



**Collectif 95 Maghreb-Egalité**

**GUIDE TO  
EQUALITY**  
in the Family  
in the Maghreb

• **Women's Learning Partnership  
Translation Series**





*Collectif 95 Maghreb-Egalité*

**GUIDE TO EQUALITY  
IN THE FAMILY  
IN THE MAGHREB**



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## Foreword to the Translation Series

*Guide to Equality in the Family in the Maghreb* is the first in a translation series initiated by Women's Learning Partnership for Rights, Development, and Peace (WLP). The goal of the series is to make available to the developed and developing worlds works of importance to women produced in the Global South, especially those that lucidly define women's issues, identify fields of opportunity, and map out strategies to empower women and to promote women's human rights. The *Dalil*, as the Guide is commonly known in the Maghreb, is such a book, produced by WLP's Moroccan partner Association Démocratique des Femmes du Maroc (ADFM) in collaboration with members of a regional women's coalition – *Collectif 95 Maghreb-Egalité*.

The Guide is an advocacy tool developed by women's organizations from Morocco, Algeria, and Tunisia as an expression of their shared vision for women's rights. It is unique in that it outlines a process that relates change to women's capability to choose. Activists struggling to create egalitarian societies in the Muslim-majority world focus mainly on the family laws that govern every aspect of a woman's life, from minimum age and conditions of marriage, to divorce, child custody, and the right to work, to travel, or to decide upon a place of residence. The Guide provides relevant information and knowledge on family law as it relates to other fields that also affect women's lives, such as health sciences, sociology, national and international law, religion, and culture, contextualizing the relationship in specific articles of proposed legislation. It thus highlights the contradictions between and among these various fields as they interact with women's lives within the family, providing an opportunity for individual women to make deliberate and thoughtful choices that lead to effective communication and advocacy.

The Guide treats equality as simultaneously a frame of reference, an evolving social practice, and an action plan. It is an appeal built on four strains of argument:

- A religious argument based on the actual historical diversity of Islamic legal doctrines;

- A legal argument based on national laws;
- A universal law argument stemming from international human rights law and;
- A sociological argument related to social change evidenced in the Maghreb countries.

The Guide provides a good beginning for the *WLP Translation Series* which is meant as a mechanism for sharing the knowledge and tools that organizations, individual activists, and academics have successfully employed to defend and promote women's rights and to strengthen women's capacity to impact cultural, religious, and political change.

The *WLP Translation Series* will make notable works from the Global South, particularly from the Middle East/North Africa region, available throughout the world.

Mahnaz Afkhami  
President and CEO  
Women's Learning Partnership

## Foreword to the Guide

Over three years ago, *Collectif 95 Maghreb-Egalité* began fulfilling a long-standing dream and a project as ambitious as it was difficult: to develop a guide on equality between men and women in the Maghreb, within both the family and the private sector, and to disseminate it to human rights activists.

After publishing *Cent mesures et dispositions pour une codification égalitaire des relations familiales au Maghreb (One Hundred Measures and Provisions for an Egalitarian Codification of Personal Status Codes and Family Law in the Maghreb)* in 1995, we at *Collectif 95 Maghreb-Egalité* wanted to build on this initial step so we could more easily explain the principles and philosophies governing the drafting of this document to a larger audience.

This desire was based on the conviction shared by the *Collectif 95* members, and by thousands of women and men in the Maghreb, that democratization and modernization of the region's countries are closely linked to the issue of relationships between men and women, within the family and in the private sector.

Well before the Maghreb countries gained independence, the issue of reforming the personal status code was the subject of petty political exploitation, especially in Algeria and Morocco. This was aimed at protecting both the patriarchal order governing our societies and male privileges, even though these countries have seen enormous change, especially in recent decades.

This Guide, entitled *Guide to Equality in the Family in the Maghreb*, is *Collectif 95's* contribution to the debate that began—thanks in particular to the women's movement and the democrats—in order to prove that refusing to restore women's rights and dignity cannot be justified by Islam. Islam cannot be held responsible for the inferior status women currently hold or for the violence women suffer on a daily basis due to unjust and discriminatory laws.

Our societies today are in a paradoxical situation: in the name of defending Islam, Islam is blamed for practices that run contrary to its mission and goals.

We present this *Guide to Equality in the Family in the Maghreb*, which is now ready and available to the public. We hope that its impact and usefulness will reflect the time and effort put into producing it by all the members of *Collectif 95 Maghreb-Egalité*.

– Rabéa Naciri

## Introduction

### General Context

Promoting equality within the family is an effective strategy for accomplishing change that on the one hand guarantees independence for women, and on the other hand works to build equitable relationships between the sexes. However, this process is still a difficult undertaking in our countries for at least two reasons:

- The first is related to the forces of resistance. Although they have weakened somewhat over the last few decades under the pressure of social realities and the dynamic nature of the women's movement, they are still strong, especially where civil rights are involved. A simple overview of what happens in certain Maghreb and Mashriq countries illustrates how powerful resistance forces can be. By making use of religious motives and counting on the complicity of the law, the schools, the media and other social institutions, these forces grow stronger, since gains made by women are perceived as threats to the patriarchal order.
- The second reason is linked to the types of action taken by women's movements working to consolidate basic women's rights. Only recently has "advocacy" been integrated into their actions as a means of intervening in and influencing decisions and policies. Given the political conditions, women's movements were initially positioned as forces of opposition and protest before being transformed into partners in dialogue capable of advancing alternative proposals as well as negotiating the terms of these proposals and publicizing them.

This qualitative change from simply reacting to being an "active influence" is creating new needs among the human rights activists of both sexes working in the field and presupposes equipping them with new tools. These tools should make it possible to:



- undertake communication and advocacy activities at the lowest possible cost
- increase the efficiency of actions taken
- expand the target audience, and
- target the categories of people who are the most resistant to arguments in favor of equality within the family and persuade them, first, that equality is necessary, and second, that it is achievable in our societies.

This is the context behind the *Guide to Equality in the Family in the Maghreb*. As a new educational publication of *Collectif 95 Maghreb-Egalité*, the Guide is a continuation of the commitment made by *Collectif 95* in its 1995 publication *One Hundred Measures and Provisions for an Egalitarian Codification of Personal Status Codes and Family Law in the Maghreb*.

The regional dimension of this Maghrebian group and its desire to help strengthen the actions of national and local associations rather than replace them were also factors that motivated *Collectif 95* to publish *One Hundred Measures and Provisions* in 1995 and now this Guide.

*One Hundred Measures and Provisions* is a legal and political document that solidifies the group's vision concerning women's status in the family and family relationships in general. This book represents a vision based on the principle of equality that prevailed when the group was formed in 1992.

In addition to the widespread distribution of *One Hundred Measures and Provisions* and the impact it may have had, its main contribution was that it enabled women and women's associations in several regions of the Arab and Muslim world to refine their demands with a view to amending or enacting personal status laws that would eliminate all discrimination between men and women.

## Objectives

*Guide to Equality in the Family in the Maghreb* is a teaching tool that aims to promote equality between the sexes on both legal and cultural levels:

- At the legal level, the Guide aims to support and reinforce efforts made by those who are calling for a change in personal status laws in cases where these laws are based on differentiation or even discrimination with respect to women,
- At the cultural level, the Guide makes a significant contribution to the dissemination of a culture based on equality, which widens the circle of advocates for equality and reaches the largest possible audience.

These two objectives are closely intertwined, even to the point of being interrelated, thereby providing Maghrebian women with greater opportunities to fully achieve dignity and equality as quickly as possible.

## Target Audience

*Guide to Equality in the Family in the Maghreb* is intended primarily for all women and men advocating for human and women's rights. In our countries, these leaders, who support and defend a common cause, work under difficult conditions.

In our experience as an association we have seen specific difficulties concerning the approach that should be adopted to convey the message of equality. The Guide is also intended for use by all those who work in development and whose field activities are aimed at promoting their communities, especially women.

The current debate on the "neutrality" of development activities is now over. In reality, women need just as many material resources as they do strategic resources, including basic rights, which those working in development must consider to be a prerequisite for true human development.



Finally, this Guide is intended for all those whose professional, social or institutional positions place them in contact with a public concerned about women's rights: political and labor union activists, educators, communication experts, and others.

## Working Method

This Guide, which is the fruit of both the collective and individual work of *Collectif 95 Maghreb-Egalité* members, was written in several stages. The main stages involved three Maghrebian writing workshops held over a year and a half.

The team of writers had to take several requirements into account, not only to guarantee the functionality of the Guide and ensure the necessary scientific rigor, but also to make the document accessible to its readers.

- The following elements had to be taken into account in order to ensure the Guide's functionality:
  - > the stated objectives,
  - > the user's needs and
  - > the pedagogical considerations facilitating assimilation of the message at the lowest intellectual cost, with respect to the organization of both content and style, and with respect to the final product.
- Scientific rigor required:
  - > that a clear and well-argued methodology be adopted,
  - > that qualitative data be selected in a precise manner, and
  - > that sources and reference texts be cited.

All these elements required special effort given the nature of the documents used. Encouraging the establishment of an interactive rapport with the Guide required that particular care be taken with respect to form and content so that users would have a certain degree of autonomy. The group's efforts to select, gather and organize data need to be further pursued by the Guide's users who are called upon to continue the thought process and to adapt this tool to their needs and conditions, so long as the ultimate goal is the same.

## Organization of the Contents

In addition to the foreword and the introduction, the Guide includes a general arguments section in the form of an appeal for equality within the family in the Maghreb, based on the idea that equality is simultaneously a frame of reference, an evolving social practice and an action plan.

This appeal is built on four types of argument:

- An argument based on the contextualization and historical diversity of Islamic legal doctrines
- A legal argument stemming from egalitarian national laws
- A universal law argument inspired by international human rights law, and
- A sociological argument that takes into account the social changes that have occurred in the three Maghreb countries.

Eleven thematic modules follow the general arguments:

1. standardization of the minimum legal age for marriage
2. consent to marriage
3. freedom to choose a spouse
4. ban on polygamy
5. abolition of the duty to obey
6. shared responsibility to support the family
7. equality in the dissolution of marriages
8. awarding of the house to the person who has guardianship of the children
9. the right of divorced mothers to remarry
10. the sharing of parental responsibilities
11. equality in inheritance rights

Each module is organized according to the following format:

- the proposal made by *One Hundred Measures and Provisions* in the matter;
- a succinct presentation of the relevant laws in the Algerian Family Code, the Moroccan *Moudawana* and the Tunisian Personal Status Code;
- an argument based on four sources: legal, juridical (*fiqhi*), sociological and universal human rights.

**Fiqh:** originally meant comprehension, knowledge and intelligence. It has now become a technical term used to designate legal precedent and the science of Muslim religious law.

The rules of the *fiqh* encompass all aspects of religious, political, economic and private life. *Fiqh* governs ritual practices (*ibadat*) and covers the entire spectrum of family law, inheritance laws, property laws and obligations and contracts (*muamalat*).

A result of reflection, judgment and reasoning (*ra'y*), *fiqh* was transformed, after the “door to *ijtihad* was closed,” into a set of fixed rules outlined in *fiqh* books and the commentaries they inspired.

In the Maghreb countries, the main reference works on religious judicature are secondary works: the commentaries of Ibn al Qacem and Khalil.

Each module contains definitions, explanations and various pieces of additional information that may be necessary depending on the case. The modules are followed by a specific module on communication that enables users to effectively advocate for the cause of equality.

We felt this contribution was indispensable inasmuch as women’s associations, human rights organizations and others are eager to train their leaders and members to be more professional in their activities.

In addition to reinforcing the actions of associations, this module also facilitates autonomous use of the guide for those who have not benefited from training in this respect.

The Guide also contains appendices with a glossary of concepts and key words in Arabic and English, a list of the instruments pertaining to human and women’s rights, and a copy of *One Hundred Measures and Provisions*.

This condensed and popularized documentation has been provided in order to give non-specialist users access to additional information, to spare them from having to conduct further research and to whet their appetite to learn more about the subject.

In addition to this documentation, the Guide is based on knowledge of the social realities in the three countries stemming from surveys, analyses and polls conducted by *Collectif 95* and other specialized associations and institutions.

One of *Collectif 95*’s abiding ambitions is to improve and promote this tool to meet the needs and expectations of both present and future users. For this reason, we invite everyone—both individuals and associations—to share comments, reactions and concrete proposals with us through any means possible, and more specifically, by filling out the evaluation form found at the end of the book and sending it to us.

## In Conclusion

This Guide is the result of lengthy and profound discussions among members of the *Collectif*. It bears witness to the force that unites these members despite the diversity of opinions and approaches. This book is the result of an effort through which *Collectif 95* is working side by side with all those who have chosen to make equality between women and men a reality in terms of ideas, practices and the law.

## General Arguments

This Guide is not a simple legal handbook. Rather, it is an appeal for equality designed to enable women and men to work together to make the Maghreb region a place of equality and dignity.

Our efforts are aimed at transforming the principle of equality into reality so that it becomes a shared value held by all players in the political and social spheres. This Guide, therefore, is addressed to activists, both women and men, and more generally to human rights advocates working in associations, leagues, counseling and advisory centers, collective organizations and other networks who deal with discrimination, human rights violations, violence against women and other practices that are detrimental to human dignity and freedom.

This Guide is primarily intended for activists and human rights advocates, not only to facilitate access to basic data on women's status, but also to develop arguments in which the issue of equality hinges on sociological realities and collective mentalities. This is a necessary approach because women's issues are at the heart of the political, economic, social and cultural issues in the Maghreb.

We at *Collectif 95 Maghreb-Egalité* consider this book to be our contribution to rethinking women's status, which in the three Maghreb countries is characterized by:

- a gap between legal standards and economic and social realities
- dualism in the legal realm between the public sector and the "private" sector
- tension in terms of family laws between modifying these laws or maintaining the patriarchal model, and
- ambivalence in the debate on universal rights and cultural specificities.

From this viewpoint, four series of arguments will be developed in an attempt to remove the alleged religious, legal, cultural and social obstacles to the total and complete achievement of equality in our societies.

These obstacles to equality are fueled by the notion that Islamic laws are sacred, which explains the immutable nature of the rules governing personal status and family relationships. In the three countries of the Maghreb, family law, in spite of its statutory form and its legislative value, appears to be a set of fixed, permanent standards establishing the traditional patriarchal family model. Today, millions of Maghrebian women are still relegated to a second-class status, one with "fewer rights," all in the name of legal tradition and Islamic law. On the pretext of compliance with divine law, polygamy, repudiation of one's spouse, matrimonial guardianship and discrimination in inheritance rights are still a part of family law.

### I – Is family law in the Maghreb a sacred law, doomed to remain unchanged?

In reality, the idea of an immutable and sacred Islamic law is the fruit of a doctrinal development, and a dominant version of history that presents it as a compact and definitive whole. Consequently, the myth of absolute identity between the sources and work on the sources, and between the law and its interpretation been perpetuated.

Historically, Islamic law has been shaped on the Arabian peninsula in a tribal and patriarchal society, structured on the preeminence of agnatic lineage groups (i.e. kinship through male descent) and the preeminence of the father within the group. As with any other historical production, Islamic law was formed through the intertwining of that which was newly established (Islam and its text) and that which was handed down from the past or borrowed and adapted to the needs of the growing community (pre-Islamic customs, the customs of Semitic groups and Talmudic law). The scope of this law has spread to other countries and its content has been enriched by the cultural contribution of peoples who have been conquered and converted to Islam. This complex and progressive construction, based on the



interpretation of sacred sources, as well as on awareness of the special circumstances that brought about this law's birth and development was abruptly halted in the fourth century of the *Hejrah* (10th century A.D.). This was based on the "theological and political" grounds that the door of *ijtihad* had been closed, which meant ending the legislative effort and halting doctrinal interpretation. Since that time, Islamic law has become ossified under the weight of theological dogmatism and legal scholasticism.

Personal status law (family law) stems from this historical production. This type of law establishes the traditional model of the patriarchal, agnatic and polygamous family in which women represent the tribe's honor, a vessel for reproduction for the group and an instrument of the group's social development. Rights and duties are perceived based on a division of roles between the sexes, giving preeminence to the father, husband, brother and sons and placing women under male control. In the end, this original model took a hard line and became ossified under the weight of dogmatism. The traditional values and primary institutions (polygamy, repudiation, matrimonial guardianship, inequalities in inheritance rights, duty to obey) of this model are still applied today in societies where, despite all the changes, women's issues are always set aside as a reserved domain that no one can enter without authorization.

Although it is true that Islamic law, a work of exegete scholars and doctors in law, draws its scriptural sources from the Quran and the *sunnah*—the tradition of the Prophet (see attached Glossary)—its rules are also derived from other sources whose diverse components do not all hold equal rank in the overall system. Revealed through the interpretive work of scholars, the *Shariah* (literally "voice of the Lord") is given as the full set of revealed commandments, plus all of the legal requirements (*ahkam*) contained in the sacred sources, the Quran and the *sunnah* of the Prophet (tradition). Scholars and exegetes have defined the scope of the *Shariah*, identified the occasions of the revelation, defined the sense of obligation and identified the nature of the commandments. *Fiqh*, the second part of legal activity, etymologically means comprehension, knowledge and intelligence. Not until later did this term take on a technical connotation designating jurisprudence or the science of Islamic law.

In this sense, *fiqh* refers to the rules (*ahkam*) extracted (*istinbat*) from the revealed sources, the Quran and the *sunnah*, which contain the law of Allah (the *Shariah*). A work of scholars, doctors in law and Muslim jurisconsults, *fiqh* is the fruit of their *ijtihad*, or their interpretive efforts. Rather paradoxically, this interpretation formed and developed in response to the scarcity of legal requirements in the Quran, which contains fewer than two hundred rules.

*Fiqh* saw two periods: the first was characterized by the importance attributed to opinion (*ra'y*) and turned *fiqh* into a living law that adapted to new situations. The second was characterized by the "closing of the door of *ijtihad*" (the doctrinal effort), which definitively set the contents of *fiqh*, and for Sunnite Islam (orthodox Islam), reduced it to four main schools named for their founding masters: Malekism, referring to Imam Malik, Hanafism, referring to Imam Abu Hanifa, Hanbalism, referring to Imam Hanbal and Shafeism, referring to Imam Shafii.

Starting in the fourth century of the *Hejrah*, the meaning of the Quran was conveyed to the community of believers only in the version authorized by the exegetes and the founding fathers of the legal schools (*madhahib*). Islamic law came to the Maghreb in the Malekite version, which was known for its rigor. In the end, having asserted its predominance over the other concurrent schools of thought by either eliminating or absorbing them, Malekism took deeper root in civil society, under the impetus of several factors. As historian Hisham Djait notes, it surpassed "*its original role as a legal school and was transformed into religious orthodoxy.*" Under these conditions, one can understand the semantic and historical deviations that make Islamic law—a human activity involving the exploration of sources—appear to be sacred and thus immutable.

*Fiqh*, a product of the human intelligence of the great doctors of law and their students that is sustained by various contributions, did not escape the laws of diversity. Through their very existence, their geopolitical bonds, their number and the doctrinal differences that oppose them, the legal schools attest to this rich diversity and the prolific abundance of ideas. Controversy (*ikhtilaf*) fueled the legal debate and gave the various opinions their discursive authority and persuasive force. Under these conditions, how could preemi-

nence and absolute authority be ascribed to the opinion of a single person or school of thought? Through what mechanisms were dissenting opinions suppressed? What caused creative logic to give way to dogmatic reasoning? What is preventing current legislators from interpreting and adapting, just like the founders? Nothing that is at all sacred is preventing them in any case.

This is precisely why *Collectif 95 Maghreb-Egalité* has undertaken this memory work—not to question the authority of the elders—but above all, to unearth the diversity of doctrines so as to put to rest the pretenses and the “prescribed authenticities.”

Moreover, generations of Muslim thinkers, both women and men, have been fighting against the ossification of thought and the supposedly sacred values attached to inequalities. They are calling for a revision of the Islamic productions and working to ensure that religious thought also establishes a living, internal relationship with the modern ethics of democracy, equality and human rights.

## II – What rights do domestic laws grant to women in the three Maghreb countries?

Looking only at domestic law, this question seems reductionist. It does not take into account the fight of millions of Maghrebian women everywhere who, every day in homes and schools, at work and on the street are breaking the chains of reclusion in order to build a Maghreb of equality and dignity.

However, even as worded, the question—which appears to be harmless and shallow—is in its own way indicative of the law’s ability to act on reality. The law holds this ability by virtue of that fact that it is not merely a set of neutral and objective techniques, but a central, social discourse defining the essential rules of the game in a society. This potential makes the law a privileged instrument of change and/or conservation of the social order. How do the countries of the Maghreb use this instrument?

The production of laws in the Maghreb countries is, in fact, impressive and similar in nature, despite the different road that each country has taken and the legal advances that each has made. In many areas, however, the law is at odds with reality and lags behind the “new causes” of a Maghreb in motion: one with a women’s movement and movements for freedom, human rights and democracy. The overall legal system is characterized by a constitutional duality between (1) a conceptual and referential sphere of liberal and democratic construction, devoted to equality among citizens, and (2) a sphere of religious and traditional construction that reproduces male privilege especially in terms of family relationships. On another level, the legal order is marked by a dichotomy between its external structure, based on unity from formal sources (constitution, laws and regulations), and the content of its provisions from various material sources. The dichotomy gives the overall system a composite nature. The legal order is filled with and/or inhabited by competing values and the competing logical systems of substantive law, Islamic law and customary law.

For *Collectif 95*, it is extremely important to reveal these contradictions, not only to draw attention to the problems in system, but also to highlight the elements in legal systems that are directed primarily at justice and equality.

Legal systems in the Maghreb foster dualism between women’s public status, which is based on equality of all citizens, and their private status, which is based on discrimination and legal “minorization.” At the constitutional level, the principle throughout the Maghreb is that “all citizens have the same rights and duties. They are equal before the law.” The laws establish the principle of equal voting and eligibility rights. In various places, the laws uphold the principle of equal access to government employment without discrimination on the basis of race, color or sex and the laws sometimes uphold the principle of non-discrimination between men and women in exercising the right to work. The right to unionize and public freedom of association and expression are also recognized for everyone. The right to an education is guaranteed and is also offered to all citizens—women and men alike.

However, it is true that there are several problems with this public, legal status of equality: the persistence of male privilege, especially for certain high-ranking political representatives; discrimination against women at the beginning of or during their career; the precariousness of employment for women in the private sector, which has been particularly affected by structural adjustment policies and the privatization of state-owned companies; the lack of a social security safety net for women; unemployment; salary inequalities and illiteracy, which for the most part affects women and rural areas. Despite these pockets of inequality, one has to admit that the public arena in the Maghreb is increasingly open to women. Everywhere the rise of female employment is breaking down the traditional pattern of confining women to the home.

In Tunisia, on the contrary, the legal status of women within the family is still partly or wholly structured around the principles of an all-powerful father figure and women as inferior. The personal status and family codes are an extension of the patriarchal family order, albeit with some variations. The same is true of the Moroccan *Moudawana*, promulgated in 1957 and amended in 1993, despite the calls for equality reiterated in the “Plan of Action for the Integration of Women into Development” (PANAFID). This is also the case with the Algerian family code, promulgated in 1984 after much hesitation and several drafts, which does not correspond to field surveys of Algerian women. As for the Tunisian personal status code (*Majellah*) promulgated in 1956: despite the general spirit of reform and modernity that characterizes it, this law is marred in some areas by conservative provisions based on the traditional model (inheritance, parental responsibilities, freedom to choose a spouse, etc.).

What obligates governments to maintain the practices of polygamy, repudiation, inequality in inheritance rights, matrimonial guardianship and so many other institutions that discriminate against women? Nothing that is mandated by the constitutions.

In the positive law of the Maghreb nations, the constitution—the supreme law of the land—is ranked first. It sits at the top of the hierarchy and controls the validity of the entire normative mechanism. As the basic standard, the constitution makes the principle of equality of all citizens before the law a founding value at the core of all legislation. Laws, codes and other *Majellah* relating to the family cannot escape the logic or contradict the spirit of the constitution without being sanctioned as being unconstitutional. Therefore, harmonizing family law with the constitutional principle of equality is a requirement that neither politicians nor citizens can escape. When constitutional law is violated, the whole legal system collapses.

What is the meaning of constitutional provisions proclaiming “Islam, the State religion” under these conditions? Are these provisions adhering to the obligation to conform and do they invalidate all other provisions that are not consistent with such conformity? Not in our opinion, although it is true that no religion can be reduced to its institutional aspect or to its historic, doctrinal productions alone. As a living religion, responding to modern humans’ worrisome questions and to their quest for justice and equality, Islam also cannot ignore the human values upon which it has built its universal message.

### III – Why is it always “with reservations” for Maghrebian women?

The countries of the Maghreb have not been indifferent to the debate on human rights, which has become a decisive issue at the international level and which, on the domestic side, is being voiced by women’s associations, leagues for the defense of human rights and basic freedoms, labor unions, political parties, and others. Elevated to the level of “least common denominator,” to which the entire international community is bound, human rights as proclaimed in international conventions and other instruments are an essential reference point. In fact, an international consensus that no government is challenging on the whole has been progressively evolving from this value system for a half of a century now. However, a purely international existence is not sufficient for these universal rights. The effectiveness of



these rights depends entirely on how well they are received and integrated into domestic legislation within nations. Although the movement towards the interdependence of international order and domestic order has begun, this interdependence has not yet been fully achieved. There is much resistance, some of which is political and stems from the reluctance of some governments to grant individuals rights that could be used against the State. Some of the resistance, undoubtedly the most formidable since it involves the founding references of a society, is voiced in the name of identity-related values and cultural specificities. In its own way, the heightened debate on universality and human rights, on both the international and domestic levels, bears witness to this conflict of “values” in a multi-cultural world.

While the nations of the Maghreb have agreed to, signed and ratified treaties, charters and conventions on general international law, such as covenants, these countries still reject, or express reservations about, some of the provisions in these instruments pertaining to women and seek to prevent application of these provisions or to modify their effects. Why is it always “with reservations” when it comes to Maghrebian women?

