

## A Discourse of Mudawanah al-Usrah; Guaranteeing Women's Rights in Family Law Morocco's

**Sheila Fakhria,<sup>1</sup> Siti Marpuah,<sup>2</sup>**

<sup>1</sup>*Institut Agama Islam Negeri Kediri, Indonesia*, <sup>2</sup>*Universiti Tun Hussein Onn, Malaysia*  
<sup>1</sup>*sheilafakhria@iainkediri.ac.id*, <sup>2</sup>*marpuah@uthm.edu.my*

### **Abstract**

Moroccan family code reform (*mudawanah al-usrah*) passed in 2004 after a long and dramatic process promoted by Moroccan women against retreating Islamists and male domination. This paper reviews Muslim family law (*mudawanah al-usrah*) in Morocco. Based on a literature research method that uses a normative juridical approach with a statutory approach, this paper aims to discuss the challenges and opportunities in guaranteeing women's rights in Moroccan family law. The study indicates that *mudawanah al-usrah* is a meeting point between Islamic rules and international conventions, providing a new identity for Moroccan society, especially women and their rights. This reform was also influenced by the Islamic feminist movement, which produced reforms to improve gender equality in Moroccan society. That was also expected to provide an overview of the protection of women's rights in family law, especially in Morocco, and become material for evaluation in its implementation in society. This study is also expected to be a reference for activists of family law studies to continue to develop the protection of women's rights in Islamic family law.

**Keywords:** *Family Law, Mudawanah al-Usrah, Women's Rights*

### **Abstrak**

Tulisan ini menguraikan tentang Hukum Keluarga Muslim (*mudawanah al-usrah*) di Maroko. Dengan menggunakan studi literatur, tulisan ini bertujuan untuk menyoroti, menjelaskan dan membahas tantangan dan peluang untuk menjamin hak-hak perempuan dalam hukum keluarga Maroko. Berdasarkan penelitian literatur yang menggunakan pendekatan yuridis-normatif, kajian tersebut menunjukkan bahwa *mudawanah al-usrah* merupakan bentuk titik temu antara aturan Islam dan konvensi internasional sehingga memberikan identitas baru bagi masyarakat Maroko, khususnya perempuan dan hak-haknya. Reformasi ini juga dipengaruhi oleh gerakan feminis Islam yang menghasilkan reformasi untuk meningkatkan kesetaraan gender dalam masyarakat Maroko. Tulisan ini diharapkan dapat memberikan gambaran tentang perlindungan hak perempuan dalam hukum keluarga khususnya Maroko dan menjadi materi evaluasi dalam implementasinya di masyarakat. Selain itu, kajian ini juga diharapkan dapat menjadi referensi bagi pegiat kajian hukum keluarga untuk terus mengembangkan perlindungan hak-hak perempuan dalam hukum keluarga Islam.

**Kata Kunci:** *Hak-Hak Perempuan, Hukum Keluarga, Mudawanah al-Usrah*

## **Introduction**

Discussions on marriage law are related to social, government, and human rights protection, especially for women and children. Legal reform in the form of legislation that transforms the law included in *fiqh* becomes a separate achievement for Muslims. The Islamic law included in these *fiqh* has become a living law in the lives of Muslims for several centuries. However, efforts to reform (codify) the code of laws initiated aimed at making Islamic law easier for Muslims to implement. In addition, this legislation aims explicitly for the benefit of the judiciary for legal references that are easily obtained and take a solid legal basis that Muslims have practised.<sup>1</sup>

The legal reforms consist of procedural and material law or legal substance. In procedural law (formal), reforms are carried out by reforming legal procedures (procedural law) by adopting Western procedural law. Thus, the reform gave birth to the administration of Islamic law, which embodies Islamic rules appearing in the face of a more systematic modern law. In addition, administrative rules in *shari'a* law are also enforced, such as marriage registration in family law and divorce claims with documentary evidence.<sup>2</sup>

At first, the marriage law in Morocco was not much different from that in other Islamic countries, which had a patriarchal pattern and was strongly influenced by the paradigm of the scholars in classical *fiqh*. Prior to the reform of the family law, existing regulations provided little protection for women's rights.<sup>3</sup> Regarding the reform of family law in Muslim countries, a number of researchers such as Jan Michiel Otto, Lynn Welchman,<sup>4</sup> Ziba Mir-Hosseini,<sup>5</sup> Yolanda Aixela Cabré,<sup>6</sup> and Fatimah Harrak<sup>7</sup> mention

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<sup>1</sup> Intan Cahyani, "Pembaharuan Hukum dalam Kompilasi Hukum Islam," *Al Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan* 5, no. 2 (December 14, 2016): 301–13, <https://doi.org/10.24252/ad.v5i2.4850>.

