

How the Door of *Ijtihad* Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco

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Abstract

*This Comment compares the politics and dynamics of recent family law reforms in Iran and Morocco. In both countries, reforms have in effect crippled men's privileges in marriage under Islamic law by restricting their unilateral and extra-judicial rights to divorce and polygyny. In Morocco, the 2004 reforms are radical in that they admit the principle of equality in marriage and cast classical Maliki School of Sunni law in a new light; the result of prolonged efforts by the women's movement, these reforms were finally achieved by the intervention of the King who claimed the right of *ijtihad* as the Commander of the Faithful. The Iranian reforms, on the other hand, have been incremental; they retain the patriarchal provisions of Shi'a law, yet they are neither justified nor achieved through the exercise of *ijtihad*. This is ironic given that, since the 1979 revolution, political power has been in the hands of Shi'a jurists who claim that the gate of *ijtihad* is open in Shi'a law. This Comment explores the different configurations of internal and external political circumstances and their impact on women's movements that led to "opening the gate of *ijtihad*" in Morocco and closure in Iran.*

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I. The Question

In this working Comment, I compare the politics and dynamics of recent family law reforms in Iran and Morocco. In both countries, the source of family law is Islamic jurisprudence or *fiqh*—the Twelver Shi’a School in Iran, and the Maliki Sunni School in Morocco—whose rulings were codified and grafted onto a modern legal system during the twentieth century. As in other schools of Islamic law, these rulings privilege men in marriage and grant them unilateral rights in divorce and polygamy.¹ Since codification, women in both countries have struggled to achieve reforms and a more egalitarian family law. The gains of Iranian women have been erratic and the reforms modest and incremental, while women’s gains in Morocco have been steady and the reforms radical. In February 2004, Morocco enacted a new family code that incorporates the principle of equality in marriage, thus casting the classical Maliki law on which it is based in a new light.² This is the most substantive and radical reform of family law achieved by women’s activism in any Muslim country. Previous reforms either were not so comprehensive, were granted from above (as in Tunisia), or were accomplished by putting the Islamic framework aside (as in Turkey).³

My central questions are: How, and by what processes, did Moroccan women succeed in bringing about radical reforms of Maliki law, which in many

1. See generally JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* (1982); ISLAMIC FAMILY LAW (Chibli Mallat & Jane Connors eds., 1990); ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (Abdullahi A. An-Na’im ed., 2002).

2. See Women’s Learning Partnership for Rights, Dev., & Peace, *Morocco Adopts Landmark Family Law Supporting Women’s Equality*, <http://www.learningpartnership.org/advocacy/alerts/morocco0204> (last visited Sept. 20, 2007) (summarizing the history and the elements of the new Moroccan Family Law) (on file with the Washington and Lee Law Review).

3. See generally NORMAN ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* (1976); LYNN WELCHMAN, *WOMEN AND MUSLIM FAMILY LAW IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* (2007).

ways amount to nothing less than "opening the gate of *ijtihad*"?⁴ And, how and why have Iranian women failed thus far to do the same with Shi'a law? These questions acquire poignancy in view of both the claim of Shi'a jurists that the gate of *ijtihad* is open in Shi'a law, as well as the emergence of novel jurisprudential thinking in Iran since the 1979 Revolution.

The genesis of these questions lies in my earlier research on the theory and practice of Islamic law in Iran and Morocco. Between 1985 and 1989, I did fieldwork in family courts in Tehran, Casablanca, Rabat, and Sale, studying marital disputes that made their way to courts. I focused neither on Islamic jurisprudential texts (*fiqh*) nor on legislation, but I tried to understand the relevance and operation of *fiqh*-based family law by examining court cases and litigants' strategies.⁵ My study revealed that in Iran—despite the absence of a viable women's movement at the time, and despite the "return to Shari'a" and the application of family law in courts headed by clerical judges—women fared better in law, and in the event of marital breakdown, they had more bargaining cards and greater access to the courts. I observed how women in Iran would use the courts as an arena to renegotiate the terms of their marriage contracts, and how some succeeded in turning on their head those elements in the contracts that gave men power. By contrast, in Morocco—where a vibrant and vocal women's movement existed, but also where family law was applied in "secular" courts—women had fewer bargaining cards in marriage and less ability to use the courts as such a forum for negotiation.⁶

