

Codification and Reform of Islamic Family Law in the Republic of Tunisia: An Analysis of Marriage and Inheritance

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Abstract. *The purpose of this study is to examine Islamic family law in Tunisia, which is considered unique due to Tunisia's radicalism. This study is directed at library research and data collection is carried out using documentation methods sourced from documents relevant to the problem being studied. The analysis used is content analysis. The conclusion of this study is that the process of formulating and structuring Islamic family law in Tunisia is not merely an effort to codify (book) Maliki school of jurisprudence, but also takes progressive and revolutionary steps in an effort to legalize and regulate administration in the legal field, particularly Family Law. In addition, nationalists with secular educational backgrounds also participated in legal reforms carried out by the Tunisian government.*

Keywords: *Codification; Islamic Family Law; Inheritance; Legal Reform; Marriage; Tunisia.*

1. INTRODUCTION

Tunisia is a unitary semi-presidential state led by a president as head of state and a prime minister as head of government. With its capital in Tunis, Islam is the official religion. The majority of Tunisians (around 98%) are Sunni Muslims, with 1% Christian, and the remainder Jewish and others.

The capital of Tunisia is Tunis with an area of 163,610 km (Widyadara, 1990). Tunisia includes the Karkuana archipelago in the east, while the Djerba archipelago in the southeast. Its population is 9,593,402 (based on the 2000 census). Of this population, 98% are Muslim, with the remainder being Christian (1%), and Jewish (1%). This means that in future developments, Islamic law will be implemented universally in this country.

Islamic family law reform in Muslim countries has continued to develop since the early 20th century, particularly regarding marriage, divorce, and inheritance. This effort began in Turkey (1917), followed by Lebanon (1919), Egypt (1920 and 1929), Jordan (1951), Syria (1953), and Tunisia (1956), among the Muslim countries experiencing this phenomenon. By 1996, only five countries in the Middle East had yet to reform their marriage laws: the United Arab Emirates, Saudi Arabia, Qatar, Bahrain, and Oman (Dede Ahmad Permana)

On March 20, 1956, Tunisia officially gained independence. Shortly thereafter, the Tunisian government, led by its first president, Habib Bourguiba, enacted a family law (Transitional Law, as the Basic Law was passed in 1959) adapted to the social changes taking place in Tunisia.

2. RESEARCH METHODS

This study utilizes library research with a focus on qualitative data collection through documentation methods, gathering information from various texts and documents relevant to Islamic family law. The author employs content analysis to examine the formulation and structuring of legal codes in Tunisia. Furthermore, the research includes a comparative study of different legal systems, specifically comparing the Maliki and Hanafi schools of jurisprudence, as well as examining Tunisian law in relation to the family laws of other Muslim-majority countries such as Egypt, Jordan, Syria, and Turkey.

3. RESULTS AND DISCUSSION

Tunisian family law was reformed and codified after the country gained independence. In the late 1940s, several prominent Tunisian jurists argued that by merging the Hanafi and Maliki schools of thought, a new legal framework could be developed that would adapt to the evolving social situation in Tunisia. A group of jurists presented a comparative study of the two legal systems, Hanafi and Maliki, and published it under the title *Laihat Majallat al Ahkam al Syar'iyah* (Draft of the Islamic Law Code). The government then established a committee under the supervision of Sheikh Muhammad Ja'it to draft the official law (Khairudin Nasution, 2023).

Based on the *Laihat* and the Family Laws of Egypt, Jordan, Syria and Ottoman Turkey, the committee submitted a Draft Family Law to the government. The draft was finally enacted under the title *Majallah al Ahwal al Syahsiyyah* (Code of Personal Status) in 1956, containing 170 articles, 10 books and promulgated throughout Tunisia on January 1, 1957. However, along the way, this Law underwent modifications and changes (amendments) several times, namely through Law No. 70/1958, Law No. 41/1962, Law No. 1/1964, Law No. 77/1969, and finally, according to Tahir Mahmood's notes, underwent amendments in 1981 through Law No. 1/1981 (HM. Atho' and Khairudin Nasution Muzhar, 2023).

