



fidh

LEGAL BARRIERS TO GENDER EQUALITY IN INHERITANCE IN THE MAGHREB REGION (Algeria, Morocco and Tunisia)

December 2021 / 783F



الجمعية التونسية للنساء الديمقراطيات
Association Tunisienne
des Femmes Démocrates



SCIENTIFIC COORDINATOR :

Monia Ben Jemia

WITH THE SUPPORT OF :

Kalthoum Meziou

COUNTRY EXPERTS :

Rabéaa Naciri

Lamia Neji

Sarah Chelal

Zouhour Oumara

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Main Abbreviations

ARP	Assembly of People's Representatives
ADFM	Democratic Association of Moroccan Women
ATFD	Tunisian Association of Democratic Women
AFTURD	Association of Tunisian Women for Research and Development
CAWTAR	Centre of Arab Women for Training and Research
CFA	Algerian Family Code
CFM	Moroccan Family Code
CSP	Personal Status Code (Tunisia)
CIDDEF	Information and Documentation Centre on the Rights of Children and Women (Algiers)
CNDH	National Council for Human Rights (Morocco)
CREDIF	Research Centre for Studies, Documentation and Information on Women
CDI	International Law Commission
COLIBE	Commission for Individual Liberties and Equality
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
FIDH	International Federation for Human Rights
JORT	Official Gazette of the Tunisian Republic
OCDE	Organisation for Economic Cooperation and Development
OIT	International Labour Organisation
PIDCP	International Covenant on Civil and Political Rights
PIDESC	International Covenant on Economic and Social Rights

Glossary

Fardh heirs

Fardh heirs are those heirs who have a specific share in the estate and are served in priority. They are strictly determined by the Qur'anic text and adopted by the legislations of the three countries. They are women, namely the mother, the grandmother, the daughter, the granddaughter of the son, the sisters and the wife. No other woman can be an heir.

They also include a few men, the father, the paternal grandfather, the uterine brother and the husband.

The fact that of being served first does not mean that fardh heirs are privileged, their shares in the estate are equally determined by law.

-Algeria: art. 140 CFA, Morocco: art. 335 para. 1 CFM, Tunisia: art. 91 CSP.

Aceb heirs

Aceb heirs are the relatives through male lineage of the deceased. They must not be separated from the deceased by a woman; hence the nephew son of a brother is an aceb while the nephew son of a sister is not.

Aceb heirs are entitled to the residue of the estate after distribution of the shares to the fardh heirs, they are entitled to the whole estate when there are no fardh heirs.

Radd

Radd is the technique used for estates where no aceb heir is found, and where there is therefore no one to receive the remainder of the estate once the fardh heirs have been served. In this case the entire estate is distributed to

the fardh heirs, who will thus be served twice, the second distribution being made in proportion to their shares. This technique allows the Treasury to be set aside.

Donation

A donation is an act by which, during his lifetime, a donor transfers the ownership of a property free of charge to another person, the donee.

Bequest

A bequest is an act by which property is transferred free of charge, but the transfer only becomes effective upon the death of the testator. It is done by will. In Muslim law and in the legislation of the three countries, a bequest can only relate to one third of the estate and cannot be made to an heir. If it exceeds one third of the estate or is made for the benefit of an heir, it must be approved by the other heirs, otherwise it is void.

Compulsory bequest

This is not a real bequest as there is no will. Muslim law and the legislations of the three countries do not provide for a technique allowing the children of a predeceased person to take the place of their father or mother in the inheritance of their grandparents. In order to help them, the legislator decided that the grandchildren would benefit from a compulsory bequest (meaning that it is imposed by the legislator), within the limit of one third of the inheritance.

Habus or waqf

Legally, it is defined as an inalienable endowment of bare ownership and usufruct. The habus or awqaf (plural of waqf) are sometimes used to circumvent the rules of inheritance and sometimes to further favour the male descendants.

Foreword

Since its birth, the feminist movement in the Maghreb countries has inscribed the demand for equality in inheritance in the fight for full and complete gender equality and for human rights.

This struggle may have taken different forms at different times depending on the context of each country, but it has been a common cause that will remain relevant until the abolition of this blatant discrimination.

Moreover, since the 2000s, several initiatives have been conducted by feminist organisations in the Maghreb, either separately, or collectively within the framework of the regional network Collectif Maghreb- Égalité 95¹. These actions took various forms: meetings, workshops, artistic and cultural events, communication campaigns, appeals to national authorities and international mechanisms, peaceful demonstrations, publication of reports and studies, drafting of a bill, etc.

As a result of this mobilisation, the International Federation for Human Rights (FIDH), in partnership with the Tunisian Association of Democratic Women (ATFD), organised in 2018 a regional seminar in Tunis on equality in inheritance, which brought together experts and activists from the three Maghreb countries (Algeria, Morocco and Tunisia). This seminar provided an opportunity to cross-examine the developments in the debate on women's inheritance in the three countries, to share experiences and to identify good practices that will lead to changing the discriminatory legal arsenal and to enshrine equality in all areas.

The seminar culminated in the adoption of a recommendation calling first of all for research to be carried out in the three Maghreb countries in order to highlight the achievements of women and present the obstacles and resistance factors that need to be removed for the adoption of a Maghreb convention on equality in inheritance. It is within this framework that this report entitled **«Legal Barriers to Gender Equality in Inheritance in the Maghreb Region (Algeria, Morocco and Tunisia)»** is being published today.

While shedding light on the social and economic impact of inequality in inheritance, this report explores the barriers to equality in inheritance commonly found in the three Maghreb countries and the specific obstacles under the respective legal systems. It provides a

1. <https://www.cairn.info/revue-nouvelles-questions-feministes-2014-2-page-132.htm>

synthesis of the reforms needed to achieve de jure and de facto equality in inheritance in line with international standards.

In the current context, addressing the issue of women's inheritance may be a challenge due to the retrogressive regressive atmosphere that has characterised our societies since the advent of the so-called «Arab Spring» in Tunisia and other countries in the region. However, this atmosphere did not prevent women from creating networks of associations in order to lift the taboos on a delicate topic, which has been met with refusal and even reluctance by those who do admit opening up the register of issues perceived as intangible.

The paradox of these historic times is that much progress has been made in the field of the family in these countries which have experienced a revolution, as in Tunisia, reforms in Morocco, the demand for a revision of the family code and a plea for the participation of women in politics, particularly in the framework of the Hirak in Algeria. Legislation has been amended under pressure from feminist movements, and new or revised constitutions have enshrined the principle of gender equality or non-discrimination and women's rights.

The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been ratified by the three countries, which have either lifted certain reservations relating to the issue, as in Morocco, Tunisia and Algeria, or taken steps to do so.

But much remains to be done because the demand for equality in general and equality in inheritance in particular is faced with all kinds of political obstacles, especially from religious fundamentalists, populist movements, conservatives and all the proponents of the patriarchal system.

We are listening to the new generations and together we are determined to continue our fight with civil society actors, regional and international human rights bodies, progressive political parties, academics, artists and all forces that share our values to achieve our goal.

For FIDH
Hafidha Chékir

For ATFD
Khadija Cherif

Methodology

The report «Legal Barriers to Gender Equality in Inheritance in the Maghreb Region (Algeria, Morocco and Tunisia)», surveys the various forms of exclusion and discrimination against women in inheritance law in the three legal systems of Tunisia, Algeria and Morocco.