In the two decades since that fieldwork, both my interests and my approach have changed, and I have shifted my research focus to the construction of gender in *fiqh* and the possibility of developing a feminist jurisprudence within an Islamic framework.⁷ I conducted further field research in Iran between 1992 and 2000, but I did not return to Morocco until early 2006, when I did a short period of research. Immediately afterwards, following

4. See generally Shista P. Ali-Karamali & Fiona Dunne, *The Ijtihad Controversy*, 9 ARAB L.Q. 238 (1994); Wael Hallaq, *Was the Gate of Ijtihad Closed*, 16 INT'L J. MIDDLE E. STUD. 3 (1984). *Ijtihad* literally means "exertion"; in a jurisprudential sense, it is the exertion of mental energy by a Muslim jurist to deduce legal rulings from Islam's sacred texts. Many modern scholars assume that this activity ceased by the end of the ninth century with the consent of Muslim jurists. This process, known as "closing the gate of *Ijtihad*," was later questioned.

5. See generally ZIBA MIR-HOSSEINI, MARRIAGE ON TRIAL: A STUDY OF ISLAMIC FAMILY LAW: IRAN AND MOROCCO COMPARED (2000).

6. See *id.* at 195–98 (contrasting the typical aftermath of divorce in Iran and Morocco).

7. See generally Ziba Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, 1 HAWWA: J. WOMEN MIDDLE E. & ISLAMIC WORLD 1 (2003); Ziba Mir-Hosseini, *Islam and Gender Justice*, in 5 VOICES OF ISLAM, VOICES OF CHANGE 85 (Vincent J. Cornell & Omid Safi eds., 2007).

an over five-year absence, I also returned to Iran. At that time, I came to appreciate the different trajectories that Iranian and Moroccan family law reforms and women's movements have followed since the late 1980s. As we shall see, the most salient contrast now is between the "Islamization" of society and gender discourses in Morocco and the marked "secularization" in Iran; both processes had emerged from below as reactions to state politics.

This Comment is a preliminary attempt to make sense of the changes in Iran and Morocco and of the contrasts that have emerged between these nations by drawing out the elements of legal change and gender politics in each country. I start with a brief sketch of the politics of codification and reform up to the 1990s, which saw new political openings in both Iran and Morocco. I then survey the impact of this new atmosphere on the respective women's movements, highlighting the different roots and trajectories of political reform in each country. In conclusion, I suggest how internal and international reactions to the reforms in effect resulted in opening the gate of *ijtihad* in Morocco and closing it in Iran—at least for the time being.

II. The Iranian Case

In Iran, the codification of family law occurred between 1931 and 1935 in the context of the of the modernizing policies of Reza Shah Pahlavi (1925–1941), who aimed to create a "modern," centralized judicial system on a Western model.⁸ This effort succeeded in most areas of law, where European legal concepts and codes were adopted.⁹ When it came to family law, classical Shi'a legal concepts and rulings remained almost intact as part of the new Civil Code.¹⁰ Meanwhile, the creation of new courts and procedural rules for registering marriages and divorces drastically curtailed the administrative and judicial functions of the clerical establishment.¹¹

8. For the codification of family law in Iran, see generally A.M. AMIRIAN, *LE MOUVEMENT LEGISLATIF EN IRAN ET LE MARRIAGE EN DROIT ET EN FAIT: SA REFORM [THE LEGISLATIVE MOVEMENT IN IRAN AND MARRIAGE AND DIVORCE IN LAW AND IN PRACTICE: ITS REFORM]* (1937).

9. See AMIN BANANI, *THE MODERNIZATION OF IRAN: 1921–1941*, at 71 (1961) (noting that the parts of the Civil Code dealing with general subjects were verbatim translations of French statutes).

10. See *id.* (mentioning that with respect to matters of personal status, the Civil Code was a "codification, simplification, and unification" of classic Islamic law).

11. See *id.* at 70 (discussing the dissolution of the old Ministry of Justice and the employment of new personnel in place of former clerical officials).

