

COLLECTIF *95* MAGHREB EGALITE



COLLECTIF
95

One Hundred Steps One Hundred Provisions

For an egalitarian codification
of Family and Personal Status
Laws in the Maghreb

Published by:
Women living under muslim laws
النساء في ظل قوانين المسلمين
Femmes sous lois musulmanes



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with the assistance of the Friedrich Ebert Foundation (Germany)
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WLUML wishes to warn readers that this document is not a legal translation.

TITLES ALREADY PUBLISHED (IN ARABIC AND ENGLISH):

- Maghrebi Women – Change and Resistance
- Maghrebi Women – “Living with Reservations”
- One Hundred Steps, One Hundred Provisions

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FOREWORD

In 1991, women's organizations and researchers from the three Maghreb countries (Algeria, Morocco, Tunisia) meeting in Rabat at the invitation of the Moroccan Women's Democratic Association (ADFM) - decided to form the Collectif 95 Maghreb Egalité (Collective 95 - For Equality in the Maghreb).

They noted that whereas the status and situation of women in the region have registered important changes, social and political resistance remains very strong while new threats to the gains and rights secured by Maghreb women loom large on the horizon.

Belonging to a region that a common history, language and civilization have endowed with a real unity and homogeneity, the women founding members of the Collectif 95 Maghreb Egalité chose to launch their initiative from within the framework of the autonomous women's movement in the Maghreb which emerged in the early 1980s.

This first required a collective reflection guided by a scientific approach; initially to map which women's rights had been obtained since 1985, the date of the last World Conference on Women, and then to outline strategies for the future.

The first three years of Collectif 95 were exceptionally intense: after hours of discussions which were heated, and at times exasperating although never futile, decisions were always reached by consensus. In the midst of hectic activity, Collectif members never lost sight of the real goal: basing activism on an in-depth and well-grounded knowledge of the social, economic and political realities in our countries.

Collectif members decided to seize the opportunity presented by the forthcoming World Conference on Women in Beijing to highlight the struggle of women in our region at the NGO Forum.

With this in mind, the Collectif produced three documents:

- An **assessment** of the social, economic political and cultural status of women in the Central Maghreb entitled, **Les Maghrébines, Changements et Pesanteurs** (Maghrebi women, Dynamic changes and

obstructing factors)

- A **White Paper** on the status of international conventions relating to women's rights: their ratification, implementation and their reflection in domestic laws by the states of the Central Maghreb, entitled **Les Maghrébines Sous Réserves** (Maghrebi Women - Living with Reservations).¹
- A document outlining proposed egalitarian family and personal status laws in the Maghreb, entitled **Cent Mesures et Dispositions** (One Hundred Steps, One Hundred Provisions).

This book, which is part of this series of Collectif 95 publications, presents a synthesis of thematic reports jointly produced by a number of researchers from the three countries.

We could not conclude this brief foreword without extending our warm thanks to the numerous people and institutions which have given their support to the Collectif. In particular, we would like to thank the Friedrich Ebert Foundation (Germany) whose moral and financial support has remained constant over these years, as well as the European Union which made a financial contribution towards the publication of this book.

Rabéa Naciri
Executive Director

¹ Editor's note: North African states, like many other Muslim and non-Muslim countries, have signed international conventions with reservations (sous reserve) in this case often specifying that they accept the principles of a convention insofar as they do not conflict with local practice of Muslim family laws. Appropriately reflecting women's legal status in these countries, sous reserve also means no guarantee.

THE RATIONALE

1. The Collectif 95 Maghreb Egalité is a network anchored in the women's movement of the three countries of the Maghreb: Morocco, Algeria and Tunisia. Its aim is to promote a concerted action under its umbrella at the Beijing Fourth World Conference on Women in 1995. The founders of this network, coordinators of women's organizations, intellectuals and researchers, believe that the struggle for equality between women and men is a determining factor in the achievement of full citizenship.

2. The theme of the Beijing Conference is development, equality and peace. Here, development must be understood with reference to the globally accepted norm of according primacy to human rights as an essential factor in any effort to promote economic, social, political and cultural progress. A decisive stake in the realisation of democracy and the goal of sustainable human development, a commitment to de jure and de facto equality of rights thus lies at the heart of the fundamental choice between progress and regression currently facing our societies.

3. Women's struggle for true equality and full citizenship must be founded on a respect for women's rights in both the public and private spheres. Women's legal inferiority in the family is, in effect, at the root of discrimination against women in the public sphere. In turn, discrimination in the fields of social, economic, political and cultural activity slows down, and even impedes, any significant progress in women's legal status as codified in personal status and family laws.

4. Women's access to knowledge and information is certainly a key factor in the dynamics of a rapidly changing society where illiteracy remains high.

In this respect, non-sexist education has a fundamental role in dislodging prejudices and in promoting women's rights and their legitimate claim for control over their bodies and their lives. It is important therefore that all citizens - particularly women - are aware of their rights so that they can assert and exercise these rights. For this all pedagogical, technical and audiovisual means should be used to promote the dissemination of information regarding these rights and their exercise. Finally, a revalorisation of the role of women presupposes the establishment of new social practices based on a radically changed mentality.

In terms of fundamental human rights as well as the right to development, the elimination of all forms of discrimination against women constitutes an essential objective of a just society.

In the countries of the Maghreb, such an evolution in norms and attitudes is already taking place: beyond numbers and statistics, there can be no doubt that the trend of educating girls is irreversible, as is women's participation in the cash economy, their access to family planning and their use of contraception.

