

MUDAWWANA REFORMATION : A Study of the Literature of Religious Courts in Morocco

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Abstract

The existence of religious courts in Morocco experienced various problems, ranging from the application of Islamic law, to the codification process that was used as a reference in the implementation of justice. Morocco's legal system is heavily influenced by the legal system implemented by France and Spain. However, family law (al-Ahwal al-Syakhshiyah), which is based on Islamic law, is still upheld by Muslims in Morocco based on the Maliki school of thought and its judicial body known as the Sharia Court. The type of judiciary in the Moroccan State consists of the Court of Cassation, the Constitutional Court, the Supreme Council of Judicial Power and the Moroccan Hebrew Judiciary. In 1965, within a decade after the codification of Mudawwana, an official commission was formed to find solutions to deficiencies in family law, such as on guardianship and maintenance of marriage. After the first meeting, however, nothing more was heard from this commission. Parliament reformed the family law again in 1970, 1974, and in 1979. The formulation of the problem in this article is How was the Religious Courts in Morocco before independence? How is the Religious Courts in Morocco after independence? What is the position of Islam in the legal system in Morocco? What are the types of courts in Morocco? How is the reform process (Mudawana) of Moroccan family law? The purpose of writing this paper is to find out how the Religious Courts in Morocco before independence, Religious Courts in Morocco after independence, The position of Islam in the legal system in Morocco, Types of Courts in Morocco and the process of reform (Mudawana) Moroccan family law.

Keywords: Morocco, Religious Courts, Reformation

INTRODUCTION

The religious court or in Morocco known as the Syar'iyah Court which acts as a Muslim court in Morocco, which is authorized to resolve issues based on the Moroccan Family Law Law or what was known as Mudawannah al-Ahwal al-

Syakhshiyah before it was reformed. After various controversies and demands that occurred, finally Mudawannah al-Ahwal al-Syakhshiyah was officially revised in 2004 and changed its name to Mudawanna al-Ussrah.

The existence of religious courts in Morocco experienced various problems, ranging from the application of Islamic law, to the codification process that is used as a reference in the implementation of justice. The formulation of the problem in this article is How was the Religious Courts in Morocco before independence? How is the Religious Courts in Morocco after independence? What is the position of Islam in the legal system in Morocco? What are the types of courts in Morocco? How is the reform process (Mudawana) of Moroccan family law? The purpose of writing this paper is to find out how the Religious Courts in Morocco before independence, Religious Courts in Morocco after independence, The position of Islam in the legal system in Morocco, Types of Courts in Morocco and the process of reform (Mudawana) Moroccan family law.

DISCUSSION

A. Morocco Country Biography

Mamlakah al-Maghribiyah or known as Morocco is a country that uses a monarchy or kingdom system based on the constitution (Constitutional Monarchy). Morocco is located in the northwestern part of Africa, the north and east are bordered by the Mediterranean and Algeria, the southeast and south are bordered by the French Sahara and Spain and the west is bordered by the Atlantic Ocean. The indigenous population of this country is known as Berber, which is a white-skinned community originating from North Africa where the lineage of the original inhabitants comes from among the Ahlul Bait, namely the descendants of the Prophet Salallahu alaihi wasallam who are Maliki (Malikiyyah).¹

B. The Position of Islam in the Legal System in Morocco

Between 1912 and 1956, the entire territory of Morocco was under the colonization and domination of France and Spain. The Moroccan legal system was heavily influenced by the French and Spanish legal systems. However, family law (al-Ahwal al-Syakhshiyah), which is based on Islamic law, is still upheld by Muslims in Morocco based on the Maliki school of thought and its judicial body known as the Sharia Court.

C. Religious Courts in Morocco Before Independence

¹ Sukron Ma'mun, *Pembatalan Perkawinan Menurut Hukum Islam dan UU Hukum Keluarga di Negara Muslim: Studi Perbandingan antara Negara Mesir, Aljazair, Yordania dan Maroko*, Humaniora, Vol. 5 No.2, 2014., h. 660

The Moroccan state in carrying out religious life is still dominated by France, including in terms of justice. The domination of Muslims in Morocco began with the victory of Spain and France over Germany and Great Britain, thus gaining the authority to support the sultan in modernizing the country. The way to modernize the country was to carry out legal pluralism by dividing the legal system into two parts, namely the sharia legal system and the French or Spanish legal system.