To carry out this study, FIDH and ATFD relied on the skills of a pool of experts committed to the fight for full equality. According to a methodology defined by Monia Ben Jemia, the scientific coordinator of this work, each legal system was analysed in order to unveil the discrimination it contains and the effects it has on women, particularly in the economic and social spheres. Thus, for Morocco, gender and women's rights expert Rabéa Naciri explored de jure and de facto discrimination. Lamia Neji exposed Tunisia's failure to meet its international commitments on women's rights by maintaining inequality in inheritance. As for Algeria, two experts, Sarah Chelal and Zouhour Oumara worked in pairs.

With the assistance of Kalthoum Meziou, Monia Ben Jemia then analysed the individual country reports and developed a summary report outlining the similarities and differences between the three legal systems.

Partner associations in the three countries, namely the Tunisian Association of Democratic Women, the Moroccan Democratic Women's Association and the Information and Documentation Centre on the Rights of the Child and Women in Algeria, shared their resources and work on the subject with the various experts, enriching the analysis and guiding the conclusions and recommendations of the summary report.

On 10 and 11 December 2021, a debriefing seminar held in Tunis brought together experts and representatives of the different partners and allowed, during two days, to discuss and validate the analyses and recommendations of the regional report. Prospects for joint actions were also explored to continue the defence and advocacy of equality in inheritance at the Maghreb level.

Introduction



In Morocco, Algeria and Tunisia, inheritance laws are still discriminatory against women. This discrimination, in addition to being contrary to human rights, hinders the economic empowerment of women and is a loss of income for the countries insofar as it hinders their social and economic development². It contributes to the impoverishment of women and thus of society as a whole³.

Built on the primacy of the agnatic family, male relatives by males, of a tribal nature and based on a patriarchal model, inheritance law is today totally opposed to the development and change in the structure of the family which has become conjugal and restricted. While all other branches of law are evolving in line with economic and social changes, inheritance law, which is considered inalterable, remains static. The participation of women in public life with their access to education, work and the political life of their country, the constitutional amendments enshrining equality between men and women, the accession of States to regional and international human rights conventions, and the gradual removal of reservations to the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) did not have any impact on inheritance law.

However, as early as the 1930s, calls were made by authors such as Tahar Haddad⁴ in Tunisia for the reform of this law to keep pace with social change. And, under the impetus of the women's movement, calls for equality in inheritance became increasingly numerous; a public debate could be initiated at the end of the twentieth century and the beginning of this century. Several arguments were put forward in favour of reform. The women's movement relied on legal arguments highlighting the inconsistency of inheritance inequality with the

2.OCDE/OIT/CAWTAR (2020), *Changing Laws and Breaking Barriers for Women's Economic Empowerment in Egypt, Jordan, Morocco and Tunisia, Competitiveness and Private Sector Development*, Éditions OCDE, Paris, <https://doi.org/10.1787/af7f3846-fr>.

3. *Ibid.*

4.« Tahar Haddad was a Tunisian intellectual, trade unionist and politician. The evolution of Tunisian society owes much to this activist. A staunch defender of the trade union rights of Tunisian workers, the emancipation of Tunisian women and the abolition of polygamy in the Arab-Muslim world, he is a respected figure in the history of Tunisia

Tahar Haddad was born in 1899 in the south of Tunisia, to a humble social background. He graduated from the Zitouna of Tunis and studied law for two years. Tahar Haddad was a contemporary and friend of the poet Abou el Kacem Chebbi and the trade unionist Mohamed Ali El Hammi.

Since his youth, he joined the national movement for independence and was an active member of the Liberal Constitutional Party. In June 1924, together with Mohamed Ali El Hammi, a pioneer of the trade union movement in Tunisia, he founded the «Association of Economic Cooperation» and participated in the establishment of the General Confederation of Tunisian Workers in December 1924... Publications:

Islamic education and the reform movement at the Zitouna. Tunisian workers and the birth of the trade union movement, published in 1927 and republished in 1966 by the Tunisian Publishing House.

Our Woman in Sharia and Society, published in 1930 and republished under the title *Our Woman, Islamic Legislation and Society*, published by the Maison Tunisienne de l'Édition, Tunis, 1978.» <https://lepetitjournal.com/tunis/actualites/histoire-tahar-haddad-militant-et-feministe-davant-garde-53811>

Constitution and regional and international human rights conventions. It also drew on Muslim reformist thinking and the need to adapt inheritance rules to the evolution and change of the family structure. The feminisation of poverty makes this reform an urgent but difficult in countries that are experiencing economic, social and health crises in addition to political ones. Any reform demanded by the women's movement, sometimes materialising in bills or draft laws, is given a lower level of urgency on the political agenda.

The current political climate of repression of freedoms in Algeria⁵, state of emergency in Tunisia⁶ and restrictions of freedoms in Morocco⁷, combined with the health crisis that reinforced the economic and social crisis, makes reform difficult. However, political Islam, the main opponent of egalitarian inheritance reforms, is in steep decline everywhere, especially in Tunisia⁸ and Morocco where the Islamic Party of Justice and Development (PJD) lost the 2021 legislative elections.

There is therefore hope that in the near future, there will be egalitarian reforms if mobilisation for gender equality in inheritance is sustained. This is all the more possible as in the three countries women are more present on the political scene, though to varying degrees, thanks to the introduction of quotas (Morocco and Algeria) or parity (Tunisia). Although in the parliaments, the rate of women deputies rarely exceeds 25% (25% in Tunisia⁹, 24.3% in Morocco and 22.5% in Algeria¹⁰), progress has nevertheless been made in Tunisia and Morocco. The current government in

The proportion of women MPs rarely exceeds **25%**

25% in Tunisia
24,3% in Morocco
22,5% in Algeria

Morocco has 7 women ministers out of 19 ministers and 5 deputy ministers. In Tunisia, a woman has been appointed head of government and 10 out of 24 ministers are women. The glass ceiling is beginning to break and the traditional positions given to women (culture, health, women's ministry) are being grafted onto positions generally given to men (such as justice (Tunisia) or finance (Tunisia and Morocco)). The increased participation of women in senior political positions may, if not help to put the equality in inheritance agenda on the political table, at least change mentalities and break down stereotypes about male and female roles, which is one of the paths to equality. In the case of Tunisia, however, one may regret that the first time that a woman is appointed to head the government, she has no power, as the President of the Republic is the one who determines government policy and chairs the meetings of the Council of Ministers¹¹.

Because it is acknowledged today that discrimination against women is the root cause of the violence they suffer¹² and that no society can develop without eradicating it, putting the issue of inheritance inequality back on the political agenda is not only a necessity, but an emergency. This reform is necessary to bring the law in line with social and economic changes. It is possible because inheritance discrimination is contrary to constitutional equality and human rights conventions.

This study proposes a comparative and extended analysis based on three reports on inequality in inheritance in Tunisia¹³, Morocco¹⁴ and Algeria¹⁵. It will be conducted in two stages, the first of which will cover the need for the reform of inheritance law and the second, that of its possibility.

5. <https://www.fidh.org/fr/themes/defenseurs-des-droits-humains/algerie-zoom-sur-le-hirak>

6. <https://www.fidh.org/fr/regions/maghreb-moyen-orient/tunisie/tunisie-accaparement-du-pouvoir-par-la-presidence-une-derive-sans>

7. <https://www.fidh.org/fr/themes/defenseurs-des-droits-humains/maroc-victimes-d-attaques-croissantes-des-associations-des-droits>

8. With the suspension of parliament and the transfer of prerogatives to the president of the republic, the Islamist party Nahdha no longer governs.

9. The rate dropped in the last legislative elections of 2019. In 2014, the rate exceeded 30%.

10. It had reached the rate of 25.8% in the 2017 elections. This low rate is also explained by the high abstention rate in the 2021 elections.

