guardian in the marriage contract remains unresolved¹.

Title2: The Impact of International Agreements on Marriage Legislation

Second Section:

The influence of international agreements, especially the CEDAW agreement, has directly impacted Algerian family law, particularly the role of the guardian (wali) in marriage. Article 16 of the CEDAW agreement emphasizes equality between men and women in marriage, not only during the contract but also throughout the marital relationship and its dissolution. This equality extends to the right to choose a spouse, guardianship rights, authority, and even the choice of family name. Critics argue that this article contradicts Islamic law in several aspects:

- Section (a) and (b) ignore the concept of guardianship and the guardian's consent, despite many Islamic opinions requiring the guardian's approval for the marriage contract to be valid.
- Section (c) disregards the dowry and the husband's responsibility to provide housing, which are Islamic obligations.
- Section (d) separates the mother's responsibilities as a parent from her role as a wife.

Islamic jurists' positions on each section of the mentioned article are outlined as follows:

Paragraph (1): Section (a) asserts equal rights for men and women in marriage contracts, allowing Muslim women to marry non-Muslims. However, this contradicts Islamic law, which grants Muslim men this right but not Muslim women. The reasoning is that a Muslim man would not hinder his non-Muslim wife from practicing her religion, as Islam recognizes Christianity and Judaism. Conversely, marrying a non-Muslim man might discourage a Muslim woman from practicing her faith freely, leading to worldly and spiritual loss.

¹ - Adnan Al-Qurtaji, "Al-Ghazw Wal Na'em: Dirasat Hawl Athar Al-Olumma 'ala Al-Mar'ah wa Al-Mujtama' wa Al-Uhra" (The Invasion and the Soft: Studies on the Impact of Globalization on Women, Society, and Family), Dar Ayi lil Kutub, London, 2018, p. 41.

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Prohibiting polygamy under the guise of gender equality also contradicts Islamic principles. The CEDAW committee criticized some Islamic countries for allowing polygamy, citing its adverse effects on women's rights and their dependents. Therefore, polygamy should be prohibited, and Islamic countries should adhere to the CEDAW instead of relying on other legal or customary references.

Abolishing the waiting period (iddah) for women after divorce or the husband's death aims to equate their status with men who do not face such waiting periods. Similarly, abolishing guardianship implies no authority or responsibility over women.

Section (b) advocates for the freedom of unmarried women to choose their spouses without their guardian's consent. This undermines the girl's right to protection and support from her guardian in her marital home. Marrying without family consent exposes the girl to potential abuse or mistreatment by an unsuitable spouse, knowing she might not dare to complain to her family about the marriage they disapproved of.

Marriage should be a consensus between the girl and her guardian, who is more experienced and knowledgeable about her interests. Therefore, the guardian's approval is necessary for a valid marriage contract. A virgin girl cannot be married without her consent, and she cannot be forced to marry someone she refuses. Islam considers marriage a contract requiring the consent of both parties, emphasizing the importance of the guardian's consent for religious and social reasons.

Section (c) demands equal rights and responsibilities for women during marriage and its dissolution, including abolishing the concept of male guardianship, disregarding Islamic obligations for the husband to provide the dowry, household, financial support, and bearing the full responsibility if the marriage fails. In contrast, women are not obligated to spend on themselves or their families, and if the marriage fails, they bear no financial consequences.

Different obligations lead to varying rights and responsibilities. Hence, men have authority over their families, while women have the right to be consulted, ensuring decisions reflect both spouses' opinions.

Section (d) distinguishes between a mother's role as a parent and her status as a wife. Although Islamic law agrees on human and health care responsibilities for the mother, it imposes specific rules regarding lineage establishment, especially in cases of disputed paternity.

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Sections (e) and (f) once again neglect the family's structure as a partnership between spouses, granting the husband authority over the family. However, this does not mean unilateral decision-making, as marriage should be based on consultation and mutual agreement, prioritizing the husband's responsible use of his rights.

The evident disregard for religion's role in regulating women's affairs in Arab societies, replaced by secular and international laws, highlights the impact of these agreements on eliminating women's subordination in marriage laws.

Title: Divorce, Travel, and Inheritance Legislation

Furthermore, the sixteenth article of the CEDAW, which deals with family legislation, abolishes all forms of discrimination against women in all matters related to marriage and family relationships. This includes equality between men and women in marriage regarding rights and responsibilities during and after marriage, as well as equality in guardianship rights. The danger here lies in abolishing guardianship over women to make them equal to men, which contradicts the Prophet's tradition of affirming guardianship over unmarried women. As the Prophet Muhammad said, "There is no marriage without a guardian." These are some aspects that contradict our Arab and Islamic identity, which accepted the restrictive interpretation of women's rights in our Arab and Islamic world.

Some international agreements advocate for women's right to consent to marriage and form a family without restriction. The Universal Declaration of Human Rights in Article 16 states: "Men and women have equal rights during marriage and its dissolution." Additionally, Article 2 of the Universal Declaration of Human Rights asserts that "everyone is entitled to all the rights and freedoms" without discrimination based on race, color, sex, language, or religion. Furthermore, Article 7 states that "all are equal before the law" and have the right to equal protection without discrimination.

