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April 14, 2020

The 2004 *Moudawana*:  
Studying the Impact of Legal Reform on Women's Access to Justice in Morocco

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## Abstract

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In January of 2004, the Moroccan parliament passed important reforms to Morocco's family code, the *Moudawana*. The 2004 reforms raised the minimum age of marriage for women from fifteen to eighteen, introduced divorce by mutual consent, and annulled the wife's duty of obedience to her husband, in addition to a myriad of other progressive changes. This study evaluates the efficacy of the reforms by examining three mechanisms through which laws can subordinate women: unjust and discriminatory laws, ignorance of the law by women, and prejudicial enforcement of the law. Data has been collected from personal interviews with scholars, lawyers, and activists in Morocco, library research, published reports, and newspapers. This study finds that Moroccan women face barriers to accessing justice and obtaining equality, as a result of discriminatory laws in the *Moudawana*, widespread legal illiteracy, and the prejudicial enforcement of the reforms. After examining each of the three mechanisms and their role in Moroccan society and gender relations, this thesis concludes that prejudicial enforcement of the law is the most serious barrier to women's equality in Morocco.

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This thesis would not have been possible without the support of my family and friends. I would like to thank my grandparents, Dr. Ted Underwood and Judith Underwood, for encouraging me in all my academic pursuits. I would also like to thank Elizabeth Keeley, Cameron Sadeghi, and my parents, James Keeley and Tamara Underwood, for providing feedback on my arguments throughout my writing process.

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## **CHAPTER ONE**

### **Introduction and Methodology**

“Since acceding to the throne of his noble ancestors, His Majesty King Mohamed VI, our Chief Commander of the Faithful, may God protect him, has made the promotion of human rights a priority which lies at the very heart of the modernist democratic social project of which His Majesty is a leader. Doing justice to women, protecting children's rights and preserving men's dignity are a fundamental part of this project, which adheres to Islam's tolerant ends and objectives, notably justice, equality, solidarity, *ijtihad* (judicial reasoning) and receptiveness to the spirit of our modern era and the requirements of progress and development.”

- Preamble of the 2004 *Moudawana*

### **Introduction**

In January of 2004, the Moroccan parliament passed important reforms to Morocco's family code, the *Moudawana*. Created shortly after Moroccan independence in 1956, the code details provisions for every aspect of family life and is largely responsible for defining the role of women within Moroccan society. The 2004 reforms raised the minimum age of marriage for women from fifteen to eighteen, introduced divorce by mutual consent, and annulled the wife's duty of obedience to her husband, in addition to a myriad of other progressive changes. The 2004 Family Code was initially lauded by feminists, civil society activists, and political parties alike as a victory for women's equality in Morocco. Over fifteen years later, however, serious resistance to the code's implementation still exists. Furthermore, in areas of Morocco where the code is fully implemented, serious loopholes in the text often hinder women's ability to access justice and exercise their rights. These impediments to the implementation of the *Moudawana*'s newest reforms pose a serious threat to gender equality in Morocco.

Gender inequality and discrimination exist in some form in most areas of the world. These terms refer to the discrepancies in the access, status, rights, and power men and women have within their societies. Across the globe, the law plays a critical role in enforcing gender inequality and discrimination. Laws can legitimize hierarchical gender relations, the unequal division of labor



and power, and the proprietary rights of men over women. Fatema Hasan, a human rights consultant based in Bangladesh, proposes that there are three mechanisms through which the law reinforces women's subordination: (1) unjust and discriminatory laws; (2) ignorance of the law by women; and (3) prejudicial enforcement of the law.<sup>1</sup> Within any given legal system, each mechanism can independently hinder women's equality. In a country and a legal system where each mechanism is represented, the barriers to women's equality are even greater.

Marriage and divorce laws have long served as barriers to women's equality in many countries. Minimum age requirements for marriage often vary for men and women. For instance, girls in Guatemala can marry at fourteen years old while boys must wait until they are sixteen. Early marriages often prevent girls from completing their educations, acquiring meaningful employment, and playing a more equal role in their marriages. Obedience laws in Egypt and Cameroon require women to obey the paternal authority of their husbands and have far-reaching consequences. For an extreme example, the current Haitian penal code provides no penalty for men who murder their adulterous wives. The legal systems of Ethiopia and Kenya permit nonconsensual sex during marriage and a multitude of other countries have yet to criminalize marital rape. Divorce laws have also operated to maintain gender hierarchies. In many countries, divorce is much more difficult for a woman to obtain than a man. In Sudan, men do not need to consult a judge or ask for their wife's consent to obtain a divorce. If a Sudanese man wants a divorce, he is divorced. Women's rights to equal distribution of property after divorce are also negligible in many countries. Based on these examples alone, it is evident that marriage and divorce laws can contribute to and enforce women's subordination.

<sup>1</sup> Fatema Rashid Hasan, "Limits and Possibilities of Law and Legal Literacy: Experience of Bangladesh Women" in *Economic and Political Weekly* 29.44 (1994), 69.

Several of the most significant changes to Morocco's Family Code in 2004 were made in the areas of marriage and divorce law. The reforms rescinded the spousal approval requirement for women to work, allowed women to stipulate a monogamy clause in the marriage contract, and required judicial approval for divorce by repudiation. In this paper, I propose to answer the following questions: to what extent are women in Morocco able to exercise the rights afforded to them in the 2004 family code reform? What barriers prevent women from accessing these rights and gender equality more generally? *I posit that the Moroccan legal system reinforces women's subordination through each of Fatema Hassan's three mechanisms.* While the 2004 reforms certainly represent progress, some of the Family Code's articles are still discriminatory to women.

In this thesis, I examine each of Fatema Hasan's three mechanisms - unjust and discriminatory laws, ignorance of the law by women, and prejudicial enforcement of laws - within the Moroccan context. Before examining the Moroccan case, I will first contextualize the role of the law in women's subordination across the world. With this section, I build the theoretical framework for my analysis. Second, in Chapter Three, I will explore the history of the *Moudawana* and the divorce provisions of the reforms. I assess Hasan's first mechanism, unjust and discriminatory laws, in Chapter Three. Third, in Chapter Four, I will assess women's knowledge of the 2004 reforms in Morocco, studying Hasan's second mechanism. Fourth, in Chapter Five, I will examine the prejudicial enforcement of the 2004 Family Code reforms in different areas of the country, studying Hasan's third mechanism. *After examining each of the three mechanisms and their role in Moroccan society and gender relations, I conclude that prejudicial enforcement of the law is the most serious barrier to women's equality in Morocco.*

## Methodology

In researching this thesis, I used a combination of sources to study the 2004 *Moudawana* reforms and women's legal empowerment in Morocco. I began my research by reading published books and journal articles about the *Moudawana*, women's rights in the Arab and Muslim world, and women's rights in Morocco. I read an unofficial English translation of the 2004 *Moudawana*. The translation was prepared by a professional Arabic-English Moroccan translator and a team of English and Arabic speaking lawyers. I also read legal texts and law review articles about several different countries to create the legal foundation for my research. I read articles in both English and French but was limited in my research by my limited understanding of Arabic. I used Fatema Hassan's article, "Limits and Possibilities of Law and Legal Literacy: Experience of Bangladesh Women", and her three mechanisms for the legal subordination of women to create the theoretical framework of my thesis.

I was interested in studying women's access to justice in Morocco through a legal perspective. As such, I decided to conduct interviews with Moroccan lawyers, scholars, and women's rights activists to gain insight into each of the three mechanisms. I met Stephanie Willman Bordat in January of 2019 while I was studying in Rabat and I stayed in contact with her about my thesis after returning to the United States in May of 2019. I reached out to my other interviewees after reading articles that they had written on women's rights and the law in Morocco. I conducted interviews in February and March of 2020, and I prepared questions ahead of time for each interview which were specific to the specialty and knowledge of each subject. Below, I provide a brief biography for each of the six people I interviewed.

**Stephanie Willman Bordat** is a founding partner at Mobilising for Rights Associates (MRA), an international non-profit organization based in Rabat. Bordat received her bachelor's degree in anthropology and women's studies from Swarthmore College. Bordat was also a Fulbright Fellow at the Mohammed V

University Law School in Rabat and she received her Juris Doctor from Columbia University in New York.

**Ihsane Elidrissi Elhassani** is a Moroccan lawyer who is currently based in the United Kingdom. After graduating from law school in Morocco, Elhassani completed her required legal internship and practiced law in Morocco for several years. Elhassani also worked in Qatar and for the European Court of Human Rights in France, before establishing her own law firm in the United Kingdom. In 2018, Elhassani was nominated for the “Woman Lawyer of the Year” award by England’s Law Society.

**Dr. Leila Hanafi** is a Moroccan American lawyer based in both Washington D.C. and Rabat, Morocco. Dr. Hanafi received her bachelor’s degree from American University and obtained her Juris Doctor from the George Washington University Law School. Dr. Hanafi currently works as an attorney for the World Bank in Washington D.C. Formerly, Dr. Hanafi oversaw the International Criminal Court Middle East and North Africa Coalition. Dr. Hanafi has also published a variety of papers on gender relations and women’s rights in the Middle East and North Africa.

**Rajae Nami** is a senior consultant for the Navanti Group in Arlington, Virginia. The Navanti Group is a consulting firm that works to provide insight into current economic, political, and security trends in Africa, Europe, Asia and the Middle East. For the Navanti Group, Nami specializes in development issues in the Middle East and North Africa and has published several articles about the impact of unfair inheritance laws in Morocco. Before working for Navanti, Nami worked for Magharebia/Zawaya, a Maghreb-focused news website, and as a MENA media analyst.

**Dr. Fatima Sadiqi** is a senior professor of Gender Studies at Sidi Mohamed Ben Abdellah University in Fez, Morocco. Dr. Sadiqi received her bachelor’s degree in English language and literature from the Faculty of Letters in Rabat. After obtaining her bachelor’s degree, Dr. Sadiqi received her doctorate from Essex University in the United Kingdom. Dr. Sadiqi’s primary areas of research are gender studies in North Africa, transnational feminisms, and Berber studies. I contacted Dr. Sadiqi after reading her article “The Feminization of Public Space: Women’s Activism, The Family Law, and Social Change in Morocco”.

**Dr. Rachid Touhtou** is an associate professor, researcher, and lecturer at the Institut National de Statistique et d’Economie Appliquée (INSEA) in Rabat, Morocco. Dr. Touhtou received his doctorate in gender and development studies from the Université Sidi Mohammed Ben Abdellah-Fès in Fez, Morocco. As an associate professor, Dr. Touhtou specializes in development studies, gender studies, and social movement theory. Dr. Touhtou also works as the academic coordinator for AMIDEAST Education Abroad. AMIDEAST is an American nonprofit organization engaged in international education, training, and development activities in the Middle East and North Africa.

### *Limitations*

One of the challenges in researching this thesis was the absence of recent and comprehensive quantitative data on a number of topics. To my knowledge, neither the Moroccan government nor other non-state actors have published additional data on the Moroccan people's knowledge of the 2004 *Moudawana* reforms. Without this data, it is difficult to assess women's legal literacy in Morocco. Although the anecdotal evidence certainly suggests that many women are still legally illiterate, it would be important for future research to collect country-wide quantitative data on people's knowledge of the 2004 reforms. This information would allow future researchers to further explore the relationships between legal literacy and language, literacy, and geographic location. In researching the prejudicial enforcement of the law, I realized that there was a lack of quantitative data on gender representation in the legal profession. It would be interesting for future research on prejudicial enforcement to have information on female representation in the judiciary. Researchers in the United States have studied the impact of a judge's gender on their decision making, finding that the gender of a judge does impact judicial decisions.<sup>2</sup> Conducting similar research in Morocco would be fascinating and especially relevant for family law cases. Future research should also provide comprehensive data on types of divorce by region and the average amount of alimony that women receive.

<sup>2</sup> Phyllis Coontz, "Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?" in *Gender Issues* 18.1, 59-73 (2000).

## CHAPTER TWO

### Laws, Legal Literacy, and Prejudicial Enforcement

Whereas the 1957 Moudawana was enacted before the creation of the Parliament, and amended in 1993 during a transitional constitutional period by virtue of *Sherifyan Dahirs* (Royal Edicts), we have esteemed it perspicacious to present the Family Code bill to the Parliament for the first time in view of its implications for civil law, noting that its religious legal provisions fall within the competence of the Commander of the Faithful. We expect you to rise to this historical responsibility, both through your respect of the sacredness of this bill's texts, inspired by the tolerant principles of *Sharia* (religious law), and through your adoption of other texts. These provisions should not be considered as exhaustive or approached in a narrow-minded way, but rather should be approached realistically and insightfully, because this constitutes an *ijtihad* (judicial reasoning) effort suitable for contemporary Morocco and our openness to development which we are determined to integrate wisely and progressively.

- Preamble of the 2004 *Moudawana*

#### Family Law and Gender Equality in Global Perspectives

The law plays a critical role in enforcing women's subordination across the globe. Fatema Rashid Hasan, a human rights consultant based in Bangladesh, asserts that laws can reinforce women's oppression by "legitimizing hierarchical gender relations, the proprietary rights of men over women, and the unequal division of labor and power over the allocation of resources".<sup>3</sup> In her paper "Limits and Possibilities of Law and Legal Literacy: Experience of Bangladesh Women", Fatema Rashid proposes that there are three mechanisms responsible for this reinforcement process: (1) unjust laws that are discriminatory and limit the scope of women's rights; (2) ignorance of the law and legal processes by women who are unaware of their formal rights; and (3) prejudicial enforcement of laws unfavorable to women by law-enforcement officials or gender-biased judgements in the courts. In this chapter, I explore each of these mechanisms and explain their significance for women's rights and equality globally. For the first mechanism, I discuss the power of the law in reinforcing female subordination. I then provide several international examples

<sup>3</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy", 69.

of women’s rights activists using the law to improve the female experience. For the second mechanism, I define ‘legal literacy’ and ‘legal empowerment’ and illustrate the significance of both concepts in the effort to improve women’s status. For the third mechanism, I explore examples of the prejudicial enforcement of the law. In this chapter, I utilize examples of legal injustice from all over the world to emphasize that this problem is ubiquitous globally and is not just confined to the Muslim world.<sup>4</sup>

### **The Law and Women’s Subordination**

The law plays an important role in creating and enforcing the inferior economic and social position of women in society. More broadly, governments use legislative and adjudicative processes to regulate people’s access to jobs, land, power, credit, and other goods.<sup>5</sup> In a totally equitable society, the interests of all citizens would be equally protected through these processes. However, totally just societies are few and far between. In reality, the law favors certain sectors of people by bolstering their access to jobs, land, and credit and the law disadvantages other groups by restricting their access to these resources. Through this process, the law plays an important role in delineating differential power relations based on gender, ethnicity, race, sexual orientation, etc.<sup>6</sup> Catharine MacKinnon, one of the most influential feminist legal scholars of the past four decades and a professor at the University of Michigan Law School, asserts that the law in most countries contains, produces, and reproduces patriarchy and that the power to define “who does what to whom and gets away with it” belongs to men.<sup>7</sup> For this thesis, I use ‘patriarchy’ to refer to the systematic domination and subordination of women by men. The law provides a legitimate basis

<sup>4</sup> Post-colonial Western (and white) Feminism traditionally views women in Muslim countries as oppressed. I work to avoid this narrative in my paper. For more information, see Kelley Quinn’s “Revealing the Face of Islamophobia: A Critical Evaluation of Western Feminism” in *The Corinthian* 19.12 (2019).

<sup>5</sup> Hasan, “Limits and Possibilities of Law and Legal Literacy,” 69.

<sup>6</sup> Hasan, “Limits and Possibilities of Law and Legal Literacy,” 69.

<sup>7</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State*. (Cambridge, MA: Harvard University Press, 1989), 138.

for the subordination of women by restricting women's access to political and economic resources. Lynne Henderson, a legal scholar at the University of Nevada Law School, argues that women must work to eliminate the patriarchy's political, economic, and social manifestations by dismantling the patriarchy's legal form.<sup>8</sup>

Historically, feminists and women's rights activists have used the law to gain greater rights for women worldwide. In the United States, women argued that sex should have been included in the equal protection clause of the Fourteenth Amendment of 1868.<sup>9</sup> Over a hundred years later, Catharine MacKinnon argued that workplace sexual harassment was a form of sex discrimination and American courts have increasingly accepted sexual harassment as a harm meriting legal redress.<sup>10</sup> Feminist legal action has not been confined to the United States. In Egypt, public campaigns against sexual harassment, including Fathi Farid's "I Saw Harassment", gained widespread support after videos of mass sexual assault in Tahrir Square surfaced. President Adly Mansour succumbed to the pressured and issued a decree criminalizing sexual harassment in 2014.<sup>11</sup> In 2018, France became the first country to pass legislation that punishes public sexual harassment.<sup>12</sup> France's #Balancetonporc ("expose your pig") movement, an equivalent to the #MeToo movement, encouraged women to go public with their experiences of sexual harassment and pressured the government into enacting more comprehensive sexual harassment legislation.<sup>13</sup> Each of these laws increased women's ability to seek legal recourse for sexual harassment, but

<sup>8</sup> Lynne Henderson, "Review: Law's Patriarchy" in *Law and Society Review* 25.2 (1991), 412.

<sup>9</sup> Serena Mayeri, "Constitutional Choices: Legal Feminism and the Historical Dynamics of Change" in *California Law Review* 92.3 (2004), 759

<sup>10</sup> Catharine MacKinnon, *Sexual Harassment of Working Women*. (New Haven, CN: Yale University Press, 1979), 106 – 127.

<sup>11</sup> Salma Abdelaziz, "Egypt Criminalizes Sexual Harassment" in *CNN*, 2014.

<sup>12</sup> In the United States, sexual harassment is defined as a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. U.S. sexual harassment law does not, however, criminalize public sexual harassment. For more information on Title VII, see the U.S. Equal Employment Opportunity Commission's factsheet on sexual harassment law.

<sup>13</sup> Alissa Rubin, "France's New Law Against Sexist Catcalls Gets its First Conviction" in *The New York Times*, 2018.



they did not provide support for women who feared cultural and professional repercussions for coming forward. Although these laws did not provide that support, these examples nonetheless demonstrate the power of utilizing the law to gain greater rights and protections for women. However, in many regions of the world, the issue is not simply that there are gaps in the law that endanger women's safety, as in the case of sexual harassment. In a multitude of countries, many of the laws actively discriminate against women.

It is important to note that laws in many Western countries actively discriminated against women until recently as well. Prior to 1971, laws in the United States regularly discriminated on the basis of sex. In the 1863 case *Bradwell v. The State of Illinois*, the Illinois Supreme Court upheld the Illinois Bar Association's decision to reject Myra Bradwell's application to the Illinois Bar on the basis of her sex.<sup>14</sup> Myra Bradwell appealed the decision and in 1873, the United States Supreme Court rejected Bradwell's claim that the right to practice law should be acknowledged as one of the privileges of United States citizenship. The Supreme Court's decision went unchallenged for almost one hundred years. In 1971, the Supreme Court invalidated a law that discriminated on the basis of sex for the first time. The Supreme Court Case, *Reed v. Reed*, reviewed a provision of the Idaho state code that specified that males must be preferred to females in appointing administrators of estates.<sup>15</sup> Making reference to the Equal Protections Clause of the Fourteenth Amendment, the Supreme Court ruled that the administrators of estates cannot be named in a way that discriminates between sexes. Between 1971 and 1984, the Supreme Court struck down twelve more federal and state statutes that used gender-based classification.<sup>16</sup> These

<sup>14</sup> Nancy Gilliam, "A Professional Pioneer: Myra Bradwell's Fight to Practice Law" in *Law and History Review* 5.1 (1987), 105.

<sup>15</sup> F.L. Morton, "The Supreme Court's Promotion of Sexual Equality: A Case Study of Institutional Capacity" in *Polity* 16.3 (1984), 470.

<sup>16</sup> Morton, "The Supreme Court's Promotion of Sexual Equality," 468.

Supreme Court decisions invalidated earlier discriminatory rulings, including the Court's decision in *Bradwell v. The State of Illinois*. In 1973, the Supreme Court ruled that right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion.<sup>17</sup> This landmark case, *Roe v. Wade*, was hailed as a turning point for women's rights in the United States as the ruling overturned several discriminatory laws. In 2019, however, nine states passed abortion restrictions that challenged the constitutional right established in *Roe v. Wade*.<sup>18</sup> Although each of these laws was ultimately struck down by the courts, they demonstrate that hostile laws that actively discriminate against women are still a threat in the United States.