Furthermore, the development of women's organizations and the struggle for human rights are simultaneously contributing to the democratic movement, to the secularization of standards of behaviour and to a reinforcement of civil society, an indispensable actor in this evolutionary process.

5. The Maghreb is generally perceived as one homogenous entity that is uniformly Arab and Islamic.

In fact, the Maghreb is simultaneously Berber, Arabo-Muslim, Mediterranean and African.

From the age of antiquity to the period of colonization, it has undergone numerous invasions and occupations: by the Romans, Byzantines, and finally the Arabs that by the close of the 13th century, resulted in the Islamization of almost the entire Maghreb, with the exception of some Jewish and Christian communities.

It was subjected to French colonial rule from the middle of the 19th century to the middle of the 20th century. Thus the societies that form the Maghreb region are the products of this diverse and troubled history.

The position allocated to women could only have resulted from a combination of all of these Mediterranean civilizations in which an agnatic, patriarchal family is the basis of all social organization. Structured under the authority of a male head - the father - this family only recognizes the pre-eminence of the paternal male lineage. The inferior status of women and their exclusion from public space is such a fundamental element of this patriarchal system that it legitimizes all forms of violence and attacks on the physical and moral integrity of women.

6. In the Maghreb countries, this family structure was reinforced by traditional Muslim law, the *fiqh* being the only law applicable to family law, while all other areas of law were undergoing transformations mainly brought about by colonial rule and influence. On the eve of independence, these countries shared a common legislative model of the Muslim family.

The family is (inevitably) legitimate and based on blood relationships. Natural filiation is ignored and adoption prohibited. Everywhere, polygamy is accepted and the conjugal union is weak, dependant solely on the will of the husband. The woman finds herself in a permanent position of inferiority due to:

- the father's right to decide his daughter's marriage;
- the authority of the husband to whom she owes submission and obedience;
- the possibility of having only custody of young children without the authority of guardianship;
- the unequal distribution in matters of succession and inheritance.

7. Post-Independence

Morocco has maintained tradition in its **Mudawana** and has chosen not to break with traditional Muslim law. This family code (Mudawana), promulgated in 1957 and amended in 1993, presents itself as a codification of the *fiqh*. In the event of legal lacunae, this text expressly refers back to the dominant opinion or to the unchanged jurisprudence of the Maliki school.

Algeria, for its part, took twenty-two years before promulgating a **Family Code** in 1984. This text sanctions the legal inferiority of women within the family. In the event of legal lacunae, the Algerian code refers back to the provisions of the Sharia.

In contrast, the **Tunisian Personal Status Code** - promulgated on August 13, 1956 - is an affirmation of the modernist option and this code integrates certain fundamental principles which have prevailed in the evolution of contemporary societies:

- monogamy;
- judicial divorce;
- women's emancipation;
- the welfare of the child (adoption).

Tunisian legislatures have upheld this tendency through several successive reforms reinforcing women's rights within the family.

Since 1956, the legislature has intervened in matters relating to: custody, divorce, mothers' legal guardianship, and abolition of the wife's duty of obedience to her husband.

However, while the Code makes no explicit reference to Islam, it nevertheless remains silent on a number of questions (such as inter-community marriage, obstacles to inheritance between Muslims and non-Muslims); is conservative on other questions (such as triple divorce, dowry, breast-feeding as an impediment to marriage); and upholds traditional interpretations concerning inheritance.

Reference to Islam is found in Tunisian law, but outside this Code; the continued relevance of Islam in family law is expressed in the official discourse which accompanies and justifies the Code. The legislature has always taken great care to present reforms in the framework of a re-reading of the *Sharia*. This allows jurisprudence to revert to a patriarchal and conservative view of the family, justified by the claim of respect for Islamic principles.

While the constitutions of Algeria, Morocco and Tunisia affirm the principle of equality between citizens, there is no question that women of the Maghreb remain bound by a legally inferior status in the family.

8. International norms concerning women's rights maintain three fundamental principles: freedom, equality and non-discrimination.

These principles of justice and freedom are also the values referred to by millions of men and women for whom Islam signifies the path of justice, of tolerance, of respect for human dignity and the love of knowledge.

The universality of values and principles, which underlie international instruments promoting and protecting human rights, is an essential reference point.

Indeed, this system of values has been the basis on which an international consensus has evolved over the last half century; a consensus that no state wholly rejects even though states have expressed reservations (some more and some less explicit) on certain provisions when adopting such international conventions.

This reference to universality does not in any way signify any Western monopoly over human rights, and one must emphasize the diversity and multiplicity of conceptual sources which, over many millennia and across all continents, have converged to produce a multi-cultural consensus on a culture of human rights which is based on respect for the human person and dignity and on the rejection of all forms of discrimination.

The regional preparatory conference for the World Conference in Beijing held in Dakar in November 1994, highlighted the principle of universality and insisted that, ***“Human rights are inherent, inalienable rights to be enjoyed by all human beings irrespective of race, religion, creed, nationality or sex and these rights operate independently of the State.*** Since 1949, numerous human rights instruments and resolutions have been proclaimed. *The numerous resolutions in favour of equal rights of women and girls, (...) are all guidelines for improving the legal and human rights status of women.*

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), now signed by over 34 countries in the Africa region, explicitly acknowledges that the generalized discrimination from which women continue to be subjected to, violates the principles of equal rights and of human dignity.”²

The resolution on the implementation of this platform invites, *“The interparliamentary Union and the Union of African Parliaments to exhort African states which have not yet done so, to ratify without reservations, and without further delay, all the conventions and international and regional charters concerning women’s legal rights, and to incorporate them into their national legislation”.*

² The African Platform of Action, Women’s Legal and Human Rights, paragraph 54.