11. See Decree No. 117 of 22 September 2021 on exceptional measures, JORT of 22/9/2021, No. 86, p.2196: Art. 9 – "The President of the Republic represents the State and directs its general policy and its fundamental choices". Art. 10 - «The President of the Republic shall preside over the Council of Ministers and he may delegate his presidency to the Head of Government». Art. 11 – "The President of the Republic shall see to the execution of the laws, exercise general regulatory power and may delegate all or part of this power to the Head of Government".

12. The CEDAW Committee includes violence in the field of discrimination in General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017)

13. Tunisian report, Lamia Néji, October 2021, forthcoming.

14. Moroccan report, Rabéa Naciri, September 2021, forthcoming.

15. Algerian report, Sarah Chellal & Zouhour Ouamara, October 2021, forthcoming.

Chapter 1

The need to reform inheritance law

Ensuring the development of society requires adapting legislation to social and economic changes in order to eradicate poverty, which primarily affects women. The public debate was initiated with the feminist movement, Muslim reformist thinkers and the creation of national commissions to examine the issue.

I. THE NEED TO ADAPT LEGISLATION TO THE DEVELOPMENT AND CHANGE IN THE FAMILY STRUCTURE

In all three countries, the family structure has undergone fundamental changes and no longer corresponds to the tribal model on which the system of *acebs*¹⁶ (universal heirs) is based. It has become restricted and conjugal in nature.

In Algeria, CIDDEF's argument is based on the social security law. Taking into account the change in the family pattern, this law favours the nuclear family and does not discriminate between men and women. Article 67 of Act No. 83-11 of 2 July 1983 on social insurance establishes the list of eligible claimants attached to a worker who are entitled to social security coverage in addition to the worker himself. The eligible successors of a deceased worker are: the spouse, dependent children [under 18 years of age or 21 years of age if they are still studying, disabled children unable to carry out any activity, unmarried unemployed daughters and dependent ascendants. If there are no dependent children or ascendants, the spouse receives 75% of the deceased's pension; if there are other beneficiaries, the spouse's pension amounts to 50% of the deceased's pension. As a rule, the other eligible claimants share 40% of the deceased's pension equally. In addition, in order to provide for the family's initial needs, a death grant equal to 12 times the amount of the last salary is paid to the beneficiaries and divided equally among them. Thus, the provisions of the social security laws de facto enshrine the nuclear family; they do not discriminate on the basis of sex, except for positive discrimination in favour of single daughters who do not work¹⁷.



One woman in 5 is head of household in Tunisia

Similarly, in Tunisia, the family, which has become increasingly nuclear, is no longer built according to the patriarchal model where the man, consecrated as the sole head of the family by the Personal Status Code, directs and nurtures the family. In its publication entitled «20 arguments for equality in inheritance», ATFD¹⁸ shows that women, thanks to their access to education and work, are fulfilling the same role that was once exclusively that of men. There is an increasing number of women heads of household (19.4% in Tunisia, i.e. one woman in five) and they all contribute to household expenses. They participate in the purchase of the family

home which, paradoxically, is generally registered in the man's name alone; community of property, instituted on an optional basis in the three countries, is little used¹⁹.

In addition to the changing structure of the family, the role of women within the family was also constantly developing. While inequality in inheritance is justified by the fact that men are responsible, at least primarily, for providing for the family, the figures show that women share this responsibility to the same extent as men, if not more.

Women are increasingly well educated and are therefore fully capable of managing their property: In Tunisia, more than 99.2% of girls are enrolled in primary school; 84.5% in secondary school (compared to 75.8% for boys) and constitute 62% of the student population at the higher education level. With regard to gender parity in

16. Aceb heirs are the relatives through male lineage of the deceased. They must not be separated from the deceased by a woman; hence the nephew son of a brother is an aceb, the nephew son of a sister is not. Aceb heirs are entitled to the residue of the estate after distribution of the shares to the fardh heirs, they are entitled to the whole estate when there are no fardh heirs.

17. CIDDEF, Plaidoyer pour une égalité de statut successoral entre homme et femme en Algérie, 2010, <https://ciddef-dz.com/wp-content/uploads/2021/04/plaidoyer.pdf>

18. *Pour une action commune de la société civile tunisienne en 2021, 20 arguments pour l'égalité dans l'héritage*, Tawa waqtou, maintenant plus que jamais, ATFD, Tunisian Coalition for Equality in Inheritance, with the support of EuroMed Rights and Friedrich Ebert Stiftung, Tunisia office, 2021.

19. See the Moroccan, Algerian and Tunisian reports, forthcoming.

Algeria in 2019, 47.8% of girls attended primary school compared to 52.2% of boys, and 47.9% of girls attended middle school compared to 52.1% of boys. As for the number of women with a higher education degree, it reaches the rate of 62.5% (2018-2019).

Women's domestic work, which is invisible and unpaid, makes a significant contribution to family expenses and reduces the burden on the state budget²⁰.

According to the Gender Budget Survey²¹, this invisible and unpaid work would amount to more than 47.4% of the Tunisian national GDP in 2006. Feminist NGOs also demonstrated that, despite their smaller share in inheritance, women "manage their wealth more efficiently", which has positive effects on subsequent generations as well as on the economy in the short to medium term. During their lifetime, women make donations to their children, which "confirms the macroeconomic efficiency in the management of property by women, since it contributes directly to supporting their descendants when they have the greatest need of financial support to build their work and life projects. A capital that circulates and is injected in the economy and the creation of wealth²²".



In Morocco, the National Time Use Survey, conducted by the national statistics institution, revealed that, based on the restricted perimeter (cooking, housework, material care of children, laundry, household management), domestic work represented more than 23 billion hours in 2012, 92% of which were performed by women. According to the same study, domestic tasks not accounted for by the System of National Accounts valued at the SMIG (12.24 DH/hour in 2012) are quantified at 285 billion DH, i.e. a contribution of women to Morocco's GDP in 2012, extended to non-market domestic services of about 39.7%. Valued by the average hourly wage remuneration derived from the national accounts for all economic activities (22 DH/h), this contribution amounts to 49.3% of the national GDP (513 billion DH)²³.

In Morocco, as in the other two countries, the number of women who are de facto heads of family is also constantly growing, which no longer justifies granting the status of the sole head of the family to the husband in the Tunisian personal status code - other codes having abrogated this.

Roles in families have changed, with women as well as men contributing to the creation of family wealth and contributing to expenses.

Families educate their sons as well as their daughters and spend money on their schooling, so they do not want this investment to go to waste if their inheritance does not go entirely to their children and if their daughters are partly excluded. The marital and restricted family, based on the free choice of spouse, generally consists of the father and mother and their children. It is also a family based on affection and, as Kalthoum Meziou and Ali Mezghani put it so well²⁴, fathers love their daughters as much as their sons. An increasing number of parents are reluctant to adopt this unequal distribution. This leads many families to circumvent the unequal rule by sharing through sale or donation during their lifetime, on an equal basis for children of both sexes. In Tunisia, a law promulgated in 2006²⁵ exempts donations from the heavy tax burden, allowing parents who wish to do so to be able to share their property equally between girls and boys during their lifetime. The choice of equality is not provided for by the law, it is the choice of the parents to share or not to share equally. This law was

20. *Pour une action commune de la société civile tunisienne en 2021, 20 arguments pour l'égalité dans l'héritage*, Tawa waqtou, maintenant plus que jamais, ATFD, Tunisian Coalition for Equality in Inheritance, op. cit..

21. L'Enquête Budget Temps des hommes et des femmes de 2005 en Tunisie et les défis de sa traduction dans les politiques publiques, UN Women, contribution by Triki (S.) <https://www.un.org/womenwatch/daw/csw/csw57/panels/panel5-souad-triki.pdf>

22. 20 arguments pour l'égalité dans l'héritage, Tawa Waktou...2021.

