

The Rights and Freedoms of Moroccan Women: has the 2004 reforms benefited Moroccan Women?

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Abstract

Morocco has maintained its identity and adherence to the Islamic faith since before colonialism and after. As a result of such identity the Moroccan monarchy over the years developed the Code of Personal Status (referred to as the *mudawana*) which affected only the Muslim population. This type of family law was drawn mostly from Islamic doctrines with little or no participation of women. The *mudawana* has been criticised by many as being one-side and feminist groups have made numerous calls for a reformed *mudawana* that addressed the plight of women and to improve their status within the wider community. In 2004, the monarchy decided to reform the *mudawana* as a result of women's groups pressuring the monarchy to do so. The 2004 reforms has the possibility of enhancing the rights of Moroccan women, for example, a wife is no longer legally obliged to obey her husband, contrary to a widely-held custom which regards obedience as an absolute duty of a Muslim wife, the minimum age for marriage for both parties eighteen years of age, including free and full consent. Polygyny has also been addressed. Although the 2004 version kept the concept of polygyny, there are severe restrictions to curtail this practice, for example, judicial authorisation is required as well as informing the current wife of the prospect. There are certain obstacles that seem to be hampering the full implementation of 2004 reforms which are discussed in this contribution.

Keywords

Women's rights; Islam; marriage; reform; *mudawana*.

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1 Introduction

One of the subtle, but most pervasive, areas of discrimination against Muslim women is the inequity and injustices that occur within the context of the family unit.¹ Despite foreign influences which date back to the French protectorate dominating Morocco, religion has always taken centre stage in Morocco's political and social life. Islam has been and continues to be a consolidating element of Moroccan society. It has occupied an important position in the spiritual lives of many Moroccans, and arguably represents a crucial part of Morocco's identity.²

In 2004, the Moroccan monarchy revised Morocco's *mudawana* dealing with issues relating to the family. Its provisions taken to a large extent from Islamic sources, it confers upon women unprecedented rights and freedoms.³ The reforms expand women's rights to be protected from practices such as child marriages, and to be on an equal footing with men in marriage, amongst other rights.⁴ However, several years after the passage of the 2004 version, varied sources indicate that the implementation has been less effective than its proponents had envisaged. For example, NGOs and observers have reported judicial opposition to the law, as well as corruption, both of which phenomena have resulted in the under-implementation.⁵

As the subject is of great complexity, analysis is restricted to some highly contentious issues found in Islam, such as marriage and polygyny. The article will be divided into the following sections. Section one will provide a brief overview of the tenets of Islam. Section two will trace the path of the *mudawana*. Section three will address the reform in marriage and polygyny, and section four will investigate the barriers to the implementation of the

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¹ Anwar and Rumminger 2007 *Wash & Lee L Rev* 1529.

² El Katiri 2013 *JNAS* 53-59. A recent empirical study by several Moroccan academics concluded that the religiosity of Moroccan society, particularly the youth, is expanding greatly with access to education, urbanisation, and the availability of information via satellite and internet services.

³ Eisenberg 2011 *Cornell Int'l L J* 695. In this article the *Code of Personal Status* will be referred to as the "*mudawana*", instead of the "*moudawana*" as is the practice of other authors.

⁴ Eisenberg 2011 *Cornell Int'l L J* 695.

⁵ Eisenberg 2011 *Cornell Int'l L J* 695-696.

2004 reforms. A brief overview of the basic tenets of Islam will be discussed next.

2 Overview of Islam

In order for one to understand the reforms that took place in Morocco, it is important to grasp the fundamental tenets of Islam. The preamble of the Moroccan constitution describes the kingdom as a sovereign Muslim state⁶ and highlights the importance attached to the Muslim faith in the multicultural temperament of the nation.⁷

The word Islam means "submission to the will of God".⁸ Islamic family laws epitomize primarily those spheres of *Sharia* that deal with marriage, divorce, maintenance, the custody of children and succession.⁹ In this article reference will be made to *sharia* instead of Islamic Law, as these terms are interchangeable. *Sharia* is an Arabic word that means the "path to be followed", and refers to a number of legal injunctions.¹⁰ *Sharia* and *fiqh* are important components of Islam. *Sharia* is closely associated with divinity, whereas *fiqh* is mainly a product of human reasoning.¹¹ *Fiqh* involves rational endeavour, largely the product of human reasoning, and commands a lower degree of authority than *sharia*.¹² The ambit of *sharia* encompasses not only *fiqh* but also moral and theological teachings.¹³

The *Quran* (read or recited) is deemed the primary source of *sharia*, which is the literal word of God (*Allah*).¹⁴ According to Mashhour, a legal scholar, although the *Quran* contains legal prescriptions, it is mainly concerned with

⁶ Madani, Maghraoui and Zerhouni 2012 <http://bit.ly/1MQCXn8>.

⁷ Madani, Maghraoui and Zerhouni 2012 <http://bit.ly/1MQCXn8>.

⁸ Jordan 2003 *Wash & Lee J CR & Soc Just* 57.

⁹ Rehman 2007 *IJLPF* 108-109.

¹⁰ Mashour 2005 *Hum Rts Q* 565.

¹¹ Warren 2008 *Cardozo J L & Gender* 34-35.

¹² Warren 2008 *Cardozo J L & Gender* 34-35.

¹³ *Fiqh* is more akin to positive law, and is concerned with the practical legal rules relating to the conduct of individuals. Furthermore, the conceptual distinction between *sharia* and *fiqh* is the product of a recognition of the inevitable failures of human efforts at understanding the purpose and intentions of Allah. There are jurists that state that human beings do not possess the ability to understand and implement Allah's great wisdom, and that *fiqh* is therefore justified as a rational technique bringing humans closer to understanding the will of Allah. In this way, Islamic law is often viewed as having a dual nature, both divine and human.