The codification of family law was in line with the demands of modernists, including the nascent women's movement. By creating a modern, centralized legal system, Reza Shah broke the monopoly of the clerics, who had until then defined and administered family law. Yet, his new system avoided an open confrontation with the clerics by remaining faithful to traditional Shi'a *fiqh*, and thus not only gave their rulings a new legal force, but also avoided the issue of gender equality. The codification of family law became part of his project of modernization from above and paralyzed both the clerical establishment and the women's movement by giving limited concessions to each.¹²

Thirty years passed before women achieved any reform. Mohammad Reza Shah's Family Protection Law (FPL), which came into force in 1967, put men and women on the same footing in terms of access to divorce and rights to child custody.¹³ Though the initiative for the reform came from women's rights activists and a campaign run by women's journals,¹⁴ by the time it became law the reform had already been co-opted by the official Women's Organization of Iran under the patronage of Princess Ashraf.¹⁵ This turn of events not only compromised the legitimacy and significance of the reforms but also made the very concept of legal equality in marriage a fragile and untenable project. The left and the secular opposition identified the FPL with the despotic Pahlavi regime, which had already appropriated the women's movement. The clerical establishment, for its part, was united and vocal in denouncing the reforms; Ayatollah Khomeini issued a *fatwa* that any divorce under FPL was invalid under religious law.¹⁶

Thus, it is not surprising that in February 1979, barely two weeks after the collapse of the Pahlavi regime, a directive from Khomeini's office declared the

12. See generally PARVIN PAIDAR, WOMEN AND POLITICAL PROCESS IN TWENTIETH-CENTURY IRAN 109–17 (1995); Homa Hoodfar, *The Women's Movement in Iran: Women at the Crossroads of Secularization and Islamization* (1999), <http://www.wluml.org/english/pubs/pdf/misc/women-movement-iran-eng.pdf> (last visited Sept. 20, 2007) (on file with the Washington and Lee Law Review).

13. See Doreen Hinchcliffe, *The Iranian Family Protection Act*, 17 INT'L & COMP. L.Q. 516, 517–21 (1968) (discussing the elements of the Family Protection Act that gave men and women equal rights in seeking divorce and obtaining child custody).

14. See Ziba Mir-Hosseini, *In Modern Persia*, in 9 ENCYCLOPEDIA IRANICA 192 (Ehsan Yarshater ed., 1999). The proposal for reform came from Mehrangiz Manuchehrian, president of the Association of Women Lawyers; *Zan-e Ruz*, the women's weekly, became the site for the campaign.

15. *Id.* at 193.

16. See *id.* (discussing Ayatollah Khomeini's denunciation of the FPL as contrary to Islam).

FPL to be "non-Islamic" and announced a return to *Shari'a*.¹⁷ This directive, it soon emerged, referred to the 172 Civil Code articles about marriage and family enacted in 1935. Thus began the process of Islamization of courts and law that has continued until today.¹⁸

By the early 1990s, gender debates that had been harshly suppressed after the revolution resurfaced, and many elements of the rejected FPL returned.¹⁹ This was the outcome of women's concerted lobbying of progressive clerics to issue new opinions and of women parliamentarians introducing new bills.²⁰ In order to put pressure on government, the press aired women's plight in marriage and debates over progressive *fiqh*. As the political system did not tolerate any secular-based argument, not only did restoration of the FPL reforms have to be justified in *fiqh* terms, but women's activism for change had to use Islamic language and rhetoric.²¹

In 1997, with the election of Mohammad Khatami as President, the political atmosphere relaxed, and a vocal press and a vibrant, if fragile, civil society emerged.²² President Khatami's surprise election victory gave expression to a popular reformist movement that sought a shift from the theocratic to democratic elements in the Islamic Republic. A power struggle resulted among the ruling elite, pitting the conservatives, who insisted on keeping the ideological construction of Islam intact, against the reformists, who sought to reconcile Islam with democracy, human rights, and gender equality. For about eight years—President Khatami's two terms in office—there was, in effect, a "dual state," where the unelected Guardian Council and Supreme Leadership, now identified with the Islamic side of the state, saw their hold on

17. *Id.*

18. *See generally id.* at 193–95; Ziba Mir-Hosseini, *When a Woman's Hurt Becomes an Injury: "Hardship" as Grounds for Divorce in Iran*, 5 HAWWA: J. WOMEN MIDDLE E. & ISLAMIC WORLD 111 (2007).