9. Furthermore, the challenges posed by modernity require measures in the field of economics as well as at the political, legislative, demographic, educational and cultural levels.

In our countries, the elaboration of family law within a modern context inexorably tests "the ability of Islam to re-examine itself and generate its own evolutionary dynamic."

To reflect upon the Muslim family leads to highlight the problem of an independent approach towards a number of constraints that are often presented as unavoidable, even immutable.

Muslim law is, in reality, an extensive collection of jurisprudential rules elaborated in the three centuries following The Migration (Hijrat) based on the *ahadith* (norms inspired by recommendations and behavior attributed to the Prophet Mohammed) and that constitute the *Sunna*.³ In the third century after The Migration (the Islamic era), Muslim law solidified and the doors to *Ijtihad* (the exercise of creative interpretation) were closed.

This immutability of *fiqh*, i.e. the principles of Muslim jurisprudence, obviously hindered jurists and legislatures from adapting the law to suit the changing circumstances of modern times.

It was only at the beginning of the previous century that authorized voices called for a major reform in our legislations. The demands of urbanization, of industrialization and international interaction have, for their part, brought about the adoption of modern legislations with regard to constitutional, administrative, commercial and penal matters.

However, family law, and therefore the legal status of women, has continued to depend almost exclusively on traditional Muslim law. With respect to women, there has been systematic reference to the immutable nature of the dogmas underlying law, even though in all other areas of the law an ever increasing number of exceptions, even clean breaks, have been made.

Such will to adapt to the demands of modern times manifested itself in the works of the great reformers of Islam such as Jamal al-Din al-Afghani, Muhammad Abduh, Rashid Ridha, Ali Abderrazak, Kacem Amin, and

³ Editor's note: Jurisprudence was also based on interpretations of the Qur'an itself.

Tahar Haddad; their ideas regarding the condition of women were to find a legislator in the person of Habib Bourguiba.

The focal idea of Muslim reformism is that Muslim law is by definition evolutionary.

Challenging the imposition of a dogmatic assimilation between Islam and Muslim jurisprudence, which is the result of history, consecutive generations of reformers have thus extended the debate of modernity to all aspects of our legislation on family matters. They did so without questioning Islam as a religion, as a cultural heritage, or as a civilization.

With the aim of better understanding and overcoming the problems raised by the application of such a law in a secular state, their arguments were grounded in a sound knowledge of the content and meaning of Muslim jurisprudence.

10. The principles of equality, freedom and non-discrimination, and the objective of bringing domestic legal norms into conformity with international standards were the grounds on which the initiative for alternative legislation on women emerged and developed in each of our countries - although to differing degrees. The One Hundred Steps, One Hundred Provisions proposed by our Collectif are dedicated to legislative reform in the area of family matters.

Thus, the Collectif 95 Maghreb Egalité has based its initiative upon the elaboration of one hundred measures and provisions for an egalitarian codification of Family and Personal Status Laws in the Maghreb.

The current objective is to explicitly affirm the following elements in the texts of our laws (Constitutions and Codes):

- Equality of men and women in rights, duties and before the law.
- Equality between spouses by abolishing the notion of the head of family and the duty of obedience; and providing women with the opportunity to take responsibility for supporting the family in the same manner as men.
- The replacement of paternal authority with parental responsibility.
- Equality in the matter of inheritance.
- Equal rights for men and women to pass on nationality to their children.

- Rejection of all forms of racial discrimination or religious discrimination in the area of family relations.
- Legal protection of children before and after birth by the recognition of natural filiation.

In fact, in the Maghreb today, the question of equality between women and men in all areas is linked to the fundamental issue of secularizing family law.

GENERAL PROVISIONS

Article 1. Personal status and family relationships are governed by the provisions of this Code.

Article 2. The family is composed of persons united by marriage, blood, or by court orders.

BOOK ONE: MARRIAGE

CHAPTER I: Engagement

Article 3. An engagement is an agreement between two persons to marry one another. It does not constitute marriage. Either of the parties may break the engagement.

Article 4. If breaking off the engagement causes harm to the other party, compensation may be decreed.

Article 5. Each of the two fiancés has the right to ask for the restitution of presents offered to the other unless that person is responsible for breaking the engagement.

CHAPTER II: Essentials of Marriage

Article 6. The minimum age for marriage is eighteen years for men and women, the age of civil majority.

Article 7. Marriage requires the sole consent of the two future spouses, who contract the marriage themselves.

Article 8. Under this age, marriage can only be contracted with the court's consent.

Article 9. The court can be approached by the mother or father, the legal guardian, the minor or the State Prosecutor's Office (*Ministère Public*). The judge will arrive at a decision after having heard the two future spouses and the guardian. He can only authorize the marriage in exceptional circumstances. The court's decision authorizing the marriage is not subject to appeal.

Article 10. Impediments to marriage are of two types: permanent and temporary.

- Permanent impediments are posed by relationships of consanguinity and affinity (relationships between family members, including in-laws).
- Temporary impediments are posed by the presence of an existing marriage or a woman's non-completion of the legal period of waiting following widowhood or divorce.

Article 11. Marriage is prohibited with the following persons:

- Ascendants how high soever
- Descendants how low soever
- The brothers and sisters of ascendants
- The brothers and sisters of descendants

Article 12. Marriage is prohibited between an individual and the ascendants and descendants of his/her spouse as well as with the spouses of his/her ascendants and descendants.

Article 13. Polygamy is forbidden.

Article 14. Marriage is prohibited for all persons whose previous marriage has not been dissolved. Whosoever, being married, contracts another marriage before the dissolution of the preceding marriage, will be subject to one year's imprisonment and a fine.