¹⁴ The *Quran* is the most authoritative guide for Muslims. The *Quran*, which consists of the verbatim words of Allah (God), was revealed to Prophet Mohammed [PBUH] over a period of twenty-three years and contains 114 *suras* or chapters and 6235 *ayat* or verses of unequal length. Out of the total number of verses in the *Quran*, approximately 600, or fewer than one tenth, provide legal rules or address legal issues.

general ethical principles and guidelines rather than strict instructions.¹⁵ However, there are strict instructions such as the prohibition of drinking and the acceptance of usury, which Muslims must obey. Although the *Quran* is not considered exclusively a law book or code, it is meant to be treated as a broad guide for humanity. The second primary source is the *sunnah*, which means "traditions", referring to the oral teachings or practical traditions and model behaviour of Prophet Mohammed.¹⁶ In terms of a hierarchy of sources, the *sunnah* is the next highest source next to the *Quran*.¹⁷ To Muslims and practitioners, the *sunnah* is all that was narrated, practised and approved by Mohammed.¹⁸ The contents of the *sunnah* are compiled in a series of hadiths or reports.¹⁹

Rehman, a legal scholar, correctly states that the *Quran* was recorded in a relatively short period of time, whereas the *sunnah* on the other hand took a considerable time to be recorded.²⁰ Commenting on the passage of time, Rehman says that several elements of the *sunnah* were either derived from sources that were not reliable or readily identifiable.²¹ During the previous centuries a significant amount of debate has taken place regarding the authenticity and accuracy of some of the *sunnah*, legal scholars arguing the possibility of considerable fabrication in its recording.²² Attempting to establish solid legal principles from the sources, the early jurists expressed disagreement over the validity or the authenticity of a few of the ostensible *sunnah* of Mohammed. In addition, Islamic schools of thought differed in their estimation of the gravity to be afforded to particular traditions.²³ Together, the *Quran* and *sunnah* represent the fundamental sources of authority to be found in Islam.²⁴

¹⁵ Mashour 2005 *Hum Rts* Q 565.

¹⁶ Warren 2008 *Cardozo J L & Gender* 34-35.

¹⁷ In pre-Islamic Arabia, for example, Arabs used the word *sunnah* in reference to ancient and continuous communal practices inherited from their forefathers.

¹⁸ Mashour 2005 *Hum Rts* Q 566.

¹⁹ Examples of the most authoritative bodies of hadiths were those compiled by Islamic jurists such as Muhammad ibn al-Ishmail al-Bukhari, who lived between 810 and 870, and Abdu'l Hussain bin al-Hajjaj al-Nisapuri, who lived between 817 and 875. The most respected collection of legal hadith, totalling 4800 altogether, was compiled by Ash'ath al-Sijistani, who is also known as Abu Dawood.

²⁰ Rehman 2007 *IJLPF* 111.

²¹ Rehman 2007 *IJLPF* 111.

²² Rehman 2007 *IJLPF* 111. Commenting on this issue, Coulsen makes the point that "the extent of (Mohammed's) extra Quranic law-making is the subject of the greatest single controversy in early Islamic history".

²³ Rehman 2007 *IJLPF* 111-112.

²⁴ Jordan 2003 *Wash & Lee J CR & Soc Just* 58.

In addition, to the primary sources, other supplementary sources exist such as *qiyas*, *ijma* and *ijtihad*, among others.

Qiyas, or analogical thinking, literally means measuring or ascertaining length. However, in a juristic context *qiyas* refers to analogising or extending a sharia value or idea to a new situation.²⁵ An appeal to analogy is warranted only when the solution to a new problem cannot be ascertained in the *Quran*, *sunnah* or *ijma*.²⁶ As *qiyas* involves the extension of existing principles to a new situation, it is not considered an innovation and is therefore not viewed negatively by some Muslim scholars.²⁷ However, texts in which new situations are analogized must always have recourse to the primary sources.

Ijma is defined as the consensus of the companions of Mohammad and the agreement reached on decisions taken by learned scholars/jurists on various issues in relation to matters that appeared before them.²⁸ By interpretation it excludes the opinion or consensus of laymen. Christie, a legal scholar, argues that the various schools of thought employ different interpretations and juristic techniques. *Ijma* has conventionally been difficult to achieve.²⁹

Ijtihad or personal reasoning is a subject of controversy within Islamic jurisprudence.³⁰ The controversy relates to "closing the gates of *ijtihad*". By the tenth century A.D., most of the notable principles relating to sharia had been decided by general consensus.³¹ According to Jordan, a legal scholar, the "gates of *ijtihad*" were closed.³² Thereafter a period of imitation followed, when the techniques of the preceding *Imams* were interpreted and applied by subsequent jurist and scholars.³³ Sadly, no further attempt was made to delve into the fundamental principles of Islam.³⁴

The term *ijtihad* in Arabic literally means strenuousness and from a technical perspective means an effort or exercise to arrive at one's own judgement.³⁵

²⁵ Warren 2008 *Cardozo J L & Gender* 37-38.

²⁶ Warren 2008 *Cardozo J L & Gender* 37-38.

²⁷ Warren 2008 *Cardozo J L & Gender* 37-38.

²⁸ Mashour 2005 *Hum Rts Q* 566.

²⁹ Warren 2008 *Cardozo J L & Gender* 37-38. According to Christie, *ijma* as a source of law differs from the *Quran* and *sunnah* in that it is not itself revealed but instead is a product of rational proof and reason rooted in divinity. .

³⁰ Mashour 2005 *Hum Rts Q* 566.

³¹ Jordan 2003 *Wash & Lee J CR & Soc Just* 59.

³² Jordan 2003 *Wash & Lee J CR & Soc Just* 59.

³³ Jordan 2003 *Wash & Lee J CR & Soc Just* 59.

³⁴ A comprehensive discussion relating to *ijtihad* falls beyond the scope of this article.