In countries where laws actively discriminate against women, Fatema Hasan asserts that the majority of these laws govern women's behavior in the private sphere. The private sphere, which includes domestic life, home, and family, is accepted as the traditional domain of women. The public sphere, which refers to work and politics, is considered the traditional domain of men. When women enter the public sphere, they usually have to fight for considerations that are automatically awarded to men.<sup>19</sup> In the majority of countries, laws governing the public sphere, such as labor law, have been modernized regardless of cultural context. In contrast, laws operating within the private sphere, such as inheritance law, have often been left untouched in countries where discriminatory laws still exist. Inheritance laws in several Muslim countries, including Jordan, stipulate that daughters inherit half of what their male relatives receive after the death of a parent. Unequal inheritance laws can have huge impacts on the lives of women, which can be even more exacerbated when children are present. In the Islamic ideal, the male relatives who inherit

<sup>17</sup> Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge, MA: Harvard University Press, 2015), 2.

<sup>18</sup> Rebecca Lai, "Abortion Bans: 9 States Have Passed Bills to Limit the Procedure this Year" in *The New York Times*, 2019.

<sup>19</sup> Fatima Sadiqi and Moha Ennaji, "The Feminization of Public Space: Women's Activism, the Family Law, and Social Change in Morocco" in *Journal of Middle East Women's Studies* 2.2 (2008), 94.

more are supposed to financially support their female relatives and their children. However, this does not always occur.<sup>20</sup> Women, therefore, often find themselves with fewer resources to support themselves and their children. Depending on the woman's socio-economic background (education, professional status, social status, etc.), this phenomenon can lead to a downward spiral into poverty. The issue of inheritance is fundamentally economic. While Jordan has struggled to modernize its inheritance laws, the Jordanian government has successfully liberalized labor laws and policies governing international trade. This example supports Fatema Hasan's private sphere/public sphere dichotomy, where laws that govern the traditional domain of women are not included in the modernization of the public sphere.

In many countries, private sphere laws are not included in the public sphere's modernization because the private sphere laws are considered essential to those countries' traditional identities. For example, in Saudi Arabia, authorities cite cultural norms, traditional Saudi identity, and religious teachings in denying women and girls the right to participate in sporting activities.<sup>21</sup> Similarly, in Kenya, where the customary laws of some ethnic communities discriminate against women in property ownership and inheritance, many traditional leaders defend the laws as embodying their communities' traditions. Lawmakers in both countries are hesitant to change laws that they perceive as contributing to their country's cultural identity. Laws in the public sphere – including labor law and financial regulations - do not carry the same burden of supporting traditional identities and are thus more easily reformed by federal legislatures.

Women's rights are also restricted by the private-sphere divorce statutes in a multitude of countries. In the United States, the introduction of no-fault divorces in 1969 was heralded as an

<sup>20</sup> Interview with Rajae Nami, February 13, 2020.

<sup>21</sup> Graeme Reid, "The Trouble with Tradition: When Values Trample Over Rights" in *Human Rights Watch World Report* (2016).

important alternative to the fault regime that significantly disadvantaged women.<sup>22</sup> The fault-only regime required spouses to prove that a fault had been committed in order to obtain a divorce and it was often challenging for women in oppressive relationships to prove their husbands' fault before a judge.<sup>23</sup> For example, since marital rape was exempted from ordinary rape laws until the mid-1970s, many women struggled to obtain fault divorces based on marital rape claims.<sup>24</sup> Women are disproportionately the victims of intimate partner violence and marital rape, and were therefore more impacted by the fault-only divorce statutes.<sup>25</sup> The no-fault divorce reforms authorized spouses in most states to obtain a divorce by simply alleging a specific no-fault ground, such as irreconcilable differences. However, although the no-fault divorce system increased women's ability to leave oppressive marriages, the changes did not go far enough in addressing women's inequality after divorce.

Lenore Weitzman, a former professor of sociology at Stanford University, conducted a ten-year study in the 1970s and 1980s that studied the effects of a no-fault divorce on women and children. No-fault divorce laws in the United States are gender neutral, men and women are treated equally in the proceedings, and property is divided without regard for marital transgressions. Judges presiding over no-fault divorce proceedings are primarily concerned with helping both spouses start over and become financially self-supporting.<sup>26</sup> However, for women who have devoted themselves to their families, marriage has impaired their ability to be financially independent. American courts tend to overlook a newly defined category of marital property known as "career assets" – a breadwinner's educational degree, professional license, pension,

<sup>22</sup> Georgia Dullea, "How Women Fare in No-Fault Divorce" in *The New York Times*. 1985.

<sup>23</sup> Stephane Mechoulan, "Divorce Laws and the Structure of the American Family" in *The Journal of Legal Studies*

<sup>24</sup> Lisa Eskow, "The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing its Prosecution" in *Stanford Law Review* (1996), 678.

<sup>25</sup> Centers for Disease Control and Protection, "National Intimate Partner and Sexual Violence Survey" (2015).

<sup>26</sup> Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. (New York, NY: Free Press, 1985).

health insurance and potential earning power – and ignore the reduced opportunities available to homemakers.<sup>27</sup> Homemakers often lack the resources and employment opportunities of their husbands after the divorce and so these women are more likely to experience drastic reductions in standard of living. Lenore Weitzman found that the post-divorce standard of living for women and children declines 73 percent, while the post-divorce standard living for men increases 42 percent. Hence, despite the shift to no-fault divorces, some women – especially stay-at-home mothers – are still disadvantaged in the divorce process. Thomas Leopold, a professor of sociology at the University of Amsterdam, posits that the explanations for the gender inequalities of divorce illustrate four risk factors for women seeking the dissolution of their marriage: (1) higher economic need and restricted earning capacities in the presence of children; (2) insufficient child maintenance; (3) disproportionate loss of income, which is often not fully compensated by spousal maintenance; and (4) human capital deficits resulting from gender specialization in the division of labor during marriage.<sup>28</sup> These four risk factors present obstacles to women seeking a divorce. The structural inequities of marriage and divorce prevent women from exercising all of the rights afforded to them by law in the United States.

Outside of the United States, many women are afforded even fewer rights in marriage and divorce. It is important to note that many of the obstacles faced by women going through divorce in the United States are the result of the financial realities of gender roles and not the result of discriminatory laws. In Lebanon, laws regulating the termination of marriage actively discriminate against women by restricting their ability to end their marriages. In contrast, men have a unilateral, unlimited right to terminate their marriages, with or without cause, and outside of any judicial

<sup>27</sup> Dullea, “How Women Fare in No-Fault Divorce”.

<sup>28</sup> Thomas Leopold, “Gender Differences in the Outcome in the Consequences of Divorce: A Study of Multiple Outcomes” in *Demography* 55 (2018).

proceeding.<sup>29</sup> Lebanese women often face legal and economic obstacles when terminating abusive marriages, which in turn endangers their safety and well-being. Religious courts in Lebanon are known to unfairly deny divorce petitions and restrict women's access to alimony and child support.<sup>30</sup> The Philippines is the only place in the world, outside of the Vatican City, where divorce is illegal. While options for terminating a marriage do exist in the Philippines, they differ from divorce in important and restrictive ways. To obtain an annulment, the couple must prove that one party in the marriage is psychologically incapacitated. Physical violence is not considered a sufficient reason to annul a marriage. To obtain a legal separation, the couple does not have to prove psychological impairment, but neither party is permitted to remarry.<sup>31</sup> Since the majority of women in the Philippines rely on their husbands for financial support, most women are reluctant to file for an annulment or separation. The lack of child support and division of assets typically leaves separated women in the Philippines unable to support their families. In 2011, China's Supreme Court ruled that family houses purchased before the marriage automatically belong to the registered buyer upon divorce, historically the husband. In a subsequent study, Yale sociologist Emma Zang determined that this judicial statute diminished women's wellbeing by depriving them of property rights and economic autonomy.<sup>32</sup> As with the example of no-fault divorce in the United States, the Chinese Supreme Court decision illustrates how a theoretically gender-neutral policy can create gendered and discriminatory practices. Formal equality can still produce unequal outcomes, for the reasons noted above. While each of these examples is unique, each case also demonstrates how divorce laws have enforced women's economic and social dependency on men.

<sup>29</sup> Human Rights Watch, "Unequal and Unprotected: Women's Rights under Lebanese Personal Status Laws", 2015.

<sup>30</sup> Human Rights Watch, "Unequal and Unprotected: Women's Rights under Lebanese Personal Status Laws", 2015.

<sup>31</sup> Lynzy Billing, "In Philippines, Where Divorce is Illegal, Women Pay the Price" in *NewsDeeply*. 2018.

<sup>32</sup> Emma Zang, "When Family Property Becomes Individual Property: Intrahousehold Property Ownership and Women's Well-Being in China" in *Journal of Marriage and Family* (2020).

For this study, I selected divorce law as my primary area of study for the *Moudawana* because of its wide-reaching implications for women's rights and equality.

### **Legal Literacy and Legal Empowerment**

As discussed in detail above, the inferior status of women is often a direct result of formal legislation. However, discrimination against women can also stem from prejudicial social practices not challenged by the law. In states where the government has made legislative efforts to improve women's rights, the status of individual women can still remain unchanged.<sup>33</sup> Disadvantaged women are often presented with a multitude of barriers to accessing justice. At the individual level, disadvantaged women are more likely to be limited in their knowledge of their rights and the law. Taking global demographics into account, the majority of women in the world are 'outside the legal system', especially poor women in urban and rural communities.<sup>34</sup> These women are 'outside the legal system' in part because the legal system does not always offer them very many protections, but also because they do not know what the legal system can offer them. It can be very difficult for disadvantaged women to obtain knowledge of their legal system. At the community level, customary laws and social norms can prevent the full implementation of the state's laws. Even in countries where women's rights are formally granted in both the constitution and the legal codes, informal customary practices can override formal legal provisions.<sup>35</sup> For example, in countries where the law criminalizes bride-price payments (e.g. Gabon, India, Central African Republic, among others), people often continue to follow the custom as if the ban did not exist.<sup>36</sup> Informal customary practices are often beyond the reach of the state and very challenging for the

<sup>33</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy," 69.

<sup>34</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy," 69.

<sup>35</sup> El-Zein, "Women's Access to Justice in the Middle East," 8.

<sup>36</sup> Gani Aldashev, Imane Chaara, Jean-Phillipe Plateau, and Zaki Wahhaj, "Formal Law as a Magnet to Reform Custom" in *Economic Development and Cultural Change* 60.4 (2012), 796.

state to alter, unless the state actively targets the customs. In many countries, women are also actively discouraged from asserting their rights in opposition to men. Lebanon's code of civil procedure stipulates that any citizen can apply for legal aid if they are unable to pay the costs and fees of their legal proceedings. However, women very rarely claim these rights as they are dissuaded by the prevailing patriarchal system.<sup>37</sup> In this section, I address the challenges for women 'outside of the legal system'.

Fatema Hassan asserts that a lack of understanding, or misunderstanding, of women's rights by women and society can impede a woman's ability to exercise the rights she is afforded. A lack of understanding, or misunderstanding, of the law is often referred to as 'legal illiteracy' and is studied through its converse, 'legal literacy'. In this section, I evaluate different definitions of legal literacy and select a framework for assessing legal literacy in this thesis. Then, I discuss the relationship between legal literacy and legal empowerment and address the implications of both legal literacy and legal empowerment for disadvantaged women. Ultimately, the law can offer marginalized women opportunities to break the vicious cycle of powerlessness, but if and only if they have the knowledge and capacity to utilize the rights they are entitled to by law.<sup>38</sup> Legal literacy and legal empowerment are important precursors to these opportunities.

'Legal literacy' has a wide range of possible meanings. On one end of the spectrum, legal literacy requires total proficiency in legal discourse, in both reading and writing. This definition implies that legal literacy is a competency that only legal professionals truly possess. On the other end of the spectrum, legal literacy refers to the ability to recognize legal jargon as the law. With this definition, a person would only have to know that the law exists to be considered legally

<sup>37</sup> El-Zein, "Women's Access to Justice in the Middle East", 9.

<sup>38</sup> Lorenzo Cotula, *Local Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa*. (Herefordshire, UK: IIED, 2007), 21.



literate.<sup>39</sup> Neither of these definitions is particularly useful for the purpose of this thesis. James Boyd White, a legal scholar at the University of Michigan Law School, posits that a more useful definition of legal literacy exists in between these two extremes: “that degree of competence in legal discourse required for meaningful and active life” in one’s society. In simpler terms, legal literacy refers to a person’s knowledge and understanding of the rights afforded to them by law. For a person to be considered legally literate, that person must be aware of the rights they are guaranteed by law. I will use this definition of legal literacy in this thesis.

There are a multitude of barriers to a person’s development of legal literacy, including language. In the United States, refugees are often unaware of the rights afforded to them by the American government because of translation problems.<sup>40</sup> While the United States government claims to provide proper translation for all asylum-speakers in the immigration process, indigenous languages, such as the Mayan language Mam, are rarely spoken by translators. Translation difficulties can impact an asylum-seeker’s ability to explain why they are afraid of returning to their home country in the credible-fear interview, a very important aspect of the immigration process.<sup>41</sup> Translation difficulties can also make it challenging for a government employee to explain a refugee’s rights to them. Deportations caused by mistranslation in the United States are not rare and serve as an example of language acting as a barrier to legal literacy. The barrier to legal literacy that is perhaps most explored in the literature is literacy itself.

Archie Zariski, a legal scholar at Athabasca University in Canada, argues that literacy is essential to participation in a legal system in countries where written law governs the actions of its

<sup>39</sup> James Boyd White, “The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education” in *The Critical Reader, Thinker and Writer*. Mountain View, CA. Mayfield Pub. Co., 1992. 420

<sup>40</sup> Rachel Nolan, “A Translation Crisis at the Border” in *The New Yorker*. 2019.

<sup>41</sup> Rachel Nolan, “A Translation Crisis at the Border” in *The New Yorker*. 2019.

citizens.<sup>42</sup> Without literacy, citizens are often disenfranchised and unable to fully understand the rights afforded to them. Much of the literature on legal literacy is focused on the West and presupposes the prominence of literacy, even among marginalized groups. Both James Boyd White and Archie Zariski stress the importance of reading and writing as a requirement for understanding the law. Furthermore, studies of legal literacy often require that their participants be literate. For example, in their paper “Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation”, legal scholars at the University College of London, Pascoe Pleasance and Nigel J. Balmer, created and distributed a survey with fake scenarios that tested participants’ knowledge of cohabitation law. The survey asked participants what the fake couple’s rights were in different scenarios depending on whether the couple was said to have been married or simply cohabitating.<sup>43</sup> The study’s results illustrated that legal illiteracy is common in the United Kingdom, a country where the overwhelming majority of people are literate.<sup>44</sup> However, while their results were certainly important, a similar study could not be replicated and utilized as a fair assessment of a person’s legal understanding in many areas of the world because of the study’s literacy requirement. For this thesis, I reject the notion that literacy is an important prerequisite for legal literacy. It is entirely possible, and in fact common, for a person to be illiterate and still have a working knowledge of the law and the rights afforded to them.

Separate from, although related to, the idea of legal literacy is the concept of legal empowerment. It is important to note that while definitions of legal literacy are applicable to all people, definitions of legal empowerment specifically reference the behaviors of poor or

<sup>42</sup> Archie Zariski, *Legal Literacy: An Introduction to Legal Studies*. (Athabasca, CA: Athabasca University Press, 2014), 20.

<sup>43</sup> Pascoe Pleasance and Nigel Balmer, “Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation” in *Law and Society Review* 46.2 (2012), 297-333.

<sup>44</sup> Harriet Sherwood, “Britain’s Battle to Get to Grips with Literacy is Laid Bare in H is for Harry” in *The Guardian* (2019).

marginalized people. In 2009, the United Nations released a report entitled “Legal Empowerment of the Poor and Eradication of Poverty” that asserted that laws governing economic and social interactions do not afford equal protection to a large portion of the population, who are mostly poor, minorities, women and other disadvantaged groups in a multitude of developing countries.<sup>45</sup> The report proposes that the legal empowerment of these marginalized groups could be utilized to combat their discrimination by law. Overseas Development Institute, an independent think tank on humanitarian and international development issues, defines legal empowerment as having occurred when “poor or marginalized people use the law, legal systems, and dispute resolution mechanisms to improve or transform their social, political, or economic situations, to hold power holders to account, or to contest unjust power relations”.<sup>46</sup> Legal empowerment extends beyond the provision of legal solutions and can lead to better economic opportunities for marginalized people.<sup>47</sup> For the purpose of this thesis, I will separate this definition of legal empowerment into two parts. First, legal empowerment requires that a person has the ability to effectively utilize the law and the legal system in their own life. Second, legal empowerment requires that a person has the ability to use the law to hold power holders accountable or to contest unjust power relations. The distinction between these two requirements is important for this thesis, as many marginalized women are unable to challenge power structures in their societies.

This study, therefore, removes the implied literacy component from the definition of legal literacy and proposes using a model where legal literacy is an important precursor to legal empowerment. In this model, there are three components of legal empowerment: (1) knowledge of the law or legal literacy; (2) the ability to seek legal redress and exercise one’s rights; and (3)

<sup>45</sup> United Nations, “Legal Empowerment of the Poor and the Eradication of Poverty”, 2009. 2.

<sup>46</sup> Pilar Domingo and Tam O’Neil, “The Politics of Legal Empowerment: Legal Mobilization Strategies and Implications for Development”. 2014. 4.

<sup>47</sup> United Nations, “Legal Empowerment of the Poor and the Eradication of Poverty”, 2009. 4.

the ability to challenge the inadequate rights provided by the law. In order for a marginalized person to challenge the law, they must first be able to exercise their rights. For a person to be able to exercise their rights, they must first be aware of the rights afforded to them by law. In this thesis, I will focus on steps one and two of this model, as it is often too challenging for marginalized people to challenge power structures and unjust laws in their societies. It is nonetheless important to assess the first two components in any society: do people have knowledge of the rights afforded to them by law? Are people able to exercise the rights afforded to them by law?

Legal literacy and legal empowerment are important tools for women's empowerment in countries where women are actively disadvantaged by the law. Sidney Schuler, a senior advisor on gender research at the international non-profit FHI 360, defines women's empowerment as a process through which women increase their ability to dictate their own lives and environment. Women's empowerment is an "evolution in women's self-awareness, status, and efficiency in social interactions".<sup>48</sup> Sidney Schuler identified six broad categories of women's empowerment: (1) sense of security and vision of future; (2) ability to earn a living; (3) ability to act effectively in the public sphere; (4) increased-decision making power in the household; (5) participation in non-family groups; and (6) visibility and mobility in the community.<sup>49</sup> A woman's ability to achieve empowerment in any of these categories is impacted by the legal system operating in her community. Nelly Stromquist, a professor of international development education at the University of Southern California, explains that women's empowerment means that women not only understand their society and the place they currently have in it, but also have the ability to critique

<sup>48</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy", 71.

<sup>49</sup> Sidney Schuler et al., "Measuring Changes in Women's Empowerment and Its Relationship to Intimate Partner Violence" in *Development in Practice* 28.5 (2018), 661-672.

their place in society.<sup>50</sup> Illiterate women and women who live in remote rural communities are the most vulnerable since opportunities to access information on their legal rights are severely restricted.<sup>51</sup> Fatema Hassan explains that the lack of awareness of formal rights is a considerable determinant in the gap between the formal rights of women and the ongoing social and economic inequality of women. It is important to note that this lack of awareness is not limited to women; the ignorance of men can also contribute to the gap between women's formal rights and women's lived experience. According to this approach, legal empowerment requires educating people about their legal rights in order to improve their ability to enforce their rights.<sup>52</sup> This approach to empowerment stresses access to information about legal rights as the first and most significant step towards protecting women's access to the law. It is important to stress that legal literacy is only the first step towards legal empowerment, however. By itself, legal literacy is not sufficient to ensure women's legal access, but legal literacy does facilitate the process of women's legal empowerment. The importance of both concepts is explored in greater detail with a discussion of two different non-governmental programs.