19. *See generally* Nesta Ramazani, *Women in Iran: The Revolutionary Ebb and Flow*, 47 MIDDLE E.J. 409 (1993); Ziba Mir-Hosseini, *Women and Politics in Post-Khomeini Iran: Divorce, Veiling and Emerging Feminist Voices*, in WOMEN AND POLITICS IN THE THIRD WORLD 142 (Haleh Afshar ed., 1996).

20. *See generally* Haleh Esfandiari, *The Majles and Women's Issues in the Islamic Republic of Iran*, in IN THE EYE OF THE STORM: WOMEN IN POST-REVOLUTIONARY IRAN 61 (Mahnaz Afkhami & Erika Friedl eds., 1994).

21. *See generally* Louise Halper, *Law and Women's Agency in Post-Revolutionary Iran*, 28 HARV. J.L. & GENDER 85 (2005); Mir-Hosseini, *supra* note 19 (providing an analysis of the politics of the Iranian Revolution and women's agency).

22. *See* Gholam Khiabany & Annabelle Sreberny, *The Iranian Press and the Continuing Struggle over Civil Society 1998–2000*, 63 GAZETTE: INT'L J. COMM. STUD. 203, 206–07 (2001) (discussing President Khatami's promises of greater press freedom and the licensing of many new publications following his election).

power as dependent on preventing the elected Parliament, President, and local councils from enacting their promised reforms.²³ Between 1997 and 2003, all elections were victories for the reformists, but their opponents successfully used the power of the theocratic institutions to frustrate reformist initiatives of the government and the Sixth Parliament (2000–2004).²⁴ This Parliament presented thirty-three bills to redress the discriminations that women faced in marriage and society, including the ratification of the Convention on the Elimination of Discrimination Against Women; but all bills were either rejected by the Guardian Council (which had veto power over Parliament) or were approved only after being emptied of their progressive content.²⁵

Unable to fulfill their electoral promises, the reformists lost popular support. In elections in 2003 and 2004, the theocratic forces won back the city councils and Parliament, and, in June of 2005, they brought the dual state to an end when one of their candidates, the hardliner Mahmoud Ahmadinejad, became President. Since Ahmadinejad's election—which astounded both insiders and outsiders, as had Khatami's eight years before—the politics of gender and family law reform have entered a new phase, radicalizing women's demands and increasing women's activism.²⁶

III. The Moroccan Case

Codification and reform in Morocco until the late 1990s was a smoother process, admirably described by Leon Buskens, on whose account I rely.²⁷ Family law was codified in 1957—twenty years later than that of Iran—in the Personal Status Code.²⁸ In Morocco's struggle for independence, nationalists,

23. See generally ZIBA MIR-HOSSEINI & RICHARD TAPPER, *ISLAM AND DEMOCRACY IN IRAN: ESHKEVARI AND THE QUEST FOR REFORM* (2006) (providing an overview and discussion of the reformist movement in Iran).

24. See generally Bahman Bakhtiari, *Dilemmas of Reform and Democracy in the Islamic Republic of Iran*, in *REMAKING MUSLIM POLITICS: PLURALISM, CONTESTATION, DEMOCRATIZATION* 112 (Robert W. Hefner ed., 2005).

25. See generally Mir-Hosseini, *supra* note 18.

26. See generally Ziba Mir-Hosseini, *Is Time on Iranian Women Protesters' Side* (June 16, 2006), <http://www.merip.org/mero/mero061606.html> (last visited Aug. 26, 2007) (on file with the Washington and Lee Law Review).

27. See generally Leon Buskens, *Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere*, 10 *ISLAMIC L. & SOC'Y* 70 (2003).

28. See *id.* at 72 (discussing the codification of Islamic family law in the *Mudawwanat al-ahwal al-shakhsiyya*, or *Mudawwana*). For further discussion of the codification of family law in Morocco, see generally J. Lapanne-Joinville, *le Code Marocain du Statut Personnel* [*The Moroccan Code of Personal Status*], 11 *REVUE MAROCAINE DE DROIT* 97 (1959); J.N.D. Anderson, *Reforms in Family Law in Morocco*, 2 *J. AFR. L.* 146 (1958).