³⁵ Warren 2008 *Cardozo J L & Gender* 37-38.

The effort of *ijtihad* involves analysing the original textual sources for the solution to a new problem and, if they do not provide an answer, applying *ijtihad* to extend the principles contained in those sources to the new situation.³⁶ Jordan, a legal scholar, postulates that nothing in the *Quran* or *sunna* calls for the era of interpretation to end.³⁷ It has been argued that *ijtihad* was ended by scholarly fiat, as it was assessed that all possible situations had been resolved permanently.³⁸

Of the sources that have been mentioned above, the *Quran* and *sunnah* are considered as divine, whereas the other three, namely, *qiyas*, *ijma* and *ijtihad*, are human creations and based on independent human juristic reasoning.³⁹ Mashhour, a legal scholar, argues that this proves that the sharia is not meant to be static, but evolving, and that the role of *ijtihad*, shepherded by principles of justice, equity and public welfare, is essential in responding to the changing socio-economic needs of people. There is a call that the technique of *ijtihad* should be returned to as new situations have developed which could not have been contemplated over one thousand years ago.

The intricacies of the ethical, moral and religious raw materials derived from the primary sources of Islam were given shape and direction by Islamic jurists during the second and third centuries of the Islamic calendar. The *Sunni* Muslims trace their jurisprudential descent through the first four Umayyad caliphs. Their jurisprudence was principally the work of four jurists; Abu Hanifa, Malik ibn Anas, Muhammad ibn Idris al-Shafi and Ahmad Hanbal.⁴⁰ The *Imams*, or founders, developed separate schools during the great period of theological interpretation that occurred after the demise of Mohammed.⁴¹ The various schools have been named after their

³⁶ Warren 2008 *Cardozo J L & Gender* 37-38. Only qualified *mujtahids*, Islamic legal scholars, have been authorised to practise *ijtihad*. Requirements to attain the status of a *mujtahid* comprise being a Muslim, having a sound mind and intellectual competence, the possession of sufficient Arabic to read the original texts in that language, and having sufficient familiarity with the *Quran* and *sunnah* to be able to understand and interpret both their language and purpose, as well as to separate weak from strong hadith. There are other sources such as custom (*urf*) and *taqlid* which are also found within Islam.

³⁷ Jordan 2003 *Wash & Lee J CR & Soc Just* 59.

³⁸ Jordan 2003 *Wash & Lee J CR & Soc Just* 59.

³⁹ Mashour 2005 *Hum Rts Q* 566.

⁴⁰ An Arabic term for faction or party is *shi'ah*, and the party or *shi'ah* of Ali emerged during the first civil war. Ali's leadership was first challenged by a group including Aisha [PBUH] the Prophet's most prominent wife and the daughter of the first Caliph, Abu Bakr. Although Ali defeated this group militarily, it represented the tradition that became part of the mainstream majority, or *Sunni*, tradition in Islam. *Shi'ah* Islam has its beginnings in the Party of Ali.

⁴¹ Jordan 2003 *Wash & Lee J CR & Soc Just* 59.

founders, namely, *Hanafi*, *Maliki*, *Shafi* and *Hanbali*. No one school of thought enjoys universal dominance, however, and in Morocco and Tunisia, for example, the *Maliki* school is the most influential, whereas in Egypt the *Hanafi* school appears to be the most popular.⁴² Other less dominant schools may also be found in *Sunni* Islam.

Although unparalleled in their sincerity for advancing the values of Islam, the founders of the dominant *Sunni* schools in reality established legal principles in accordance with their own subjective understanding of Islam.⁴³ Rehman is of the opinion that in a broader and a more pragmatic framework the articulation of the dominant *Sunni* schools is no more than an expression by those schools of current thought during the second and third century of the Muslim calendar.⁴⁴ Sadly, the barrier faced by many Islamic societies is that reviewing the established norms has the potential of being seen as reacting against the tenets of Islam. The historical progress of the *mudawana* will be discussed next.

3 Historical progress of the (code of personal status) *mudawana*

The year 1956 is important for Moroccans as that is the year in which the country achieved independence from French colonial rule and became a sovereign country.⁴⁵ As soon as independence had been achieved, Morocco set out to preserve its own identity and a return to Islamic traditions was set in motion. One way of achieving this goal was the codification of state family law. Alal al Fassi, an important figure in the independence movement, argued for a general Islamic framework in Morocco.⁴⁶

A year later Morocco's family law was codified and the *mudawana* was established. The text was acclaimed for its faithfulness to the *Maliki* school.⁴⁷ A commission was established by the monarchy and mandated to draft the new *mudawana*. It consisted of ten male religious scholars from the *Maliki* school of thought, together with the Ministry of Justice.⁴⁸

⁴² Al-Sarami 2007 <http://bit.ly/1SFcn2C>.

⁴³ Rehman 2007 *IJLPF* 111-112.

⁴⁴ Rehman 2007 *IJLPF* 111-112.

⁴⁵ Eisenberg 2011 *Cornell Int'l L J* 693-703.

⁴⁶ Buskens 2003 *Islamic Law and Society* 70.

⁴⁷ Charrad 2012 <http://bit.ly/1SXEW5e>. The *mudawana* was first developed as a set of royal decrees (referred to as *zahir*) released by the monarchy, without parliamentary debate, between 1957 and 1958. The *mudawana* became a symbol of Moroccan and Islamic unity and identity, as well as of the *Maliki* school and the Monarchy.

⁴⁸ Cabré 2007 *Lang Intercult Comm* 133-135.