<sup>2</sup> Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 14, no. 1 (June 30, 2014): 1–19, <https://doi.org/10.18326/ijtihad.v14i1.1-19>.

<sup>3</sup> Nasiri Nasiri, "Perkawinan Di Maroko," *Syaikhuna: Jurnal Pendidikan Dan Pranata Islam* 8, no. 1 (October 4, 2017): 14–37.

<sup>4</sup> Lynn Welchman, "Musawah, CEDAW, and Muslim Family Laws in the 21st Century," 2012, 309–20, <https://doi.org/10.1093/acprof:oso/9780199641444.003.0018>.

<sup>5</sup> Ziba Mir-Hosseini, "Women in Search of Common Ground: Between Islamic and International Human Rights Law," January 1, 2013, <https://doi.org/10.1093/acprof:oso/9780199641444.003.0016>.

<sup>6</sup> Yolanda Aixelà Cabré, "The Mudawwana and Koranic Law from a Gender Perspective. The Substantial Changes in the Moroccan Family Code of 2004," *Language and Intercultural Communication* 7, no. 2 (May 15, 2007): 133–43, <https://doi.org/10.2167/laic269.0>.

<sup>7</sup> Fatima Harrak, "The History and Significance of the New Moroccan Family Code," Working paper, The Roberta Buffet Center for International and Comparative Studies Northwestern University, 2009. Accessed June 15, 2022, <https://www.almendron.com/tribuna/wp-content/uploads/2017/02/the-history-and-significance-of-the-new-moroccan-family-code.pdf>.

that Moroccan Family Law is one of the most progressive family laws and the most significant development, the most egalitarian, and the most different today. The reform of family law in Morocco is a rejection of the principle that Islamic law cannot be changed because changing it is tantamount to changing God's provisions.<sup>8</sup>

Remarkably, the reform of family law in Morocco affirms women's rights which was previously not well organized.<sup>9</sup> The previous law, *Mudawanah* 1957, which regulates areas of family law such as marriage, divorce, inheritance, and child custody, was adopted in Morocco two years after the country became independent from France. This rule gives women few rights, although the central position of women in the family structure has been established by Moroccan society. Under *mudawanah*, men could practice polygamy without their wife's consent and divorce one of their wives unilaterally. In other contexts, women cannot marry without the legal consent of a guardian. Married women are legally required to obey their husbands, and their right to divorce is severely restricted.<sup>10</sup>

Family law reform brings justice for women's rights. Reforming the *mudawanah* and recognizing women's legal rights illustrates a fundamental tension between Morocco and many other Islamic states. These concerned the deep need and desire to modernize the state and society and an equally strong desire to maintain a Muslim identity.<sup>11</sup> This discussion began with the community's encouragement to reform the *mudawanah* in 1957, although in 1982, discussions began and were accompanied by the emergence of debates related to gender issues. Morocco reformed the family law code based on the Maliki school of thought, accompanied by the adoption of modern formulations to enforce women's rights.<sup>12</sup>

Hursh said, the 2004 *mudawanah* Reforms greatly expanded the legal rights of Moroccan women. It was regulated from marriage to raising children, although many things still need to be discussed in depth, such as marriage, polygamy, divorce, child

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<sup>8</sup> Budi Juliandi, Fauzun Jamal, and Saifuddin Herlambang, "Mudawanah Al-Usrah Dan Pemihakan Terhadap Hak-Hak Perempuan Di Maroko," *Proceedings of Annual Conference for Muslim Scholars*, no. Seri 1 (May 14, 2017): 122–29, <https://doi.org/10.36835/ancoms.v0iSeri>.