Islamic reformists, and traditionalists united in opposition to the legal pluralism promoted by the French Protectorate, which divided the country into two zones: that governed by Islamic law and that governed by Berber customary law.²⁹ Islamic law served as an important unifying force, and when independence was won in 1956, one of the first acts of the new government was to abolish Berber customary law and to set up a commission to draft a state family law.³⁰ The commission consisted of ten men (Maliki jurists and judges), and King Muhammad V, who had led the country to independence, retained ultimate responsibility for the proceedings.³¹ For some, like ‘Allal al-Fasi—a reformist Islamic scholar (*‘alim*) and one of the nationalist leaders, who served as reporter for the commission—this was the first step in building a just society and a return to Islamic roots.³² In drafting the Code, the members remained faithful to traditional Maliki *fiqh*, and although they used the 1956 Tunisian *Majalla* as a model for structure, content, and language, they did not reproduce its liberal spirit.³³ The Code was promulgated through *zahir* (a royal decree) without parliamentary debate, and still remains the only Maliki-based law in Morocco.³⁴ The Personal Status Code became a symbol of Moroccan and Islamic unity and identity, as well as of Maliki tradition and the monarchy.³⁵ The King claimed descent in the House of the Prophet, and used the title *Amir al-Mu‘minin*, Commander of the Faithful.

Attempts to reform the Code began within a decade of its codification, but all failed until 1993.³⁶ By the end of the 1980s, public debate over family law had become intense, and women linked their struggle for women’s rights to the struggle for human rights, an issue that King Hassan II and his government

29. See Buskens, *supra* note 27, at 72 (discussing the French Protectorate’s division of Morocco).

30. See *id.* (describing the unifying force of Islamic law and the first actions of the new Moroccan government in 1956).

31. See *id.* at 72–73 (discussing the composition of the commission and the King’s authority over the commission’s work).

32. See *id.* at 72 (detailing ‘Allal al-Fasi’s role on the commission and his interpretation of the role of the Mudawwana).

33. See *id.* at 73 (comparing the Tunisian *Majalla* with the Moroccan Mudawwana).

34. See *id.* at 73–74 (discussing the promulgation of the Code, the lack of parliamentary discussion on the part of the commission, and the reflection of classical Maliki principles in the Code).

35. See *id.* at 76 (stating that the Mudawwana served as a symbol of national identity).

36. See *id.* at 77–78 (discussing calls and plans for reform of the Mudawwana between 1965 and 1992). See generally ABDERRAZAK MOULAY R’CHID, *LA FEMME ET LA LOI AU MAROC [WOMEN AND LAW IN MOROCCO]* (1991); Bruce Maddy-Weitzman, *Women, Islam, and the Moroccan State: The Struggle over the Personal Status Law*, 59 MIDDLE E.J. 393 (2005).

considered too sensitive.³⁷ At the same time, inspired by the Iranian Revolution, and with the slogan of return to *Shari'a*, Moroccan Islamists were gaining ground as an oppositional force. Women's groups, aligned with the secular and socialist opposition, intensified their activism and demands for change; in March 1992, the *Union de l'Action Feminine* launched a campaign to gather one million signatures in support of reforming the Code.

At this time, the King decided to intervene.³⁸ In September 1992, he received representatives of women's organizations at the royal palace and made a speech stating that he would not allow Islamic law to be the subject of political struggle, stressing his role as Commander of the Faithful, and declaring that it was his role to decide on the authoritative interpretation of Islam by means of *ijtihad*.³⁹ In October, the King set up a commission (one of the twenty-one members was a woman, the rest men, including Islamic scholars) to prepare a draft revision of the Code.⁴⁰ In May 1993, he presented the draft to women's rights organizations and ordered them and the commission to reach a consensus, which they duly did.⁴¹ In September, while the Parliament was dissolved, King Hassan II promulgated the reforms by royal decree.⁴²

The 1993 reforms preserved male prerogatives in divorce and polygamy, while giving some protection to women in the face of men's abuse of these privileges.⁴³ For example, men could not register a divorce without a court order and had to pay compensation.⁴⁴ However, these protections were modest and certainly did not meet the demands of the women's movement, which continued to agitate for further reform.⁴⁵ In March 1998, the King invited an

37. See Buskens, *supra* note 27, at 78 (discussing the union of the struggle for women's rights with the struggle for human rights and the sensitive nature of human rights issues in the eyes of the Moroccan government).

38. See *id.* at 79 (discussing King Hassan II's decision to reform family law in context of the "general climate of carefully controlled political reform and democratization").