Surprisingly, no women served on the Commission. The formulation of the *mudawana* could well be seen as ecclesiastical and as perhaps the most important initiative by the Moroccan monarchy since gaining independence. By integrating under one set of family laws the many ethnic and tribal groups in Morocco, the *mudawana* has become a symbol of both national unity and Islamic identity, entrenching the significance of the monarchy and the *Maliki* school.⁴⁹

The *mudawana* relates to the family unit, and as such regulates marriage, polygyny, divorce, inheritance, maintenance, and child custody.⁵⁰ It could thus be argued that the *mudawana* determines the status of a Moroccan woman throughout her entire life, commencing at birth and including her capacity to own, inherit, and manage property, her freedom to work, marry, divorce and remarry, as well as her relationship with her children.⁵¹ According to an earlier version a woman was considered to be a minor under the guardianship of her father and thereafter her husband or another male guardian within the family.⁵² In addition, it codified the right to compel a daughter to marry, the minimum age for marriage (then fifteen years for girls and eighteen years for boys), a wife's obedience to her husband in exchange for financial maintenance, the husband's right to divorce by unilateral repudiation (including the practice of polygyny) and judicial divorce at the wife's request for specific reasons as determined by the *Maliki* school (for example the lack of maintenance and/or harm).⁵³

Attempts at reform followed in 1961, 1962 and 1965 with the establishment of an official commission to examine any shortcomings in the *mudawana*, and similar attempts were made throughout the 1970s.⁵⁴ However, it was only in the 1980s that issues emerged concerning the rights and freedoms of women. Issues surrounding the rights of women became a subject of public debate linked to a struggle for the protection and promotion of women's rights. As a result a petition campaign was established consisting of a coalition of women's groups. While some of these women's groups aligned themselves with left-wing political parties, others adopted an independent stance.⁵⁵ The particular demands articulated by the women's groups included a call for equality and complementarity between husband

⁴⁹ Charrad 2012 <http://bit.ly/1SXEW5e>.

⁵⁰ Zoglin 2009 *Hum Rts* Q 964.

⁵¹ Htun and Weldon 2011 *Ind J Global Legal Studies* 145.

⁵² Charrad 2012 <http://bit.ly/1SXEW5e>.

⁵³ Charrad 2012 <http://bit.ly/1SXEW5e>.

⁵⁴ Alidadi 2005-2006 *UCLA J Islamic & Near E L* 3-26.

⁵⁵ Maddy-Weitzman 2005 *Middle East J* 393-400.

and wife relating to the family unit. The demands sought to afford women the right to marry without a guardian (*wali*), to increase the minimum age of marriage for girls from fifteen to eighteen years, to make divorce an equitable process, and to place the divorce process in the hands of a judge. The prohibition of polygyny, the extension of equal rights of guardianship over children, as well as the recognition of the right to work and the right to an education, which the husband could not dispute, also garnered considerable attention.⁵⁶

In 1993 the *mudawana* thus underwent reforms by royal decree again, as had been the case with the previous reforms, instead of reform through parliamentary processes.⁵⁷ The majority of the population, however, considered the 1993 reforms to be inadequate and to fall short of their expectations of true reform.⁵⁸ Sidiqi, an Islamic and legal scholar, rightly points out that the disappointment largely stemmed from the fact that the *mudawana* was still based on religious thought.⁵⁹ Disappointment with the reforms stemmed especially from within the sphere of liberal feminism since at the time other legal codes were based on civil law, including the *Penal Code* and the *Constitution* of Morocco.⁶⁰ The recent reforms in marriage will be discussed next.

4 Pre-reform *mudawana*

There is general agreement that Muslim women in North Africa and the Middle East enjoy greater fundamental rights, perhaps second only to those living in Tunisia.⁶¹ In the case of Morocco, Hursh, a legal scholar, attributes this phenomenon to its history as a cultural crossroads between Europe and Africa, Christianity and Islam, and Arab and Berber, allowing for more tolerance and a greater sensitivity to women's rights and freedoms.⁶² Yet, despite this cultural diversity Morocco remains convincingly Islamic, and the Constitution of Morocco of 2011 entrenches the notion of the family as being "founded on the legal bonds of marriage as the basic unit (*cellule*) of society".⁶³ Article 3 states that Islam is the religion of the State, but

⁵⁶ Maddy-Weitzman 2005 *Middle East J* 393-400.

⁵⁷ Hursh 2012 *Berkeley J Gender L & Just* 252-259.

⁵⁸ Alidadi 2005-2006 *UCLA J Islamic & Near E L* 26-27.

⁵⁹ Sadiqi 2008 *BJMES* 325.

⁶⁰ Jansen 2007 *Nw U J Int'l Hum Rts* 1-1.

⁶¹ Hursh 2012 *Berkeley J Gender L & Just* 252-259.

⁶² Hursh 2012 *Berkeley J Gender L & Just* 252-259.

⁶³ Article 32 of the *Constitution of Morocco*, 2011.

guarantees to all the free exercise of their beliefs.⁶⁴ The inference may be drawn from Article 3 that Morocco remains convincingly Islamic. The state is obliged "to guarantee by the law the protection of the family under the juridical, social and economic plans, in a manner to guarantee its unity, its stability and its preservation".⁶⁵

The clear purpose of marriage according to previous drafts was procreation. It may be argued that the *mudawana* which subscribed to the *Maliki* school cast marriage as a contract of legitimate sexual gratification.⁶⁶ Cabré, a legal and Islamic scholar, correctly argues that this concept of marriage implies a prior judgment that all women are compelled to marry and that theoretically they accept their primary roles of wife and mother.⁶⁷ In addition, any form of extra-domestic activity could be viewed as a distraction from the woman's primary role which has been forced upon her, namely that of wife and mother.⁶⁸

The issue of guardianship has raised serious questions, not only in Morocco but throughout the world. Arguments have been made that the issue of guardianship strips women of their autonomy. We notice in other faiths, that the father of the bride walks besides his daughter at her wedding, for example, and if the father is deceased then it would fall to the brother or uncle. Another example of such guardianships would be when a priest who is about to marry the bride inquires asks "Who giveth this woman to be married to this man?" The respondent would have to be the father, the uncle or the brother, not necessarily in that order. However the issue of guardianship should pertain to advice only, and must not be an overriding factor in the conclusion of a marriage.