It is again in the name of “Islam, the State religion” that Maghreb countries block acceptance of the rights recognized in universal human rights instruments. However, due to its ambivalence, the concept of Islam as the State religion does not allow for treaties submitted for State ratification to be ruled unconstitutional. The debate, should this need repeating, is not a legal one and is not an issue in terms of conflicts in the law. The reference to “Islam, the State religion” has a different legal resonance. This ideological concept *par excellence* is often put forward as an objection to all women’s rights. The problem is not one of conflict between legal norms, but a power game whose legitimacy rests on the status of women in the society and whose alibi is Islam.

Thus, while Morocco fully adheres to the main conventions of the International Labor Organization (ILO) concerning night work for women, equal treatment, equal compensation and non-discrimination with regards to employment and profession, it adheres with reservations to the convention on the political rights of women as well as the Convention on the Elimination of

All Forms of Discrimination Against Women (CEDAW). Moreover, Morocco has not yet adopted the United Nations conventions on the nationality of a married woman, consent to marriage, age of marriage and registration of marriages.

Likewise, although Algeria ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights in 1989, it ratified the main instrument on women’s rights and non-discrimination against women with reservations. Finally, after having ratified without reservations all the conventions on women’s rights, Tunisia rediscovered the potential for these conventions to block Article 1 of its constitution in 1985 and ratified CEDAW with reservations on the basis of “Islam, the State religion.”

Yet, CEDAW is a vital instrument. Establishing equality in terms of rights and dignity for men and women, and working toward the elimination of all forms of discrimination against women, this convention is comprehensive in nature and applies to all aspects of life—economic, political, social and cultural—which constitutes a major first at the international level. Its operational nature makes this convention a powerful instrument that imposes a set of duties on States, including the duty to take all appropriate administrative and legislative measures to abolish inequalities. The convention also establishes international oversight mechanisms—obligations that States agree to fulfill when they subscribe to the Convention.

Women in the Maghreb are pushing for the universal values recognized in the international human rights instruments precisely because they continue to have an inferior legal status. To artificially invoke “Islam, the State religion” and to comfortably stick to this excuse is to refuse these women the dignity they deserve. In fact, nothing justifies opting for only one side of modernity—that of technology and material powers—or opting for only some human rights, i.e., the economic ones. Human rights are indivisible by virtue of their universality. Furthermore, if these rights are universal, it is because humans are the same everywhere and therefore have the same rights everywhere, without regard to race, color, sex or religion. Maghrebian women are not on the fringes of humanity.

## IV – Striving for egalitarian practices – what is the response?

The reforms undertaken by the Maghreb governments raise major questions: What are the obstacles? What will hinder the process? What progress has been made for women by legislation currently in effect? What do women and men know about these reforms? Who uses the provisions defined by the family codes? Who challenges them or circumvents them?

There is no longer any need to demonstrate that the countries of the Maghreb cannot evolve without women playing a greater role, both in the family and in public life. This evolution has clearly revealed the gap between the actual role of women and their legal status as prescribed by legislation and by moral and religious institutions, which continue to codify and closely supervise individual behavior.

Various studies have shown that profound changes in practices have often occurred before mentalities have changed. Families have evolved considerably in terms of structure and function. Throughout the Maghreb, the extended family is disappearing and giving way to the nuclear and conjugal family, which is smaller in size but has more numerous and complex tasks. The sharing of tasks and the increased participation of women is transforming the roles of men and women, which up until now have been highly differentiated and prescribed on the basis of sex. We are seeing more working women, a lower birth rate, women marrying at a later age and an increase in the number of single women and female heads of households.

These transformations indicate that **we are in a transition stage**, in which the former landmarks are fading away and new reference points are slowly taking their place. This transition, which is destabilizing for some, is seen by others as an opportunity for greater awareness. Thus, couples are still formed on the basis of marriage, but marriages are no longer established on the basis of kinship. Marriage now brings together a bride and groom who know each other and in many cases, have chosen each other. The objective of marriage is still first and foremost to establish a family and have children. However, the birth rate has dropped and couples are using contraception to control their fertility.

Instead of focusing exclusively on the number of descendants, parents are now focusing on the child as an individual and on the child's development and success in school.

Consequently, there has been a dual transformation in the Maghreb countries: a change in the status of couples, who are slowly liberating themselves within their relationships, and a transformation in terms of the status of children, who are being given more and more individual rights. In moving from the extended family to the conjugal family, women are gaining more autonomy and individuals are asserting themselves vis-à-vis the group.

### **Nevertheless, the gap between women's status in their private lives and their status in public life is becoming more pronounced.**

Alongside the traditional couple structure in which the man is the provider and the woman stays at home, there are more and more cases of married couples where both the man and woman work and share expenses, even though household chores are still the responsibility of women. By working, women—wives, daughters and mothers—are helping to increase the family's income and in some cases, ensure the survival of the family.

However, society does not recognize this new role of women, whether assumed by choice or by default (unemployment, physical incapacity or advanced age of the spouse, abandonment by spouse, etc.). In private life, this role does not grant women decision-making power or the corresponding rights. Property acquired jointly in the household is still often registered under the husband's name, which makes the woman economically dependant, not to mention the fact that in the event of a divorce, the woman may find herself utterly destitute. In terms of inheritance, the rules governing estate sharing give a double share to boys even if girls are contributing to the family patrimony through paid or unpaid work (as family aids, or working on the farm or at the family business). However, more and more, we are seeing an equal sharing of the marital patrimony, joint sharing of family responsibilities, parental dialogue with respect to minor children, purchase of homes in both names and the equal sharing of the family patrimony between boys and girls while the parents are still living.

**Families have changed, but the laws have not kept pace.** Legislation continues to dictate the ties and relationships among family members even though practices are indicating that people are seeking consensual or negotiated relationships, which the law should consolidate. Some issues that relate strictly to private life, such as guardianship of children, contraception, freedom of movement, and violence are still public matters. More and more, people are integrating the standards and values of equality into their private lives: nothing prevents this from being inscribed in the law as well.

## LANDMARKS

### *The Development of Family Law in the Maghreb*



## Algeria

- 1959:** Sid-Kara ordinance (named for its author) excluding the traditional marriage procedure and introducing judicial divorce.
- 1962:** Renewal of the prior legislation in effect as of December 31, 1962.
- 1975:** Repeal of legislation in effect prior to July 1, 1975. Thenceforth, family status was governed by Article 1 of the Civil Code (1975): "In the absence of a legal provision, judges shall rule based on the principles of Islamic law."
- 1984:** Promulgation of the Family Code on June 9. The code ratifies polygamy, the institution of matrimonial guardianship, obedience, marital repudiation and the preeminence of the husband as the head of the household.
- 1992:** Legislation allowing abandoned children taken in under legal guardianship (*kafalah*) to take the name of their guardian.
- 1997:** On the recommendation of the women's movement, the government submitted a bill to reform the Family Code to the Parliament. This bill is still awaiting consideration.
- 2002:** Creation of the Ministère Délégué à la condition féminine et à la famille [Under-secretariat for the Status of Women and the Family]. Proposed revision of the Algerian Family Code announced.

## Morocco

- 1957/58:** Promulgation of the *Moudawana* [Family Code], which perpetuates the traditional model and is essentially a codification of the Maliki *fiqh* even though recommendations made to the commission encouraged it to adopt modern legislation that was adapted to the new social realities. In areas where the law is silent, the *Moudawana* expressly refers the matter to dominant opinion or permanent case law established by the courts
- 1992:** Reform of Article 137, which sets the legal age at 20 years for men and women.
- 1993:** Partial reform of the *Moudawana* after several aborted bills. Even though the reform does not make any major changes to the former system and introduces only a few adjustments in terms of family relationships, it does mark a sort of deconsecration of the *Moudawana* by eliminating matrimonial guardianship for fatherless girls, placing the father in second position for custody if the marriage is dissolved, attributing legal custody to the mother in the event the father dies or becomes incapacitated and abolishing the need for a woman to have her husband's permission to work.
- 1999:** The government submitted a draft plan of action for the integration of women into development that contains a revision of the *Moudawana* in which family relationships are adjusted in order to give women greater equality in terms of guardianship, polygamy, age of marriage, divorce, sharing of property, etc. This draft plan was never adopted.
- 2001:** Creation of a royal advisory board to reform the *Moudawana*. The board has yet to submit any proposals.

## Tunisia

- 1956:** Promulgation of the Personal Status Code. Liberal in spirit, this code significantly transforms traditional law. The code abolishes polygamy, marriages based on *urf* (custom), marital repudiation, the institution of matrimonial guardianship, and the right of *jebr* (matrimonial constraint), and establishes the practice of free and full consent of intending spouses, civil marriage and judicial divorce.
- 1958:** Recognition of full adoption (with descent).
- 1959:** Establishment of the right of succession for grandchildren, including granddaughters of the paternal line, giving them the right to supplant certain traditional male successors (uncles) in the estate of their father or grandfather. Widows granted the right to inherit from their spouses. Increase in the share of an estate for childless widows in the absence of other heirs.
- 1964:** Establishment of, and authorization for [a system of prenuptial] payment, introduction of prenuptial agreements for intending spouses.
- 1966:** Modification of the order of persons awarded custody of children under Islamic law and introduction of the notion of the child's interest when judges award custody.
- 1981:** Mother awarded legal custody of her children if the father dies.
- 1993:** Abolition of the duty to obey, divorced mother given full custody of her children in terms of schooling, travel and finances. Creation of a guarantee fund for child support and alimony.
- 1998:** Optional system of communal property between spouses. Introduction of lawsuits to determine paternity for abandoned children or children of unknown descent.

# LEGAL AGE OF MARRIAGE

*One Hundred Measures*

*“The minimum age for marriage shall be set at the full age of 18 years for both women and men, which is the age of legal majority.”*

**Article 6**



## The Laws in the Maghreb

### ALGERIAN FAMILY CODE

*"The ability to marry shall be acquired at the full age of 21 years for men and 18 years for women..."*

Article 7

### THE MOROCCAN MOUDAWANA

*"The ability to marry shall be acquired:*

- 1. at the full age of eighteen years for men...*
- 2. at the full age of fifteen years for women."*

Article 8

### TUNISIAN PERSONAL STATUS CODE

*"...Marriage may not be entered into before the full age of twenty years for men and seventeen years for women..."*

Article 5

## The Various Majority Ages

Country	Legal Age of Marriage		Legal Age	Voting Age	Criminal Majority Age
Algeria	21	18	19*	18	16
Morocco	18	15	20**	18	16
Tunisia	20	17	20	20	18

■ age for males

□ age for females

\* except for marriage

\*\* except for marriage, with the exception of fatherless girls

**Legal age of marriage:** Age at which the right to marry without authorization from a judge is granted.

**Legal age:** Age at which a person may commit legal acts alone: running a business, making purchases, entering into contracts, filing lawsuits, etc.

**Voting age:** Age at which a person has the right to vote and to be elected to office.

**Criminal majority age:** Age at which a person may be tried [as an adult] in common law courts for felonies and misdemeanors. Persons under this age are tried in specialized juvenile courts.

It is generally recognized that there should be some similarity between the legal age of marriage, the legal age, the ability to vote and to go to court to defend one's rights, and the age at which one is held responsible for any felonies or misdemeanors committed.

## Differences in Rites for Determining the Age of Puberty

### Hanafites

Males must be 18 years old. Females must be 17 years old.

### Shafiites

15 full years for both males and females.

### Hanbalites

15 full years for both males and females.

### Malikites

18 full years for both males and females. (According to some Malikites, having entered the eighteenth year is sufficient.)

## Doctrinal Arguments

Neither the Quran nor the *ahadith* (the tradition-reports of the Prophet) contain any categorical or formal laws establishing the legal age of marriage for young girls. Religious rites address only the issue of determining puberty in the absence of biological signs. Consequently, the matter has been the subject of an interpretation (*ijtihad*) by the *fuqaha* (jurisconsults in law) and is still subject to customs. One can therefore deduce that this is one of the regulatory areas where the degree of evolution within a society is an essential factor in setting the legal age of marriage in accordance with public interest.

The Maliki rite sets the age of puberty at 18 years for both males and females. This is the same age that is used in the Maghreb countries.

The Quran says, “Put orphans to the test until they reach a marriageable age. If you find them capable of sound judgment, hand over to them their property...” (surah Al-Nisa’ “Women,” verse 6).<sup>1</sup> This verse clearly shows that puberty alone does not qualify a person to perform acts of management

or to enter into contracts, including a marriage contract. Legal age, the age at which a person is capable of good judgment, is a prerequisite to being able to manage one’s property. In this respect, men and women are equal. Although according to tradition, reaching puberty appears to be a prerequisite for attaining legal age, this criterion alone is not sufficient. The ability to show sound judgment and reason are also required.

## Sociological Arguments

- Early marriage, at an age when an adolescent has not reached physical and psychological maturity, has a negative health impact, primarily due to the risks of early pregnancy and greater vulnerability to sexually transmitted diseases (STDs, including HIV/AIDS) due to lack of information.
- By way of example, the national survey on maternal and child health conducted in Morocco in 1997 revealed that one out of every two mothers between the ages of 15 and 19 had a pregnancy with complications (premature birth, difficult labor, stillborn child, etc.). The death rate for infants and children of mothers under 20 is particularly high (52.7 per thousand, according to the same source).
- Legalizing marriage for persons under 18 (15 in Morocco) seems to be a form of violence against girls insofar as it is difficult to assume the consequences of a marital commitment at this age. Moreover, statistics show that early marriages frequently end in divorce. In Morocco, one out of every two women married before the age of 15 is divorced, while the rate is only 15% for those in the 15 to 19 age group.
- The change in the family structure in the Maghreb and the disappearance of the extended family, which often provided young couples with support and a home, should lead us to rethink the issue of having a young marriage age. As statistics indicate, the trend in the three countries is toward marrying later. The average age of women marrying for the first time is 27 in Algeria (ONS 1999)<sup>2</sup> and Morocco (CERED 1997)<sup>3</sup> and 29 in Tunisia (INS 1994).<sup>4</sup> Given economic requirements, the need for couples to have sufficient resources before they can settle down is growing. Reducing the

age difference between spouses, a result of marrying later, will certainly have a positive impact on families.

- Keeping the legal marriage age under 18 limits girls' chances to pursue higher education and encourages them to drop out of school at a young age. Above all, a young marriage age jeopardizes women's opportunities to achieve social and professional success and consequently, considerably reduces their contribution to the development of their countries. In Algeria, Morocco and Tunisia, the proportion of illiterate women is higher among women married before age 19 than in other age brackets. The enrollment numbers for girls in secondary education confirms this handicap that is linked to marrying at an age when the adolescent should still be sitting at a desk in school. On the national level, the rate of girls' enrollment is 32% in Morocco, 64% in Algeria and 72.4% in Tunisia, whereas the combined rate for both sexes is 74% in Morocco, 88% in Algeria and 95% in Tunisia.
- The evolution of the three Maghrebian societies shows that in practice, people are marrying later due to economic constraints and to improvements in the status of women through education and paid work. An increasing number of parents in the three countries are encouraging their daughters to marry after adolescence and would like to see the minimum marriage age increased to at least 18.<sup>5</sup>

Thus, setting the minimum legal age of marriage for women at 18 full years takes this social evolution into account.

### Some Data on Early Marriages

Country	Average Age of First Marriage	Proportion of Women Married at a Young Age
<b>Algeria</b> (1)	27.6 years (1997)	1% of 15 – 19 year olds (1999)
<b>Morocco</b> (2)	26.6 years (1997)	8% of 15 – 19 year olds (1999)
<b>Tunisia</b> (3)	29 years (1994)	10% of 17 – 20 year olds (1994)

(1) National Office of Statistics (ONS), Algeria (1999).

(2) Office of Statistics, Morocco (1999).

(3) National Institute of Statistics (INS), Tunisia (1994).



## Universal Human Rights Arguments

After having long ignored the problem of early marriages, the international community recognized the need to set a minimum “marriageable age” in 1962.

Today, the international community is stressing the need to raise this minimum age. This progress bears witness to the growing awareness of children’s interests and the duty that States have to protect children and to guarantee them, among other things, the legal conditions required for their personalities to develop and for them to attain human dignity.

### Definition of “child”

*“A child means every human being below the age of eighteen years...”*

Article 1 of the International Convention on the Rights of the Child – 1989.

### Minimum Marriage Age

*“States agree to enact and strictly enforce laws to ensure that marriage is only entered into with the free and full consent of the intending spouses. In addition, enact and strictly enforce laws concerning the minimum legal age of consent and the minimum age for marriage and raise the minimum age for marriage where necessary.”*

Beijing Statement and Platform for Action, September 4-15, 1995 – Fourth International Conference on Women.

## International Convention on the Rights of the Child – 1989

### Origins

- Creation by the League of Nations of a Committee for the Protection of Childhood (1919)
- Geneva Statement on the Rights of the Child, adopted by the League of Nations General Assembly in 1924
- Universal Declaration of Human Rights (Art. 25, para. 2), December 10, 1948
- Declaration of the Rights of the Child. Resolution 1386 (XIV) UN/GA, November 20, 1959
- Convention on the Rights of the Child, November 20, 1989, (entry into force: September 2, 1990)

### Content of the Convention

The convention grants human rights to children and makes children a subject of law.

### Founding Principles of the Convention

- Best interests of the child
- Non-discrimination based on color, religion, race, sex, etc.

### Types of Rights

- Right to survive
- Right to protection
- Right to participate
- Right to develop

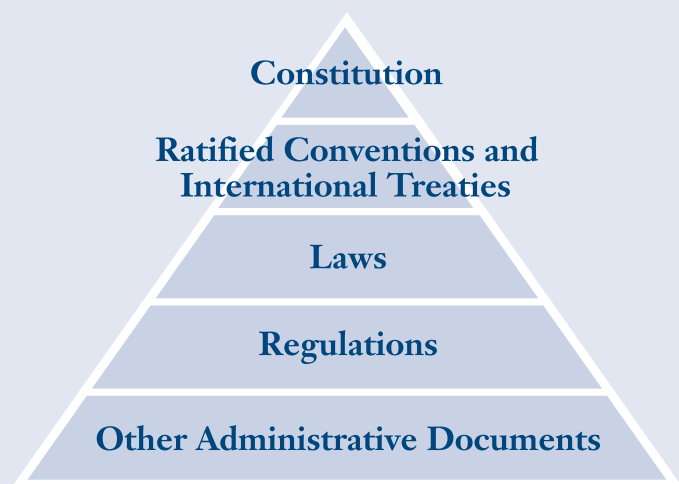
### Status of Ratification by the Maghreb Countries

- Algeria: 1992 with reservations
- Morocco: 1993 with reservations
- Tunisia: 1991 with reservations

## International Conventions in Domestic Legal Systems

In the three countries of the Maghreb, the international conventions that have been duly ratified (adopted) by representatives of the people or the nation have primacy over domestic laws. This provision is stipulated either in the constitutional laws of the States, to which all other legal texts (organic laws, ordinary laws, decrees, regulations, orders, circulars, etc.) must conform, or in the Vienna Convention on the Law of Treaties to which all three States of the Maghreb adhere. This hierarchy principle, which assigns greater value to treaties than to laws, specifically involves:

1. *Taking new measures to apply the conventions*
2. *Adapting previous legislation to the new commitments made by the State*
3. *Raising arguments drawn from the conventions to which the State has adhered before a civil or criminal judge, if necessary.*



## Domestic Law Arguments

The issue of increasing the marriage age to 18 years has been raised continually in Morocco since the promulgation of the *Moudawana* in 1957. In 1999, the “Plan of Action to Integrate Women into Development” (PANAFID) called for the marriage age to be set at 18.

In Tunisia, the Child Protection Code, adopted on November 9, 1995 in application of the Convention on the Rights of the Child, recognizes that a child is any person under the age of 18 and acknowledges the principle of the child’s best interest. The marriage age in the Personal Status Code, however, still needs to be reconciled with these new provisions.

In Algeria, the Family Code has already set the marriage age at 21 for males and 18 for females.

# CONSENT TO MARRIAGE

*One Hundred Measures*

*“Marriage shall be formed solely by the consent of the two intending spouses. The two intending spouses themselves shall be the ones to agree to the marriage.”*

**Article 7**



## The Laws in the Maghreb

### ALGERIAN FAMILY CODE

*"Marriage shall be entered into when there is consent by the intending spouses, the presence of the matrimonial guardian and two witnesses, and the payment of a dowry."*

Article 9

*"For a woman, the marriage shall be agreed to by her matrimonial guardian, who is either her father or one of her close relatives. The judge shall act as the matrimonial guardian for persons who do not have one."*

Article 11

### THE MOROCCAN MOUDAWANA

*"1. Marriage may be entered into only with the consent and agreement of the bride, and through the signing by the bride of a marriage certificate in the presence of two just witnesses. In no case shall the wali (guardian) have the power to force the bride to marry, subject to the provisions of Articles 12 and 13 above."*

*2. The validity of the marriage license shall be subject to the simultaneous presence of two just witnesses to attest to the exchange of consent between the future husband or his representative and the wali (guardian)."*

Article 5

*"... A fatherless woman of full age has the right to contract marriage herself or to appoint a wali of her choice."*

Article 12, paragraph 4

### TUNISIAN PERSONAL STATUS CODE

*"Marriage may be formed only by the consent of the intending spouses."*

Article 3

## Doctrinal Arguments

The Quran has no explicit provision, and the *sunnah* does not contain any established *ahadith*, that define the matrimonial guardianship system in clear terms. This opens the door to multiple interpretations.

In Islamic law (*fiqh*), numerous and complex controversies have arisen over the system of matrimonial guardianship. Some consider this system to be one of the conditions required in all cases for a marriage to be valid (such as the well known opinion of Imam Malik). They think that a woman is not allowed to arrange her own marriage contract without the help of a guardian. If she does, the contract is considered null and void. However, we note that Ibn Al Qacem, an undisputed legal expert in Islamic law, reports that Imam Malik contemplated division of the inheritance between spouses without the help of a guardian.<sup>6</sup> This means that Imam Malik thinks that the presence of a guardian is required only for the arrangement of a marriage contract. According to him, the presence of a matrimonial guardian is required in order for the marriage contract to be complete, otherwise it would be deficient and consequently there would be no succession between spouses.

Some *fuqaha*, in particular Abu Hanifa, think that a woman of full age, having reached puberty, is the only person entitled to arrange her own marriage contract, whether she is a virgin, divorcee or widow, since she is no longer under guardianship by virtue of having reached legal age. She is nevertheless advised to let her guardian arrange the contract for her, but if she does enter into the contract herself, it will still be valid.

Ibn Roshd states, *"The reason the ulema have different points of view on the subject of matrimonial guardianship is the absence of verses in the Quran or the sunnah that impose matrimonial guardianship on women as a condition for marriage."*

*"The verses of the Quran and the sunnah that the ulema use to justify this condition are all suppositions. The same is true for the verses and sunnah that are advanced in favor of abolishing it. Although the terms of the ahadith are plausible, opinions concerning their authenticity are divided" (Bidayat Al Moujtahid).*

Among the best-known *ahadith* invoked in support of making matrimonial guardianship a prerequisite for a valid marriage are the following:

- The first, reported by Aishah, wife of the Prophet Mohammed, states: *"The marriage of any woman who marries without the permission of her guardian shall be null and void. If the marriage is consummated, she shall be entitled to the dowry for her suffering. In the event of a conflict, the Emir shall serve as the guardian for women who do not have one"* (Hadith reported by Ibn Juraih, according to Al-Zuhri).
- The second states: *"No marriage without a guardian."*

Some of the ulema contest the authenticity of the first *hadith*. Ibn Roshd comments: *"There is not unanimous support for the hadith attributed to Aishah. Consequently, its application is not a requirement"* (Al-Bidayah, volume 2, p. 10).

The second *hadith*, *"No marriage without a guardian,"* is missing the first link in the chain of transmitters, namely the companion of the Prophet who reported it. Even if we were to concede that this *hadith* could be attributed to the Prophet, marriage itself cannot be challenged, since it clearly does exist. The only assumptions that can be made then, concern the *hadith's* validity or its conclusion, and neither of these two elements can prevail unless they are except based on external proof. In other words, one can no longer make use of this *hadith*.

In short, the assertion can be made that there is no established and explicit text that imposes matrimonial guardianship on women and that makes it a condition for the validity of the marriage contract, just as there is no established and explicit text that authorizes women to arrange their own marriage contracts. And as Ibn Roshd said, *"It is that which is forbidden that must be proved, not that which is allowed."*

Islam recognizes a woman's right to choose her husband or to offer herself in marriage. However, many people today contest this right in the name of Islam and/or one of its doctrines, which nevertheless are quite divergent. In order to avoid any form of hatred in marriage and to prevent the dissolution of marriages, Islam granted pubescent women of full age the freedom to choose their husband and the full right to agree or refuse to marry without any constraints whatsoever. Similarly, women are allowed to arrange their own marriage contracts. A Muslim woman of sound mind who is of full age is completely independent and free to manage her own personal affairs.

## Doctrinal Disagreement on Guardianship

Muslim doctrine does not agree on the issue of matrimonial guardianship. In fact, there are five schools of thought:

- Malik, according to the version of Ashhab and Shafii: No marriage without a guardian.
- Imams Abu Hanifah, Zuhri, Sha'bi and Zuhri: Women may arrange their own marriage contracts without the help of a guardian.
- Daoud: A matrimonial guardian is required for young *"virgin"* girls, but not for divorced or widowed women.
- Ibn Qacem, quoting Malik: Guardianship is a *sunnah* and not an obligation in all scenarios.
- Ibn Roshd: *"No verse and no clear sunnah imposes guardianship, other than the absence of any laws."* (Al-Bidayah, volume 2, pg. 9).

Malikites, Shafiites and Hanbalites feel that a woman cannot personally consent to marriage. She must request help from a matrimonial proxy (or guardian), a *wali*, who is a pubescent Muslim male with good judgment, to represent her in arranging the marriage. In summary, according to these rites, a woman cannot personally contract her own marriage. Hanafites, however, feel that a pubescent young girl does have the right to arrange her own marriage contract.