23. Shadow report by Moroccan NGOs on the implementation of the Beijing Declaration and Platform <https://ngocsw.org/wp-content/uploads/2019/11/Rapport-parallele%CC%80le-des-ONG-marocaines-sur-Beijing25-ADFM.pdf>

24. Mezghani (A) et Meziou Dourai (K.), *L'égalité entre hommes et femmes en droit successoral*, Sud éd. Tunis, 2006.

25. Law n°2006-69 of 28 October 2006, relating to the exemption of donations between ascendants and descendants and between spouses from the proportional registration right. JORT of 3/11/2006, n°88, p. 3869

amended in the 2017 Finance Act which only allows this total exemption if the estate does not exceed a certain amount. Article 29 of the 2017 finance law²⁶ has, in fact, provided for an additional registration duty on sales and donations of real estate whose value is greater than or equal to five hundred thousand dinars.

This circumvention is also the case in Morocco and Algeria, where all means are used, including donations, to ensure that the inheritance goes to the immediate family and not to distant relatives (acebs) and without discrimination against daughters and wives.

26. JORT of 27 December 2016, n°105, p.3836.

II. THE URGENT NEED FOR REFORM

THE FEMINISATION OF POVERTY²⁷



All the studies demonstrate based on figures that legal inequalities constitute barriers to the economic empowerment of women and contribute to their impoverishment. This same observation is made by the International Labour Organisation (ILO)²⁸.

Despite some progress, unequal access to factors of production such as land and/or finance constrains efforts to fight poverty²⁹. Women in all three countries are more likely to drop out of school, to work in precarious jobs and to have limited access to housing... Their precariousness was further exacerbated by the pandemic crisis

The «Gender Gap», published each year by the World Economic Forum, shows in its report published in March 2021³⁰ that despite their growing access to education and work, the rate of participation of women in the national economy (Economic Participation and Opportunity)³¹ in the three countries does not exceed 27%, whereas in developed countries, it reaches about 50%. In Algeria, women participate at a rate of 16% compared to 75% for men. In Tunisia and Morocco, it is 27% against respective rates of 75% and 79% for men.

27. <https://books.openedition.org/ideid/5536?lang=fr#fn1>

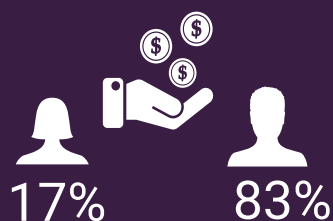
28. Women's Economic Empowerment in Selected MENA Countries: The Impact of Legal Frameworks in Algeria, Egypt, Jordan, Libya, Morocco and Tunisia, Competitiveness and Private Sector Development, Éditions OCDE, Paris, https://read.oecd-ilibrary.org/development/l-autonomisation-economique-des-femmes-dans-la-region-mena_9789264280434-fr#page111

29. https://www.afdb.org/sites/default/files/documents/publications/adr15_chapter_4-fr.pdf

30. OCDE/OIT/CAWTAR (2020), Changer les lois et éliminer les obstacles à l'autonomisation économique des femmes : Égypte, Jordanie, Maroc et Tunisie, Compétitivité et développement du secteur privé, Éditions OCDE, Paris, <https://doi.org/10.1787/af7f3846-fr>. Global Gender Gap report, 2021, <https://www.weforum.org/reports/ab6795a1-960c-42b2-b3d5-587eccda6023>

31. The expression "Economic Participation and Opportunity" contains «three concepts: the participation gap, the earnings gap and the advancement gap. The participation gap is captured using the difference between women and men in labour force participation rates. The pay gap is captured using a hard data indicator (ratio of women's estimated earnings to men's)¹ and a qualitative indicator collected through the World Economic Forum's Executive Opinion Survey (equal pay for similar work). Finally, the gap between the advancement of women and men is captured using two hard data statistics (the ratio of women to men among legislators, senior officials and managers, and the ratio of women to men among technical and professional workers)".

Furthermore, women living in rural areas, while deprived of land, are the ones who feed their families and the country through their work. The survey realised by ATFD on the working conditions of women living in rural areas reveals that: «In the rural world, women work massively in agriculture while bearing heavier domestic burdens. They accept this unrewarding agricultural work and the low profits and wages, despite the great effort it requires, while it is increasingly deserted by men. Women keep family farms alive, help to fix rural families in their environment and provide production that is essential to the country's food autonomy. The distribution of tasks and responsibilities in rural areas assigns women a total workload that is almost 40% higher than that of



Loans granted by the Banque de Financement des Petites et Moyennes Entreprises (BFPME)

men. But the inequality in inheritance means that “only 5.8% of women are farm operators, 14% are landowners and only 4% hold land titles, whereas they make up 76% of the agricultural labour force”³².

More generally, Tunisian women often end up homeless or poorly housed due to their limited access to property. A study by the Tunisian association Beity, published in 2018, entitled «Housing, mirror and vector of discrimination against women»³³, shows that precariousness, poor housing and vulnerability among women are the result of “a combination of systemic oppressions, dominations and discriminations of gender, sex, class and race. Poor housing is thus a vehicle for women's vulnerability and a product of the patriarchal system and the power of ‘agnates’”.

With regard to labour, Tunisia equally has an unemployment rate of 42% for female university graduates (INS 2015), which is about double

the unemployment rate for men (21.4%). In 2019, these rates recorded a slight decrease to 38.1% for female graduates and 16.4% for men. With the deteriorating economic and social situation and the COVID-19 pandemic resulting in the closure of factories in feminised sectors such as textiles, unemployment among women in 2020 will reach 25% as against 18% for men.

Access to credit and finance is difficult for women, as they usually do not have real estate to mortgage as collateral for loans. In Tunisia, housing loans granted to women in 2020 did not exceed 24%. The credits granted by the Banque de Financement des Petites et Moyennes Entreprises (BFPME) amount to 17% of the projects initiated by women entrepreneurs while they amount to 83% for men. The total amount of projects approved for women does not exceed 568 thousand dinars, whereas it can reach 800 thousand dinars for men, i.e. a gap of 40.8% in favour of men (INS, UN Women, 2015)³⁴. Finally, another indicator of the feminisation of poverty is the wage inequality between men and women.

“The study on gender diversity in Tunisian companies (IACE-GIZ 2016) estimated that women receive on average 86% of men's wages, placing Equal Pay Day on 22 February and meaning that in 2016, a woman had to continue working until 22 February 2017 to accumulate an equivalent salary received by a man on 31 December 2016. This finding of wage disparity between women and men was also raised by the Global Wage Report (2018), calculating a GINI index³⁵ of 37.3 measuring the gender inequality in hourly wage in Tunisia.”³⁶

The Covid-19 crisis dramatically increased women's poverty. As Hafidha Chekir writes, the health crisis (COVID 19) particularly affected women in precarious situations: domestic workers and those working in the agricultural

32. ATFD, Enquête sur les conditions de travail des femmes en milieu rural, 2014, <https://atfd-tunisie.org/publications/page/2/>

33. BEITY, Le logement : miroir et vecteurs de discrimination à l'égard des femmes, Etude d'anthropologie sociale des conditions de logement et d'habitat des femmes en situation de vulnérabilités économiques et sociales dans le Grand Tunis, Cérès-Editions, December 2020, <https://beity-tunisie.org/2021/01/le-logement-miroir-et-vecteur-de-discriminations-a-legard-des-femmes/>

34. Triki (S.), « Méthodologie nationale de la violence économique à l'égard des femmes », study conducted for the Observatoire des Violences, 2020, unpublished