<sup>9</sup> Anna Virkama, *Discussing Moudawana: Perspectives on Family Code Reform, Gender Equality and Social Change in Morocco* (Lap Lambert Academic Publishing GmbH KG, 2009).

<sup>10</sup> "Reforming Moroccan Family Law: The Moudawana | Centre For Public Impact (CPI)," accessed May 21, 2022, <https://www.centreforpublicimpact.org/case-study/moroccan-moudawana-reform>.

<sup>11</sup> John Hursh, "Advancing Women's Rights Through Islamic Law: The Example of Morocco," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 24, 2012), <https://papers.ssrn.com/abstract=2173872>.

<sup>12</sup> Fathonah K. Daud and Nurrohman Syarif, "Hak Cerai Perempuan dalam Hukum Keluarga Islam Maroko," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 14, no. 2 (December 31, 2021): 159–72, <https://doi.org/10.14421/ahwal.2021.14204>.

custody, and inheritance.<sup>13</sup> Deiana also conveyed that the 2004 *mudawanah* reforms signaled the spirit of community reform that gave husbands and wives the same rights and obligations in the family, to support the dignity of both and ensure family balance and balance the provision of rights and protection of children.<sup>14</sup> Furthermore, the results of another study by Yulia Fatma,<sup>15</sup> Nasiri,<sup>16</sup> and Rachel Salia<sup>17</sup> also revealed that the new regulations accommodate many women's rights which were not detailed in the previous regulations.

Based on this, this paper will describe reforming family law in Morocco from *mudawanah* 1957 to *mudawanah al-usrah* 2004. This paper will describe the extent to which this new regulation recognizes the rights of women in the family and determines their household's future. Consequently, this paper will also describe the factors behind the reforms conducted by Morocco.

## **Method**

The Moroccan parliament unanimously adopted a new family code – the *mudawanah* – in February 2004. The new law is a landmark reform of the status of Moroccan women as it puts them on equal footing with men regarding marriage and children. This code is a reform of previous marriage laws that legitimized practices such as polygamy and forced marriage and contributed to the subjugation of Moroccan women.

For this study, the author would like to understand the guarantee of women's rights in this legislation and the factors behind the reform. Therefore, this research was conducted based on research on literature sources and laws, especially *mudawanah* 1957 and *mudawanah al usrah*. Because this paper will discuss women's rights, the shells used are normative juridical with a statutory approach. This article proportionately relies on gender studies thinking to justify the level of development and modernization of women concerning women's rights. This paper is expected to answer women's rights as

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<sup>13</sup> Hursh, "Advancing Women's Rights Through Islamic Law."

<sup>14</sup> Manuela Deiana, "Improving Women's Rights in Morocco: Lights and Shadows of the New Family Code (Moudawana)," *The International Journal of Interdisciplinary Social Sciences* 3 (January 1, 2009): 69–80.

<sup>15</sup> Yulia Fatma, "Batasan Usia Perkawinan dalam Hukum Keluarga Islam (Perbandingan Antar Negara Muslim: Turki, Pakistan, Maroko dan Indonesia)," *JURIS (Jurnal Ilmiah Syariah)* 18, no. 2 (December 30, 2019): 117–35, <https://doi.org/10.31958/juris.v18i2.1670>.

<sup>16</sup> Nasiri, "Perkawinan Di Maroko."

<sup>17</sup> Rachel Salia, "Reflections on a Reform: Inside the Moroccan Family Code" (Columbia University, 2011), <https://doi.org/10.7916/D8CR61B6>.

stated in Morocco's reform of family law. Thus, it will become a treasure of new ideas for the researcher of Islamic family law in the Muslim world.