Another version according to Aishah: "A young girl came to see the Prophet, may Allah bless him, and said to him: 'My father married me off to his nephew in order to improve his financial situation.' The Prophet allowed her to decide. The girl said, 'I assent to my father's decision, but I wanted women to know that this power does not in any way belong to fathers'" (Musnad El Imam Ahmad, volume 6, p. 136).

## Sociological Arguments

- Matrimonial guardianship (*wilayah*) gives women a lifetime position as a minor. This practice weakens and damages the status of women in our societies. The inferior status thus conferred upon women in the private sphere prevents them from fully assuming or sharing the responsibilities of a couple.
- In addition, matrimonial guardianship over a woman devalues her ability to play a role in public and political life. In our societies, where women are marrying at a later age (on average between 27 and 29), when they are more educated, have greater economic autonomy in some cases and are able to enter into civil contracts (e.g., signing employment contracts, sales contracts, etc.), and where they have more access to decision-making positions in professional and political life, they still cannot arrange their own marriage contracts in Morocco and Algeria. In order to get married, they are required to go through the intermediary of a man to whom they give the power to represent them.
- In practice, the guardian turns into a constraint imposed upon the woman in terms of her choice of a future spouse. This constraint may be the cause of marital disagreement and put the couple at risk of separation. The *"Etat matrimonial et stratégies familiales"* ("State of Marriage and Family Strategies") survey shows that 71.3% of divorced Moroccan women stated that they had a forced marriage.<sup>7</sup> Far from being a guarantee that couples will stay together, matrimonial guardianship over women of legal age seems to be a factor that disrupts family relationships because it introduces an unequal and restrictive relationship between couples.

- In a country like Tunisia, the elimination of matrimonial guardianship did not necessarily lead to more conflicts with parents over marriage. The *"Divorce, violence et droits des femmes"* ("Divorce, Violence and Women's Rights") survey (2001) showed that more than half of women married with the approval of their parents.<sup>8</sup>
- Contrary to what the proponents of this institution assert, the Tunisian statistics also show that abolition of guardianship did not lead to an increase in the divorce rate (the average rate has been 14% for several years).
- This practice does not protect women from the vagaries of life. On the contrary, they are forced to suffer the sometimes negative consequences of a commitment that they did not make of their own accord.

In the three Maghreb countries, increasing numbers of parents are acknowledging the need for their daughters to consent to marriage and are supporting their daughters' choices. Instances of parents opposing the marriage are rare, especially in cases of women entering into marriage with the advantages of a diploma and a good salary.

A study entitled *"Femmes diplômées du Maghreb, pratiques novatrices"* ("Women with Degrees in the Maghreb: Innovative Practices"), published in 1994, was conducted in Algeria, Morocco and Tunisia based on a sample of 1,300 women with university degrees. It revealed that 71% of parents overwhelmingly approved of their daughter's choice of spouse, a few were reticent and barely 6% were opposed.<sup>9</sup>

- Matrimonial guardianship no longer has a place in societies that claim to be modern, especially since many people no longer attach any legitimacy to this practice. In fact, according to a survey conducted by *Collectif 95 Maghreb-Egalité* in Algeria in 2001, four out of ten people feel that women should have the right to get married without a guardian.<sup>10</sup> In Morocco, 53% of people surveyed in a similar poll conducted by the *Association Démocratique des Femmes du Maroc* [Democratic Association of Women in Morocco - ADFM] in 2000 said that matrimonial guardianship should be limited if the legal age of marriage is raised to 18 or older.<sup>11</sup> For women

who marry when they are 30 or older, nearly three quarters of the respondents felt that guardianship was no longer necessary.

## Universal Human Rights Arguments

Recognized by the international community as a basic human right, free and full consent to marriage is consistently and forcefully affirmed in international human rights instruments. By including this right in Article 16(2), the Universal Declaration of Human Rights (1948) establishes it as a common standard of achievement for all people and all nations. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) reaffirms this principle and sets forth the rule that *“No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person...”* (Article 1). Moving from the ethical principle to the legal rule, free and full consent to marriage was once again proclaimed in 1966 in the International Covenant on Civil and Political Rights, which states, *“No marriage shall be entered into without the free and full consent of the intending spouses.”* (Article 23(3)).

It should be noted, however, that despite these various instruments, women are still the subject of major discrimination. The international community is adopting the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) and giving States Parties the responsibility for *“[taking] all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same right freely to choose a spouse and to enter into marriage only with their free and full consent”* (Article 16(b)).

In this regard, the active principle of international law is to place the burden on States Parties to *“...accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity”* (Article 15(2)).

States are bound by these rules of conventional international law by virtue of the fact that they have made international commitments and the fact that these rules are incorporated into domestic legislation in the ratification process.

### Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages

**Adoption:** United Nations General Assembly, December 10, 1962

**Entry into Force:** December 9, 1964

#### Accession:

- **Algeria** has not signed this convention
- **Morocco** has not signed this convention
- **Tunisia** ratified in 1967 without reservation

### “No Marriage Shall be Entered into Without the Free and Full Consent of the Intending Spouses”

#### International Covenant on Civil and Political Rights, Article 23(3):

- Ratified without reservation by Tunisia (1968) and Morocco (1979)
- Ratified with an interpretive declaration by Algeria (1989)



## Domestic Law Arguments

The principle of free consent to marriage as required by law makes sense only if the institution of matrimonial guardianship is eliminated. Maintaining this constraint contradicts all other principles of equality and citizenship pertaining to legal personality and status—constitutional principles which, moreover, are recognized as having high value.

When the Moroccan *Moudawana* was written in 1957-58, the Royal Commission that had to rule on the issue of matrimonial guardianship based its decision to keep this practice on the customs and practices of the time, not on religious factors.

In Algeria, there is a legal contradiction between keeping the institution of matrimonial guardianship and the principles of the Civil Code, which states *“All persons who have not been forbidden from doing so shall be fully entitled to exercise their civil rights”* (Article 40), and *“No one may waive his or her legal entitlements or modify the terms thereof”* (Article 44).

In Tunisia, the abolition of matrimonial guardianship in 1956 was not contested at all, and since that time has not been challenged in any way. The elimination of this practice, which is consistent with the principles of citizenship, is a concrete expression of the ideals of equality and social justice that come with national independence.

## FREEDOM TO CHOOSE A SPOUSE

### *One Hundred Measures*

*“A difference in religion shall not be an impediment to marriage. A marriage between a Muslim woman and a non-Muslim man shall be valid.”*

**Article 16**

## The Laws in the Maghreb

### ALGERIAN FAMILY CODE

*"A Muslim woman may not marry a non-Muslim man."*

Article 31

### THE MOROCCAN MOUDAWANA

*"Marriage between a Muslim woman and a non-Muslim man shall be prohibited."*

Article 29(5)

### TUNISIAN PERSONAL STATUS CODE

*"The two intending spouses must not be experiencing any of the impediments [to marriage] stipulated in the law"*

Article 5(1)

However, a circular from the Minister of Justice dated 11/5/73 cites: *"the strictest instructions from the Prime Minister, which forbid judges, officers of the court and registrars of births, deaths and marriages, from issuing marriage certificates to Tunisian Muslim women marrying non-Muslim men unless a statement of conversion to the Muslim faith can be produced," according to the Justice Minister's letter of October 19, 1973, No. 606.*

## Doctrinal Arguments

The *fuqaha* based their judgment on a specific interpretation of verse 221 of the surah *Al-Baqarah* "The Cow," verse 10 of the surah *Al-Mumtahanah* "She Who is Tested," and verse 5 of the surah *Al-Ma'idah* "The Table" in authorizing Muslim men to marry Christian or Jewish women (people of the Scriptures) and in prohibiting Muslim women from marrying non-Muslims (people of the Scriptures). *"You shall not wed pagan women unless they embrace the faith. A believing slave-girl is better than an idolatress, although she may please you. Nor shall you wed idolaters, unless they embrace the faith. A believing slave is better than an idolater, although he may please you"* (surah *Al-Baqarah*, "The Cow," verse 221).

*"Believers, when believing women seek refuge with you, test them. Allah knows best their faith. If you find them true believers do not return them to the infidels; they are not lawful to the infidels, nor are the infidels lawful to them. But hand back to the unbelievers the dowries they gave them. Nor is it an offence for you to marry such women, provided you give them their dowries"* (surah *Al-Mumtahanah*, "She Who is Tested," verse 10).

*"All good things have this day been made lawful to you. The food of those to whom the Book was given is lawful to you, and yours to them. Lawful to you are the believing women and the free women from among those who were given the Scriptures before you, provided that you give them their dowries and live in honour with them, neither committing fornication nor taking them as mistresses. He that denies the faith shall gain nothing from his labours. In the world to come he shall have much to lose"* (surah *Al-Ma'idah*, "The Table," verse 5).

These verses are non-categorical provisions and set forth general principles that have been interpreted in various ways, especially with regard to the terms "pagans" (*mushrikeen*), "the unfaithful" or "infidels" (*kuffar*) and "virtuous believing women" (*muhsinat*).

This shows that both the prohibition and the authorization are merely the result of human interpretation, which is not at all sacred in nature. In this

day and age it is essential to reassess the material factors that served as the basis for the *fuqaha's* decision to prohibit Muslim women from marrying men of the Holy Scriptures and to authorize Muslim men to marry a woman of the Scriptures. Their arguments, which are used on a national scale, now seem outdated insofar as women, just like men, and regardless of their religious faith, have acquired economic power that allows them to play an active role in the family.

In light of the foregoing, and in order to establish equality between men and women that would allow women to marry non-Muslim people of the Scriptures, we based our position on everything that the *fuqaha* have expressed, without drawing a distinction between the sexes. How can this right be granted to men and not women, when many other *fuqaha* impose the same prohibition on Muslim men on the basis of several verses and *ahadith*, thereby making men and women equal in this area, and when these two different points of view are merely the result of human interpretation (*ijtihad*)? It is also up to us to promote further reflection and to speak out in favor of equality with respect to the right to choose a spouse.

## Sociological Arguments

More and more, the freedom to choose a spouse is a given in our societies. Even though the family group still more or less directly controls the formation of the marriage, individuals do have some leeway and marriages between relatives are in the minority (between 10 and 15% depending on the country). Surveys on attitudes and opinions show that in Tunisia, for example, 77% of fathers and mothers allow their sons to choose their own spouse and 70% allow their daughters to choose freely.<sup>12</sup>

- It is important to note that girls now have more opportunities to voice their opinion or to choose the person they want to marry and to decide when they want to marry. According to the same study conducted in Tunisia, the vast majority of parents think that for their daughters, marriage should take a back seat to academic and professional success, which is a considerable change in terms of attitudes and mentalities.

Moreover, a degree and a career are added values that give young women a new social identity and enable them to assert their choices.

- It should be noted that one of the consequences of tourism, work-related population movements, globalization and relocation of companies abroad, is that there are new opportunities for people of different religions and cultures to meet, which consequently facilitates marriages between them. These unions involve both Muslim men who marry non-Muslim women and Muslim women who marry non-Muslim men. While neither over-exaggerating nor minimizing this phenomenon, we simply note that it does exist in our societies. The ban on Muslim women marrying non-Muslim men causes rifts and forces couples to leave the country to marry or forces the spouse to convert to Islam.
- In recent years, however, more and more young women are asserting their right to choose their own spouse and their family destiny. There is always resistance, but now reactions to women who have married non-Muslims have nonetheless changed.

A qualitative survey conducted by *Collectif 95 Maghreb-Egalité* in Tunisia in April 1999 found that although families only rarely said that they would accept a marriage between their daughter and a non-Muslim man, many families, when presented with a *fait accompli*, found excuses and made compromises in order to save and maintain family relationships, placing the family above social order.

A society that claims to be modern and on the path toward equality between the sexes in the areas of education, work and public life, and that promotes conditions favorable to individual success without discrimination on the basis of sex, has no choice but to grant men and women the same freedoms in choosing a spouse.

## Universal Human Rights Arguments

Recognized as an inherent human attribute, freedom of conscience and religion is one of the imperative rules of universal human rights.

Discrimination in any form on the basis of color, sex, opinion or beliefs is prohibited in the name of dignity and value for human life. This philosophy, which makes human beings the foundation of law, is what underpins the statement *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"* (Universal Declaration of Human Rights, 1948).

This principle of freedom is restated in various other international treaties and conventions that prohibit discrimination in marriage, whether based on color, sex, race, beliefs or other grounds.

In this respect, the reservations expressed by Algeria on the basis of the Family Code, by Tunisia on the basis of Article 1 of the Constitution and by Morocco on the basis of the *Shariah*, render meaningless the goal of the conventions that these same countries ratified.

## Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief

### Adoption

UN/GA, November 25, 1981, Res. 3655

### Principles

*"...religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed"* (Preamble).

### Content

Comprising eight articles, this declaration sets forth the rights to freedom of thought, freedom of conscience and freedom of religion and proclaims the principle that "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."

These declarations are a first step toward institutionalizing the duties and obligations placed upon States by international conventions and treaties.

The reservations and general declarations that States formulate in an attempt to modify the legal effect that the provisions on freedom to choose a spouse will have on domestic law are in complete contradiction to the international commitment these States have made to promote peace, equality and human rights. Because they prevent certain rights from being granted, even though human rights are indivisible, these reservations are incompatible with the very objective of the Convention.

The three states of the Maghreb are called upon to lift the reservations they expressed when ratifying international instruments related to women's rights.



## Domestic Law Arguments

Several arguments, based on law and the legal philosophy in the Maghreb states, go against the ban on Muslim women marrying non-Muslim men.

This prohibition is contrary to the constitutional principles that guarantee freedom of conscience and religion and the freedom to enter into marriage.

The Algerian constitution sets forth the principle that all citizens are equal before the law, followed by its indispensable corollary that *“No form of discrimination on the basis of birth, race, sex, opinion or any other personal or social condition or circumstance shall prevail,”* (Art. 29). Similarly, the constitution also makes freedom of conscience and freedom of opinion inviolable rights.

The Tunisian constitution is just as explicit, stating *“The Tunisian Republic guarantees the inviolability of the human person and freedom of conscience, and protects the freedom to worship, provided that such worship does not disturb public order”* (Art. 5 of the Constitution).

As for Morocco, Article 5 of the bilateral French-Moroccan Convention on Judicial Assistance in Matters of Personal Status states that the basic conditions for marriage are age, consent and any impediments to marriage on the grounds of consanguinity or affinity and having been nursed by the same woman. Impediments of a bi-cultural nature (including different religions) may be disregarded when two Moroccans or a Moroccan and another foreign national get married in France.

The ban on Muslim women marrying non-Muslim men introduces discrimination between nationals, giving some citizens, namely women, fewer rights than others in the freedom to choose their spouses.

This discriminatory rule is based on religious affiliations and is contrary to the philosophy of a modern State in which the two building blocks are nationality and citizenship. This principle of citizenship requires that all citizens be equal before the law.

## BAN ON POLYGAMY

### *One Hundred Measures*

*“Polygamy shall be prohibited.”*

**Article 13**

## The Laws in the Maghreb

### ***THE ALGERIAN FAMILY CODE***

*"A man may marry more than one wife within the limits of the Shariah."*

Article 8

### ***THE MOROCCAN MOUDAWANA***

*"Polygamy shall be authorized in principle."*

Articles 29 and 30

### ***TUNISIAN PERSONAL STATUS CODE***

*"Polygamy shall be prohibited."*

Article 18

## Doctrinal Arguments

In Islamic law (*fiqh*), opinions are divided among those who authorize polygamy, those who authorize it under certain conditions and those who categorically ban it.

All the opinions are based on the Quranic verses that deal with polygamy: *"...then you may marry other women who seem good to you: two, three, or four of them. But if you fear that you cannot maintain equality among them, marry only one..."* (surah *Al-Nisa'*, "Women," verse 3).

*"Try as you may, you cannot treat all your wives impartially"* (surah *Al-Nisa'*, "Women," verse 129).

The first verse authorizes polygamy and the second prohibits it due to the fact that it is impossible for a believer to be fair and just. Thus, monogamy can be considered to be the rule in Islamic law and polygamy the exception.

The proponents of polygamy invoke the provision that is favorable to polygamy and leave the rest in the background. According to them, man may not ban what Allah has allowed. However, this position is not unanimously supported by doctrine.

Several schools have had differences of opinion depending on whether they favored the first verse or the second.

Al Qurtubi explains the part of the verse that says *"and if you fear that you cannot maintain equality among them, marry only one"* by quoting al-Dahhák: *"Jealousy is aroused when one of the wives is favored and loved and when there is unequal distribution in terms of the conjugal sexual relations, cohabitation, and property among the wives, whether there are two, three or four wives. The verse in the Quran on polygamy requires that affection and love, conjugal sexual relations, cohabitation and the distribution of property be shared equally among all the wives in the polygamous relationship"* (*al Jami' li Ahkam al Qur'an*, volume 5, page 20).

According to Tahar Haddad, the second parts of verse 3 and verse 129 in the surah *Al-Nisa'*, "Women," show men the impossibility of being perfectly fair towards four wives at a time, no matter what their sense of justice. These verses favor a single wife by showing the impossibility of establishing true justice among several wives.<sup>13</sup>

Muslim reformers feel that the institution of polygamy has no basis in dogma. No one can affirm the existence of an explicit and definitive provision. Also, freedom of opinion (*ra'y*) is permitted. Some assert the idea that not only is polygamy tied to the condition of complete and absolute equality among the wives, but also that fulfilling this condition is not humanly possible since men are incapable of equally sharing their love among their wives. The reformers base their opinion on an interpretation of the Quran's meaning, with reference to pre-Islamic practice, the progressive nature of these instructions and their end goals.

The authorization of polygamy must be understood and explained in terms of the nature of human relationships, especially the relationship between men and women in a pre-Islamic society that was based on a tribal way of life, a patriarchal family and a precarious subsistence economy. At that time, the practice of polygamy was unlimited. If they were not buried alive, young girls were traded or sold as simple objects necessary for propagation of the species. Women were objects of law and not subjects of law. The advent of Islam was accompanied by a ban on infanticide and the limitation of polygamy to four wives. At the time, limiting the number of wives to four was considerable progress. Limiting the number of wives to one 15 centuries later is the natural progression along the path begun by Islam.

### "A Father Defends His Daughter"

Based on El Laith, who is based on Ibn Abi Malki, El Mousawar, and Ibn Makhrouma, Koutaiba reports:

*"I heard the Prophet of God, may Allah bless him, say from atop his stand, 'Bani Hesham asked me to allow them to marry their daughter to Ali Ibn Abi Taleb. I did not do so and I will not do so; I will not do so! Unless Ali wants to disown my daughter and marry theirs. My daughter is a part of me. What worries her, worries me and when she is wronged, I am wronged.'"*

(Reported by Al-Bukhari in the chapter "*Difa' Al-rajul 'an ibnatihi fi'l-ghayrah wa'l-insaf*" ("A Father Defends His Daughter, Jealousy and Fairness").

This statement clearly shows the Prophet's strong disapproval, if not opposition, to polygamy.

## Sociological Arguments

- Polygamy is not a widespread practice. It involves 5.5% of Algerian households and only 3.6% of Moroccan households, compared to 5.1% in Morocco in 1992.<sup>14</sup> The practice disappeared in Tunisia after being abolished in 1956. At that time, only 2% of Tunisian households practiced polygamy. So polygamous marriages are disappearing in the three countries and even though the practice still exists in Algeria and Morocco, it is allowed only under very strict conditions.
- In practice, our societies are monogamous, even though they continue to partially support the social norm of polygamy in their abstract representations (the ideological discourse of societies). The survey conducted by *Collectif 95* in Algeria shows that an overwhelming majority of women and more than half of men refuse to engage in polygamy even though there are fewer voices actually calling for the abolition of polygamy at the level of public opinion.

In Morocco, the ADFM survey showed that 53% of Moroccans think that a man should not take a second wife, even if he has the financial means to do so. Almost half are in favor of regulations that would limit polygamy, a phenomenon that in their opinion is destined to disappear.

Keeping polygamy enshrined in the Algerian and Moroccan legislation hangs over the heads of women like the sword of Damocles and results in married women being kept in perpetual submission, threatened by the arrival of a second wife. Maintaining polygamy is actually more of an ideological choice that aims to legitimize the relationship of male domination over women.

- Often, women resign themselves to polygamy out of fear of repudiation, which puts them at risk of utter destitution. Polygamy has heavy social and psychological costs. For women, it is a source of undeniable humiliation, in addition to being a frequent source of family tension and inheritance-related conflicts among brothers and sisters, and it often leads to a breakdown of the family.

- Contrary to what opponents of the Tunisian policy on polygamy allege, the abolition of polygamy actually helped strengthen marital relationships, gave greater value to the role of women in the family and created a climate of emotional security that is favorable to the growth and development of children.

By creating the conditions for equal relationships within the family, we help give women the status of a full-fledged partner within the couple, thereby reinforcing their own sense of dignity.

## Universal Human Rights Arguments

At the foundation of the new international order, respect for human dignity is the universal value underlying the fundamental principles of “non-discrimination against women” and “the elimination of all forms of violence against women.” Proclaimed as early as 1948 in the Universal Declaration of Human Rights, these principles have been translated into law in later treaties, especially in the Convention on the Elimination of All Forms of Discrimination against Women.

Within the meaning of this 1979 Convention, polygamy constitutes discrimination and as such, is a form of violence against women.

### Definition of Discrimination Against Women

Acts of discrimination against women are defined as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).



## The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

**Adoption:** UN/GA, December 18, 1979, Copenhagen

**Entry into force:** September 3, 1980

### Content

Comprising 30 articles, the Convention opens with a definition of discrimination against women. The States Parties to the Convention agree to take appropriate measures to ensure equality between men and women in every field, including in marital and family relationships, by according to women a capacity equal to that of men (Art. 15), the same rights to enter into marriage and to choose a spouse with full consent (Art. 16) and the same rights and responsibilities as parents for issues relating to children.

This Convention was followed in 2000 by the Optional Protocol concerning the Committee on the Elimination of Discrimination Against Women. The Protocol is a final touch, improving the system of protecting women's rights by strengthening this monitoring body.

## Ratification Status as of January 31, 2001

### Algeria

Ratified in 1996 with reservations

### Morocco

Ratified in 1993 with reservations and declarations

### Tunisia

Ratified in 1985 with reservations and general declarations

The reservations that the Maghreb countries expressed concerning the Convention undermine the very principle of discrimination and consequently, the very aim of the Convention. Yet, such reservations are not allowed by either the Vienna Convention on the Law of Treaties or Article 28 of CEDAW, which states *"A reservation incompatible with the object and purpose of the present Convention shall not be permitted."*

Given these conditions, has not the time come for the States of the Maghreb to withdraw the reservations they have expressed in order to truly adhere to this convention?

## Domestic Law Arguments

Maintaining polygamy is contrary to the principle of equality that the constitutions in the Maghreb countries have set forth as a core value of the domestic legal system.

The Algerian constitution solemnly affirms the principle of equality according to which *“The purpose of institutions is to ensure equality of the rights and duties of all citizens, both male and female, by eliminating the impediments that thwart the development of human beings and prevent effective participation by all citizens in political, economic, social and cultural life,”* (Art. 31) and further adds *“All forms of physical or moral violence or injury to dignity shall be prohibited”* (Art. 34(2)).

The Moroccan constitution adopts the same principles when it proclaims that *“All Moroccans are equal before the law”* (Art. 5).

In Tunisia, the abolition of polygamy is a prelude to the constitutional principle affirmed in Article 6, which states *“All citizens shall have the same rights and the same duties. They shall be equal before the law.”*

## ABOLITION OF THE DUTY TO OBEY

### *One Hundred Measures*

*“Husbands and wives owe each other mutual respect, fidelity and assistance. Together, they shall manage the family, raise and protect the children and choose the family home. They must avoid causing each other any kind of harm whatsoever.”*

**Article 23**

## The Laws in the Maghreb

### ALGERIAN FAMILY CODE

*"The obligations of husbands and wives are as follows:*

- *to safeguard the husband-wife relationship and the duties of married life;*
- *to jointly contribute to defending the family's interests and to protecting and properly educating the children; and*
- *to protect family relationships and maintain good relations with parents and [other] relatives."*

Article 36

*"A wife must:*

- *obey her husband and respect him as the head of the household;*
- *nurse the couple's offspring if she is able to do so and raise the children;*
- *respect her husband's parents and relatives."*

Article 39

### THE MOROCCAN MOUDAWANA

*"Marriage is a legal contract.... The goal of marriage is a life of fidelity and purity and the desire to procreate, by establishing on stable foundations and under the direction of the husband, a home that allows the husband and wife to fulfill their mutual obligations in safety, peace, affection and mutual respect."*

Article 1

*"The husband is entitled to expect his wife to:*

- *be faithful;*
- *be obedient in accordance with acceptable standards of behavior;*
- *nurse the children born to the couple, if possible;*
- *allow him to oversee the running and organization of the household;*
- *be respectful of his father, mother and close relatives."*

Article 36

### TUNISIAN PERSONAL STATUS CODE

*"Each spouse must treat the other with kindness, live in harmony and refrain from harming the other."*

*"The husband and wife must fulfill their marital duties pursuant to customs and common practices."*

*"They shall cooperate in matters related to the family, the proper upbringing of their children and the management of their children's affairs, including schooling, travel and financial transactions."*

Article 23, paragraphs 1, 2 and 3

### The Duty to Obey and the Precariousness of the Married Woman's Status

The duty to obey stems from the notion that the husband is dominant, which is an ongoing threat to women's ability to exercise their basic rights:

- work
- freedom of movement
- voting
- choice of the family home
- reproductive health
- sexuality

## Doctrinal Arguments

There is no categorical law that obligates women to obey their husbands. This principle is simply one of doctrinal interpretation (*ijtihad*), open to discussion.

Muslim orthodoxy advances verse 34 of the surah *Al-Nisa'* "Women" to legitimize the duty to obey: *"Men have authority over women because Allah has made the one superior to the other, and because they spend their wealth (to maintain them)."* However, opinions on this verse are divided. Some think that obedience should be expected from only one category of women, *"those from whom you fear disobedience"* (same verse).

Concerning the *sunnah*, most of the *ahadith* (tradition-texts) that the *fuqaha* use to support obedience are open to debate. Some of jurisconsults have even gone so far as to say in no uncertain terms that they would not attribute these *ahadith* to the Prophet. They are words that quite simply have been falsely attributed to him.