35. Index for measuring income inequality

36. « Violences économiques basées sur le genre : un véritable frein à la relance économique », OGECE bulletin, by: Mohamed HAJAIEJ, Mekki Ben Jemaa, quoted by Triki Souad, above-mentioned study for the Observatoire des violences.

sector. Often without an employment contract or social security coverage, they were unable to reach their workplaces due to a lack of transport or permission to travel. Others, particularly female agricultural workers, either lost their jobs or worked without observing health protection measures.³⁷

In Morocco, women's access to property remains very limited. Women's access to housing increased from 15.3% to 18.7% in 2014 and only 16.3% of land titles (of a plot of land or a flat) are held by women against

80.9% for men. Finally, only 2.2% of the titles issued include the names of both partners (male and female) of the beneficiaries of the "Villes Sans Bidonvilles" (Towns without slums) programme.³⁸

While the unemployment rate for women in Morocco has been on a downward trend over the past three years, falling from 14.7% to 13.5% between 2017 and 2019, it has increased by 2.7 points in 2020 under the combined effect of the pandemic and the drought. In 2020, the unemployment rate for women increased in both rural and urban areas, from 2.7% to 3.9% and from 21.8% to 24.7% respectively.³⁹

**The sanitary crisis
(COVID 19)
particularly affected
domestic workers and
women working in the
agricultural sector**

An analysis of wage discrimination, based on data from household living standards surveys carried out by the Moroccan High Commission for Planning (HCP Morocco) over the last 25 years, shows that, on average, a man earned 56% more than a woman in 1991, 28% in 1999 and 17% in 2007⁴⁰. Though decreasing, these differences are much more significant in rural than in urban areas.

According to the High Commission for Planning, poverty among female-headed households stood at 17.4% in 2014. The monetary poverty rate of women heads of household fell from 7.4% in 2007 to 3.9% in 2014. The rate fell from 15.1% to 9.6% in rural areas and from 4% to 1.9% in urban areas. The economic vulnerability of women heads of household also fell significantly during the period 2007-2014, from 16.4% in 2007 to 10.6% in 2014, at the national level, from 23.2% to 17.4% in rural areas and from 13.4% to 8.2% in urban areas.

Compared to the pre-containment period, the average monthly income of employed Moroccan women in 2020 fell by 42% compared to 52% for men⁴¹. Indeed, 51% of employed women reported a drop in income, due to the disruption of business activities because of the pandemic, particularly in the industry and service sectors. Women's economic participation in the labour market has also been adversely affected. The unemployment rate for women increased in the first and second quarters of 2020 to 14.3% and 15.6% respectively, compared to the same quarters in 2019 (13.4% and 11.1% respectively).

Furthermore, according to the Moroccan NGOs' shadow report on the implementation of the Beijing Declaration and Platform⁴², "women have limited access to entrepreneurship due to administrative and financial constraints, but also due to cultural and social factors. Women find it difficult to obtain bank loans for the creation of their businesses, which requires them to mobilise large personal contributions. Almost 50% of women's businesses are entirely self-financed, and only one third of the financing comes from external resources"⁴³

In Algeria, Nadia Ait Zai, president of the association CIDEFF, points to the inequality in inheritance in the exclusion of women from their right to housing. She writes: "What interests those entering the inheritance is

37. Hafidha Chekir, «L'impact de la COVID-19 sur les droits des femmes», in *La Tunisie à l'épreuve de la COVID-19*, edited by Hamadi Redissi, p.117 and references cited. <http://library.fes.de/pdf-files/bueros/tunesien/16394.pdf>

38. Shadow report by Moroccan NGOs, op. cit..

39. High Commission for Planning, National Employment Survey

40. In his article on the "Impact of gender pay inequalities" published in the journal *economia*, M. Doudich observes that the significant downward trend in the wage gap should be interpreted with caution because of the decline in women's economic activity and the withdrawal of the lowest paid women from the labour market, which would lead to a reduction in the difference in pay between men and women.

41. HCP. Survey on the impact of the coronavirus on the economic, social and psychological situation of households, 2020

42. <https://ngocsw.org/wp-content/uploads/2019/11/Rapport-parallele%CC%80le-des-ONG-marocaines-sur-Beijing25-ADFM.pdf>

43. Ibid.

often the flat, the real estate prized by so many indirect heirs, putting the widow and daughters of the deceased in a precarious situation. Once the property is sold, the female heirs find themselves homeless.”⁴⁴

In Algeria, equal opportunities in access to social services are taken care of by the Algerian state, which devotes a large part of its budget on the one hand to social transfers and on the other hand to supporting the prices of basic food products, free access to the education system, free university education for all, free access to preventive health care, particularly for mothers and children, whose indicators have been greatly improved in terms of parity in education, increased life expectancy, and reduced maternal and infant mortality rates. Furthermore, the living conditions of women and girls have been improved by major development programmes, such as the intensification of electrification networks in rural and scattered areas, the extension of drinking water supply, the sanitation networks, and the development of the road and rail network, which

Women's access to micro credit in Algeria is very low 5%, to micro enterprise 11%.

has allowed greater mobility for women and girls. Women's living conditions have also been improved by programmes to eradicate precarious housing, allowing access to social housing, and to housing programmes at state prices, which reduced inequalities and poverty margins. The feminisation of certain sectors such as education, health, justice, etc. shows that the situation has changed for women and to a greater extent for girls. Although the programmes have brought convincing results in terms of development from which women benefit directly

or indirectly, there are still pockets of poverty or «grey areas» that affect women and girls. The challenge today is to ensure that the implemented policies and programmes are combined with mechanisms that focus on promoting the conditions of women heads of households, the family being nuclear, and women and girls being the most vulnerable. This requires the establishment of more refined gendered data to identify the most vulnerable women for better targeted intervention, supported by affirmative action, to promote better access to services for women and girls, better consideration of their needs, with a view to their empowerment and greater participation in development. Ultimately, we note that it is possible to make rights progress and that they did progress, except for inheritance rules which are not moving and their evolution is obviously not on the agenda. It is important to note that if such significant progress has made it possible to strengthen the empowerment of women and girls, it is also possible to continue the path towards the empowerment of women and therefore towards equality by at least starting to reflect on this important link in the access to property through a more egalitarian right to succession.

Cette évolution n'a toutefois pas mis fin à la féminisation de la pauvreté : La part de l'emploi féminin dans l'However, this development did not eliminate the feminisation of poverty: the share of female employment in total employment remains limited to 17.6% in 2016 compared with 14.6% in 2005. Female employment reached just over two million in 2019, according to the ONS, compared with 1.4 million in 2009. The proportion of women in total employment is growing slowly from 15% in 2009 to 18% in 2019. The ONS employment survey of households also measures undeclared employment: 42% of those who reported working were not affiliated to Social Security. Women's access to credit is low: According to a report by the Ministry of Employment, for the two schemes ANSEJ and CNAC⁴⁵, carried out in 2018, out of a total number of 9,009, only 1,528 projects involve women (i.e. 17%); For 2019 (as of 31 August 2019): out of a total number of 7,371 projects, 1,221 involve women, i.e. 16.6%. The cumulative results show that out of a total number of 530,822 projects, 54,895 projects concern women, i.e. 10.34%⁴⁶. The wage gap is significant, An increasing number of women in Algeria “form the cohort of precarious and underpaid contract workers”. An increasing number of women are graduating from university and are the first victims of the glaring mismatch between education and the labour market. According to the United Nations, women's salaries in Algeria are almost three times lower than those of men⁴⁷. Their work in the agricultural sector is generally not valued, as it is often unpaid and “considered as domestic work and not as ‘family helpers’”. It is also pointed out that “the unequal sharing of inheritance can be an

44. « Les discriminations : Obstacles à la réalisation effective d'une Égalité entre hommes et femmes », Nadia Ait-Zai, CIDDEF magazine number 44 November - December 2021.