## **Result and Discussion**

### ***Overview of Morocco and Reformation of Mudawanah***

Morocco is a French protectorate country. The presence of French Morocco caused various reactions, especially for groups who did not want the presence of France in Morocco. Finally, in 1955, Sultan Muhammad V ended the French protectorate government. In this context, Maroko has many legal systems influenced by the Spanish legal system that once conquered Morocco and France, as mentioned above. However, private law (*ahwal al-syakhsiyah*) is still based on *shari'a* because Moroccan Muslims still uphold the existence of Islamic *shari'a*.<sup>18</sup>

The renewal of private law (*ahwal al-syakhsiyah*) in Morocco was held two years after the independence, namely in 1958. The family law applied by Tunisia heavily influenced this renewal. Hard work measures brought out by Moroccan legal experts and other instruments produced several drafts of codification of Islamic law. The drafts made were: 1) The principle and basis of the applied family law were the Maliki School; 2) Paying attention to aspects of *maslahah mursalah*;<sup>19</sup> 3) Including paying attention to the development of other Muslim family laws.<sup>20</sup>

*Mudawanah* was created as a continuation of traditional Maliki *fiqh*. This codification is the result of post-colonial events in many Muslim countries. They understood that *fiqh* and *shari'a* should be codified into state-sanctioned rules. Historically, *shari'a* has been more of a way of life for Muslims than Islamic Law in the sense of a punitive western code of law.<sup>21</sup> Under the old code, women did not have the power to consent to marriage without the permission of a guardian or designated guardian. Women also cannot start the divorce process without the husband taking steps. Whereas a man not only has the sole right to divorce his wife but is also not required to receive court approval for the divorce.<sup>22</sup> Therefore, there may be many gaps in the protection of

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<sup>18</sup> Usman Musthafa, "Pembaharuan Hukum Keluarga Di Maroko," *Syakhsia: Jurnal Hukum Perdata Islam* 20, no. 1 (June 30, 2019): 49–60, <https://doi.org/10.37035/syakhsia.v20i1.1984>.

<sup>19</sup> Musthafa.

<sup>20</sup> Daud and Syarif, "Hak Cerai Perempuan dalam Hukum Keluarga Islam Maroko."

<sup>21</sup> Salia, "Reflections on a Reform."

<sup>22</sup> Rachel Olick-Gibson, "From the Ulama to the Legislature: Hermeneutics & Morocco's Family Code," 2021, <https://www.semanticscholar.org/paper/From-the-Ulama-to-the-Legislature%3A-Hermeneutics-%26-Olick-Gibson/3050dacf2f1f04d9ed05b18b2cdc83f8bb170927>.

women's rights because the patriarchal style of *fiqh* is still perpetually codified in the rules passed by the state.

During the rise of Islamism in the 1980s and 90s, Moroccan women's rights organizations began to express arguments on a new reading of the *Qur'an* and *hadith* as the one to advocate Family Code reform.<sup>23</sup> In 1992, l'Union de l'Action Féminine (UAF) launched the one million signatures campaign, a petition demanding reforms to the Family Code. In 1998, the debate grew more intense with the existence of the proposed "action plan for integration women into development", which begins with pragmatic steps ranging from education to reproductive health and economic empowerment. This activity was prepared by a feminist community together with The World Bank, which provided material support and financial. *Ulama* and Islamists have strongly criticized this 'foreign interference' because the proposal goes against the sacred principles of the religion and threatens Muslim identity. Every problem related to the human rights of women and even people involved in promoting those labelled as un-Islamic or anti-Islam.<sup>24</sup>

A year after the demonstrations in Casablanca and Rabat in 2001, Sultan Muhammad VI responded to these criticisms and suggestions by forming a commission to reform the *mudawanah al-ahwal al-syakhsiyah*. The commission consisted of politicians, judges, clerics, women's activists, intellectuals, and academics.<sup>25</sup> At the same time, the King promoted the status of women in public by placing ten women in strategic positions in government. As the preamble in *mudawanah al-usrah*, this promotion also aims to improve justice for women, children's rights, and the preservation of the dignity of men by adhering to the goals of tolerant Islam.<sup>26</sup>

Reforming *mudawanah* is a step toward recognizing more substantial legal rights for women, illustrates the fundamental tensions in Morocco, and many Muslims express a deep need and desire to modernize the country and society and an equally strong desire to maintain a solid Muslim identity. Hursh quoted Weingartner, who stated, "along with the goals of economic and social modernization, however, the deep-rooted and enduring desire on the part of the Moroccan people is to maintain a distinctly Muslim identity. An identity that instantly resonates with ideas of democracy, plurality, guaranteed political and legal rights." In this regard, King Mohammed VI secured ambitious women's rights

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<sup>23</sup> Olick-Gibson.