In this respect, Ibn Hazm, in discussing the *ahadith* related to this issue, explains the uncertainty of these *ahadith* as follows: *"Some people have offered differing points of view on the subject that we have just mentioned and have advanced worthless information"* (*al-Muhallá*: volume 7, part 10, pages 332-334).

Such positive and constructive attitudes draw their strength and credibility from the love and mercy that are the foundation of the relationship between husband and wife in Islam: *"By another sign He gave you wives from among yourselves that you might live in tranquility with them, and planted love and kindness in your hearts."* (surah *Al-Rum*, "The Romans," verse 21).

*"They are a comfort to you as you are to them"* (surah *Al-Baqarah*, "The Cow," verse 187).

## Ahadith that Condemn Corporal Punishment for Wives

Several respectable *ahadith* condemn wife beating. The Prophet says, *"Are you not ashamed to beat your wives by day and to make love to them by night?"*

In another version, he says: *"No one should beat his wife or manhandle her like a camel during the day and make love to her at night."*

The Prophet also says: *"Do not beat women; they are creatures of God"* (recorded by Abu Daoud, *Al-Sunan*, chapter "Al-Nikah", no. 43 and Al-Darimi, chapter "Al-Nikah", no. 34-65).

He also says: *"The worthiest among you is he who treats his relatives the best, and I am the most worthy for my relatives"* (Ibn Maja, *Marriage*, page 50, Al-Darimi, *Marriage*, page 55).

## Sociological Arguments

In the spirit of family legislation, the wife's duty to obey stems from the husband's obligation to provide for her. However, this model for distributing the duties and roles of the two spouses in the family is now outdated. In the three Maghreb countries, factors related to modernization (education, urbanization, paid employment, family planning, etc.) have drastically changed the roles of women and the relationship between men and women.

Women are helping support the family through both their productive (paid or unpaid) and reproductive work. Reproductive work, which includes not only motherhood, but also all the tasks and responsibilities required for family maintenance and cohesion (caring for children and elderly family members, household tasks, supporting children in their schooling, etc.), is neither counted nor socially valued. In the end, only the contribution of the husband, which is easy to quantify, is taken into account while the woman's contribution continues to be overshadowed in an attempt to impose the



duty to obey on her. This logic contributes to legitimizing the duty to obey the husband, who is considered to be the main, if not the sole provider for the family.

The unbalanced relationship created by the duty to obey is often a source of marital conflict and can result in the use of violence against women. Keeping in mind that the phenomenon of violence is largely underestimated, it is nevertheless significant to note that in Tunisia, for example, out of the one thousand cases of domestic violence registered at the counseling center run by *l'Association Tunisienne des Femmes Démocrates* (ATFD), more than half involved women who were attacked by their husbands.<sup>15</sup> In Morocco, a poll conducted by ADFM with assistance from UNIFEM, indicated that 70% of men thought that abusing their wives was legitimate in certain situations.<sup>16</sup> In Algeria, one out of every two people considers spousal abuse to be legitimate, according to the *Collectif 95* survey.<sup>17</sup> It is seen as the establishment and confirmation of the husband's undisputed power.

In the collective imagination, it is thought that concentrating power in the hands of the husband and father contributes to maintaining family cohesion and stability. And yet in Tunisia, where the duty to obey was abolished in 1993, the divorce rate is the lowest in the region. Consequently, abolishing the duty to obey does not necessarily lead to a breakdown in the family. On the contrary, the Tunisian example shows that freeing women from marital domination and having a more equal distribution of power between spouses contribute to family solidarity.

On a day-to-day basis, there must be a *de facto* equal distribution in the areas of the children's upbringing and education and in managing the household and the budget. Given the pressures of modern life, spouses are forced to invest equally in the management of family affairs, even though women are often more involved on a daily basis.<sup>18</sup>

Families are increasingly supportive of egalitarian values within the couple. One of the effects of marital harmony is shared decision-making on important issues, especially in terms of the number of children and their upbringing and future careers, the choice of a home, the purchase of property, etc. Marital harmony is also a deciding factor in how the couple accepts modern

contraceptive methods.<sup>19</sup> Other effects, which are just as positive as this harmony between spouses, involve the personal growth of women and their contribution to public life.

## Universal Human Rights Arguments

Within the meaning of the Universal Declaration of Human Rights, the principle of equality between men and women toward which the international community is striving implies that *"Everyone has the right to recognition everywhere as a person before the law,"* (Art. 6) and that *"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination"* (Art. 7).

In ratifying the International Covenant on Civil and Political Rights, the States of the Maghreb have solemnly pledged to *"take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution"* (Art. 23(4)).

These principles are reaffirmed in the Convention on the Elimination of All Forms of Discrimination against Women in article 16(1c). In concrete terms, they signify that *"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution."*

In the name of what value are women obligated to submit—simply because they are women?

## The International Covenant on Civil and Political Rights (ICCPR)

**Adoption:** December 16, 1966

**Entry into force:** January 3, 1976

### Ratification

- **Algeria:** 1989
- **Morocco:** 1979
- **Tunisia:** 1968

### Principles

Based on the credo from the Universal Declaration of Human Rights, *"All human beings are born free and equal in dignity and rights,"* the ICCPR affirms the principles of liberty, equality, dignity and non-discrimination.

### The Covenant reaffirms

- the equal right of men and women to the enjoyment of all human rights and calls upon States to make this principle a reality (Art. 3),
- the indivisibility and interdependence of all human rights.

### Content

The Covenant recognizes and defines human rights and basic liberties in the areas of civil and political rights and guarantees the free and equal exercise of these rights.

## The ICCPR

### The International Covenant on Civil and Political Rights:

- aims to protect the right to life and states that no one shall be subject to torture, slavery, or arbitrary arrest
- guarantees the right to freedom of movement
- establishes that all persons are equal before the courts, prohibits States from making criminal laws retroactive
- stipulates that everyone has the right to recognition as a person before the law and that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation
- proclaims the right to freedom of thought, conscience, religion, opinion and expression
- provides for the legal prohibition of any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence
- recognizes the right of peaceable assembly, the right to freedom of association with others
- recognizes the right for men and women to marry and start a family, as well as the principle of equality of rights and responsibilities of spouses as to marriage, both during the marriage and at its dissolution
- provides for measures to protect the rights of children
- recognizes that all citizens have the right to take part in conducting public affairs in their country, to vote and to be elected on general terms of equality
- provides for measures to protect ethnic, religious or linguistic minorities

## Legal Effect of the ICCPR

The States Parties to the ICCPR are bound by its provisions. They have a duty to comply with these provisions and to fulfill the obligations incumbent upon them under this Covenant.

The International Covenant on Civil and Political Rights was adopted in 1966, at the same time as the International Covenant on Economic, Social and Cultural Rights. It is a founding document of the new, international positive law. This instrument translates universal human rights into law for the first time, in the form of international commitments made by States.

On a philosophical level, the Covenant expresses the primacy of human beings as people. This concept is based on the idea that rights are universal because they are inherent in human nature and that consequently, they are tied to humans in an inalienable and inalienable manner. Since human nature is the same, human rights are the same for everyone, without discrimination on the basis of race, color, sex, opinion, culture, religion, and so on.

## Domestic Law Arguments

Equality before the law is a principle that the constitutions of the three Maghreb countries established at the core of their positive law when the countries were founded. It springs from the need to abolish privilege and to implement a new order in which the law is the same for everyone.

The Algerian constitution solemnly affirms the principle that *"The purpose of institutions is to ensure equality of the rights and duties of all citizens, both male and female, by eliminating the impediments that hinder the personal development of human beings and prevent effective participation by all citizens in political, economic, social and cultural life,"* (Art. 31) and further adds *"All forms of physical or moral violence or injury to dignity shall be prohibited"* (Art. 34(2)).

The Moroccan constitution adopts the same principles when it proclaims that *"All Moroccans are equal before the law"* (Art. 5).

In Tunisia, article 6 states that *"All citizens shall have the same rights and the same duties. They shall be equal before the law."*

The universality of the law, which means that the law has to be the same for everyone, creates the right for all citizens to be equal before the law.

Personal status laws, which reproduce the model of patriarchal discrimination, are contrary to the basic principles enshrined in the constitution. Although the law is sovereign, its provisions cannot challenge constitutional principles, including the principle of equality among citizens.

This principle of equality demands that the duty imposed on wives to obey their husbands be abolished.

If Tunisia was able to pass this milestone in 1992 when it abolished the wife's duty to obey, what is still preventing the other Maghreb countries from doing likewise? If Algeria and Morocco have abolished the right of guardians to impose their will, what is preventing them from abolishing the duty to obey?

### The Force of the International Conventions in the Domestic Legal System

According to a decision of the Algerian Constitutional Council on August 30, 1989:

*“After ratification and upon their publication, all conventions shall be integrated into domestic law and, pursuant to Article 123 of the Constitution, shall have higher authority than do the laws authorizing Algerian citizens to avail themselves of these laws in court; that such shall be the case especially for the 1966 United Nations Covenants, approved by law no. 89-08 of April 25, 1989 and to which Algeria adhered through presidential decree no. 89-67 of May 16, 1989, as well as the African Charter on Human and Peoples’ Rights, ratified by decree no. 87-37 of February 3, 1987. These legal instruments formally prohibit all forms of discrimination.”*

Official Gazette of the Algerian Republic, August 30, 1989.

## SHARING THE OBLIGATION TO SUPPORT THE FAMILY

### *One Hundred Measures*

*“Spouses shall have shared responsibility for supporting the family based on their financial contribution and/or contribution in the form of household work.”*

**Article 25**



## Paradox!

### Obligation to support the family, without any parental authority

In the three Maghreb countries, the husband is responsible for financially supporting the family, based on his means. This is what gives him the status of head of the household.

However,

- “A woman must contribute to family obligations if she owns property.”  
Article 23(5) of the Tunisian CSP
- “When the father does not have the means to provide for his child and if the mother is wealthy, she is responsible for paying child support.”  
Article 129 of the Moroccan Moudawana
- “If the father is incapacitated, the mother is responsible for supporting the children if she has the means to do so.”  
Article 76 of the Algerian Family Code

This obligation to support the family should come with recognition of co-authority for the woman.

## The Laws in the Maghreb

### ALGERIAN FAMILY CODE

*“The husband must:*

- 1. support his wife to the extent he is able, unless it has been established that she left the marital home,*
- 2. act in all fairness towards his wives if he has more than one.”*

Article 37

### THE MOROCCAN MOUDAWANA

*“The wife has the right to receive from her husband the types of support required by law, such as food, clothing, medical care and housing.”*

Article 35(1)

*“All persons shall support themselves with their own resources except for wives, whose husbands are responsible for their support.”*

Article 115

### THE TUNISIAN PERSONAL STATUS CODE

*“In the context of the various components of family allowance support, the husband, as the head of the family, must provide for the needs of his wife and children according to his means and their situation. A woman must contribute to family obligations if she owns property.”*

Article 23(4) and (5)

## Doctrinal Arguments

Verse 34 of the surah *Al-Nisa'*, "Women," lays out men's duty to support their families when it states, "*Men have authority over women because Allah has made the one superior to the other, and because they spend their wealth (to maintain them).*"

Although the *fuqaha* have differing explanations of the term *qawamah* (authority) used in the aforementioned verse, on the whole, all the interpretations tend to say that this term refers to the preeminence of men over women.

Based on this interpretation, the *fuqaha* have attributed the role of head of the family to men in their capacity as providers of goods and [money for] expenses, and they have imposed the duty to obey on women. However, some *fuqaha* feel that the word *qawamah* means "*to care for and surround with solicitude.*" So it follows that, for them, the word *qawamah* refers to taking charge of material interests and not exercising authority over women.

Muslim jurisconsults have altered the meaning of the Quran by giving prerogatives to men that are not in the nature of *qawamah*. The root of *qawamah*, "q-w-m," means "*to be responsible for.*" In this sense, the Quran puts men in charge of women's material needs. Divine preference is referring to taking care of women and not taking *charge* of them when it says "*and because men spend their wealth (to maintain them).*"

## Sociological Arguments

More and more women are supporting their families just like men. Currently, women make up one third of the work force in the Maghreb. In Morocco, 17.5% of households are headed by women.<sup>20</sup> In Tunisia this figure is 14 percent.<sup>21</sup>

- Through their paid and unpaid work, women are contributing to the well-being of their families and to improving the family's standard of living by contributing financially in various ways, managing family resources,

contributing to the acquisition of property and to savings, contributing to consumer expenses and to repaying loans, and working and caring for family members.

- Social practices have integrated joint spousal responsibility into family maintenance, either because of economic constraints, as is the case among social classes of modest means where both spouses have to help support the family ("*Enquête qualitative*" (Qualitative Survey), *Collectif 95, Tunisia, April 1999*), and among executives who have a sufficient income and a higher level of education, and deliberately choose shared management.<sup>22</sup>
- Despite this remarkable development, there is still a gap between innovative practices on the one hand and social discourse and the law on the other; the latter still view the duty to support the family as being the husband's prerogative. Consequently, women are not given the right to participate equally with men in making important family decisions, nor are they able to manage the resources and assets acquired by the couple.

## Universal Human Rights Arguments

According to international human rights instruments, the duty to provide for the family cannot be the sole responsibility of one spouse and consequently, cannot be the source of additional rights in order to make up for this unequal responsibility. Universal human rights base the relationship between spouses on the positive values of equality, co-responsibility, sharing and reciprocity. Thus, the duty to provide maintenance is equally incumbent on both spouses, as parents who are responsible for supporting their family. In place of the former head-of-household status accorded to the father, universal law substitutes the concepts of co-responsibility and the interests of the child.

## Universal Declaration of Human Rights

### Adoption

UN/GA, New York, December 10, 1948, Resolution 217 A (III).

*"Men and women...are entitled to equal rights as to marriage, during marriage and at its dissolution."*

Article 16(1) U.D.

### Founding Principles

*"Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."*

Preamble

### Content

The Declaration comprises thirty articles, some of which are sometimes considered as general principles of law and others as basic principles of humanity. It affirms the basic rights of people on both an individual and a collective basis: equality, the right to life, liberty, security, defense and respect for family life, the right to effective remedy by tribunals, to a home, to correspond, and to enjoy freedom of thought, conscience, religion, opinion, expression and assembly.

### Legal Value

The Declaration is an affirmation of ideals, without legal constraints or binding force. It is a moral commitment on the part of the adhering States and is now the source of all international human rights instruments.

## Domestic Law Arguments

The laws in the Maghreb do not take into account the changes in the distribution of roles within the family and recognize an obligation to support the family only on the husband's part. It is this obligation that serves as the basis for his authority as the head of the household. These laws perpetuate an anachronistic situation and overshadow any real solidarity within the couple, which should translate into legal recognition of the shared responsibility of both spouses to support the family. Such recognition would simply acknowledge the reality and duly recognize the essential economic role that women are playing in today's Maghreb societies.

The joint duty to support the family logically corresponds to the constitutional principle that all citizens are equal before the law.

To legally recognize joint responsibility for supporting the family is to make the constitutional principle of equality even more effective.

**In Algeria:** The constitution affirms the commitment of *"institutions to ensuring equality of the rights and duties of all citizens, both male and female, by eliminating the impediments that hinder the personal development of human beings and prevent effective participation by all citizens in political, economic, social and cultural life"* (Art. 31). The Family Code (Art. 4) bases marital relationships on the positive values of mutual assistance and protection.

**In Morocco:** The abolition of the requirement in prior laws that a woman obtain her husband's authorization to exercise certain civil rights or to conduct certain professional activities is an implicit acknowledgement of the fact that couples are sharing roles in order to have shared and joint management of the family, and demolishes the concept of the husband being dominant.

- **1994:** Abolition of the need to have the husband's permission to obtain a passport.
- **1996:** Abrogation of Articles 6 and 7 of the Commercial Code, which required the husband's permission in order to run a business.
- **1996:** Abrogation of Article 726 on the need to obtain the husband's permission in order to sign an employment contract.

In Tunisia: Since the 1993 reform, relationships between spouses must reflect the principle of reciprocity. According to Article 23 of the CSP [Personal Status Code], spouses have an obligation to cooperate in conducting family affairs.

## EQUALITY IN THE DISSOLUTION OF MARRIAGE

### *One Hundred Measures*

*“Divorce may be granted only by a court and shall be granted equally to both spouses in all cases.”*

*“Divorce shall be granted:*

- In cases of mutual consent by both spouses,*
- At the request of either spouse on the grounds of harm suffered,*
- Upon a no-fault request by either spouse,*
- At the request of either party or by both parties for shared fault.”*

**Articles 26 and 27**



## The Laws in the Maghreb

### THE ALGERIAN FAMILY CODE

*"Divorce (talaq) shall occur through a decision by the husband in the presence of two just witnesses"*

Article 48(1)

*"A woman is not entitled to file for divorce except in very limited cases"*

Article 53

*"A woman may file for divorce unilaterally through the khol' system, that is, by paying financial compensation to the husband"*

Article 54

*"All types of divorce must be authorized by the courts"*

Article 49

### THE MOROCCAN MOUDAWANA

*"Repudiation (talaq) is a unilateral act of the husband in the presence of two just witnesses"*

Article 44

*and "is not authorized by the courts. A woman may file for divorce only in extremely limited cases and only before a court"*

Articles 53-58

*"Both spouses may mutually agree to repudiation in exchange for the wife paying compensation to her husband (khol')"*

Article 61

### TUNISIAN PERSONAL STATUS CODE

*"Divorce may be authorized only by a court"*

Article 30

*"...at the request of either spouse"*

Article 31

## From Repudiation...To Court-Ordered Divorce

### A marriage may be dissolved by several means:

- *Talaq* in the sense of "repudiation" [simply uttering the ritual words for divorce] means that the marriage is dissolved through a unilateral decision by the husband.
- The wife may declare *talaq* if she chose this option on the marriage license.
- Although in Algeria repudiation must be authorized by a court, in Morocco, it can occur simply in the presence of two just witnesses.
- *Talaq* (or legal divorce) can be granted only by a court upon the husband's request and in extremely limited cases (Morocco, Algeria).
- *Khol'* is the wife's right to seek a divorce in exchange for payment of financial compensation to her husband. In Morocco, *khol'* can be obtained only with the husband's consent, whereas such consent is not required in Algeria.

In Tunisia, the only way a marriage can be dissolved is through a court-ordered divorce.

## Doctrinal Arguments

The Quran has never limited a woman's ability to seek a divorce. All the restrictions placed on women are the work of the jurisconsults (*fuqaha*). These restrictions were based on precedents (cases and situations) submitted to the Prophet, who recognized a woman's right to seek divorce in his arbitration.

Although in principle, and in accordance with dominant doctrine, divorce is at the discretion of the husband whenever he feels that marital cohabitation has become impossible, it is nonetheless true that a woman may also obtain a divorce on the same grounds as the man.

The Quran gives men the right to decide to divorce, but recommends that men use this right only as a last resort because divorce destroys family stability. However, women may also seek divorce whenever their rights have been violated or they have been subjected to bodily harm. Religious tribunals have the authority to grant divorce at the expense of the husband even in cases where the injury was involuntary and not premeditated, such as in cases of material or physical incapacity of the husband, a defect or disability that is incompatible with the normal pursuit of married life, failure by the husband to fulfill his conjugal duties and also failure to comply with the terms of the marriage contract, such as the husband marrying a second wife.

Did Allah not say in the surah *Al-Rum* "The Romans," verse 21: *"By another sign He gave you wives from among yourselves, that you might live in tranquility with them, and planted love and kindness in your hearts. Surely there are signs in this for thinking men"*?

One of the main causes for divorce is the case where a wife starts to hate her husband and refuses to continue living with him. This is what jurisconsults (*fuqaha*) call *khol'*.

Concerning this topic, al-Nasafi explains, *"It is through marriage that Allah creates love and goodness in you,"* (*Exégèse d'al-Nasafi* (Exegesis by al-Nasafi), v. 13, p. 269). Whenever this love and goodness come to an end, separation becomes urgent, even if separation is *"the lawful thing*

*that Allah abhors the most."* A judge must hear the petition filed by the woman and give a ruling on the divorce even if the woman renounces her dowry. This is the conclusion that can be drawn from the words of Ibn Abbas concerning Jamilah, the wife of Thabit Ibn Kais. Some even think that verse 229 of the surah *Al-Baqarah*, "The Cow," is linked to the previous *hadith*. This verse stipulates, *"Divorce (repudiation) may be pronounced twice, and then a woman must be retained in honour or allowed to go with kindness. It is unlawful for husbands to take from them anything they have given them, unless both fear that they may not be able to keep within the bounds set by Allah."*

Others think that the provision ordering compensation was revoked and replaced by another verse of the surah *Al-Nisa'*, "Women" (verses 20 and 21), stating: *"If you wish to divorce a woman in order to wed another, do not take from her the dowry you have given her even if it be a talent of gold. That would be improper and grossly unjust...."* Thus, women have the right to seek divorce even without paying compensation. Jurisconsults do agree that women have the right to divorce, but disagree as to who is eligible to file for the divorce.

Some of them feel that women are able to file for divorce without having to go through a *cadi* (Islamic judge). Others think that it is not up to the woman to file for divorce, but rather to the *cadi*, who has the authority to delegate this power to the woman, thereby enabling the woman to file for divorce on his behalf. The *cadi* can also file for divorce in place of the husband. Still others say that a woman may bring the matter before a *cadi*, and he can file for divorce without her permission if she so desires. They also say that the *cadi* can force the husband to file for divorce. What is important is that a woman's decision to seek divorce is acceptable and implemented with or without the consent of the husband.

The details pertaining to these differences of opinion can be found in a book written by Jurisconsult al-Tasouli, entitled *Shurouh* (Exegesis), v. 1 (pp. 305 and 396).

In summary, men and women are equal in terms of divorce. This means that women have the right to seek divorce on the same grounds that the husband

may invoke in order to repudiate her. And nothing prevents her from doing so. Thus, equality between men and women in divorce matters can be inferred. This is a principle that is accepted by jurisconsults and rejected by only some people whose opinions are not authoritative, although current legislation tends to link divorce to the husband's consent or to other conditions.

Ibn Abbas reports: *"The wife of Thabit Ibn Kais came to see the Prophet, may Allah bless him and grant him peace, and said, 'Messenger of God, if I have something against Kais, it is not for religious or ethical reasons, but because I am afraid of being unfaithful.' The Prophet, may Allah bless him and grant him peace, said, 'Will you give him back his garden?' The woman replied, 'Yes,' and gave him back his garden. The Prophet ordered Kais to separate from his wife"* (Hadith reported by Al Bukhari, Kitab al-Talaq (The Book on Divorce), chapter "Al Khol", v. II, p. 319).

In al-Baihaqi's version, the Prophet asked the woman, *"(Will you give him back the garden that he gave you?)"* She replied, *"Yes, and then some."* The Prophet, may Allah bless him and grant him peace, continued and said, *"No! Nothing more, just the garden."* She said, *"Yes."* He took the money and freed her. When Thabit learned what had happened, he said, *"I accept the verdict issued by the Prophet, may Allah bless him and grant him peace"* (According to al-Baihaqi, this *hadith* is authentic).

The version reproduced by Ibn Jarir is as follows: *"Ibn Jarir reports that Ikrimah was asked about the origin of al khol". Ikrimah replied, 'The first case of khol' in Islam involved the sister of Abdullah Bin Ubai. She came to see the Prophet, may Allah bless him and grant him peace, and said to him, 'Messenger of God, nothing will keep me joined in marriage with him for life. I lifted the tent flap and I saw him coming with a group of people and I noticed that he has the darkest skin, is the shortest, and has the ugliest face.' The husband said to the Prophet, 'Messenger of God, I gave her the best I had. Will she give me back my garden?' The Prophet asked the woman, 'What do you say?' She replied, 'Yes, and if he wants, I will even give him more than his garden.' And the Prophet separated them."*

According to the Malikites, the Shafiites and the Hanbalites, both the husband and the wife have the right to dissolve the marriage if there is a defect or a prejudice, but they do not agree on whether the wife can dissolve the marriage by herself or whether she has to use a mediator.

### Differing Views of the *Fuqaha* (Jurisconsults) Concerning the Amount of *Khol'* (Compensation)

The *fuqaha* have different opinions concerning the amount that a woman must pay her husband in the case of *khol'*. Ibn Rushd (Averroes) said in this respect, *"Concerning the amount that the woman is authorized to pay in order to obtain a khol', Malik, Shafii and others say that she can pay an amount that is greater than what she obtained in the marriage contract if she is to blame for the misconduct. She may also pay back the same amount or a lesser amount. Some say, in accordance with an authentic hadith, that the man can take back only that which he gave his wife. Unlike compensation that applies in ordinary transactions, we see that in this case the amount must be subject to an agreement. Those who understand the hadith as it is presented, do not authorize women to pay more and feel that husbands who receive more are being given an amount to which they are not entitled"* (Bidayat al-Mujtahid, vol. 2, p. 67).

Negotiating with the woman to determine the amount of compensation is tantamount to obtaining something from her that she should not have to pay because she is thus forced to buy her freedom. As many thinkers have recommended, it is more appropriate to stick with the literal meaning of the *hadith*.

## Sociological Arguments

Contrary to preconceived notions, granting men and women equality in terms of legal divorce does not necessarily lead to an increase in the number of divorces. In Tunisia, where repudiation has been abolished and where men and women have equal rights to divorce, divorces must be granted by the courts. Moreover, surveys and vital statistics show that from 1958 to 2000 the divorce rate remained stable at 14% on average.<sup>23</sup>

- In Algeria and Morocco, repudiation is a form of violence against women and children. It inevitably results in a breakdown of the family and causes trauma with lasting consequences. Generally it involves putting the wife and children out of the family home, sometimes even after several years of marriage.

In addition to the drastic consequences that repudiation has on the family, it also constitutes flagrant discrimination against women. Women can obtain divorce only by instituting legal proceedings and then only if they can prove that they have suffered serious harm, which is difficult to prove, or by paying financial compensation to the husband so that he will agree to repudiate her. The price a woman has to pay for her freedom is thus destitution. Plus, husbands often get into a bidding war before agreeing to repudiate their wives.