45. ANSEJ and CNAC provide support for business creation, particularly by granting loans of up to 10 million DA. ANSEJ is aimed at young entrepreneurs..

46. Annuaire femmes en chiffres, publication CIDDEF, 2020.

47. See the Algerian report.

obstacle to women's access to land and to the status of farm operator⁴⁸." The "time use" survey also showed the importance of the domestic burden on women: women aged 25 to 59 spend on average about 6 hours on domestic tasks, compared to 40 minutes for men⁴⁹.

The health crisis has exacerbated the situation of vulnerable women: "During the global health crisis, women workers in the informal sector in areas that were shut down in Algeria received no income. The shutdown of public transport made it more difficult for women in the informal sector than for men to access income-generating activities, while women working in the formal sector with children under 5 years of age received their salaries during the two major lockdown periods. The shutdown of a number of private industrial, commercial and craft enterprises for more than two months led to the bankruptcy of many of them and forced most of the others to lay off some of their staff when activity resumed."⁵⁰ Measures were implemented by the government to allow the deferral of water, gas, electricity and telephone bills while keeping services functional. It has also been authorised to tacitly renew free medical treatment for patients with chronic illnesses on the CNAS files. It should be noted that the most disadvantaged families benefited from the immense mobilisation in an effort of solidarity between associations, civil society, citizens, donors and local authorities. These volunteers travelled the length and breadth of the country to provide food, medicine, health care, clothing and other needs. This momentum deserves to be reported as it has contributed significantly to the resilience to the pandemic. It should be noted, however, that vulnerabilities have nevertheless increased and that violence against women has been further exacerbated during this period.

A recent report, published by the ILO and CAWTAR⁵¹, indicated that: "Women's economic empowerment is not just a human rights issue, it is a powerful incentive for governments to get their economies back on track and achieve the 2030 Agenda for Sustainable Development. Even before the crisis⁵², estimates indicated that if women played an equal role in the global labour market, USD 28 trillion could be added to the world's annual gross domestic product (GDP) by 2025. The Middle East and North Africa (MENA) region could add as much as \$2.7 trillion to its GDP if it also followed this path." These are further arguments that civil society is using to fuel a public debate on the issue. The march towards gender equality in inheritance is becoming inevitable.

48. «La parité sur le marché du travail», Marie-France Grangaud, Fondation Pour l'Égalité - CIDDEF, CIDEFF magazine Number 43, December 2020,

49. «La participation des femmes et leur rôle dans la vie économique», Marie France GRANGAUD, Fondation Pour l'Égalité - CIDDEF, CIDEFF magazine, Number 43, December 2020

50. Ibid

51. OCDE/OIT/CAWTAR (2020), *Changing Laws and Breaking Barriers for Women's Economic Empowerment in Egypt, Jordan, Morocco and Tunisia*, *Changing Laws and Breaking Barriers for Women's Economic Empowerment in Egypt, Jordan, Morocco and Tunisia*. op.cit

52. This refers to the economic crisis.



III. TOWARDS EQUALITY IN INHERITANCE

The opening of a public debate in the three countries, thanks to the mobilisation of the women's movement, has led to proposals from civil society and national organisations in Morocco and Algeria and to a draft law in Tunisia. And any progress in one country allows the others to re-launch the debate⁵³ and exert pressure for equality in inheritance.

1. THE LAUNCH OF A PUBLIC DEBATE

In Tunisia, since the end of the 1990s, the Tunisian Association of Democratic Women (ATFD) has been calling for the recognition of the place of women in Tunisian society, their economic and social contributions and, since the 2014 constitution, for the reform of the PSC through the adoption of laws in harmony with the country's new constitution. Several studies have been published, in 2006 by the Tunisian Women's Association for Research on Development (AFTURD)⁵⁴ followed by an advocacy report prepared in collaboration with ATFD.⁵⁵ In 2013, the Maghreb-Equality group published a document on equality in inheritance⁵⁶ and in 2018, ATFD continued the fight with a document entitled "now is the time" for equality in inheritance, after organising a demonstration in which both left and centre political parties participated. Several feminists from other Arab countries, including the Egyptian Nawel Saadaoui, participated remotely in an audiovisual message of solidarity broadcast on social networks.

In Morocco, the Association Démocratique des Femmes du Maroc (ADFM), which had been working on inheritance law for several years, published a book in 2015 entitled "Pour un débat social autour du régime successoral" (For a social debate on the inheritance scheme)⁵⁷. And a memorandum was published in 2017 by the same association. Economic and social arguments, as well as legal ones, were mobilised in favour of equal inheritance.

53. On the 'interplay of views between neighbours' and 'regional interdependence', see Bras (J-P) «La réforme du code de la famille au Maroc et en Algérie: quelles avancées pour la démocratie? Critique internationale 2007/4 (n° 37), pages 93 to 125, <https://www.cairn.info/revue-critique-internationale-2007-4-page-93.htm>

54. AFTURD, Egalité dans l'héritage, pour une citoyenneté pleine et entière, Volume I, Histoire, droits et sociétés; Volume II : Plaidoyer pour l'égalité dans l'héritage, Tunis, 2016, with the support of Friedrich Ebert Foundation.

55. AFTURD, ATFD, 15 arguments de plaidoyer pour l'égalité successorale entre les sexes, Tunis, 2016 with the support of Friedrich Ebert Foundation

56. Collectif 95 Maghreb Egalité, Egalité dans l'héritage et autonomie économique des femmes, <https://www.onu-tn.org/uploads/documents/14323068260.pdf>

57. ADFM, Pour un débat social autour du régime successoral, les marocaines entre lois et évolutions socio-économiques. Ed. Le Fennec, 2015

The most significant recent initiatives include the publication of two collective works on the issue respectively edited by Siham Bencheekroun⁵⁸ and Hakima Lebbar⁵⁹, as well as the broadcasting of several debates in the print and audiovisual media on the issue between opponents and supporters of the reform. Also in Morocco, in November 2019, the Damir movement, a democratic civil society coalition, published a memorandum entitled «The Morocco we want», as a contribution to the national debate on the New Development Model (NMD). According to this memorandum, “the rules of inheritance built on Muslim law are largely responsible for the economic imbalance between men and women [...]. We consider that the Moroccan legislative framework applicable to inheritance rules must be progressively aligned with the principles set out in the 2011 Constitution, in particular Article 19, and with the Kingdom of Morocco’s international commitments.”⁶⁰

In Algeria, the movement “Collectif 20 ans BARAKAT”⁶¹ was initiated in 2004 and is campaigning against discrimination in the Family Code, particularly through its magazine “Plurielles”. It organises caravans that criss-cross the country and provide an opportunity for debate on the Family Code and the discrimination it contains. As early as 2004, with the amendments to the Family Code, associations such as CIDDEF opened a wide-ranging debate on inheritance, which led in 2010 to the publication of “Plaidoyer pour une égalité de statut successoral entre homme et femme” (Advocacy for equality between men and women in inheritance status). This document contains an account of inequalities in the Family Code, showing its opposition to constitutional equality, but also invites a less patriarchal and literal interpretation of the Sharia. The advocacy is supported by a survey that shows that about half of adults and two thirds of teenagers are in favour of equality: “This relatively high proportion is driven more by women/girls than by men. It is a perfect illustration of how safeguarding interests, on the one hand, and seeking material security through access to property (for women), on the other, can push religious considerations into the background.”⁶²

Algerian feminists are supported by the RCD party (Rassemblement pour la Culture et la Démocratie), whose president, Mohsine Belabbas, declared in 2018: “It is necessary that the fight of the founders of a citizen’s demand for true equality of rights be pursued by women as well as by all democracy activists.” He also invites to a “debate with experts and activists from North African parties on this issue of equality between men and women.”⁶³

Women in Algeria, who were highly involved at the time of the Hirak, have continued to demand equality in family law and inheritance since the feminist square was created in March 2019 by the initiative «Algerian Women for Change and Equality» (FACE), linking it to the anti-regime struggle.⁶⁴

These civil society initiatives were reinforced by the contribution of Muslim reformists.