### *Legal Literacy and Legal Empowerment Programs*

A number of NGOs have implemented legal literacy and legal empowerment programs in countries where the legal system reinforces women's oppression. In 1986, the Bangladesh Women's Lawyers Association (BNWLA) developed legal literacy programs to teach women about their legal system. The BNWLA was established in Dhaka in 1979 with the goal of creating equal opportunities and equal rights for every woman and child in Bangladesh.<sup>53</sup> The creators of the

<sup>50</sup> Nelly Stromquist, "Women's Empowerment and Education: Linking Knowledge to Transformative Action" in *European Journal of Education* 50.3 (2015), 11.

<sup>51</sup> Fares El-Zein, "Women's Access to Justice in the Middle East: Challenges and Recommendations", OxFam Great Britan Research Report (2013), 7.

<sup>52</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy", 70.

<sup>53</sup> Namati Group, "Bangladesh National Woman Lawyers Association," <https://namati.org/bangladesh-national-woman-lawyers-association-bnwla/> (Accessed 15 March 2020)

legal literacy program understood that women would be better equipped at protecting themselves if they knew the rights afforded to them by law. For example, if women knew that they had the legal right to petition for a divorce on certain grounds, fewer women would continue to experience domestic-partner violence. The BNWLA's information-giving program aimed to "facilitate women's awareness about the laws that affected them the most, about available legal remedies, and how to gain access to those remedies".<sup>54</sup> Areas of the law that were emphasized in the program included divorce, custody of children, and property rights during marriage. BNWLA's program was implemented across the country by female lawyers who worked with the local governments to encourage attendance and participation at their legal literacy sessions. In the sessions, facilitating lawyers provided explanations of individual laws, ran role-plays, and also worked as a mobile legal advice unit.<sup>55</sup> The BNWLA conducted an evaluation after the sessions to determine the amount of information that the participants had absorbed in their legal literacy classes. The evaluation team surveyed 150 participants in five different areas of Bangladesh, and they discovered high levels of information retention. Each interviewed participant also expressed an interest in learning more about the Bangladeshi legal system and the majority of the participants believed that the access to the legal knowledge was empowering in itself.

In her 1994 paper on the BNWLA program, Fatema Hasan addresses several flaws in the organization's strategy for legal literacy education. The paper also discusses issues with the information-giving approach to legal literacy more generally. Fatema Hasan asserts that an information-giving approach to legal literacy does not communicate to the women the limits of the law and the role of the law in transforming women's lives.<sup>56</sup> Information-giving programs provide

<sup>54</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy", 74.

<sup>55</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy", 75.

<sup>56</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy", 76.

women with information about the rights afforded to them by law, but typically do not supply participants with a critique of the law and an explanation of how the law is discriminatory and/or insufficient at protecting women. Without information about these limits, participants are left to believe that the law is the solution to all problems and that the law is not a problem in and of itself. Furthermore, the BNWLA program presented information about the law through lectures, role-plays, and audio-visuals, in which the women were passive listeners. By not actively participating in the learning process, the women were denied an understanding of their own oppression. Fatema Hasan argues that a legal literacy strategy based solely on information-giving empowers the law instead of the female participants in the program. I agree with Fatema Hasan that the information-giving approach empowers the law, but I believe that the approach concurrently empowers women. With this approach, women are provided with essential information that they need to gain more agency in their own lives. It is worth recognizing that information-giving legal literacy programs are still an important starting point for women's legal empowerment. In communities where women do not have knowledge of the law and their rights, women need the information provided in these information-giving programs to begin the process of legal empowerment. The level of legal literacy that women obtained from the BNWLA program was certainly significant and worthwhile. However, programs that never move beyond the information-giving phase fail to empower women to use the law for action and change in their own lives. Fatema Hasan suggests that a comprehensive approach to legal literacy education should begin with an understanding of both the limits and the possibilities that the law presents to women. To help women progress from legal literacy to legal empowerment, facilitators of these programs should "actively engage the participants, contextualize the learning process within their own lives, and provide the legal and technical tools for the participants to decide if and how law can be useful in their struggles for

social transformation”.<sup>57</sup> Fatema Hassan also notes that legal education programs can maximize their success by developing flexible curriculums. The structure and content of any workshop should be determined by the number of women attending, the religious identities of the participants, and the prior legal knowledge of the group.

A legal literacy program implemented by the Bar Hostess Empowerment and Support Programme (BHESP) in Kenya satisfies many of Fatema Hasan’s requirements for women’s legal education. BHESP was created in 1998 by a coalition of sex workers, women having sex with women, women using drugs, and bar hostesses to protect and advocate for the interests of these at-risk women.<sup>58</sup> BHESP works to influence policy and facilitate provision of quality health services, human rights awareness, legal services, and economic empowerment for their vulnerable populations. In Kenya, BHESP provides a number of services that address the systemic barriers that impact the safety of sex workers, including violence, arbitrary arrest, and legal issues. For example, the organization trains sex workers on law, human rights, and access to justice initiatives, enabling them to provide legal advice, counselling, and support to other sex workers.<sup>59</sup> The organization also teaches sex workers how to contest charges and use the courts to take legal action against those who have violated their rights. Sylvia Okoth was sold to a brothel by her brother when she was sixteen years old. In an interview with Kenya’s highest circulation newspaper, the Daily Nation, Sylvia described meeting a spokesperson from BHESP at a bar. The spokesperson told Sylvia that she had a right to say no to harassment from clients and that she could also report the harassment to a police officer. Of the interaction, Sylvia wrote “it was here, in this crowded

<sup>57</sup> Hasan, “Limits and Possibilities of Law and Legal Literacy”, 76.

<sup>58</sup> Bar Hostess Empowerment and Support Program, “About Us” <https://www.bhesp.org/> (Accessed 13 March 2020).

<sup>59</sup> Unknown author, “Confronting Discrimination: Overcoming HIV-Related Stigma and Discrimination in Health-Care Settings and Beyond” by UNAIDS. 2017. 37.



bar, that I was empowered and found my life's purpose".<sup>60</sup> After escaping the brothel, Sylvia underwent BHESP's legal literacy training, studied HIV management at university, and became a peer educator with BHESP. Sylvia now works as a peer-educator in low-income areas of Nairobi, providing legal information and legal advice to vulnerable young girls.

It is difficult to directly compare the success of the BHESP legal literacy program with the success of the BNWLA program. The BNWLA program worked with all women, while the BHESP program focuses on particularly vulnerable populations, including sex workers and women using drugs. Furthermore, the 2017 United Nations report that discussed the BHESP program was primarily concerned with HIV-related stigma and did not provide detailed information about BHESP's legal literacy efforts. As such, the level of the participants' legal understanding at the beginning of the BHESP program is not public knowledge. BHESP has yet to conduct a survey-based evaluation of their legal literacy training. It is still possible, however, to evaluate BHESP's program using Fatema Hasan's criteria for a comprehensive legal literacy education. The program begins by teaching sex workers and other vulnerable women about the rights afforded to them by law and running role-plays that demonstrate how to exercise these rights in practice. The course then extends beyond this information-giving phase, when graduates of the program become peer educators and teach the same information to other women. This process of encouraging the students to become the teachers allows for a degree of participation in the program that did not exist in the BNWLA workshops. Peer educators in BHESP also advocate for national policies and programs related to sex work and organize demonstrations on issues such as police inaction on violence against sex workers.<sup>61</sup> Participants in the BHESP program are given the legal and technical tools they need, in addition to preliminary information about the law and their rights,

<sup>60</sup> Joan Thatiah, "From Sex Worker to Sex Rights Activist" in *The Daily Nation*. 2019.

<sup>61</sup> Bar Hostess Empowerment and Support Program, "About Us" <https://www.bhesp.org/> (Accessed 13 March 2020).

to fight for the social transformation of Kenya. The early stage BHESP legal literacy programs facilitate the process of their participant's legal empowerment, thus meeting Fatema Hasan's criteria for a comprehensive legal literacy education. The program first teaches women how to seek legal redress – the first stage of legal empowerment – and then teaches women how to critique the system and the limits of the rights afforded to them – the second stage of legal empowerment. This example demonstrates that it is possible for NGOs to develop and implement legal literacy programs that also promote the development of legal empowerment. I will revisit Fatema Hassan's criteria for a comprehensive legal empowerment education when I assess the efficacy of similar programs in Morocco in Chapter Six.

### **Prejudicial Enforcement of the Law**

This chapter has explored the first two mechanisms through which the law can reinforce women's oppression: unjust laws and women's ignorance of the law. In this section, I discuss the third mechanism: the prejudicial enforcement of laws unfavorable to women and gender-biased judgements in the courts.

International standards recognize access to justice as both a basic human right and a means of protecting other universally recognized human rights. The United States Institute of Peace defines access to justice as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with international human rights standards. Access to justice does not exist if citizens fear the legal system and do not access it, if the justice system is financially inaccessible; if individuals have no lawyers; if individuals do not have information or knowledge of rights; or if a weak justice system exists. A 2013 OxFam study on the impact of legal fees on women's access to justice in Lebanon, Jordan, Iraq and Yemen studied access to justice along four variables: access, affordability, control, and extra-institutional

control. Control refers to the actors who have power over women's access to justice, specifically judges and court officials. Extra-institutional control refers to social norms and traditions that hinder or encourage women's access to justice.<sup>62</sup> These variables can be assessed by studying legal protection, legal awareness, adjudication, and enforcement in any given context. Since legal protection and legal awareness were explored in the first two sections of this chapter, this section will focus on prejudicial adjudication and enforcement.

Disadvantaged women often face a multitude of barriers to accessing justice. Even in countries where women's rights are formally granted in both the constitution and the legal codes, informal customary practices can override formal legal provisions. Many women are also actively discouraged from asserting their rights in opposition to men.<sup>63</sup> At the institutional level, the prejudicial enforcement of laws unfavorable to women and gender-biased court decisions restrict women's access to justice. For example, in countries where statistics demonstrate that girls marry below the legal age in significant numbers, judges are prejudicially enforcing the law. Thousands of young girls in the state of Florida have been married in the past ten years, in many cases to their rapists.<sup>64</sup> Nearly every state technically prohibits people younger than 18 from marrying, but each of these jurisdictions has exceptions to these laws. In Florida, as in many other states, judges often approve child marriages after receiving consent from the child's legal guardians. Judges in Florida may also issue marriage licenses without any age minimum in the case of pregnancy.<sup>65</sup> The prejudicial enforcement of the law in these cases jeopardizes the well-being of many young girls for several reasons. Child marriage curtails a girl's education, increases her risk of domestic

<sup>62</sup> El-Zein, "Women's Access to Justice in the Middle East", 5.

<sup>63</sup> El-Zein, "Women's Access to Justice in the Middle East", 9.

<sup>64</sup> Amanda Parker, "Worse than Weinstein is the Exploitation of Florida Girls" in *The Sun Sentinel* (2017).

<sup>65</sup> David McClendon and Aleksandra Sandstrom, "Child Marriage is Rare in the United States, Though This Varies by State" in *Pew Research Center FactTank* (2016).

violence, and minimizes her economic opportunities.<sup>66</sup> The handling of sexual assault cases by judges in the United States also reveals prejudicial enforcement of the law. In 2016, Judge Aaron Persky of the Superior Court of California infamously sentenced Brock Turner to a mere six months in county jail after Turner was convicted of three felony counts of sexual assault.<sup>67</sup> The recommended legal sentencing for three felony counts of sexual assault is fourteen years. Countless blog posts, articles, and petitions accused Judge Persky of promoting a culture of slut-shaming and discrimination with his sentencing.

In countries where men dominate the police, the judiciary, and all other legal institutions, sexism can also hinder the fair treatment of women under the law. Even female police, female judges, and female government officials can uphold sexist and discriminatory norms. In Egypt, reports from various jurisdictions indicate that legal and judicial institutions can lack sensitivity for women's experiences and show indifference to women's rights claims.<sup>68</sup> The Egyptian police rarely devote the same amount of attention to 'honor crimes' as they do to other types of offenses.<sup>69</sup> Furthermore, Egyptian victims of sexual crimes are often forced to describe their assault to an entire police station, thereby losing their privacy and anonymity. This practice deters many women from reporting their assaults.<sup>70</sup> In Yemen, the penal code stipulates that the state should assign lawyers to those individuals who cannot arrange their own legal defense. However, the pro-bono lawyers that the state assigns to women do not always understand discriminatory dimensions of a

<sup>66</sup> International Women's Health Coalition, "The Facts on Child Marriage," <https://iwhc.org/resources/facts-child-marriage/> (Accessed 25 March. 2020).

<sup>67</sup> Liam Stack, "Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage" in *The New York Times* (2016).

<sup>68</sup> El-Zein, "Women's Access to Justice in the Middle East", 8.

<sup>69</sup> Honor crimes are acts of violence, including murder, predominantly committed by male family members against female family members who are perceived to have brought dishonor on their families. For more information, see "Seductions of the Honor Crime" in *Do Muslim Women Need Saving?* by Lila Abu-Lughod.

<sup>70</sup> USAID, "Egypt: Violence Against Women Study,"

[https://www.cepal.org/mujer/noticias/paginas/7/42837/internal\\_link\\_egypt\\_violence.pdf](https://www.cepal.org/mujer/noticias/paginas/7/42837/internal_link_egypt_violence.pdf) (Accessed 4 March 2020).

given law.<sup>71</sup> In short, the prejudicial enforcement of the law can limit women's ability to access rights granted to them by law.

### **Conclusion**

The law plays a critical role in enforcing women's subordination across the globe. Laws can reinforce women's oppression through three primary mechanisms: (1) unjust laws that are discriminatory and limit the scope of women's rights; (2) ignorance of the law and legal processes by women who are unaware of their formal rights; and (3) prejudicial enforcement of laws unfavorable to women by law-enforcement officials or gender-biased judgements in the courts. These three mechanisms present a seemingly insurmountable challenge to women's equality. In a country like the United States, where the legal system is largely equitable and the majority of women have knowledge of their rights, prejudicial enforcement of the law still contributes to women's inequality. The judicial authorization of child marriages leaves American girls vulnerable to domestic violence and poverty. In countries like Lebanon, where some laws still actively discriminate against women, the barriers to access to justice are even greater. In this paper, I use these three mechanisms to analyze women's access to justice and women's equality in Morocco.

<sup>71</sup> El-Zein, "Women's Access to Justice in the Middle East", 9.

## **CHAPTER THREE**

### **The Law in Morocco**

“His Majesty King Mohamed VI, may God glorify him - in order to illustrate his commitment to the policies of local democracy and participation, responds to the legitimate expectations of the Moroccan people, and emphasizes the shared will that unites the entire nation with its leader on the path of comprehensive reform, swift progress, and the strengthening of the Kingdom’s civilizational enlightenment - has insisted, may God protect him, on making the Moroccan family - based upon shared responsibility, affection, equality, equity, amicable social relations and proper upbringing of children - a substantial component of the democratization process, given that the family constitutes the essential nucleus of society”

- Preamble of the 2004 *Moudawana*

#### **Overview**

The first mechanism through which legal systems can restrict women’s rights is the existence of unjust and discriminatory laws. Morocco is an important case study of this mechanism for several reasons. For one, Morocco is frequently cited as a model for progressive reform in the Arab world. Over the course of his reign, Mohammed VI has ensured free and fair elections, fostered a multiparty political system, and released a multitude of political prisoners. International organizations and governments around the world view Morocco as a true supporter of women’s equality as it compares to other Arab states. The U.S. State Department frequently praises Morocco’s *Moudawana* reforms and parliamentary gender quotas.<sup>72</sup> Secondly, Morocco ratified the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) in 1993. CEDAW is a comprehensive document defining equality between men and women, as well as detailing how gender equality can be achieved. However, in spite of these factors, Morocco’s performance in gender development is not among the best in the Middle East and North Africa (MENA)– an arguably low bar. This phenomenon suggests that there may be a large discrepancy between the policies the government establishes and the successful implementation of the law. In

<sup>72</sup> Vishvini Sakthivel, “The 2004 Morocco Moudawana Reforms: Outcomes for Moroccan Women”, 2013.

this section, I first detail the evolution of the Personal Status Code, from the French Protectorate of Morocco to the 2004 reforms. Then, I discuss the reforms made to marriage law and divorce law, with references to specific articles from the *Moudawana*. *I conclude that while the new Code drastically reduces the legal differences between men and women and changes the legal definition of gender relations, the Moudawana still contains gender discriminatory laws.*

### **History of the *Moudawana***

Before examining specific articles from the *Moudawana*, it is important to first understand the Moroccan context in which these laws were created. This section details the development of the modern feminist movement in Morocco and the evolution of the Moroccan Family Code. Morocco is a Muslim country and a former French protectorate. French political activity in Morocco began during the late 1800s, after a series of local wars threatened France's investments in the country. France, along with several other European states, took advantage of Morocco's political instability and encroached on Moroccan territory.<sup>73</sup> In 1880, Morocco signed the Treaty of Madrid and granted many European powers, including France and the German Empire, ownership of the territory that they had seized.<sup>74</sup> By the start of the 20<sup>th</sup> century, French influence in Morocco had increased as the other European powers concentrated their attention elsewhere. In 1911, authorized representatives of France and Germany signed an agreement that granted full control of political action in Morocco to France.<sup>75</sup> The French pledged to support the Moroccan sovereign by assisting him in state-building and economic development in the Treaty of Fes (1912), thereby establishing Morocco as an official French protectorate.<sup>76</sup> Morocco was governed as a French protectorate from

<sup>73</sup> Richard Young, "The End of American Consular Jurisdiction in Morocco" in *The American Journal of International Law* 51.2 (1957), 402.

<sup>74</sup> Charles Wellington Furlong, "The French Conquest of Morocco" in *The World's Work: History of Our Time* (Garden City, NY: Doubleday, Page, & Company, 1991), 14990.

<sup>75</sup> Unknown author, "Morocco" in *The American Journal of International Law* 6.1 (1912), 159-160.

<sup>76</sup> Jonathan Wrytzen, *Making Morocco: Colonial Intervention and the Politics of Identity* (Ithaca, NY: Cornell University Press, 2015), 248.

the Treaty of Fes until Morocco regained its independence in 1956. During the protectorate, the French promoted a system of legal pluralism in which Islamic law, the *Shari'a*, was utilized in some regions of the country and Berber law was enforced in other regions of the country.<sup>77</sup> Many Moroccans opposed the French system of legal pluralism, however, as they wanted Islamic law to ubiquitously enforced across the country. Nationalists, traditionalists, and Islamic reformists promoted the unity of the *Shari'a* to oppose the French legal system. Islamic law served as an important symbol of national identity as Moroccans struggled to regain their self-determination from the French. At the center of the fight for Moroccan self-determination was the '*Istiqlal*' (independence) Party.

In the fall of 1943, King Mohamed V encouraged the creation of the *Istiqlal* Party and the drafting of the Manifesto of Independence.<sup>78</sup> The Manifesto called for Moroccan independence and the establishment of a constitutional monarchy. Members of the *Istiqlal* Party worked for overall societal advancement, in addition to promoting Moroccan self-determination.<sup>79</sup> Their social advancement campaign was so expansive that it even included a number of feminist positions. Party leaders dismissed polygamy and lobbied for the creation of equitable inheritance laws because these practices did not embody their ideals of a modern Islam and an enlightened European style society.<sup>80</sup> Fatima Sadiqi, former professor of Gender Studies at the Université Sidi Mohamed Ben Abdallah in Fes, argues that while these men advocated for many radical reforms that benefitted women, they were not actually concerned with the advancement of women's rights.

<sup>77</sup> Leon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere" in *Islamic Law and Society* 10.1 (2003), 72.

<sup>78</sup> Wyrzten, *Making Morocco: Colonial Intervention and the Politics of Identity*, 254.

<sup>79</sup> Douglas Ashford, "Politics and Violence in Morocco" in *Middle East Journal* 13.1 (1959), 12.

<sup>80</sup> Fatima Sadiqi, "The Central Role of the Family Law in the Moroccan Feminist Movement" in *British Journal of Middle Eastern Studies* 35.3 (2008), 325.



Moroccan male feminists sought to improve society on the whole and did not consider the rights and experiences of individual women.

