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Storms, O.L.

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The reform of the Moroccan Family Law and women’s daily lives: Navigating between structural constraints and personal agency
4.1 Introduction

In the aftermath of the Arab spring, the expected positive impulse for gender equality seems rather the reverse of what was aimed by the active young people. In Morocco however, women’s organizations have been fighting for decades for gender equality, with as a highpoint the reform of the ‘Mudawana’ (2004). The Mudawana organizes the legal rights and duties of men and women within the family. “In these surroundings girls marry when they are sixteen, seventeen years old. But first you have to go to the judge. Officially youngsters are not allowed to get married before their eighteenth birthday. But you always get permission.” We are talking to Hakima, mother of five, her oldest daughter is sixteen, her youngest is still suckling her breast. The family lives in a beautiful but isolated small house in the mountains in North-eastern Morocco. Hakima is commenting on the reform of the Mudawana.

After the independence from France and Spain in 1956, the family law was developed and introduced. In 2004, a major revision took place. These reforms were preceded by vociferous debates between modernists and religious conservatives. The revisions of the family law in 2004 accomplished the goal of greater legal equity between men and women in several areas of civil society. The women’s movement in Morocco strongly connected to political organizations and NGOs advocating women’s rights, played an important role in the formation of the reform. The revision – on paper – is considered an improvement by the Moroccan women’s movement and internationally. However, one cannot speak of total equity as the implementation of these changes face many hurdles.

With the legal reforms, gender relations have shifted. Important revisions concern the abolition of the mandatory marriage guardian (article 24-25). Women can now choose a marriage partner and marry without the official approval of a male family member. Besides, an important revision was made concerning divorce. Although it was possible for women to apply for a divorce before the 2004 reform, in practice there were many constraints.

Many Moroccans harbor serious reservations about the legal changes. Not only men, but also women are opponents. They express their critique in terms of a break with religion. At the same time, many men feel as if their power is taken from them. Both men and women state that giving more rights to women is contrary to Islam and the responsibility of men for their female family members. Several articles are written on the 2004 reforms in Morocco from a historical perspective, (Islamic) law perspective, and women’s rights perspective (f.e. Bargach 2005, Cabré 2007, Dalmasso, Cavatorta 2010, Desrues, Moreno Nieto 2009, Harrak 2009, Jansen 2007, Mateo Dieste 2009, Sadiqi 2006, Sadiqi 2008, Weingartner 2005, Wuerth 2005). These articles give a thorough insight into the history of the Mudawana and the limitations of the family law on paper. Regarding the resistance, the question is whether the revisions of the Mudawana are implemented and how they are implemented not only by judges, but also by common people (Willman Bordat, Kouzzi 2004).

In this chapter we explore how and why the reforms of the Mudawana were accomplished and we focus on how these changes are implemented after the reform of 2004 and their impact on the daily lives of women particularly in divorce proceedings.

25 In 1965 and 1993 there were two minor revisions. Still, compared to men women enjoyed fewer rights concerning divorce, child custody and inheritance.
This chapter consists of two parts. In the first part we trace the history and the revisions of the Mudawana. To interpret the complexity of the developments of the revision of Morocco’s family law, we will describe the different parties involved in the controversy surrounding the reform. The second part focuses on the practice and implementation of the 2004 revisions. This will be illustrated by cases of women in divorce proceedings. We will describe how different women talk about possibilities and restraints during divorce procedures.

4.2 Methodology

This chapter is based on anthropological fieldwork in (primarily) North-eastern Morocco in 2007 (Oka Storms) and the follow-up research in 2008, 2009 and 2010 (Edien Bartels and Oka Storms). Twenty in-depth interviews were conducted with women who were either planning to divorce, were in the process of divorce or were divorced after the reform. These women were found via a local women’s organization (giving free legal aid), a lawyer’s office, a women’s shelter and the SSR (Stichting Steun Remigranten). Participant observation took place especially at the women’s shelter and a local women’s organization headquarters. Next, there were countless informal conversations with (some of) these women and other women in some way confronted with the Mudawana, for example unwed mothers. In addition, lawyers and founders and staff of women’s organizations were interviewed, as well as those assisting women in divorce procedures at the court. In Rabat and Casablanca important women’s organizations were visited and spokespersons interviewed (LDDF, UAF, ADFM and Anaruz). Other activities included participating at demonstrations for women’s rights and attending a theatre performance about the reformed Mudawana.

