



Matrimonial Guardianship Between Absolute Authority and Statutory Restriction: A Socio-Legal and Jurisprudential Analysis in Light of the CEDAW Convention

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Abstract:

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) constitutes a pivotal international legal instrument impacting the socio-legal architecture of domestic family structures, primarily by compelling State Parties to harmonize their municipal legal orders with its norms. Utilizing a comparative jurisprudential and statutory analysis, this study offers a critical appraisal of key mandates articulated within CEDAW, specifically Article 16, through the analytical framework of Islamic jurisprudence (*Fiqh*), while evaluating the legislative trajectory of the Algerian legal system regarding matrimonial guardianship (*Wilayah*). The inquiry demonstrates that the Algerian statutory framework underwent a discernible paradigm shift following the 2005 reform of the Family Code. By enshrining gender parity across select provisions governing guardianship, the legislature recognized the full legal capacity (*Ahliyyah*) of adult women to independently execute matrimonial contracts. Institutionally, this shift replaced the traditional paternalistic mandate requiring a matrimonial guardian (*Wali*) to execute the contract on the woman's behalf with an explicit empowerment formulation stipulating that an adult woman shall conclude her own marriage contract. Consequently, the adult woman is reconstituted as a primary legal subject (*sui juris*) in the matrimonial covenant, empowered to exercise her personal autonomy and manifest informed consent within the codified legal framework. Ultimately, this research highlights the nuanced synthesis between international human rights norms and national legislative adaptations in contemporary Islamic jurisprudence.

Keywords: Algerian Family Law; CEDAW Convention; Female Legal Capacity; Islamic Jurisprudence; Marital Guardianship ; Statutory Reforms.

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Introduction

Matrimonial guardianship (*Wilayah*) occupies a central yet contested position within Islamic jurisprudence (*Fiqh*) and contemporary family law reform. Traditionally conceptualized as a protective legal mechanism designed to safeguard women's interests and uphold familial dignity, the institution of *Wilayah* has increasingly become a focal point of intense normative debate. This friction primarily emanates from the divergence between traditional protective paradigms and modern legal trends advocating for the secularization, civil status codification, and individual autonomy of matrimonial contracts, a paradigm shift prominent in Western legal systems and increasingly codified through international human rights instruments. Chief among these is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has exerted a profound influence on domestic legal reform across the Arab and Islamic world.

In the Algerian context, the reception of CEDAW's egalitarian mandates has triggered a complex legal re-alignment. While proponents argue that international harmonization enhances female legal agency, critics contend that uncritically adopting international instruments risks undermining the structural cohesion and socio-religious foundations of the Islamic family unit. Although existing literature has widely addressed the 2005 Algerian Family Code amendments, significant scholarly ambiguity remains regarding how the legislature critically balanced classical jurisprudential doctrines of legal capacity (*Ahliyyah*) with the binding imperatives of Article 16 of CEDAW.

To address this critical research gap, this study offers a nuanced jurisprudential and statutory appraisal of marital guardianship. Specifically, it examines the normative posture of CEDAW regarding *Wilayah*, evaluates its systemic implications for familial stability in Algeria, and scrutinizes its concrete reflections within the substantive provisions of the Algerian Family Code. Consequently, the central research problem is formulated through the following overarching inquiry:

How does the Algerian legislature reconcile the classical jurisprudential requirements of matrimonial guardianship (Wilayah) with its international obligations under CEDAW, and to what extent has this synthesis reconstituted female legal capacity in execution of the marriage contract?

To systematically resolve this inquiry, the study is structured into two main analytical sections:

- **Section I** undertakes a comprehensive jurisprudential analysis of *Wilayah* in Islamic Sharia, establishing its conceptual underpinnings, legal rulings, and the primary juristic debates (*Fiqh*) concerning the requirement of a guardian's consent.



• **Section II** investigates female guardianship under the Algerian statutory framework in light of CEDAW, analyzing first the normative scope of the Convention and subsequently its concrete legislative ramifications for female agency and matrimonial autonomy within Algerian law.

THE FIRST TOPIC: The Position of Islamic Sharia on Guardianship in the Marriage Contract

Matrimonial guardianship (*Wilayah*) constitutes a foundational pillar within Islamic jurisprudence (*Fiqh*), attracting rigorous scholarly discourse due to its systemic role in safeguarding women's interests, facilitating prudent spousal selection, and reinforcing the institutional stability of the family unit. Classical and contemporary jurists have historically diverged regarding the normative status of a guardian (*Wali*) in the execution of a marriage contract. This doctrinal spectrum spans from the majority view, which elevates guardianship to an indispensable legal pillar (*Rukn*) or prerequisite for validity (*Shart Sihhah*), to juristic positions that recognize a fully competent woman's capacity to independently conclude her matrimonial covenant under specific conditions.

To rigorously delineate the position of Islamic Sharia, this section first clarifies the legal nature, conceptual underpinnings, and normative rationale of matrimonial guardianship. Subsequently, it provides a critical analytical evaluation of the primary juristic doctrines (*Madhahib*) governing the requirement of a guardian in marriage contracts.

FIRST REQUIREMENT: Conceptual Framework and Legal Nature of Marital Guardianship

This subsection elucidates the conceptual foundation of matrimonial guardianship (*Wilayah*) by examining its linguistic origin and technical juristic definition (Subsection 1), followed by an outline of the statutory and juristic qualifications required of a matrimonial guardian (*Wali*) (Subsection 2).

1. Definition of Guardianship (Wilayah)

Defining guardianship within Islamic legal theory necessitates a dual examination of its etymological derivation and its specialized juristic signification.

First : Etymological and Linguistic Derivation

Etymologically, the root noun *Wali* (plural: *Awliya'*) encompasses a rich spectrum of linguistic connotations within classical Arabic lexicography. Prominent among these is "the beloved" (*al-Muhibb*), functioning as the conceptual antonym of the adversary, derived from the verb *Wālāhu* (to express affection or proximity). It similarly denotes "the intimate friend" (*al-Ṣadīq*) and "the supporter or ally" (*al-Nasīr*).

From a morphological perspective, the verbal root *Waliya* (signifying proximity, governance, or assumption of responsibility) yields two primary noun



forms: *Walāyah* (with a *Fathah*) and *Wilāyah* (with a *Kasrah*). Classical lexicographers maintain that the form with *Fathah* (*Walāyah*) constitutes the abstract verbal noun, denoting devotion, allegiance, and support. Conversely, the form with *Kasrah* (*Wilāyah*) signifies an official office, administrative authority, or sovereign title, analogous in morphological structure and function to *Imārah* (governance) and *Niqābah* (representation). As noted by Ibn al-Sikkīt and preserved in classical lexicographical references such as *Al-Muhkam*, *Wilāyah* specifically denotes sovereign authority¹.

Second : Technical Juristic Signification

Building upon this etymological foundation, classical jurists (*Fuqahā'*) conceptualized guardianship as a recognized legal authority (*Sultah Shar'iyyah*) by virtue of which a fully competent individual is empowered to administer the affairs of, or execute binding legal dispositions on behalf of, another party. Crucially, in Islamic legal theory, this power is not absolute; rather, it functions as a fiduciary duty (*Amānah*) strictly contingent upon protecting and advancing the ward's best interests (*Maslahah*) in conformity with Divine Law.

Consequently, in formal juristic terminology, *Wilayah* is defined as:

"A Sharia-sanctioned authority conferring legal standing upon a fully competent person to execute binding transactions and administer the personal or property affairs of another."

Within Islamic legal typology, this juristic formulation encompasses two major categories:

1. **Public Guardianship (*al-Wilāyah al-'Āmmah*):** Represents the supreme administrative authority of the Sovereign (*al-Sultān*) or public institutions over the community, acting as a legal representative to preserve public order and advance common societal interests.

2. **Private Guardianship (*al-Wilāyah al-Khāssah*):** Comprises specific familial jurisdictions, such as a father's authority over his minor children to oversee their upbringing, manage their financial assets, and contract their marriages².

