

# **FAMILY LAW REFORMS IN THE ARAB WORLD: TUNISIA and MOROCCO**

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### **Introduction**

In the Islamic world, basic rights in family law constitute a major dimension of gender equality and good family practices. Without these rights, women are vulnerable to the whims of their husbands and sometimes their male relatives. Recognizing the centrality of family law for women’s well being, Asma Khadar (1996), a lawyer and human rights activist once declared: **“Family law is the key to the gate of freedom and human rights for women.”** Beginning in the 1950s and continuing thereafter, Tunisia has implemented gender legislation expanding women’s rights in family law. A steady stream of reforms has followed the first and ground breaking phase of the mid-1950s, the period that witnessed the formation of a national state in the aftermath of independence from French colonial rule.

The promulgation of the Tunisian Code of Personal Status (République Tunisienne 1997) in 1956 constituted a radical shift in the interpretation of Islamic laws with regard to the family and set a stage for further developments. Another major phase occurred in the 1990s with reforms of citizenship law as embodied in the Tunisian Code of Nationality (République Tunisienne 1998). As a result of these two major phases, **Tunisia has been at the forefront of “woman friendly” legislative changes in the Arab-Islamic world and is widely recognized as such** (see for example Nazir and Tomppert 2005). The consistency in gender legislation over half a century is itself a remarkable development. At a time when issues of women’s rights are not only

highly debated, but also sometimes violently contested in Muslim countries, the Tunisian case thus requires examination.

This report documents the two major phases of reforms in favor of women's rights in Tunisia. It then places the Tunisian case in the context of the broader Arab-Islamic world in general. It also briefly compares the Tunisian reforms to another case where significant reforms occurred: that of Morocco in 2004. Although the Moroccan reforms of 2004 do not go quite as far as those in Tunisia, they are nevertheless important in that they place Morocco in second place in the Arab world in regard to gender equality in family law. A study of women's rights in the Middle East and North Africa conducted by Freedom House states: "As measured by this study, Tunisian women enjoy the greatest degree of freedom in the MENA region, followed by women in Morocco, Algeria, Lebanon, Egypt, Jordan, Palestine, Kuwait, Bahrain, Syria, Libya, the UAE, Iraq, Qatar, Oman, and Iran. Yemen and Saudi Arabia lag significantly behind (Kelly and Breslin 2010: 4).

The first wave of reforms in Tunisia in the 1950s and the 2004 reforms in Morocco transformed the legal construction of gender roles within the family. Since one may wonder why these reforms occurred, let me mention briefly what I see as their historical roots. In painting social change in broad strokes, I see the initial and pioneering phase of the 1950s in Tunisia as a reform from above resulting from the actions of a newly formed national state interested in building a new society at the end of colonial rule (Charrad 2001). By contrast, the role of women's agency came into play in Tunisia starting in the 1980s and became more robust in the 1990s. From the 1980s to today, women's rights advocates have contributed to the making of gender legislation either through direct involvement in the committees preparing the laws or by indirectly putting pressure on the power holders, neither of which was present in the Tunisia of the 1950s. Women's rights advocates also played a key role in Morocco in the promulgation of the 2004 reforms.

### **Tunisia in the Context of the Arab-Islamic World**

Before we proceed to examine the substance of family in Tunisia and Morocco, it is useful to place these two countries in the context of the Arab-Islamic world. Scholars and activists have agreed on the extent to which the Tunisian Code of Personal Status has expanded women's rights and transformed family law, when compared to the situation ante and to developments in other parts of the Arab-Islamic world (Charrad 2011). For example, in November 2006, the Library of Congress in Washington, D.C. organized a symposium to commemorate the fiftieth anniversary of the promulgation of the Code of Personal Status (US Library of Congress 2006). During the symposium, I heard Justice Sandra Day O'Connor describe Tunisia as a model for other countries in the Islamic world regarding gender legislation. In advocating the Tunisian example for Palestinian women's rights in the future and in considering countries with a Muslim majority, A. K. Wing and H. Kassim (2007: 1551-52) write: "Along with Turkey, Tunisia has taken the most secularized approach to women's rights in majority-Muslim countries." Referring to the Arab world, L. Labidi (2007: 7) remarks that "the [CPS] has been a beacon and a source of hope for other women's movements and governments in the region."