Article 15. A woman's marriage is prohibited before the expiration of her minimum legal period of waiting following widowhood or divorce.

This period is for three months. It commences with the dissolution of marriage by death or final decree of divorce.

This period ends upon the following:

- delivery, in the case of pregnancy.
- medical certification that the woman is not pregnant.
- remarriage of the former husband.

Article 16. A difference of religion is not an impediment to marriage. Marriage between a Muslim woman and a non-Muslim man is valid.

Article 17. Marriage is performed before a civil officer of the State, or any authority legally recognized for this purpose, in the presence of both parties to be wed and two witnesses.

Witnesses may be of either sex.

Article 18. Any provision relating to assets may be inserted into the marriage contract.

Article 19. The marriage must be registered by the State.

Marriage is proven by the act itself or by a certificate issued by a civil officer of the State.

CHAPTER III: Marriages that are Null and Void

Article 20. A marriage is void if contracted in contravention of Articles 7, 10, 11, 12, 13, 14 and 15 of this Code.

Article 21. Any marriage is void if contracted in contravention of the procedures set forth in Article 17.

Article 22. A void marriage will have the following effects:

- the establishment of filial relations,
- the obligation for a woman to observe the legal minimum waiting period following widowhood or divorce,
- marriage impediments due to affinity.

CHAPTER IV: Effects of Marriage

Article 23. The mutual duties of spouses to one another are respect, fidelity and support. They are jointly responsible for leading the family, for the education and protection of their children and in choosing the marital residence. They must avoid doing harm one another in any way.

Article 24. Each of the spouses has the right:

- to work
- to administer and dispose of her/his own property
- to keep her/his family name
- to freedom of movement

Article 25. The spouses have joint responsibility for supporting their family since both contribute whether financially or through domestic work.

BOOK TWO: DIVORCE

Article 26. Divorce may only be pronounced by a court of law.

CHAPTER I: Grounds for divorce

Article 27. Divorce is granted:

- In the case of mutual consent between spouses.
- On the demand of one of the spouses on the grounds of having suffered harm.
- On the request (without grounds) of one spouse or the other.
- On the request of one of the spouses or upon a joint request on the grounds that both parties are at fault.

CHAPTER II: The Divorce Procedure

Article 28. Divorce may only be pronounced by court decision preceded by an attempt at reconciliation.

Article 29. The reconciliation attempt is compulsory. It takes place before the Family Affairs Judge and precedes all other matters.

If the defendant does not appear in court, and when legal notice has not been served to this person, the Family Affairs Judge will postpone the hearings and will be assisted by whoever he sees fit in order for the

defendant to be notified in person or to determine the defendant's actual residence so that the defendant may appear for the hearings.

If any minor children are involved, three hearings of reconciliation will be held, with a delay of at least thirty days between two such hearings.

The judge must attempt to reconcile the spouses. To this end, he must talk to each one separately and in person and then together.

The judge may request the services of any person he deems useful, including the lawyers of both parties.

Article 30. The Judge of Family Affairs must, as a matter of course, make interim provisions concerning separate residences of the spouses, alimony, custody of children and rights of visitation. The parties may come to a mutual agreement and disregard these provisions, in whole or in part, providing however that the results of this agreement are not detrimental to the interests of the children.

The Judge of Family Affairs must set the amount of alimony to be paid, based on his assessment of the information available to him or her at the time of the reconciliation attempt.

The interim provisions of the court should be minuted and function as a temporary executive order that can neither be appealed nor brought before any superior court but may be revised by the Judge of Family Affairs until such time as the final decree has not been issued.

Article 31. The Judge may abridge the procedure in the case of divorce by mutual consent, providing this does not harm the interests of the children.

Article 32. Should the attempt at reconciliation fail, the Judge of Family Affairs will bring the case to court, which will first decide on the divorce and all its ensuing consequences.

The provisions of the judgement concerning the custody of children, alimony, post-divorce maintenance, separate residences for the spouses and rights of visitation are to be implemented notwithstanding an appeal or recourse to a superior court.

CHAPTER III: The Consequences of Divorce

Article 33. Compensation will be considered regarding the material and moral harm suffered by either spouse in cases of divorce pronounced according to points 2, 3 and 4 of Article 27.

Article 34. In the case of a woman who cannot support herself, material harm can be compensated in the form of an allowance paid monthly at the end of the minimum legal period of waiting following widowhood or divorce, and will be determined on the basis of her standard of living, including accommodation, during her married life.

This post-divorce maintenance can be revised annually and raised or lowered in accordance with the cost of living and other fluctuations that may arise. It will continue to be paid until the divorced woman's death or until her circumstances change due to her re-marriage or until she no longer needs the income. Should the divorced man die, the post-divorce maintenance shall be a debt against his estate, and consequently must be settled in a single disbursement, either through a private settlement with the heirs or by a court decree, bearing in mind the age of the beneficiary at that time. She may however prefer that the allowance be settled through the form of a one-time transfer of a capital asset.

Article 35. Custody of the children is to be granted to either one of the parents or to a third party. The judge will decide this, taking into consideration the welfare of the child.

Article 36. The parent who does not have custody of the child has visitation rights. The right to house the child may be granted by the court to the parent who does not have custody, if the welfare of the child so warrants.

The parent who does not have custody has a right to supervise the child, a right that may be exercised through the intervention of the Judge of Family Affairs, should the need arise.

Article 37. The parent who does not have custody must contribute to the support of the child.

The marital residence is awarded to the parent who has custody if this parent has no residence.