As members of the *Istiqlal* Party worked to create an ‘enlightened’ Islamic state, vocal women began to advocate for women’s human rights on the basis of the individual female experience. In 1946, the ‘*Akhawat al-Safaa*’ (Sisters of Purity) Association published a number of legal demands in the prominent *Istiqlal* newspaper, *Al-Alam*.<sup>81</sup> Their demands, which included the abolition of polygamy and more visibility for women in the public sphere, are considered the first ‘public’ voice of the Moroccan feminist movement. The women of *Akhawat al-Safaa* were able to publish their liberal positions in *Al-Alam* because they all had influential male relatives in the *Istiqlal* Party. It is important to note that while the women of *Akhawat al-Safaa* were linked to the men of the *Istiqlal* Party, their brands of feminism were very different.<sup>82</sup> The differences between male feminism and female feminism in Morocco persisted after Moroccan independence in 1956.

After independence, women continued working to improve women’s lives while male feminists used feminist principles to ameliorate Morocco’s perceived backwardness. For example, male feminists viewed the education of women as a prerequisite for Moroccan progress. As a result, women’s participation in education arose from general social projects, and not from any specific measures aimed at improving the female experience. Women entering the workforce was also an unplanned consequence of these general social projects.<sup>83</sup> Although these social projects did not target the empowerment of women, middle- and upper-class women did gain empowerment from entering the public sphere, via education and job opportunities. Women

<sup>81</sup> *Akhawat al-Safaa* was founded in 1946 by Malika al-Fassi as a women’s organization within the *Istiqlal* party. Malika al-Fassi is widely seen as the pioneer of Morocco’s feminist movement; between 1935 and 1946, al-Fassi wrote a series of articles advocating women’s progress through education. For more information, see Osire Glacier’s article “Power and the Production of Knowledge: The Case of Moroccan Feminism”.

<sup>82</sup> Sadiqi and Ennaji, “The Feminization of Public Space,” 96.

<sup>83</sup> Sadiqi, “Central Role of the Family Law,” 325.

became pharmacists, doctors, and professors. However, while Moroccan women were experiencing greater empowerment in their daily lives, the creation of the Moroccan personal status code cemented their position as second-class citizens.

Shortly after Moroccan obtained independence, the new government abolished Berber customary law and codified Islamic family law under the *Moudawana*. Moroccan laws were not unified in a single document, but rather split into different codes based on subject area. The *Moudawana* addressed matters of the family including marriage, gender roles, divorce, inheritance, and child custody. The legal code, labor code, penal code and Moroccan constitution govern other areas of life in Morocco. It is important to note that laws in the other codes also impact women's equality in Morocco. For example, the 1962 penal code addresses a multitude of issues related to gender-based violence and so-called "morality crimes", including rape, prostitution, abortion, and illicit sexual relations.<sup>84</sup>

The family law codification commission, which consisted of ten men, judges, and *ulama* (religious scholars), based the code on classical *Maliki* jurisprudence and the result was more conservative than Tunisia's 1956 family code. *Maliki* jurisprudence is one of the four leading schools of *fiqh*, or Islamic law, within the Sunni tradition. The school is named for Malik ibn Anas (ca. 710-95), a jurist from Medina who collected *hadith*, or sayings, from Muhammad, his family, and his companions.<sup>85</sup> Malik ibn Anas' collection, *Al-Muwatta*, differs from the other Sunni schools of law most notably in the sources it uses. *Maliki* jurisprudence includes the legal rulings of the four rightly guided Caliphs, in addition to the Qur'an and the *hadiths*. In contrast, the other

<sup>84</sup> Stephanie Willman Bordat and Saida Kouzzi. "USAID/Morocco Gender Analysis." Prepared by Banyan Global. 2018.

<sup>85</sup> Syafiq Hasyim, *Understanding Women in Islam: An Indonesian Perspective* (Jakarta, Indonesia: Solstice Publishing, 2006), 73.

three Sunni schools do not use the Caliphs' legal rulings.<sup>86</sup> *Maliki* jurisprudence was less popular in the Muslim east than the other three schools of Islamic law, but was brought to North Africa during the expansion of Umayyad rule in the 7<sup>th</sup> century C.E.<sup>87</sup> Over the centuries, the *Maliki* legal tradition established dominance in Morocco.<sup>88</sup> In 1910, al-Mahdi al-Wazzani, a Moroccan Islamic scholar, published a collection of *Maliki fatwahs* (Islamic legal rulings) that reinforced the authority of *Maliki* jurisprudence in Moroccan society. The collection addressed the specific challenges and changes generated by Moroccan modernity and the French intervention in Morocco.<sup>89</sup> Interestingly, the *Moudawana* was the only law created after Moroccan independence that was based on *Maliki* jurisprudence. The other Moroccan legal codes, including the penal code and the Constitution, were derived instead from French secular civil codes.<sup>90</sup> To my knowledge, previous literature does not speculate about the cause of this difference, but I suggest it is representative of Fatema Hasan's private sphere/ public sphere dichotomy. Perhaps *Maliki* jurisprudence was only considered essential to the preservation of Moroccan identity in the area of family law.

The 1957 *Moudawana* was codified without parliamentary discussion and emphasized the patriarchal family model of *Maliki* jurisprudence. For example, the code treated women as minors throughout their lives and required that women receive the consent of their husbands or fathers to carry out business transactions.<sup>91</sup> Furthermore, the code granted husbands the right to their wives'

<sup>86</sup> Mansoor Moaddel, *Islamic Modernism, Nationalism, and Fundamentalism: Episode and Discourse* (Chicago, IL: University of Chicago Press, 2015), 32.

<sup>87</sup> Jonathan Wrytzen, *Making Morocco*, 38.

<sup>88</sup> Mohamed el-Mansour, "Maghribis in the Mashriq During the Modern Period: Representations of the Other Within the World of Islam" in *Journal of North African Studies* 6.1 (2001), 83-86.

<sup>89</sup> Ety Terem, "Redefining Islamic Tradition: Legal Interpretation as a Medium for Innovation in the Making of Modern Morocco" in *Islamic Law and Society* 20.4 (2013), 425.

<sup>90</sup> Stephanie Willman Bordat, Susan Schaefer Davis, and Saida Kouzzi, "Women as Agents of Grassroots Change: Illustrating Micro-Empowerment in Morocco" in *Journal of Middle East Studies* 7.1 (2011), 94.

<sup>91</sup> Bruce Maddy-Weitzman, "Women, Islam, and the Moroccan State: The Struggle over the Personal Status Law" in *The Middle East Journal* 59.3 (2005), 399.

chastity and obedience. Article 35 of the Code stipulated that a husband's duties were essentially financial, while Article 36 outlined the responsibility of wives to submit to their husbands, train their children in the Islamic tradition, and breast feed, if possible.<sup>92</sup> The *Moudawana* reserved public space for men only, while designating private space for women.<sup>93</sup> However, the code also included some provisions that strayed from *Maliki* jurisprudence. Although polygamy was legal, a wife could use her husband taking a second wife as grounds for divorce.<sup>94</sup> The minimum age of marriage for girls was also set at fifteen, an improvement from the lack of minimum age before the *Moudawana*. The reforms, although limited, created a legal code that was uniquely Moroccan and a code that emphasized national unity under the guidance of Islam.

The *Moudawana* was a great disappointment to women's rights activists in Morocco. In 1965, less than ten years after the *Moudawana* was codified, King Hassan II established a commission to reform the rules concerning marriage guardianship and maintenance. The commission was created by to address shortcomings in these areas of the law but was disbanded after just one meeting. In 1965, the Moroccan government was distracted by a series of student street riots that resulted in more than 1,000 deaths.<sup>95</sup> The government took up family law reform again in 1970, 1974, and 1979, and in 1981, a royal commission prepared a new draft of the family law.<sup>96</sup> The draft, which was composed of 336 articles, never reached parliament. The available literature does not directly indicate why these reforms failed, but one can speculate that the political environment was not conducive to women's rights reform at that time. This time period, known as

<sup>92</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 400.

<sup>93</sup> Fatima Mernissi, *Beyond the Veil: Male-Female Dynamics in Muslim Society* (London, Saqi, 1985), 109-110.

<sup>94</sup> Although the 1957 Family Code did include grounds for woman-initiated divorce, the grounds were extremely restrictive. In practice, women rarely initiated divorces. I will discuss this in greater depth in Chapter Three.

<sup>95</sup> In a series of protests that began in Casablanca in March of 1965, thousands of students demanded the right to public higher education in Morocco. The demonstrations were brutally suppressed by law enforcement. For more information, see "Que s'est-il vraiment passé le 23 mars 1965?" in *JeuneAfrique*.

<sup>96</sup> Buskens, "Recent Debates on Family Law Reform in Morocco," 77.

the “Years of Lead”, was marked by repression and state violence against political dissidents and human rights activists.<sup>97</sup> Freedom of expression was limited by three constraints: (1) no criticism of the monarchy; (2) no criticism of the integrity of the nation; and (3) no criticism of Islam as the official religion of the kingdom.<sup>98</sup> Even so, as reform after reform failed to reach parliament, public discussion of the family law became more prominent as women began to express themselves more freely in the public sphere. This discussion largely avoided repercussions from the government, as the family law conversations refrained from involving these three constraints.

In the 1960s and the 1970s, women’s feminist ideas began to appear in academic and editorial writings. Newspaper reports and magazine articles disseminated feminist ideology among the educated classes. Female writers published novels and autobiographies that subtly (and sometimes not-so-subtly) challenged the patriarchy while also highlighting the importance of women’s private-sphere roles. For example, writers critiqued the notion that women should be excluded from the public sphere and they also promoted women’s participation in the workforce. Cleverly, these writers framed public participation as essential to a woman’s personal development, thereby helping her become a better wife and mother.<sup>99</sup> Journalists also began to address issues of women’s health and education and published articles that taught women how to become more effective mothers. In the 1980s, magazines like *8 Mars* and *Kalima* were created and they published articles that challenged traditional gender roles and their religious justifications. Although feminist writers worked to demonstrate that gender roles were not divinely prescribed, they did not criticize Islam.<sup>100</sup>

<sup>97</sup> J.N.C. Hill, *Democratisation in the Maghreb* (Edinburgh: Edinburgh University Press, 2018), 162.

<sup>98</sup> Khalid Amine, “After the ‘Years of Lead’ in Morocco: Performing the Memory” in *New Theatre Quarterly* 32.2 (2016), 122.

<sup>99</sup> Sadiqi, “The Central Role of the Family Law,” 327.

<sup>100</sup> Sadiqi, “The Central Role of the Family Law,” 328.

The 1960s, 1970s, and 1980s also saw the emergence of women's progressive professional organizations. These organizations, such as the '*Union Progressiste des Femmes Marocaines*' (Progressive Union of Moroccan Women), worked to support and advance the interests of Moroccan women working outside of the home. Although most of the professional organizations were not political in focus, women became very involved in politics during this time period as well. In leftist parties such as the '*Partie du Progres et du Socialisme*' (Progress and Socialism Party), women served as vocal and effective politicians. Women's non-governmental organizations (NGOs) were also created shortly after the women's professional organizations. The ADFM, or '*L'Association Démocratique des Femmes du Maroc*' (The Democratic Association of Women of Morocco) was established in the 1980s, and the UAF or '*L'Union de l'Action Féminine*' (Women's Action Union) soon followed. These NGOs and smaller, more specialized organizations worked to combat women's illiteracy, gender-based discrimination, and domestic violence.

In 1982, the French language magazine *Lamalif* published an article that criticized the secrecy surrounding the 1981 reform attempt. The article, entitled "*La Femme Mineure*", was widely disseminated among Moroccan liberal thinkers and its publication inspired the distribution of a myriad of other articles that argued for family law reform.<sup>101</sup> Interestingly, the majority of these pieces were published in French – the preferred language of progressive intellectuals. Several authors stressed the incongruity of the *Moudawana*'s patriarchal family model with Morocco's economic need for women in the workforce. Leon Buskens, chair of Law and Culture in Muslim Societies at Leiden University in the Netherlands, argues that the patriarchal family had become impractical by the 1980s, as most Moroccan families could not afford to have only the husbands provided for the family while the wives remained in the home.

<sup>101</sup> Buskens, "Recent Debates on Family Law Reform in Morocco," 77.

Just as public discussion of the family law became more prominent in 1980s, Islamist groups also began to gain support in Morocco. Islamism is a complex and multidimensional socio-political movement that advocates for the reordering of government and society in accordance with Islamic law.<sup>102</sup> Islamism does not specify a singular vision for this reordering and Carrie Rosefsky Wickham, a professor of Middle Eastern Studies at Emory University, argues that Islamist groups are not “monolithic entities whose members think and act in lockstep”.<sup>103</sup> It is also important to note that Moroccan Islamists are not a homogenous group; they range from conservative, to moderate, to radical.<sup>104</sup>

In 1969, *al-Shabiba al-Islamiya* (the Islamic Youth) became the first Islamist group in Morocco to use violence as a political weapon.<sup>105</sup> *Al-Shabiba al-Islamiya* opposed the influence of the progressive movement in Morocco and rejected the existing political order in the 1970s. In the mid-1970s, there was significant debate in the group about the effectiveness of their violent strategy and members broke away from *al-Shabiba* to create new Islamist groups.<sup>106</sup> A more moderate Islamist group, the Movement for Unity and Reform, emerged from *al-Shabiba* and publicly acknowledged the supreme authority of the king as the Commander of the Faithful and the guardian of the Islamic character of the Moroccan state.<sup>107</sup> In contrast, the Islamist organization Justice and Charity (*al-‘Adl wa al-Ihsan*) rejected the supreme authority of the king and promoted a more confrontational approach to the monarchy. The creation of Moroccan Islamist groups that

<sup>102</sup> Mehdi Mozaffari, “What is Islamism? History and Definition of a Concept” in *Totalitarian Movements and Political Religions* 8.1 (2007), 17

<sup>103</sup> Carrie Rosefsky Wickham, *The Muslim Brotherhood: Evolution of an Islamist Movement* (Princeton, NJ: Princeton University Press, 2015), 2.

<sup>104</sup> Sadiqi, “Central Role of Family Law,” 330.

<sup>105</sup> Abdellatif Hissouf, “The Moroccan Monarchy and the Islam-Oriented PJD: Pragmatic Cohabitation and the Need for Islamic Political Secularism” in *All Azimuth: A Journal of Foreign Policy and Peace* 5.1 (2016), 48.

<sup>106</sup> Moroccan authorities accused *Al-Shabiba al-Islamiya* of being involved in the 1975 assassination of popular labor unionist Omar Benjelloun. The government’s investigation into the attack led to a government crackdown of the organization. For more information, see *A History of Modern Morocco*, page 188.

<sup>107</sup> Wickham, *The Muslim Brotherhood*, 231.

rejected violence and supported the monarchy increased the broader appeal of Islamist organizations and contributed to their rise in prominence in the 1980s. Furthermore, the Moroccan regime was more concerned with containing socialist politics than Islamist politics in the last 1970s and the Islamist organizations were able to grow relatively unchecked.<sup>108</sup>

Although the ideologies of the distinct Islamist groups differed, each group emphasized the importance of the Islamic patriarchal tradition. Bruce Maddy-Weitzman, a professor of Middle Eastern Studies at Tel Aviv University, argues that “Islamists viewed the combination of working outside the home and dressing as one pleases as making women vulnerable to new forms of exploitation and repression”.<sup>109</sup> Moroccan Islamist ideology of the 1980s appealed to young, unemployed men in particular.<sup>110</sup> These men were easily convinced that the presence of women in the public sphere diminished their employment opportunities. Moroccan feminists quickly noticed the ways in which Islamist groups appealed to young men, and they moved to incorporate Islam into their women’s rights agenda. Fatima Sadiqi argues that liberal feminists thought to incorporate Islam into their discourse for two reasons: (1) Islamic dialogue facilitated easier conversation with the majority of Moroccan women; and (2) using an Islamic discourse helped feminists avoid accusations of cultural betrayal. The NGOs that worked with lower class or rural women found that women were more receptive to feminist ideas when framed from an Islamic perspective, as they could not be accused of betraying Islam.<sup>111</sup> To fight Islamist discourse, Moroccan feminists began to incorporate more of the Qur’an and the Hadith in their programming with lower class women. They emphasized Islam’s role as both a culture and a religion, argued for more liberal readings of Qur’anic texts, and stressed the dangerous absence of legal protection for women

<sup>108</sup> James Sater, *Morocco: Challenges to Tradition and Modernity* (New York, NY: Routledge, 2016).

<sup>109</sup> Maddy-Weitzman, “Women, Islam, and the Moroccan State”, 397.

<sup>110</sup> Sadiqi, “Central Role of Family Law,” 330.

<sup>111</sup> Sadiqi, “Central Role of Family Law,” 331.



before the law.<sup>112</sup> Feminists used the media to display the social repercussions faced by divorced women and underscore other social dangers women experienced as a result of the *Moudawana*'s conservative provisions. In this fashion, liberal feminists maintained their focus on the importance of reforming the Family Code. As feminist NGOs rallied to mitigate the influence of Islamist groups, Moroccan women's organizations grew stronger and expanded to work in rural areas in addition to urban centers.

By the 1990s, international condemnation for King Hassan II's repressive policies prompted the gradual political and economic liberalization of Morocco. In 1992, a coalition of newly energized women's groups, including the UAF, sent a letter to the Moroccan Parliament that demanded reforms to the *Moudawana*.<sup>113</sup> Their demands included: (1) equality between husband and wife in the family; (2) raising women's legal age of maturity to 18; (3) giving women the right to marry without a marriage tutor; (4) making judges responsible for all divorces; (5) outlawing polygamy; and (6) giving equal rights of guardianship over children. Launched on International Women's Day, the letter was part of a larger campaign for gender equality and received over one million signatures in support of its demands.<sup>114</sup> The campaign was poorly received in religious circles. Prominent scholars of *Maliki* jurisprudence accused feminists of attempting to change God's Word, while the Islamist organization *Jama'at al-islam wa'l-tajdid* asked the *ulama* to reclaim their responsibilities as the authoritative interpreters of Islamic law.<sup>115</sup> Muhammad al-Habib al-Tujkani, a professor of *Maliki* jurisprudence, argued that anyone who signed the petition was essentially relinquishing their Muslim faith.

<sup>112</sup> Sadiqi, "Central Role of Family Law," 330.

<sup>113</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 400.

<sup>114</sup> Sadiqi, "Central Role of Family Law," 331.

<sup>115</sup> Buskens, "Recent Debates on Family Law Reform in Morocco", 82.

Despite the opposition from religious circles, King Hassan II invited representatives from women's organization to his palace in September of 1992. Bruce Maddy-Weitzman writes that "Hasan stepped into the fray, in a way that both legitimized the issue as a subject and essentially depoliticized and demobilized the campaign".<sup>116</sup> Hassan II legitimized the campaign by creating a new commission of twenty *ulama* and one woman to review proposed reforms and draft a revision of the *Moudawana* in October of 1992. As *amir al-mu'minin* (Commander of the Faithful), Hassan II often cited the principle of *ijtihad*, which is the interpretation of Holy Law to promote human wealth-fare by qualified individuals. In May of 1993, the King presented the draft to representatives of the women's organizations and ordered the commission and the organizations to reach a consensus on the reforms. Consensus was quickly reached.

Several substantive improvements were made. Fathers were no longer allowed to compel their daughters to marry. Marriages could only be contracted if the woman consented with her signature in front of notaries. The most serious issues of family law, such as the abolition of repudiation, polygamy, and male guardianship, went largely unaddressed. Conservative Moroccans were particularly interested in preserving these three practices and Hassan II feared antagonizing the conservative and Islamist segments of the population.<sup>117</sup> The patriarchal family structure was preserved, but accommodations were created to protect women against some of the privileges assigned to men. Although the reforms were ultimately a disappointment to liberal feminists, the changes also represented an important symbolic step forward. The *Moudawana* was no longer an untouchable piece of Moroccan culture – it could both be changed and withstand that change. Furthermore, the inclusion of women's organizations in the drafting process illustrated both the government's willingness to work with the public and the king's openness to modern

<sup>116</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 401.

<sup>117</sup> Buskens, "Recent Debates on Family Law Reform in Morocco", 83.

ideas of gender equality. The reforms were also passed by Parliament in spite of the vocal opposition by Islamist groups, which was interpreted by many women's organizations as a sign that the Islamists' influence was fading.<sup>118</sup> However, in reality, the influence of Islamist groups was only growing.