39. See *id.* (describing King Hassan II's pronouncements to representatives of women's groups).

40. See *id.* (detailing the composition of the commission formed to revise the *Mudawwana*).

41. *Id.* at 79–80.

42. See *id.* at 80 (discussing the fact that reforms were promulgated by means of *zahir* (royal decree) in a period when Parliament was dissolved in anticipation of elections).

43. See *id.* at 81 (summarizing the protections that the 1993 reforms provided to women and children).

44. See *id.* at 80 (discussing the substantive changes to divorce procedures under the 1993 reforms).

45. See *id.* at 81–82 (illustrating the dissatisfaction on the part of most modernist factions with regard to the extent of the family law reforms).

opposition leader—Abderrahman Youssoufi from the *Union Socialiste des Forces Populaires* (USFP)—to form a new government.⁴⁶ In the same year, the Islamist *Partie de la Justice et du Développement* (PJD) stood for parliamentary election.⁴⁷ In March 1999, the new government, aligned with the women's movement, presented a Plan of Action for the improvement of women's position in Moroccan society.⁴⁸ One element of the Plan was the "reinforcement of female power," involving reforms in penal law, the code of nationality, and family law.⁴⁹ The proposed reforms of family law were radical, laying the ground for equality in marriage.⁵⁰ These reforms were justified in terms of Islamic legal methodology, using the notion of *ijtihad*.⁵¹

Women's organizations welcomed the Plan, but Islamists and conservatives in government strongly opposed the reforms.⁵² In September 1999, King Hassan II died, and new King Mohammed VI promised further political openings and rights for women.⁵³ A period of intense debate and political dispute followed, reaching a showdown on Sunday, March 12, 2000.⁵⁴ To put pressure on the government, the women's movement organized a march in Rabat; to show their political muscle, the Islamists planned their own march in Casablanca.⁵⁵ Attendance estimates for the Rabat march ranged from 40,000 to 100,000 people, but twice as many participated in Casablanca.⁵⁶ The government backed down and the Plan of Action stalled.⁵⁷ Both sides appealed

46. *Cf. id.* at 84 (addressing Abderrahman Youssoufi's rise to power in March 1998 "at the express orders of the king").

47. *Cf. id.* (discussing the PJD's participation in Morocco's Parliament for the first time).

48. *See id.* (mentioning the new government's introduction of the *Projet Plan d'Action National pour l'Intégration de la Femme au Développement* with the aim of integrating women more fully into society).

49. *See id.* at 85 (listing the four domains of priorities of the plan and specifying the goals of reinforcement of female power).

50. *See id.* at 88 (distinguishing the proposed reforms from the classical teachings of the Maliki school, the policies of the Mudawwana, and the family law reforms promulgated in 1993).

51. *See id.* at 84–94 (denoting *ijtihad* as the main justification of the reform proposal).

52. *See generally id.* at 89–93 (describing the debates about the proposed reforms of family law up to the point of King Hassan II's death in July 1999).

53. *See id.* at 94 (discussing King Mohammed VI's pronouncements upon taking the throne following King Hassan II's death).

54. *See generally id.* at 94–103.

55. *See id.* at 103 (describing the planning of the two opposing marches that occurred on March 12, 2000).

56. *See id.* at 103–04 (detailing the attendance estimates for the two marches and noting that estimates for the Casablanca march were significantly higher than those for the Rabat march).

57. *See id.* at 107 (discussing the government's change of priorities and description of the

to the young King to intervene as Commander of the Faithful,⁵⁸ eventually, in April 2001, he established a new sixteen-member consultative commission for the reform of the Code, consisting of three women and thirteen male Islamic scholars, two of whom were progressive.⁵⁹

The commission continued its work, the debates intensified, and the cleavage between the women's movement and the Islamist opposition widened.⁶⁰ However, the Casablanca bombing in May 2003, perpetrated by Islamist extremists, changed the political balance. The bombing horrified the public and turned the tide against the Islamist opposition, who wanted to distance themselves from such horrific acts. The women's movement judged the time ripe to push for reform. In September, after thirty months of contentious deliberation, the commission presented the King with their recommendations, which were the basis of a bill submitted to Parliament in October. The Parliament debated the reforms extensively, making some amendments, before passing the reforms unanimously in January 2004. The New Family Code defines marriage as an equal partnership between spouses with equal responsibility for the family. The Code modifies traditional Maliki *fiqh* language and concepts by putting men and women on equal ground in establishing and terminating the marriage contract.