Between 1912 and 1956, most of Morocco was under the political domination of France and Spain. During this period the French and Spanish legal systems influenced local laws, but in terms of family law, Morocco is still based on Islamic sharia. The majority of the population are followers of the Maliki school of thought. Morocco uses the principles of the Maliki school of law in its case decisions in the Sharia Courts. At the same time, customary law is also applied in some cases governed by the courts with some aspects that are contrary to Islamic law (sharia). The administration of the religious courts in Morocco was under the supervision and control of France and Spain.²

D. Religious Courts in Morocco After Independence

Morocco became independent from French and Spanish colonization in 1956. In Morocco's struggle for independence, Islamic law served as the country's identity. After independence in 1956 one of the first new acts was for the government to abolish Berber customary law. Sheikh 'Allal al-Fasi,' a scholar and one of the leaders of the independence movement, fought for a complete Islamization of the legal system.³ Moroccan Islamic jurists were unhappy with the influence of customary law and French law. They wanted Islamic shari'ah to be used as the sole personal law.⁴

At the beginning of independence, Morocco was ruled by King Muhammad V. The independence of Morocco became an opportunity for Muslims to reform Islamic law. King Muhammad V compromised with conservatives to Islamize civil and criminal law, but only family law was approved.⁵

Awareness of the importance of legal reform found its momentum after Morocco's independence from French colonization. Legal reform in Morocco is reflected in the draft of the Family Law Law, Mudawannah al-Ahwal al-Syakhshiyah in 1957-1958..⁶

² Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Leiden: Leiden University Press, 2010), h. 98

³ Buskens, L, *Recent Debats on Family law Reform in Morocco: Islamis Law as Politics in an Emerging Public Sphere, Islamic Law and Society*, Vol 10 No. 1, 2003., h. 72

⁴ Sukron Ma'mun, *Loc Cit.*

⁵ John Hurs, *Advancing Women's Rights Through Islamic Law: The Example of Morocco*, Berkeley Journal of Gender, Law and Justice, 2012., h. 259

⁶ Sukron Ma'mun, *Loc Cit.*

The word Mudawana literally means collection. The word Mudawana is taken from one of Imam Malik's most famous books, *al-Mudawwana al-Kubra*.⁷ On August 19, 1957 the Moroccan government prepared a committee of ten people, 'ulama' and judges. Sheikh 'Allal al-Fasi acted as rapporteur. The committee worked in close cooperation with the Ministry of Justice. The committee was responsible for the function of finalizing the draft Family Law Law for the country on which Moroccan jurists had been working for several years. The royal decree issued for this purpose outlined the aims and objects of the proposed codification of Islamic law. The sources of the draft legislation are:⁸

- a. The principles of the various schools of Islamic law, particularly the dominant opinion in the Maliki School;
- b. The Maliki school's teaching on public interest (Maslahah al-Mursalah); and
- c. Laws applicable in other Muslim countries.

The draft Family Law Law prepared by the committee was approved and passed in stages by the Moroccan Legislature over the next few months. It consists of more than 300 articles organized into six books and enacted with different dates, as below:⁹

- I. Marriage 21-11-1957
- II. Dissolution of marriage 21-11-1957
- III. Birth and related matters 18-12-1958
- IV. Legal capacity and guardianship 25-01-1958
- V. Testament 20-02-1958
- VI. Inheritance 03-04-1958

On December 6, 1957 the King issued a decree dated November 22, 1957, announcing the birth of a marriage and divorce law. Finally, the first family law law covering marriage and divorce came into force for the whole of Morocco on January 1, 1958.¹⁰

E. Types Of Courts In Morocco

a. Moroccan Court of Cassation (المحكمة النقض بالمغرب)