- Repudiation puts divorced women who have custody of their children in a precarious situation. This situation is all the more disastrous in the context of a market economy in which the extended family is no longer playing its traditional protective role, women do not have the same opportunity to inherit or share in the marital estate, and judges are not systematically applying the laws on compensation owed to repudiated women.

In Morocco, statistics show that repudiated women, who are threatened by poverty, have to work more than others: 54% of them are employed as opposed to 23.5% of widows and 28.4% of married women.<sup>24</sup> According to the same study, the youngest divorced women are the most affected. The labor force participation rate for women between 15 and 19 years of age is 33 percent.

- Divorce is still a man's prerogative. In Algeria, for example, in the 1987/88 legal year alone, 10,762 divorces were by mutual consent compared to 18,652 cases of divorce through decision by the husband.<sup>25</sup>

However, surveys and polls conducted in Algeria indicate that current public opinion is largely favorable to granting men and women equal rights to divorce, since 79% of those surveyed said that women should be able to seek a divorce just like a man.<sup>26</sup>

The same phenomenon is observed in Morocco: three-fourths of the respondents in the ADFM poll said that women should have equal rights to file for divorce.<sup>27</sup> The petition for divorce is considered to be legitimate when the woman has suffered harm (husband's failure to support her, prolonged absences, frequent humiliation, imposition of a second wife, etc.).

Thus, these data indicate a clear trend towards acknowledging women's right to divorce and serve as a good argument for the laws to be revised so as to better reflect these social expectations.

## Universal Human Rights Arguments

International human rights instruments establish the principle of equality between the sexes in dissolving a marriage.

Within the scope of international law, repudiation constitutes discrimination and an act of violence that is detrimental to the dignity of women. In this respect, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages reiterates that certain customs, old laws and practices that pertain to marriage and the family are incompatible with the principles set forth in the United Nations Charter and the Universal Declaration of Human Rights.

These principles, which are based on the recognition of human dignity, guarantee the same rights and duties equally to men and women during marriage and at its dissolution.



Adherence to the Declaration on the Elimination of All Forms of Violence against Women implies that States *“agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void”* (Art. 15(3)).

In adhering to the values of equality, as witnessed by the unreserved ratification of the International Covenant on Civil and Political Rights, and in order to honor their international commitments, the Maghreb States are duty-bound to abolish repudiation as a male privilege.

### Equal Protection Before the Law

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination...on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

International Covenant on Civil and Political Rights, Article 26.

## Domestic Law Arguments

In the three Maghreb countries, relationships under private law are based on the exchange of mutual consent and commitment. A contract is legally binding on the parties according to the civil codes in these countries.

Marriage, which is a contractual agreement, cannot unilaterally be undone without constituting an injustice and without resulting in the payment of damages to the co-contracting party. From this point of view, repudiation, which is a unilateral severing of the marriage bond, constitutes an injustice and causes irreparable harm to women.

Nowadays, repudiation is in contradiction to the constitutional and legislative principles that recognize equality and explicit consent in marriage. Abolishing the system of repudiation, therefore, would be tantamount to restoring constitutional legality.

With respect to the modern principles of equality, unilateral repudiation is an abusive act that challenges the values of mutual respect and kindness between husband and wife.

In Tunisia, repudiation has been banned since 1956 and was replaced by court-ordered divorce, open to both men and women.

In Tunisia's case, the guarantees offered by a system of legal divorce (collegiality, impartial judge, multiple avenues of appeal, the right of defense, possibilities for reconciliation between the spouses at every stage of the procedure) have reduced the risk of frivolous divorces. The divorce rate has stabilized at 14 percent.

# AWARDING THE HOUSE TO THE CUSTODIAL PARENT

*One Hundred Measures*

*“The marital home shall be awarded to the parent with custody of the children if that parent does not have a house.”*

**Article 37(2)**

## The Laws in the Maghreb

### ALGERIAN FAMILY CODE

*"If there is only one marital home, it automatically goes to the father."*

Article 52

### THE MOROCCAN MOUDAWANA

*"The amount of family support allowance owed to parents or to children and what it includes by way of food, clothing, housing and education for the children shall be determined based on the resources of the payer and the practices in the social milieu of the payees."*

Article 127

### THE TUNISIAN PERSONAL STATUS CODE

*"The father must provide housing for the child and the child's guardian if the latter does not have housing."*

Article 56

## Doctrinal Arguments

In verse 1 of the surah *Al Talaq* "Divorce" (Repudiation), the Quran states, *"Prophet (and believers), if you divorce your wives, divorce them at the end of their waiting period. Compute their waiting period and have fear of Allah, your Lord. Do not expel them from their homes or let them go away unless they commit a proven crime."* This verse is included in the surah on repudiation and deals with housing for the repudiated woman. Ashhab reports that according to Malik, the husband should leave the home and let the repudiated woman stay there, pursuant to the divine order stating *"House them."* If the husband was supposed to occupy the same house, Allah would not have said, *"House them."*

Concerning this order from Allah to *"house them,"* Ibn Nafia reports that this verse pertains to women who have been subject to an irrevocable divorce and who are not pregnant (*Al Kortobi*, v. 9, section 18, p. 110).

The Quran also states in verse 6 of the same surah, *"Lodge them in your own homes, according to your means. Do not harass them so as to make life intolerable for them."* This is a general verse that applies to all divorcees, whether the divorce was revocable or irrevocable. This is confirmed by the rite of the two imams, Shafii and Malik.

Thus, the *fuqaha* (jurisconsults) order the husband to provide lodging for his repudiated wife when she is pregnant and after the period of waiting. *A fortiori*, fathers must provide housing for women who have custody of the children and are responsible for their upbringing and who often do not have the financial means to provide a decent home for them.

## Sociological Arguments

- Current laws and their enforcement by the legal institutions, which often lack the means to oversee child protection measures or do not take these measures into account, deprive the custodial parent of the marital home. This places the family in a precarious situation which is seen in the:
  - > deterioration of the family's standard of living
  - > destabilization of the children on the material and psychological levels, and
  - > lack of residential stability (new school, neighborhood, environment).
- Although in most cases the mother is awarded custody of the children, the father gets to keep the marital home as either the owner or a tenant. In Tunisia, despite the relatively progressive laws in this area, the AFTURD survey conducted in 2001 revealed that fewer than one in four divorced women with children (23%) was actually able to remain in the family home or was given alternative housing.<sup>28</sup>
- Given the extremely serious nature of this problem, where destitute women and their children are left completely helpless, attitudes tend to favor keeping the mother and children in the marital home, even if it belongs to the husband.

In Morocco, the ADFM opinion poll indicated that 54% of those surveyed are in favor of awarding the marital home to the wife or custodial parent.<sup>29</sup>

In Algeria as well, 89% of people surveyed are in favor of keeping the wife with custody of the children in the marital home.<sup>30</sup>

Thus, legislators in the three Maghreb countries would simply be assenting to this collective will by passing legislation that would automatically award the home to the custodial parent.

## Universal Human Rights Arguments

The international community's recognition of economic and social rights as universal human rights constitutes remarkable legal progress.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes that *"in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights"* (Preamble).

In this respect, the international community is placing the duty upon States Parties to the Convention to take all appropriate measures to ensure everyone's well-being. Article 3 states that *"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights."*

Article 10 recognizes that the greatest possible protection and assistance should be accorded to the family, in particular with respect to education, as long as the family has responsibility for the support and care of the children.

Finally, the ICESCR recognizes the right of all persons to an adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the improvement of living conditions.



## International Covenant on Economic, Social and Cultural Rights

**Adoption:** December 16, 1966

**Entry into force:** January 3, 1976

### Principles

Principles of freedom, equality and solidarity inherent in human dignity. Pursuit of the ideal of social justice and cooperation for peace.

### Content

This Covenant lists the various rights referred to in the Universal Declaration of Human Rights and gives new legal significance to these rights. Respect for the rights established in the Declaration becomes a legal obligation for States that are bound by the Covenant, and no longer simply a moral directive. The Covenant sets forth so-called second generation material human rights: the right of all people to self-determination and enjoyment of all economic, cultural and social rights.

### Ratification status

- **Algeria:** 1989
- **Morocco:** 1979
- **Tunisia:** 1968

## Domestic Law Arguments

According to legislation in the three Maghreb countries, custody of a minor child (*hadhanah*) means providing child with food, clothing, housing and education.

These material needs are met by both parents during the marriage. If the marriage is dissolved, this care is provided by the custodial parent. If the father is not awarded custody, he is called upon to give financial support to the custodial parent so that said parent may provide this care.

The three codes set forth the father's obligation to provide a family support allowance for the children during the marriage and thereafter, in the event the marriage is dissolved.

The laws state that housing is an integral part of the maintenance that a father must provide for his children.

### Algeria

- Article 52(2) of the Algerian Family Code stipulates, *"If custody is awarded to her [the mother] and if she does not have a guardian who will take her in, she and her children are guaranteed the right to housing in accordance with the husband's means."*
- Article 78 states, *"Maintenance includes food, clothing, medical care, housing or rent and everything else that is deemed necessary with regard to common practices and customs."*

## Morocco

- Article 179 of the Code of Civil Procedures stipulates, *"When a judge authorizes repudiation, he shall set the amount of the security deposit that the husband must pay the court. This deposit is designed to guarantee that the husband complies with the provisions related to repudiation: alimony for the wife during legal retirement and her housing during the [waiting] period."*
- Article 127 of the *Moudawana* states, *"The amount of family support allowance owed to parents and children and what it includes by way of food, clothing, housing and education for the children shall be determined based on the resources of the payer and the practices in the social milieu of the payees."*

## Tunisia

- Article 50 of the Personal Status Code stipulates, *"The family support allowance includes food, clothing, housing, education and everything else considered necessary to life according to customary practices."*
- Article 56 states, *"... the father must provide housing for the child and the guardian of the child if the latter does not have housing."*
- Article 8 of the Child Protection Code stipulates, *"Any decision made must be in the interest of keeping the child in his or her family environment...said decision must guarantee the child's right to continue enjoying a standard of living and various services that are adapted to the child's needs and age and correspond to a normal family environment."*

In Morocco, women *per se* do not have the right to housing except during the waiting period. Although women in Tunisia are entitled to a pension for life, Moroccan women are not.

However, the legislation in the three countries clearly spells out the right to housing for children and their guardians. Thus, the courts have a clear legal basis for awarding the family home to the mother, who is the custodial parent in almost all cases.

## A Basic Right: Children's Right to Housing

The Social Section of the Moroccan Judicial Council, in its July 23, 1984 ruling (journal: *Al Kada wál Kanoun*, no. 135-136, p. 194), was of the opinion that *"Pursuant to the provisions of Article 127 of the Moudawana, child support includes housing, which is one of the basic rights for children and for the custodial parent as long she remains tied to her children. The custodial parent may not waive the rights of her children."*

*Consequently, the court violated the provisions of Article 127 when it ruled that the appellant's waiver of housing in exchange for child support was a waiver of the children's right to housing as stipulated in said article, and the court's ruling must therefore be overturned."*

# A DIVORCED MOTHER'S RIGHT TO REMARRY

*One Hundred Measures*

*“The right to custody may not be challenged if the custodial parent remarries unless a judge rules otherwise in the interest of the child.”*

**Article 39**

## The Laws in the Maghreb

### THE ALGERIAN FAMILY CODE

*"A custodial parent who remarries a person who is not related to the child through a degree of prohibited relationship, shall lose the right to custody."*

Article 66

### THE MOROCCAN MOUDAWANA

*"A mother with custody who remarries another person other than a close relative (to the prohibited degree) of the child or the testamentary guardian of the child, shall lose her right to custody, unless she herself is the testamentary guardian of the child or the only wet-nurse that the child will accept."*

Article 105

### THE TUNISIAN PERSONAL STATUS CODE

*"A female custodial parent must not be married unless a judge rules otherwise in the interest of the child or unless the father is a relative to the prohibited degree of the child or is the guardian of the child."*

Article 58

## Doctrinal Arguments

No established text states that a mother will lose custody of her children if she remarries or if the father leaves the country (Ibn Hazm, *al-Muhalla*, volume 7, section 10, p. 323).

The rule in Islamic law is that in remarrying, a mother loses her custodial rights and custody of her children goes to the guardian who is next in line. However, those who advocate this forfeiture of custody are not basing their position on any sure source from the Quran or the *sunnah*.

Ibn Hazm feels that there is no established basis (Quran, *sunnah*, *ahadith*) for using *fiqh* to justify forfeiture of custody based on the mother's remarriage. He explains in detail that the *ahadith* that justify this point of view are not from reliable sources. He quotes one of these *ahadith*, which says, "You shall have the first right to it as long as you do not remarry." Ibn Hazm feels that this *hadith* cannot be used as justification because it has been "falsely" attributed to the Prophet (*al-Muhalla*, volume 7, section 10, p. 325 Ets).

It also seems that the *fuqaha* have justified forfeiture of custody by a remarried mother too lightly and without any solid basis. Ibn Hazm maintains that remarriage is not a reason for automatic forfeiture of a mother's right to custody because children can be separated from their mothers only in cases of absolute necessity (*al-Muhalla*, volume 2, p. 171).

Consequently, all the laws that recommend forfeiture of custody are based on *ijtihad* (interpretations of the *ahadith*), which have never been unanimous.

The *fuqaha* at that time were not able to reach a consensus on this point. What then can be said about the current day and age when multiple ideas and social norms abound?

The laws concerning forfeiture of custody by the mother upon remarriage have no sacred basis and are exclusively the result of *ijtihad*. Therefore, custody should be awarded based on the interests of the children and to the person the judge feels is best able to take on this role, without having a rigid, pre-set order of devolution.



### The Remarriage of Umm Anas Did Not Result in her Forfeiting Custody

Through al-Bukhari, Anas Ibn Malik reported that Abu Talha, the husband of Malik's mother, took him to see the Prophet when the Prophet came to Medina and told the Prophet, *"Messenger of God, Anas is a well-mannered and clever boy. I place him in your service."* The Prophet replied, *"His service should continue both while traveling and during times of normal residence."* Ibn Hazm explains this *hadith* as follows, *"Here is Anas who is in his mother's custody even though she is married to Ibn Talha and the messenger of God knows this"* (al-Muhalla, volume 7, chapter 10, p. 325).

## Sociological Arguments

Divorced mothers are penalized on three counts:

- They are repudiated
- They are "prohibited" from remarrying, and
- They lose custody of their children if they remarry.

Children who are placed with their mother following a divorce are subsequently taken away from her and given to a father who, in most cases, had severed all ties with them during the time when their mother had custody. This is doubly traumatic for both the children, who are forced to leave their mother, and for the mother, who is forced to abruptly sever her maternal ties. And yet, custodial fathers who remarry are not stripped of their rights to custody.

What arguments serve as the basis for deciding that a child would be better off with a remarried father than with a remarried mother? Why assume that a child would be better off with his or her stepmother than with his or her mother?

- Current legislation is supposed to protect children from the second husband, who is an outsider to the family. However, research on incest shows that children can be put in a situation of vulnerability even in their original families.<sup>31</sup> In actuality, it seems as though the objective of this legislation is to punish mothers who remarry by depriving them of their right to custody rather than to protect the interests of children.
- It is a fact that happy parents are better able to care for their children than parents who have to sacrifice their adult life for them. Freedom and dignity for women requires that a woman not be made to choose between her children and her life as a woman. This is especially true as there is nothing to justify the postulate that the interest of the child would necessarily be compromised if the mother remarries. This is confirmed by the favorable opinion of a majority of people (73% of women and 54% of men in Algeria) who say that a divorced woman who remarries should maintain custody of her children.<sup>32</sup>
- According to the AFTURD study, one out of every three divorced women are encouraged by their families to remarry, which is significantly lower than the percentage for men (52%).<sup>33</sup> However, since divorced women have internalized a spirit of sacrifice for their children, a greater proportion of them than men (71% versus 49%) rule out the idea of remarriage.
- In Morocco, even though prevailing opinion is against granting custody to divorced mothers, the ADFM survey (March 2000) indicated that 64% of respondents were in favor of more flexibility in the provisions governing child custody in divorce cases.

## Universal Human Rights Arguments

Within the meaning of the International Covenant on Civil and Political Rights, the principle of equality implies that States have an obligation to refrain from taking any measures that would restrict the legal capacity of women, including the right to start a family. The Convention on the Elimination of All Forms of Discrimination against Women obligates States to take all legal and other measures necessary to give women full and complete legal capacity to enter into contracts, including marriage contracts (Art. 15).

The Declaration on the Elimination of All Forms of Discrimination against Women (United Nations General Assembly Resolution 2263 XXII of November 7, 1967), which was an important step in the fight against all forms of discrimination against women, states in Article 1, *"Discrimination against women... is fundamentally unjust and constitutes an offence against human dignity[!]"* In addition, the Declaration calls for the abolition of existing laws, customs, regulations and practices that discriminate against women and for adequate protection of equal rights for women to be embodied in the principle of equality in constitutions and legislation.

The right to marriage is a basic right of women and men and any rules that limit this right are a violation of international human rights instruments.

Furthermore, protecting the interests of the child requires that children not be separated from their mother and father.

The evolution of international law towards the extension of universal human rights means that children are now seen as full-fledged beneficiaries of rights, including the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, and that States have a responsibility to always consider the best interests of the child (Convention on the Rights of the Child, Art. 27).

## Domestic Law Arguments

The principle of a divorced mother forfeiting custody when she remarries is still in effect in the three Maghreb countries. However, forfeiture does not apply when a custodial father remarries.

This paradoxical situation is contrary to the legislative policies of the Maghreb countries, which establish marriage as a founding act of the family and at the same time, raise obstacles to the remarriage of custodial mothers. This situation is also contrary to the spirit of domestic law, which is based on the equality of all citizens.

Furthermore, these domestic laws, which establish forfeiture of custody when divorced mothers remarry, are also in contradiction to the States' international obligations to respect the equality of women and men under the law.

## SHARING PARENTAL RESPONSIBILITY

*One Hundred Measures*

*“During marriage, the mother and father shall jointly exercise guardianship as a matter of law. The parents shall have rights and responsibilities concerning the custody, supervision and upbringing of the child. The mother and father shall jointly administer the child’s property.”*

**Article 63**

*“In the case of divorce, the custodial parent shall exercise guardianship.”*

**Article 63**

## Definition and Exercise of Guardianship in the Three Maghreb Countries

In the three Maghreb countries, fathers have guardianship over children. If the father is unable to assume guardianship because of death or incapacity, this right falls to the mother. In all cases, guardianship is exercised over:

- the person of the child: support, upbringing, travel and education, and
- the child's property: management with approval from a judge.

In Tunisia and Algeria, in addition to exercising guardianship in the event of the father's death, mothers also have guardianship over minor children if the father is absent or leaves the family home.

Moreover, in Tunisia, mothers have certain guardianship prerogatives in matters pertaining to travel, education and bank accounts both during the marriage and, in the case of divorce, if they have custody of the children.

## The Laws in the Maghreb

### THE ALGERIAN FAMILY CODE

*"The father shall be the guardian of his minor children. Upon his death, guardianship shall revert to the mother as a matter of law." For his part, "the guardian must manage the property of his ward in the best interests of the ward." In addition, the guardian is "responsible and must seek authorization from a judge for all major acts: sales, partition, mortgage, renting of real estate..."*

Articles 87 and 88

### THE MOROCCAN MOUDAWANA

*"Legal representation is provided in the following order by: 1) the father, 2) the mother of legal age in the event the father dies or loses legal capacity. However, the mother may not transfer any property of the minor without prior authorization from a judge," "The father shall exercise legal guardianship over the person and property of the [legally] incapable [child] until such time as the child has acquired capacity. The father must exercise this guardianship."*

Articles 148 and 149

### THE TUNISIAN PERSONAL STATUS CODE

*"The father shall be the guardian of his minor child. In the event the father dies or becomes incapacitated, the mother shall become the legal guardian, subject to the provisions concerning marriage in Article 8 of this Code."*

Article 154

*"If custody is awarded to the mother, she shall have guardianship prerogatives in matters pertaining to the child's travel, education and management of his or her financial accounts."*

Article 67

*"A judge may award guardianship to a mother who has custody of the children if the guardian is unable to exercise guardianship, has demonstrated abusive behavior in his home, has failed to completely fulfill the obligations arising from his responsibility, is absent from the family home and becomes homeless, or for any other reason that is prejudicial to the child's interests."*

Article 67, last paragraph



## Doctrinal Arguments

According to the traditional interpretation of Islamic law, the husband is considered to be the head of the family on the basis of a concept in the Quran found in verse 34 of surah *Al-Nisa'*, "Women," called *qawamah*, which literally means "to be responsible for." On this basis, certain attributes and prerogatives have been given to fathers vis-à-vis their children: name, filiation, religion, nationality, and so on. Men derive a certain number of rights from *qawamah*, including the right to be head of the household, to represent the interests of the child, and to be the child's guardian.

Men have these rights because they alone have the obligation to support the family.

In any case, although there are doctrinal differences of opinion concerning the actual meaning of *qawamah*, it is clear that the word primarily refers to providing economic support and maintenance for the family. However, insofar as women nowadays are taking as much responsibility as men for supporting the family, they have a right to help manage the family, to represent the children and to exercise guardianship.

## Qawamah or the Right to Supervise: Doctrinal Differences of Opinion

- *Qawamah*, *qayyim*, and *qiwam* indicate exaggeration and signify accomplishing an act with tyranny, based on careful consideration. Al-Kortobi (*al-Jami'*).
- Preference: in other words, the person with authority is dominant and has a higher position. Abu Bakr Ahmed Ali Razi (*Ahkam Al Qor'an*).
- *Al-qiyam* (to watch over) is the right of the husband to punish his wife. The wife must obey her husband.
- *Al-qiyam* (to manage business) means sovereignty; *qawamah* refers to someone who watches over something or takes care of it, hence that person has authority.
- The reasons for authority (the right to supervise): Allah gave men preeminence over women on the basis of the elements that make up this authority, i.e., spending and virtue, which signifies incursion, a pillar of faith and the spirit, and other similar concepts.
- The reasons for authority: Allah gave men preeminence over women for matters related to the spirit, succession and *jihad* (holy war).
- Obedience (repudiation, which is at the discretion of the man) which imposes its will.
- *Qama* and *Qama ala*: to take care of (a woman's) business.
- *Qama* and *Qama ala* mean to be in charge of, to take care of, to watch over (the other person's affairs), to prepare oneself and pay attention to something and to pursue action.
- *Qawwamun*: persons in charge of financial affairs.

## Sociological Arguments

Adherence to the principle of equality between women and men implies joint responsibility for the children. According to the legislation of the three Maghreb countries, guardianship is the power to supervise and raise minor children, to manage their assets, to represent them in legal matters and finally, to consent to their marriage.

In reality, women do fulfill these various functions just as much as men, if not more. Women contribute to supporting and raising children in concrete ways: they serve as the contact with the school or other institutions, provide emotional support and are true partners in making plans for the future of adolescent boys and girls. Various studies (especially the Tunisian survey on socialization of children and adolescents in the Tunisian family) highlight the changes in women's and men's roles in the family and the growing importance of the maternal role, which covers many areas that men do not.<sup>34</sup>

These changes in men's and women's parental roles and the new social practices would be confirmed if parental co-responsibility was legally recognized.

In addition, in cases of divorced parents, the custodial parent should, logically and practically speaking, exercise parental responsibility, thereby legally assuming co-guardianship over the children with the non-custodial parent.

How can we continue to accept that a woman be kept in a subordinate relationship with a husband whom she has divorced? The guardianship monopoly for fathers is based on a negative prejudice, i.e., that women are "not qualified" to supervise children and to manage their affairs. However, this monopoly no longer has a place, since Maghrebian women are just as educated, active, able to vote and eligible as men. In Algeria and Tunisia, women are even given legal guardianship of their children after their husbands die. Women who were incapable of supervising and raising their children while their husbands were alive suddenly (after the death of their husbands) become qualified to raise and supervise their minor children and to manage their assets!

Guardianship is frequently used by fathers as a means of blackmail. Children become hostages of the father, who then continues to have a means of exerting pressure on his former wife. This leads to deal-making between the parents and the children are the ones who suffer.

In the interests of the children, it is essential that mothers have shared guardianship with fathers over their minor children so as to be able to make necessary decisions in all cases, especially when the father is absent or fails to fulfill his responsibilities, without having to systematically rely on a judge to arbitrate. This is especially important in our current societies where failure by fathers to assume their responsibilities is not rare, as indicated by the previously mentioned Algerian survey, the ADFM poll (Morocco) and the survey conducted in Tunisia by the Ministry of Women's and Family Affairs.

In order for women to have co-responsibility in supporting the family, they must be given more rights, especially the right of co-guardianship.

## Universal Human Rights Arguments

Principle 7 of the Declaration of the Rights of the Child states, *"The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."*

This shared responsibility of parents is affirmed in Article 18 of the International Convention on the Rights of the Child: *"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child."*

Thus, the Convention bases parental co-responsibility on the values of family protection, the harmonious development of the child's personality, the well-being of the child and the child's right to have an individual life in society and to be raised in a spirit of peace, dignity, tolerance, freedom, equality and solidarity (Art. 2 of the Convention).

On another level, the Convention on the Elimination of All Forms of Discrimination Against Women establishes the rule that *“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”* (Art. 16(1)(d)).

Consequently, the Maghreb States that have ratified these Conventions are obligated to standardize their domestic legislation on the basis of these fundamental principles and/or the principle of shared responsibility of parents for their minor children.

## Domestic Law Arguments

In the three Maghreb countries, fathers have guardianship over their children. If the husband dies or is incapable of assuming guardianship, it falls to the mother who becomes the children’s legal guardian with respect to their food, upbringing, travel, schooling and assets and the management of these assets.

The inconsistency in this legislation is that women who were incapable of supervising and raising their children while their husbands were alive suddenly (upon their husband’s death) become capable of raising and supervising their minor children and managing their assets.

However, in Tunisia, *“Both spouses shall cooperate in the conduct of family affairs, the proper upbringing of their children, and the management of their affairs, including education, travel and financial transactions”* Art. 23(3) CSP.