In a similar vein, V. M. Moghadam (2005: 295) notes: "Tunisia's 1956 personal status code, the *Code du Statut Personnel*, afforded women full and equal rights and remains one of the most progressive family laws in the Arab world today." A Tunisian woman journalist declared: "The dispositions of the Code are revolutionary relative to the laws of personal status in countries similar to ours" (quoted in Charrad 1998: 74). A Tunisian woman active in politics echoed the statement: "The Code of Personal Status is a cutting edge body of legislation that many countries envy. I just came back from a meeting in an Arab country and I realized that, as soon as people speak about Tunisia, they speak about the Code of Personal Status. It is an excellent thing" (quoted in Charrad 1998: 74).

In an extensive survey of women's rights in the Arab World, Freedom House compared countries on several dimensions related to gender equity (Nazir and Tomppert 2005). It ranked Tunisia number one regarding women's legal rights (Nazir and Tomppert 2005: 25). The following table shows that Tunisia ranks highest with its score of 3.6 out of 5 in the categories of nondiscrimination and access to justice and 3.4 in autonomy, security, and freedom of the person. The first column, Nondiscrimination and Access to Justice, assesses women's equality under the constitution, protection from gender-based discrimination, citizenship rights, equality in the penal code and criminal laws, and women's legal identity. The second column, Autonomy, Security and Freedom of the Person, refers to family laws and equality within marriage, freedom of religion, freedom of movement, and freedom from gender-based violence (Nazir and Tomppert 2005: 1-14).

	Nondiscrimination and no Access to Justice	Autonomy, Security, and Freedom of the Person	Economic Rights and Equal Opportunity	Political Rights and Civic Voice	Social and Cultural Rights
ALGERIA	3.0	2.4	2.8	3.0	2.9
BAHRAIN	2.2	2.3	2.9	2.1	2.8
EGYPT	3.0	2.8	2.8	2.7	2.4
IRAQ	2.7	2.6	2.8	2.2	2.1
JORDAN	2.4	2.4	2.8	2.8	2.5
KUWAIT	1.9	2.2	2.9	1.4	2.8
LEBANON	2.8	2.9	2.8	2.9	2.9
LIBYA	2.3	2.1	2.3	1.2	1.8
MOROCCO	3.2	3.2	3.1	3.0	3.0
OMAN	2.0	2.1	2.7	1.2	2.1
PALESTINE	2.6	2.7	2.8	2.6	2.9
QATAR	2.0	2.1	2.8	1.7	2.5
SAUDI ARABIA	1.2	1.1	1.4	1.0	1.6
SYRIA	2.7	2.2	2.8	2.2	2.3
TUNISIA	3.6	3.4	3.1	2.8	3.3

UAE	1.7	2.1	2.8	1.2	2.3
YEMEN	2.4	2.3	2.3	2.6	2.1

In repeating the study and publishing the results in 2010, Freedom House gave a score of 3.1 to Morocco and again 3.6 to Tunisia (Kelly and Breslin 2010: 23).

### **The Initial Step: the Tunisian Code of Personal Status of 1956**

Promulgated in the aftermath of independence from French colonial rule, the Code of Personal Status (CPS) redefined relationships within the Tunisian family (Charrad 2007 and 2001: 201-15). The CPS was part and parcel of a larger state building program that aimed at developing a modern centralized state and at marginalizing patriarchal kin-based communities in local areas. Like other world religions, Islam offers many possible interpretations and systems of meaning, as demonstrated by Clifford Geertz (1971). In Islamic texts, arguments exist both for and against legal innovation. Members of the 1956 government introduced the CPS as a new phase in Islamic innovation, similar to earlier phases in the history of Islamic thought. Rejecting dogmatism, they emphasized, instead, the vitality of Islam and its adaptability to the modern world in regard to the family.