4.3 The reform of 2004: a brief history

4.3.1 Parties in the controversy surrounding the reform

The codification of the Islamic family law in the Mudawana dates back to 1957-1958, the first years after the independence from France and Spain. After the independence there was an attempt at introducing a uniform legal system, unlike the legal pluralism introduced by France. Most forms of legislation are based on secular legislation. The Shari’a is only used for the family and personal status law. Literally Mudawana means ‘edited, written text’ referring to the goal of king Mohammed V to codify the Islamic legislation into one work. Buskens (2003) emphasizes that the Mudawana served as a symbol of national unity and Islamic identity. After the independence, Morocco was confronted with the task to measure the nation-state in conjunction with religion. On the one side the aim was to create a right and just society by returning to the Islamic roots, while on the other, the text was modeled according to the French legal tradition, aiming at the creation of a modern nation-state (Buskens 2003).

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26 Stichting Steun Remigranten (SSR) is a Dutch transnational organization based in Northern Morocco, Berkane. They primarily give legal aid to Dutch Moroccan return migrants.
Several commissions have been installed to reform the law since 1965. However, every attempt failed or was received with disaffection. Simultaneously great criticism was uttered from the religious side. Meanwhile, the public debate on family law and women’s rights intensified. In the eighties intellectuals and modernists revolted; they protested against the secrecy that surrounded the revisions of the Mudawana and the gap between legislation and everyday life. In the late eighties, the controversy over women’s rights became linked to human rights. Criticism and pressure from other countries helped in stimulating the liberalization of the political and intellectual climate. It was possible to speak openly about the need for reform (Buskens 2003). The Union de l’Action Féminine (UAF), a coalition of professional middle class women, started a campaign and collected more than a million signatures for a petition in favor of the reform of the Mudawana (Wuerth 2005).

In October 1992 king Hassan II installed a commission to explore and propose revisions. In May 1993 the proposed revisions were presented to the representatives of the leading women’s organizations in Morocco. The king ordered all parties to come to a consensus rapidly. This was achieved; however, the alterations were minor. The proponents were dissatisfied with the revisions. At the same time there was much criticism from the religious side (Buskens 2003, Cabré 2007). Cabré (2007) underlines that the aim of the 1993 reform was to silence women’s organizations and political parties who were in favor of the reform.

In his first official speech in 1999, Mohammed VI raises the issue of the revision of the Mudawana again thereby meeting the demands of the women’s organizations and the international human rights organizations who were dissatisfied with the previous reforms (Adolf 2005). This announcement was the start of a fierce discussion in which proponents and opponents took opposite camps. These discussions resulted in the largest demonstrations in modern history of Morocco. March 12th 2000, women demonstrated in favor of more rights in Rabat. At the same time in Casablanca a massive demonstration against the reform took place, organized by the religious conservative side (Mateo Dieste 2009). The king and the women’s organizations tried to legitimize the proposed revisions from an Islamic frame. However, they found the Islamist party PJD (Parti de Justice et Développement) and the al-‘Adl wa-l-Ihsân movement with Nadia Yassine, the daughter of sheik Yassine, who is the leader of this movement, against them. These Islamist groups agreed on the need for change, but rejected the proposed revisions as being too ‘foreign’ and ‘western’ (Wuerth 2005) and as “a strategy of Westernization, Christianization and the introduction of secularity” (Mateo Dieste 2009). The demonstration in Casablanca, against the reform, attracted far more people – especially ‘non-elite’ women – than the demonstration in Rabat.