Third : Scriptural Foundations and Structural Typologies of Matrimonial Guardianship

The conceptual foundation of guardianship is explicitly anchored within primary Islamic scriptural sources. The Holy Qur'an emphasizes the overarching ethos of mutual legal, moral, and social solidarity among believers, as Allah

¹ (*al-Sultān*) and administrative jurisdiction (*al-Khittah wa al-Imārah*) (*Al-Zabīdī*, n.d., Vol. 40, p. 242).

² Al-'Awfī, 'Abd al-Rahmān. *Al-Wilāyah fī al-Nikāh*. Deanship of Scientific Research, Islamic University of Madinah, 2002, p. 24.



Almighty states: *"Your ally is none but Allah and [therefore] His Messenger and those who have believed"* (Al-Mā'idah, 5:55). This principle of social stewardship is further amplified in the verse: *"The believers, both men and women, are guardians of one another; . They encourage good and forbid evil "* (At-Tawbah, 9:71).

In synthesizing these textual foundations, classical and contemporary jurists generally eschewed a single, rigid definition of matrimonial guardianship. Instead, they formulated nuanced functional descriptors that delineate its core legal nature³. Specifically, *Wilayah* in marriage is conceptualized as:

- **A Delegated Juridical Authority:** A legal power vested in a male agnate over a woman, grounded in paternal kinship (*Ubuwwah*), agnatic relationship (*Ta'sīb*), testamentary appointment (*Īsā'*), custodianship (*Kafālah*), or sovereign administrative authority (*Saltanah*).

- **A Special Category of Personal Guardianship (*al-Wilāyah 'alā al-Nafs*):** A specific branch of personal status law conferring jurisdiction over intrinsic personal rights, such as upbringing, moral guidance, and the solemnization of marriage.

- **An Exclusive Legal Standing (*Persona Standi*):** The legal capacity enabling the guardian to execute a valid and binding matrimonial contract on behalf of, or in conjunction with, the woman.

- **An Enforcement Authority (*Nafādh al-Tasarruf*):** As classically articulated by Islamic jurists, it represents *"the legal power to enforce a binding declaration upon another, whether they consent or object."*

Fourth : Doctrinal Classification: Compulsory vs. Non-Compulsory Guardianship

Islamic jurists (*Fuqahā'*) systematically categorize matrimonial guardianship into two fundamental typology frameworks based on the degree of legal compulsion exercised over the ward:

1. Compulsory Guardianship (*Wilāyat al-Ijbār*):

Refers to the absolute, unilateral legal authority exercised by the guardian to execute binding marriage contracts on behalf of wards lacking full legal capacity, such as minors or individuals with severe intellectual disabilities. In this capacity, the guardian acts as the sole legal representative (*Proxy*), thereby dispensing with the requirement of prior legal consent due to the ward's legal incapacity⁴.

2. Non-Compulsory or Participatory Guardianship (*Wilāyat al-Ikhtiyār / al-Mushārah*):

³ Al-'Imād, Hishām 'Abd Yahyā. *Al-Wilāyah fī al-Zawāj: Dirāsah Fiqhiyyah Muqāranah wa-Ra'y al-Qānūn al-Yamanī* (1st ed.). Dār Ghāfiq li-l-Dirāsāt wa-al-Nashr, 2022.

⁴ Ushari, 'Abd Allāh 'Alī. *Al-Wilāyah fī al-Zawāj 'alā Daw' al-Shari'ah al-Islāmiyyah wa-Qānūn al-Usrah al-Jadīd*. Journal of Legal Studies and Research, 9, 2018, pp. 85-104.



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According to the majority juristic consensus (*al-Jumhūr*, comprising the Mālikī, Shāfi'ī, and Hanbalī schools), a sane, adult woman who has attained full legal capacity (*Bālighah 'Āqilah Rashīdah*) cannot independently conclude her matrimonial contract. Instead, the solemnization must be formally conducted through her guardian. However, because the father or agnate cannot compel a fully competent adult woman against her will, this framework is characterized as *Participatory Guardianship (Wilāyat al-Mushārah)*. Within this dual-agency model, the woman retains the autonomous right to express informed consent and select her prospective spouse, while the guardian provides formal execution⁵.

Islamic jurists categorize matrimonial guardianship into two fundamental types:

- **Compulsory Guardianship (*Wilāyat al-Ijbār*):** Refers to the absolute legal authority vested in the guardian to execute marriage contracts on behalf of wards lacking full legal capacity, such as minors and persons with intellectual disabilities, without obtaining their prior consent, as the guardian acts as their sole legal proxy⁶.

- **Option or Co-Guardianship (*Wilāyat al-Ikhtiyār / al-Mushārah*):** According to the majority of jurists (*fuqaha*), a sane, adult woman of full legal capacity (*Bālighah 'Āqilah Rashīdah*) cannot independently execute her marriage contract or that of others; rather, solemnization must be conducted by her guardian, excluding the father, who cannot compel her without her consent. This is termed co-guardianship (*Wilāyat al-Mushārah*) because the woman retains the autonomous right to voice her opinion and select her spouse⁷.

In stark contrast to the majority view, the Hanafī school posits that a fully competent adult woman possesses independent legal capacity (*Ahliyyah Kāmilah*) to execute her marriage contract autonomously, even without the involvement or consent of a guardian. Under Hanafī jurisprudence, the guardian's role is relegated to Recommended/Consultative Guardianship (*Wilāyat al-Nadb wa al-Istihbāb*), rendering his participation advisory rather than a prerequisite for contract validity⁸.

Nevertheless, to balance individual autonomy with family honor, the Hanafī doctrine retains the guardian's right to judicial recourse (*Haqq al-I'tirād*). Should the woman contract a marriage with a spouse of unequal social or moral standing (*Ghayr Kuf*), the guardian may petition a competent judge for judicial annulment

⁵ Jhaysh, 'Alī Jum'ah 'Abd. Al-Wilāyah fī al-Nikāh wa-mā Yataratabu 'Alayhā min Ahkām. Dār I'adat Handasat al-Fikr, 2008.

⁶ Ushari, 'Abd Allāh 'Alī. Al-Wilāyah fī al-Zawāj 'alā Daw' al-Sharī'ah al-Islāmiyyah wa-Qānūn al-Usrah al-Jadīd. Journal of Legal Studies and Research, 9, 2018, pp. 85-104.

⁷ Jhaysh, 'Alī Jum'ah 'Abd. Al-Wilāyah fī al-Nikāh wa-mā Yataratabu 'Alayhā min Ahkām. Dār I'adat Handasat al-Fikr, 2008.

⁸ Qarāt, Nūr al-Dīn. Muhādārāt fī Ahkām al-Usrah. Mohammed I University, 2016.



(Faskh). Thus, even within the most liberal classical paradigm, absolute matrimonial autonomy remains subject to judicial oversight regarding spousal compatibility⁹.

2. Qualifications required of a Marital Guardian (Wali)

Islamic jurists (*Fuqahā'*) consistently maintain that a marital guardian (*Wali*) must satisfy specific legal, mental, and personal qualifications to execute a valid marriage contract. While scholarly consensus (*Ijmā'*) exists regarding fundamental capacity requirements, other personal attributes remain subject to significant doctrinal debate. These prerequisites are categorized into objective legal capacity requirements and subjective/doctrinal qualifications:

a. Mental Sanity and Legal Majority (Al-'Aql wa al-Bulūgh)

The absolute majority of jurists stipulate that a guardian must possess full legal capacity (*Ahliyyah Kāmilah*), specifically, being an adult of sound mind (*Bāligh 'Āqil*). Consequently, guardianship is legally withheld from minors and individuals suffering from mental incapacitation (*Al-Majnūn*), as both lack foundational legal capacity (*Ahliyyah*). Functionally, *Wilayah* is predicated upon rational discernment, sound judgment, and the capacity to advance the ward's best interests. This is governed by the established legal maxim:

*"An individual who lacks legal capacity over their own person (Wilāyah 'alā al-Nafs) cannot lawfully exercise authority over another."*¹⁰.

b. Personal Freedom (Al-Hurriyyah)

Historically, classical jurists required personal freedom as a prerequisite for guardianship, positing that an enslaved individual lacked autonomous authority (*Al-Milk wa al-Tasarruf*) over their own person and thus could not exercise legal authority over others¹¹. *While this requirement is rendered obsolete under modern municipal and international legal frameworks abolishing slavery, it reflects the foundational principle that Wilayah necessitates absolute legal autonomy.*

c. Community of Faith / Profession of Islam (Al-Islām)

Jurists unanimously hold that a shared religious affinity (*Al-Islām*) is a strict prerequisite for exercising guardianship over a Muslim woman. Consequently, a non-Muslim cannot possess or exercise marital guardianship (*Wilayah*) over a Muslim woman, ensuring that the guardian's protective discretion aligns with the ward's personal law and socio-religious interests¹².