The CPS reformed marriage, divorce, custody, and to some extent, inheritance (Chamari 1991; Charrad 2001: 215-32; Bessis 1999). On all of these dimensions, it expanded women's rights by eradicating some of the most patriarchal arrangements of the legislation previously in force. It radically transformed divorce by eliminating the husband's right to repudiate his wife and by allowing women to file for divorce. It made divorce a matter for the courts. It also established the principle of alimony and increased women's rights to child custody, while maintaining men's advantage through guardianship.

In one of the boldest moves in the Arab-Islamic world, especially in 1956, it abolished polygamy unconditionally. The outright abolition of polygamy has become one of the best-known aspects of the CPS. Even though in Tunisia, as in most of the Arab-Islamic world, only men able to support two or more wives and their children could have several wives, polygamy was nevertheless a constant threat for women. Tunisia is the only Arab-Islamic country to make a second marriage null and void, as well as to make any attempt to take a second wife, while already married, punishable with a fine and imprisonment.

Although regulations on divorce may appear, at first glance, less dramatic than those on polygamy, they have far reaching implications on gender roles and family dynamics. They contribute at least as much to transforming the legal construction of the family. Prior to 1956, the Maliki School of Islamic law applied to the overwhelming majority of the Muslim population in Tunisia. In part for reasons of political expediency, the French colonial state had left Islamic family law untouched. In the Maliki school, a repudiation required only the presence of two witnesses and no judicial intervention for

the termination of marriage by the husband. Furthermore, the wife had no judicial recourse. She could turn to her family or community to put pressure on the husband not to repudiate her. But that is a different order of intervention from the role of a judicial authority. By contrast with the husband's unilateral right to divorce at will, a woman had to appeal to a religious judge to ask for a divorce, which she could obtain only on highly limited and specific grounds.

In addition to abolishing the man's unilateral right of repudiation by establishing the principle of equal divorce rights and obligations for men and women, the CPS of the 1950s also introduced the necessity of judicial intervention in all cases: "No divorce shall take place save before the court," reads Article 30 (République Tunisienne 1997: Art. 30). The CPS made it possible for women to get a divorce and gave them the same rights and obligations as men in this respect (Chamari 1991). It stated that the party not desiring the divorce, man or woman, should get compensation. Presenting a new conception of divorce, the CPS required the party wanting the divorce to go to court, go through a session of reconciliation, reflect on the situation, and consider the possibility of having to make a payment to the other spouse. A new law, introduced in 1981, addressed post-divorce issues. It increased a mother's custody rights by making her automatically the guardian of a child in case of the father's death, something that had not been true earlier.

The CPS of the 1950s granted women considerable autonomy from husbands and male kin. At the same time, however, it maintained gender inequality in the family by leaving a woman's share of inheritance as half of that of a man's, by granting fathers greater rights regarding guardianship of children, and by requiring that a wife should obey her husband. Subsequent amendments increased women's guardianship rights and dropped the clause according to which wives should obey husbands. Guardianship differs from custody insofar as custody refers to day-to-day care and guardianship to legal matters concerning the child.

In sum, relative to Maliki law previously in effect, the CPS and further amendments brought major changes that expanded women's rights in the family, even though they did not eliminate gender inequality in family law. By requiring judicial intervention in divorce, abolishing polygamy, and increasing women's custody and then guardianship rights, the legal reforms embodied in the CPS lessened the prerogatives of men in marriage and gave more protection to women in the family.

### **The Second Major Wave: Tunisian Reforms of 1993**

The second major wave of reforms occurred in 1993 under the government of President Ben Ali who succeeded President Bourguiba in 1987. The remarkable difference between the two waves of reform resides in the role of women's activism in the latter. In contrast to what happened in the 1950s, women's associations emerged and the feminist discourse came to the forefront of public debates in the 1980s and 1990s. This was a period when women's rights advocates made their voices heard (Brand 1998; Zoughlami 1989).