<sup>24</sup> Deiana, "Improving Women's Rights in Morocco."

<sup>25</sup> Deiana.

<sup>26</sup> Daud and Syarif, "Hak Cerai Perempuan dalam Hukum Keluarga Islam Maroko."

reforms primarily by using Islamic law to legitimize them by characterizing them as a balance between modernity and Islamic values Moroccan society demands.<sup>27</sup>

Family law reform in Morocco received support from the public. The group that supports this applies a universal frame of reference, such as human rights treaties and international Conventions on Eliminating all forms of Discrimination Against Women (CEDAW). They made Family Law no longer sacred. Family law is treated no more like secular law, more open to debate.<sup>28</sup> This party considers Family law to be derived from a sacred source of law which later becomes a legal construct and human understanding. This group also stated that the rules contained in CEDAW are a clear international legal mandate to eliminate gender discrimination, which is more in line with *shari'a* than the family law found in Muslim countries today. The linguistically erroneous interpretation of texts causes the construct of rights that experience inequality in marriage and the concept of patriarchy which is considered a sacred blueprint for society (the divine blueprint for society).<sup>29</sup>

Although changes in family law cannot satisfy all the demands of liberal/secular feminist groups, these efforts are significant and interesting to observe because they are dismantling the old, deep-rooted belief that family law cannot be renewed.<sup>30</sup>

### ***Women's rights in Mudawanah al-Usrah***

The presence of the 2004 Moroccan Family Law is a victory for women's rights and a step to change the husband-wife power relations in the household (power relations between men and women within the household). The role of women in the public sphere of post-colonialism in France in 1956 has undergone significant changes since independence until today. In Muslim Arab countries, patriarchal traditions and strict textual interpretation of the *Quran* at that time, the leadership of King Muhammad V contributed to the subordination of the Moroccan women. As a result, post-independence, women have limited access to their rights.

Reformation of *mudawanah* signifies a deep spirit of change: a project that makes the responsibility of both husband and wife, recognizing the same rights and obligations in the family, supporting the dignity of both, and ensuring family balance and the

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<sup>27</sup> Hursh, "Advancing Women's Rights Through Islamic Law."

<sup>28</sup> Virkama, *Discussing Mudawanah*.

<sup>29</sup> Juliandi, Jamal, and Herlambang, "Mudawanah Al-Usrah Dan Pemihakan Terhadap Hak-Hak Perempuan Di Maroko."

<sup>30</sup> Juliandi, Jamal, and Herlambang.

provision of rights and protection of children. Created with a clear desire to improve women's rights and strengthen the family as a whole.

### **a. Marriage**

*Mudawanah al-usrah* begins the definition of marriage that changes from the point of view of the old tradition (article 4).<sup>31</sup> Marriage is defined as a legal agreement where a man and a woman jointly agree to unite in a standard and lasting marital life to commit and create a stable family. That breaks the discriminatory tradition of equality between husband and wife and eliminates the woman's obligation to obey her husband. This statement is very contrasted to the previous code, which allows husbands alone to direct the marriage and demand "obedience" from the wife, even demands to endure children.<sup>32</sup> In addition, the age of marriage also experienced a very egalitarian change in gender equality. Article 19 now defines that the minimum age for marriage is eighteen years for both men and women.<sup>33</sup> Previously, the age of consent was eighteen for men but fifteen for women,<sup>34</sup> which resulted in the neglect of women's opportunities in social activities and reproductive health due to demands for marriage.

In this code, marriage guardianship (*wilaya*) is an optional right for women in adulthood: a woman can now choose to enter into the marriage himself or delegate his rights to a guardian (articles 24-25). Marriage guardians in the Moroccan family law are regulated in articles 13,17,18,24, and 25 of *mudawanah al-usrah* of 2004. Guardianship is women's property, so the guardians are not entitled to become marriage guardians if the woman does not provide marriage guardianship—his power. However, there must be a good side that the woman sees in her marriage.<sup>35</sup>

This rule seems to eliminate the position of guardian in marriage. However, it seems that Morocco tends to go further into understanding women's authority in marriage and considers that guardianship is not the parents' right but the daughter's right. Morocco, which has the Maliki school of thought regarding guardianship, adopts the view of the Hanafi school, which states that marriages performed by adult women independently

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<sup>31</sup> "The Moroccan Family Code (Moudawana)," 2004.