Despite its substantive nature, this provision is still limited since it does not legally mean co-guardianship. Guardianship unequivocally lies solely with the father according to Article 154 of the CSP. In the case of divorce, a Tunisian mother does have some guardianship powers over travel, education and financial accounts.

Thus, parental co-responsibility, which is theoretically a corollary of the values of mutual assistance, kindness, solidarity and mutual respect, has not yet been enshrined in the legal systems of the Maghreb countries. Guardianship by the father is still the general rule, despite acknowledgment of the role mothers play in raising children and managing their affairs.

This difference in the attribution of guardianship leads to situations of legal impediments. Even though parents are not co-guardians, they have shared criminal liability in some cases. For example, Article 479 of the Moroccan Penal Code states that both parents are equal in criminal matters and that they are subject to the same penalties if either of them abandons or leaves the family home without a valid, pressing reason. Likewise, according to Article 482, both parents are equal and are liable to the same punishment if either of them harms any of their children.

# EQUAL INHERITANCE RIGHTS

*One Hundred Measures*

*“Women and men with the same degree of relationship to the deceased (decedent) shall be entitled to an equal share of the estate.”*

**Article 88**



## The Laws in the Maghreb

### ***THE ALGERIAN FAMILY CODE***

Articles 126 to 183 of Book Three govern inheritance.

### ***THE MOROCCAN MOUDAWANA***

Articles 217 to 297 of Book VI govern inheritance.

### ***THE TUNISIAN PERSONAL STATUS CODE***

Articles 85 to 152 of Book Nine govern inheritance.

### **On the Successoral Inequality Between Women and Men in the Laws of the Maghreb**

In the three countries, all the provisions concerning inheritance stipulate that women shall inherit a share that is equal to half that of the man with the same degree of relationship, with one exception: grandparents from the paternal line inherit equal shares.

## Doctrinal Arguments

*"Men shall have a share in what their parents and kinsmen leave; women shall have a share in what their parents and kinsmen leave; whether it be little or much, they are legally entitled to their share"* Verse 7 of the surah *Al-Nisa'* "Women").

This verse shows that the Quran initially assigned women and men an equal share in inheritance. Thus, the verse recognizes the rule of equal inheritance rights between the sexes.

The notion of equal inheritance rights between the sexes has provoked strong opposition on the part of certain Muslims who are still deeply entrenched in the traditions of the *Jahiliyyah*. At that time, not only were women prevented from inheriting at all, they were actually part of the estate. The main arguments in favor of this system are summed up in this question: *"Is it possible to give inheritance rights to those who does not ride a horse, carry a sword or fight the enemy?"*

The rule of equality was modified along the lines of verse 11 of the surah *Al-Nisa'* "Women": *"Allah has thus enjoined you concerning your children: a male shall inherit twice as much as a female...."* However, even in legislating and stipulating this rule, which is an exception to the general rule of equality set forth in verse 7 above, the Quran did maintain equality between the sexes in certain cases, notably where two parents inheriting from a deceased person with children: *"Parents shall inherit a sixth each, if the deceased have a child"* (Verse 11, surah *Al-Nisa'*, "Women").

The Quran has even gone so far as to offer women a greater share of the inheritance than men when parents inherit from a deceased person who has no children: *"...but if he leave no children and his parents be heirs, his mother shall have a third"* (Verse 11, surah *Al-Nisa'*, "Women").

There is also equality between brothers and sisters of a deceased person who does not have any direct heirs: *"If a man or a woman leave neither children nor parents and have a brother or sister, they shall each inherit one-sixth"* (Verse 12, surah *Al-Nisa'*, "Women").

Based on the foregoing, and taking into account the principle of *fiqh*, the rule that states that a man's share is twice that of a woman's must be understood in its social and historical context, bearing in mind the reality that existed when this verse was revealed. According to the principle of Islamic jurisprudence, *"A rule changes according to the reason for the rule, depending on whether the reason still exists or not."*

Another principle states: *"no one can dispute that the provisions of the law are adapted to fit the changing times."*

The Quran has imposed upon men the duty of providing for their wives, thereby instituting an established fact. Jurisconsults have justified the rule that a woman's share in the estate should be less than a man's because men have to support women. However, we see today that men are no longer required to play this role since women have greater economic independence vis-à-vis men, thanks to education and employment, and are therefore providing for their own material needs.

Furthermore, women are now contributing to family budgets and in some cases women are the family's sole source of support. The reason for unequal inheritance rights between women and men no longer exists. This means that according to the aforementioned principle of Islamic jurisprudence, the rule in question should be modified since *"A rule changes according to the reason for the rule, depending on whether the reason still exists or not."*

Since the reason no longer exists, it is therefore logical that the rule should change to allow for equal distribution of an inheritance between the sexes.

The rule of inequality in inheritance was related to the social and historical conditions at the time of the revelation. Since the conditions have changed and the reason (men providing for women) has disappeared, there is no choice but to apply verse 7 of the surah *Al-Nisa'*, which sets forth the general principle of equal inheritance rights.

## Equality Between the Sexes According to Tahar Haddad

According to Tahar Haddad in the conclusion of the legal section of his book *Notre Femme dans la Charîa et la Société* ("Our Women in the Shariah and in Society") (Maison tunisienne de l'édition, 1978, pp. 141-142), *"An in-depth study of Islamic law will undoubtedly provide a glimpse of the objectives behind establishing equality between men and women in all areas of life.... Although the Muslim faith has chosen to apply reforms in stages, we, nevertheless, have not been left in a state of vague doubt that would lead us to believe that our religion therefore favors men over women. Even taking into consideration the fact that this principle of equality was not explicitly established on a case-by-case basis in all the texts, it is still clear that the greater objective of Islam is equality among all believers...."*

*"Although it is true that the Muslim faith has stated in numerous verses of the Quran that there is a difference between men and women in specific cases, it is no less true that the Muslim faith has never rejected the principle of social equality between the sexes whenever conditions so lent themselves as time passed... moreover, no text seems to prescribe, either implicitly or through deduction, that the progress made in legislation during the life of the Prophet signaled an end to any future development. This is because all progress depended either on social problems that could be solved immediately, or on problems that could be solved only through a change in mores and through opportunities that one could hope to achieve over time"* (page 49).

## Sociological Arguments

The issue of equal inheritance rights between women and men is more problematic than any other. It is an extremely complex issue insofar as it involves two levels:

- legal standards and Islamic law, and
- social practices.

Compared to the pre-Islamic practices that prevented women from inheriting at all, the Quran does give women the status of heirs, but gives women only half of the man's share. However, and as the history of our societies has shown, Muslim jurisconsults have not hesitated to violate this rule:

- by establishing institutions such as the private *waqf* and the *habs*, that circumvent the rule in order to prevent women from inheriting at all and to dispossess them, and
- by creating special rules that decrease the share for women as established by the Quran.

This inheritance rule, which is based on the fact that men should have more resources because they are responsible for supporting the family, creates a situation of economic dependence for women, gives them inferior status and justifies other forms of inequality.

Through their contributions to the economic development of their countries or through their "visible" (salary or income) or their "invisible" (domestic work that is economically unaccounted for) contributions, women are now helping to materially support their families. They are taking on this responsibility just like men and in some cases they are the only ones to do so when they are the heads of household.

However, this fundamental economic role that women have always played and that is clearly a "given" in the development of modern societies, has not always been socially or politically recognized. The need to recognize this role is becoming more pressing and is reshaping attitudes towards

equality between women and men. We are now seeing that those involved in social issues are more aware of the unfairness and arbitrary nature of the inheritance rule. Women, much more than men, are increasingly declaring their support for equal distribution of the inheritance and some families have already begun to put this notion in practice.

The different studies conducted in the three Maghreb countries by associations or by *Collectif 95 Maghreb-Egalité* show that various strategies and tricks are employed to circumvent existing laws. In particular, dividing the family assets equally between daughters and sons, or giving the daughters beneficial compensation in the form of gifts or fictitious sales are practices that are increasingly used. It is also not rare for an estate to be equally divided among brothers and sisters after the parents' death, sometimes on the recommendation of the parents themselves.

The same compromise solutions are used by husbands who want to protect their wives, especially non-Muslim wives who are completely eliminated from the line of succession under the laws in the three countries.

Both the qualitative study conducted by *Collectif 95 Maghreb-Egalité* in Tunisia and the poll conducted in Algeria show that two thirds of Tunisians and half of all Algerians are in favor of equality between women and men. This attitude predominates, especially among women who are increasingly demanding their share of inheritance and who say they are willing to fight for equal inheritance rights. Women are determined, more so than men, because they have long suffered from a type of discrimination that seems all the more arbitrary given that women are increasingly providing for their own needs and those of their families through their work.

Opinions and practices that still run counter to the possibility of equal inheritance rights are not based on an objective knowledge of society, but rather on ideological biases that proclaim the norm to be sacred. At the same time, it would be an exaggeration to say that a reform towards equality in inheritance would not be accepted. Proof can be seen in the *radd* technique used by a Tunisian legislator in 1959. This technique excludes collateral heirs (uncles, cousins, etc.) from the estate to the exclusive benefit of daughters. The legislator in this case was circumventing an inheritance rule that was

clearly stated in the Quran. Yet, this infringement did not stir up any opposition because it was in keeping with social evolution. This Tunisian man preferred to leave all of his assets to his daughters rather than his brothers. This confirms the change in mentalities linked to the changes in family structure and the transition from the extended family to the smaller, modern nuclear family.

## Universal Human Rights Arguments

The international community recognizes that women are taking part in economic life and the fight against poverty through their paid or unpaid domestic, community and professional work, and proclaims that their economic autonomy is an essential condition for the elimination of poverty. This is underscored by the numerous reports and studies published by international institutions since 1975, the International Year of the Woman.<sup>35</sup>

For this reason, the international community recommends that governments take steps to promote economic autonomy for women and calls upon them to mobilize in order to *“protect women’s rights to full and equal access to economic resources, including the right of inheritance and the right to land ownership.”*

On the international level, discrimination in inheritance is contrary to all the moral and legal principles of equality between women and men affirmed in the declarations, covenants and conventions on universal human rights. The principle that humans are born free and equal requires that there be equal access to inheritance.

## Beijing Declaration and Platform for Action

### Adoption

Fourth World Conference on Women, Beijing September 4-15, 1995

### Founding Principles

- To advance the goals of equality, development and peace for all women everywhere in the interest of all humanity
- To ensure equal rights and inherent human dignity of women and men
- To ensure the full implementation of the human rights of women and of the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms

### Content

The platform for action adopts strategic objectives aimed at fighting poverty, advancing education and training, improving the health of women, eliminating violence, protecting women who are victims of armed conflicts and integrating women into decision-making. The platform sets up institutions charged with promoting women’s basic rights, access to media, the right to the environment and the rights of the girl child. It also sets up structures at the international, national and regional levels in addition to financial provisions to promote the economic, cultural, political and social status of women and girls.



Domestic Law Arguments

Strict application of the rules of inheritance under Islamic law, which created situations deemed to be unfair, has caused legislators in the Maghreb to make slight changes to the legal system, without however, challenging the principle of discrimination between men and women.

According to strict tradition, grandchildren do not have any rights to the estate of their grandparents if their father or mother dies before their grandparents. They are, in fact, precluded by their uncles and aunts, who thus block them from the estate.

To remedy this injustice, certain tricks (*tanzil*) have traditionally been used. Modern legislators have also used these tricks to limit the effects of exclusion. The *Moudawana*, following the Egyptian and Tunisian codes, adopted a change on behalf of orphaned grandchildren by allowing them to inherit the parents’ share of their grandparents’ estate in their place. However, the *Moudawana* voluntarily excludes grandchildren born to the daughter, based on the principle that the paternal line has primacy.

There has been greater innovation in Tunisian law, which grants girls who are only children access to the entire estate of their deceased father, shared only with any living grandparents.

A few examples are sufficient to show that far from being sacred, immutable and untouchable, the rules of inheritance can be reformed in order to take into account the changing society in the Maghreb and the new status acquired by women who are now providing for their families along with their husbands, or even by themselves in some cases.

APPENDICES

## Appendix 1

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### Practical Instructions for Using the Guide to Improve Communication

This Guide was prepared on the initiative of *Collectif 95 Maghreb-Egalité*. The Guide's objective is to provide human rights activists—both men and women—with the arguments they need to advocate for equality between men and women and within the family. This book is an essential teaching tool that will help its users to convey the most persuasive activist message possible.

However, the best ideas in the world, whether controversial or not, will not be well received in most cases if those in charge of presenting and defending them do not use proven interpersonal and group communication techniques.

Awareness-raising, educational and training activities are based on the exchange of information, whether between members of the same group or different groups. In order to have fruitful exchanges, a good mastery of communication mechanisms is a must.

### Introduction

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Communication involving issues related to the recommendations supported by the women's movement, in the context of reforming the laws governing family relationships, is not easy.

This topic, which has a social, cultural and religious frame of reference, is one that has been highly internalized. This internalization leads to practices and behaviors that make dialogue difficult.

People's attachment to their view of this frame of reference, which is not always logical, is a sensitive topic and it is important to be particularly vigilant and to follow some of the basic principles of communication.

Indeed, due to the sensitive nature of the subject, attention must be paid to all aspects of communication. Non-verbal communication, for example, is extremely important and it will be necessary to pay close attention to gestures, facial expressions, spatial relationships, and so on. Similarly, the first few seconds can be decisive, as can the method used to choose your arguments. All these aspects will determine whether your communication succeeds or fails.

The following section attempts to present information concerning important communication elements that need to be taken into consideration when engaging in a discussion where you attempt to defend a position.

## The Structural Components of Oral Communication

These are:

- the intent to communicate
- the message = What?
- the sender = Who?
- the receiver(s) = To whom?
- non-verbal behavior: Voice + body
- language used
- external environment

### **Note:**

The message has two components:

- **content**

- > conveyed by **the voice**.
- > **the verbal** message (= what is said).

- **form**

- > expressed by the **body** (tone of voice, facial expressions, gestures, distance, position, etc.)
- > **the non-verbal** message (that which is not said: how the content is conveyed)

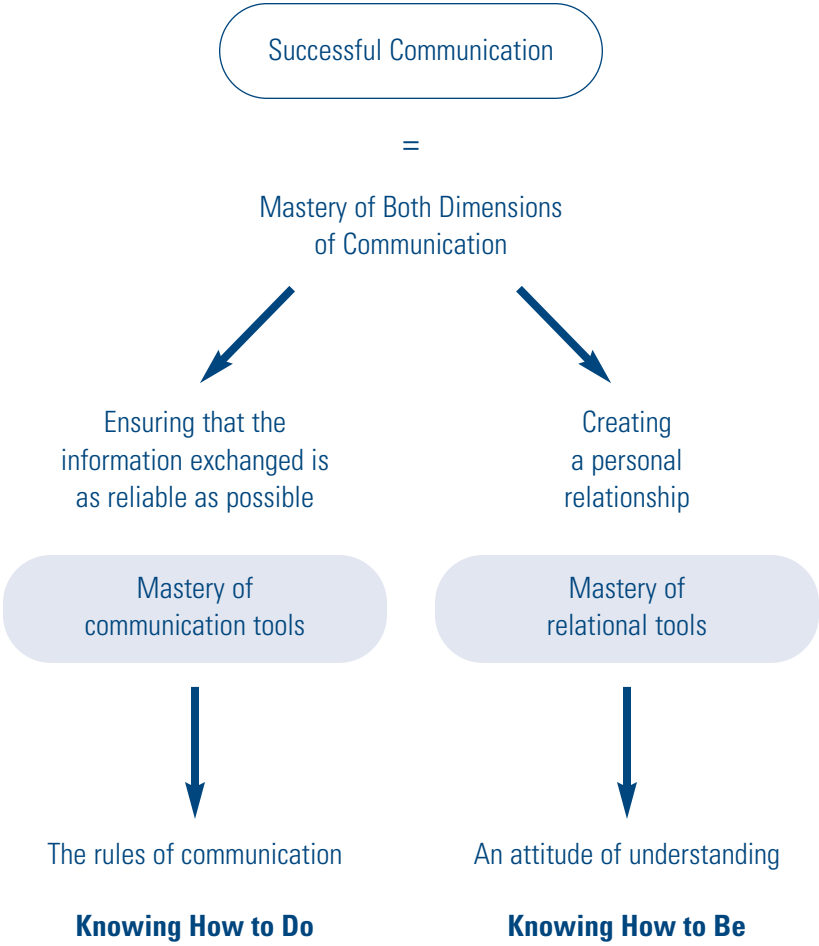
Your listener will pay attention not only to the content, but also to the accompanying form, i.e., your non-verbal behavior and attitude.

## The Relational Components of Oral Communication

These are:

- motivation,
- status,
- role,
- setting (created) = distance, position,
- language,
- register,
- organization of thought,
- word choice,
- sentence structures.

How to be a Successful Communicator



How to Introduce Yourself

The first twenty seconds are decisive. Pay attention to:

State of Mind	Verbal	Non-Verbal	Setting
<ul style="list-style-type: none"><li>• Be open:<ul style="list-style-type: none"><li>&gt; observe</li><li>&gt; listen</li></ul></li><li>• Be positive and constructive<ul style="list-style-type: none"><li>&gt; warm</li><li>&gt; enthusiastic</li><li>&gt; polite</li><li>&gt; friendly</li><li>&gt; patient</li><li>&gt; calm</li></ul></li><li>• Overcome stage fright</li></ul>	<ul style="list-style-type: none"><li>• The first words:<ul style="list-style-type: none"><li>&gt; Hello</li><li>&gt; introduction</li><li>&gt; identification of your partner in dialogue</li><li>&gt; attention-getters (How are you?, etc.)</li></ul></li><li>• Voice: tone + delivery</li><li>• Words to avoid:<ul style="list-style-type: none"><li>&gt; words that devalue your audience</li><li>&gt; words that devalue you</li><li>&gt; negative words</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Maintain an adequate distance:<ul style="list-style-type: none"><li>&gt; do not stand too close to the listener, or too far away</li></ul></li><li>• The first gestures:<ul style="list-style-type: none"><li>&gt; handshake</li><li>&gt; if the other person does not shake your hand, greet him/her orally</li></ul></li><li>• Facial expressions:<ul style="list-style-type: none"><li>&gt; smile</li><li>&gt; look at the other person</li></ul></li><li>• Clothing:<ul style="list-style-type: none"><li>&gt; proper dress (nothing extravagant)</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Be sure to meet in a favorable environment:<ul style="list-style-type: none"><li>&gt; avoid hallways, street corners and noisy places: what you have to say is important</li></ul></li><li>• Handling interruptions:<ul style="list-style-type: none"><li>&gt; don't show irritation</li><li>&gt; sum up after every interruption</li></ul></li></ul>



## Arguing Your Case

### What Does it Mean to Argue Your Case?

“To argue” means to present ideas (our own or someone else’s) and to try to convince the listener to adopt the ideas that we think are true and right (our own or someone else’s). In order to have the best chance of persuading the listener, you must apply three principles:

- Based on who your listener is, choose from among all potential arguments those that are most likely to convince the listener.
- Determine the order in which you will present your arguments.
- Clearly indicate the stages of your reasoning so that the listener can really follow it and, as a result, be responsive to the arguments being presented.

### How a Case is Built

#### Analyze the problem or the idea to be discussed

- What are the facts in question? How can they be interpreted?
- To what area does the idea to be discussed relate? What are the various aspects of the idea?

#### Finding your arguments

- What various points of view can be discussed vis-à-vis this problem?
- What arguments will support or refute this point of view?

#### Defining your own position

- Choose the theory that you want to defend (pro/con/complex). This decision should be made after careful consideration: there are pros and there are cons.
- Choose the arguments that will support this theory and those that will refute the opposing theory.

### Building your case

- Establish a plan (sequence of ideas and “pro” and “con” arguments) that will enable you to demonstrate the merits of the theory you have chosen to defend.
- Make sure that this sequence is clear and convincing (reasoning is logically articulated, important elements are highlighted, the stages of the reasoning are clearly presented, etc.)

## Keeping the Audience in Mind

Building a case is a “customized” process. Taking into account the specific characteristics of your audience is therefore an essential prerequisite to building each case.

- Are you dealing with an individual who you know or who is a stranger to you?
- Are you dealing with a large homogenous or heterogeneous group?
- Are you dealing with a small homogenous or heterogeneous group?
- How is your audience affected by the topic of your argument?
- What is the audience’s level of interest?
- What does the audience already know about the subject?
- Can what you say lead the audience to change its mind?
- What are the audience’s objectives?
- What are the audience’s motivations?
- What points will the audience resist?
- To what system of influence does the audience belong?
- What are the audience’s beliefs?

- What is the audience's ideological position?
- What is its value system? To what extent can these values be changed?
- What is the audience's cultural level?
- What language is the audience likely to understand?
- To what extent is the audience able to criticize you?
- How does the audience perceive you? What is your credibility?

In addition to these questions, based on the personality of your audience and on their **mental, emotional and cultural** universe, it is important to look at another aspect—**the position that the listeners hold within the structure to which they belong.**

As an “actor” in the sociological sense of the term, in an organization where he or she has responsibilities, status and a particular role, the listener develops behavior that is logical and consistent with the local system and the implicit and explicit rules that govern him or her.

## Above All, Successful Communication Means:

### Knowing how to listen

*We frequently tend to spontaneously intervene in the speech of those with whom we are conversing, without waiting for him or her to finish speaking. There is often a reason for this: hasty judgment, digression, disagreement, etc.*

### To listen is to make progress

- Being a good listener means:
  - > concentrating on what is being said
  - > observing non-verbal behavior
  - > showing interest
  - > not being afraid of silence and being able to keep quiet
  - > being tolerant, and
  - > being considerate of the other person.
- Listening can be:
  - > active: showing that you are listening attentively through your gestures, posture and expressions
  - > neutral: showing that you are neither positively nor negatively influenced, or
  - > emphatic: showing that you are paying attention to what the speaker feels (in terms of emotions).
- Listening is extremely important because:
  - > one can obtain objective and subjective information by listening
  - > listening encourages better participation, and
  - > listening helps prevent misunderstandings.

## Raising Awareness

**To be aware:** is to be affected on an emotional level.

**Becoming aware:**

- is a personal discovery
- is gaining consciousness of a problem to which you were previously indifferent

**Result:** you recognize the problem and react to it.

## Successfully Raising Awareness

**Facts:**

- the audience is asked to think based on concrete facts
- the facts should be pertinent to the audience's culture and environment
- isolated facts generally create problems

**Experience:** Listeners should start with their own experiences.

Exchanging views and comparing opinions allows the parties to have a fresh understanding of the problem and to move forward from their initial perception, thanks to dialogue.

**Involvement:** the parties to the dialogue are involved in finding solutions together.

## Some Practical Advice

1. Clarify your **desired objective**. Vagueness, ambiguity and the unexpected are sources of worry and anxiety in any communication situation.
2. **Establish a climate that is favorable to dialogue** through an open and cordial attitude. To do so, try to make the other person feel relaxed and at ease, and remain as natural and as receptive as possible.
3. **Be sure of your objective** and never stray from it.
4. Always **listen** and let the other person speak. Know how to keep quiet and to wait, and never interrupt.
5. **Accept silence.**
6. **Take in as much information as possible**, both at the beginning of the meeting and throughout. If the information phases are rich and detailed, you will have a greater chance of attaining your end goal for the meeting.
7. **Encourage your listeners to express themselves.** Push them to develop their ideas. Show that you understand what they said and that you are interested.
8. Always use the **communication techniques** that are the most suited to the desired objective (rephrasing, questions, etc.) in order to make progress in the dialogue.
9. Above all, always **conclude the meeting in a way that is satisfactory** for your audience so as to ensure that you can follow up on the relationship if you have not yet met your objective.

# Dealing With Objections

## Strategies

### Insincere objection

- Ignore the objection so as to avoid getting involved in a needless disagreement
- Minimize the objection if you cannot ignore it.

### Unfounded objection

- Provide information by explaining and giving proof.

### Sincere and justified objection

- Acknowledge the objection and counter it.

## Tactics

Tactics rely on different techniques. Those used most often are:

Refutation Techniques	Examples of Objections	Examples of Responses to Objections
<b>Yes, but...</b> Acknowledge the remark and restate it from another point of view, while continuing your arguments	"Why do you want to ban polygamy when Allah authorized it?"	"Of course the Quran did not formally prohibit polygamy, but it did lay down conditions for fairness that are nearly impossible to meet."
<b>Weaken</b> Diminish the strength of the objection.	"If the house is to be automatically awarded to the mother, what will happen to the father?"	"We are recommending that the house be awarded to the parent with custody, but we must also note that more often than not the mother has custody of the children."
<b>Deflect</b> Indicate to the speaker that his or her objection has been noted and that it will be addressed later in the argument.	Objection at the beginning of the meeting: "At any rate, this quest for equality between men and women is a lost cause when you see how much resistance there is in some of the Maghreb societies."	"I understand your concern but you will see in the rest of my presentation that the opposite is actually true."
<b>Anticipating the objection</b> Getting ahead of an objection that is sure to come up		"I know that you are going to tell me..."



<b>Interrogative rephrasing</b> Restating the objection as a question so as to have time to think of a response.	"In this day and age, the onset of sexuality is so early that it is in our interest to marry off our daughters at puberty to avoid the risk of reprehensible behavior"	"If I understood you correctly, you think that because a girl has reached puberty, she will be capable of assuming the responsibilities of marriage, that her body is ready to handle a pregnancy and that she will know how to raise children..."
<b>Selective</b> In a series of objections, choose to respond to those that are easiest to refute.	"I would not want my daughter to marry a non-Muslim or for him to be able to one day inherit what she owns. Plus the children might follow their father's religion."	"Experience has shown that in terms of religion, children are more inclined to follow their mother's religion. Therefore, there is a greater risk in allowing a Muslim man to marry a non-Muslim woman because if they ever divorced, it is more likely that the children would embrace their mother's religion."
<b>Testimony</b> Use other peoples' experiences to support your response to the objection.	"What harm is there in having a woman be married off by her guardian, who might be her father or her brother?"	"So, you feel it is normal for a woman judge or minister, whose decisions impact the lives of other citizens, to be considered a minor for life?"
<b>Questioning</b> Ask the speaker to explain his or her objection.	"Women do not need to have the same share as men in an estate."	"Why?"