One of the greatest changes of 1993 concerns women's citizenship rights as defined in the transmission of nationality to their children (Charrad 2000: 75-79). I use the terms "citizenship" and "nationality" interchangeably in the following discussion. A consideration of nationality rights raises the question of the conditions for membership in the community of citizens. Such rights have significant implications on families as they let us know whether a child can have the same citizenship as his mother and thus enjoy the same privileges as well as face the same restrictions.

The Tunisian *Code de Nationalité* (République Tunisienne 1998) was promulgated in 1957, revised in 1963, and revised again in 1993. As with other codes of citizenship, its purpose is to delineate the conditions for membership in the community of citizens within the nation-state. Like the codes of many countries in the world, it combines elements of *jus sanguinis*, the right of blood, and elements of *jus soli*, the right of soil, in the attribution of nationality rights. Whereas *jus sanguinis* confers nationality through blood descent, *jus soli* means that people born within the national territory are nationals.

Unsurprisingly, in Tunisia, as in other Maghribi countries, the patrilineage or extended family on the father's side has historically had primacy as a determinant of nationality in that membership in the political community of the nation-state flows directly from male descent or patrilineality. *Jus sanguinis* through fathers is unconditional. The Tunisian code states: "Is Tunisian: . . . the child born of a Tunisian father . . ." (République Tunisienne 1998: Art. 6). Since paternal filiation serves in all cases as a source of nationality rights, fathers have a definite advantage. A Tunisian father thus automatically passes nationality to his children regardless of whether the children were born on Tunisian national territory or abroad. A child whose father and grandfather were born in Tunisia also is Tunisian (République Tunisienne 1998: Art.7).

The reforms of 1993 made mothers a source of *jus sanguinis*. For the first time a Tunisian woman could pass her nationality to a child born abroad, regardless of the nationality of the child's father: "Becomes Tunisian, . . . [if he or she meets all conditions imposed by the Code and makes the request] within one year before reaching the age of majority, a child born abroad from a Tunisian mother and a foreign father" (République Tunisienne 1998: Art.12). Widely applauded in Tunisia and elsewhere, the 1993 provision has granted a critically important citizenship right to women and a form of protection to children. In introducing matrilineal descent as a legitimate and sufficient reason for *jus sanguinis* regardless of *jus soli*, the provision of 1993 challenges the special status of patrilineality as the source of membership in the political community. Calling into question the privileges of the patrilineage and the model of the extended family, the provision is an important step toward allowing women to become equal citizens in their nuclear family and in their own country.

### **The 2004 Reforms of Family Law in Morocco**

We now turn to Morocco, which comes second after Tunisia in the Arab world in

implementing a family law reform that gave women greater rights in family life. Following its independence from French colonial rule in 1956, Morocco initially adopted a socially conservative policy towards family law by promulgating the *Mudawwana* or Code of Personal Status of 1957-58. The *Mudawwana* was essentially a reiteration of Maliki family law left in place during French colonization. It was first formulated as a set of royal decrees released between 1957 and 1958. In unifying under one set of family laws the many ethnic and tribal groups in Morocco, the *Mudawwana* also codified the subordinate status of women. This was in sharp contrast with the 1956 Code of Personal Status in Tunisia.

Under the *Mudawwana* of the 1950s, a woman was a minor under the guardianship of her father, husband, or other male guardian. She could not be married without the consent and signature of her *wali*, or matrimonial guardian. She might legally be married at 15, where her male counterpart could legally be married at age 18. She could not be employed or obtain a passport without the permission of her male guardian (Zoglin 2009). Moreover, women could lose custody of their children if they remarried and could be divorced unilaterally and without justification or judicial oversight. Minor revisions were made to the *Mudawwana* by royal decree in 1993, but the spirit of the law remained essentially intact (Zoglin 2009).

For decades after independence from French rule, strong alliances between the state, religion and patriarchy halted all efforts to improve women's rights and reform the *Mudawwana* from the 1950 to the 2000s. According to the Maliki jurisprudence that prevails in Morocco as in the rest of the Maghreb, the King is considered to be the supreme representative of the nation and the symbol of its unity and is thus entitled to proclaim personal *ijtihad*s (or legal and theological interpretations) (Karam 1999). Using this authority, King Mohammad VI announced the *Mudawwana* reforms on October 10, 2003, two and a half years after deliberations began on the royally selected reforms committee. They were unanimously approved by the parliament on January 16, 2004, and thereafter publicized to the international community as reforms grounded in religious continuity (Baragach 2005).