<sup>32</sup> Virkama, *Discussing Moudawana*.

<sup>33</sup> "The Moroccan Family Code (Moudawana)."

<sup>34</sup> Hursh, "Advancing Women's Rights Through Islamic Law."

<sup>35</sup> Miftahul Jannah, "Kedudukan Wali dalam Hukum Keluarga Islam," October 10, 2016, <https://repository.uinjkt.ac.id/dspace/handle/123456789/33553>.

without a guardian are considered valid in the eyes of the law.<sup>36</sup> As for the facts, even though the law stipulates that adult women in Morocco who can carry out their marriages independently still prefer to ask for help from a male guardian.<sup>37</sup>

Furthermore, polygamy is often a difficult challenge for parties who want to demonstrate the compatibility of women's rights and Islamic law due to the direct support of the *Qur'an* to practice it, even if only in certain circumstances. The solution adopted by the reformed *mudawanah* is both intelligent and practical.

Some critical notes in the rules on polygamy: *First*, polygamous marriages now require court approval, not the husband's discretion. The judge's authorization becomes a fundamental right for the code to determine the need for objective justification for polygamy. *Second*, the husband must demonstrate the "need" for a second marriage. In the extraordinary case, polygamy requires ensuring the economic resources of the husband in order to jointly meet the needs of two wives (and their children). *Third*, the reformation of *mudawanah* retains protection from traditional Islamic law found in the previous code that made polygamy illegal if the previous wife did not allow the husband to marry a second wife. The woman has the right to include the marriage contract conditions that her husband will refrain from taking another wife (articles 40-45). Finally, quoting the *Qur'an*, which states, "[i] if you fear injustice, marry only one woman, the reformed *mudawanah* set the standard for polygamy so high that it has become a practical impossibility."

These changes redefine marriage closer to a just partnership than a male-dominated conquest. Women are no longer sexual objects with an explicit obligation to reproduce, and a new emphasis on "reciprocal rights and obligations" replaces obedience to husbands. Similarly, eliminating temporary guardianship and increasing the age of consent to marriage increases women's autonomy. In addition to increasing women's autonomy, these changes remind men of their marital obligations, relieving pressure on women.

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<sup>36</sup> Ashraf Booley, "The Rights and Freedoms of Moroccan Women: Has the 2004 Reforms Benefited Moroccan Women?," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 5, 2016), <https://papers.ssrn.com/abstract=2862432>.

<sup>37</sup> Jan Michiel Otto, ed., *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2011), <https://press.uchicago.edu/ucp/books/book/distributed/S/bo8930448.html>.

### b. Divorce

In the previous code, *mudawanah* 1957, divorce was not wholly regulated, especially on divorce rights for women. The problem of divorce in classical *fiqh* often explains men's absolute right to divorce by simply saying, "I divorce you." Suppose a woman's right to divorce in *fiqh* is known as *khulu'* (a form of divorce at the wife's initiative, by paying a ransom). In that case, above the law, specifically the divorce lawsuit rules, is in book II, a category in the dissolution of a marriage. In book II (*mudawanah* 1957), the law on divorce does not have women's rights in the decision-making process. Women without any power to defend themselves or influence decisions, and even the right to use the judiciary is not guaranteed.<sup>38</sup>

In *mudawanah al-ahwal syakhshiyah*, there are no options and offers for couples in disagreement (*syiqaq*) other than breaking the marital relationship suddenly by *talak*, which is pronounced unilaterally by the husband or (in a minimal way) by a Judge's decision. Divorce due to disagreement allows one of the spouses to go to court to explain the dispute with the spouse. The cause of this divorce is usually not explained with certainty because this dispute is impossible to be resolved or reconciled.<sup>39</sup> In a study, Elisabeth Nossing showed that divorce due to *syiqaq* effectively guarantees Moroccan women's right to divorce. It is this type of divorce that the new family law rules defend.<sup>40</sup>

As for the new regulations, divorce is now accessible to both men and women under the same conditions and has been set to limit the frequent abuse of refusal by the husband (verbal refusal is no longer legal). Options for divorce due to irreconcilable differences (*syiqaq*) and consensual divorce have also been introduced. If cohabitation is no longer possible, the court takes all measures to protect the wife and children until judgment (article 121).