In what follows, the resistance to the reforms in Morocco will be illustrated by Halima and Isam; a married couple. Their vision is well thought-out and similar stories can be heard throughout Morocco. Halima and Isam are both in their early thirties and married for two years, they are both educated and have a job. They live in an apartment in the outskirts of a city. The house belongs to the father of Isam, who together with his wife and two unmarried daughters occupies the apartment above. Halima and Isam feel that Islam gives enough rights to women and that the reformed Mudawana puts the rights of women first. Contrary to many Moroccans, they have read parts of the family law booklet on the Internet.

“Allah has given men more duties. For example regarding prayer, the man must always attend the Friday prayer at the mosque”, Isam says. “And it is also the men who slaughter
the sheep during the Aid al Kabir. Women are far from so much work.” “She is less in the religious sphere and mentally, her thinking is not as complete as man’s”, Halima adds. “Look”, Isam says, “In the Quran is explained why. Women become nervous far more easily compared to men, they are not as calm.” “That is true”, affirms Halima. “Men are just a bit stronger, they take the decisions”, she adds.

Halima and Isam give their vision through which they view the reforms of the Mudawana. They married after the 2004 reform. Halima thinks the revised article in which the mandatory marriage guardian is abolished (article 24-25), by which a woman can choose a partner herself and marry without official approval of a male family member, a disgrace. After Halima spoke to the adoul (traditional marriage officer) who would marry her and Isam, and after reading several passages in the Quran, she decided that her grandfather – who raised her – would have to officially pass the guardianship to her husband during the ceremony. Halima explains her choice as follows: “This is a marriage for Allah, not for the new Mudawana, so that I can account for my choices after my death”. Halima renounces her new acquired rights completely. The views of Halima and Isam on gender, and the justification of the differences between men and women in societal and legal position are widely shared. They base their stance on their understanding of the Quran.

Thanks to king Mohammed VI, the proposed revisions are implemented. He is head of state and Amīr-al-mu’minīn (commander of the faithful). The king has a decisive vote in religious issues and the right of ʾijtihād (interpretation of the Quran and the Sunna). Because the positions of religious head and head of state coincide, the king has the power to carry through reforms. After the terrorist attacks in Casablanca in May 2003 the Islamist opposition stayed silent. The Islamist movements were blamed for creating an environment in which these bomb attacks could take place. To demonstrate a constructive stance, the opposition in parliament agreed to the proposed reforms (Willman Bordat, Kouzzi 2004). The revision of the Mudawana is a revolutionary example of a modernization process in an Islamic country without secularization (Tucker 2008). Reforms have been introduced while the family law, as a symbol of national Islamic identity is still intact. In this modernization process a change has taken place in gender relations. In the following paragraph we will elaborate on the articles and compromises of the Mudawana of 2004.

4.3.2 Reforms of 2004

Until the reforms in 2004 the different rights and duties that men and women have towards each other were central. The inequality between men and women stems from the patriarchal model of gender- and family relations which underlies the family law. This could be found in provisions regarding marriage, divorce, child custody and inheritance. The new Mudawana constitutes a break with the patriarchal model. The principal change of the reform is that men and women are equal in many areas. However, the structural inequality between men and women is not completely abolished. For example, polygamy is still allowed under strict circumstances. Another example of inequality is the right for a Muslim man to marry a non-Muslim woman, while women are not allowed to marry non-Muslims. Under strict conditions only a man has the right to repudiate his wife. In case of a divorce it is the man who keeps the legal authority over the children, while the woman obtains the
maintenance. Finally, women inherit half of what men inherit in the same position (Buskens 2006). However, important issues where men previously had exclusive rights, are aligned.  

Book One of the Mudawana titled ‘The Marriage’ starts with article 4, the fundament of the new model:

Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue and the creation of a stable family, under the supervision of both spouses according to the provisions of this Mudawana.

The italicized words mark the changes in the new article. The central difference between the old and the new texts is that under supervision of the husband is changed to under the supervision of both spouses. Husband and wife now have mutual responsibility for the marriage and for each other (Berger 2004).