The 2004 *Mudawwana* reforms brought new promise to Moroccan women, but not total emancipation. The newest reforms developed around a general principle of extending the protections of women within the family unit, and to that end women received greater rights in regard to marriage, divorce, polygamy, and custody. The reforms attempted to reconcile the existing *Mudawwana* with international standards of human rights, adhering to Islamic tenets of justice and reason while remaining receptive to the requirements of progress and modernity (HREA, Moroccan Family Code, English translation).

The marriage age for women was raised to 18, where it remained for men, and the role of the *wali* or matrimonial guardian was diminished in that it became optional instead of required. Women can now enter into marriage contracts on their own, and judges are now required to provide written justification for the authorization of underage marriage, whereas before they could more easily permit marriage for females younger

than 15 years of age (HREA, Moroccan Family Code, English translation).

Significantly, a new guiding principle of men and women as joint custodians of the home led to the abolition of Moroccan women's legal requirement to be obedient to their husbands. While husbands are still legally required to support their wives financially, the 2004 reforms specified that a husband and his wife are joint heads of the household. The language and normative expectations for marriage changed to reflect this, emphasizing consent, fidelity, and the creation of a stable family unit (HREA, Moroccan Family Code, English translation).

Although polygamy has not been abolished, in contrast to Tunisia where it is illegal, there are now tighter controls over the practice. Whereas in the past a man could take up to four wives without either judicial consent or the permission of his first wife, judicial authorization is now required for a second wife. New restrictions on polygamy—including a man's need to prove his ability to financially support his wives and children equally, and his need for an exceptional reason for seeking another wife—are supported by provisions to protect a man's first wife. A woman can now legally insert and enforce a monogamy clause in a marriage contract, and she must be notified and present if her husband appears in court to seek authorization for a second wife (Zoglin 2009 and Sadiqi 2006).

The 2004 reforms also protect women in instances of divorce, placing unilateral repudiation (still permissible for men and without necessary cause) under judicial oversight. A wife must now be present so that she knows she is being repudiated. In the 1957-58 *Mudawwana*, a wife's options for divorce required substantial proof of cause of abandonment, failure to provide financial support, harm, absence, or imprisonment. Now, however, there are two new forms of divorce available in addition to the prior forms: "mutual consent," initiated by both spouses; and "irreconcilable differences," initiated by either spouse (Zoglin 2009). Most significantly, women can now legally initiate divorce.

Unlike the *Mudawwana* of 1957-58, the new reforms give women priority in custody rights, even upon re-marriage or relocation. While the father remains the legal guardian of his child even when a mother might be the physical custodian on a day to day basis, children of both sexes can choose a custodian at the age of fifteen (previously, sons remained with a mother until puberty, whereas daughters remained with a mother until marriage) (HREA, Moroccan Family Code, English translation).

Judges are accorded authority to place children with guardians who may or may not be on the approved list, and they may consult social workers regarding appropriate guardianship (Zoglin 2009). In keeping with this policy of extended children's rights, children who before could only acquire Moroccan nationality through patrilineage can now do so through matrilineage, as well. This is similar to the 1993 provisions in Tunisia. And whereas paternity could previously only be established by the testimony of twelve witnesses, judges can now order paternity tests or accept a wider range of evidence to determine filial connection (Baragach 2005).

Importantly, the 2004 reforms depend greatly on the willingness of judges to arbitrate marriage, divorce, and custody to an unprecedented degree (Zoglin 2009). Because the *Mudawwana* now includes substantial ambiguity with regard to enforcement, responsibility lies with a judge to divide assets, provide mediation, prevent unnecessary polygamy, uphold prenuptial agreements, and ensure that custody decisions are made in the best interests of children. The reforms, though they were designed to achieve greater equality in the family, only protect women and children insofar as they are implemented by the judiciary. Several obstacles prevent women from fully exercising their hard-won rights, but women's advocates continue to promote awareness among ordinary Moroccans.