The situation in Islam is as follows. There is consensus amongst the dominant schools that a woman who has already experienced married life and has subsequently been divorced or widowed is entitled to contract her own marriage without the aid of a guardian.⁶⁹ However, a woman who possesses legal capacity and who is a virgin appears not to be in a similar position. The *Maliki* school holds the view that such a woman cannot

⁶⁴ Article 4 of the *Constitution of Morocco*, 2011. Article 1 states: "The nation relies for its collective life on the federative constants, on the occurrence of moderate Muslim religion, the national unity of its multiple components, the constitutional monarchy and democratic choice".

⁶⁵ Hursh 2012 *Berkeley J Gender L & Just* 252-259.

⁶⁶ El Alami *Marriage Contract in Islamic Law* 10.

⁶⁷ Cabré 2007 *Lang Intercult Comm* 133-136.

⁶⁸ Cabré 2007 *Lang Intercult Comm* 133-136.

⁶⁹ Ur-Rahman *Code of Muslim Personal Law* 38.

contract her own marriage without the intervention of a guardian who, under normal circumstances, would be her father.⁷⁰ However, if the father is unavailable, the guardianship may be passed on to one of the other agnatic consanguineous relatives.⁷¹ Although the guardian could not force a woman into marriage without her consent, the woman could not contract her own marriage without the assistance of a guardian.⁷² Ur-Rahman, a legal scholar, explains that although the *Maliki* school considers the permission of a guardian necessary for the completion of a marriage contract, the validity of the contract is not affected.⁷³ In accordance with the *Maliki* school of thought, a woman can never, however, act as a guardian. The situation in Morocco is that the need to have a guardian applies to women and not to men.

4.1 The 2004 reforms

Under the 2004 version a wife is no longer legally obliged to obey her husband, contrary to widely-held custom which regards obedience as an absolute duty of a Muslim woman. The 2004 version in fact corresponds to the core sources of Islamic law, which call on couples to engage in consultation, dialogue and understanding in the fulfillment of their mutual obligations. This is underscored, in particular, by the *Qur'anic* injunctions of fair treatment, consultation and dialogue,⁷⁴ and the instruction calling on all Muslims to disobey illegal commands, including those issued by parents and husbands.⁷⁵

In keeping with the desire for equality between men and women, the minimum age for marriage in the 2004 version has been set at eighteen years of age for both men and women. Previously, girls were legally permitted to marry at the age of fifteen⁷⁶ and it still remains permissible for a girl between the ages of fifteen and eighteen to enter into marriage. In such instances, the permission of the Family Affairs Judge is required and a medical certificate is required.⁷⁷ This represents a significant reform of the

⁷⁰ Cabré 2007 *Lang Intercult Comm* 133-136.

⁷¹ Ur-Rahman *Code of Muslim Personal Law* 38-42.

⁷² Ur-Rahman *Code of Muslim Personal Law* 38-42.

⁷³ Ur-Rahman *Code of Muslim Personal Law* 38-42.

⁷⁴ Ali *Holy Qur'an* 17-93.

⁷⁵ Ali *Holy Qur'an* 17-93.

⁷⁶ Article 19 of the *Code of Personal Status*, 2004, which states: "[m]en and women acquire the capacity to marry when they are of sound mind and have completed eighteen full Gregorian years of age".

⁷⁷ Article 20 of the *Code of Personal Status*, 2004. The Family Affairs Judge in charge of marriage may authorise the marriage of a girl or a boy below the legal age of marriage, as stipulated in Article 19, "in a well-substantiated decision explaining the

traditional position in Islam. Although no suitable age for marriage was stipulated, it was assumed that boys and girls attained puberty at the ages of twelve and nine respectively.⁷⁸ The *mudawana* of 2004 now declares the marriage of a minor to be contingent on the consent of his or her legal tutor. In the event that the minor's legal tutor withholds consent, the Family Affairs Judge must rule on the matter.⁷⁹ The fact that a minimum age is set for marriage is to be welcomed, as this renders it unnecessary to deal with the question of puberty. In addition, the requirement of a medical certificate is to be welcomed, as this requirement will ensure that the physical well-being of a young girl is given due consideration.

Article 4 of the 2004 version defines marriage as a legal contract so as to distinguish between marriage and other contracts, such as those envisaged in the Code of Obligations.⁸⁰ Marriage is therefore based on consent and is defined as a long-lasting union between a man and a woman, whose mutual obligations are purity, chastity and the establishment of a stable family, to be attained through mutual care following the provisions laid out in the *mudawana*.⁸¹ Articles 10 and 12, for example, stipulate that consent must be provided, which must be consistent with the intention of both parties.⁸² In addition, Article 13 stipulates that both parties should have the necessary legal capacity and there should be no intention or agreement to cancel the dowry.⁸³ The dowry is an essential feature of marriage and has been prominent in all versions of the *mudawana*.⁸⁴ Cabré, a legal scholar, argues that in some instances the dowry constitutes the women's wealth, which she has recourse to in a case of economic difficulty or divorce.⁸⁵ Article 13(2) states that there must be no intention or agreement to cancel the dowry.

interest and reasons justifying the marriage, after having heard the parents of the minor who has not yet reached the age of capacity or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry".

⁷⁸ Jansen 2007 *Nw U J Int'l Hum Rts* 181-184.

⁷⁹ Article 21 of the *Code of Personal Status*, 2004.

⁸⁰ Garcia 2012 *JBSS* 44-45.

⁸¹ Article 4 of the *Code of Personal Status*, 2004.