⁷ Buskens, L, *Loc Cit.*

⁸ Tahir Mahmood, *Op Cit.*, h. 118

⁹ Usman Musthafa, *Pembaharuan Hukum Keluarga di Maroko*, h. 55

¹⁰ Miftahul Jannah, *Kedudukan Wali dalam Hukum Keluarga di Dunia Islam (Studi Komparatif Peraturan Perundang-Undangan Indonesia dan Maroko)*, (Jakarta: UIN Syarif Hidayatullah, 2016)., h. 31

In the Moroccan judicial system the Supreme Court is a criminal court established by Dahir No. 1.08.64 Organic Law No. 24.07 on the Supreme Court issued in the Official Gazette No. 5681 on October 20, 2008. The Supreme Court is constitutionally authorized to hear cases of offenses and crimes committed by members of the government in the course of their duties; They can be prosecuted by both houses of Parliament and referred to the Supreme Court; The indictment proposal must be signed by at least a quarter of the members of the council to which it is first submitted, and the two councils discuss it in sequence, and it is only approved by a decision that they approve by secret ballot by a two-thirds majority of the members who make up each council, with the exception of members entrusted to participate in follow-up, investigation or judgment.

The Supreme Court is composed of members half of whom are elected from among the members of the House of Representatives, and the other half from among the members of the Advisory Council, and its president is appointed by an honorable dahir; The organic law determines the number of members of the Supreme Court, the manner of their election, and the procedures to be followed. The Moroccan legislator has adopted the Supreme Court system since the first constitution in 1962, through constitutional revisions in 1996, 1970, 1972, 1980 and 1992.

Under Article 94 of the 2011 Constitution, the Supreme Court was abolished and members of the government are criminally liable before the ordinary courts of the Kingdom, for crimes and misdemeanors they commit, while performing their duties. The law is authorized to determine the procedural law associated with this responsibility.

b. Constitutional Court of Morocco (المحكمة الدستورية بالمغرب)

The history of the constitutional judiciary in the Kingdom of Morocco dates back to the first years of independence when the 1962 constitution provided for the establishment of a constitutional chamber in the Supreme Council as the highest body in the judicial organization.

In 1992, this judiciary would become more independent according to the constitutional review, which was established with the creation of the Constitutional Council as an independent institution with broader powers, in line with the reform plan established by the Kingdom in the early nineties aimed at strengthening the rule of law and consolidating internationally recognized human rights principles.

Within the scope of the broad and deep constitutional reforms approved by the Kingdom under the Constitution issued on July 29, 2011, namely the expansion of public rights and freedoms and the consolidation of institutions and mechanisms to ensure the continued development of a modern democratic state, a Constitutional Court was established - replacing the Constitutional Council - with broader powers and open to the people to defend the rights and freedoms guaranteed to them constitutionally.

c. High Council of Judicial Power (المجلس الأعلى للسلطة القضائية)

The Superior Council of Judicial Power (Conseil Supérieur du Pouvoir Judiciaire - CSPJ), according to the 2011 constitution, is a constitutional institution authorized by the legislature to deal with the recruitment of judges and to provide guarantees to them that have been affirmed within the framework of the law with the principle of judicial independence and to achieve effective and impartial justice.

d. Moroccan Hebrew Judiciary

The Moroccan Hebrew Judiciary is a judicial body that resolves disputes relating to the personal status of Moroccan residents of the Jewish faith, and which are decided by Hebrew courts. The Hebrew judiciary in Morocco has undergone tremendous development throughout history

F. Mudawwana Reform Or Mudawwana Reformation

Regarding the Family Law Law in Morocco, after it was codified, it still raises debates that are considered sensitive and lead to demands for revision. Modernists argued for human rights to be incorporated into the law and more favorable to women but still based on Islamic law.