In addition to fighting legal and political battles, women's rights organizations continue to overcome basic obstacles in expanding women's access to the fruits of modernization. Morocco's population of 33 million has a 0.994 male/female sex ratio for citizens between the ages of 15 and 64. While women have increasingly been seeking education at all levels even more aggressively than their male counterparts, illiteracy among Moroccan women still remains stubbornly high, at 60 percent, despite a state-supported education system (Sadiqi 2003, 89). A 2004 International Labor Organization survey showed that labor force participation among Middle Eastern women (27 percent) lagged well behind other economically comparable countries (42 percent), yet Morocco's female labor participation, at 25 percent, lagged even further behind.

## **Conclusions and Recommendations**

This report has discussed two major waves of gender legislation that have expanded women's rights in Tunisia, one regarding gender roles within the family and the other regarding women, children and citizenship. It has also considered a set of reforms in Morocco in 2004. Even though women have made immense gains through those reforms, important dimensions of gender inequality in the law remain to be addressed in Tunisia and in Morocco.

During recent visits to Tunisia, I heard women's rights advocates now focus on three particular areas of concern. If they remarry after a divorce, women who had custody of their children can lose it because of the remarriage itself. Issues of domestic violence remain insufficiently addressed in legislation. Finally, inheritance continues to be unequal between men and women—who generally inherit half as much as men in similar family situations.

We can draw some lessons from the Tunisian experience and raise questions about the future. That experience suggests that "woman friendly" reforms matter a great deal, even when they are top-down and even when governments initiate them in the absence of feminist pressures as was the case in the 1950s. The reforms are important because at the very least they generate a new climate in which the next set of debates will take place. Following the 2011 Tunisian Revolution during the Arab Spring, a degree of uncertainty prevails. Most observers believe that the reforms of family law that have been in place will be maintained. Now that Tunisia is identified with a family legislation

oriented towards greater gender equity than in most of the Arab-Islamic world, it has become a matter of national pride and international recognition to continue on that path.

The recommendations in regard to Tunisia include the following:

- Increase women's custody rights so that the only consideration as to who has custody is the best interest of the child, to the exclusion of any other.
- Increase women's access to inheritance and make men's and women's inheritance equal.
- Ensure that the laws are properly enforced everywhere in the country. On the whole, the judiciary in Tunisia has enforced family law. There remain regions where this is less the case, however, and this requires sustained attention.

The situation in Morocco is different in part because the reforms are less drastic than in Tunisia and also because they are much more recent. Since the reforms occurred in 2004, we lack the historical depth that we have in the Tunisian case where the reforms have been in place since the 1950s. A major issue repeatedly mentioned in Morocco is that of enforcement of the 2004 reforms. This is due to a number of reasons. Given the eight-year period since the reforms were promulgated, the personnel in the judiciary is still the same as before. Many judges, trained in the previous legislation based on the *Shari'a* in its Maliki interpretation, are sometimes reluctant to apply fully the new reforms.

I suggest that it is only with a change of generations that we can see a real shift in how members of the judiciary applies the new laws and in how faithful they are to the spirit of the new legislation. Many women in the country may know that reforms occurred, but still lack a full understanding of specific regulations. It will take time before women come to a greater appreciation of their rights. And needless to say, patriarchal norms were enshrined in the law and the social history of Morocco. Families continue to hold on to those norms, often making it difficult for women to avail themselves of their relatively new rights in family law.

The recommendations for Morocco thus include the following:

- Further reform family law so as to continue to expand women's rights and increase gender equity. For example, abolish polygamy altogether; equalize custody and guardianship unconditionally; and make inheritance rights equal for men and women.
- Educate women about the new family legislation that resulted from the 2004 reforms. This can be done through national campaigns and literacy classes, for example.
- Ensure that the laws are properly enforced throughout the country. This requires continuous training of judges and monitoring of court decisions especially in rural areas or urban neighborhoods where less educated and underprivileged women are less likely to be aware of the new family laws.

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