The new article regarding divorce is one of the most important revisions of the Mudawana in 2004. This reform builds on the aforementioned article 4. Before the reform, marriage was described as a ‘lasting conjugal life’. After the reform this is altered to a ‘enduring conjugal life’ (Berger 2004). Despite the more flexible stance towards divorce, it is condemned by Allah and only licit in exceptional circumstances. Only after attempts to reconcile the spouses one can proceed to a divorce.

Leading up to the reform, there was a plan to introduce a magisterial divorce that would be equally accessible for both spouses. This form of divorce, introduced in 2004, is based on ‘irreconcilable differences’, and is called shiqāq. However, the old forms of divorce for men and women are not abolished but persist. This decision is typical for the compromise of the reform of Family Law. Both Buskens (2006) and Jordens-Cotran (2005) ascribe this decision to the effort to satisfy both modernists and conservatives. For example, the right of a man to repudiate his wife (talâq) persists because of this decision. The wife can only repudiate her husband when that is specified in the marriage contract (article 78-93). Besides, repudiation by the husband in exchange for compensation (khul’) and annulment persist.

The six ‘old’ grounds on which a woman can petition for divorce are mentioned in the new Family Law (article 98 and further). However, therefore she needs burden of proof. The first ground concerns ‘Non respect by the husband of one of the conditions in the marriage contract’. The second ground when the husband ‘harms’ his wife. ‘Harm’ means both material harm (violence and oppression) and moral harm (trouble, manhandle, contempt, despise, offend, defame, hurt in pious or female feelings, neglect). Harm can be direct but also indirect, such as offending the woman’s family. Harm is differently explained for men and women. ‘Hurting in pious and female feelings’ for example, resorts to gender representations, in which emotionality is ascribed to women and rationality to men. To prove ‘harm’ is very difficult. If the wife cannot prove the harm and maintains her request for divorce, she may resort to the irreconcilable differences procedure of the Family Law of

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27 Jansen (2007) compares the recent family reforms in Egypt, Tunisia and Morocco. She concludes that Tunisia’s Family Law is the most progressive, but Morocco has made the greatest stride forward, and is for example the only one of the three countries where the marriage age of men and women is equal for both (18 years).

The third ground on which a woman can petition for divorce is when her husband breaches his duty of maintenance. Fourth, when the man is absent for longer than one year. Fifth, when latent defects hinder married life. For example in case of serious longstanding illnesses, provided that the wife was not aware of it when the marriage was concluded. Abstinence is the last ground on which a wife can petition for divorce. Divorce based on shiqāq (article 97), is the first reform in favor of women. Irreconcilable differences (shiqāq) is described in the Handbook of Family Law as a ‘profound and continuous disagreement between the spouses, of a gradation that makes a marital relation impossible’.

Last, ‘repudiation in mutual agreement’ (article 114) is the last (new) possibility to petition for divorce. In this case, men and women agree jointly to petition for divorce. In the aforementioned we elaborated on the official reforms in divorce. In the public debate, the strive surrounding the reforms is subsided, but in daily practice women cannot use the new law without difficulties.

### 4.3.3 Between law and practice

The implementation of the reformed Family Law still faces many obstacles (Willman Bordat, Kouzzi 2004, Desrues, Moreno Nieto 2009). First: knowledge and acceptance of the new Mudawana, not only in court, but also by the public. In the years following the reform, judges have been trained and also women’s organizations (especially centres d’écoute) informed the public, specifically women. However, due to the opposition of the religious conservatives leading up to the reform, acceptance seems to be a greater obstacle. Willman Bordat and Kouzzi (2004) assert:

“The commitment of the judiciary to the spirit behind the reforms is uncertain. According to the revised text, judges are still allowed to use religious principles to decide matters not covered in the text – of which there are many – leaving ample room for them to apply the most conservative religious interpretations. The new law also assigns judges the role of overseeing mandatory reconciliation in divorce cases, which had raised concern among women’s organizations that judges will prioritize reconciliation in the interest of ‘family harmony’ over the application of the reforms”.