The law also requires the husband to pay all the money owed to his wife and children before a divorce can be appropriately registered. The protection of children's rights is prioritized according to international protocols. While some protections for divorce existed before the code was reformed, Islamic law has always given women the right to determine the conditions of their marriage through the marriage contract—extra

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<sup>38</sup> Daud and Syarif, "Hak Cerai Perempuan dalam Hukum Keluarga Islam Maroko."

<sup>39</sup> Daud and Syarif.

<sup>40</sup> Elisabeth Nössing, "Divorce on Grounds of Discord: Did the Moroccan Family Law Reform Bring the Guarantee of Divorce for Women? An Ethnographic Perspective on the Changing Landscape of Divorce. The Mudawwana a Decade On," *Asiatische Studien - Études Asiatiques* 74, no. 1 (March 1, 2020): 35–65, <https://doi.org/10.1515/asia-2019-0025>.

the protections found in the reformed *mudawanah*— provide laws that provide more protection for women. The reformed code also demonstrates the government's commitment to fighting violence against partners.

#### **c. Child Custody**

In traditional Islamic law, the remarrying woman automatically loses custody of their children. The reformed *mudawanah* tried to reduce this requirement, but the results were not entirely optimal and satisfactory. In the reformed *mudawanah*, Articles 173, 174, and 175 address the issue of child custody for remarried women.<sup>41</sup> The three articles outline some of the technical requirements that govern this issue. Most importantly, Article 174 states that a woman may not remarry without losing custody of her children unless the husband is appropriately removed from the lineage, his new husband is the child's legal guardian, or he is the legal guardian of the child. Article 175 serves as a quasi-loophole that allows the mother to retain custody even if she remarries as long as the child does not suffer a loss.

Thus, this rule indicates that a woman will not lose custody of her children even if she remarries, subject to the following conditions: 1) the child is seven years old or younger, or separation will endanger the child; 2) the child suffers from a disease or condition that makes it impossible to be cared for by someone other than the mother; 3) the spouse is the legal guardian of the child, or 4) the mother is the legal guardian of the child. In this context, *mudawanah* still opens legal loopholes that can cause problems for women to maintain custody of their children after a divorce, whether they remarry or not.

#### **d. Inheritance**

There have not been many inheritance-related reforms. However, the most recent reform on inheritance is a provision that allows the grandchildren of a son or daughter of a deceased grandparent to receive a certain amount of the grandparent's inheritance. Previously, only the grandchildren of male descendants were entitled to inherit. The reformed *mudawanah* eliminates gender differences as a condition.<sup>42</sup>

The reformed *mudawanah* also gave women and children greater rights over paternal disputes. Under the previous rule, twelve witnesses were required to testify in

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<sup>41</sup> “The Moroccan Family Code (Moudawana).”

<sup>42</sup> “The Moroccan Family Code (Moudawana).”

court and offer evidence to judges to establish the father of a child born out of un-marriage parents. Now, children born out of un-marriage parents receive legal recognition, and if a person denies the parents, the court will use scientific method testing to resolve the dispute. While Morocco previously ratified the Convention on the Rights of the Child (CRC), which requires similar action, the reformed *mudawanah* established these international principles in Morocco's domestic law for the first time for child rights.<sup>43</sup>

### ***Reforms and Implementation: Are Gender Gaps Closing?***

One of the characteristics and forms of success of this reform, related to the Moroccan context, is that it acculturates from two sources: the goals of *sharia* and the through ratified international conventions. Therefore, these results from negotiations translated into a rule, including the maintenance of polygamy or discriminatory aspects of inheritance. Nevertheless, the progress of the code has been considered the most important because of the impact it can have in the short and long term.