IV. Comparison and Conclusions

In the 1990s, when the process of political reform started in Morocco and Iran, women in both countries lived under similar family law regimes. Despite differing political systems (monarchy and Islamic Republic) and differing *fiqh* traditions, with the law applied by nonclerical judges in Morocco but by clerical judges in Iran, similar rationales and arguments were used to retain men's privileges in marriage. However, the two nations' paths diverged, and a decade later, Moroccan women have achieved radical reforms, while Iranian women are now struggling.⁶¹ Reasons for this divergence must be sought in the

reform plan as simply a proposal); *see also* Maddy-Weitzman, *supra* note 36, at 403 (discussing the reaction of the political elite to the mass demonstrations).

58. *See* Buskens, *supra* note 27, at 107 (discussing the hopes of both the advocates and opponents of the reform plan that King Mohammed VI would defend their respective views).

59. *See id.* at 113 (describing the establishment and the composition of the Consultative Commission Entrusted with the reform of the Mudawwana).

60. *See generally id.* at 114–17 (discussing the continued debate over family law reform during the period of the commission's work).

61. *See generally* Fatima Sadiqi & Moha Ennaji, *The Feminization of Public Space: Women's Activism, the Family Law, and Social Change in Morocco*, J. MIDDLE E. WOMEN'S

configurations of domestic and international events between 1997 and 2004 that shaped the politics of gender and family law reforms in each country.

First, the political relaxation in Iran two decades after the Revolution came from below; the relaxation was unplanned, and it divided the ruling elite into two bitterly opposed factions with divergent readings of Islam and gender rights. The Supreme Leader sided with the conservatives, who by 2005 had ousted the reformists from the structures of power. In Morocco, by contrast, the relaxation was initiated from above and did not divide the political elite; unlike in Iran, the confrontation was less between two readings of Islam than between Islamists and secularist women's groups. The ruling elite eventually supported the women's groups, with King Mohammed acting as an arbiter and using his politico-religious authority to oversee the reforms of family law.

Secondly, international developments were major factors in tipping the internal balance against family law reform in Iran and in its favor in Morocco. Notably, President George W. Bush's inclusion of Iran in the "Axis of Evil" in 2002, just after Iran helped dislodge the Taliban in Afghanistan; his invasion and occupation of Iraq in March 2003; his subsequent rhetoric of "regime change;" and his refusal to negotiate with Iran about nuclear weapons and other issues strengthened the theocratic forces and blindsided the reformists.⁶² In Morocco, by contrast, external pressures helped promote reform and the opening up of society. Morocco's bid to become a full member of the European Union gave the government an incentive to democratize and to respond to the women's movement. The Morocco-European Union and Morocco-United States free trade agreements brought social and economic provisions that placed pressure on the government to carry on down the path of reform.⁶³

A combination of internal and external factors and events that created political will to reform Maliki-based family law opened the gate of *ijtihad* in Morocco. Of course, reforms were achieved less by jurisprudential arguments than by King Mohammed VI's authority, which legitimated an egalitarian reading of Islamic law. In Iran, sophisticated arguments by progressive jurists and painstaking work by the reformist Parliament's research center in drafting

STUD., Spring 2006, at 86 (providing a recent account of the role of the women's movement in family law reform in Morocco).

62. See generally ALI M. ANSARI, CONFRONTING IRAN: THE FAILURE OF AMERICAN FOREIGN POLICY AND THE NEXT GREAT CRISIS IN THE MIDDLE EAST 184-232 (2006).

63. See Oriana Wuerth, *The Reform of the Moudawana: The Role of Women's Civil Society Organizations in Changing the Personal Status Code in Morocco*, 3 HAWWA: J. WOMEN MIDDLE E. & ISLAMIC WORLD 309, 321 (2005) (describing international free trade agreements as a force behind King Mohammed VI's commitment to improving human rights, particularly the rights of women).

bills to reform family law failed to bring change. Without producing any counterarguments or reasoning, the clerics of the unelected Guardian Council, appointed by the Supreme Leader, rejected reformist arguments as "opposed to the Shari'a"—that is, their own interpretation.