58. BENCHEKROUN (S.) (ed.), *L’héritage des femmes, Réflexion pluridisciplinaire sur l’héritage au Maroc*, 2016, quoted by Rabéa Naciri, Moroccan report, forthcoming.

59. Lebbar (H.) (ed.), *Les hommes défendent l’égalité en héritage*, 2017, quoted by Rabéa Naciri, Moroccan report.

60. Quoted in the Moroccan report, forthcoming.

61. Collectif 20 ans Barakat is made up of five women’s associations - Tharwa n’Fathma n’Soumeur, Association Indépendante pour le Triomphe des Droits des Femmes (AITDF), Association Défense et Promotion des Droits des Femmes (ADPDF), Association Volonté Initiative et Engagement (AVIE) and SOS femmes en détresse, quoted in the Algerian report

62. Advocacy, op. cit.

63. Quoted in the Algerian report, ShemsFm, ‘An Algerian political party favours equality in inheritance between the two sexes’. Available at the following link : https://www.shemsfm.net/amp/fr/actualites_world-news/204967/un-parti-politique-algerien-favorable-a-l-egalite-dans-l-heritage-entre-les-deux-sexes

64. Lydia Haddag, « Hirak et féminisme: une équation à deux inconnus », Arab reform initiative, bawader, 22/6/2021 https://www.arab-reform.net/wp-content/uploads/pdf/Arab_Reform_Initiative_fr_hirak-et-feminisme-une-equation-a-deux-inconnus_19112.pdf?ver=e27abb3dd0bf5e72118e681a7ceb91d1

2. CONTRIBUTION OF MUSLIM REFORMISTS

In the various codes adopted, reforms have been introduced to reduce inequalities in inheritance law.⁶⁵ These reforms were made in those countries with a Sunni Malekite tradition, by appealing to rules of the Zahirite school and Ibn Hazm, as is the case of the compulsory bequest, or to rules of the Hanafi and Hanbali rites (the radd). These reforms are of course insufficient, as they do not in any way put an end to the unequal shares between men and women. They have made it possible to limit, to varying degrees depending on the country, the male privilege of the acesbs, in particular in order to preserve inheritance in the small, conjugal-type family⁶⁶.

Muslim reformists went further, proposing the reopening of the door of the Ijtihad closed in the 12th century, a rereading of the Qur'an and an interpretation in line with the changes of society. All of them challenged the argument of the intangibility of the Qur'anic rules of succession and that of the unambiguous text, not open to interpretation.

**Equality in inheritance:
«from the moment when the
reasons for male superiority
have disappeared and the
required means are achieved»**

Taher Haded

In Morocco, the kad wa si'aya, which can be literally translated as 'labour and quest' or 'effort and perseverance', is a fatwa of the jurisconsult Ibn 'Ardoun, dating back to the Hejira 10th century, which recognised women's work on the basis of a right of acquisition. Applied in several rural Amazigh regions of Morocco, this fatwa recognised the woman's right to a share of her husband's property after divorce or death, in addition to her share of the inheritance, in return for her contribution to the constitution and growth of the family property through her work outside the home. However, this rule, which attempted to

establish a certain equity for women, disappeared with the codification of family law

This fatwa, which some consider to have inspired Article 49 of the Family Code of 2004, states that "Both spouses have their own property. However, the spouses may agree on the conditions of beneficial use and distribution of the property they have acquired during their marriage. This agreement is the subject of a document separate from the marriage certificate. The Adults shall notify both parties, at the time of the conclusion of the marriage, of the above provisions. In the absence of the aforementioned agreement, the general rules of evidence shall be used, taking into consideration the work of each of the spouses, the efforts they have made and the burdens they have assumed in order to develop the family's property."

Ahmed Khamlichi, a member of the advisory commission in charge of drafting the new Family Code of ²⁰⁰⁴, testifies to the difficulties encountered in integrating the rule of Kad wa si'aya in this draft. Indeed, following the refusal of the majority of the members of this commission, it was agreed to formulate the last paragraph of article 49 of the FC as follows: "In the absence of the aforementioned agreement, the general rules of evidence shall be used, taking into consideration the work of each of the spouses, the efforts and services they have provided to the family and to the development of its property". This new proposal was rejected by four members of the committee. Thus, the final version of Article 49 deleted the reference to services provided to the family and retained only the reference to family property.⁶⁷

Ahmed Khamlichi, currently head of Dar al-hadith al-hassania⁶⁸ an institution of higher education in religious science and scientific training and research in the field of specialised and in-depth higher Islamic studies, supports the opening of a debate on a law that he considers unjust. However, "an unjust law cannot be legitimate".⁶⁹ He adds: "All subjects can be debated and there is no difference between political and non-political issues.⁷⁰ [...] What we have to think about when there is a difference of opinion on any subject is not what each person thinks, but how to resolve the differences. [...] Some say that the verse on inheritance is unequivocal, while others reject this qualification. Should we stop here? This is also a difference of opinion and it is not limited to the issue of inheritance." Regarding the verse that gives men double the share of women, Ahmed

65. See below.

66. See dev. below

67. A. Khamlichi, in: H. Lebbar (ed.), in Arabic, 2017, p.12

68. Created in 1964, Dar al-hadith al-hassania is an institution of higher education in religious sciences and scientific training and research in the field of specialised and in-depth higher Islamic studies (in the Moroccan report).

69. Interview with Khamlichi, in: BENCHEKROUN (ed.), L'héritage des femmes, 2016, p.32 (quoted in the Moroccan report)

70 V. S. BENCHEKROUN (ed.), 2016, p. 29 et seq. (quoted in the Moroccan report)

Khamlichi explains that it was prescribed at a time when women were financially dependent on men, which is no longer the case today.⁷¹

As early as 1936, the Tunisian author Tahar Haddad advocated equality in inheritance “from the moment when the reasons for male superiority have disappeared and the required means have been achieved.”⁷² He added: “It is true that Islam ordered in some verses the discrimination between men and women, in specific cases. Nevertheless, this cannot prevent it from accepting the principle of social equality between the two when the conditions are met, according to the evolution of time, since it tends by its essence towards equality and supreme justice and since it is a religion that proceeds according to the principle of gradation in the legislation of its laws, whenever possible. There is nothing indicating or implying that the steps taken in legislation during the lifetime of the Prophet ‘peace be upon him’ mark the end of any desired evolution, as long as the process of gradation is related to the complexity of the issues dealt with which can be solved later or to a difficulty which requires an evolution of morals and provisions in line with the evolution of time. There are several examples in Islam that are similar and obvious.”⁷³ Thus, according to Tahar Haddad, the Qur’an must be reinterpreted in the light of the circumstances of its revelation.⁷⁴ He believes that reform can be achieved by distinguishing between the unchanging principles that concern man’s relationship with God (‘Ibadat) and those that govern the relationship between men and women (Mu’amalat). In the latter, the rules of inheritance, can be modified according to the changes in society.