The new reforms reduced the gap that opened between law and social reality. Morocco has undergone extensive demographic and socioeconomic changes in the half-century, separating it from the promulgation of the first code. These changes impact families, particularly women, particularly their access to education, paid employment, and contraception. The economic role of women (30% of the active population, 20% of heads of household) is a statistic that is not without influence on the hierarchy of male-female relations so that men are not the only breadwinners in the family.<sup>44</sup>

Some of the new provisions will influence the structure of society. The abolition of guardianship – which the women's movement considers a significant legal advance – is equivalent to granting women rights because their capacity is recognized by law to carry out a marriage contract or marriage contract without a guardian (except for those who wish to do so). Mutual rights and obligations between spouses also undermine the ancient pillars of *mudawana*: the obligation of obedience often referred to as the slave-owner relationship.

Revised *mudawana* closes several gender gaps related to family and personal life, making it one of the most progressive family law frameworks in the MENA region regarding gender equality. What is commendable is that this rule gives women the right

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<sup>43</sup> Hursh, "Advancing Women's Rights Through Islamic Law."

<sup>44</sup> "Repercussions of the Reform of the Family Code in Morocco," accessed June 3, 2022, <https://www.iemed.org/publication/repercussions-of-the-reform-of-the-family-code-in-morocco/>.

to marry without the consent of a male guardian, which was previously required to terminate the marriage. Now, women can sign their contracts to increase a woman's bargaining power both before and during the marriage, regulating factors such as financial maintenance wife and dowry.

Although efforts have been made to protect women's rights in this regulation, some women have not done it in the majority. A survey found that the percentage of women signing their marriage contracts at the place of a male relative was only 21% in 2010, essentially unchanged since 2007. In the case of polygamy, women can also add provisions to marriage to protect their interests to prohibit polygamy and allows the wife to refuse one-sidedly as a form of divorce. However, no data can assess how women did add these provisions and their impact.<sup>45</sup>

In the case of the minimum age of marriage, the revised *mudawanah* raised the minimum age of marriage for girls from fifteen to eighteen, equating it to boys. However, exceptions are still provided for boys and girls to marry between the ages of fifteen to eighteen with the judge's approval.<sup>46</sup> If this reform aims to reduce the number of minor marriages, it can fail if the application reaches a high number and the judge approves it.

The provisions on divorce have undergone many developments compared to the previous rules. Women have access to divorce as well as guarantees for their post-divorce rights. However, this does not close the legal gaps in some circles. The choice to initiate a divorce is not entirely equal between men and women. Most importantly, the reforms in *mudawanah* on divorce give women the ability to initiate a divorce without pointing out some cause with the husband, such as lack of financial support and failure to comply with the marriage contract, abandonment, damage or absence. Apart from showing the cause, women can get a divorce by leaving their right to dowry and allowances (*khulu'*), which may be the only economic asset for many women, especially the poor. This phenomenon still leaves a lack of partiality for women's rights in a specific society.

Therefore, measuring the implementation of reformed family law is essential. Comprehensive data must support this assessment to see what points must be evaluated and the level of implementation. In this way, it will be easier to know what areas are still

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<sup>45</sup> "Ten Years After Morocco's Family Code Reforms: Are Gender Gaps Closing?," accessed May 23, 2022, <https://openknowledge.worldbank.org/handle/10986/20550>.

<sup>46</sup> "INT\_CEDAW NGO JOR\_26632\_E.Pdf," accessed June 16, 2022, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/JOR/INT\\_CEDAW NGO JOR\\_26632\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/JOR/INT_CEDAW NGO JOR_26632_E.pdf).

causing problems, who will be harmed or benefited, and how personal assets and economic rights can be fulfilled to the fullest.

## **Conclusion**

This reform was hailed as an extraordinary event in the history of the Moroccan women's rights movement, not for its overwhelmingly positive substantive provisions. That is Morocco's first movement for human rights reform. Also, this is a long struggle of long-term suffering and controversial debate from various parties. Equally crucial for Morocco is that they show that society can achieve modernity and conform to universal values while maintaining its identity. Women's rights are voiced in this law to guarantee their rights in the family. However, this does not necessarily become a breath of fresh air because there are still many loopholes that allow some parties to be unable to access the rights that have been fought for fully. In addition, the state, especially judges, remains the primary key in realizing the objectives of this law, both in terms of socialization and implementation in society.

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