In 1965, within a decade of Mudawwana's codification, an official commission was established to seek solutions to shortcomings in family law, such as those concerning guardianship and maintenance of marriage. After the first meeting, however, nothing more was heard from this commission. Parliament undertook family law reforms again in 1970, 1974, and in 1979.¹¹

Mudawwana's 2004 reforms expanded women's legal rights into five categories, namely:

1. Marriage

The reformed Mudawwana defines marriage as "a legal contract in which a man and a woman agree to unite in order to have an equal and lasting marital life." Previously, the code allowed the husband alone to organize the marriage and demand the "obedience" of the wife. Then in article 19, previously the minimum age of marriage for men was 18 years old and women were 15 years old, after the reform the minimum age of marriage for men and women was equalized to 18 years old.

Husband and wife have equal rights and have reciprocal rights and obligations, which previously made women obedient to their husbands and as sexual objects.

¹¹ *Ibid.*, h. 77

This change reminded men of their duties in marriage, thereby attempting to alleviate some of the social pressures on women.¹²

2. Polygamy

Reform in terms of polygamy, in substance Islamic law does not change, but only makes it difficult for husbands to commit polygamy. This is an effort to protect women when their husbands want to remarry.

3. Divorce

Before Mudawwana was reformed, the issue of divorce was the right of the husband and the husband could divorce his wife unilaterally. However, after the reform, divorce can only be done based on a judge's decision.¹³

4. Child Custody

In the unreformed Mudawwana, a woman loses custody of her children if she remarries. However, after the reform, a woman who remarries will not lose custody of the child as long as the child meets four conditions, if :¹⁴

- 1) The child is seven years old or younger, or the separation will harm the child;
- 2) The child suffers from an illness or condition that makes care of the child by someone other than the mother impossible;
- 3) The spouse is the legal guardian of the child; and
- 4) The mother is the legal guardian of the child.

Another change is that when a child reaches the age of fifteen, he or she can decide which parent to live with after a divorce. In the previous Mudawwana, boys could make this decision at the age of twelve, but girls could not before the age of fifteen.

This change removed the gender bias in favor of boys and implemented gender-neutral rules that demonstrate the reformed Mudawwana's broad commitment to advancing women's rights. Under the previous law, there was no time limit for resolving legal disputes from divorce. Judicial inaction could result in wives and children waiting years to receive any support from their husbands. Thus some cases languished for over fifteen years without reaching a verdict. Under the reformed Mudawwana, judges must close cases within six months.

5. Inheritance

¹² *Ibid*, h. 262

¹³ *Ibid.*, h. 264

¹⁴ HREA (*Human Right Education Associates*), *The Moroccan Family Code (Moudawana)*, (Rabat: Duo al-Hijja, 2004)., h. 39

The most significant reform is regarding inheritance, which provides for the grandchildren of a deceased son or daughter of a deceased grandparent to receive the requisite amount of inheritance. Previously, only grandchildren of deceased sons were eligible. This distinction was based on an obsolete tribal custom, not on any religious or legal basis. Thus, the previous code seems to have recognized an *urf* (custom) that was inconsistent with the Shariah. The reformed *Mudawana* also gives greater rights to women and children out of wedlock. Previously, twelve witnesses needed to testify in court and offer evidence to the judge to establish the paternity of a child born out of wedlock. Now, children born out of wedlock receive legal recognition, and if someone denies parentage, the court will use science to weigh in.

CONCLUSION

Morocco is a country that adheres to the kingdom model (Kingdom of Morocco) based on the constitution (Constitutional Monarchy). Islam has a position as a system that governs Muslims, especially in private law (*al-Ahwal al-Syakhshiyah*). Prior to Morocco's independence from French and Spanish colonization, Muslim religious courts remained sharia-based but administratively under the supervision and control of both. After independence, Morocco established a codification of Islamic law known as *Mudawannah al-Ahwal al-Syakhshiyah*. or now after the reform was changed to *Mudawanna al-Usrah*. This codification was carried out as a form of awareness of the importance of reform as a momentum for independence from French and Spanish colonialism. The Moroccan judiciary consists of the Court of Cassation, the Constitutional Court, the Supreme Council of Judicial Power and the Moroccan Hebrew Judiciary.

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