## Appendix 2

### Evaluation Form

We ask those who consult this Guide or use it as a training tool to photocopy this questionnaire, fill it out and return it to the organization that wrote and published it. Your feedback will enable us to learn from its initial use and incorporate any necessary changes in future editions of the Guide.

#### COLLECTIF 95 MAGHREB-EGALITE

Villa 2, Rue Ibn Moqla, Les Oranges, Rabat, Morocco  
E-mail: cmemaghreb95@yahoo.fr

#### User profile / Basic education:

##### Age

☐ Under 30    ☐ 30-35    ☐ 36-40    ☐ Over 40

##### Sex

☐ Male    ☐ Female

#### Name of your organization:

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#### Country:

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#### Your status within the organization:

☐ Volunteer    ☐ Staff    ☐ Other (please specify):

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**1. How did you obtain this guide?**

- ☐ It was given to me by my NGO
- ☐ It was loaned to me on a personal level
- ☐ It was loaned to me for use in conducting training sessions
- ☐ Other (please specify):

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**2. How many times have you used it?**

- ☐ Never
- ☐ Once
- ☐ More than once (please specify):

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**3. Did you feel this guide was useful?**

- ☐ Yes, How?

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- ☐ No, Why?

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- ☐ No opinion

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**4. Is there anything you would criticize?**

- ☐ Yes, in terms of the form (please specify):

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- ☐ Yes, in terms of the content (please specify):

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- ☐ No

**5. Are there any additional arguments you would add to expand on the points that are developed?**

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*(please add additional pages if necessary)*

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**6. Are there any other aspects that you feel should be discussed in the same manner?**

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*(please add additional pages if necessary)*

**7. Do you have any ideas for other teaching tools?**

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*(please add additional pages if necessary)*

**8. Do you have any recommendations for the originators of this document?**

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*(please add additional pages if necessary)*

## Appendix 3

### Glossary

**Ada:** Custom, customary law.

**Adl:** Justice (adil), fair.

**Ahadith:** Plural of *hadith*. See *hadith*.

**Ahkam:** Plural of *hukm*: legal norms, judgments. There are said to be five ways to qualify human acts: obligatory, recommended, permissible, reprehensible and forbidden.

**Ahl al-hadith:** Supporters of tradition-reports.

**Ahl al-kitab:** People of the Book, those who hold the revealed texts, al-tawrat (the Torah), al-Indjil (the Gospel).

**Amal:** Legal practice, case law. Developed in Cordoba. Spread to Fez starting in the ninth century, known as “the amal of Fez.”

**Aqd:** Contract, agreement, contractual legal document that sets forth obligations.

**Bulugh:** Puberty, majority age as determined by physical maturity.

**Butlan:** Nonexistent transaction, absolute nullity.

**Dalil:** Proof, sign, indication, guide.

**Dharurah:** Necessity. In the works of the *fiqh*, the term has two accepted meanings. In a narrow sense, *dharura* means “state of necessity.” In a broader sense, the word refers to the needs and requirements of social and economic life that legal experts had to take into account when drafting Islamic law.

**Dustour:** Refers to the Constitution in modern Arabic, the basic charter of the State.

**Fardh:** Obligation. Obligatory. One of the five ways to qualify human acts.

**Fasid:** Deficient, irregular.

**Fatwa:** Consultation on a point of law. A juridical opinion pronounced by a mufti or jurisconsult.

**Fiqh:** Originally meant comprehension, intelligence, knowledge. It became a technical term designating the science of Islamic law, then later came to mean the sum of the deductions made by legal experts (*fuqaha*), taken from the following four sources: the Quran, the *sunnah*, the *ijma* and the *kiyas*.

**Gha'ib:** Absent person. A prolonged absence by the husband (four years, four months and ten days) authorizes the wife to seek legal divorce.

**Habs or Waqf:** Mortmain goods.

**Hadith:** Reports referring to the tradition that gives an account of the acts and words of the Prophet. Not all the reported traditions are accepted by the science of *ahadith*. Only the so-called authentic traditions (confirmed by *matn* or *isnad* transmission) are considered to be primary sources. These authentic traditions are contained in books of the *ahadith* called *sahih*.

**Halal:** Lawful act.

**Haraam:** Unlawful act.

**Hidanah:** Right to custody of a child. Under Maliki law, this right lasts until puberty for boys and until consummation of marriage for girls. Devolution of the right to custody follows different rules depending on the various schools of thought. On the one hand, Hanafites and Malikites make the right to custody an exclusive prerogative for women, or at the very least, a responsibility given to women as first priority. On the other hand, the Shafii and Hanbali schools, while giving some women (the mother and maternal grandmothers) undisputable priority, nevertheless do not hesitate to give preference to men over women in certain situations, even if the woman is extremely close to the child.

**Hiyal:** Ruses, tricks, expedients, stratagems. Used with various technical meanings, the term in Islamic law means the use of legal means for illegal purposes that could not be otherwise achieved using the means provided by the *Shariah*.

**Hudud:** In the technical sense, this term refers to the penalties and punishments for crimes set forth in the Quran.

**Iddah:** Waiting period. Period of chastity that a widow or divorced woman must observe before she can remarry.

**Ijma:** Consensus, particularly consensus of the ulema specifically the Medina scholars (in Malikiite).

**Ijtihad:** Literally "effort." In Islamic law, this is the technical term used to designate the use of individual reason. It was Imam Shafii who set principles for using independent reasoning in Islamic law.

**Ikhtilaf:** Difference of opinion between authorities on religious law, in particular, differences between the schools of thought.

**Ikrah:** Constraint, compulsion.

**Islah:** Reform. In modern Arabic, the term refers specifically to reformism as it appeared in the twentieth century through the doctrinal teachings of Mohammad Abdu, Rashid Ridha, etc.

**Jahiliyyah:** Pre-Islamic period.

**Jebr:** Matrimonial constraint.

**Kafalah:** System of legal guardianship for abandoned children.

**Khass:** Personal, private.

**Khol':** Divorce that a woman can seek in exchange for paying compensation to the husband.

**Kiyas:** Reasoning through analogy. Fourth source of conventional Islamic law.



**Li'an:** Oath of anathema.

**Madhhab:** Rite, theological/legal school.

**Madhhab al-Maliki:** Rite of orthodox Islam that became a theological/legal school of thought after adopting the doctrine of Imam Malik bin Anas, died in Medina in 179 AH/795 AD. His al-Muwatta was the first legal book in Islam. Asad Ibn al-Furat brought Malikism to the Maghreb, where it became a truly religious, strict and hard-line orthodoxy.

**Maghreb:** West. The western Islamic world, usually refers to Algeria, Morocco, and Tunisia.

**Mahkamah:** Tribunal.

**Mahr:** Synonymous with *sadaq*. Gifts given by the future husband when the marriage contract is signed. In Islamic law, this is one of the terms of validity of the marriage contract.

**Nafaqah:** Financial support, maintenance.

**Nasab:** Genealogy, relationship, descent, line of consanguinity that relates a person to his or her progenitors. It is based on the paternal line.

**Nikah:** Legal union.

**Qadi/Cadi:** Judge, authority invested with judicial powers.

**Qawamah:** Prevailing, in the sense of having preeminence.

**Ra'y:** Opinion, reasoning.

**Sadaq:** Dowry (see Mahr).

**Shariah:** Voice of the Lord. The Canonical Law of Islam revealed imperative laws.

**Sunnah:** The Prophet's conduct, tradition.

**Tafsir:** Explanation of and commentary on the Quran, exegesis.

**Talaq:** Repudiation.

**Taqlid:** Imitation.

**Tatliq:** Divorce.

**Ta'wil:** Allegorical interpretation.

**Urf:** Customs.

**Usul:** Principles, foundations.

**Usul al fiqh:** Science of the foundations of Islamic law.

**Wali:** Proxy, guardian, guardian for the purposes of marriage.

**Wasi:** Testamentary guardian.

**Wasiyyah:** Will.

**Wilayah:** Guardianship, power.

**Wirathah:** Heritage.

## Appendix 4

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### International Instruments Related to Women's Rights

- **Universal Declaration of Human Rights**

Resolution 217 A (III)

- **Declaration of the Rights of the Child**

> Adoption: UN/GA, November 20, 1959, Resolution 1386 (XIV)

> Ratification:

Algeria: April 16, 1996, with reservations

Morocco: June 26, 1993, with reservations

Tunisia: January 30, 1992, with reservations

- **Convention on the Political Rights of Women**

> Adoption: UN/GA, December 20, 1952

> Entry into force: July 7, 1954

> Ratification:

Morocco: October 5, 1976

Tunisia: November 21, 1967

- **Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages**

> Adoption: UN/GA, December 10, 1962

> Entry into force: December 9, 1964

> Ratification:

Algeria: has not signed this Convention

Morocco: has not signed this Convention

Tunisia: November 21, 1967

- **Convention on the Nationality of Married Women**

> Adoption: UN/GA, January 29, 1957

> Entry into force: August 11, 1958

> Ratification:

Tunisia: November 21, 1967

- **International Covenant on Economic, Social and Cultural Rights**

> Adoption: UN/GA, December 16, 1966

> Opened for signature: December 19, 1966

> Entry into force: January 3, 1976

> Ratification:

Algeria: September 12, 1989, with reservations

Morocco: May 3, 1979

Tunisia: March 18, 1969

- **International Covenant on Civil and Political Rights**

> Adoption: UN/GA, December 16, 1966

> Opened for signature: December 19, 1966

> Entry into force: January 3, 1976

> Ratification:

Algeria: September 12, 1989, with reservations

Morocco: May 3, 1979

Tunisia: March 18, 1969

- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

> Adoption: UN/GA, December 18, 1979

> Opened for signature: March 1, 1980

> Entry into force: September 3, 1981

> Ratification:

Algeria: May 22, 1996, with reservations

Morocco: June 6, 1993, with reservations

Tunisia: September 20, 1985, with reservations and a general declaration

*Appendix 5*

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## **ONE HUNDRED MEASURES AND PROVISIONS**

*For an Egalitarian Codification of the  
Personal Status Codes and Family Law  
in the Maghreb*

## Foreword

In 1991, women's associations and researchers from the three Maghreb countries (Algeria, Morocco and Tunisia) met in Rabat at the invitation of the *Association Démocratique des Femmes du Maroc* (Democratic Association of Women in Morocco) and decided to found the **Collectif 95 Maghreb-Egalité** (Maghreb Equality Collective 95).

They noted that although the situation and status of women in the region had changed significantly, social and political resistance was still extremely strong and new threats against the privileges and rights won by women in the Maghreb were looming on the horizon.

Hailing from a region where the common history, language and civilization have made for a truly unified and homogeneous society, the founding members of *Collectif 95 Maghreb Egalité* decided to base their actions and approach on the dynamic framework of the autonomous women's movement in the Maghreb, which began in the early 1980s.

To accomplish this goal it was necessary, first, to start with collective reflection based on a scientific approach in order to take stock of the progress made in terms of rights won since 1985—the date of the last world conference on women—and then to lay out a course of action for future strategies.

*Collectif 95's* first three years were marked by rare intensity: decisions were always consensus-based and made after hours of passionate and sometimes exasperating, but never fruitless, debate. In the heat of the moment, the members never lost sight of the actual stated objective, which was to establish activism based on an exacting knowledge of the socio-economic and political realities of our countries.

The upcoming Beijing World Conference on Women was an opportunity that the members of the *Collectif* wanted to seize in order to bring the struggles of women in our region to the NGO forum.

*Collectif 95* was thus able to complete three documents:

- An **assessment** of the socio-economic, political and cultural conditions of women in the central Maghreb entitled, ***“Les Maghrébines, Changements et Pesanteurs”*** (“Maghrebian Women: Sluggish Changes”)
- A **white paper** on the status of ratifications, standardization and application of international conventions on the rights of women by the States of the central Maghreb entitled, ***“Les Maghrébines sous Réserves”*** (“Maghrebian Women ‘with Reservations’”)
- An egalitarian codification of the Personal Status Codes and Family Law in the Maghreb entitled ***“Cent Mesures et Dispositions”*** (“One Hundred Measures and Provisions”).

This book, which is part of a series of books published by *Collectif 95*, is a summary of the thematic reports that were written by researchers in the three countries.

Finally, this brief introduction would not be complete without offering a word of thanks to the many people and organizations that supported the *Collectif*, especially the Friedrich Ebert Foundation (Federal Republic of Germany, FRG), which has provided unfailing moral and financial support through all these years, and the European Union, which helped fund this book.

– *Rabéa Naciri*  
Executive Director



## General Arguments

1. *Collectif 95 Maghreb Égalité* is a network that bases its actions on the dynamic women's movement in the three Maghreb countries: Morocco, Algeria and Tunisia. Its funding objective was to promote joint action in light of the upcoming World Conference on Women in Beijing in 1995. The founders of this network—heads of women's organizations, intellectuals and researchers—felt that the fight for equality between women and men was crucial for women to enjoy full citizenship.
2. The theme of the Beijing conference was development, equality and peace. The reference to development should be understood in its general meaning based on the primacy of respect for human rights as an essential factor in any undertaking designed to promote economic, social, political and cultural progress. The commitment to real and legal equality of rights is a decisive factor in meeting the requirements of democracy and the objectives of sustainable human development and is at the very heart of the fundamental choice between progress and regression which our societies are facing.
3. Women's fight to achieve real equality and true citizenship must be based on respect for women's rights in both public and private life. Women's legal inferiority within the family is, in fact, the source of discrimination against women in public life. In turn, this discrimination in the areas of social, economic, political and cultural activities slows down and even impedes any significant progress in terms of legal status for women as established in the legislation on personal status and family law.
4. Women's access to knowledge and information is certainly a key variable in the dynamics of a changing society where the illiteracy rate is still quite high.

In this respect, non-sexist education has a crucial role to play in flushing out prejudices and promoting women's rights and their legitimate demands to control their own bodies and fate. For this reason, it is important that all citizens, especially women, be informed of their rights

so that they can assert and exercise these rights and that all possible pedagogical, technical and audiovisual means be used to facilitate the dissemination of knowledge about these rights and how to use them. Finally, giving greater value to the role of women means adopting new social practices based on a radical change in mentalities.

With regard to basic human rights, the elimination of all forms of discrimination against women—just like the right to development—is one of the essential rights at stake in society.

In the Maghreb countries, morals and mentalities have already begun to change. Looking beyond numbers and statistics, education for young girls is undeniably an irreversible fact, like women's emergence in the labor force, family planning and the use of contraceptives.

Moreover, the proliferation of women's and human-rights organizations is contributing to the democratic movement, the process of secularizing morals and the strengthening of civil society, an essential element in this development.

5. The Maghreb is generally perceived to be a homogeneous zone that is entirely Arab and Islamic. However, the Maghreb is actually Berber, Arab/Muslim, Mediterranean and African all at once. From ancient times to colonization, the Maghreb was the victim of Roman, Byzantine and finally Arab invasions and occupations, with this last resulting in the Islamization of nearly the entire Maghreb, except for a few Jewish and Christian communities, at the end of the thirteenth century.

The region then lived through French colonial domination from the mid-nineteenth century to the mid-twentieth. Maghrebian societies are the product of this diverse and eventful history.

The place reserved for women cannot help but be the product of all these civilizations on the Mediterranean's perimeter, in which social organization is based on the agnatic, patriarchal family. The family is structured around the power of a chief—the father—and recognizes only the preeminence of the male paternal line. The inferior status of

women and their exclusion from public life is a basic element of this patriarchal system, which even goes so far as to legitimize all forms of violence and attacks on women's physical and moral integrity.

6. In the Maghreb countries, this family structure was consolidated by traditional Islamic law, or *fiqh*, which was the only law applied to family law. In contrast, all other areas of the law underwent transformations resulting primarily from the colonial invasion. On the eve of independence, the legal model for Muslim family was the same throughout the Maghreb.

The family was (necessarily) legitimate and based on blood ties. Birth out of wedlock was not recognized and adoption was prohibited. Polygamy was accepted everywhere and the marital relationship was fragile, entirely dependent on the will of the husband. Women were always in a situation of inferiority, subject to:

- the right of a father to force his child to marry
- the husband's authority, to which she had to submit and obey
- the possibility of having only custody of young children, without any guardianship power
- unequal share in inheritances.

7. After independence: **Morocco** perpetuated the tradition in the ***Moudawana*** and chose not to depart from the content of traditional Islamic law. This family code, promulgated in 1957 and amended in 1993, appears to be a codification of the *fiqh*. In matters where the law is silent, the code explicitly refers back to dominant opinion or the unchanging case law of the Maliki rite.

**Algeria** took twenty years to promulgate a **Family Code** in 1984. This law establishes the legal inferiority of women within the family. In cases where the law is silent, the Algerian code refers back to the provisions of the *Shariah*.

In contrast, the **Tunisian Personal Status Code**, promulgated on August 13, 1956, affirmed a more modern approach, and this code integrates some of the basic principles that have prevailed in the evolution of contemporary societies:

- monogamy
- legal divorce
- emancipation of women
- the interests of the child (adoption).

Tunisian legislators also confirmed this trend in several successive reforms that strengthened the rights of women in the family. Since 1956, legislators have influenced matters of custody, divorce, legal guardianship for the mother and the abolition of women's duty to obey their husbands.

Although the Code does not explicitly refer to Islam, it is silent on certain issues (bicultural marriage, inability of non-Muslims to inherit from Muslims), conservative on others (triple divorce, dowry, having been nursed by the same woman as an impediment to marriage) and loyal to tradition in inheritance-related matters.

References to Islam are found in Tunisian law, but not in the Personal Status Code. Islam's continued presence in family law is expressed in the official discourse that accompanies and legitimizes the Code. Legislators have always been careful to present reforms in the context of a rereading of the *Shariah*, which allows case law to revert to a patriarchal and conservative vision of the family under the guise of respect for Islamic principles.

Although the constitutions of Algeria, Morocco and Tunisia uphold the principle of equality among citizens, women in the Maghreb are still undeniably relegated to an inferior legal status within the family.

8. In the area of women's rights, international standards establish three basic principles: liberty, equality and non-discrimination.

These principles of justice and liberty are also values upheld by millions of men and women for whom Islam is a religion of happy medium, of tolerance, love of knowledge and respect for human dignity and love.

The universality of the values and principles serving as the basis for the international instruments that promote and protect human rights is an essential reference. In fact, this system of values has been the foundation upon which nearly a half a century of international consensus has gradually been built—a consensus that no State challenges on the whole, although when adopting these instruments some may express more or less explicit reservations about various provisions.

This reference to universality in no way means that human rights are a Western monopoly. Emphasis must be placed on the diversity and multiplicity of the sources of thought, which have converged—over several thousand years and across all continents in an intercultural consensus—to form a culture of human rights, based on respect for human beings and their dignity, and on the rejection of all forms of discrimination.

The regional conference held in Dakar in November 1994 to prepare for the World Conference in Beijing highlighted this reference and emphasized the fact that ***“Human rights are innate and inalienable rights independent of the State, enjoyed by all human beings regardless of their race, religion, beliefs, nationality or sex. Since 1949, numerous human rights instruments and resolutions have been adopted. The many resolutions adopted in order to give women and girls equal rights...are guidelines that can help improve women's legal status and human rights situation. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, which more than 34 countries in the African region have already signed, explicitly recognizes that the widespread discrimination women continue to suffer violates the principle of equality of rights and the principle of human dignity”*** (African Platform for Action).

The resolution implementing this platform calls upon *“The Inter-Parliamentary Union and the Union of African Parliaments to urge African nations who have not yet done so, to ratify without reservations and without delay all of the international and regional conventions and charters on the legal rights of women, and to incorporate them into their domestic legislation.”*

9. Furthermore, the challenges of modernity also require action on the economic, political, legislative, demographic, educational and cultural levels.

In Maghreb countries, the drafting of family law in the modern sense does inevitably challenge the “ability of Islam to question itself and to set an evolutionary dynamic in motion on its own.”

Reflection on the Muslim family, therefore, does raise the issue of independent thought vis-à-vis certain constraints that are often presented as being inescapable, or even immutable.

In reality, Islamic law is a truly vast set of legal rules that was created during the first three centuries of the *Hejrah* from the *ahadith* (reports of standards inspired by the recommendations and behaviors attributed to the prophet Mohammed). These standards make up the *sunnah*. By the third century of the *Hejrah*, Islamic law was set and the doors to *ijtihad* (the effort of creative interpretation) had been closed.

This immutability of the *fiqh*, (the principles of Muslim legal doctrine) has apparently prevented legal experts and legislators from adapting the law to the circumstances of a new era.

It was not until the beginning of the last century that voices with some authority began calling for major reform of our laws. The requirements of urbanization, industrialization and international trade led to the adoption of modern constitutional, administrative, legal, commercial and penal legislation.

Family law, and hence the legal status of women, has nonetheless continued to be based almost exclusively on traditional Islamic law. In addition, the argument that the dogmas of this law are immutable has been systematically advanced with regard to the status of women, even though in other areas, increasing numbers of exceptions to and even departures from the law have been made.

This desire to adapt to the demands of modern times became apparent thanks to the efforts of the great reformers of Islam such as Jamal al-Din al-Afghani, Mohammed Abdu, Rashid Rida, Ali Abd al-Raziq, Kacem Amin and Tahar Haddad, whose ideas on the status of women found a legislative advocate in the person of Habib Bourguiba.

The focal point of Muslim reformist thought is that Islamic law is, in essence, an evolving law. Challenging the dogmatic assimilation imposed between Islam and Islamic law, which is a product of history, successive generations of reformers have expanded the debate on modernity to include all aspects of our family legislation. They have done so without questioning Islam as a religion, or as a cultural heritage or civilization.

They base their arguments on solid information about the content and meaning of Islamic law so as to better understand and overcome the difficulties that arise when this law interferes in a secularized State.

- 10.** It is on this foundation—equality, liberty and non-discrimination—and with the goal of harmonizing domestic and international legal standards, that legislation on the status of women began to evolve and develop to varying degrees in our countries. The one hundred measures and provisions proposed by our Collective are dedicated to legislative action in the area of family relationships.

The approach that *Collectif 95 Maghreb-Egalité* took was to draft one hundred measures and provisions for an egalitarian codification of personal status codes and family law in the Maghreb. Now, the goal is to explicitly establish the following elements through the reference texts of our law, that is, constitutions and codes:

- Equality between men and women in law, in duty and before the law
- Equality between spouses through the abolition of the duty to obey and the notion that there is one head of the household, and by giving women the opportunity to take responsibility for providing for the family just like men
- Substitution of parental responsibility for parental authority
- Equal rights in inheritance
- Equality of rights between women and men in terms of attributing nationality to the children
- Elimination of all forms of racial or religious discrimination in family relationships
- Legal protection for children before and after birth through recognition of children born out of wedlock.

In the Maghreb today, the issue of equality between women and men in all areas is, in fact, related to the basic problem of secularizing family law.

## General Provisions

**Article 1:** Personal status and family relationships shall be governed by the provisions of this Code.

**Article 2:** A family shall be made up of persons united by marriage, blood ties or through a court order.

## BOOK ONE: MARRIAGE CHAPTER 1: ENGAGEMENT

**Article 3:** An engagement is a promise of marriage between two intending spouses. An engagement does not constitute marriage and either party may break the engagement.



**Article 4:** If the breaking of the engagement causes harm to the other party, damages may be awarded.

**Article 5:** Each of the intending spouses shall be entitled to the return of any gifts offered to the other person unless he or she is the one who broke the engagement.

## CHAPTER II: FORMATION OF MARRIAGE

**Article 6:** The minimum age for marriage shall be set at the full age of 18 years for both women and men, which is the age of legal majority.

**Article 7:** Marriage shall be formed solely through consent of the two intending spouses. The intending spouses themselves shall be the ones to agree to the marriage.

**Article 8:** Persons under 18 years of age may enter into marriage only with permission from a judge.

**Article 9:** Request for permission may be brought before a judge by the mother or father, the legal guardian, the minor or by the public prosecutor's office. The judge shall render a decision after having heard the intending spouses and the guardian and may grant the marriage only if there is serious reason to do so. The order authorizing the marriage is not open to appeal.

**Article 10:** Impediments to marriage shall fall under one of two categories: permanent or temporary.

- Permanent impediments are due to consanguinity or affinity
- Temporary impediments are due to the existence of a marriage that has not been dissolved or non-expiration of the mandatory waiting period before a woman may remarry following death of her husband or the cessation of cohabitation preceding divorce.

**Article 11:** A person shall be prohibited from marrying:

- his or her ascendants
- his or her descendants
- the ascendants' sisters and brothers
- the descendants of his or her sisters and brothers

**Article 12:** Marriage of any person with the ascendants or descendants of his or her spouse and the spouses of his or her ascendants and descendants shall be prohibited.

**Article 13:** Polygamy shall be prohibited.

**Article 14:** A person whose previous union has not been dissolved shall be prohibited from marrying. Any person who contracts a marriage with another person while still involved in a marriage that has not been dissolved shall be liable to a year in prison and a fine.

**Article 15:** A woman shall be prohibited from marrying before the expiration of the mandatory waiting period following death of her husband or the cessation of cohabitation preceding divorce.

This period shall last three months and shall take effect starting from the dissolution of the marriage by death or by final ruling in a court-ordered divorce.

This period shall end:

- upon birth of the child, if the woman is pregnant
- upon production of a medical certificate stating that the woman is not pregnant
- upon the remarriage of her ex-husband.



**Article 16:** A difference in religion shall not be an impediment to marriage. A marriage between a Muslim woman and a non-Muslim man shall be valid.

**Article 17:** Marriage shall be entered into before a registrar of births, deaths and marriages or any other authority vested with such powers by the law, in the presence of both parties and two witnesses.

Witnesses may be of either sex.

**Article 18:** Any clause concerning property may be inserted into the marriage contract.

**Article 19:** Marriages must be recorded with the Office of Vital Statistics.

The actual marriage license or a certificate issued by a registrar of births deaths and marriages shall be considered proof of marriage.