In the mid-1990s, the Islamist group Movement for Unity and Reform decided to participate in Moroccan government.<sup>119</sup> The Justice and Charity organization denounced the political order instead and refused to engage. In 1996, Movement for Unity and Reform merged with a small legal party, the MDCP (*Mouvement Populaire Democratique et Constitution*), and began to gain prominence in Moroccan politics, emphasizing the Islamist nature of its platform.<sup>120</sup> The MDCP was renamed the "*Parti de la justice et du développement*", or the PJD, in 1998 and was the first Islamist party represented in Moroccan Parliament. The new government appointed in 1998, however, promoted several progressive and secular ideas that the PJD opposed. In March of 1999, the State Secretary for Family and Youth Affairs, Sa'd Saadi, presented a proposal for the improvement of women's position in Moroccan society, known as the "National Action Plan for the Integration of Women in Development".<sup>121</sup> The plan had four areas of priorities: (1) literacy and education for equality; (2) reproductive health; (3) integration of women in economic development; and (4) the reinforcement of female power. To reinforce female power, the plan proposed several changes to the *Moudawana*, including raising the official minimum marriage age from 15 to 18, abolishing polygamy, and equalizing the right of divorce and making it subject to the courts. Since the proposed reforms went far beyond traditional *Maliki* jurisprudence, they provoked intense debate within both Moroccan parliament and greater Moroccan society.

<sup>118</sup> Buskens, "Recent Debates on Family Law Reform in Morocco", 83.

<sup>119</sup> Wickham, *The Muslim Brotherhood*, 231.

<sup>120</sup> Wickham, *The Muslim Brotherhood*, 231.

<sup>121</sup> Buskens, "Recent Debates on Family Law Reform in Morocco", 84.

The Minister of Religious Foundations and Islamic Affairs, Abdelkebir Alaoui M'Daghri, argued that the proposed reforms directly contradicted Islamic law and he tasked a commission of *ulama* with writing a report about the intended changes. The *ulama* argued that only *ulama* have the authority to interpret Islamic laws. The report also argued that problems with the family law stemmed from a lack of morality and could be easily remedied by a return to *Shari'a*. The PJD also objected to the plan and formed *L'Instance National Pour le Protection de la Famille Marocaine* to challenge the reforms.<sup>122</sup> Reformists and women's groups protested the report and asserted that no group had the exclusive right to interpret the sacred texts. Debate over the proposed reforms continued after the death of Hassan II and the ascension of his son Muhammad VI to the throne in July of 1999. In March of 2000, the conflict over the plan resulted in two competing mass marches in Rabat and Casablanca. The Rabat march, in support of the National Plan, was organized by a coalition of liberal political groups and was attended by 40,000 people.<sup>123</sup> The Casablanca march, in opposition to the national plan, was organized by the PJD and other Islamist groups, and was attended by over 100,000 people. The liberal political elite was shocked by the strength of the Islamist reaction to the national plan and stopped promoting it.<sup>124</sup>

The two marches signified Morocco's evolution from a repressive state under Hassan II to a more open, modern, and pluralist society. In contrast, much smaller marchers were brutally repressed during the Years of Lead. Carrie Rosefsky Wickham writes "that the PJD felt free to voice its objections to the Plan reflected the fact that it emanated from liberal and left-leaning figures in the government rather than the monarchy".<sup>125</sup> However, the Moroccan monarchy had

<sup>122</sup> L'Instance National Pour le Protection de la Famille Marocaine was an umbrella group composed of over 40 associations. For more information, see *The Muslim Brotherhood: Evolution of an Islamist Movement*.

<sup>123</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 393.

<sup>124</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 403.

<sup>125</sup> Wickham, *The Muslim Brotherhood*, 232-3.

also underwent some liberalization with Muhammad VI's ascension to the throne in 1999.<sup>126</sup> In one of his first speeches as king, Muhammad VI announced his commitment to equal rights for men and women and the full integration of women into Moroccan society. Muhammad VI then appointed a number of women to high-profile royal positions, including choosing a woman to serve as head of the National Office of Oil Research and Exploration. In 2002, Muhammad VI broke tradition by publicly announcing his engagement to Latifa Benani, a computer engineer from a middle-class family. Muhammad VI's announcement was unprecedented for two reasons: (1) the wives of Moroccan kings were historically kept secret; and (2) Muhammad had ignored the tradition of marrying the daughter of a Berber nobleman.<sup>127</sup> Muhammad VI ultimately decided to promote the image of a modern royal family, at the expense of several traditions.

Muhammad VI was committed to publicly demonstrating his sympathy for women's rights activists and their cause.<sup>128</sup> In April of 2001, Muhammad VI created another commission to study the possibility of revising the *Moudawana*. The committee included members of the *ulama* and both politically liberal and politically conservative women. In March of 2003, the committee provided Muhammad VI with two sets of recommendations – one that was far-reaching and one that was more limited in scope.<sup>129</sup> Women's rights activists foresaw a repeat of the Casablanca march and did not believe that the reforms could survive more Islamist activity. However, in May of 2003, fourteen Islamist suicide bombers killed thirty-three civilians in Casablanca. The bombings were the deadliest terrorist attacks in Moroccan history and are still commonly referred

<sup>126</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 396.

<sup>127</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 397.

<sup>128</sup> It is important to note that there are limits to Muhammad VI's commitment to gender equality. For example, abortion and premarital sex are still criminalized in Morocco. For more information, see "Moroccan Court Sentences Journalist for Premarital Sex, Abortion She Denies Having" by Sudarsan Raghavan. Many feminists also suspected Muhammad VI's motivations in the early 2000s, arguing that his support of the reforms served his own interests in response to international pressure from Morocco's western allies and the threat posed by the rise of political Islam.

<sup>129</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 404.

to as Morocco's "September 11<sup>th</sup>".<sup>130</sup> The bombing suspects, their supporters, and all suspected radical Islamists were interviewed by the police. Moroccan authorities arrested 2,000 people in connection with the attacks and began to put them on trial by May of 2004. The attacks prompted widespread anti-fundamentalist and anti-Islamist sentiment and this public outrage was channeled into marches against hate across the country. Liberal feminists were among the first to condemn and protest the bombings and they capitalized on the public sentiment to promote *Moudawana* reform.

It would be difficult to overestimate the impact of the 2003 Casablanca bombings on Muhammad VI's decision to complete the long-delayed process of altering the *Moudawana*. Muhammad VI feared both the influence of Islamic terrorism and the perception that he was complicit in promoting radical Islam; he was determined to present an alternative to the Moroccan people.<sup>131</sup> In October of 2003, less than six months after the attacks, Mohammad VI selected the committee's far-reaching version of the reforms and presented the Moroccan parliament with a revised *Moudawana*. Women's rights organizations analyzed the details of the legislation and organized workshops and discussion groups to educate the public about the reforms. The reforms introduced divorce by mutual consent and irreconcilable differences, eliminated the requirement of a male marital tutor for adult women to marry, increased judicial control over repudiation and polygamy, and increased the age of marriage for women from fifteen years to eighteen years (the same age as for men).

When the bill was brought to parliament in January of 2004, the PJD voted to support the reforms. Although the bill was practically identical to the contested National Plan of 1999, the PJD's affirmative vote did not signify a systemic shift in the party's ideology. The PJD simply no

<sup>130</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 404.

<sup>131</sup> Maddy-Weitzman, "Women, Islam, and the Moroccan State", 404.

longer had the influence to contest the entire bill. The 2003 bombings had placed the PJD on the defensive and had reduced their public support base.<sup>132</sup> While the bill was being discussed by parliament, Muhammad VI largely refused to debate with the PJD, although they were still successful at introducing some qualifications to the bill. For example, the PJD ensured that judges were allowed to approve polygamous marriages in certain cases.<sup>133</sup> The final version of the code was adopted in January 2004. In this next section, I analyze specific articles from the 2004 *Moudawana*.

### **The 2004 *Moudawana* Reforms**

The 2004 *Moudawana* is composed of seven books and 399 articles that codify conditions for marriage, divorce, inheritance, and property ownership. The preamble to the Code sets the broad policy objective of providing justice to women, preserving men's dignity, and protecting children, while adhering to Islam's objectives of justice, tolerance, equality, and independent juridical reasoning. The preamble also references Muhammad IV's speech about the reforms, in which he highlighted a number of important principles, including: equality between women and men, in accordance with *Maliki* jurisprudence; women should not be compelled to marry against their will; and protection of children in accordance with international human rights standards.<sup>134</sup> Book One is entitled "Of Engagement and Marriage" and outlines the process for engagement and marriage, with articles addressing the marriage of minors, dowries, and polygamy. Book Two is entitled "Of the Dissolution of the Bonds of Matrimony and its Effects" and outlines the process by which people can exit their marriages. In this section, I will discuss marriage and divorce laws under the old version of the code and then delineate the reforms.

<sup>132</sup> Wickham, *The Muslim Brotherhood*, 235.

<sup>133</sup> Wickham, *The Muslim Brotherhood*, 235.

<sup>134</sup> Paul Prettitore, "Family Law Reform, Gender Equality, and Underage Marriage: A View from Morocco and Jordan" in *The Review of Faith and International Affairs* 13.3 (2015), 32.

Article 4 of the 2004 Family Code states that “marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life”. Both parties must consent to the union. The Family Code also stipulates the conditions required to contract a marriage, which are: (1) the legal capacity of both spouses to marry; (2) no intention to cancel the dowry; (3) a marital tutor, if required (4) the hearing and notarized statement by two *adouls* (public notaries) of the offer and acceptance pronounced by both spouses; and (5) the absence of any legal impediments. The reforms abolished the legal requirement of a wife’s obedience to her husband and stipulated that the husband and wife are joint heads of the household. Since the reforms, women do not need their husband’s permission to work outside of the home. The husband, however, is still legally required to support his wife in accordance with *fiqh*.<sup>135</sup> Before the 2004 reforms, women were also required to retain marriage tutors, *walis*, and have the *walis* consent to their marriages. However, *walis* frequently ignored the best interests of their clients and promoted unsuitable and dangerous unions.<sup>136</sup> The reforms removed the *wali* requirement and granted women the right to enter into a marriage on their own accord. Couples can still utilize and refer to a *wali* if they so choose. Under the previous code, women could marry at the age of fifteen and men could marry at the age of eighteen. The 2004 reforms require that both men and women be eighteen years old to marry. However, underage marriage is still permissible if a judge is able to provide reasons for the marriage’s necessity. Article 20 states that “the Family Affairs Judge in charge of marriage may authorize the marriage of a girl or boy below the legal age of marriage as stipulated in preceding Article 19”. No minimum age is provided for these exceptions.

<sup>135</sup> Leila Hanafi, “*Moudawana* and Women’s Rights in Morocco: Balancing National and International Law” in *ILSA Journal of International and Comparative Law* 18.2 (2012), 518.

<sup>136</sup> Katie Zoglin, “Morocco’s Family Code: Improving Equality for Women” in *Human Rights Quarterly* 31.4 (2009), 971.



The 2004 *Moudawana* also introduced new provisions for polygamy. Although parliament decided to protect a man's prerogative to marry a second wife, the reforms also included provisions to protect the first wife. Article 40 states that "polygamy is forbidden when there is the risk of inequity between the wives. It is also forbidden when the wife stipulates in the marriage contract that her husband will not take another wife". A judge is responsible for determining if there is a risk of inequity between the wives. In a couple's premarital contract, a woman may make it a condition of the marriage that her husband not take a second wife. If the husband later decides to take a second wife anyway, the wife is entitled to a divorce. A husband must also notify his current wife that he would like to marry an additional wife and notify his intended new wife that he is already married. If the first wife objects to her husband taking another wife and she does not have a premarital contract, the court must make two findings for the husband's request to be granted: (1) exception circumstances exist that justify the husband marrying a second wife and (2) the husband has sufficient resources to provide for both wives and families and to treat them equally. It is also important to note that polyandry, a woman having more than one husband, is illegal in Morocco – with no exceptions.<sup>137</sup>

### *Divorce Law*

The forms of divorce stipulated in the new *Moudawana* are manifold and complex. The 2004 Family Code provides for five types of divorce: (1) *talaq*; (2) repudiation by the judge upon the request of the wife; (3) divorce in exchange for compensation or *khol'*; (4) divorce based on irreconcilable differences; and (5) divorce by mutual consent. Under the 1993 Family Code, the husband enjoyed a unilateral and unconditional right to divorce his wife through repudiation, a process known as *talaq*. According to traditional *Maliki* jurisprudence, *talaq* is fulfilled after a

<sup>137</sup> Dina Rosin, "Polygamy in Morocco" in *Claremont Journal of Law and Public Policy* (2018).

man has said “I divorce you” to his wife three times.<sup>138</sup> A man did not need to obtain court approval for a *talaq* divorce before the 2004 reforms. This statement of *talaq* was followed by a legal waiting period, known as *iddat*, in which the couple tried to reconcile; the length of the *iddat* depended on the wife’s condition. If the wife was pregnant, her legal waiting period ended with the delivery of the baby or the end of the pregnancy. The legal waiting period for non-pregnant women was three full menstrual cycles for women who were still menstruating and three full months for women who were not menstruating.<sup>139</sup> If the *talaq* and *iddat* were performed three times with no reconciliation, the divorce was considered complete. Husbands were granted the sole prerogative of initiating *talaq* because it was assumed that men would have no interest in initiating a divorce without good cause.<sup>140</sup> For women’s rights activists, *talaq* was one of the most blatant examples of inequality between the sexes.<sup>141</sup> However, conservatives and Islamists in Morocco viewed *talaq* as a God-given right and the practice held great symbolic value. As such, the 2004 Family Code did not eliminate *talaq* altogether, although it did introduce several reforms.

The 2004 reforms created important limits for *talaq*. In the preamble to the reformed code, the authors write that they aim to “restrict the abusive arbitrary practices of the husband in exercising repudiation”. Article 79 states that “whoever wishes to repudiate must petition the court for authorization to certify the repudiation by two legal notaries, known as *adouls*, accredited for this purpose in the judicial district of the conjugal domicile, the wife’s domicile or place of residence, or the place where the marriage contract was issued, in that order”. This article grants

<sup>138</sup> Katherine Lemons, *Divorcing Traditions: Islamic Marriage Law and the Making of Indian Secularism* (Ithaca, NY: Cornell University Press, 2019), 126.

<sup>139</sup> These provisions for the legal waiting period were preserved in the 2004 *Moudawana* as well. See articles 129-137 of the Family Code.

<sup>140</sup> Maaïke Voorhoeve, “Divorce: Historical Practice” in *The Oxford Encyclopedia of Islam and Women* (Oxford University Press, 2013),

<sup>141</sup> Leon Buskens, “Sharia and National Law in Morocco” in *Sharia and National Law: Comparing the Legal Systems of Twelve Islamic Countries* (Cairo: American University Press, 2010), 117.

women the right to initiate a *talaq* divorce and requires that both spouses petition for judicial authorization for their divorce to receive approval. All *talaq* divorces, initiated by both men and women, must receive judicial approval. The court then subpoenas the two spouses for a reconciliation attempt. If reconciliation fails, the husband must pay his wife a court-determined sum. The payment includes: (1) the delayed dowry, if applicable; (2) maintenance for the *iddat*; and (3) the Consolation Gift. The Consolation Gift is determined by the length of the marriage, the financial means of the husband, and the reasons for the *talaq*. Article 89 stipulates that women who initiate the *talaq divorce* still receive this fixed sum. A wife can only initiate a *talaq* divorce, however, if her husband has granted her that right in their premarital contract.<sup>142</sup>

Repudiation by the judge upon the request of the wife was permitted in the previous version of the Family Code. However, the law only recognized six grounds on which a wife could petition: (1) non-respect by the husband of one of the conditions in the marriage contract; (2) harm; (3) non-maintenance; (4) latent defect; and (5) abstinence and abandonment. According to *Maliki* scholars, continuation of the marriage under any of those six grounds was unreasonable. However, cases of women actually obtaining divorces on these grounds were few and far between.<sup>143</sup> Discrimination in the court system created a high standard of proof for each ground, while societal pressures dissuaded women from petitioning at all.<sup>144</sup> The 2004 Family Code did not reform repudiation by the judge upon the request of the wife. In a *khol'* divorce, women are able to petition for divorce in exchange for compensation. If the husband supports the *khol'* but does not agree to the proposed compensation, Article 120 stipulates that “the court shall grant the divorce in exchange for

<sup>142</sup> Buskens, “Sharia and National Law in Morocco,” 117.

<sup>143</sup> Haideh Moghissi, *Women and Islam: Images and Realities* (London: Routledge, 2005), 246-253.

<sup>144</sup> In Morocco, divorced women are said to occupy a ‘third space’ in society, neither equal to men nor to women. Divorced women are often type-cast as immoral and lustful, because they have no marital home. For more information, see “Gender Construction and Divorced Women in Morocco: Fez City as a Case Study”.

compensation after fixing its amount, taking into consideration the amount of the dowry, the duration of the marriage, the reasons for the divorce petition, and the material situation of the wife". Women also have to relinquish their rights to alimony in a *khol* divorce.<sup>145</sup> For many Moroccan women, *khol*' divorces are financially unobtainable. A husband can also reject his wife's petition for *khol* and force her to pursue other avenues for divorce.

Article 94 stipulates that either spouse can petition the court for a divorce based on irreconcilable differences, known as *shiqaq*. The couple is then required to attend a reconciliation arbitration conducted by a judge or two court-appointed arbitrators. A divorce cannot be granted until a couple attends their reconciliation session and couples with children are required to attend additional mediation sessions.<sup>146</sup> Article 97 states that "in the event reconciliation is impossible to reach, and the conflict between the spouses persists, the court shall make written mention of this in an official report of the proceedings, and grant the divorce as well as fix the vested rights to be paid according to preceding articles, taking into account each spouse's responsibility for the cause of the separation when considering measures it will order the responsible party to take in favor of the other spouse". The Code stipulates that women must receive the fixed sum, which includes the delayed dowry, maintenance for the *iddat*, and the Consolation Gift. Divorce based on irreconcilable differences represents a major improvement in the law for several reasons. For one, a range of circumstances qualify as grounds for *shiqaq*, including, but not certainly not limited to, the six grounds discussed earlier. Secondly, women do not need their husband's permission to initiate *shiqaq*. Lastly, women are not forced to relinquish their money, property, and future alimony in a divorce for irreconcilable differences. The fifth type of divorce is divorce by mutual

<sup>145</sup> Janet Afary, "The Human Rights of Middle Eastern and Muslim Women: A Project for the 21<sup>st</sup> Century" in *Human Rights Quarterly* 26.1 (2004), 117.

<sup>146</sup> Zoglin, "Morocco's Family Code: Improving Equality for Women", 973.

consent. Article 114 provides that “the spouses may mutually agree on the principle of ending their conjugal relationship with or without conditions, provided that the conditions do not contradict the provisions of this Moudawana, and do not harm the children’s interests”. After the spouses agree to end their marriage, the couple petitions the court and the divorce is authorized, if reconciliation proves impossible. Both *shiqaq* and divorce by mutual consent allow women to exit their marriages without providing explicit justifications for their decisions.

The 2004 Code provides for five types of divorce: (1) *talaq*; (2) repudiation by the judge upon the request of the wife; (3) divorce in exchange for compensation or *khol*; (4) divorce based on irreconcilable differences or *shiqaq*; and (5) divorce by mutual consent. The introduction of *shiqaq* and divorce by mutual consent increased women’s options for obtaining a divorce. However, the Code also encourages couples to avoid divorce at all costs. Article 70 states that “no one should resort to the dissolution of the bonds of matrimony through repudiation or divorce except in exceptional circumstances, considering the rule of the least harm, given the family dislocation and harmful effects on children”. For each type of divorce, couples are also required to attend reconciliation sessions to try and resolve the issues in the marriage. The reconciliation requirement extends the divorce process for couples.

### *Assessment of Reforms*

While the new *Moudawana* drastically reduced the legal differences between men and women, the reforms did not completely erase these differences. The 2004 *Moudawana* still contains several gender discriminatory laws for both marriage and divorce. For example, the Code provides a list of temporary impediments to marriage, which are different for men and women. A temporary impediment exists if a Muslim woman wants to marry a non-Muslim man. Muslim men do not experience the same impediment, as long as their prospective spouse is Christian or Jewish.

Furthermore, although the code did provide several restrictions for polygamy, both the UN Human Rights Committee and CEDAW condemn polygamy in no uncertain terms. The UN Human Rights Committee asserts that polygamy violates women's dignity rights and is an inadmissible discrimination against women.<sup>147</sup> Women must also receive their husband's approval to obtain both a *talaq* divorce and *khol'* divorce. Husbands do not have to seek their wife's permission.