It should also be noted that, although generally based on the Maliki school of thought, this law also incorporates several principles derived from other schools of Islamic law. Compared with other Arab countries, the legal reforms introduced in Tunisia are more revolutionary.

3.1.1. Age of Marriage

The minimum age limit for marriage is not explicitly stated in the Quran. Similarly, the hadith of the Prophet Muhammad (peace be upon him) never specify a minimum age limit for marriage. In fact, the Prophet Muhammad (peace be upon him) himself married Aisha at the age of 6 and consummated her marriage at the age of 9. The rationale for the absence of an age limit for marriage seems to align with the Muslim perspective on the nature of marriage at that time. According to them, marriage was not viewed in terms of sexual relations, but rather focused on establishing a mutually beneficial relationship (Amir Syarifudin, 2007).

Almost all countries in their family laws include a minimum age for marriage, and this also applies to Tunisia.

Men and women in Tunisia can marry if they are 20 years old. This provision amends Article 5 of the 1956 Constitution, which previously set the minimum age for marriage at 17 for women and 20 for men. Both men and women must be 20 years old to marry. Women aged 17 must obtain permission from their guardian. If the guardian does not grant permission, the case can be decided in court (Siti Munadziroh, 2012).

As in other schools of thought, it is obligatory for a man who marries a woman to officially become a husband who must provide for his wife.

The Tunisian Family Law Act applies Maliki principles to the wife's right to receive maintenance from her husband. This is detailed in articles 37-42. Furthermore, article 41 states that a wife is permitted to spend her personal assets used for living expenses and seek reimbursement from her husband. The amount of maintenance depends on the husband's (the payer's) ability, the wife's status, and the reasonable cost of living at the time (article 52) (Muzhar).

The Maliki school of jurisprudence, which is a major source of Tunisian law, states that maintenance is obligatory for the husband once the husband has reached puberty and reached puberty (baliq). This view differs from the opinion of Abu Hanifah and one of the opinions of Imam Ash-Shafi'i, who do not require the husband to reach puberty (Abdurrahman, 1990).

3.1.2. Marriage Agreement

The 1956 Tunisian law provides an opportunity for khiyar al-syart in marriage. If any of the contents of the agreement is violated, the party aggrieved by the violation can file a request for dissolution of the marriage. The dissolution of the marriage cannot give rise to a right to compensation if this occurs before the marriage has been completed perfectly.

3.1.3. Invalid Marriage

Marriages that are considered invalid according to family law in Tunisia are:

1. Marriage that is contrary to the principles of marriage (Article 21)
2. Marriage without the consent of either husband or wife (article 3).
3. Marriage that takes place before the age of puberty or where there are other legal obstacles (Article 5).
4. A marriage in which there are obstacles to consummating the marriage (articles 15-17).
5. Marrying a woman who is still in the iddah period (article 20).

A marriage like the one above can be annulled immediately. The legal consequence that arises, if the marriage has indeed taken place perfectly (ba'da ad dukhul), is that the wife has the right to a dowry and the obligation to undergo the iddah period. Meanwhile, if the divorce occurs before dukhul, the wife is entitled to a dowry. Children

who are born can have their lineage depend on the husband, but they are not related to the inheritance between the two parties.

3.1.4. Polygamy

Article 18 of the Tunisian Family Law states that having more than one wife is a prohibited act. Likewise, this Law expressly states that a man who is married, and whose marriage has not been legally dissolved, then remarries, can be threatened with a prison sentence of one (1) year or a fine of up to 240,000 Malim.

The basis for the prohibition of polygamy used by the Tunisian government is: (1) that polygamy, like slavery, is an institution that will never be acceptable to the majority of humanity anywhere;

(2) The absolute condition for a husband to be allowed to practice polygamy is to treat his wives fairly. Meanwhile, historical facts prove that only the prophet was able to treat his wives fairly. This prohibition has a legal basis in the verse of the Qur'an, which states that a man is obliged to marry only one wife if he is sure that he is unable to treat his wives fairly, namely in QS 4:3.

وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ أَلَّا تُعَدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَدْنَىٰ أَلَّا تَعُولُوا

Meaning: "And if you are afraid that you will not be able to do justice to (the rights of) orphaned women (if you marry them), then marry (other) women that you like: two, three or four. Then if you are afraid that you will not be able to do justice, then (marry) just one, or the slaves you have. That is closer to not committing wrongdoing."

3.1.5. Divorce

In Tunisia, a unilateral divorce cannot result in a divorce. A divorce can be final and effective only if it is declared by a court.

Likewise, the court can terminate a marriage proposed by the wife on the grounds that the husband has failed to provide maintenance, or because both parties have agreed to end the marriage. The court can also decide on divorce if one party unilaterally intends to divorce, the divorcee has the right to compensation to the other party. The decision to divorce is only given in all circumstances, if the husband and wife's efforts to reconcile fail to be achieved.

As is customary in Islamic law regarding divorce, Tunisian Marriage Law also regulates triple divorce. Article 19 of Tunisia's 1954 Constitution states that a man is prohibited from having a wife who has received a triple divorce (talak bain kubra). Previously, Article 14 stated that triple divorce constituted a permanent impediment to marriage.

3.1.6. Child Care (Hadhanah)

Articles 54-57 of the 1956 Tunisian Law regulate in detail the rights and obligations of parents and guardians regarding child custody.

The provisions regarding child custody are generally based on the principles of the Maliki school of jurisprudence. The Maliki school of jurisprudence states that if a man marries his wife, custody of the child becomes the mother's right, as a mother is qualified to care for and breastfeed her child, given that she is more understanding

and capable of educating her child. A mother's patience in this regard is greater than that of a father, and therefore, the mother is given priority in order to safeguard the child's well-being (Sayyid Sabiq, 2008).

The fiqh formulation also states that the right to hadhanah is terminated if the mother marries. Because there are predictions that mothers will be negligent in caring for children, which will result in children not being able to live peacefully and prosperously. Meanwhile, if the mother dies, custody of the child passes to the maternal grandmother as long as the grandmother is the child's direct grandmother.

Article 67, amended in 1981, states that if a parent who has the right to care for a child dies while the marriage has previously been dissolved, then the right of hadhanah is transferred to the surviving parent. However, if the marriage is dissolved while both parties are still alive, the right to child maintenance is transferred to one of the parties or may be transferred to a third party. Furthermore, the court can decide the time limit for child maintenance by taking full account of the child's condition (Article 67). Meanwhile, in the Maliki school of thought, it is stated that hadhanah ends when the boy has reached puberty and the girl has married. This differs from the opinion of the Shafi'i school of thought which states that a girl's hadhanah period ends when she reaches puberty.

3.2. Inheritance Law in the Republic of Tunisia

One aspect that receives the main focus in Islam is the issue of inheritance.³ Meanwhile, inheritance law (Amir Syarifudin, 2004). Islam is a law that regulates everything relating to the transfer of rights or obligations over a person's assets after he dies, to his heirs. Islamic inheritance law explains in detail the procedures for dividing and transferring inherited assets to heirs, inherited assets, as well as things that prevent heirs from obtaining inherited assets from the testator. The distribution and transfer of inherited assets to heirs includes, among other things, handing over the inherited assets to the rightful heirs or by means of a will if the heirs, such as siblings or relatives, are prevented from obtaining the inherited assets.

Regarding inheritance issues, Tunisia generally only codifies the legal provisions of the Maliki school. However, there are several provisions that differ from the Maliki school, namely based on the opinions of legal experts from other schools. For example, Article 88 states that an heir who intentionally causes the death of the testator, whether as the main perpetrator or merely a supporter, or provides false testimony regarding the death of the testator, that person is not entitled to inherit from the deceased, this is the opinion of the Shafi'i school) (Muhammad Ali Ash-Shabuni, 1995).

3.2.1. Wills of Different Religions and Citizenship

Among the most prominent provisions of testamentary law is the validity of a will between two parties of different religions. Likewise, wills made by parties of different nationalities are considered valid (Articles 174-175).