Other changes like the creation of special courts for Family Law matters and the shift in position of adouls pose difficulties. Before the reforms of 2004, adouls had the sole authority regarding marriage. Nowadays this is ascribed to judges in the family court and adouls only have a symbolic religious function (Willman Bordat, Kouzzi 2004).

As a member of a women’s organization in Rabat declared:

“In Morocco, divorce was and I think still is taboo. Women who file for divorce are women who have reached a certain level. They have undergone all sorts of suffering. When they come to ask for help from an NGO, they really reached the final stage. They are determined; they cannot step back. The motivation is mainly violence.”

Divorce occurs often in Morocco, but its rate seems to decrease. From the eighties till the reform of the Mudawana in 2004 about 50% of the marriages ended in divorce (Bartels
1993, Koelet et.al. 2009). Koelet et.al. (2009) write that according to the Moroccan ministry of Justice the divorce rate dropped between 2003 and 2005.\footnote{Koetlet et.al (2009) cite Jones (1997) to analyse this decrease. Jones (1997) analyses that in societies with a relatively high divorce rate and a low socio-economic development, the risk of divorce lessens during modernization processes.} Table 4.1 shows this drop in divorce rate in 2004. It also shows that the decrease has stabilized.

Table 4.1. Divorce number (under juridical control) through the years (Ministère de la Justice et des Libertés, 2012)

<table>
<thead>
<tr>
<th>Years</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>N</td>
<td>41450</td>
<td>44922</td>
<td>26914</td>
<td>29668</td>
<td>28239</td>
<td>27904</td>
<td>27935</td>
<td>24170</td>
<td>22452</td>
<td>22937</td>
</tr>
<tr>
<td>% change</td>
<td>10,26%</td>
<td>8,38%</td>
<td>-40,09%</td>
<td>10,23%</td>
<td>-4,82%</td>
<td>-1,19%</td>
<td>0,11%</td>
<td>-13,48%</td>
<td>-7,11%</td>
<td>2,16%</td>
</tr>
</tbody>
</table>

Table 4.2 shows the percentages of different forms of divorce in 2010 and 2011, publicized by the Ministry of Justice of Morocco (2012). The terms in the table are the ones used by the Ministry. The percentages show two important things. First, divorce by mutual consent, as new form of divorce after 2004, is very high. Second, divorce on initiative of the wife is extremely low.

Table 4.2. Divorce rate 2010 – 2011 (Ministère de la Justice et des Libertés, 2012)

<table>
<thead>
<tr>
<th></th>
<th>Revocable</th>
<th>For compensation ('khol')</th>
<th>Before consumption [of the marriage]</th>
<th>By mutual consent</th>
<th>At the initiative of the wife (right of option)</th>
<th>Pronounced following two previous divorces</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>15,56%</td>
<td>24,39%</td>
<td>18,59%</td>
<td>40,91%</td>
<td>0,26%</td>
<td>0,29%</td>
</tr>
<tr>
<td>2011</td>
<td>10,07%</td>
<td>18,08%</td>
<td>18,17%</td>
<td>53,23%</td>
<td>0,18%</td>
<td>0,27%</td>
</tr>
</tbody>
</table>

At first sight the new grounds for divorce seem to meet the needs of women. However, our research shows that women do not en mass use the new possibilities of divorce. The ‘old’ grounds to petition for divorce are still being used. In the next section we’ll describe how women in divorce proceedings navigate on the basis of cases.