Although this thesis focuses on the marriage and divorce laws of the 2004 *Moudawana*, it is important to note that discriminatory laws exist in several other areas of the code as well. Inheritance laws in Morocco stipulate that after the death of a parent, daughters of the deceased inherit half of what their male relatives receive. This rule, the *ta'sib*, dates back hundreds of years and does not adequately protect women or families in a country where more than a third of households are headed by women or rely on women as their primary earners. Over half of these women are widows, 20 percent are married, 14 percent are divorcees, and many others are the single mothers of the roughly 50,000 children born out of wedlock each year. Moha Ennaji, a professor of gender and cultural studies at the Université Sidi Mohammed Ben Abdellah, argues that Moroccan law helps keep women financially dependent on men and thus vulnerable to male violence by denying women equal access to inheritance.<sup>148</sup>

The progressive intent of the code is also undermined by loopholes in the text. The *Moudawana* does not specifically repeal pre-existing legal practices and gives judges the option of consulting traditional *Maliki* jurisprudence. When judges are caught between the positivist Code and *Maliki* jurisprudence, judges frequently revert to the old religious interpretations of the law

<sup>147</sup> Susan Deller Ross, "Should Polygamy be Permitted in the United States?", American Bar Association (2011).

<sup>148</sup> Moha Ennaji, "Morocco's Inheritance Laws are Hurting Women and Must be Reformed" in *The Conversation*. 2018.

and ignore the code's new provisions. I will discuss these loopholes and judicial discretion in greater detail in Chapter Six.

### **Conclusion**

Unjust and discriminatory laws contribute to women's subordination in Morocco. Although the 2004 reforms made significant progress for women's equality, several unjust laws still exist within the Family Code. The Code still permits polygamy and allows exceptions for the marriage of minors. With these discriminatory laws still in practice, Moroccan women are unable to reach an equal status with men. Having established that the first mechanism of women's legal subordination is in effect in Morocco, I will now explore the second mechanism: knowledge of the law. To what extent are women in Morocco aware of the rights afforded to them in the 2004 *Moudawana*? Furthermore, to what extent are Moroccan women able to exercise the rights afforded to them by the reforms?

## **CHAPTER FOUR**

### **Women's Legal Literacy in Morocco**

“Place the family under the joint responsibility of both spouses, given that ‘women are men’s sisters before the law’ in keeping with the words of my ancestor the Chosen Prophet Sidna Mohammed, Peace Be Upon Him, as reported, ‘Only an honourable person dignifies women, and only a villainous one degrades them.’”

- King Mohammed VI, Preamble of the 2004 *Moudawana*

#### **Overview**

Ignorance of the law and legal processes by women is the second mechanism through which the law can reinforce women’s subordination. In Morocco, ensuring that the public knows about and accepts the 2004 *Moudawana* reforms is a significant challenge. Anecdotal evidence from several Moroccan NGOs reveals that women’s legal illiteracy is still common across the country. Obstacles to legal literacy and widespread knowledge of the 2004 reforms include language diversity, high illiteracy rates, and the geographic isolation of a large rural population. Governmental programs in Morocco are working to improve literacy rates, while non-governmental organizations are implementing legal literacy programs in various regions of the country. In this chapter, I first assess Moroccan women’s knowledge of the 2004 *Moudawana* reforms. Then, I discuss several barriers to legal literacy that exist in Morocco today. *I conclude that women’s legal illiteracy is still common in Morocco and an impediment to women developing legal empowerment.*

#### **Knowledge of the 2004 Reforms**

As delineated in Chapter Two, legal literacy refers to a person’s understanding of the rights afforded to them by law and is an important precursor to legal empowerment. There are three components of legal empowerment: (1) legal literacy; (2) the ability to seek legal redress and exercise one’s rights; and (3) the ability to challenge the inadequate rights provided by the law. Immediately after the Moroccan parliament ratified the new *Moudawana* in 2004, government



programs, non-governmental human rights organizations, and other NGOs quickly worked to disseminate information about the Family Code reforms. Some organizations released poster campaigns on the changes to the *Moudawana*, while others created short video clips highlighting one or two of the reforms at a time.<sup>149</sup> There were theater pieces, radio shows, brochures, and flyers all about the *Moudawana*, as women's organizations worked to raise awareness of the new protections. Of the campaigns, Stephanie Willman Bordat, the founder of the Moroccan NGO 'Mobilising for Rights Associates', said: "everyone I knew was doing it. Everyone was doing awareness raising on the family code". However, grassroots religious groups also worked to spread inflammatory propaganda and misinformation about the reforms.<sup>150</sup>

Assessing Moroccan women's knowledge of the 2004 reforms is difficult. Two years after the new *Moudawana* was implemented, the Moroccan government distributed a survey to gauge public knowledge of the *Moudawana* and people's attitudes about the reforms. The government survey found that 68 percent of men and 62 percent of women reported knowledge about the reforms, with awareness higher in urban areas (72%) versus rural areas (55%). Rural women were particularly unfamiliar with the *Moudawana*. Of the people who reported awareness, women were much more likely than men to view the reforms positively. The government survey reported that 62 percent of women viewed the reforms positively, as compared to the 36 percent of men.<sup>151</sup> Among the serious reservations both men and women harbored about the reforms, the most frequently cited is that people see the reforms as a dangerous break from both religion and tradition.<sup>152</sup> Interestingly, a non-governmental study also conducted in 2006 reported lower levels

<sup>149</sup> Interview with Stephanie Willman Bordat, February 3, 2020.

<sup>150</sup> Bordat and Kouzzi, "USAID/ Morocco Gender Analysis".

<sup>151</sup> Paul Prettitore, "Ten Years after Morocco's Family Code Reforms: Are Gender Gaps Closing?", World Bank (2014).

<sup>152</sup> Soumia Boutkhil, Chourouq Nasri, and Larbi Touaf. *In the Eye of the Storm: North African Women after the Arab Spring* (Palgrave Macmillian, 2017), 84.

of knowledge about the reforms than the government survey did. A study carried out by Kamal Mellakh, a sociology professor at Mohammedia's Hassan II University, reported that just 38 percent of women and 32 percent of men had knowledge of the reforms. Over 90 percent of illiterate women had no knowledge of the reforms.<sup>153</sup> While the government's statistics differ greatly from Kamal Mellakh's findings, both studies reveal that knowledge of the reforms is not widely disseminated across the country. In 2008, the International Foundation for Electoral Systems and the Institute for Women's Policy Research distributed a survey to determine the level of popular support for the *Moudawana* reforms. When asked how much they had heard about the reforms, a third of Moroccan women said that they had heard a lot about it (31 percent), over half of women said that they had heard a little about it (57%), and 11 percent of women said that they had heard nothing at all about the new provisions.<sup>154</sup> To my knowledge, neither the government nor other non-state actors have conducted additional research on the Moroccan people's understanding of the *Moudawana* reform since 2006. It is therefore difficult to speak to the current state of countrywide knowledge of the reforms, sixteen years after the new *Moudawana* were implemented.

Although there is an absence of comprehensive, updated data on women's knowledge of the reforms, anecdotal evidence reveals that many women are still unaware of the rights afforded to them in the 2004 *Moudawana*. Stephanie Willman Bordat works to implement grassroots legal awareness campaigns with a multitude of NGOs across the country. Through her work, Stephanie Bordat has spoken with many women who still lack knowledge about the 2004 reforms.<sup>155</sup> While

<sup>153</sup> Bordat et al., "Women as Agents of Grassroots Change", 106.

<sup>154</sup> International Foundation for Electoral Systems, "Focus on Morocco: Opinions on the Family Law and Gender Quotas" <https://www.ifes.org/publications/focus-morocco-opinions-family-law-and-gender-quotas-topic-brief> (Accessed 10 March 2020).

<sup>155</sup> Interview with Stephanie Willman Bordat, February 3, 2020.

Stephanie Bordat cannot provide a statistic about the number of women in this position, she stresses that this phenomenon isn't uncommon. Furthermore, many Moroccan women do not know where they can find information about their rights and the courts.<sup>156</sup> Moroccan women who lack knowledge of the 2004 reforms are not legally literate. As discussed in Chapter Two, legal literacy refers to an individual's ability to understand the rights afforded to them by law. It is very difficult for women who do not have knowledge of the 2004 reforms to enforce their rights, either at home or in the courts. Hence, without this basic knowledge of the law, women are unable to develop legal empowerment. A woman is legally empowered if she possesses the ability to seek legal redress and exercise the rights afforded to her by law.

### **Barriers to Legal Literacy in Morocco**

Language shapes women's access to the law in Morocco. Morocco's family law is encoded in Standard Arabic, a language that is not the mother-tongue of many Moroccans.<sup>157</sup> The Moroccan linguistic scene is very diverse, with Modern Standard Arabic ("*fusha*") existing alongside Amazigh languages, local dialects, and foreign languages – especially French, Spanish, and English. After Morocco gained independence in 1956, Arabic was adopted as the official language of the state. However, Moroccan secondary education was characterized by the near-complete dominance of the French language, as French became the language of instruction for the sciences. This phenomenon privileged those who spoke French over those who did not and led to the dominance of the francophone elite over political, economic, and cultural decision making.<sup>158</sup> This privileging still persists in Morocco today. When Moroccan children begin school in the first

<sup>156</sup> Fatima Zohra Boukaissi, "Du Deroulement des Audiences a la Section de la Justice de la Famille Pres des Tribunaux de Premiere Instance de Rabat" in *Le Code de La Famille: Perceptions et Pratique Judiciaire* (Friedrich Ebert Stiftung, 2007), 189-216.

<sup>157</sup> Interview with Fatima Sadiqqi, February 4, 2020.

<sup>158</sup> Fouad Bouali, "The Language Debate and the Constitution Amendment" (2012). Arab Center for Research and Policy Studies. 5.

grade, they are first taught Modern Standard Arabic. About a year later, students learn French in a systematic way that quickly establishes it as their second formal language.<sup>159</sup> In daily life, however, most Moroccans use the dialect *Darija*, a unique combination of colloquial Arabic, Amazigh, French, and Spanish, to communicate. The contradiction between the language of daily life and the official languages used in schools can be quite overwhelming for students.

A considerable number of Moroccans, almost forty percent of the population, also speak Tamazight, one of the Amazigh dialects, as their native language. The Amazighs, commonly referred to as Berbers, are an ethnic group indigenous to North Africa and West Africa. In 2001, after decades of legal discrimination against the Amazigh, King Mohammed VI established the Royal Institute of the Amazigh Culture to reclaim Berberness as a principal element of Moroccan national culture.<sup>160</sup> By 2004, schools in the Rif, the High Atlas, the Middle Atlas, and the Sous Valley were required to teach Tamazight language classes. Increased pressure from Amazigh activists led to the recognition of Tamazight as an official language of the state in the 2011 Moroccan constitution, alongside Arabic and French.<sup>161</sup> The use of Tamazight in the administration, public services, and schools progressed slowly and the government had to adopt a new language bill in 2016 that detailed how Tamazight would be fully integrated into Moroccan life.<sup>162</sup> However, eight years on, parliament has yet to enact the legislation required to establish its

<sup>159</sup> Morgan Reisinger, “The Challenges of Morocco’s Many Languages Lead to Academic Debate” in *Morocco World News* (2019).

<sup>160</sup> Paul Silverstein and David Crawford, “Amazigh Activism and the Moroccan State” in *Middle East Report* 233 (2004), 44.

<sup>161</sup> On February 20, 2011, tens of thousands of Moroccans took to the streets to demand freedom and democracy. 40 political organizations and civil rights groups came together to support the movement, named the ‘February 20<sup>th</sup> movement’, and organize more nationwide protests. The activism of Amazigh activists in the movement led to the formal recognition of Amazigh rights and culture in Morocco, including Tamazight as an official language. For more information, see “‘*Le Printemps Démocratique*’: Amazigh Activism in the February 20 Movement in Southern Morocco” by Daniele Rossi-Doria.

<sup>162</sup> Safaa Kasraoui, “Google Translate Considers Adding Tamazight Language” in *Morocco World News* (2019).

use in education and public life.<sup>163</sup> Despite the state's recognition of Tamazight as an official language, the *Moudawana* is still only encoded in Modern Standard Arabic. Although monolingual women (using only Tamazight) are relatively few in Morocco, they are disadvantaged by their inability to understand the language that the law is produced in. Furthermore, only highly educated women are comfortable using Modern Standard Arabic in their daily lives. When I interviewed Fatima Sadiqi, she said "Knowing the language of the law is very important in this case. Not only does knowing the language lead to easier access to justice, but it also gives a woman self-confidence in her transactions with her husband and family at home". Women who speak Modern Standard Arabic are less reliant on their husbands or male family members if they need to pursue an issue with state officials and the judiciary.

In Morocco, high illiteracy rates also pose a significant challenge to informing the public about the 2004 reforms. Although the government and several NGOs released a diverse variety of informative programming about the reforms, flyers, brochures, and posters were the most widely disseminated. It was impossible to represent the reforms in pictorial form and so the flyers, brochures, and posters did little to inform illiterate populations. Even though in 1999 the Morocco government began a campaign to eradicate illiteracy by 2015, statistics collected by the United Nations Development Programme reveal that illiteracy is far from eliminated. Illiteracy disproportionately affects Moroccan woman, particularly women in rural areas and older women. A shadow report prepared by the ADFM suggested that illiteracy rates in rural areas were almost double illiteracy rates in urban areas in 2007.<sup>164</sup> In 2018, 97.4 percent of women between the ages of 15 and 24 were literate.<sup>165</sup> This percentage rivals men's literacy rate for this same age group,

<sup>163</sup> Unknown author, "Morocco's Amazigh Push for Official Recognition of their New Year" in *Al-Jazeera*, 2019.

<sup>164</sup> ADFM, Shadow Report, 43.

<sup>165</sup> United Nations Development Programme, "Morocco" (2018).

which was 98 percent. However, increasing the age range decreases literacy rates for both men and women, but disproportionality so for women. For all women 15 and older, the literacy rate is 64.5 percent. For all men 15 and older, 83.3 percent. While these statistics illustrate that literacy rates are improving for younger generations, it is important to recognize that older women are still disadvantaged by their illiteracy. Since only 19 percent of women aged 65 and older in Morocco are literate, this age demographic may be less likely to have knowledge of the rights afforded to them in the 2004 reforms. The differences in literacy rates between men and women and between urban and rural populations stem from disparate education opportunities, as well as differences in some norms and values. In Morocco, the lack of educational opportunity for girls is still evident, despite actions taken by the government.<sup>166</sup>

Compulsory education in Morocco lasts nine years, from age six to age 14 for both girls and boys. However, it can be difficult for the government to enforce compulsory education in some rural areas. Families from lower-income communities often struggle to support their children's education because of low-education parents, large families, and poor housing conditions.<sup>167</sup> Rural families are often poorer than urban families and more likely to financially struggle with sending all of their children to school. When rural families are forced to decide which of their children to send to school, they almost always choose their male children. Not only is the education of men considered a higher priority, but many rural families also fear sending their female children far away for school.<sup>168</sup> Many rural families must send their children to secondary education in larger towns and the children may have to board with other families or live in boarding houses. For highly traditional rural families, sending their daughters to other towns is seen as jeopardizing the girls'

<sup>166</sup> Moha Ennaji, "Morocco's Experience with Gender Gap Reduction in Education" in *Gender and Women's Studies* 2.5 (2018), 1.

<sup>167</sup> Moha Ennaji, "Morocco's Experience with Gender Gap Reduction in Education", 1.

<sup>168</sup> Jessica Lambert, "Studying the Impact of the UN Women's Convention" (2011), 60.

reputations and purity. The geographic isolation of a vast rural population also poses a challenge to informing the public about the reforms.<sup>169</sup> As of 2008, 44 percent of the population lived in rural areas.<sup>170</sup> The majority of Morocco's rural population own small farms of less than five acres of land that are geographically isolated from major urban centers.<sup>171</sup> It can be very difficult for the government and non-governmental organizations to disseminate information about the law to these isolated and out of reach communities. It is important to note that while this rural-urban divide exists in Morocco's education system, I am in no way stereotyping the behaviors and the values of every rural family or of every urban family. As noted in Chapter Two, literacy is often considered an important precursor to legal literacy. While I argue that an illiterate person can have knowledge of the law and their rights, I do acknowledge that literacy can make participation in a legal system in countries where written law governs the actions of its citizens more accessible. The converse is also true; a woman can be literate and still face obstacles to understanding and exercising her rights in practice.<sup>172</sup>

### **Conclusion**

In short, many women in Morocco are still unaware of the rights afforded to them by the 2004 *Moudawana* reforms. Although there is an absence of concrete, country-wide data, a number of NGOs report legal illiteracy in the communities they work with. There are several reasons for this phenomenon, including Morocco's language diversity, low literacy rates, and the geographic isolation of a large rural population. Without knowledge of the 2004 reforms, women may struggle to exercise the rights afforded to them by law in their daily lives.

<sup>169</sup> Bordat et al., "Women as Agents of Grassroots Change", 106.

<sup>170</sup> World Bank, 2010.

<sup>171</sup> Jessica Lambert, "Studying the Impact of the UN Women's Convention", 60.

<sup>172</sup> For more information, see "Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation" by Pascoe Pleasence and Nigel Balmer.

## CHAPTER FIVE

### The Prejudicial Enforcement of the Law

“For all issues not addressed by a text in the present code, reference may be made to the *Malikite* School of Jurisprudence and to *ijtihad* (judicial reasoning) which strive to fulfil and enhance Islamic values, notably justice, equality and amicable social relations.”

- Article 400 of the 2004 *Moudawana*

#### Overview

Fatema Hassan’s third mechanism for female subordination is the prejudicial enforcement of laws unfavorable to women by law-enforcement officials or gender-biased judgements in the courts.<sup>173</sup> Hassan asserts that a discriminatory application of the law impedes a woman’s ability to exercise the rights she is afforded in any society. In this chapter, I first provide an overview of the Moroccan legal system. I discuss the courts and the creation of specific family courts, and the actors that wield power in the judiciary – namely, judges, lawyers, and *adouls*. I then assess whether prejudicial enforcement of the law occurs in Morocco. *I conclude that the nod to Maliki jurisprudence in the text of the Moudawana encourages judicial interpretation and the prejudicial enforcement of the law in a fashion that is discriminatory to Moroccan women.* For women who are legally literate and aware of the rights afforded to them in the 2004 *Moudawana*, access to justice can still be blocked.

#### The Moroccan Judiciary

The Moroccan judiciary plays a critical role in enforcing the provisions of the *Moudawana*. In this section, I will provide an overview of the Moroccan judicial system. Morocco, along with most other former French protectorates, follows a civil law system.<sup>174</sup> Morocco’s civil law system greatly differs from the common law system of the United States. In a common law system, judicial

<sup>173</sup> Hasan, “Limits and Possibilities of Law and Legal Literacy”, 69.

<sup>174</sup> Netty Butera and Kevashinee Pillay, “Introduction to the Moroccan Legal System” in *GlobaLex* (2018).



decisions are binding, although they can be appealed, and decisions of the highest court can only be repealed by that same court or through legislation.<sup>175</sup> Precedent obliges judges to make decisions other than the ones that they, in their best judgment, may have made without the existing precedent.<sup>176</sup> In a civil law system, only legislative enactments are considered binding and judicial decisions do not dictate future court rulings.<sup>177</sup> Since Moroccan judges are not bound by precedent, individual judges have more freedom in interpreting the laws. Judicial decisions are also less consistent across jurisdictions than in a common law system.<sup>178</sup>

Article 82 of Morocco's constitution states that judicial authority is independent from the legislative power and the executive power, although the king is still the guarantor of the judicial system's independence.<sup>179</sup> A judicial council, the *Conseil Supérieur du Pouvoir Judiciaire* (CSPJ), is also responsible for governing the application of guarantees relating to the independence, appointment, promotion, and discipline of judges. The CSPJ, created by the 2011 constitution, also has the authority to draft reports on the state of justice and provide recommendations for the judiciary.<sup>180</sup> The CSPJ's establishment was one several measures taken after the Arab spring to strengthen the independence of Morocco's judiciary.<sup>181</sup> Morocco's judiciary is divided into three principal types of courts: (1) general jurisdiction courts; (2) specialized jurisdiction courts; and (3) special courts. The Supreme Court is the highest appellate court in Morocco and has the power to review all other court decisions. Since the Moroccan Supreme Court is a court of cassation, the Supreme Court does not re-examine the facts of a case, it only hears appeals on issues of law. The

<sup>175</sup> David Strauss, "Common Law Constitutional Interpretation" in *The University of Chicago Law Review* 63.3 (1996), 879.