If the state of the mushaa lah (beneficiary of the will) does not prevent wills from people such as the mushii (will giver), as an application of the principle of equality and the system of mutual exchange, then wills are permitted if the state of the mushii allows contracts such as wills, but wills are prevented if the state does not allow it.

Meanwhile, evidence of a will must be in the form of written evidence that is dated and signed by the testator, so that oral evidence is considered insufficient as evidence (Article 176).

3.2.2. Mandatory Will

A will is a gift from one person to another, whether in the form of an object, a debt, or a benefit, to be owned by the beneficiary as a gift that takes effect after the death of the person who made the will. Furthermore, a will is a statement or declaration that commences an act, usually after the person who uttered or declared it dies (Zakiyah Daradjat, 1995).

According to the Compilation of Islamic Law (KHI), a will is the gift of an object from a testator to another person or institution that will be effective after the testator's death. In contemporary Islamic law, besides a will, there is also the term *wajibah* will, which is a will that must be given. In theory, a *wajibah* will means the action of a ruler or judge as a state official to enforce or issue a *wajibah* will for a deceased person, which is given to certain individuals under certain circumstances (Ahmad Rofiq, 2000).

The mandatory will first appeared in Egypt as part of the 1946 Inheritance Law legislation to address the view that grandchildren are inherited by sons (Fahmi Amruzi, 2014). In Egyptian will law, mandatory wills are limited to the heir's grandchildren whose parents have died first and they do not get a share of the inheritance due to their position as *zawil arham* or being veiled by other heirs (Ahmad Zahari, 2006). A mandatory will can be defined as a mandatory gift to a grandchild who is prevented from receiving an inheritance because their mother or father died before their grandfather or grandmother. A grandchild does not inherit if they are a son, and the grandchild's position here is as a *zawil arham*. To receive their grandfather's inheritance, a mandatory will is required (Anshary, 2013).

The provision regarding mandatory wills was introduced by the Egyptian Inheritance Law in 1946, which established the legal requirement for orphaned grandchildren of the testator. Family and inheritance laws in several Islamic countries stipulate this type of will, which provides a fixed share of the grandfather's inheritance for grandchildren if his son (the grandson's father) dies while the grandfather is still alive. This law is known as the "Qanun Wasiyat Wajibah (Yusuf Qardhawi, 1995).

This was later followed by Syria and Tunisia. Tunisian law stipulates that the mandatory will is only for first-generation orphaned grandchildren, both male and female (Article 192), with the proviso that male grandchildren receive twice the share of female grandchildren.

In Tunisia, obligatory wills are assigned to grandchildren whose parents die before the testator, whereas in Indonesia obligatory wills are assigned to adopted children, while grandchildren whose parents die first are positioned as substitute heirs.

4. CONCLUSION

The process of establishing Family Law in Tunisia began after the country's independence from France. Tunisian Family Law is dominated by the Maliki school of thought, but it also incorporates several principles derived from other schools of thought. Compared with other Arab countries, the family law reforms introduced in Tunisia are more revolutionary. Marriage law in Tunisia is generally the same as

marriage law in other Islamic countries, including the same as marriage law in Indonesia because marriage law in Tunisia adopts from the laws of fiqh, the difference is the dominance of schools of thought, for example in Tunisia it is dominated by the Maliki school, while in Indonesia it is dominated by the Shafi'i school, but by adding several specifics that are not regulated by fiqh law, for example regarding the age limit for marriage and polygamy, the prohibition of polygamy except with very strict conditions. Likewise, inheritance law in Tunisia is generally the same as inheritance laws in other Islamic countries, including the same as inheritance law in Indonesia because inheritance law in Tunisia adopts from fiqh law, the difference is the dominance of the school of thought. Inheritance law in Tunisia is dominated by the Maliki school, while in Indonesia it is dominated by the Shafi'i school, but with the addition of several specifics that are not regulated by fiqh law, for example regarding the mandatory will to grandchildren whose parents died before the testator, while in Indonesia the mandatory will to adopted children, while grandchildren whose parents died first are positioned as substitute heirs.

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