Article 38. The person who is awarded custody may relinquish it.

The Judge will then designate a new guardian, taking into account the child's welfare.

The Judge can withdraw the right of custody from someone who fails to fulfil her/his responsibilities.

Article 39. Custody is not brought into question if the person with custody remarries, excepting if a judge so rules for the child's welfare.

BOOK THREE: FILIATION

Article 40. Filiation is the link that unites a child with his/her mother and father.

CHAPTER I: The establishment of filiation (parentage)⁴

Article 41. Filiation may be established by:

- Marriage
- Acknowledgement
- Judicial decree

Section 1: The Establishment of Filiation Through Marriage

Article 42. The filiation of a child born within a marriage is established with her/his mother and father.

It is similarly established if the child is born less than three hundred days after the divorce of the parents, or the death or absence of the father.

Article 43. The husband can disown a child in court if he has evidence to demonstrate that he could not be the child's father, corroborated by scientific methods, should the need arise.

Article 44. The husband must disown the child within six months of its birth if he is residing in the area. If he is not in the area, he must make

⁴ Editor's note: a French legal term denoting the judicial determination of parentage, of either the father or mother.

the declaration within six months of his return, or within six months of discovering the false registration if the birth of the child has been hidden from him.

Article 45. If the husband dies before declaring his intentions, his ascendants or descendants do not have the right to contest the legitimacy of the child.

Article 46. Proceedings for disowning a child take place, in the presence of the mother, with the judge appointing an ad hoc guardian for the child to act as the respondent.

Article 47. The mother may contest the paternity of the ex-husband through any and all means, but only for the purpose of legitimizing the child, when, after dissolution of marriage, she marries the true father of the child.

Article 48. This suit, directed against the husband or his heirs must be coupled with a petition for establishing the legitimacy of the child, otherwise it will be rejected.

This suit must be initiated by the mother and her new spouse within six months of their marriage and before the child has reached the age of five.

Article 49. Both petitions are settled through one and the same judgement, which cannot accept the contestation of paternity unless legitimacy has been established.

Section 2. The establishment of filiation by acknowledgement.

Article 50. The filiation of a child by acknowledgement of the mother or the father is established only by:

- declaration to the civil authorities upon birth or afterwards.
- declaration of the mother and father at the time of marriage.
- a separate authentic act.

Acknowledgement of a child can only occur while the child is alive.

Article 51. Acknowledgement can only be contested through a judicial procedure on the initiative of the parent or the child.

A suit can also be initiated by the public prosecutor if the registration documents contain elements which make the declared filiation highly improbable.

Section 3: The Establishment of Filiation by Judicial Process

Article 52. Filiation can be established with respect to the mother or father by a suit seeking to establish maternity or paternity, and by adoption.

Article 53. The right to seek the establishment of maternity or paternity belongs only to the child. While a minor, the child is represented by her/his guardian.

This right ends two years after the child reaches the age of majority.

Article 54. A suit seeking to establish maternity or paternity is only admissible when there are solid grounds or indicators.

Proof may be established through any means available.

Article 55. Adoption is permitted for the welfare of the child.

The adoption relationship is established only through court order.

Article 56. The adopting party must have reached the age of majority and have full legal capacity. She/he must be of sound mind and body and capable of supporting the adopted child.

A child cannot be adopted by several persons jointly unless they are a married couple.

Adoption by a married couple is valid only if the two spouses apply for it.

The age difference between adopter and adopted child must be at least 15 years.

The child being adopted must be a minor.

Article 57. The adoption act is to be established by court order in the presence of the adopter, and if necessary, in the presence of the mother and father of the adopted child, or the representative of the administrative authority vested with public guardianship of the child, or the acting guardian.

Article 58. Once the adoption order is decreed, it is definitive and irrevocable except by the child after the age of majority.

Article 59. Adoption entails the same rights and obligations as other modes of filiation. However, if the legitimate parents of the adopted child are known, the restrictions to marriage stated in Articles 10, 11 and 12 of the present code still apply.

CHAPTER II: The Effects of Filiation

Section 1. The name

Article 60. A child whose filiation is established with respect to a single parent bears the name of this parent. If the filiation is established with regard to both parents, the child bears the name of the mother and father.

Section 2. Guardianship

Article 61. Guardianship consists of the protection and education of the child, the management of the child's assets, representing the child in court and in all areas of daily life such as the administration of affairs, financial transactions, and permission to obtain a passport and to travel.

Article 62. Guardianship terminates:

- When the child reaches the age of majority.
- When guardianship legally ends, through marriage of the child, or by court order after the age of 16.

Article 63. During marriage, guardianship is a right jointly exercised by the mother and father.

With respect to the child, the parents have the rights and responsibilities of custody, supervision and education.

The mother and father jointly administer the child's assets.

Any conflict which may arise is to be heard by the Family Affairs Judge.

Article 64. In the event of divorce, guardianship is exercised by the parent who retains custody of the child.

If custody is to be given to a third party instead of one of the parents, the judge appoints a relative or third person who will have guardianship.

In all cases, the parent who does not have custody retains the right of supervision over the child, a right exercised through the offices of the Family Affairs Judge.

Article 65. Should one parent be absent or incapable of guardianship, guardianship is to be exercised by the other parent.

In the event of the death of one parent, guardianship is accorded to the surviving parent.

In the event that both parents die, guardianship is to be given to the guardian named in the will of either of the parents.

Article 66. The parent who has acknowledged a child singly retains guardianship.

When both parents have acknowledged the child, guardianship is exercised by the parent who has custody.

The parent who does not have custody retains the right of supervision of the child through the offices of a judge.

