

# Reforms in Family Law in the Maghreb

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The King of Morocco, in his capacity as commander of believers, has decided to authorize amendments to the *Mudawana*, and nobody, not even the Islamist militants, has criticized him for it. According to Nadia Yassine, spokesperson for *Al Adl wal Ihsane* (Justice and Development), the Islamists even consider that the new code is the product of “an intelligent reinterpretation of the sacred texts.” These reforms have been greeted with great joy and lucidity by part of the Moroccan women’s movement. The latter know that the struggle still continues, for, as Leila Rhiwi has said, “it is necessary to work for changing mentalities and passing on to the 61% of Moroccan women who are illiterate or to Berber women hidden away in the Rif and the Atlas mountains the message that they have the same rights men have.”

This modification of the *Mudawana* has been received favourably by part of the Algerian women’s movement, which has been fighting for the last twenty years against the discrimination confirmed by the current family law, which was passed in 1984.

Whilst on the one hand congratulating their Moroccan sisters on this important breakthrough, Algerian women nonetheless feel frustrated at being overtaken in the process of legal reform, which has fallen behind in their own country due to the demagogical policy of the country. The first draft of the proposed modifications to Algerian family law were looked at by the Council of Ministers in August 2004. This text aroused the anger of the Islamic radical parties, who denounced the abolition of the custom of “matrimo-

nial guardianship,” and the fact that the practice of polygamy should be made subject to prior authorisation by a judge. A process of debate nevertheless took place in society at large with regard to these issues. When it was first announced that the draft modifications to the law were going to be examined by the Council of Ministers, there was no reason to think that a further reworking of the text was being prepared. What was actually discussed at the Council of Ministers, was a project of legal ruling. The subsequent discovery that it was planned to maintain “matrimonial guardianship” for adult women came as something of a bombshell. This aroused the wrath of women’s associations, who did not hesitate to claim that too many concessions had already been made to conservative Islamic groupings, the latter being clearly delighted by the new draft proposal. The legal ruling modifying family law was duly adopted by the Algerian parliament on 14th March.

The changes made to Algerian family law resemble those relating to the Moroccan *Mudawana*. The new legislation in the two countries is based on a conception of the institution of the family which departs from the vision traditionally found in this type of text.

The Moroccan and Algerian law-makers have placed relations between husband and wife on a more balanced footing. The shared obligations of husband and wife replace the concept of obedience and the notion of “head of family.” The minimum age for marriage in Morocco has been fixed as 18 years old for both men and women, thus shielding girls as young as 15 from marriage. In Algeria the minimum age for marriage has been fixed as 19, when young people reach the legal adult age.

The concept of “matrimonial guardianship” in Moroccan law, i.e., the rule by which a woman is automatically placed under the guardianship of a male member of her family for the duration of her marriage ceremony, has been abolished, and adult women have been granted the right to act on their own behalf. Women thus become responsible for their own choices and exercise this right by their own will and of their own free consent. This means, in reality, that a woman has the right to seek, or not to seek, the assistance of a guardian when concluding arrangements for marriage.

The changes instituted by the Algerian disposition do not dispense with the role of the matrimonial guardian. Article 11 has been redrafted so as to enable an adult woman to conclude her own marriage contract in the presence of her *wali* (guardian), who may be her father, a close relative, or any other person of her own choosing. One might well question the importance to be given to the presence of the guardian, and ask what would happen if the guardian did not attend the wedding ceremony. Would the woman still be able to marry? This is just one of the many questions posed by the proposed new law.

By establishing the equality of rights and duties of husband and wife, the Moroccan and Algerian law-makers have placed the family under the joint responsibility of both partners. Thus both the concept of a wife’s obedience to her husband and the notion of the “head of the household” are dispensed with. There is in fact no marriage regime as such in either Moroccan or Algerian law. Each partner keeps his or her own property, under an arrangement which legally is known as division of property. Nowadays, husband and wife pool together their

revenues to pay for their household needs, the acquisition of consumer goods, or long-term investments. In order to protect the possessions acquired by husband and wife during the course of their marriage, they are given the opportunity, by means of a document that remains separate from the marriage contract, to reach an agreement concerning how to manage and exploit these possessions.