⁹ Oulad Ali, H., & Allal, A. *Al-Wilāyah fī 'Aqd al-Zawāj bayna Siyādat al-Tashrī' al-Ilāhī wa-Tasayyud al-Qānūn al-Waḍī*. Mediterranean Journal of Law and Economics, 7(2), 2022, pp. 112-129.

¹⁰ Al-Kāsānī, 'Alā' al-Dīn Abū Bakr. *Badā'ī' al-Sanā'ī' fī Tartīb al-Sharā'i'* (2nd ed., Vol. 2). Dār al-Kutub al-'Ilmiyyah, 1986, p. 239.

¹¹ Ibn Taymiyyah, Taqī al-Dīn Ahmad. *Ahkām al-Zawāj* (M. 'A. 'Atā, Ed., 1st ed.). Dār al-Kutub al-'Ilmiyyah, 1988, p. 95.

¹² Ibn Taymiyyah, Taqī al-Dīn Ahmad. *Ahkām al-Zawāj* (M. 'A. 'Atā, Ed., 1st ed.). Dār al-Kutub al-'Ilmiyyah, 1988, p. 96.



d. Moral Probity (Al-'Adālah)

Jurists diverge on whether moral probity (Al-'Adālah, the absence of major religious transgressions) constitutes a strict condition for legal validity, yielding two primary doctrinal approaches¹³:

• **The Non-Essentialist Approach:** Moral probity is not a prerequisite for the validity of guardianship. This represents the authoritative position of the Hanafī school, the predominant view among Mālikī jurists, a recognized opinion (*Wajh*) in Shāfi'ī doctrine, and a narrated position (*Riwāyah*) from Imām Ahmad. This approach prioritizes natural agnatic affinity (*Ta'sīb*) over individual moral standing.

• **The Essentialist Approach:** Moral probity is an indispensable condition for the legal validity of *Wilayah*. This stance is strictly maintained by the Shāfi'ī and Hanbalī schools, as well as a non-predominant opinion in Mālikī jurisprudence, reasoning that an unjust person (*Fāsiq*) cannot be entrusted with the fiduciary duty (*Amānah*) of marriage.

e. Gender Qualification: Masculinity (Al-Dhukūrah)

The requirement of male gender (*Al-Dhukūrah*) for the marital guardian represents one of the most critical legal divergences in Islamic jurisprudence¹⁴:

• **The Majority Patriarchal Consensus (*al-Jumhūr*):** The Mālikī, Shāfi'ī, and Hanbalī schools strictly stipulate masculinity as an essential prerequisite, holding that a woman, regardless of her maturity or intelligence, cannot lawfully execute a marriage contract on her own behalf or for another woman.

• **The Hanafi Autonomy Counter-Model:** Conversely, the Hanafī school maintains that an adult woman of sound mind possessing full legal capacity (*Bālighah 'Āqilah Rashīdah*) enjoys the absolute legal right to directly conclude her own matrimonial contract. Furthermore, she possesses full legal capacity to act as an agent (*Wakīl*) or guardian (*Wali*) for another woman, establishing an early jurisprudential foundation for female legal agency (*Ahliyyah*).

SECOND REQUIREMENT: Juristic Divergence Regarding the Imperative Requirement of a Guardian (Wali)

Classical and contemporary Islamic jurists have diverged significantly regarding whether the presence and formal consent of a male guardian (*Wali*) constitutes an absolute prerequisite (*Shart*) or pillar (*Rukn*) for the legal validity of a marriage contract. This doctrinal divergence has yielded two principal frameworks. Below is an analytical evaluation of these doctrines, examining their foundational scriptural, hermeneutical, and rational proofs (*Adillah*).

¹³ Al-Kāsānī, 'Alā' al-Dīn Abū Bakr. *Badā'ī' al-Sanā'ī' fī Tartīb al-Sharā'ī'* (2nd ed., Vol. 2). Dār al-Kutub al-'Ilmiyyah, 1986, p. 239.

¹⁴ Sālih, 'Abd Allāh Ibrāhīm. *Al-Zawāj wa-Ahkāmuhu fī al-Sharī'ah al-Islāmiyyah wa-fī al-Mahākīm al-Misriyyah*. 2006, pp. 218-220.



1. The Majority Paradigm (Al-Jumhūr): Guardianship as an Absolute Prerequisite for Validity

Under the majority paradigm, a marital guardian exercises exclusive legal authority to execute the marriage contract of a woman under his jurisdiction by virtue of established Sharia entitlement. Consequently, a woman, irrespective of her age, sound mind, or social standing, lacks the independent legal standing (*Persona Standi*) to autonomously conclude her own matrimonial covenant or that of another woman. Should she directly execute the contract, the marriage is deemed legally non-existent and subject to absolute nullity (*Bātil*). Similarly, any contract solemnized on her behalf by an unauthorized third party (*Ajñabī*) without the explicit authorization of her legitimate guardian is rendered null and void.

This restrictive position represents the authoritative consensus (*Jumhūr*) of the Maliki, Shafi'i, and Hanbali schools of law¹⁵. It is likewise vigorously upheld by numerous contemporary traditionalist scholars, including Sheikh Ibn Bāz, Sheikh Ibn 'Uthaymīn, Sheikh Mustafā ibn al-'Adawī, and Sheikh Abū Ishāq al-Huwaynī¹⁶.

Adherents of the majority doctrine substantiate their position using a multifaceted evidentiary matrix derived from the Holy Qur'an, Prophetic Traditions (*Sunnah*), and early judicial practice (*Āthār al-Sahābah*):

a. Exegetical Proofs from the Holy Qur'an

The Hermeneutics of Non-Obstruction ('Adl):

Allah Almighty decrees: *{When you divorce women and they have reached the end of their waiting period, do not 'let the guardians' prevent them from re-marrying their ex-husbands if they come to an honourable agreement.}* (Al-Baqarah, 2:232).

This verse explicitly prohibits agnatic guardians from unlawfully preventing ('*Adl*) women under their authority from executing a new contract with former husbands following the expiration of their waiting period ('*Iddah*). Majority jurists argue that addressing this divine prohibition directly to guardians ("do not prevent them") constitutes definitive proof that guardians possess legal authority over the contract. Had women possessed autonomous legal capacity to independently solemnize their marriages, addressing the prohibition to male guardians would be hermeneutically redundant¹⁷.

This verse explicitly prohibits legal guardians from unjustly preventing ('*Adl*) women under their authority from returning to their former husbands through a

¹⁵ Al-'Awfī, 'Abd al-Rahmān. *Al-Wilāyah fī al-Nikāh*. Deanship of Scientific Research, Islamic University of Madinah, 2002, pp. 67-68.

¹⁶ Āl Rajab, Ahmad Muhammad. *Al-Īdāh li-Ahkām al-Wilāyah fī al-Nikāh* (1st ed.). Dār al-Fuqarā', 2019.

¹⁷ Al-Ashqar, Sulaymān. *Ahkām al-Zawāj fī Daw' al-Kitāb wa-al-Sunnah* (1st ed.). Dār al-Nafā'is li-l-Nashr wa-al-Tawzī', 1998, p. 131.



new contract following the expiration of their waiting period (*'Iddah*). The divine prohibition addressed directly to the guardians ("*do not prevent them*") demonstrates that if women possessed the autonomous legal capacity to independently contract their own marriages, addressing the prohibition to the guardians would be logically redundant¹⁸.

The Imperative Addressing Mandated Guardians:

Allah Almighty states: { *Marry off the 'free' singles among you, as well as the righteous of your bondmen and bondwomen. If they are poor, Allah will enrich them out of His bounty. For Allah is All-Bountiful, All-Knowing.* } (An-Nūr, 24:32).