4.4 Divorce proceedings: how women navigate in daily life

In the Islamic world, in the past fifty years there have been modernization processes regarding gender and Islam. ‘The Muslim woman’ is a theme of numerous discussions in ‘the western world’. They are commonly portrayed as merely passive victims of their religion and culture. Within this discourse, both ‘Islam’ and ‘women’ are portrayed as homogeneous, unchanging entities, without intern diversity. Islam is associated with ‘suppressing men’ versus ‘suppressed women’. In this discourse ‘power’ is situated opposite ‘powerless’. In this chapter we argue however that Moroccan women navigate between a range of structural
constraints in order to claim an effective form of personal agency, enabling them to defend their own interests (sometimes successfully as the revision of Family Law shows). Compared to most other Muslim countries, the Moroccan Mudawana is progressive. Regarding modern Islamic Family Law in general, especially divorce and polygamy, Cabré (2007: 142) observes “tension between the duties of modern states to uphold women’s rights and their alleged Islamic principles and the tension that exists between the state and religion”. These tensions can be translated to ‘the real world’. The question is what role the new legislation plays in the power relations between men and women? Is the new legislation a source of power for the women? It is clear that women try to influence on several levels, with the aid of the new legislation as well as the old legislation that still exists side to side with the changes of 2004. The concept of ‘navigating’ is explained by Vigh (2009) as ‘how people act in difficult or uncertain circumstances and in describing how they disentangle themselves from confining structures, plot their escape and move towards better positions’. Institutions – like the Mudawana – are gendered. With the reform in 2004, notions of masculinity and femininity have shifted on paper. In reality, these notions sometimes collide with the symbolic dimension of gender: how men and women should behave or with the economic circumstances. On the individual level, women seek agency, they navigate between rights given, notions of femininity and structural constraints. To illustrate this I’ll present two cases: The case of Aisha and Mounia. Due to divorce, these women are confronted with the ‘new’ Mudawana.

The case of Aisha
Aisha, 24 years of age, was eighteen when she married voluntarily. A year after signing the marriage contract in Morocco, she went to the Netherlands, where she grew up herself and where her family in law resides. Her relationship with her husband and her in-laws, specifically her mother-in-law, is very poor.

“I was not allowed to pick up the phone, or to open the door. When, for example, they [husband and parents-in-law] all left, they locked all the doors. Only my room and the bathroom where unlocked. The rest was locked, so that I could not escape. My mother in law put the phone in her room and locked it, so I could not call anyone. It was really like a prison”.

At daytime Aisha’s husband was at work, and in the evenings he often went outdoors. She stayed at home together with her mother-in-law. “I was actually married to my mother-in-law. She was the one with whom I spent twenty-four hours a day”. The tension between Aisha and her mother-in-law built up. Eventually Aisha returned to Morocco and moved in again with her parents. A divorce seemed inevitable when Aisha left her new house.

Regarding religious disapproval of divorce, an attempt to reconciliation must be undertaken when a couple petitions for divorce (article 81, 82). The obligation of reconciliation builds on the notion of patience. Women themselves say they have to have patience (sabr) during their marriage, or their family members stimulate them to postpone a divorce as long as possible. When the situation is unbearable, there are often reconciliation attempts from both families. When this does not succeed, the last option is to go to court. Depending on possible children from the marriage, there are one or two attempts to prevent the proposed divorce. In practice, a reconciliation attempt in court is seldom fruitful, since going to court is often the last step, following unsuccessful reconciliation attempts from the families.
Also in the case of Aisha, her family-in-law attempted to prevent the divorce. However, it took a year before her husband and his family visited Morocco to discuss the situation. Angrily, Aisha tells how her father-in-law visited her father as if they were still friends: “He [father-in-law] started to cry and said they regretted it. It was too late”, says Aisha, with a mix of pent up anger and distress. Afterwards her husband together with his sister’s husband visited her home. Aisha explains how they were sitting together in a room when he asked her why she had left. “Why did you return to Morocco? Why haven’t you stayed?” Aisha states that she couldn’t believe that he asked her that question. “After everything you have done to me, you still ask me why...?” she describes her reaction to which he reacted: “You haven’t told me a lot of things about what my mother did.” Aisha commented: “And even when I’d have told you, would you have believed me? You just believe your mother, you don’t believe me!” It was clear for Aisha’s husband that she had no intention to reconcile, upon which he asked her what she wanted to do now. Aisha seized the opportunity to express her displeasure. Even before the reconciliation attempt by Aisha’s husband and his family, it was clear for Aisha and her family that she wanted a divorce. Consequently, Aisha’s reaction to the reconciliation attempt was a deliberate decision, discussed in advance. Aisha explains that before her husband and family visited, everybody in her surroundings had said that she was not the one who should talk about getting a divorce; he had to mention it. “In the other case, I would have to pay for the divorce, and repay the twenty thousand dirham [about two thousand euro’s] that they’ve given me, and the costs of the wedding. Where do you get that amount of money? We don’t have that. Thus, when he said ‘what do you want to do, do you want a divorce or get together again?’ I said: the choice is up to you. You want a divorce, we’ll divorce. You want me to come back, I’ll come back. Not that I would go back. I just said it, I had a plan. Anything you want, we’ll do. Then he said ‘okay, I’ll think about it. I’m going home to discuss it with my parents’. He didn’t say anything about a divorce; he didn’t want to divorce. He and his brother in law went home. Fifteen minutes later his father came by on a bicycle. He ringed the bell and wanted to speak to my father. Then he said to my father: ‘tomorrow, tomorrow we’ll see each other at court. Tomorrow we’ll get a divorce’ “.