Should there be a dispute, they are required to appear before a judge, who applies the general criteria of the evidence available in order to evaluate each partner's contribution to the sum of possessions acquired during the marriage.

Polygamy continues to exist in both countries, although it is subject to draconian legal requirements and to the specific authorisation of a judge. The judge must be convinced that there is no basis for unequal treatment, and ascertain that the husband can treat the second wife in a way that is directly comparable with the way he treats the first wife, guaranteeing the same living conditions to both wives. The fact that such an institution continues to be tolerated, even if restrictions are nevertheless imposed on its operation, reduces the impact of the principle of joint responsibility of husband and wife in family life.

Another very important change which has now been introduced in Morocco, although it has always existed in Algeria, concerns the establishment of the contested divorce. The custom of repudiation has continued to exist, but is subject to prior authorisation by a court of law. It should be explained in this respect that in Muslim law repudiation is the exclusive right of the husband, and that it is a right that is subject to no other constraints or conditions. Before requesting the authorisation of a court of law, the husband could express his repudiation orally and without legal control. On the other hand, when a request for separation is presented by the wife, it is considered in terms of a divorce to be defined as the dissolution of the ties of marriage. This definition has now also been extended to cases of repudiation. It has even been envisaged that a woman should have the right to ask for divorce on the grounds of ill-treatment (in the case of wives who have been physically assaulted, neglected, or abandoned

without means); in such cases, divorce is announced by the judge at the wife's request. In Arabic, *talaq* means repudiation, i.e., the husband's right to end the marriage, whilst *tatliq* represents the wife's right to ask for a divorce.

Divorce by mutual consent has been added as a new case of dissolution of the ties of marriage under Moroccan law. This type of rupture of the bonds of marriage already exists under Algerian law. With a view to preserving the Moroccan institution of the family and in a spirit of ensuring fairness and equality between husband and wife, the possibility has been introduced to reject the request for divorce presented by the wife on the grounds of neglect, if it can be proved that the wife has means sufficient to meet her needs, and that the husband has insufficient means. The

creation of a family aid fund and the opening of specialised family proceedings courts are examples of measures taken to permit the efficient implementation of Family Law. This type of measure is not envisaged by Algerian law-makers.

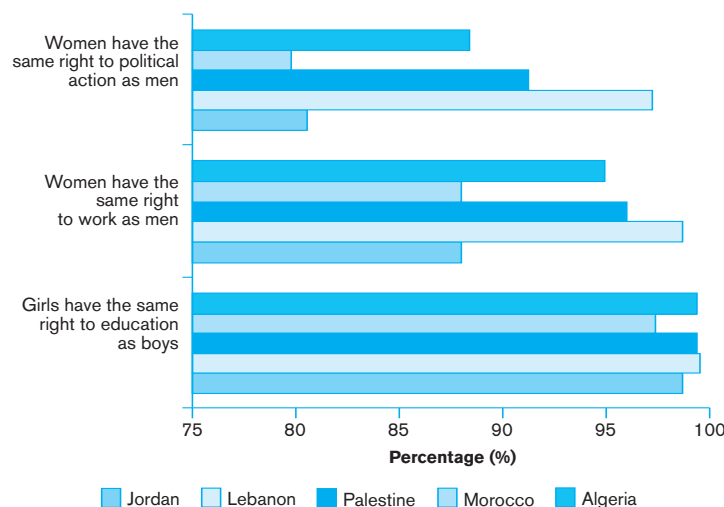
By establishing the principle of equality between men and women, the law-makers have accorded Moroccan women a certain number of rights which they may now enjoy, and have recognised women's status as individuals in their own right. This is in accordance with all the International Conventions concerning women's role in society and recognising women's right to individual action. Women in this way become fully-fledged citizens. Giving rights to women also means protecting children's rights. By placing relations between men and women in the family on an equal footing,

**THE SITUATION OF WOMEN IN THE ARAB WORLD (AHDR, 2004)**

The Arab Human Development Report (AHDR) for 2004, which focuses on freedom in the Arab world, conducted a survey in five Arab countries (Algeria, Morocco, Jordan, Lebanon

and Palestine). The survey included a series of questions about gender equality, some of which are set out below:

**GRAPHIC 19** Percentage of interviewees who agree that women should have the same rights, in five Arab countries, "Freedom Survey" 2003



Source: "Freedom Survey," included in the Arab Human Development Report 2004.