As Al-Qurtubī observed, the imperative grammatical construction ("*Marry off...*", *Ankihū*) is addressed to society's male custodians, proving that a woman does not possess independent agency to solemnize her marriage without a guardian's formal intervention¹⁹.

b. Evidentiary Proofs from the Prophetic Sunnah

The majority doctrine further reinforces its stance through explicit Prophetic traditions that negate the legal validity (*Nafy al-Sihhah*) of guardianless contracts:

1. **The Principle of Invalidation:** Abū Mūsā al-Ash'arī reported that the Prophet explicitly declared: "*There is no valid marriage contract without the authorization of a legal guardian (Wali).*" (Recorded by Abū Dāwūd, Al-Tirmidhī, and Ibn Mājah). Jurists argue that the structural negation ("*There is no...*") targets legal validity (*Nafy al-Sihhah*) rather than mere moral perfection (*Nafy al-Kamāl*), thereby nullifying guardianless marriages *ab initio*²⁰.

2. **The Triple Invalidation Formula:** The Mother of the Believers, 'Ā'ishah (may Allah be pleased with her), narrated that the Messenger of Allah declared: : "*Whichever woman marries without the permission of her guardian, her marriage is null and void, her marriage is null and void, her marriage is null and void...*" (Recorded by Abū Dāwūd, Ibn Mājah, and Al-Bazzār; Al-Albānī, 2014, No. 3067). The threefold repetition serves as an emphatic legal confirmation (*Tawkīd*) of absolute nullity (*Bātil*).

3. **Prohibition of Female Execution and Deputization:** Abū Hurayrah (may Allah be pleased with him) reported that the Messenger of Allah stated: "*No woman shall execute the marriage contract of another woman, nor shall any woman execute her own marriage contract; indeed, only an unchaste woman executes her own marriage contract.*" (Recorded by Ibn Mājah and Al-Bayhaqī; Al-Albānī, 1997, No. 1539).

¹⁸ Al-Ashqar, Sulaymān. *Ahkām al-Zawāj fī Daw' al-Kitāb wa-al-Sunnah* (1st ed.). Dār al-Nafā'is li-l-Nashr wa-al-Tawzī', 1998, p. 131.

¹⁹ Al-Qurtubī, Abū 'Abd Allāh. *Al-Jāmi' li-Ahkām al-Qur'ān* (Tafsīr al-Qurtubī) (A. Al-Bardūnī & I. Atfīyah, Eds., 2nd ed., Vol. 12). Dār al-Kutub al-Misriyyah, 1964, p. 239.

²⁰ Āl Rajab, Ahmad Muhammad. *Al-Idāh li-Ahkām al-Wilāyah fī al-Nikāh* (1st ed.). Dār al-Fuqarā', 2019, p. 23.



c. Rational, Customary, and Hermeneutical Proofs (Adillah 'Aqliyyah wa 'Urfiyyah)

Beyond direct scriptural texts, majority jurists reinforce the mandatory status of matrimonial guardianship through multifaceted customary, rational, and hermeneutical arguments:

The tradition establishes an absolute legal prohibition against a woman directly executing a marriage contract, whether for herself or on behalf of another, thereby proving that the presence and agency of a male guardian constitute an indispensable legal prerequisite²¹.

Scholars upholding this doctrine substantiate the legal imperative of a marital guardian (*Walī*) by drawing upon multifaceted evidence from the Holy Qur'an, the Prophetic Sunnah, and the established practice (*'Amal*) of the Companions. Historically, custom (*'Urf*) dictated that men exclusively solemnized marriage contracts, with no authenticated record of a woman executing her marriage contract independently. Furthermore, jurists distinguished matrimonial contracts from financial transactions, invoking the declaration of 'Ā'ishah (may Allah be pleased with her): *"A woman shall not solemnize her own marriage, for indeed, only an unchaste woman executes her own marriage."*

Nevertheless, stipulating a guardian does not restrict guardianship solely to a woman's agnatic relatives; rather, such authority may devolve upon others when legally necessitated pursuant to Sharia provisions. Allah Almighty addressed guardians directly in His command: *"And marry off the singles among you, as well as the righteous of your bondmen and bondwomen"* (An-Nūr, 24:32), as well as His injunction: *(And do not marry polytheistic men [to your women] until they believe)* (Al-Baqarah, 2:221). This establishes that the legislative mandate targets those exercising matrimonial authority, underscored by the deliberate hermeneutical distinction between His command *"And do not marry polytheistic men [to your women]"* and His command *"Do not marry polytheistic women until..."* (Al-Baqarah, 2:221; Ibn Taymiyyah, 1980, Vol. 32, p. 102).

2. The Second Doctrine: The Permissibility of Contracting Marriage Without a Guardian (The Hanafi Counter-Paradigm)

This position represents the predominant jurisprudence of Abū Hanīfah, alongside Abū Yūsuf and Zufar²². These jurists affirm the fundamental legal validity (*Sihhah*) of a marriage contract executed independently by a woman possessing full legal capacity (*Kāmilat al-Ahliyyah*).

²¹ Al-Zayla'ī, 'Uthmān ibn 'Alī. *Tabyīn al-Haqā'iq Sharh Kanz al-Daqa'iq* (Vol. 2). Dār al-Kitāb al-Islāmī, 1896, p. 98.

²² Al-Kāsānī, 'Alā' al-Dīn Abū Bakr. *Badā'ī' al-Hanā'ī' fī Tartīb al-Sharā'ī'* (2nd ed., Vol. 3). Dār al-Kutub al-Ilmiyyah, 1986, p. 1364.



Nevertheless, this autonomous authority is not absolute; the legal guardian (*Walī*) retains a statutory right of objection (*Haqq al-I'tirād*) should the husband lack social status compatibility (*Kafā'ah*)²³, or if the marriage is contracted below the proper customary dower (*Mahr al-Mithl*). This restriction serves to safeguard both the woman's personal interests and the family's standing. Where no pregnancy or issue has resulted from the union, judicial dissolution (*Tafriq*) may be sought by the guardian; conversely, if pregnancy or offspring exists, the contract shall not be rescinded, out of due deference to the child's welfare and the preservation of lineage²⁴.

Proponents of the Hanafī doctrine substantiate the autonomous legal capacity of women by drawing upon a robust framework of textual proofs (*Adillah Naqliyyah*) from the Holy Qur'an and the Prophetic Sunnah:

a. Textual Evidence from the Holy Qur'an

Hanafī jurists deduce female contractual autonomy from several explicit Quranic directives that directly attribute the act of marriage to women themselves:

1. Direct Attribution of Matrimonial Execution:

Allah Almighty states: *{And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms}*(Al-Baqarah, 2:232).

By directly attributing the verb denoting the contract execution (*Yankihna*) to women themselves, the Quranic text constitutes clear scriptural proof that a woman possesses the inherent legal capacity to solemnize her marriage independently. Furthermore, the verse prohibits guardians from obstructing women who have reached mutual consent with prospective suitors; had women lacked the autonomous legal right to execute the contract, this statutory prohibition addressed to guardians would be rendered hermeneutically redundant²⁵.

2. Autonomous Legal Disposition Post-'Iddah:

Allah Almighty states: *{And when they have fulfilled their term, then there is no blame upon you for what they do with themselves in an acceptable manner}*(Al-Baqarah, 2:234).

In this directive, Allah explicitly vests legal disposition (*Tasarruf*) over their own affairs in women upon the expiration of their waiting period (*'Iddah*). Since solemnizing a marriage contract constitutes the primary legal act following the expiration of the waiting period, this text corroborates her autonomous legal standing to directly execute the contract.

²³ Al-Kāsānī, 'Alā' al-Dīn Abū Bakr. *Badā'i' al-hanā'i' fī Tartaib al-Sharā'i'* (2nd ed., Vol. 2). Dār al-Kutub al-Ilmiyyah, 1986, p. 370.

²⁴ Ibn 'Ābidīn, Muhammad Amīn. *Radd al-Muhtār 'alā al-Durr al-Mukhtār* (Vol. 4). Dār 'Ālam al-Kutub li-l-dibā'ah wa-al-Nashr wa-al-Tawzī', 2003, p. 156.

²⁵ Āl Rajab, Ahmad Muhammad. *Al-Idāh li-Ahkām al-Wilāyah fī al-Nikāh* (1st ed.). Dār al-Fuqarā', 2019, p. 52.