⁸² Article 10 of the 2004 version of the *mudawana* states: "Marriage is legally concluded by an offer expressed by one of the parties and acceptance by the other, in any accepted expression from which the meaning of marriage is inferred verbally or conventionally". Article 12 states: "Any marriage contract concluded under duress or by fraud is subject to the provisions of Articles 63 and 66".

⁸³ Article 13 states: "The conditions required to contract marriage are: 1- The legal capacity of both spouses; 2 – No intention or agreement to cancel the dowry; 3 – A marital tutor, if required; The hearing and notarized statement by two *adouls* (public notaries) of offer and acceptance pronounced by the two witnesses; 5 – The absence of any legal impediments".

⁸⁴ See the 2004 *Mudawana*, Chapter II: Of the Dowry, aa 26, 27, 28, 29, 30, 31, 32, 33 and 34.

⁸⁵ Cabré 2007 *Lang Intercult Comm* 133-137.

Article 13(3) also prescribes the presence of a marital tutor, where necessary, and two public notaries (*adouls*) at the moment when the offer and acceptance are pronounced by the couple.⁸⁶

The 2004 version requires the presence of two public notaries (*adouls*) at the moment when the offer and acceptance are uttered by the couple.⁸⁷ This means that the provision of consent must be executed in the presence of the public notaries. However, it must be emphasized that the presence of the public notaries is not a requirement for the validity of the marriage, but merely serves as proof of the solemnization of the marriage.⁸⁸ The presence of the public notaries is thus seen as a formality in the concluding of the marriage contract. The marriage contract serves as a document of proof that the marriage has been concluded between the parties, again in line with the *Maliki* school.

The *Maliki* school holds the view that the presence of witnesses in order to conclude a marriage is not necessary.⁸⁹ However, what seems to be important is that the marriage is to be made public.⁹⁰ The *Maliki* school asserts that it is the publicity which is a *conditio sine qua non* for the validity of the marriage.⁹¹ It could therefore be argued that the presence of the public notaries is to give effect to the provision of the *Maliki* school which calls for the marriage to be made public.⁹²

This provision is based on two narrations of Mohammed, cited by Ur Rehman, a legal scholar. The first is that marriage must not be in secret and the second is that it is necessary to "announce the marriage, no matter if it is by means of a tambourine".⁹³ The *Maliki* school construes the first of these as meaning that by prohibiting the contracting of the marriage in secret Mohammed has commanded its publicity.⁹⁴ The second part considers the publicity to be an essential condition relating to the validity of the marriage, and the beating of a drum or drums is a means to announce the marriage or to attain publicity.⁹⁵ It may be argued that the *Maliki* school seeks to

⁸⁶ Garcia 2012 *JBSS* 44-45. See a 13(3) of the 2004 *Mudawana* which states: "A marital tutor, if required".

⁸⁷ Article 16 of the *Code of Personal Status*, 2004.

⁸⁸ Garcia 2012 *JBSS* 44-45.

⁸⁹ Ur-Rahman *Code of Muslim Personal Law* 38-76.

⁹⁰ Ur-Rahman *Code of Muslim Personal Law* 38-77.

⁹¹ Ur-Rahman *Code of Muslim Personal Law* 38-77.

⁹² Ur-Rahman *Code of Muslim Personal Law* 38-77.

⁹³ Ur-Rahman *Code of Muslim Personal Law* 38-78.

⁹⁴ Ur-Rahman *Code of Muslim Personal Law* 38-78.

⁹⁵ Ur-Rahman *Code of Muslim Personal Law* 38-78.

distinguish marriage from adultery, as adultery is generally speaking almost always takes place in secret.

The previous versions stipulated that a girl may enter into marriage at the age of fifteen, while the required age for boys was eighteen.⁹⁶ According to Cabré, this arrangement was of significant importance for it established a system for early marriage.⁹⁷ In contrast, the 2004 version now stipulates that people gain legal capacity to contract marriage when they have reached the age of eighteen. The current reform provides for equity in terms of the ages at which men and women may get married.⁹⁸ However, Articles 19 and 20 state that a judge has the power to permit marriages in the case of minors.⁹⁹ Although it is understood that there is no prescribed minimum age to impede the authorisation of a marriage, it is accepted that even though the couple may be young, they must be post-pubescent.¹⁰⁰

Guardianship unquestioningly denies a woman her independence and autonomy, while the same does not apply to men.¹⁰¹ The 2004 version is thus to be welcomed as it recognises a woman's agency and independence to exercise the freedom to enter into marriage. It is still, however, possible for a woman who so wishes to delegate tutelage to her father or to a male relative.¹⁰²

Men and women are now declared "equal before the law" in recognition of the dignity of women as human beings.¹⁰³ Whereas previously the family was the sole responsibility of the husband, the 2004 version of the *mudawana* makes the husband and the wife jointly responsible for the family.¹⁰⁴ This amendment echoes the words of Muhammad, who, upon delivering his farewell sermon near Mount Arafat, instructed: "[t]reat your women well and be kind to them for they are your partners and committed helpers".¹⁰⁵

⁹⁶ Cabré 2007 *Lang Intercult Comm* 133-136.

⁹⁷ Cabré 2007 *Lang Intercult Comm* 133-136.

⁹⁸ Zoglin 2009 *Hum Rts Q* 964-971.

⁹⁹ Articles 19 and 20 of *Code of Personal Status*, 2004.

¹⁰⁰ Garcia 2012 *JBSS* 44-45.

¹⁰¹ Jansen 2007 *Nw U J Int'l Hum Rts* 181-184.

¹⁰² Foblets 2007 *Wash & Lee L Rev* 1385-1390.

¹⁰³ Chapter 1 Article 4 of the *Constitution of Morocco*, 1996 adopted 13 September 1996.

¹⁰⁴ Jansen 2007 *Nw U J Int'l Hum Rts* 181-203.

¹⁰⁵ Warren 2008 *Cardozo J L & Gender* 33.