Aisha was furious when her father told her. She describes her reaction as follows: “No, I’m not getting a divorce. ‘But you want a divorce as well, right’? My father said. Yes I want a divorce, but I don’t want to hear it from my father-in-law, I want to hear it from my husband. I want him to come to me and say: I’m getting a divorce. I didn’t marry my father-in-law! If he doesn’t come, I’m not getting a divorce. [Laughing] I’m opinionated”.

Aisha’s story illustrates her agency. During the reconciliation process, in which at first sight, she has little power, she seeks strategies to achieve the desired result for her and her family. This strategy of Aisha and her family is primarily economic fear for having to pay money that the family does not have, resulted in a plan in which the husband is forced to make the decision. Aisha takes upon her the role of ‘obedient wife’, by creating the idea that the choice of her husband is decisive. Meanwhile she increases her space for negotiating. During our conversation Aisha says she felt strong at that moment, because he found himself on her grounds, in her house. Aisha states in her story ‘I haven’t married my father-in-law!’ This statement clashes with established views on marriage and family bonds. Since, her marriage indeed was a union between families. It was her mother-in-law who asked for her hand in marriage and Aisha moved in with her family-in-law. By her marriage, she also
committed to the family of her husband. That divorce is also a process that is settled between the two families is not so strange. Aisha’s accusation of the formal system however, is just. The Mudawana has created juridical conditions on which a woman can say ‘I want a divorce’, without having to neither prove nor explain why. After the reform of 2004, marriage is an agreement between husband and wife and it is possible – on juridical grounds – to exclude the family. Indeed, after the reform of 2004 women are no longer obligated to marry with the permission of a male family member as a marriage guardian (article 24-25)

Aisha divorced on grounds of ‘mutual agreement’, according to the reformed Family Law (article 114). The condition is, however, that both husband and wife agree. Yet, there are still many women who petition for divorce on ‘old’ grounds that the law provides. In the following section we tell the story of Mounia. Despite the reformed Mudawana, she petitioned for divorce on the ground of an old form; darar (harm).

The case of Mounia
Mounia is 31 years old. At sixteen, she married a man twice her age. He asked her family for her hand in marriage, and although Mounia didn’t want to marry him, she thought she had no choice. The problems between the spouses started right after the marriage. Mounia speaks of how he got drunk and met other women. “Especially the women bothered me and he was aggressive and burned me”, she explains, pointing to the places on her chest were the burns are still visible. One day, he left the house and went back to his parents. Mounia, and their two children remained behind. They had no money and received no financial aid from her husband. Mounia’s family started providing for their livelihood. Mounia has no proof of the maltreatment of her husband. She has medical certificates and pictures of the injuries on her face and body, caused by her husband. But she has no witnesses. “Everything happened at home, during the night, nobody has seen anything”, she explains. Although the shiqāq procedure is presented as an improved possibility to petition for divorce, Mounia has petitioned for divorce on ground of darar (harm). There are sound reasons why women prefer the darar procedure above the shiqāq procedure. Paradoxically, darar gives women rights and they receive compensation, shiqāq does not.