### CHAPTER III: ANNULMENT OF MARRIAGE

**Article 20:** Any union entered into in violation of the provisions of Article 7(1) or Articles 10, 11, 12, 13, 14 or 15 of this Code shall be annulled.

**Article 21:** Any marriage entered into outside the scope of the legal forms set forth in Article 17 shall be annulled.

**Article 22:** The annulment of a marriage shall result in the following effects:

- proof of relationship by descent
- the obligation for the woman to observe a mandatory waiting period
- impediments to marriage resulting from affinity.

### CHAPTER IV: EFFECTS OF MARRIAGE

**Article 23:** Husbands and wives owe each other mutual respect, fidelity and assistance. Together, they shall manage the family, raise and protect the children and choose the family home. They must avoid causing each other any kind of harm whatsoever.

**Article 24:** Each spouse has the right to:

- practice a profession
- administer and dispose of his or her own personal property
- keep his or her family name, and
- enjoy freedom of movement.

**Article 25:** Spouses shall have shared responsibility for supporting the family based on their financial contribution and/or contribution in the form of household work

### BOOK TWO: DIVORCE

**Article 26:** Divorce may be granted only by a court.

#### CHAPTER 1: CASES OF DIVORCE

**Article 27:** Divorce shall be granted:

- in cases of mutual consent by both spouses
- at the request of either spouse on the grounds of harm suffered
- upon a no-fault request by either spouse
- at the request of either party or by both parties for shared fault.

#### CHAPTER II: DIVORCE PROCEEDINGS

**Article 28:** Divorce may be granted only through a court decision following an attempt at reconciliation.

**Article 29:** The reconciliation process shall be mandatory and shall take place before a Family Affairs judge prior to any hearing on the merits.

If the defendant fails to appear and notice to appear was not personally served to him or her, the Family Affairs judge shall postpone the case for rehearing and shall call upon the assistance of any person whom he or she deems useful in order to personally serve notice to appear on the party in question or to determine his or her true legal address at which the notice can be served.

In cases involving minor children, three reconciliation hearings shall each be held at least thirty days after the preceding hearing.

The judge must attempt to reconcile the spouses. To do so, he or she must meet separately and personally with each spouse and then meet with both spouses together.

The judge may require the services of any person whose assistance he or she deems useful, including the lawyers of each party.

**Article 30:** The Family Affairs judge may order, even *proprio motu*, any interlocutory measures necessary concerning separate residences for the spouses, alimony or child support, custody of the children and visitation rights. The parties may agree to expressly renounce any or all of these measures, provided that this renunciation does not cause any harm to the interest of any minor children.

The Family Affairs judge shall determine the amount of alimony and child support allowance to be paid based on the information available to him or her at the time of the reconciliation attempt.

The interlocutory measures shall be set forth in an immediately enforceable order which shall not be open to appeal on fact or on a point of law, but which may be revised by the Family Affairs judge provided he or she has not rendered a decision on the merits.

**Article 31:** The judge may shorten the proceedings in cases of divorce by mutual consent, provided that the interests of the children are not harmed in any way.

**Article 32:** If the attempt to reconcile fails, the Family Affairs judge shall refer the matter to the court, which shall rule on the divorce and on any other consequences resulting therefrom in a decision open to appeal.

The provisions of the ruling relating to child custody, child support, spousal support, separate residences for the spouses and visitation rights shall be binding, notwithstanding any appeal on fact or a point of law.

### CHAPTER III: CONSEQUENCES OF DIVORCE

**Article 33:** Damages for material loss and moral harm suffered by either of the spouses and resulting from the divorce shall be awarded on the basis of Article 26 (2), (3) and (4).

**Article 34:** Concerning women who cannot support themselves, damages for material losses may be awarded in the form of a monthly, spousal support allowance, including housing, starting from expiration of the mandatory waiting period and based on the standard of living to which she was accustomed during married life.

This allowance may be increased or decreased on a yearly basis to reflect the cost of living index and any fluctuations that may occur. Said allowance shall be paid until the death of the divorced woman, until any changes occur that would affect her social standing through remarriage or until she no longer needs the allowance. In the event the divorced husband dies, this allowance shall be included in the liabilities of the estate and consequently must be paid off in a single payment via an out-of-court settlement with the heirs or through court proceedings, based on the age of the beneficiary at that time. The full amount shall be paid in a single payment, unless the beneficiary prefers to have the allowance paid in the form of capital.

**Article 35:** Child custody shall be awarded to one of the two parents or to a third party. In making the decision, the judge shall take the interests of the child into consideration.

**Article 36:** The non-custodial parent shall have visitation rights.

The judge may award housing to the non-custodial parent if the interest of the child so warrants.

The non-custodial parent shall maintain supervisory rights over his or her child, which he or she shall exercise if necessary through the intermediary of the Family Affairs judge.

**Article 37:** The non-custodial parent shall contribute to supporting the child.

The marital home shall be awarded to the parent with custody of the children if that parent does not have a house.

**Article 38:** The parent to whom custody is awarded may renounce such custody.

In such cases, the judge shall designate a new guardian, taking the interests of the child into consideration.

The judge may revoke child custody rights from the custodial parent if said parent fails to perform his or her duties.

**Article 39:** The right to custody may not be challenged if the custodial parent remarries unless a judge rules otherwise in the interest of the child.

### BOOK THREE: DESCENT

**Article 40:** Descent is the relationship that unites a child to his or her mother and father.

#### CHAPTER 1: ESTABLISHMENT OF DESCENT

**Article 41:** Descent shall be established by:

- marriage
- recognition
- court order

#### SECTION 1: ESTABLISHMENT OF DESCENT THROUGH MARRIAGE

**Article 42:** Descent of a child born in wedlock shall be established with respect to his or her mother and father. Descent shall also be established if the child is born within less than three hundred days after divorce or the death or absence of the father.

**Article 43:** The husband may legally disown a child if he has factual evidence, corroborated by scientific proof if necessary, to prove that he cannot be the father.

**Article 44:** The father must initiate disownment proceedings within six months following the birth of the child if he is present. Failing that, he may initiate such proceedings within six months of his return or within six months following the discovery of the false statement if the birth of the child was hidden from him.

**Article 45:** If the husband dies before he can initiate the proceedings, his ascendants and descendants shall not be legally entitled to contest the legitimacy of the child.

**Article 46:** The disownment suit, held in the presence of the mother, shall be directed against an ad hoc guardian appointed by the judge for the child.

**Article 47:** A mother may contest the paternity of the father through any means available, but only for the purposes of establishing legitimacy when she remarries the child's true father after dissolution of her previous marriage.

**Article 48:** This action against the husband or his heirs will be ruled inadmissible unless it is accompanied by a request for legitimation. Said request must be made by the mother and her new spouse within six months of their marriage and before the child reaches the age of five.

**Article 49:** The judge shall rule on both requests in a single ruling and may not hear the paternity suit unless the request for legitimation is admissible.

## SECTION 2: ESTABLISHING DESCENT THROUGH LEGAL RECOGNITION

**Article 50:** The descent of a child may be established through legal recognition by the mother or father only in the following ways:

- a declaration to the Office of Vital Statistics upon or after the birth of the child
- a declaration by the mother and father at the time of their marriage
- a separate, officially recorded instrument.

A child may be legally recognized only while living.

**Article 51:** Recognition may be challenged only through legal proceedings initiated by the person who sought recognition or by the child himself or herself. Such proceedings may also be initiated by the public prosecutor's office if evidence from vital statistics records indicates that the stated descent is implausible.

## SECTION 3: ESTABLISHMENT OF DESCENT BY LEGAL PROCESS

**Article 52:** Descent from the mother or father may be established through a maternity or paternity suit or through adoption.

**Article 53:** Only the child may initiate a maternity or paternity suit. If the child is a minor, he or she shall be represented by his or her guardian. Such suits shall be barred starting two years after the child has reached the legal age of majority.

**Article 54:** A maternity or paternity suit shall be admissible only if there is prima facie or presumptive evidence. Proof may be by any means.

**Article 55:** Adoption shall be permitted in the interest of the child.

Adoption shall be granted only through legal process.

**Article 56:** The adoptive parent must be a person of legal age who has full civil capacity. Said person must be of sound mind and body and able to provide for the adopted child.

No one may be adopted by more than one person, except by two spouses.

Adoption by a married couple will be granted only if the application originates from both spouses.

The age difference between the adoptive parent and adopted child must be a minimum of 15 years.

The adopted child must be a minor.

**Article 57:** Adoption shall be granted through a ruling handed down in the presence of the adoptive parent and, if necessary, the mother and father of the adopted child or a representative of the administrative authority holding public guardianship of the child, or the unofficial guardian.

**Article 58:** The adoption order shall be final and irrevocable, however, the child may contest said adoption after reaching legal age.

**Article 59:** Adoption shall confer the same rights and responsibilities as other types of descent. However, if the parents of the adopted child are known, the impediments to marriage referred to in Articles 10, 11 and 12 of this code shall apply.

## CHAPTER II: EFFECTS OF DESCENT

### SECTION 1: NAMES

**Article 60:** A child whose descent has been established with respect to only one parent shall bear the name of that parent. If descent has been established with respect to both parents, the child shall bear the name of his or her mother and father.

### SECTION 2: GUARDIANSHIP

**Article 61:** Guardianship consists of protecting and raising the child, administering his or her property and representing him or her in court, and in all other acts of everyday life such as management of his or her affairs and financial transactions, and permission to obtain a passport or to travel.



**Article 62:** Guardianship shall end:

- when the child reaches legal age
- when the child is emancipated through marriage or court order, starting from the age of sixteen full years.

**Article 63:** During marriage, the mother and father shall jointly exercise guardianship as a matter of law. The parents shall have rights and responsibilities concerning the custody, supervision and upbringing of the child.

The mother and father shall jointly administer the child's property.

Any disputes shall be brought before a Family Affairs judge.

**Article 64:** In the case of divorce, the custodial parent shall exercise guardianship. If custody is awarded to a person other than the two parents, the judge shall designate which parent or third party shall exercise guardianship. In any case, the non-custodial parent shall retain the right to supervision, which he or she shall exercise through the intermediary of the Family Affairs judge.

**Article 65:** If one of the two parents is incapacitated or absent, the other parent shall have guardianship. If one of the two parents dies, the surviving parent shall exercise guardianship. If both parents die, guardianship shall be exercised by a testamentary guardian designated by either of the parents.

**Article 66:** A parent who is the sole person to have recognized a child shall have guardianship. If the child is legally recognized by both parents, the custodial parent shall exercise guardianship. The non-custodial parent shall retain the right to supervision, which he or she shall exercise through the intermediary of a judge.

**Article 67:** In all other cases, a guardian shall be appointed by a judge based on the interests of the child.

**Article 68:** Any disposal of the child's property must first be authorized by a judge.

## BOOK FOUR: OBLIGATION TO SUPPORT (MAINTENANCE)

**Article 69:** Support comprises everything necessary to life, including food, clothing, medical care, schooling and lodging.

**Article 70:** Spouses must support each other. Ascendants and descendants, regardless of the degree of relationship, are also entitled to receive a support allowance.

**Article 71:** The amount of the allowance shall be assessed in proportion to the income of the person who owes the allowance and the needs of the person claiming it, taking living conditions into account.

**Article 72:** An ascendant, regardless of the degree of relationship, must support his or her minor descendants who are incapable of providing for their own needs, regardless of the degree of relationship.

Support shall be provided to the descendants until they have finished school, provided they are not older than twenty-five years. Support shall be provided to disabled descendants who are unable to provide for their own needs, regardless of their age.

**Article 73:** If there is more than one child, the children shall contribute to supporting their ascendants in proportion to their wealth and not their number.

**Article 74:** The obligation to support between the spouses shall not be subject to limitation.

**Article 75:** If one of the spouses is unable to support the children, the obligation shall fall to the other spouse who is in a position to do so.

**Article 76:** If spousal or child support is deliberately not paid for over a month, starting from the due date, the payor shall be liable to a prison sentence ranging from three months to one year. Once payment is made, the proceedings or sentence shall be suspended. The amount of spousal or child support shall automatically be paid to the beneficiary out of a guaranteed fund. Said fund shall have the right to seek recourse against the payor in order to recover the amount [it has] paid out.



**BOOK FIVE: ESTATES**

**Article 77:** Probate begins upon real or presumed death, the latter being duly established through a court ruling.

**Article 78:** If two persons die and it is impossible to determine which of the two died first, neither may inherit from the estate, regardless of whether they perished as a result of the same event or not.

**Article 79:** Any liabilities attached to the estate shall be paid in the following order of priority:

- any debts incurred through real property included in the estate
- funeral and burial costs
- any documented debts owed by the deceased
- any valid and binding bequests
- the inheritance.

**Article 80:** The requirements to inherit are:

- to be alive or at least to have been conceived at the time probate begins
- to not be debarred from inheriting.

**Article 81:** A child who has been conceived shall be entitled to his or her share of the estate if he or she is born alive.

**Article 82:** Estates shall be passed on to the surviving spouse, descendants, ascendants and collateral heirs of the deceased.

**Article 83:** Any collateral heirs shall be excluded from the estate if the spouse, descendants or ascendants of the deceased are still living.

**Article 84:** When inheriting an estate, brothers and sisters who are full siblings, half-siblings on the mother's side or half-siblings on the father's side shall be entitled to an equal share.

**Article 85:** In all other cases, the estate shall be passed on to the closest relative.

**Article 86:** In the event there are no heirs the estate shall revert to the state.

**Article 87:** The male and female descendants of a person who has preceded them in death shall inherit in place of the deceased, with equal shares going to each.

**Article 88:** Women and men with the same degree of relationship to the deceased shall be entitled to an equal share of the estate.

**Article 89:** A wife or husband shall inherit the same share in the estate of the spouse who preceded them in death.

**Article 90:** The surviving spouse shall receive life tenancy of the marital home. Said tenancy shall lapse if the surviving spouse remarries.

**Article 91:** A difference in religion shall not constitute debarment from inheriting.

**Article 92:** The following persons shall be debarred from inheriting and thus, are excluded from the estate:

- persons who have murdered the deceased, whether said person is the perpetrator or an accomplice
- persons who are guilty of bringing a capital charge against the deceased through false evidence.

**BOOK SIX: WILLS**

**Article 93:** A will is a document in which a person freely disposes of all or part of his or her property, and which takes effect upon his or her death.

**Article 94:** A person may dispose of only a third of his or her patrimony if his or her ascendants, descendants or spouse are still living. If they are not living, all of the patrimony may be disposed of.

**Article 95:** Bequests may be made in the form of property not subject to life tenancy or in the form of life tenancy. Life tenancy bequests shall cease at the death of the legatee and the object of the bequest shall return to the estate of the testator.

**Article 96:** A will must be in the form of a notarized instrument, and may be revoked in the same form.

**Article 97:** Bequests made to a person of a different faith shall be valid.

**Article 98:** The legatee shall have two months following the death of the testator to accept the bequest. Silence on the part of the legatee during these two months shall constitute acceptance. Bequests accepted in part shall be executed for this part. The remainder of the bequest shall be null and void.

**Article 99:** All forms of *habs* and *waqf* shall be prohibited.

## FINAL PROVISION

**Article 100:** All provisions contrary to those contained herein are hereby repealed.

## INFORMATION ABOUT SOME OF THE ARTICLES

*Collectif 95 Maghreb-Egalité* put extra effort into writing some of the chapters in this draft Personal Status Code, namely those on:

- Polygamy
- Marriage between a Muslim woman and a non-Muslim man
- Inheritance
- Adoption

The text below describes the referents used by *Collectif* in writing these chapters.

## POLYGAMY

There are three doctrinal trends on polygamy in Islamic law. The first trend unquestionably approves of polygamy. The second approves of polygamy in principle but sets limits on it and the third bans polygamy. We share the latter point of view (Art. 13).

Since advocates of banning polygamy have already developed their arguments clearly in various other works, we do not see the need to repeat them here. We will simply add the following points:

1. The institution of polygamy must be understood in the context of social factors and human relations as they existed in pre-Islamic Arab society.

Polygamy was actually an attempt to rein in the anarchy that prevailed at the time over the appropriation of women. From this perspective, limiting the number of wives to four can be seen as the first milestone on the road to women's liberation.

In addition, since Islamic tradition is inclined toward gradual evolution, limiting the number of wives to one after fifteen centuries of human development can be seen as the next logical step in the process initiated by Islam.

2. Moreover, since justice is one of the main pillars of Islam, the elimination of polygamy altogether would certainly be a way to show respect for justice, in addition to the fact that this ban would be in keeping with the development of today's society.

## MARRIAGE OF A MUSLIM WOMAN TO A NON-MUSLIM MAN

One of the temporary impediments to marriage set forth in the law is the marriage of a Muslim woman to a non-Muslim man. We do not approve of this prohibition for the following reasons:

1. The first reason is rooted directly in the Quran:

- "You shall not wed pagan women, unless they embrace the faith. A believing slave-girl is better than an idolatress, although she may please you."<sup>(1)</sup>
- "Believers, when believing women seek refuge with you, test them...If you find them true believers, do not return them to the infidels [of Mecca]; they are not lawful to the infidels, nor are the infidels lawful to them."<sup>(2)</sup>
- "[Now], lawful to you are the [chaste] believing women ...and those who were given the Scriptures before you."<sup>(3)</sup>

These are the verses quoted in support of making the marriage of a Muslim man with a Jewish or Christian woman lawful and the marriage of a Muslim woman to a non-Muslim man unlawful.

However, these particular verses are not formal verses, but simply passages that state general principles. This is what explains the differences of opinion over the interpretation of these verses. And since interpretation is a human effort, the end verdict of something being lawful or unlawful is not sacred in nature.

(1) Quran, surah *Al-Baqara*, "The Cow," verse 221.

(2) Quran, surah *Al-Mumtahana*, "She Who is Tested," verse 10.

(3) Quran, surah *Al-Ma'ida*, "The Table," verse 5.

Furthermore, some jurisconsults feel that the term *mushrikeen* refers to non-Muslims, in other words, non-believers or *kuffar*. They argue that the term *kuffar* refers both to people of the Book and to idolaters. From that, they infer that the ban as it applies to Muslim women is categorical in nature insofar as it refers to all infidels.

Others hold the opposite view and think that this ban applies to all Muslims, men and women alike. This is true for the "Imamists" who prohibit Muslim men from marrying women from among people of the Book, based on the verse that says "You shall not wed pagan women..."<sup>(4)</sup>

Moreover, whereas jurisconsults do not differentiate between people of the Book and idolaters in banning Muslim women from marrying non-Muslims, they do not hesitate to draw this distinction in justifying the marriage of a Muslim man to a non-Muslim woman. Although Jews, Christian and idolaters are all lumped together under the term *kuffar*, or non-believers, it is nevertheless true that people of the Book are closer to Muslims than are idolaters. The best proof of this is that Allah includes them in many verses. In addition, Jews and Christians cannot be compared to idolaters because they believe in one God, as the Quran confirms a number of times.

Despite the doctrinal differences on the issue of whether or not the verses in the surah "The Cow" or the surah "The Table" should be used as a reference in determining the meaning of the terms *muhsinast* (chaste women) and *kitabiyat* (women from among the people of the Book), jurisconsults again distinguish between idolaters on the one hand, and Jews and Christians on the other. They infer from this distinction that the term *kuffar* (non-believers) includes only idolaters. To bolster their position, they refer to numerous verses in which Allah speaks to Jews, Christians and Muslims alike. They also maintain that the verse imposing this ban was repealed by the verse in the surah called "The Table," hence the reason this verse is called an "abrogative verse." On that basis, they allow Muslim men to marry "chaste and free" Jewish or Christian women, but not idolatresses.

(4) Quran, surah *Al-Baqara*, "The Cow," verse 221.

In light of the foregoing, and in order to establish equality between men and women in marriage with people of the Book, we base our position on arguments taken from doctrine without, however, discriminating on the basis of sex. Otherwise a Muslim man would be allowed to do what a Muslim woman is prohibited from doing.

It is important to note that there are doctrinal trends in Islamic law that use some of the verses and *ahadith* as a basis for imposing this same prohibition on men, thereby putting men and women on equal footing.

However, given that the two interpretations advanced in doctrine (restrictive vs. broad) are but the fruit of human effort, we are in favor of the interpretation that maintains equality between men and women, so as to support the principle of freedom of marriage and freedom of choice without regard to religion, as set forth in international conventions.

2. The second reason is based on the fact that the governments in the Maghreb have ratified a certain number of international conventions, albeit with reservations in some cases, including the New York Convention of September 10, 1962 on the "Consent to Marriage, Minimum Age for Marriage and Registration of Marriages," which states that women have the same right to choose their spouse as men do, without any discrimination on the basis of color, belief or race.

Consequently, domestic law needs to be brought into line with the standards in the international conventions. Otherwise, ratification of these various conventions would be devoid of meaning. The act of ratification has legal value that should place the convention above family law or else the binding force of the convention will be inferior to that of domestic laws.

These are the two main principles, in a nutshell, that guided the drafting of the provisions of Article 13 so as to be in line with equality between men and women.

## INHERITANCE

Islam has opted to change the status of women gradually. It started by bringing women out of their state of near-slavery by giving them the right to own property and the ability to inherit, in accordance with the verse that says, "Men shall have a portion in what their parents and kinsmen leave; and women shall have a share in what their parents and kinsmen leave; whether it be little or much..."<sup>(5)</sup>

This verse, which was the first verse revealed in matters of inheritance, establishes the principle of equality between the sexes. However, given the weight of its impact on inheritance practices of the pre-Islamic period, some Muslims were opposed to this principle. They argued, "How can the ability to inherit be given to someone who does not ride a horse, carry a sword or fight the enemy?" Therefore, Islam did amend the principle of equality by limiting the woman's share to half the man's. "Allah has thus enjoined you concerning your children: a male shall inherit twice as much as a female."<sup>(6)</sup>

However, although the Quran imposed this double-share rule, which is actually an exception to the general principle that preceded this rule, it does establish equality between women and men in some cases. This is the case when a father and mother inherit from a son who has children, and for brothers and sisters in the special case called *kalalah*. Furthermore, a woman actually receives a greater share than the man when the deceased does not have any children and his mother and father are the only heirs. "...but if he leave no children and his parents be his heirs, his mother shall have a third."<sup>(7)</sup>

In light of the foregoing, the text that gives a woman half of a man's share needs to be re-examined from the standpoint of the socio-historical context in which it was revealed. Although Islam gave men the obligation to provide for women, true to the reality of the times, and although jurisconsults used

(5) Quran, surah *Al-Nisa'*, "Women," verse 7.

(6) Quran, surah *Al-Nisa'*, "Women," verse 11.

(7) Quran, surah *Al-Nisa'*, "Women," verse 11.



this as an argument to justify the disparity between the sexes in matters of inheritance, the reality today is nonetheless quite different.

In fact, thanks to access to education and employment, women are no longer financially dependant on men. They now contribute to household expenses; moreover, it is not uncommon for a woman to be the sole breadwinner. Thus, the reason behind this double-share rule no longer exists. In accordance with the jurisprudential rule that says on the one hand, "all principles live and die with that on which they are based," and on the other, "the evolution of rules over time cannot be denied," the double-share rule should be modified, since the reason has changed, and be replaced by one of the basic principles of Islam - equality between men and women. As Tahar Al Haddad so rightly observed:

"If we look closely at the rules set by Islamic law, as well as their objective, we see that these rules attempt to establish equality between men and women in all aspects of life."<sup>(8)</sup>

"By changing gradually," adds the author, "Islam has kept us from sinking into doubt and believing that in its very essence, Islam aims to establish discrimination between the sexes."<sup>(9)</sup> Moreover, as Muslim doctrine states, "there is nothing that can lead us to believe in the everlasting nature of this situation. Has not Islam itself modified this context by changing the pre-existing reality through the establishment of new principles, stressing the need to modify this reality based on changing times?"<sup>(10)</sup>

(8) Haddad Tahar, *Les femmes dans la Charia* ["Women in the Shariah"], p. 111.

(9) Haddad Tahar, *Les femmes dans la Charia* ["Women in the Shariah"], p. 112.

(10) Haddad Tahar, *Les Femmes dans la Charia* ["Women in the Shariah"], p. 38.

## ADOPTION

The issue of adoption is a subject of extreme dissension between traditionalists and modernists.

Many jurisconsults, in fact, think that adoption is prohibited under Islam, based on the verse pertaining to the Prophet's adoption of Zayd Ibn Harith. Those who support this point of view refer to the following verses:

- "Mohammed is the father of no man among you. He is the apostle of God and the Seal of the Prophets."<sup>(11)</sup>
- "Name your adopted sons after their fathers,"<sup>(12)</sup> (meaning adopted children should be called by their real father's name).

In their eyes, these verses provide irrefutable proof that adoption is unlawful under Islam. Moreover, they add, adoption goes against the rules of descent because of the repercussions in terms of inheritance.

The inheritance argument has been the main argument advanced by adoption opponents, who claim that adoption would entail granting the ability to inherit to a person to whom Allah has not given this right.

In reality, true solutions to the adoption issue cannot be found in the interpretation or counter-interpretation of the provisions relating to adoption. Rather, a solution must be sought in a reading of the texts that takes into account the socio-historical context in which they were revealed.

The reality to which the Revelation refers is based on blood ties and more specifically, on paternal filiation.

In opposition to the position defended by jurisconsults, Tunisian legislators have authorized adoption, but have attached certain conditions in the interest of the adopted child. For example, an adopted child is allowed to bear the name of his or her adoptive father, but only if the request to do so

(11) Quran, surah *Al-Ahzab*, "The Confederate Tribes," verse 40.

(12) Quran, surah *Al-Ahzab*, "The Confederate Tribes," verse 5.



comes from the adopted child. In addition, legislators have given the same rights and duties to adopted children as those incumbent upon the father's own children.<sup>(13)</sup>

In light of the foregoing, and based on the fact that Tunisian legislation recognizes adoption, we chose the same approach in writing the articles on adoption.

(13) Abu Zaid Nasr Hamid, *Les femmes et le statut personnel* ["Women and Personal Status"], pp. 247-277.

## Appendix 6

### Notes and References

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## Collectif 95 Maghreb-Egalité Publications

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