Article 67. In all other circumstances, the guardian will be appointed by the judge, taking into account the welfare of the child.

Article 68. All acts relating to the disposal of the child's assets are subject to prior judicial authorization.

BOOK FOUR: THE OBLIGATION OF MAINTENANCE

Article 69. Maintenance includes all the necessities of life, particularly food, clothing, medical care, education and housing.

Article 70. Spouses have mutual obligations of maintenance.

Ascendants and descendants how high soever and how low soever⁵ are equally entitled to this maintenance.

Article 71. The amount of maintenance is to be determined on the basis of the income of the person who will be providing it and the needs of the person receiving it, taking into account the standard of living.

Article 72. The ascendant how high soever⁶ must support all minor descendants how low soever⁷ who are unable to support themselves.

Maintenance continues to be owed to descendants until they complete their studies, providing that they are not above 25 years of age.

Maintenance also continues to be owed to disabled descendants incapable of supporting themselves, irrespective of their age.

Article 73. When there is more than one offspring, children will contribute to the maintenance of ascendants according to their financial status and not according to their number.

Article 74. The debt of maintenance is not cancelled between spouses.

Article 75. In case one or the other parent is incapable of maintaining the children, the obligation to provide falls on the parent able to do so.

Article 76. In the event of deliberate non-payment of post-divorce maintenance or alimony for more than one month calculated from the day it was due, the creditor is liable to imprisonment for a period of three months to one year.

⁵ Editor's note: i.e. parents, grandparents, great grandparents on one hand, and children, grandchildren, and great grandchildren on the other.

⁶ The term 'ascendant' is here defined as meaning surviving parents, grandparents and great-grandparents.

⁷ The term 'descendants' is here defined as meaning all descendants, regardless of how many generations removed they are.

Payment will halt prosecution or execution of the sentence.

A Special Fund will automatically pay the amount of maintenance or alimony to the spouse to whom it is due.

The Fund has the right to recourse against the debtor in order to recover the amount paid out.

BOOK FIVE: INHERITANCE & SUCCESSION

Article 77. Succession occurs through actual or presumed death, the latter established by judicial decree.

Article 78. If two persons die without it being possible to determine who died first, there is no cause for inheritance between them, irrespective of whether or not they died in the same event.

Article 79. The execution of the estate will be carried out in the following order of priority:

- Taxes incurred by the actual assets constituting the inheritance
- Funeral and burial costs
- Established debts of the deceased person
- Valid and executable bequests
- Inheritance

Article 80. Conditions necessary to inherit are:

- Being alive or at least conceived when the inheritance is opened.
- Not being ineligible to inherit.

Article 81. The conceived child has the right to her/his share in the legacy if born alive.

Article 82. The inheritance is bestowed upon the surviving spouse, the descendants, ascendants and the relatives of the legator.

Article 83. Indirect relatives of the legator are excluded from inheritance in the presence of the spouse, and/or descendants and ascendants of the legator.

Article 84. In matters of inheritance, uterine, consanguine, and full brothers and sisters have the right to an equal share.⁸

Article 85. In all other cases, succession passes to the nearest relatives.

Article 86. In the absence of heirs, the estate goes to the Treasury.

Article 87. The descendants - male or female - of a predeceased person will inherit in lieu of and in the same proportion that the predeceased would have inherited from the deceased.

Article 88. Women and men who have the same degree of kinship with the deceased have the right to an equal share in the inheritance.

Article 89. The spouse (male or female) will inherit the full share due to a predeceased spouse in a legacy.

Article 90. The usufruct of the marital residence goes to the surviving spouse. The usufruct ends upon remarriage.

Article 91. A difference in religion does not render a person ineligible to inherit.

Article 92. The following are unworthy to inherit, and are therefore excluded from inheritance:

- a person guilty of the deliberate homicide of the legator, whether the main culprit or an accomplice.
- a person who through false testimony is guilty of bringing a major indictment against the deceased.

BOOK SIX: WILLS

Article 93. A will is the act through which a person freely dispose of all or part of her/his assets. It comes into effect upon her/his death.

Article 94. No person may dispose of more than a third of her/his property in the presence of her/his ascendants, descendants or spouse.

She/he can dispose of it entirely in their absence.

⁸ uterine: of the same mother; consanguine: of the same father; full: sharing both parents.

Article 95. The bequest can be established in terms of ownership or usufruct. The bequest of usufruct ends with the death of the legatee, the object of the usufruct in question returning to the estate of the legator.

Article 96. A will is established through a notarized document and can be revoked in the same manner.

Article 97. A bequest established in favour of a person of a different religion is valid.

Article 98. The legatee has a two month time period after the death of the legator to accept the inheritance.

The legatee's silence during these two months is equivalent to her/his acceptance.

A bequest accepted only in part will be executed only for that part; it is void for the remainder.

Article 99. All forms of *habs* or *waqf* are forbidden.⁹

FINAL PROVISION

Article 100. All provisions contrary to this code stand abrogated.

⁹ Editor's note: Habs and waqf are bequests in perpetuity for public works or religious purposes. In some cases, these bequests continued to benefit the original owner's family through salaries as managers or employees of the waqf and became means to deprive the state of taxes or to avoid appropriation by the state.

COMMENTS ON CERTAIN ARTICLES

The Personal Status Code initiative includes chapters which required a special effort on the part of the “**Collectif 95 Maghreb Egalité.**” These chapters include:

- Polygamy
- Marriage of a Muslim woman with a non-Muslim man
- Inheritance & Succession
- Adoption

The following presents the sources upon which the Collectif based its elaboration of these chapters.