3. Individual Agency in Marital Contracts:

Allah Almighty states: *{So if a husband divorces his wife [three times], then it is not lawful for him to remarry her until after she has married another man}* (Al-Baqarah, 2:230).

The Quranic text explicitly attributes the act of marrying exclusively to the woman (*Hattā Tankiha Zawjan Ghayrah*), demonstrating that she possesses the requisite legal capacity (*Ahliyyah*) to directly conclude the marriage contract without mandatory intermediary agency²⁶.

4. Validity Through Direct Offer (Ījāb):

Allah Almighty states: *{a believing woman who offers herself to the Prophet 'without dowry' if he is interested in marrying her}* (Al-Ahzāb, 33:50).

This verse establishes that a marriage contract is validly executed through a woman's explicit verbal declaration and offer (*Ījāb*), thereby affirming her legal capacity to directly execute the covenant²⁷.

b. Textual Evidence from the Prophetic Sunnah

The Ḥanafī school further substantiates its paradigm through authentic Prophetic traditions that affirm female self-determination and negate absolute paternal coercion:

1. Prioritization of Personal Authority (Al-Ayyim):

Ibn 'Abbās (may Allah be pleased with both) reported that the Prophet declared: *"The unmarried woman (Al-Ayyim) has a greater right to her person than her 'A previously-married woman is more entitled to give a decision about her marriage than her guardian, whereas a virgin's permission is to be sought. Her permission is her silence.'"* (Recorded by Muslim, 1972, No. 1421; Ibn Taymiyyah, 1980, Vol. 24, p. 32).

Linguistically, *Al-Ayyim* denotes any woman lacking a husband, whether virgin or previously married. The Prophetic phrase *"has a greater right to her person"* (*Ahaqqu Bi-Nafsihā*) indicates that her authority supersedes that of her guardian in selecting a spouse and executing her marriage contract. Consequently, the guardian cannot compel her into an unwanted marriage, reinforcing that guardianship does not divest a fully competent woman of her fundamental right to marital self-determination²⁸.

2. Invalidation of Unilateral Paternal Coercion:

'Ā'ishah (may Allah be pleased with her) reported: *"A young woman came to the Messenger of Allah and said: 'O Messenger of Allah, my father married me*

²⁶ Āl Rajab, Aḥmad Muḥammad. *Al-Īdāh li-Ahkām al-Wilāyah fī al-Nikāh* (1st ed.). Dār al-Fuqārā', 2019, p. 53.

²⁷ Al-Kāsānī, 'Alā' al-Dīn Abū Bakr. *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'* (2nd ed., Vol. 3). Dār al-Kutub al-Ilmiyyah, 1986, p. 372.

²⁸ Al-Kāsānī, 'Alā' al-Dīn Abū Bakr. *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'* (2nd ed., Vol. 2). Dār al-Kutub al-Ilmiyyah, 1986, p. 245.



to his nephew to elevate his own status through me.' Thereupon, the Prophet left the decision entirely to her. She replied: 'I have indeed endorsed what my father did, but I wished women to know that fathers possess no [sole] authority in this matter.' (Recorded by Al-Nasā'ī, No. 3269; Ahmad, No. 25043; verified by Al-Arna'ūt, 2001, No. 25043).

This tradition confirms that a guardian does not possess an absolute, mandatory right to execute the contract without her consent, but rather a recommendatory one (*'Alā Wajh al-Istihbāb*). This principle is conclusively validated by the Prophet's tacit approval (*Iqrār*) of her closing statement²⁹.

3. Execution in the Absence of Guardians:

Umm Salamah (may Allah be pleased with her) reported: "The Messenger of Allah visited me after the death of Abū Salamah and proposed to me directly. I said: 'O Messenger of Allah, none of my guardians are present.' He replied: 'None of them, whether present or absent, would object to this.' She then said: 'Stand up, O 'Umar [i.e., Ibn Salamah, her son], and solemnize the marriage of the Messenger of Allah,' so he married her." (Recorded by Al-Tahāwī, Vol. 3, pp. 11--12).

This narration demonstrates the absence of any primary legal guardians at the execution of the contract, proving that the essential validity of a marriage contract does not strictly depend upon direct execution by an agnatic legal guardian³⁰.

THE SECOND TOPIC: Matrimonial Guardianship Under Algerian Legislation and the CEDAW Convention

The major legislative impetuses underpinning the 2005 reform of the Algerian Family Code³¹ derive substantially from state obligations under international human rights instruments, most notably the *Convention on the Elimination of All Forms of Discrimination Against Women*³².

CEDAW posits that all forms of gender-based discrimination constitute an intolerable violation of fundamental justice and human dignity. These egalitarian principles are explicitly codified within Article 16 of the Convention, which mandates State Parties to ensure equal rights regarding marriage, specifically concerning the determination of the legal age of marriage, full autonomy in spousal selection, and the direct execution of matrimonial covenants.

To evaluate these dynamics critically, this section is structured into two thematic subsections:

²⁹ Ibn al-Humām, Kamāl al-Dīn Muhammad. *Sharh Fath al-Qadīr* (Vol. 3). Dār al-Kutub al-'Ilmiyyah, 2003, p. 255.

³⁰ Āl Rajab, Ahmad Muhammad. *Al-Īdāh li-Ahkām al-Wilāyah fī al-Nikāh* (1st ed.). Dār al-Fuqarā', 2019, p. 61.

³¹ Ordinance No. 05-02 (2005), Amending Law No. 84-11 of June 9, 1984, Enacting the Family Code. Official Gazette of the People's Democratic Republic of Algeria, No. 15, February 27, 2005.

³² Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by UN General Assembly Resolution 34/180, 1979.



• Subsection A establishes the conceptual, normative, and structural framework of the CEDAW Convention.

• Subsection B analyzes its direct legislative manifestations and structural impacts on the institution of matrimonial guardianship (Wilāyah) within Algerian family law.

FIRST REQUIREMENT: The Conceptual and Normative Framework of the CEDAW Convention

This subsection examines the formal definition, foundational objectives, and legal characteristics of the CEDAW Convention within contemporary international public law.

1. Definition of the CEDAW Convention

Internationally recognized as the primary legal treaty dedicated to eradicating all forms of gender-based discrimination, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) is widely characterized as the definitive international bill of rights for women³³.

Adopted by the United Nations General Assembly on December 18, 1979, opened for signature on March 1, 1980, and entering into force on September 3, 1981, following the required statutory ratifications, CEDAW establishes legally binding international obligations upon State Parties upon ratification or accession. Consequently, it mandates ratifying states to enact comprehensive domestic legislative, administrative, and regulatory reforms designed to systematically eliminate gender-based discrimination.

To monitor compliance and evaluate implementation, the treaty instituted the *Committee on the Elimination of Discrimination against Women* (CEDAW Committee), tasked with reviewing periodic statutory reports submitted by State Parties. Structurally, the Convention comprises a preamble and thirty substantive articles setting forth overarching principles, statutory duties, and enforceable rights across the political, economic, social, cultural, and civil spheres³⁴.

Adopted as the culmination of over three decades of institutional labor led by the United Nations Commission on the Status of Women (established in 1946), CEDAW is anchored in two foundational imperatives: the universality and the indivisibility of women's human rights. Upon its entry into force, its provisions achieved normative force, becoming strictly binding upon ratifying states under international public law.

As an international normative instrument, the treaty mandates absolute legal equality between men and women across all operational domains while firmly

³³ Abu Zayd, Rāghib Sirāj. *Ittifāqiyyat al-Qadā' 'alā Jamī' Ashkāl al-Tamyīz Didd al-Mar'ah min al-Mansūr al-Islāmī. Dār al-Wafā' li-Dunyā al-Tibā'ah wa-al-Nashr*, 2009, p. 34.

³⁴ Abu Zayd, Rāghib Sirāj. *Ittifāqiyyat al-Qadā' 'alā Jamī' Ashkāl al-Tamyīz Didd al-Mar'ah min al-Mansūr al-Islāmī. Dār al-Wafā' li-Dunyā al-Tibā'ah wa-al-Nashr*, 2009, p. 34.



emphasizing the principle of individualism. Under this paradigm, a woman is recognized and evaluated as an autonomous legal subject (*Persona Juris*) possessing independent individual agency, rather than merely as a component of a familial structure, irrespective of her marital status as single, married, divorced, or widowed³⁵.