The Universal Declaration has legal value as the first document on human rights issued by a global international organization. It gains moral value through the principles it enshrines, especially concerning legislation concerning human rights.

Article 1 of the 1964 Convention also affirms this right, as does Article 23 of the International Covenant on Civil and Political Rights, stating: "Marriage shall not be entered into without the free and full consent of the

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intending parties." Additionally, Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women requires all parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relationships.

In Algeria, to consolidate the principle of equality between men and women upon marriage, the legislator abolished Article 12 in the recent amendment and amended Articles 11 and 13. Consequently, forced marriage is no longer practiced, neither on adult nor minor women. Therefore, the presence of the guardian is mandatory unless the bride is a minor without coercion.¹

The legislator's intention behind this was to embody the principle of gender equality to align with the CEDAW convention despite its reservations on some articles like Articles 2 and 16. However, Algeria faced criticism from the CEDAW committee, as evident in the third and fourth reports regarding the non-abolition of the guardian condition entirely. The legislator found himself caught between two pressures: firstly, from CEDAW, and secondly, from the conservatism of Algerian society. Therefore, he sought to embody the principle of equality by emphasizing the contractual consent and abolishing forced guardianship without contradicting it by withdrawing reservations on Articles 2 and 16 of the CEDAW convention. The legislator's amendment to Article 11 is merely an attempt to gauge the pulse of Algerian society as a precursor to its complete abolition, as demanded by the CEDAW committee.

The pressure exerted by these conventions against states to change their legislative systems, especially regarding family matters, is irrelevant to human rights as claimed by these organizations. Each country has its own religion, customs, and traditions. However, these countries are forced to impose them on their people.

The violent imposition of legal rules, which are incompatible with established social norms, leads to nullifying the purpose of the law and fosters distrust, resulting in conflict between citizens and the legislator. The government intends to gradually introduce elements of non-discrimination and gender equality without regression in personal status laws, as many Arab countries, particularly Tunisia and Morocco, have done.

¹ - Maysoun Dhaifallah Aldabboubi, *Islamic Feminist Thought in the Contemporary Arab World: Between Heritage and Modernity*, Now Publishers and Distributors, p. 143.

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Conclusion:

Based on the foregoing regarding guardianship provisions and the role of the guardian in marriage contracts, we have reached a set of conclusions and recommendations:

1. Guardianship does not detract from the dignity or freedom of women, and the guardian is not a dictator but rather represents her, conveying her will to the person she wishes to marry.
2. Islamic law has institutionalized guardianship in marriage by giving the guardian a role in either consenting to or rejecting the contract.
3. The Hanafi principle demonstrated flexibility by considering guardianship preferable for adult women while limiting the guardian's role in cases of minority or insanity.
4. The Algerian legislator acknowledged guardianship in marriage but reduced the guardian's role by rejecting forced guardianship and limiting the obligation to attend only in marriages below the legal age without hindering contract execution.
5. The Algerian legislator retained some aspects of public opinion regarding guardianship at the time of contract solemnization and neglected it in the guardian's description, while affirming the contract's validity after consummation. The legislator did not adhere to arranging guardians as prescribed in the jurisprudential schools but instead allowed adult women the freedom to choose a specific guardian in the contract, which contradicts customary practices.
6. The state's accession to international organizations, despite its reservations on some articles, indirectly contributed to amending the guardian's status and its description from Law 11/84 to Law 2005, which may lead to further amendments to its laws and gradual abandonment of reservations altogether.

Recommendations:

1. Activating customary practices if consistent with Islamic law because they are a legitimate source of legislation, and prioritizing them over international conventions if they clash with them, especially since Algerian society does not accept women marrying themselves or choosing another guardian.

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2. Calling for a review by the legislator of guardianship provisions in marriage contracts, starting from defining guardian conditions, arranging guardians, and reconsidering forced guardianship as prescribed in Islamic jurisprudence, and ending with cases of obligatory guardianship and its non-obligatory nature.

3. Revising Articles 11 and 13 of the Algerian Family Law in accordance with Islamic jurisprudence and Algerian customs.

4. It is essential to reconsider Algeria's accession to the CEDAW convention, which poses a significant risk to Algerians in the future, especially regarding legislation in personal status matters, particularly marriage conditions and guardianship, which do not suit the United States, which is not a party to the CEDAW convention.

5. This matter is extremely dangerous because it may eventually lead to the complete abolition of guardianship in marriage contracts. Formerly, the guardian was a pillar in Law 1984, but in the recent amendment in 2005, it became a condition, and perhaps another amendment will impose further changes that entirely annul guardianship and the guardian's role, despite the significant pitfalls of the guardian's absence in marriage contracts. Therefore, we call on decision-makers, legislators, and those who care about religion, nation, or family to pay attention to this matter and its serious repercussions on family security and stability.

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