4.2 Polygyny and the 2004 reforms

Polygyny has generated much debate. Under the previous versions of the *mudawana* a husband did not need judicial authorisation if he sought to enter into a second marriage. The husband was not required to notify his first wife of his intention.¹⁰⁶ Polygyny is now subject to stringent legal conditions. Although the Moroccan parliament decided to retain the husband's prerogative to enter into a second marriage, certain conditions had to be satisfied before a court in order for the second marriage to be authorised.¹⁰⁷ The wife could make it a pre-condition of marriage that her husband may not enter into a second marriage. If the husband proceeded to do so, the wife would be entitled to a divorce.¹⁰⁸ In addition, the husband must notify the current wife that he would like to take another wife and must furthermore advise the proposed new wife that he is already married.¹⁰⁹ If the first wife objects to the husband's taking another wife the court must find exceptional and objective circumstances that justify the taking of a second wife. There must be sufficient resources to provide for both families so as to treat both families equally.¹¹⁰

Previously the *mudawana* stipulated that if any injustice between co-wives is feared, polygyny is not permitted.¹¹¹ Abdullah correctly argues that this stipulation appears to be identical to what is stated in the *Qur'an*.¹¹² Previous drafts of the *mudawana* did not require an inquiry by any authority into the husband's capacity to do justice between co-wives. A court may therefore grant a judicial divorce to a wife who complains of injury as a direct result of the husband's contracting a further marriage.¹¹³ The *mudawana* thus confirms the *Quranic* text that if a husband is unable to treat the co-wives equitably, then such a husband must, as a rule, confine himself to one wife.¹¹⁴ Surprisingly, polygyny is mentioned in the Quran in only one verse:

And if ye fear that ye shall not be able to deal justly with orphans, marry women of your choice, two, three, or four,

¹⁰⁶ Zoglin 2009 *Hum Rts* Q 964-972.

¹⁰⁷ Zoglin 2009 *Hum Rts* Q 964972.

¹⁰⁸ Articles 40, 42 and 45 of the *Code of Personal Status*, 2004.

¹⁰⁹ Articles 43 and 46 of the *Code of Personal Status*, 2004.

¹¹⁰ Article 41 of the *Code of Personal Status*, 2004.

¹¹¹ Article 30 of the *Code of Personal Status*, 1958.

¹¹² Abdullah 2008 *Al-Jāmi'ah* 154-163.

¹¹³ Abdullah 2008 *Al-Jāmi'ah* 154-163.

¹¹⁴ Ur-Rahman *Code of Muslim Personal Law* 38-97.

But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hand possesses.

That will be more suitable, to prevent you from doing injustice.¹¹⁵

The practice of polygyny was not amended and thus the position remains as found in the *Qur'an*.¹¹⁶

5 Barriers to the implementation of the *mudawana*

Despite the gains the *mudawana* brought to the realization of women's rights, it remains obstructed by several obstacles. The following obstacles will be discussed, namely, deficiencies in the wording of the *mudawana*, the government's allocation of resources, and the decisions of the judiciary.

5.1 Deficiencies in the wording of the *mudawana*

Revisions to the *mudawana* and the introduction of the 2004 version into legislation should be seen as stepping stones to the realization of women's access to justice. There are areas in which the text fails to realize women's rights to equality. For example the *mudawana* does not establish a threshold age below which special permission to contract a marriage before the lawful age of 18 years may be granted.¹¹⁷ In addition, the *mudawana's* provisions on the joint administration of property acquired during the subsistence of the marriage do not include standards for evaluating the wife's contribution in the form of domestic duties, where there is no contract between the parties in dealing with domestic duties.¹¹⁸ Furthermore, the *mudawana* does not completely eradicate polygyny, the unilateral repudiation of the wife by the husband, separation by compensation (referred to as *khula*), or inheritance rules, according to Sidiqi, a legal scholar.¹¹⁹ Although strides have been made towards the realization of women's rights in some areas of criminal and civil law, family law has been lagging behind. For example, women possess equal testimony rights in most if not all areas in civil and criminal law cases, but the court allocates only half the weight to their testimony that

¹¹⁵ This verse does not enjoin polygyny or deem it an absolute right of man, but rather it permits polygyny in specific circumstances. In addition, polygyny is conditional on whether the husband can be just to his wives or not. If he cannot be fair to his wives and treat them equally, then he may have only one. Therefore, polygyny appears to be the exception in marriage, while monogamy is the rule. It may be argued that the practice of polygyny is misused by men and is not perceived as conditional and exceptional but rather as an absolute right and privilege.

¹¹⁶ Abdullah 2008 *Al-Jāmi'ah* 154-163.

¹¹⁷ Hanafi 2013 <http://bit.ly/1VM04IU> 9.

¹¹⁸ Hanafi 2013 <http://bit.ly/1VM04IU> 9.

¹¹⁹ Sadiqi *Five Years After the New Moroccan Family Law* 2.

it does to the testimony of men in family issues.¹²⁰ Finally, married women receive the most protection in terms of the *mudawana*, but it neglects the rights of those women who are single, foreign women who are married to Moroccan men, and Moroccan women married to foreign men.¹²¹ According to Hanafi, a legal scholar, the latter point, particularly, is of great importance as the number of multicultural marriages is on the increase.¹²²

5.2 *Government's allocation of resources*

Civic organisations believe that there are certain areas in terms of how family law is written into legislation and how family law is applied at grassroots level, in-particular women's access to justice, that need revision.¹²³ As outlined by the *mudawana*, there is no differentiation of access to justice among women, but in practice women situated in rural areas have less access to justice than those situated in urban areas. A 2003 report to the CEDAW committee highlighted that despite the progress of the *mudawana*

...a number of constraints and difficulties have emerged, including in particular difficulties attributable to inadequate infrastructure and logistic resources, a lack awareness and training among officials responsible for enforcing the Code, and persons in charge of publicizing it and propagating an understanding of it throughout Morocco's social fabric.¹²⁴

A number of civic organisations exist in the major cities but not in the rural parts of Morocco. According to Hanafi, a legal scholar, too many rural areas lack crucial physical infrastructure such as roads, which lack hampers the formation of rural civic organisations, which are mainly concentrated in major urban centers such as Rabat and Casablanca.¹²⁵ In addition, if there were physical infrastructure such as roads, this would assist the villagers to gain access to justice as their villages would be physically accessible to organisations such as legal aid and other non-profit organisations.¹²⁶

5.3 *The judicial system*

Morocco has a dual legal system consisting of secular courts founded on the French legal tradition and courts based on Islamic and Jewish

¹²⁰ Sadiqi *Five Years After the New Moroccan Family Law* 3.