Furthermore, the Convention seeks to eliminate systemic discrimination by directly targeting entrenched traditional gender roles and advocating structural revisions to conventional family paradigms. This legal approach encompasses extending legal legitimacy toward non-traditional family structures, including same-sex unions as well as *de facto* cohabitation existing outside traditional marital frameworks.

Ultimately, CEDAW legally binds ratifying State Parties to international human rights norms governing women's status, requiring states to abolish all discriminatory legal provisions, guarantee equal civil, political, economic, social, and cultural rights, and refrain from any state or private conduct that degrades women or compromises their human dignity³⁶.

2. Salient Legal Characteristics of the CEDAW Convention

The CEDAW Convention exhibits a distinct set of legal characteristics that mirror its underlying normative nature and strategic objectives. The most prominent of these can be delineated as follows:

a. The Adoption of Absolute Gender Equality (Formal Parity)

The Convention is fundamentally anchored in the principle of absolute, unqualified equality between men and women, categorically repudiating any discrimination predicated on sex and advocating strict parity in rights, duties, and opportunities. However, this conception diverges fundamentally from the framework of equality within Islamic jurisprudence (Sharia). Sharia posits fundamental equality between men and women regarding human dignity and basic rights, while acknowledging innate biological and functional distinctions in order to achieve substantive justice (*al-'Adl al-Mawdū'ī*) rather than absolute, mechanistic parity³⁷.

This egalitarian doctrine is explicitly codified in Article 16 of the Convention³⁸. Widely regarded as one of the most critical and far-reaching

³⁵ Ashour, S. In'ikās Ittifāqiyyat Saydāw 'alā Qānūn al-'Usrah al-Jazā'irī (al-Khul' Namūdhajan). *Journal of Scientific Research and Islamic Studies*, 14(1), 2022, p. 547.

³⁶ Mahrez, M. *Al-Makānah al-Siyāsiyyah li-l-Mar'ah fī al-Qānūn al-Duwalī wa-al-Tashrī' al-Jazā'irī* [Master's thesis, University of Biskra], 2014, p. 83.

³⁷ Allam, H., & Dhriḥ, S. *Al-Māddah 16 min Ittifāqiyyat Saydāw wa-In'ikāsātuhā 'alā Wilāyat al-Mar'ah fī Qānūn al-'Usrah al-Jazā'irī*. *Ma'ārif Journal*, 19(2), 2024, p. 41.

³⁸ **Textual Reference to Article 16 (CEDAW, 1979)**

Article 16 states:



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provisions of the treaty, Article 16 encompasses a comprehensive suite of stipulations governing personal status matters, including marriage, divorce, marital authority (*Qiwāmah*), guardianship (*Wilāyah*), legal custodianship (*Wisāyah*), spousal rights and obligations, and child custody. In essence, it deconstructs and directly intervenes in the family structure as an institution, a value system, and a foundational social framework.

Critics maintain that Article 16 embodies a Western-centric epistemological framework for regulating domestic relations, which fails to accommodate the theological, ethical, and cultural specificities underpinning many non-Western societies, thereby generating profound friction with their religious and legal systems. Consequently, this provision is viewed as irreconcilable with several established *Sharia* principles, including the legal imperative of a matrimonial guardian (*Walī*), dower (*Mahr*) doctrines, male household guardianship (*Qiwāmah*), the permissibility of polygyny, the prohibition against a Muslim woman marrying a non-Muslim, as well as statutory rules governing divorce, post-divorce waiting periods (*'Iddah*), widows' mourning periods, and child custody (*Hadānah*)³⁹.

In this specific context, Paragraph (a) is critiqued for deliberately omitting the legal requirement of guardianship (*Wilāyah*) over a woman who has not previously been married. Similarly, Paragraph (b) fails to stipulate the requirement of a guardian's consent in such instances, focusing exclusively on a woman's unrestricted and absolute autonomy to select her prospective spouse.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

³⁹ Mahrouq, K. Makhātīr Ittifāqiyyat al-Qadā' 'alā Jamī' Ashkāl al-Tamyīz Didd al-Mar'ah 'alā al-Usrah al-Jazā'iriyyah. *Journal of Applied Legal Studies*, 2022, p. 10.



b. The Mandatory Domestication and Harmonization of Convention Provisions

The Convention explicitly mandates State Parties to adopt all appropriate legislative, administrative, and statutory measures without delay to eradicate discrimination against women. This necessitates enshrining the principle of gender equality within national constitutions and domestic legal codes, alongside ensuring its effective practical enforcement^{40 41}.

Article 2 of CEDAW is widely considered one of the most transformative provisions impacting domestic legal systems. It legally obligates State Parties to undertake requisite legislative, administrative, and judicial measures to eliminate all forms of discrimination against women, including provisions rooted in custom, tradition, or religious beliefs, particularly within family law regimes. Furthermore, the treaty requires reviewing, amending, or outright repealing statutory provisions deemed incompatible with the principle of absolute equality, while establishing accessible legal and judicial mechanisms to enable women to seek redress against discriminatory practices.

Critics emphasize that the gravamen of this provision lies in its imposition of a standardized, globalized culture, establishing the Convention as the exclusive reference point for women's rights, thereby rejecting the legislative diversity and legal pluralism inherent to sovereign states. This mandatory harmonization arguably contravenes the Charter of the United Nations itself, which explicitly mandates respect for the cultural and religious diversity of nations. Under this critical lens, CEDAW purports to operate as a supreme normative instrument that supersedes, amends, and overrides sovereign domestic legislative and religious frameworks⁴².

In a parallel context, Article 3 of the Convention mandates State Parties to adopt all appropriate measures, including statutory legislation, to guarantee women the full exercise and enjoyment of fundamental human rights and basic freedoms on an equal footing with men^{43 44}.

⁴⁰ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by UN General Assembly Resolution 34/180, 1979, Art. 2.

⁴¹ **Textual Reference to Article 2 (CEDAW, 1979)**

Article 2 states: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women..."

⁴² Mahrouq, K. Makhāṭir Ittifāqiyyat al-Qadā' 'alā Jamī' Ashkāl al-Tamyīz Didd al-Mar'ah 'alā al-Usrah al-Jazā'iriyyah. *Journal of Applied Legal Studies*, 2022, p. 7.

⁴³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by UN General Assembly Resolution 34/180, 1979, Art. 3.

⁴⁴ **Textual Reference to Article 3 (CEDAW, 1979)**

Article 3 states: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."



Fundamentally, the CEDAW Convention is designed to eliminate gender discrimination by institutionalizing absolute equality between men and women. Central to its governing principles is the imperative to accelerate *de jure* and *de facto* equality through binding state commitments to adopt legislative and regulatory measures, primarily executed through systematic law reform and the repeal of discriminatory statutory provisions.

Consequently, the Algerian State entered specific formal reservations to several provisions of the treaty, most notably Article 16⁴⁶. Algeria's reservations demonstrate the national legislature's commitment to preserving the society's religious and cultural identity, particularly concerning personal status matters. This jurisdictional stance stems from the fact that the Algerian Family Code derives its substantive rules primarily from Islamic *Sharia* principles, which constitute a foundational material source of national legislation. These principles rest upon achieving substantive justice and protecting human dignity, while acknowledging functional differentiation dictated by familial and social structures, without classifying such structural distinctions as unlawful sex-based discrimination.