A woman, who petitions for divorce via the shiqāq procedure, does this on the ground of irreconcilable differences. Next, the judge decides who he thinks is responsible for the divorce. Because it is the woman who petitions for divorce, and since she does not use the darar procedure, it is often assumed that she no longer wants to stay with her husband, without clear reason. Subsequently it is the woman who is responsible for the costs of the divorce and the compensation (article 97). This is an important point, emphasizes a lawyer in Oujda, who has many female clients filing for divorce. “When a woman knows her rights a little bit, she will try to petition for divorce via a darar procedure. When this doesn’t work, she will use the shiqāq procedure” says the lawyer. This strategy is described in article 100 of the Mudawana, wherein it says that women can invoke the procedure of irreconcilable differences, when she cannot prove ‘harm’ but persists her petition for divorce. The main reason to choose the darar procedure is the economic dependency of the woman upon her family, like in the case of Mounia, who enjoyed schooling, but never worked. Thus, admission to the ‘new’ shiqāq procedure is determined by economic circumstances, class and gender. Financial independence, associated with education and/or work play a major
role in the possibility that women have to petition for divorce. Although more and more women in Morocco have a salary, the majority is economically dependent on their husbands or families. As the lawyer in Oujda concludes: “Because women have no income of their own; how are they going to pay for the compensation?” The lawyer here indicates that the shiqāq procedure is not always the favorable option from an economic point of view.

However, analyzing access to the shiqāq procedure not only economics play a role, gender, religion and power relations are important as well. The shiqāq procedure is presented as a divorce possibility when a woman ‘just wants a divorce’. It is assumed that a woman does not have a good reason to petition for a divorce. This assumption associates with notions on femininity and virtue that are ascribed to women. It is the woman who is educated, has a job and independent accommodation, who is in the position to say ‘I want a divorce’. There is less pressure on them from an economic and social perspective, because they are independent.

At the same time, the shiqāq procedure is at odds with religion. The shiqāq procedure is an important and debated reform and is a great change compared to the ‘old’ forms of divorce, since they can be found literally in the Quran. In short, through the darar procedure, the woman demonstrates that she has a legitimate reason to petition for divorce, that is defendable on gender as well as religious level. The aforementioned can however stand in the way of women to petition for a divorce through the shiqāq procedure. Besides, there are women who defend their pride and seek justice, like Mounia: “No, he has maltreated me all this time, I am not going to pay the costs of the divorce”. They also try to petition for divorce using the darar procedure. Besides Mounia’s financial dependency she feels the same. ‘I’ve had patience [sabr] and was determined to seek justice”. To conclude, for the time being the shiqāq procedure is class, gender and religiously loaded.

4.5 Conclusion

In this chapter about the reform of the Mudawana we have reflected upon recent modernization processes of gender in an Islamic society such as Morocco. Thanks to the reform(s) gender relations have been more leveled out, so that men not only lost power, but also responsibility and they have more obligations, whereas women have obtained more responsibility for themselves and their family. The reform of the Mudawana was preceded by years of rivalry between modernists and religious conservatives. These ferocious debates have marked the final reform of 2004. It is an attempt to find the middle ground in order to preserve tradition on the one side and the call for laws matching changing circumstances on the other. Moroccan women in general benefit from the new laws as they have obtained more rights. In daily life however the access to and use of the Family Law differs for women because other factors also play a role. ‘New’ legislation on marriage and divorce are at odds with normative notions of femininity. On the institutional level, there are notions of femininity that some women want or need to act on. However, on the economic level, there are also constraints. As the cases illustrate, women navigate between a range of structural constraints in order to claim an effective form of personal agency, enabling them to defend their own interests. The interests of the women do not always have to be in line with the
‘new’ rights given to them. Through the reform of the Mudawana, space is created for women to take opposite positions.

References