<sup>176</sup> Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2012), 41.

<sup>177</sup> World Bank Group, "Key Features of Common Law or Civil Law Systems" (2016).

<sup>178</sup> Interview with Ihsane ElDrissi, March 13, 2020.

<sup>179</sup> Netty Butera and Kevashinee Pillay, "Introduction to the Moroccan Legal System" (2018).

<sup>180</sup> The International Committee of Jurists, "Reforming the Judiciary in Morocco" (2013).

<sup>181</sup> Brahim Mokhliss, "Le Conseil Supérieur du Pouvoir Judiciaire Entre en Fonction" in *Le Matin* (2017).

Supreme Court is also responsible for reviewing cases of abuse of discretionary power in decision-making by regulatory or administrative tribunals, the prime minister, and other administrative authorities where such decisions concern more than one administrative court's jurisdiction.

Several types of courts fall under the category of general jurisdiction courts. Municipal and district courts were established by the judiciary to make justice more accessible to the Moroccan people. These courts rule on minor criminal offences and on civil cases where less than 1,000 *dirhams* are being disputed. In addition to exercising jurisdiction over personal status cases, first instance courts are also responsible for civil, social, and commercial matters. The 2004 *Moudawana* was accompanied by the creation of family courts, distinct from the ordinary courts of first instance that previously had jurisdiction over family matters.<sup>182</sup> Family courts are under the category of general jurisdiction courts. Before the family courts were created, observers worried that removing family law cases from the general courts would result in a lower standard of justice for those cases. Since Moroccan judges are appointed, not elected, activists worried that the judges appointed to family court positions would not have the same qualifications as judges appointed to other jurisdictions. One fear was that the government would appoint traditional and older judges to the family courts, in an attempt to restrict some of the progressive reforms. To my knowledge, research has not been conducted on the quality of Morocco's new family courts.

*Actors: Judges, Lawyers, and Adouls*

Morocco's judiciary requires the participation of judges, lawyers, and religious notaries, known as *adouls*. Judges and lawyers are educated in Moroccan law schools before they enter the work force. According to the 2016 World Bank Report, just ten percent of women in Morocco reach the university level.<sup>183</sup> In contrast, over fifteen percent of men reach the university level. Moroccan

<sup>182</sup> Bordat and Kouzzi, "USAID/ Morocco Gender Analysis".

<sup>183</sup> Ennaji, "Morocco's Experience with Gender Gap Reduction in Education", 5.

universities currently have 860,000 students, only 40 percent of whom are women.<sup>184</sup> Despite some gender disparity, anecdotal evidence suggests that women are well-represented in the student bodies of law schools.<sup>185</sup> It is unclear why this is the case. All law schools in Morocco follow the same curriculum and students do not pay tuition. After graduation, students decide whether they want to pursue a career as a lawyer or a career as a judge. Students who want to be lawyers attend bar training school and then complete an internship at a law firm. Students who want to be judges complete judge training school and then enter a lottery system for employment. The lottery system can place judges all over Morocco and most judges are not from the communities they preside over.<sup>186</sup> Although women are relatively well-represented in Moroccan law schools, far fewer women actually pursue legal careers.<sup>187</sup> Moroccan women are often encouraged to stop working after marriage, a phenomenon that removes educated women from legal careers and the workforce more generally.<sup>188</sup> When I interviewed Ihsane Eldrissi, a Moroccan lawyer and legal scholar, about her legal career, she said “when I began to practice law, I realized that it is really a male dominated field. The associates and heads of the firm were all male, I was the only female in my post-graduation internship. I was usually assumed to be the firm’s secretary”. There are also far fewer female judges than there are male judges in Morocco. Judges come from different backgrounds and hold a range of viewpoints on the role of women in society, law, religion, and the family.<sup>189</sup>

<sup>184</sup> Ahlam Ben Saga, “Half of Moroccan University Students Drop Out Before Graduation” in *Morocco World News* (2018).

<sup>185</sup> Interview with Ihsane Eldrissi, March 13, 2020.

<sup>186</sup> Interview with Stephanie Willman Bordat, February 4, 2020.

<sup>187</sup> Interview with Ihsane Eldrissi, March 13, 2020.

<sup>188</sup> In 2014, Prime Minister Abdelilah Benikrane told Moroccan Parliament that women would be better off at home than in the workforce. Youssef Belal, a political science researcher at the University of California, Berkeley, wrote that Benikrane’s statement was in line with what the vast majority of Moroccans think. For more information, see “Leader’s Words About Women Jolt Morocco” by Aida Alami.

<sup>189</sup> Zoglin, “Morocco’s Family Code: Improving Equality for Women”, 979.

The 2004 reforms assigned new duties to judges and prosecutors. For example, judges and public prosecutors are now required to exercise increased oversight and play proactive roles in their cases. In Morocco, public prosecutors are responsible for ensuring that the *Moudawana* is enforced. Article 3 of the Code stipulates that “the Public Prosecutor’s Office is an essential party to all legal actions related to the implementation of the provisions of this *Moudawana*”. For example, public prosecutors are charged with ensuring that parents protect, financially support, and provide for the education of their children. These provisions were introduced to ensure the proper enforcement of the reforms.<sup>190</sup> However, the Family Code does not specify how prosecutors should accomplish these tasks or provide a mechanism to assure their compliance with the new role. The reforms also require judicial approval for authorizing divorces and certain types of marriages, namely underage and polygamous marriages. Judges also play a new and important role in determining how assets are divided after a couple divorces. If the divorced parties are unable to agree on how their property should be divided and they do not have a marital contract that delineates the division, the court is required to step in. Article 34 stipulates that “when disputes arise concerning the remaining household furnishings, the matter is decided according to general rules of evidence. However, if neither the husband nor the wife presents any evidence, the husband under oath claims those effects that men habitually use and the wife under oath claims those effects that women habitually use. Objects commonly used by men and women will be, upon the sworn word of both of the spouses, shared between them when neither of them renounces his or her oath”. In all types of divorce except for *khol*, the husband is required to pay his wife a court-determined sum. The payment includes: (1) the delayed dowry, if applicable; (2) maintenance for the *iddat*; and (3) the Consolation Gift,

<sup>190</sup> Zoglin, “Morocco’s Family Code: Improving Equality for Women”, 970.

the Moroccan equivalent of alimony. The judge determines the Consolation Gift by assessing the length of the marriage, the financial means of the husband, and the reasons for the divorce.

Private attorneys also play an integral role in the Moroccan judiciary. To file a divorce petition, neither spouse is legally required to hire an attorney.<sup>191</sup> However, when I interviewed Rachid Touhtou, a professor of gender studies at the *Institut National de Statistique et d'Economie Appliquée*, about the process of filing for divorce, he said “in order for people, particularly impoverished women, to understand the legal procedures and access their rights, they need a lawyer to facilitate these procedures and protect their rights during the divorce”. Hiring a lawyer to support one’s divorce petition is particularly important for legally illiterate women, but it can also be very expensive. However, the legal system offers pro-bono legal services and legal aid for Moroccans who cannot afford a private attorney, typically women. Many women’s rights NGOs also offer free legal counseling to women who cannot afford a traditional lawyer.<sup>192</sup> Indigent defense services work to ensure quality representation for all defendants, regardless of income or social status, and are especially important for women in Morocco. It is important to note, however, that while these indigent defense services are useful and informative for impoverished women, they are often poorly staffed and poorly funded. Oftentimes, Moroccan women reliant on pro-bono services for a divorce petition do not receive the same quality of advice and attention as their husbands receive, if the husband is able to pay for an attorney.<sup>193</sup>

Similar to notaries but with a religious bent, *adouls* have the authority to adjudicate inheritance, approve wills, and draw up marriage contracts.<sup>194</sup> In the Qur’an, the term *adoul* is used

<sup>191</sup> Interview with Rachid Touhtou, March 27, 2020.

<sup>192</sup> Interview with Rachid Touhtou, March 27, 2020.

<sup>193</sup> Financial inequality is central to the female experience and financial impediments play a major role in restricting women’s access to justice. For more information, see “Financial Freedom: Women, Money, and Domestic Abuse” by Dana Conner.

<sup>194</sup> Ihsane Elidrissi Elhassani, “Women *Adoul* in Morocco: The Not So Modern Legal Dilemma” in *Morocco World News*, 2018.

as a description of the qualities that a judge should have and does not reference a unique profession. However, the Moroccan public and the *adouls* themselves instilled religious authority into the profession over time, due to confusion over the ceremonial nature of the role.<sup>195</sup> *Adouls* are not granted authority from the Qur'an. *Adouls* are also responsible for conducting different types of pre-marital counseling. For example, if a couple decides to create a marital contract, an *adoul* must advise the couple about the provisions that they can include, such as a monogamy clause.<sup>196</sup> The *adoul* must also inform the couple that the clauses they create are legally binding. In 2018, Muhammed VI endorsed a motion allowing women to become *adouls*.<sup>197</sup> The royal decree was met with opposition from traditional male *adouls*, who believed that women could not properly witness contracts and that the decree violated *Sharia*.<sup>198</sup> The only verse of the Qur'an that references the gender of a witness is the verse about debt. Surah 2, verse 282 says "call upon two of your men to act as witnesses; and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses". Traditional *adouls* interpret this verse to equate the testimony of two women to that of one man, meaning that a woman's value as a witness is less than a man's value.<sup>199</sup> Before 2018, Ihsane Eldrissi explained that:

The position was denied to women, because of the religious perception of *adouls*. But it caused so many contradictions in the justice system. Male *adouls* advanced the argument that a woman cannot properly witness a contract, although there were many female lawyers and judges in Morocco working on contracts directly.

- Interview with Ihsane Eldrissi, March 13, 2020.

Despite the traditional *adouls'* objections, over 7,000 women took the public notary exam to become *adouls* in 2018. Women represented almost 40 percent of the passing candidates, while

<sup>195</sup> Elhassani, "Women *Adoul* in Morocco".

<sup>196</sup> The 2004 reforms granted women the right to stipulate that her husband cannot marry a second wife in their marriage contract.

<sup>197</sup> Fayrouz Yousfi, "Morocco Allows Women to Take Up Public Notary Officials", in *Al-Jazeera* (2018).

<sup>198</sup> Interview with Ihsane ElDrissi, March 13, 2020.

<sup>199</sup> Ihsane Elidrissi Elhassani, "Women *Adoul* in Morocco: The Not So Modern Legal Dilemma".

also making up 40 percent of the total test-takers.<sup>200</sup> The impact of having female *adouls* on women's legal experiences has yet to be studied, as the phenomenon is so new, but would certainly make for interesting research.

### *General Dissatisfaction with the Justice System*

According to the U.S. State Department's 2015 study of human rights practices, the Moroccan public lacks confidence in the justice system.<sup>201</sup> The judiciary is criticized as corrupt, inaccessible, and lacking independence from the regime.<sup>202</sup> More than two-thirds of Moroccans have paid a bribe to the courts and companies report that bribes are often exchanged in return for favorable court rulings.<sup>203</sup> When I interviewed Rachid Touhtou about the efficacy of the Moroccan judiciary, he said that "the justice system is a big problem in two ways: the dominance of male judges and corruption".<sup>204</sup> Businesses believe that the judiciary is too beholden to the executive branch and they do not have confidence in the courts' ability to challenge the government. Corruption is also rampant in Morocco's police sector. In 2015, almost four in every ten households surveyed by Transparency International reported having paid a bribe to the police.<sup>205</sup> The Moroccan government has conducted investigations on police abuse, but these investigations have seldom resulted in criminal proceedings or disciplinary action. In 2013, a study conducted by Afrobarometer, a non-partisan, pan-African research institution, revealed that almost eight in ten citizens perceived the police to be corrupt, while almost one-third of Moroccans did not trust the police.<sup>206</sup>

For the maintenance of public safety, it is important that trust exists between police officers and the communities they serve. When people do not trust the police, they do not believe that the

<sup>200</sup> Unknown author, "Morocco: Some 300 Women Become Adouls", in *The North Africa Post* (2018).

<sup>201</sup> U.S. Department of State, "Country Reports on Human Rights Practices for 2015" (Accessed 10 March 2020).

<sup>202</sup> Zoglin, "Morocco's Family Code: Improving Equality for Women", 976.

<sup>203</sup> U.S. Department of State, "Country Reports on Human Rights Practices for 2015" (Accessed 10 March 2020).

<sup>204</sup> Interview with Rachid Touhtou, March 27, 2020.

<sup>205</sup> U.S. Department of State, "Country Reports on Human Rights Practices for 2015" (Accessed 10 March 2020).

<sup>206</sup> "Governments Falter in Fight to Curb Corruption: The People Give Most A Failing Grade", Afrobarometer, 2013.

police will appropriately handle their cases, particularly cases of intimate-partner violence and sexual assault.<sup>207</sup> In Morocco, where large parts of the population do not trust the police, citizens may be hesitant to turn to law enforcement when they need them the most. Moreover, the legal system experience is stressful and intimidating for most Moroccans. For one, many Moroccans do not know how to obtain information about legal processes and this problem is exacerbated for Moroccans who cannot find legal aid.<sup>208</sup> Secondly, most Moroccans are unfamiliar with court proceedings and judicial formalities. Katie Zoglin, an American attorney who worked for American Bar Association’s Rule of Law Initiative in Morocco, writes “judges do not announce cases in an audible manner. As a result, parties may not realize that their cases have been called, they wait for hours, and the judge scolds them when they finally enter the courtroom. Judges often show little respect for the parties. Litigants are allowed limited time and opportunity to speak”.<sup>209</sup> Hence, lower income Moroccans are often dissuaded from bringing their disputes to the courts.<sup>210</sup>

### **Prejudicial Enforcement**

Fatema Hassan asserts that a discriminatory application of the law impedes a woman’s ability to exercise the rights she is afforded in any legal system.<sup>211</sup> For women who are legally literate and aware of the rights afforded to them in the 2004 *Moudawana*, access to justice can still be blocked. The last article of the 2004 *Moudawana* provides that “for all issues not addressed by a text in the present code, reference may be made to the *Malikite* School of Jurisprudence and to *ijtihad* (judicial reasoning)”. This provision gives significant authority to judges and essentially encourages them

<sup>207</sup> In Egypt, reports from various jurisdictions indicate that legal and judicial institutions can lack sensitivity for women’s experiences and show indifference to women’s rights claims. The Egyptian police rarely devote the same amount of attention to ‘honor crimes’ as they do to other types of offenses. For more information, see “Women’s Access to Justice in the Middle East” by Fares el-Zein.

<sup>208</sup> Fatima Zohra Boukaissi, “Du Deroulement des Audiences a La Section de la Justice de La Famille pres des Tribunaux de Premiere Instance de Rabat” in *Le Code de La Famille: Perceptions et Practicque Judiciare*

<sup>209</sup> Zoglin, “Morocco’s Family Code: Improving Equality for Women”, 976.

<sup>210</sup> Interview with Stephanie Bordat, February 4, 2020.

<sup>211</sup> Hasan, “Limits and Possibilities of Law and Legal Literacy”, 69.



to make legal decisions based on their own interpretations of religious texts. Judges do not have this discretion when applying the other, purely civil codes.<sup>212</sup> This difference between the family code and Morocco's other civil codes exemplifies Fatema Hassan's private sphere/ public sphere dichotomy. Judges overseeing civil cases in the public sphere do not have the authority to consult *Maliki* jurisprudence, but judges are granted that authority for matters of the private sphere. *In my interviews, prejudicial enforcement was stressed as the most glaring barrier to women's ability to exercise their rights.* When I interviewed Rajae Nami, a Moroccan consultant for the Navanti Group, about prejudicial enforcement, she said:

There have been several documented accounts of judges and other legal parties referencing earlier interpretations of the personal status code and *Maliki* jurisprudence and putting women at a great disadvantage. These judges have ruled against women in contentious cases, due to limited precedents in court decisions, along with the fact that the legal texts leave significant room for interpretation. This is often due to the judges' conservative values and differences of interpretation.

- Interview with Rajae Nami, February 4, 2020.

The lack of clear guidelines in the Family Code allows judges to apply discretion and their personal interpretations of religious law to family law cases. For example, although the 2004 reforms technically increased the minimum age of marriage for women from fifteen to eighteen, judges can still grant minors permission to marry.<sup>213</sup> Article 20 of the *Moudawana* stipulates that a judge can grant permission for an underage marriage if the judge obtains permission from the parent or legal guardian of the minor, conducts a medical examination of the child, and surveys the minor's social circumstances. However, according to the *Association Amal pour la Femme et le Développement*, judges typically only ask girls if they know what marriage means, in addition to obtaining permission from their fathers. In practice, judges freely use Article 20 and child marriages have actually increased since the reforms. A 2019 study conducted by the *Droit et Justice* organization

<sup>212</sup> USAID, "Morocco Gender Analysis: Final Report", 2008.

<sup>213</sup> Interview with Rachid Touhtou, March 27, 2020.

found that child marriages had almost doubled from 18,000 cases in 2004 to 35,000 cases in 2014.<sup>214</sup> According to the Moroccan High Commission of Planning, over 40,000 underage marriage requests were filed in 2015 and 99 percent of those requests were for female minors. *Adouls* authorized 85 percent of the requests and rejected only 15 percent.<sup>215</sup> In 2017, UNICEF estimated that 16 percent of all Moroccan girls are married before the age of 18. Scholars are confounded by this phenomenon and actively working to understand the increase. These numbers do not take into account the occurrence of unregistered religious marriages. When I interviewed Rachid Touhtou about religious marriages, he said:

In some parts of Morocco, like the south east of Morocco, tribalism and customary law is still practiced. They call it the marriage of *fatih*a (introductory *surah* of the Qu'ran). It is not registered officially. So, women do not have recourse to the legal system and their rights are not protected.

- Interview with Rachid Touhtou, March 27, 2020.

In a *fatih*a marriage involving a minor, the minor's guardians do not apply for judicial permission. Instead, the minor participates in a marriage ceremony in which the *fatih*a *surah* is read. The couple's community treats them as married after the ceremony has taken place. When the girl turns eighteen, the couple legalizes the marriage with the courts.<sup>216</sup> Child marriage is clearly still a pervasive issue in Morocco, despite the country's attempt to curb the practice by raising the legal marriage age to 18 in 2004. Moroccan judges are prejudicially enforcing the Article 20 'loophole' to the detriment of young girls. The *Droit et Justice* study found that almost 99 percent of married female minors were unemployed and financially dependent on their husbands. The study also

<sup>214</sup> Doit et Justice, "Combatting Child Marriage in Morocco", <https://kvinfo.dk/mena/projects/2017-22-child-marriages-in-morocco/?lang=en> (Accessed 30 March 2020).

<sup>215</sup> Ahlam Ben Saga, "Study: Child Marriages in Morocco Are Increasing," <https://www.morocoworldnews.com/2019/01/262828/study-child-marriages-in-morocco-are-increasing/> (Accessed 30 March 2020).

<sup>216</sup> Patrick Lovett and Elise Duffau, "Maroc: Des Adolescentes Toujours Mariées de Force" in *France24* (2015).

demonstrated that married female minors were more likely to be victims of intimate-partner violence than women who married after their eighteenth birthdays.<sup>217</sup>

The 2004 *Moudawana* reforms also restricted the practice of polygamy. The reforms granted the women the right to demand a monogamous marriage in their marriage contracts. If such a contract exists and the husband still wants to marry a second wife, the first wife can be granted a divorce. If a woman does not have such a clause in her marriage contract, the husband may apply to the court for permission to marry another wife. The husband must be able to cite “special” and “objective” reasons for wanting an additional wife in order for the judge to grant the marriage permit. Article 40 states that “polygamy is forbidden when there is the risk of inequity between the wives”. Judges are required to refuse the application if they believe that the man cannot treat his spouses equally and if the man has insufficient financial resources to support two or more families. Since these stronger restrictions were adopted in the 2004 reforms, polygamy in Morocco has become rather rare. After the 2004 reforms, there was a 12.5 percent decrease in the occurrence of polygamous marriage relative to all marriages.<sup>218</sup> According to Moroccan authorities, over 750 polygamous marriages were approved by judges in 2013, making up less than one percent of total marriages. However, enforcement of these restrictions is weak in the more rural parts of Morocco.<sup>219</sup> In rural areas, many judges ignore the “special” and “objective” justification requirement and grant permits for polygamous marriages regardless of the husband’s financial circumstance. The vague language of the law allows judges to apply personal discretion and enforce the law in a fashion that can discriminate against Moroccan women.