POLYGAMY

There are three trends in Muslim jurisprudence regarding polygamy. The first unquestionably approves polygamy, the second while accepting polygamy in principle, limits its practice, and finally, the third bans polygamy altogether. We share the third viewpoint. (Article 13)

The proponents of outlawing polygamy having widely expounded their arguments in various written works, it does not appear necessary for us to review these again here. We will only add the following elements:

1) The institution of polygamy has to be understood in the framework of the social context and the nature of human relationships that prevailed in pre-Islamic Arab society.

In fact, polygamy was meant to curb the anarchy prevailing at that time regarding the number of women a man could have. From this perspective, limiting the number of wives to four seems a first step on the path towards women’s liberation.

Besides, since Islamic tradition favours a gradual evolution, after fifteen centuries of human evolution, reducing the number of wives to one should be considered a natural step on the path initiated by Islam.

2) In addition, justice being a fundamental pillar of Islam, the suppression of polygamy, besides being in tune with the evolution of contemporary society, can only promote respect for this justice.

MARRIAGE BETWEEN MUSLIM WOMEN AND NON-MUSLIM MEN

Amongst the temporary impediments to marriage in contemporary law is a difference in religion in the case of a marriage between a Muslim woman and a non-Muslim man. We do not approve of this restriction for the following reasons:

1) The first stems directly from the Qur'an, where it says¹⁰:

- "Do not marry unbelieving women (idolaters) until they believe: (Indeed), a slave woman who believes is better than an unbelieving woman even though she (the former) attracts you."¹¹
- "O ye who believe! When there come to you believing women refugees; Examine (and test) them:... If ye ascertain that they are believers then send them not back to the unbelievers. They are not any longer lawful (wives) for the unbelievers, nor are the (unbelievers) lawful (husbands) for them..."¹²
- "... (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time."¹³

These verses are the basis on which marriage between a Muslim man and a woman of Jewish or Christian faith has been considered lawful, and marriage between a Muslim woman and a non-Muslim man has been considered unlawful. However, the verses being referred to are not formal verses and only describe general principles. This explains the divergence

10 Translations from Yusuf Ali; brackets indicate that the word has been added by the translator.

11 Qur'an 2:221, Surah al-Baqara.

12 Qur'an 60:10, Surah al-Mumtahana.

13 Qur'an 5:5, Surah al-Ma'ida.

in their interpretation. This interpretation being of human design, neither the lawfulness nor unlawfulness are of a sacred nature.

In addition, some jurists believe that the term *mushrikin* stands for non-Muslims, i.e. non-believers or *kuffar*. Thus, they argue, the word *kuffar* includes both the People of the Book and idolators. They conclude from this that the restriction applied to Muslim women is categorical in that it targets all infidels.

To the contrary, other jurists extend this restriction to all Muslims, men and women. This is the case of the Shias who ban Muslim men from marrying women belonging to People of the Book on the basis of the verse stating "Do not marry unbelieving women (idolators)."¹⁴

Furthermore, while jurists fail to distinguish between People of the Book and idolators when forbidding a marriage between a Muslim woman and a non-Muslim man, they do not hesitate to make this distinction to justify marriage between a Muslim man and a non-Muslim woman. While Jews, Christians, and idolators are all categorized as *kuffar* (that is, non-believers), it is nevertheless true that the People of the Book are closer to Muslims than idolators. The best proof of this is that God refers to them together as one group in a number of verses. Moreover, Jews and Christians cannot be assimilated into the concept of idolators, since they believe in a Single Unique God, as is confirmed several times within the Qur'an.

The lack of consensus on whether to refer to the verses in Surah al-Baqara or those in the Surah al-Ma'ida for determining the meaning of *muhsanat* (chaste women) and *kitabiyat* (women belonging to the People of the Book), has not prevented jurists from distinguishing between idolators on the one hand, and Jewish and Christian women on the other. From this distinction they deduce that the word *kuffar* (non-believers) applies only to idolators. To support their position, they refer to numerous verses in which God addresses Jews, Christians, and Muslims without distinction. They also argue that the verse providing for the restriction has been abrogated by the one contained in Surah al-Ma'ida (which is why it is referred to as 'abrogative verse'). From that, they have allowed Muslim men to

¹⁴ Qur'an 2:221, Surah al-Baqara.

marry “chaste and free” women from Christian and Jewish faiths, but not idolatresses.

In the light of the above, and with a view to establishing equality between men and women regarding their marriage to People of the Book, we have based ourselves on these arguments, without however discriminating on the basis of sex. To do otherwise is to make permissible for Muslim men that which is forbidden to Muslim women.

It is worth remembering that, within Muslim jurisprudence several doctrines exist which refer to a number of verses and *ahadith* (the sayings of the Prophet) to impose this same restriction upon men, thus putting them on an equal footing with women.

But given that the two points of view (restrictive and permissive) put forward in doctrine are only human endeavours, we declare ourselves in favour of the one that upholds equality between men and women; by doing so we support the principle of freedom of marriage and freedom of choice without any discrimination on the basis of religion as stipulated by international conventions.

2) The second reason stems from the fact that the governments of the Maghreb have ratified numerous international conventions (admittedly some with reservations) notably the New York Convention of September 10, 1962 relating to “consent to marriage, minimum age of marriage, and the registration of marriages”. The Convention, holds that a woman has the right to choose her husband just as a man is free to choose a wife without discrimination on the basis of color, creed, or race.

From this flows the necessity of ensuring conformity between domestic law and the norms set by international conventions. Otherwise, the various ratifications (of international conventions) would be meaningless. In fact, ratification carries a legal value that places the Convention over and above family law. In other words, it is legally more binding than domestic laws.