B.The Reflections of the CEDAW Convention on Female Guardianship in Algerian Family Law

The CEDAW Convention has significantly influenced statutory reform across numerous jurisdictions, including Algeria, particularly regarding the legal institution of matrimonial guardianship (*Wilāyat al-Nikāh*). Although the Algerian legislature retained the legal guardian (*Walī*) within Article 9 of the Family Code, classifying guardianship as a statutory condition (*Shart*) for the marriage of an adult woman, the scope, nature, and functional efficacy of this institution were substantially altered. To provide a rigorous legislative critique, this subsection is structured into two analytical branches:

- Branch (a) evaluates a woman's autonomous legal capacity to directly execute her own marriage contract.
- Branch (b) analyzes the legal scope and statutory authority of the guardian over wards under his jurisdiction.

a. A Woman's Legal Capacity to Execute Her Own Marriage Contract

Under classical Islamic jurisprudence (*Sharia*), a woman is accorded the absolute right to grant or withhold personal consent regarding marriage; however, traditional jurisprudence does not vest in her the unilateral legal authority to

⁴⁵ **Conceptual Note on "Gender"**

Scholars observe that international instruments have progressively introduced the legal concept of "Gender" (Gender Equality) to replace biological sex (Male/Female). Under this conceptual shift, "gender" encompasses socio-cultural constructs and diverse identities, gradually supplanting traditional binary gender definitions in international law doctrine (Ashour, 2022, pp. 555--556).

⁴⁶ Presidential Decree No. 96-51 of January 22, 1996, ratifying the CEDAW Convention with reservations. Official Gazette of the People's Democratic Republic of Algeria, No. 6, 1996.



execute her own marriage contract directly, requiring instead the formal intervention of an agnatic legal guardian (*Walī*). This traditional paradigm was explicitly codified by the Algerian legislature within Article 11 of *Law No. 84-11* prior to the 2005 legislative reform.⁴⁷

However, the 2005 legislative reform (*Ordinance No. 05-02*) fundamentally transformed the legal requirement of the guardian's presence, reducing it to a procedural formality for an adult woman (*Al-Mar'ah al-Rāshidah*). Consequently, an adult woman now possesses full, autonomous legal capacity to execute her marriage contract directly in the presence of her guardian, who may be her father, an agnatic relative, or any individual of her own choosing for this specific purpose.

Conversely, a female minor (*Al-Qāsir*) lacks independent legal capacity to execute her marriage contract directly. Instead, her designated legal guardian executes the contract on her behalf, acting as a statutory protective mechanism designed to safeguard the minor's best interests rather than diminishing her intrinsic legal status. This statutory rule applies equally to male and female minors alike. Primary legal guardianship rests with the father; should his intervention be precluded, guardianship devolves upon the nearest agnatic relative, and ultimately upon the judge pursuant to the established legal maxim that *the judge is the guardian of whoever has no guardian*, as codified under Article 11(2) of the amended Family Code.

It is worthy of note that Article 12 of the Family Code, prior to its outright repeal in 2005, explicitly prohibited a legal guardian from objecting to the marriage of a woman under his wardship if she sought to marry a status-compatible suitor (*Kuf*) in her best interest. Where a guardian abused his statutory authority by unlawfully withholding consent (*'Adl*), the judge was empowered to authorize the marriage pursuant to former Article 9. Under that prior statutory regime, the legislature permitted a father to prevent his virgin daughter from marrying where her best interests dictated, whether regarding a suitor proposing to her or one she expressed a desire to marry.

A systematic normative reading of Article 9 of the amended Family Code demonstrates that the Algerian legislature established mutual consent (*Al-Ridā*) as the fundamental pillar (*Rukn*) for the legal formation of a marriage contract. This underscores the strictly consensual nature of the covenant, grounding its legal validity entirely upon the meeting of the minds of both contracting spouses. Consequently, the absence or defect of consent by either or both parties renders the marriage contract voidable, as valid consent constitutes an indispensable element

⁴⁷ **Article 11 of Law No. 84-11 (Prior to the 2005 Amendment):**

"A woman's marriage shall be conducted by her guardian, who is her father, followed by her closest agnatic relatives, and the judge is the guardian of whoever has no guardian."



of formation. Any interested legal party may institute judicial proceedings to annul the contract upon establishing the absence of genuine consent⁴⁸.

Furthermore, the 2005 reform repealed Article 20 of the Family Code, which had previously permitted proxy marriage solemnization through a special power of attorney. This repeal reflects an explicit legislative mandate requiring the direct physical presence of both contracting parties at solemnization.

In sum, an analysis of the amended Family Code reveals that while the Algerian legislature did not retain the guardian as an essential pillar (*Rukn*) of contract formation, it did not eliminate the institution of guardianship entirely. Instead, the legislature preserved the *Walī* as a statutory condition (*Shart*) accompanying the solemnization of a woman's marriage contract. Thus, the requirement of guardianship remains applicable to both virgins (*Bikr*) and previously married women (*Thayyib*), albeit within a significantly narrowed scope of application. This legislative approach represents an attempt to harmonize domestic statutory law with Algeria's international treaty commitments, specifically under the CEDAW Convention, while simultaneously preserving the religious, ethical, and cultural foundations of the national legal order.

b. Scope and Authority of the Guardian over Wards

Article 4 of the Algerian Family Code establishes that a marriage contract is fundamentally predicated upon the mutual consent of both spouses. Consequently, its valid legal formation requires solely the meeting of their intent, without the intervention of the legal guardian (*Walī*) exerting any formative or constitutive effect on the creation of the contract (Family Code, Art. 4).⁴⁹

Based on this core statutory principle, a prominent body of legal scholarship maintains that a fully competent adult woman possesses the legal right to directly execute her own marriage contract provided her free intent is established, subject to her guardian's consent being granted either prior to execution or subsequently through legal ratification (*Iqrār*)⁵⁰.

Under Article 11 of the Family Code prior to the 2005 amendment, the legislature precluded a woman from directly executing her marriage contract, requiring instead a legal guardian, whether her father or an agnatic relative, to

⁴⁸ Allam, H., & Dhrifi, S. Al-Māddah 16 min Ittifāqiyyat Saydāw wa-In'ikāsātuhā 'alā Wilāyat al-Mar'ah fī Qānūn al-Ushrah al-Jazā'iri. *Ma'arif Journal*, 19(2), 2024, p. 46.

⁴⁹ **Decision of the Supreme Court of Algeria (Personal Status Chamber):**

In Decision No. 415123 (March 12, 2008), the Supreme Court affirmed that mutual consent constitutes an indispensable pillar (*Rukn*) of marriage. The Court upheld a wife's right to refuse forced consummation where the husband sought a judicial order compelling her to complete marital rites. The Court ruled that under Articles 4 and 9 of the Family Code, marriage is a consensual contract built upon mutual affection and consent; thus, trial judges cannot compel a wife to consummate a marriage against her explicit lack of consent (*Supreme Court Journal*, 2008, Vol. 1, pp. 275-277).

⁵⁰ Shihani, 2019, p. 315 (full bibliographic details for this source were not supplied in the manuscript's reference list).



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execute the contract on her behalf. Through the 2005 reform, the Algerian legislature formally recognized the legal right of an adult woman (*Al-Rāshidah*) to execute her marriage contract directly in the presence of her guardian. This reflects a major legislative paradigm shift aimed at restricting the requirement of mandatory legal guardianship for adult women. This orientation is grounded in institutionalizing equal legal capacity (*Ahliyyah*) between men and women in solemnizing marital contracts, aligning national legislation with international treaty commitments ratified by Algeria, most notably the CEDAW Convention. Consequently, the legal requirement of the guardian's presence is restricted strictly to attendance and expression of assent, without extending to executing the contract on behalf of the adult woman.

Within this same statutory framework, adult women now enjoy full personal autonomy in selecting a spouse as well as choosing the guardian who attends the solemnization. However, this statutory mechanism has sparked intense juristic debate regarding its consistency with Islamic jurisprudence (*Sharia*), wherein the majority of classical jurists regard guardianship as a foundational condition of legal validity (*Shart Sihhah*) for a woman's marriage⁵¹.

Regarding female minors (*Al-Qāsir*), the legislature retained the protective regime of guardianship. However, this guardianship assumed an option-based rather than a coercive character; the guardian's statutory role is strictly confined to effectuating the minor's intent and fulfilling her desire to enter into marriage, without possessing the authority to impose his own will, even if he deems it in her best interest.

Furthermore, the legislature restricted the exercise of guardianship over minors to the father, followed by closest agnatic relatives, utilizing the conjunctive sequence "then" (*Thumma / Al-Fā'*) to denote a mandatory order of precedence, unlike the flexible rule adopted for adult women. However, instead of exhaustively defining eligible relatives, the legislature employed the broad phrase "closest relatives" (*Al-Aqārib al-Awwalūn*) without delineating its precise statutory scope⁵².