<sup>217</sup> Doit et Justice, “Combatting Child Marriage in Morocco”, <https://kvinfo.dk/mena/projects/2017-22-child-marriages-in-morocco/?lang=en> (Accessed 30 March 2020).

<sup>218</sup> Rosin, “Polygamy in Morocco” in *Claremont Journal of Law and Public Policy* (2018).

<sup>219</sup> Rosin, “Polygamy in Morocco”, 1.

The reformed laws on polygamy and child marriages are not uniformly enforced across Morocco. According to Stephanie Willman Bordat's assessment of the implementation of the reforms, a major problem lies in the discrepancies among court decisions. Stephanie Willman Bordat writes that "this inconsistent application of the laws across jurisdictions results in unequal access to justice for women based on their socioeconomic status and geographic location".<sup>220</sup> Furthermore, prejudicial enforcement of the law is not just limited to the courts and actually extends into other state institutions. When I interviewed Stephanie Willman Bordat about prejudicial enforcement, she said:

When women were going to state institutions - like the police, the prosecutors, the hospitals, the court systems - they were being met with unresponsive public services and unresponsive systems – even though the women knew their rights. They were being met with either hostile attitudes towards women or sexist attitudes towards women or a lack of knowledge among public actors themselves about the law, corruption, unclear procedures, or really not useful procedures – a whole host of structural obstacles that meant that even though women might be fully aware of their rights, there were problems with getting those rights respected in reality. So, the women were coming back to the NGOs we work with and saying "hey you said I had the right to do this or that, but when I went to the police or the court or the hospital, this is what happened to me instead".

- Interview with Stephanie Willman Bordat, February 4, 2020.

Police officers, prosecutors, and medical professionals also restrict women's ability to exercise their rights in practice. A 2016 Human Rights Watch study reported that Moroccan police officers often refuse to record the statements of domestic abuse victims and fail to investigate their abuse. In several cases, when women went to public prosecutors, the prosecutors did not file charges against the women's abusers.<sup>221</sup> Local *adouls* also pose an obstacle to women seeking to exercise their new rights. According to the 2004 *Moudawana*, *adouls* are responsible for informing future spouses of the possibility of creating a prenuptial contract governing their financial obligations. However, in

<sup>220</sup> Bordat et al., "Women as Agents of Grassroots Change", 96.

<sup>221</sup> Human Rights Watch, "Morocco: Tepid Response on Domestic Violence"

<https://www.hrw.org/news/2016/02/15/morocco-tepid-response-domestic-violence#> (Accessed 30 March 2020).

reality, many *adouls* oppose this provision and refuse to discuss finances with future spouses.<sup>222</sup> In these cases, women are not afforded all of the benefits awarded to them by law and are instead reliant on the preferences of their assigned *adoul*. Prejudicial application of the law also occurs in many different areas of Morocco and is dependent on a judge's personal views. When I interviewed Stephanie Willman Bordat about the occurrence of prejudicial enforcement, she said:

The situation is much more complex than the oversimplified urban-rural divide. The occurrence of the discriminatory application of the law depends on the judge's personality. NGOs report that when there is a positive judge, prison director, or prosecutor in their town, they can do a lot of collaboration and things work really well. But it is not institutionalized. When these personnel switch and move around and get rotated to other regions, as they often do, a new person comes in and it really just depends on their personality. Which is another problem. All of these things – procedures, policies, and how the law is implemented – are supposed to be institutionalized. There are supposed to be clear guidelines on how the laws are supposed to be applied and implemented and it not supposed to change with the person, but it does happen with the person.

- Interview with Stephanie Willman Bordat, February 4, 2020.

The 2004 *Moudawana* reforms are prejudicially enforced in many different areas of Morocco. While some judges render decisions that grant women all of the right afforded to them by law, other judges revert to traditional *Maliki* jurisprudence and enforce a system of female subordination instead. Since the *Moudawana* does not specifically repeal pre-existing legal practices, it gives judges the option of consulting traditional *Maliki* jurisprudence. When judges are caught between the positivist Family Code and *Maliki* jurisprudence, judges frequently revert to the old religious interpretations of the law and ignore the code's new provisions.

Divorce laws are also prejudicially enforced by judges in Morocco. For example, although divorce for irreconcilable differences was introduced with Articles 98-101 of the 2004 Family Code, judges often refuse to grant victims of domestic violence fault-based divorces in practice.<sup>223</sup>

<sup>222</sup> Bordat, et al., "Women as Agents of Grassroots Change", 95.

<sup>223</sup> Bordat et al., "Women as Agents of Grassroots Change", 95.

Judges are also responsible for determining the Consolation Gift given to the wife after a divorce. Although judges must assess the length of the marriage, the financial means of the husband, and the reasons for the divorce when determining the wife's financial compensation, judges are not required to provide for the wife's financial survival after the divorce. Many Moroccan women are financially reliant on their partners, particularly women in abusive relationships, and the threat of financial instability often dissuades women from pursuing a divorce. Divorce by mutual consent is the most common type of divorce in Morocco (57.9 percent of all divorces) and *khol* divorce is the second most common (17.6 percent).<sup>224</sup> In a *khol'* divorce, a woman divorces her husband by providing him with financial compensation. Many Moroccan women are unable to provide the financial compensation needed, oftentimes the remaining balance of a bride price, to obtain this type of divorce. For some women, the inability to afford not receiving alimony or paying for the required *khol'* compensation necessitates staying in a loveless or even violent marriage.

### **Conclusion**

Fatema Hassan asserts that a discriminatory application of the law impedes a woman's ability to exercise the rights she is afforded. In Morocco, the 2004 *Moudawana* reforms restricted the influence of the *adouls* and were accompanied by the creation of specific family courts. Although these changes were progressive and the Code was created with a progressive intent, loopholes in the law contribute to women's continued subordination in Morocco. Judges often refer to *Maliki* jurisprudence when making decisions and ignore some of the more progressive reforms. In this fashion, the third mechanism of women's subordination is active in Morocco.

<sup>224</sup> Royaume du Maroc: Haut-Commissariat au Plan, *La Femme Marocaine en Chiffres* (Rabat: HCP, 2014).

## CHAPTER SIX

### Conclusion

One of the results of this supreme royal attention was the historic achievement of this pioneering Family Code, its provisions drafted in a modern legal jurisprudential style, in conformity with Islam's tolerant rules and exemplary purposes while providing balanced, fair and pragmatic solutions resulting from enlightened open *ijtihad* (judicial reasoning).

- Preamble of the 2004 *Moudawana*

Fatema Hasan proposes that there are three mechanisms through which the law reinforces gender inequality and women's subordination: (1) unjust and discriminatory laws; (2) ignorance of the law by women; and (3) prejudicial enforcement of the law.<sup>225</sup> In Chapter Three, I established that the 2004 *Moudawana* still contains several gender discriminatory articles, in addition to leaving dangerous loopholes in the law. In Chapter Four, I concluded that many Moroccan women are legally illiterate and unaware of the rights afforded to them in the 2004 reforms. Without legal literacy, women struggle to exercise their rights and fail to achieve legal empowerment. In Chapter Five, I determined that several of the *Moudawana* reforms are prejudicially enforced by the judiciary. The prejudicial enforcement of these laws impedes women's ability to exercise their rights. With these three conclusions in mind, it is interesting to assess which of the three mechanisms is the most detrimental to women's equality in Morocco.

Although the *Moudawana* contains several discriminatory laws, the Moroccan Family Code is still more progressive than most other family codes in the MENA region.<sup>226</sup> However, Morocco is actually outperformed by other MENA countries in the United Nations' Gender Inequality Index (GII). The GII reflects gender-based inequalities in three dimensions – reproductive health, empowerment, and economic activity.<sup>227</sup> GII ranges from 0.00 to 1.00, where

<sup>225</sup> Hasan, "Limits and Possibilities of Law and Legal Literacy," 69.

<sup>226</sup> Sakthivel, "The 2004 Morocco Moudawana Reforms," 2.

<sup>227</sup> Reproductive health is measured by maternal mortality and adolescent birth rates; empowerment is measured by the share of parliamentary seats held by women and attainment in secondary and higher education by each gender;

0 means 0% inequality, i.e. women and men fare equally, and 1 means 100% inequality, i.e. women and men are significantly unequal. A low score, such as 0.15, would be indicative of a more gender-equitable society, whereas a high score such as 0.85 indicates less equity. In 2019 Morocco has a GII value of 0.49, ranking 118<sup>th</sup> out of 162 countries. In contrast, GII values for Tunisia and Libya are 0.30 and 0.17 respectively. If Moroccan judges did not prejudicially enforce the Family Code, women would experience less discrimination in the legal system, and one could therefore assume that Morocco's GII would be lower. Legal literacy and legal empowerment are both crucial to women's equality in Morocco but are insufficient at fighting women's subordination alone.

When I interviewed Stephanie Willman Bordat about the importance of legal literacy, she said:

The typical discourse narrative in Morocco is that the problem is not the law and it is not the procedures – the problem is that people are illiterate and that they don't know their rights. I think it is a pretty easy way for the government to not fulfill its obligations and responsibilities. They are pushing it off onto the populations who are supposedly not aware, rather than having to change the ways in which they operate. It is really the obligation of the Moroccan state to make sure they have the structures, systems, and services in place for people to benefit from their rights. Awareness raising work does not take into account the fact that there are still loopholes in the law, still laws that are discriminatory against women, still laws that are not really well-written and that are applied differently across the country, based on how judges are interpreting it. You can do all the awareness raising you want, but if the local authorities themselves either don't know the law or are against the law and don't want to apply it or the law is so fluffily written that it can be applied a thousand different ways across the country, the problem is not just that there is not awareness among the population. The problem is implementation by the public actors and the state services that are supposed to be applying it. There are supposed to be policies in place, procedures in place, there is supposed to be clarity of laws and clarity of procedures, there are supposed to be mechanisms for holding public actors accountable when they don't apply the law as it is supposed to be applied. If a judge doesn't apply the 2004 law on underage marriage, for example, there are supposed to be mechanisms for holding them accountable and sanctioning them. Those mechanisms just don't exist. There is bad implementation of the law, with impunity, very frequently. This limits the application of the laws in reality.

- Interview with Stephanie Willman Bordat, February 4, 2020.

and economic activity is measured by the labor market participation rate for women and men. For more information, see the United Nations Report "Inequalities in Human Development in the 21<sup>st</sup> Century" [http://hdr.undp.org/sites/all/themes/hdr\\_theme/country-notes/MAR.pdf](http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MAR.pdf) (Accessed 30 March 2020).



Stephanie Willman Bordat argues that the prejudicial enforcement of the law prevents legally literate women, in addition to legally illiterate women, from exercising their rights in Morocco. It is certainly more difficult for a legally illiterate woman to exercise her rights than it is for a legally literate woman to exercise her rights, but legal literacy is not sufficient for women's equality in Morocco. Without universal support from state institutions, Moroccan women are unable to exercise the rights afforded to them in the 2004 Family Code. Fair enforcement of the 2004 laws is an important prerequisite for women's equality in Morocco. With this knowledge, I conclude that the prejudicial enforcement of the 2004 *Moudawana* is the greatest impediment - of the three mechanisms - to women's equality in Morocco. Furthermore, as Stephanie Willman Bordat explains above, there is currently no infrastructure supporting the legal framework of the *Moudawana*. Without this infrastructure, there is no formal mechanism for monitoring judges' behavior and holding judges accountable when they fail to adhere to the intent of the *Moudawana*. By MENA standards, the *Moudawana* is a progressive Family Code and it contains a number of important, non-discriminatory articles that have the potential to improve the female experience in Morocco. However, the absence of enforcement mechanisms hinders the Family Code's ability to affect meaningful change. The proper enforcement of the *Moudawana* also has the potential to shape Moroccan norms. When I interviewed Leila Hanafi, a Moroccan human rights lawyer, about women's equality, she said:

The Moroccan government has the ability to improve the condition of women. Through the transformative power of legal formalism, the better implementation of the *Moudawana* has the capacity to empower women. While social realities must be considered by legislators, the law has an educational function and sets norms for what society thinks is right and what's wrong. Patriarchal gender relations are ripe to be addressed through this function of legal reform and must be addressed collectively by the government, the judiciary, local leaders, the media, civil society, and educators. Failure to do so hinders the law from affecting meaningful change.

- Interview with Leila Hanafi, March 31, 2020.

Leila Hanafi also stresses the need for better government enforcement of the *Moudawana*. Without this enforcement, the *Moudawana*'s potential will never be fully realized. Until the Moroccan government reforms the Family Code and creates mechanisms for ensuring its proper enforcement, Moroccan women will experience barriers to exercising their rights. In the absence of government intervention, Moroccan non-governmental organizations continue to empower individual women in the justice system. One of these NGOs, Mobilising for Rights Associates (MRA), employs a comprehensive legal empowerment strategy that allows women to acquire more agency.

Under the leadership of Stephanie Willman Bordat, MRA partners with women-led NGOs, lawyers, and other activists located in towns and cities outside of Casablanca and Rabat to implement a multipronged legal empowerment program.<sup>228</sup> In Chapter Two, I identified the three components of legal empowerment: (1) knowledge of the law or legal literacy; (2) the ability to seek legal redress and exercise one's rights; and (3) the ability to challenge the inadequate rights provided by the law. MRA's program addresses the first and second components by teaching Moroccan women about the rights they are legally afforded and facilitating role-playing of real-life scenarios. After implementing its legal literacy strategy, MRA worked with NGOs to provide individual legal advice and legal accompaniment to women. The NGOs train their members to accompany women to the public services, such as going with women to the courts or to their lawyer's office. The NGOs help women, through legal accompaniment services, navigate the complex systems that often discourage women from exercising their rights. In addition to helping women with reading, writing, and understanding paperwork, the NGOs also intervene on the behalf of women who are ignored or harassed when they visit legal institutions. For vulnerable

<sup>228</sup> MRA both directly implements programs and trains local NGOs to implement the programs in their villages, towns, and cities.

women in particular, MRA's legal accompaniment program has reduced the corruption and the harassment they faced when attempting to exercise their rights.

MRA has also sought to empower women to challenge the very procedures and policies that contribute to their subordination, thereby addressing the third component for legal empowerment. For example, graduates of MRA's program exercised pressure on the government to improve women's rights in the penal code and the government introduced the Violence Against Women Act in 2018.<sup>229</sup> The program also works to develop participants' individual skills for analysis, reflection, and critical thinking on their own lives.<sup>230</sup> With the critical thinking and group mobilization workshops, MRA's programming meets Fatema Hasan's requirements for a legal empowerment strategy. Unlike the *BNWLA* program discussed in Chapter Two, the MRA program teaches women about the limits of the legal system and helps women develop the tools to critique the system of subordination.

After Stephanie Willman Bordat realized that legally empowered women still faced barriers to accessing justice, she expanded MRA's programming to include the training of public actors; namely, judges, prosecutors, and police officers. MRA runs educational programs for these professions on women's equality. When I interviewed Stephanie Willman Bordat about the effectiveness of these programs, she said:

We are working very closely with the local public actors to encourage them to use best practices and training the public actors. I think it has had the most impact in establishing the relationships between the NGOs and the public actors. and creating a space for dialogue to be able to attack the problems in the community and developing solutions for the problems they are facing. If you don't have a strong local system with strong relationships, implementation of the law won't work. This is where we have seen the most improvement in the communities we work with across the country. Public actors invite NGOs to collaborate with them, NGOs invite state actors to their training workshops and the state actors actually attend.

<sup>229</sup> Siobhan O'Grady, "Why Activists Aren't Happy with Morocco's New Anti-Sexual Harassment Laws", in *The Washington Post* (2018).

<sup>230</sup> Interview with Stephanie Willman Bordat, February 3, 2020.

They put into place joint action plans and they decide together how to receive female victims of violence. The thing about training public officials is that you can train them on women's rights and good practices, but the bottom line is that public officials have to follow the rules, internal procedures, and regulations that govern their job. You can convince the local state actors that it would be good to do this or that, but if they're not allowed to do that or are not compelled to do that, they simply can't. You can't just go train people and say that they should be nicer – what you have to do is change the rules and regulations surrounding their job positions. You have to create enforcement mechanisms.

- Interview with Stephanie Willman Bordat, February 4, 2020.

Although MRA reports success in training individual judges and police officers in women's rights education, the progress is inevitably restricted by the scale of the task and the limitations with government enforcement. While the *Moudawana* is not a panacea to solve women's inequality, it is nonetheless important as it has provided a foundation for change. Individual women across Morocco have benefitted from the reforms, with the support of local NGOs. The Moroccan justice system is both an institution in which barriers to full implementation exist and one that could be greater utilized in the pursuit of women's equality.

The case of the 2004 *Moudawana* reforms has implications that extend beyond Morocco. As stated above, the 2004 *Moudawana* is a progressive law in many respects. The reforms raised the minimum age of marriage for women from fifteen to eighteen, introduced divorce by mutual consent, and annulled the wife's duty of obedience to her husband, in addition to a multitude of other liberal changes. However, over fifteen years have passed since the *Moudawana* was reformed and yet serious resistance to the Family Code still exists. As discussed in Chapter Three, the 2004 reforms were passed in parliament without total support from the Moroccan people, as the reforms were highly unpopular among conservative and Islamist groups. Since the 2004 *Moudawana* is still unpopular and prejudicially enforced in some parts of Morocco, it is apparent that passing a progressive law does not automatically create progressive social norms and values. Furthermore, the case of the *Moudawana* reveals that a law is only as strong as the support for that law. Without

ubiquitous support for the 2004 reforms, the law is prejudicially enforced without protest in some regions of the country and the government is not pressured into creating judicial enforcement mechanisms. Traditional values are still common in many areas of Morocco and the 2004 *Moudawana* did not magically remove people's support for practices like polygamous and underage marriages.

Stanford economist Matthew Jackson argues that when norms clash with formal laws, the laws are likely to go unenforced and the result is often counterproductive for everyone involved.<sup>231</sup> Although the U.S. Supreme Court ruled that the Constitution protects a pregnant woman's liberty to have an abortion almost fifty years ago, states continue to pass abortion restrictions that challenge the constitutional right established in *Roe v. Wade*. Clearly, *Roe v. Wade* did not change social norms throughout the entire United States. For many Americans, abortion is still the equivalent of murder. While each of the 2019 proposed abortion bans was ultimately struck down by the courts, they demonstrate the counterproductivity of creating laws that clash with formal norms. This does not mean that there is no hope for progressive laws that run counter to a society's social normal; it is just difficult to assess how norms change over time. Duncan Green, a professor of International Development at the London School of Economics, writes that “norms are a continuously evolving system. Even law—the most codified, formal subset of norms—is constantly changing”.<sup>232</sup> Jackson proposes that there are two possible ways to successfully challenge social norms: (1) dramatic and highly visible efforts to change behaviors spearheaded by leaders like Mahatma Gandhi or Martin Luther King, or (2) gradual changes in laws over long

<sup>231</sup> Clifton Parker, “Laws May be Ineffective if They Don’t Reflect Social Norms, Stanford Scholar Says” <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html> (Accessed 9 April 2020).

<sup>232</sup> Duncan Green, *How Change Happens* (Oxford, UK: Oxford University Press, 2016).

periods of time.<sup>233</sup> Hence, it is still possible that traditional norms in Morocco will change and eventually match the 2004 *Moudawana* reforms. Moroccans have demonstrated their propensity for dramatic efforts to change behaviors, as demonstrated by the February 20<sup>th</sup> movement, and have found success in these efforts in the past. Perhaps as legal empowerment and women's rights education becomes more common and popular across the country, more Moroccans will rally around a women's rights agenda. Hence, it is still possible that traditional norms in Morocco will change and eventually match the 2004 *Moudawana* reforms.

<sup>233</sup> Clifton Parker, "Laws May be Ineffective if They Don't Reflect Social Norms, Stanford Scholar Says" <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html> (Accessed 9 April 2020).

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