These constitute the two main reasons behind Article 13 which seeks to establish equality between men and women.

INHERITANCE

With respect to the status of women, Islam opted for a gradual evolution. It began by bringing women out of a state of semi-slavery by granting them the right to own property and recognizing their right to inherit, as stated in Surah al-Nisa¹⁵: "To male heirs is assigned a determinate share of what is left by parents and relatives, and to women as well a share of their parents and relatives' inheritance is reserved, regardless of the quantity."

This verse, the first revealed to the Prophet concerning inheritance, posits the principle of equality between the sexes. But, in view of its potential impact on the practices inherited from the pre-Islamic era, this was opposed by some Muslims. "How can we accord the right of inheritance to one who does not ride a horse, nor bears a sword nor combats the enemy?" they argued. Consequently, Islam amended the principle of equality by mandating that a female heir is entitled to half the share of a male heir, as it states in the Qur'an: "Allah directs you as regards your children's (inheritance): to the male, a portion equal to that of two females..."¹⁶

However, while the Qur'an prescribed this rule of a double share in inheritance for men which, in fact, is an exception to the general principle which precedes it, it did establish equality between women and men in some cases. For instance, it does so in the case of a mother and father inheriting from their son in the presence of a grandson; or that of sisters and brothers in the case of *kalala*.¹⁷ Furthermore, the woman's share is greater than that of the man when the legator leaves no son and his father and mother are sole inheritors: "...if the mother and father are the only heirs, a third of the inheritance belongs to the mother..."¹⁸

From the above it flows that the text stipulating that the woman's share be half that of the man must be seen in the socio-historical context in which it was revealed. So, while Islam, in keeping with the reality of that time, stipulated that the maintenance of women is the duty of men and while

15 Qur'an 4:7, Surah al-Nisa.

16 Qur'an 4:11, Surah al-Nisa.

17 Collateral succession (i.e., between siblings) in the event that a person dies leaving neither parents nor children. It is used in Surah al-Nisa, 4:12: "If a man or a woman dies leaving no parent or child, and he/she has a brother or sister, each of them is entitled to one sixth..." and Surah al-Nisa, 4:176: "When they ask you regarding kalala..."

18 Qur'an 4:11, Surah al-Nisa.

jurists have used this argument to justify inequality between men and women in matters of inheritance, today's reality is radically different.

Indeed, thanks to their access to education and to the workplace, women are no longer financially dependent on men. Nowadays, women contribute to household expenses. Moreover, it is no longer unusual for women to be the sole source of financial support. Therefore, the basis underlying the double share no longer exists. Accordingly, applying the principle of jurisprudence which holds that "every principle exists and disappears with that which gives rise to it," and that, "one cannot deny the evolution of rules with the passing of time," this rule should be modified since the conditions giving rise to it have changed. It should be replaced by one of the fundamental principles of Islam: equality between men and women. As Tahar al-Haddad has noted,

"If you closely examine the rules posited by Muslim laws as well as their final objective, you realize that these rules seek to establish equality between men and women in all spheres of life."¹⁹

"By observing a tradition of gradual evolution," he adds, "Islam spares us from plunging into the darkness of doubt that would have us believe that this religion, in its essence, aims to instil discrimination between the sexes."²⁰ Moreover, as Muslim doctrine specifies, "there is nothing to make us believe that any given situation is immutable. Did Islam itself not modify the parameters by changing the previous reality through the establishment of new principles, and by promoting the need to change reality with the passage of time."²¹

ADOPTION

The question of adoption is a major bone of contention between traditionalists and modernists.

In fact, many scholars, basing themselves on the Qur'anic verse concerning the adoption of Zayd Ibn Harith by the Prophet, believe that

19 Tahar Haddad, *Les femmes dans la charia*, p.111.

20 Tahar Haddad, *Les femmes dans la charia*, p.112.

21 Tahar Haddad, *Les femmes dans la charia*, p.38.

adoption is categorically rejected in Islam. Those adhering to this point of view refer to the following verses:

“Muhammad is not the father of any men among you, but (he is) the Apostle of Allah and the Seal of the Prophets...”²²

“Call those adopted children by the name of their father...” (Let’s call these adopted children by the names of their real fathers).²³

For them, these verses constitute irrefutable proof of the unlawful nature of adoption in Islam. Besides, they add, this goes against rules of filiation because of their repercussions in matters of inheritance.

The question of inheritance was the major argument advanced by those opposed to adoption, which, they argue, may lead to granting rights of inheritance to those who are not entitled to them in accordance with God’s laws.

In fact, the issue of adoption will not be settled by interpretation or counter-interpretation of the provisions that refer to it. A solution to this issue must rather be sought in a reading of the texts which takes into account the socio-historical context within which they have been revealed.

The reality addressed by the Revelation is based on blood relationships and specifically upon paternal filiation.

Taking a position directly opposed to that defended by jurists, Tunisian legislature authorizes adoption and sets conditions regulating its practice, which have all been edicted taking into account the interests of the adopted child. It allows the child to take the name of the adopted father, if the request for this comes from the adopted person. In addition, this legislation accords the same rights, with all the duties they entail, as those accorded to a biological child.²⁴

Considering the above points and the fact that Tunisian legislation recognizes adoption, we have chosen the same position concerning the elaboration of articles pertaining to adoption.

22 Surah al-Ahzab, 33:40.

23 Surah al-Ahzab, 33:5.

24 Abu Zayd Nasr Hamid, *Les Femmes et le statut personnel*, pp.274-277.