¹²¹ Sadiqi *Five Years After the New Moroccan Family Law* 6.

¹²² Hanafi 2013 <http://bit.ly/1VM04IU> 10.

¹²³ Hanafi 2013 <http://bit.ly/1VM04IU> 10.

¹²⁴ UN Women 2008 <http://bit.ly/1Wk7OtQ>.

¹²⁵ Hanafi 2013 <http://bit.ly/1VM04IU> 11.

¹²⁶ Hanafi 2013 <http://bit.ly/1VM04IU> 11.

traditions.¹²⁷ The secular structure includes communal and district courts, courts of first instance, appellate courts, and a Supreme Court.¹²⁸ There are 27 *Sadad* courts, which act as courts of first instance for Muslim and Jewish personal laws. The *Sadad* courts are divided into Sharia, Rabbinical, Civil, Commercial and Administrative and Criminal sections.¹²⁹

A weakness relating to the lack of implementation is the delays in courts. The performance of an effective and efficient judiciary is of paramount importance to the administration of justice. There are numerous causes of delay, such as heavy caseloads, lengthy hearings, insufficient court resources, both financial and personal, and inefficient legal procedures and court processes.¹³⁰ The success of the *mudawana* depends explicitly on the legitimacy of the judiciary. Several issues of the reform fall to the discretion of the judiciary, such as the approval of polygynous marriages, the granting of waivers for child marriages, and the oversight of all divorce proceedings.¹³¹ Although the judiciary has made strides towards adhering to the provisions of the *mudawana*, there seems to be evidence of a patriarchal leaning towards child marriages.¹³²

As a result of the abovementioned hurdles, which seem to be prevalent amongst the members of the judiciary, many women fear failure or harbour serious misgivings that prevent them from seeking judicial intervention.

6 Conclusion

Women's activism has had a significant impact on the reform of family law in Morocco, and this led, in no small part, to the adoption of an entirely new *mudawana* in 2004. Moghadam and Fahimi, legal scholars, argue that the new *mudawana* is consistent both with the spirit of Islam and the notion of equal rights for men and women.¹³³ The fact that the feminist campaign succeeded in altering the *mudawana* in a country where the law is based on Islamic principles shows how effective women's activism can be when linking social and economic development to the notion of women's rights.

The enactment of the 2004 version of the *mudawana* is a step forward in the realisation of the fundamental rights and freedoms of Moroccan women,

¹²⁷ Encyclopedia of the Nations 2015 <http://bit.ly/1QvDci2>.

¹²⁸ Encyclopedia of the Nations 2015 <http://bit.ly/1QvDci2>.

¹²⁹ Encyclopedia of the Nations 2015 <http://bit.ly/1QvDci2>.

¹³⁰ Hanafi 2013 <http://bit.ly/1VM04IU> 12.

¹³¹ Hanafi 2013 <http://bit.ly/1VM04IU> 12.

¹³² Hanafi 2013 <http://bit.ly/1VM04IU> 13.

¹³³ Abdullah 2008 *Al-Jāmi'ah* 154-163.

but sadly the application of the revision has not taken full effect. The judiciary has to play a more profound role in its enforcement, as it has the power to make legal reform a reality or alternatively to hamper reform. In addition, efforts must be made at grassroots level to educate women, especially those situated in the rural areas, about their rights as set out in the *mudawana*. The way to achieve the full implementation of the *mudawana* is for all the role-players, such as government, civil society groups, media and educational institutions, to make a collaborative effort. And yet Article 400 clearly stipulates that issues that are not foreseen by the 2004 version of the *mudawana* will be determined in accordance with the principles of the *Maliki* school,¹³⁴ thereby, re-asserting the provisions of the *Maliki* school.

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¹³⁴ Article 400 of the *Code of Personal Status*, 2004. Article 400 states: "[f]or all issues not addressed by a text in the present code, reference may be made to the *Malikite* School of Jurisprudence and to *ijtihad* (independent reasoning to arrive at a legal principle), which strive to fulfil and enhance Islamic values, notable justice, equality, and amicable social relations".

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List of Abbreviations

Berkeley J Gender L & Justice
Berkeley Journal of Gender, Law and Justice
Just

BJMES
British Journal of Middle Eastern Studies

Cardozo J L & Gender
Cardozo Journal of Law and Gender

Cornell Int'l L J
Cornell International Law Journal

Hum Rts Q
Human Rights Quarterly

IJBSS
International Journal of Business and Social
Science

IJLPF	International Journal of Law, Policy and the Family
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
JNAS	Journal of North African Studies
Lang Intercult Comm	Language and Intercultural Communication
Middle East J	Middle East Journal
Nw U J Int'l Hum Rts	Northwestern University Journal of International Human Rights
UCLA J Islamic & Near E L	UCLA Journal of Islamic and Near Eastern Law
Wash & Lee L Rev	Washington and Lee Law Review
Wash & Lee Race & Ethnic Anc L J	Washington and Lee Journal of Civil Rights and Social Justice