**TABLE 23** Results of the question: Do you think that gender equality in your country has improved, has stayed at the same level or has deteriorated over the last five years? (Percentage of answers)

	Jordan	Lebanon	Palestine	Morocco	Algeria
It has improved	28.69	22.57	13.18	43.68	34.22
It has deteriorated	18.46	12.84	25.3	14.94	15.93
Net change	10.23	9.73	-12.12	28.74	18.29

Source: "Freedom Survey," included in the Arab Human Development Report 2004.

Morocco has also considered it very useful to reinforce children's rights by inserting the texts of many international agreements to which Morocco has adhered in the context of family law. The child's own interest is taken as the basic criterion for any decision to be taken concerning the child's future. The child (whether it be boy or girl) is from the age of 15 onwards given the chance to choose freely the person to whose care he or she shall be entrusted.

The innovation and departure from Muslim law here resides in the possibility given to a woman to keep custody of her child even after re-marrying or moving to an area other than the place of residence of the husband. It should be noted that under former Moroccan law and still today under present-day Algerian law, a woman who re-marries loses right to custody of her children, and may even lose her right to it if she moves to more than 120 km from the husband's home. The husband will be the children's guardian, since it is he who exercises paternal authority. It is regrettable that changes have not been extended to the question of shared parental responsibility between husband and wife, or the possibility of transferring guardianship to the wife in case of divorce. In the same way, no mention is made of the concept of parental responsibility, which nevertheless appears in the Convention of Children's Rights.

There have also been changes to the order in which custody is allocated, going first to the mother, then to the father, and

subsequently to the mother's side (e.g., the maternal grandmother). The judge acts in the interest of the child, giving custody to the most suitable of the near relatives should there be a problem with the father and the mother. In Algerian law, the right to custody of the children falls to the mother's side of the family, whilst the father comes only in the sixth position in terms of priority to receive custody. The new proposals bring this principle into question, and establish a system of alternating custody between the mother's and father's sides of the family, although the father always comes second after the mother.

The child is guaranteed a decent home, in keeping with his social status before the divorce. In Algeria this question has been much more problematic, since the conjugal home reverted to the husband. Today the situation is that the parent who has custody of the child keeps the right to the conjugal home. If this person is the mother, the father must provide the mother with a decent home, or if not provide the rent to pay for one. The woman who is granted custody must be maintained in the conjugal home until the father puts into action the legal decision concerning accommodation.

It is important to underline that the new Moroccan law to protect the rights of children born outside marriage has introduced and established the concept of recognition of paternity for cases in which marriage is not formalised by a legal ceremony.

This procedure existed formerly in Algeria, but it was abolished by Islamist parliamentarians elected in 1990-1991, since they started to demand (and still do so) the production of a family allowance book for all declarations of birth.

The changes in Moroccan law have also affected the order of inheritance, since grandchildren on the daughter's side can now inherit from their grandfather in the same way that grandchildren on the son's side can. Thus discrimination between grandchildren has been removed.

These new measures improve the status of women in the Moroccan family, and in Moroccan society in general. Although equality in the relations between men and women in Moroccan families has only been partially introduced, it is nonetheless true that these new measures are real advances which open the way to the modernisation of family structures and of the whole country.

Moroccan women can thus mark a milestone in the pursuit of their struggle to help change mentalities.

Aided by the political will, the *Ijtihad* method (meaning "effort to interpret") has borne fruit in Morocco.

In the case of Algeria, the proposed changes to family law are greeted by some as too revolutionary. It is nonetheless true that, until women have regained all their legal power to exercise their civil rights, it remains impossible to consider that the draft law completely emancipates women from all form of guardianship.