Additionally, the legislature used the term "minors" (*Al-Qussar*) in Article 11(2) as an inclusive statutory term covering both males and females, without establishing a statutory minimum age threshold for minor marriage. This statutory omission raises critical legal questions regarding whether the applicable threshold

⁵¹ Hammouda, A. A. R., & Assaf, M. M. M. *Dirāsah li-l-Māddah 16 min Ittifaqiyyat Saydāw fī Daw' Maqsad al-Musāwāh bayna al-Rajul wa-al-Mar'ah fī al-Tashrī' al-Islāmī*. Global Academic Journal of Islamic Sharia and Sciences, 3(2), 2021, p. 8.

⁵² Bouaziz, A. *Al-Ishkālāt al-Nātijah 'an al-Muṣ'ādaqah 'alā Ittifaqiyyat Saydāw: Al-Māddah 11 min Qānūn al-Usrah Namūdhajan*. Journal of Rights and Human Sciences, 16(2), 2023, p. 659.



corresponds to the age of discernment (*Sinn al-Tamyīz*), a lower statutory age, or the attainment of biological puberty.

On another note, the legislature did not restrict the guardian in Article 11(1) to male individuals, employing instead the gender-neutral phrasing "any person of her choice" (*Ay Shakhs Takhtāruh*). This broad formulation encompasses both males and females, prompting juristic debate over whether a woman, such as a mother, may assume the role of guardian in a marriage contract based on the literal statutory interpretation of "person", which applies equally to both sexes⁵³.

Beyond the identity of the guardian, the legal ambiguity surrounding the guardian's role in the marriage of a competent adult woman is further compounded by the legislature's failure to prescribe any explicit legal sanction for his absence at solemnization. Article 33(2) of the amended Family Code stipulates that if a marriage is concluded without two witnesses, a dower (*Sadāq*), or a guardian where obligatory, it shall be dissolved prior to consummation without entitlement to a dower, and confirmed after consummation upon payment of a proper customary dower (*Mahr al-Mithl*)⁵⁴.

By applying the canon of negative inference (*Mafhūm al-Mukhālafah*) to Article 33(2), it becomes evident that there are statutory circumstances under which the presence of a guardian is not legally mandatory. The mandatory requirement applies strictly to the marriage of minors, as corroborated by Article 11(2), which provides that: "*Without prejudice to the provisions of Article 7 of this law, the guardianship of minors' marriages is undertaken by their guardians, who are the father, closest relatives, or a judge for those who have no guardian.*"

In light of this statutory weakening of mandatory guardianship, the 2005 amendments faced substantial criticism from conservative jurists for restricting the scope of guardianship in pursuit of female marital autonomy. To justify this reform, commentators invoked the Hanafī doctrine, which permits a competent adult woman, whether virgin or previously married, to execute her marriage contract independently. However, this attribution does not reflect the Hanafī doctrine in its entirety; while Hanafī jurists permit a woman to execute her contract, they do not eliminate the guardian's role completely. Instead, they grant the guardian the legal right to object (*Haqq al-I'tirād*) and seek judicial dissolution (*Tafriq*) if the husband lacks status compatibility (*Kafā'ah*) or if the dower falls

⁵³ Hidoussi, I. Wilāyat al-Um 'alā Abnā'inā al-Qussar: Qirā'ah fī al-Māddah 87 min Qānūn al-Ussrah. Human Sciences Journal, A(50), 2018, p. 336.

⁵⁴ Jabbara, Z. Hudūd Sultat al-Walī fī Tazwīj al-Mar'ah bayna al-Sharī'ah al-Islāmiyyah wa-Qānūn al-Ussrah al-Jazā'irī. Family Research Journal, 5(1), 2025, p. 18.



below proper market value (*Mahr al-Mithl*), thereby protecting the woman's interests and family standing ⁵⁵.

Consequently, the statutory formulation of Article 11 has created complex legal and juristic dilemmas. On one hand, it departs from the traditional order of precedence established by the majority of jurists; on the other hand, the phrase "*any person of her choice*" remains exceptionally broad and unregulated, opening wide latitude for judicial interpretation and raising continuous questions regarding its alignment with *Sharia* principles governing guardianship.

In conclusion, the CEDAW Convention exerted a profound impact on the reform of the Algerian Family Code, as directly reflected in Article 11. Through this amendment, the legislature sought to operationalize spousal equality. However, the legislature attempted to reconcile two antithetical legal doctrines: the first stream advocated the complete abolition of matrimonial guardianship to fulfill CEDAW obligations and grant women full autonomous authority, whereas the second (traditionalist) stream insisted on retaining the legal guardian as a foundational validity condition. In response to these competing pressures, the legislature adopted a compromise model by granting adult women the legal capacity to execute their marriage contracts directly ⁵⁶.

Despite this legislative compromise, Algeria continues to face international scrutiny from the CEDAW Committee in its response to Algeria's third and fourth periodic reports, which criticized the non-abolition of mandatory guardianship. Consequently, the Algerian government maintains a cautious orientation toward incrementally integrating non-discrimination and gender equality principles into domestic personal status law without triggering systemic legal regression ⁵⁷.

Conclusion

It becomes clearly evident through the course of this study that the CEDAW Convention conflicts with the foundational principles of state sovereignty and non-interference in internal affairs by positioning itself as a supreme normative benchmark for domestic legislation. Consequently, the treaty has exerted a demonstrable influence on Algerian legislation, most notably on the Family Code with respect to matrimonial guardianship (*Wilāyat al-Nikāh*). This impact is most acutely reflected in the legislative decision to grant a competent adult woman full legal capacity to execute her marriage contract in the presence of her guardian, a relative, or any individual of her choice, even a stranger, a formulation that

⁵⁵ Mizyani, N. D. *Ittifāqiyyat al-Qadā' 'alā Jamī' Ashkāl al-Tamyīz Didd al-Mar'ah wa-In'ikāsātuhā 'alā Ba'ḍ Ahkām al-Zawāj wa-al-Talāq fī Qānūn al-Usrah al-Jazā'irī wa-al-Mawāthiq al-Duwalīyyah* [Doctoral dissertation, Abou Bekr Belkaid University of Tlemcen], 2021, p. 77.

⁵⁶ Langar, B. *Musādaqat al-Jazā'ir 'alā Ittifāqiyyat Saydāw wa-Ta'thīruhā 'alā Qānūn al-Usrah al-Jazā'irī*. *Global Politics Journal*, 5(3), 2012, p. 450.

⁵⁷ Moudou, N. *Tahaffuz al-Jazā'ir 'alā Ittifāqiyyat al-Qadā' 'alā Jamī' Ashkāl al-Tamyīz didd al-Mar'ah* [Doctoral dissertation, Mouloud Mammeri University of Tizi Ouzou], 2020, p. 345.



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represents a distinct departure from the established doctrines of Islamic jurisprudence.

Based on these findings, the following key recommendations are proposed:

- **Enhancing Societal Awareness:** Broadening public awareness, particularly among women, regarding the legal and socio-cultural implications of the CEDAW Convention through dedicated scientific conferences, academic symposia, and specialized workshops.

- **Revising Article 11:** Re-evaluating Article 11 of the Algerian Family Code to ensure strict alignment with Islamic Sharia principles by eliminating statutory ambiguities regarding the guardian's role and replacing arbitrary selection with established agnatic kinship.

- **Mandating Masculinity in Guardianship:** Formally requiring male gender as a legal condition for matrimonial guardianship over women, whether virgins or previously married, on the premise that male agnates traditionally possess greater insight into protecting family interests and evaluating prospective suitors.

- **Codifying the Guardian's Right of Objection:** Re-establishing the legal right of the primary agnatic guardian (such as the father) to object to a marriage if the prospective husband lacks status compatibility or if the union compromises the daughter's best interests.

- **Upholding Sovereign Reservations:** Maintaining Algeria's strategic commitment to its international treaty reservations under Presidential Decree No. 96-51 and rejecting calls for their withdrawal, as these provisions safeguard the core religious and cultural identity of Algerian society.

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⁵⁸ Official Gazette of the People's Democratic Republic of Algeria, No. 6, 1996 (publishing Presidential Decree No. 96-51 ratifying CEDAW).



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