Contemporary Muslim reformists follow this path, that of the possibility of bringing the mu’amalat in line with economic and social developments. Most of them, if not all, consider that the Qur’anic verses relating to inheritance are not numerous and the inheritance rules that the three countries have inherited are in fact rules laid down by Islamic exegetes. It is therefore a human interpretation and not a sacred one. The number of works by exegetes on this issue is colossal, which shows that the argument that the Qur’anic text is clear does not hold water. Otherwise, why are there so many books and works of exegetes on this issue?

In a study on “Women’s inheritance, the text and interpretations», Zahia Jouirou⁷⁵, points out that it is the interpretations made to the Qur’anic text that have led to the establishment of a system of wealth distribution that reflects the dominant system of role distribution between men and women as much as it reflects a cultural and mental system based on the absolute conviction of the superiority of men over women. And this is what has justified over the centuries their deprivation even of their inheritance shares as decided by the Qur’anic text.

One of the ways advocated by some Muslim reformists is to institute equality in inheritance through a re-reading of all the Qur’anic verses which should lead to a reconciliation between Islam and equality. Several verses could be reinterpreted in this way, in the light of the new social and economic reality. The classical, literal and patriarchal interpretation of the Qur’an, which was derived from the different rites and was fixed by the closure of the ijtihad in the 12th century, was itself strongly inspired by local customs and was only a reflection of the society of that time.

For several Muslim reformists, including Mohamed Charfi, Neyla Sellini⁷⁶ in Tunisia and Khamlichi in Morocco, there is a way to reform, through the will, based on verse 180 of Sura al Baqarah, which states: “It is prescribed that when death approaches any of you—if they leave something of value—a will should be made in favour of parents and immediate family with fairness. This is an obligation on those who are mindful of Allah.”⁷⁷ According to Khamlichi, this is already a reality, as public bodies such as the National Social Security Fund or pension funds give widows half of their husband’s pension, as well as their children with special needs.

71. See the Moroccan report.

72. Tahar HADDAD, *Notre femme dans la charia et la société*, Translated from Arabic by Manoubia MESKI, Tunis, Nirvana, 2018, p. 44, quoted in the Tunisian report.

73. Ibid, p. 45.

74. CHARFI (M.), *Introduction à l’étude du droit*, Tunis, Cérès, 2011, p. 66, quoted by Lémia Néji, Tunisian report.

75. In *L’égalité entre hommes et femmes en droit successoral*, supra, part in Arabic. French translation in the Tunisian report.

76. دار الجنوب 2019 بإشراف نائلة السليني : ميراث النساء و وهم قطعية الدلالة « تلك قسمة ضيزى ».

In *Les hommes défendent l’égalité en héritage*. S/D. Lebbar (H.), Ed. Fan-Dok 2017, p. 11-21 (quote 77. أحمد الخمليشي ملاحظات عن الجدل حول الإرث بين الرجل والنساء.

(in the Moroccan report

The provisions on the will are said to be historically unfair because the Qur'an is said to be explicit about its primacy, cited in ten verses while inheritance is cited in only three verses: "priority being given to bequests in four passages of the verses on inheritance and the verse on bequests "[...] insists on the prescription which is corollary to the obligation among the fundamentalists. [...]. Moreover, in these verses, there is no distinction

Inequality in inheritance is contrary to the constitution and ratified international conventions

between men and women (Qur'an: 4:7)" [...] one of the obvious paradoxes in the ijthad tradition of jurisconsults regarding inheritance is the neglect of the notion of bequest and the importance assigned to it by the Qur'an, in comparison to that assigned to inheritance and its legal status."⁷⁸ Thus, the bequest in a will is an obligation, whereas the shares in the distribution of an inheritance are a recommendation.

Ahmed El-Khamlichi, essentially proposes that the will should be based on verse 180 of Sura al Baqarah, as the first Qur'anic reference on this subject, which says: "It is prescribed that when death approaches any of you—if they leave something of value—a will should be made in favour of parents and immediate family with fairness. This is an obligation on those who are mindful of Allah."⁷⁹ This means lifting the double restriction on the authorised third and on the legal heirs. According to Khamlichi, this is already a reality, since public bodies such as the National Social Security Fund and pension funds allow widows to receive half of their husband's pension, as well as their children with special needs.⁸⁰

The compulsory will is also presented as a possible solution by the Moroccan historian and intellectual Abdallah Laroui who believes that inheritance in Morocco is a socio-economic problem that could be approached «from the point of view of utility and interest» and not from a religious point of view. For him, the issue of gender equality in inheritance could be solved by requiring all Moroccans to draw up their own wills in the form of "a declaration by citizens, as part of their assets subject to taxation".⁸¹ However, in its 2018 memorandum, the ADFM advocates the repeal of the prohibition on testing in favour of heirs with regard to only one third of the estate. This proposal is justified by the fear that in a patriarchal society, as in Morocco, the testamentary bequest concerning the totality of the patrimony, is used as a means to totally exclude women from the inheritance.

Mohamed Charfi⁸² recalls that the recognition of women as heirs is an achievement in Islam, and adds that the verses that recommend "using the faculty of testing is proof that all these verses have only an indicative value." Inheritance law is therefore not a reiteration of the Qur'anic verses, but a human interpretation.

78. For more details, see the Moroccan and Tunisian reports

79. أحمد الخمليشي ملاحظات عن الجدل حول الأثر بين الرجل والنساء
In Les hommes défendent l'égalité en héritage. S/D. Hakima Lebbar, Ed. Fan-Dok2017, p.p 11-21

80. سورة البقرة الآية 180: "كتب عليكم إذا حضر أحدكم الموت إن ترك خيرا الوصية للوالدين والأقربين بالمعروف حقا على المتقين

81. Speech delivered on 19 January 2018 at the Faculty of Letters and Humanities of Mohammed V University in Rabat, quoted by the magazine Telquel.. <https://telquel.ma/2018/01/19>

82. Mohamed Charfi, Islam et Liberté, le malentendu historique, Albin Michel, 1998.

3. CONTRIBUTION OF REPORTS BY NATIONAL COMMISSIONS AND COUNCILS

In Morocco, the National Council for Human Rights (CNDH, a constitutional institution established according to the Paris Principles)⁸³ published a report in October 2015 in which it called for the amendment of the Family Code in order “to grant women the same rights in the formation of marriage, in its dissolution and in the relationship with children and in matters of inheritance, in accordance with Article 19 of the Constitution and Article 16 of CEDAW”.

According to the report, “Inheritance laws, particularly the provision for the inclusion of collateral persons in the estate in the absence of male descendants, deprive poor women, especially widows, of the few assets for which they have incurred sacrifices and hardships”.⁸⁴

The conservatives, and in particular the Justice and Development Party (PJD), which led the government coalition from November 2011 to October 2021, violently opposed it, describing the CNDH’s recommendation as “irresponsible”, contrary to the Constitution and as an attack on the nation’s enduring foundations aimed at achieving an external agenda. They added that «the group leading the CNDH failed to take into account the fact that the family code is one of the country’s fundamental laws, the result of a broad societal debate, and under the supervision of the king, who had previously stated that he cannot “make licit what is illicit, and illicit what is licit”.⁸⁵

Nevertheless, the report earned the support of parties such as the Authenticity and Modernity Party (PAM), which adopted a resolution calling for the promotion of women’s rights, particularly in relation to inheritance. Expressing support for the CNDH, this resolution criticised those who «obscure diversity and disseminate a radical discourse [...] aspire to impose restrictions on free thought and innovation [...] and attempt to impose forms of guardianship on society». ⁸⁶ Other important political parties have called for a debate, as was the case for the Socialist Union of Popular Forces (USFP) and the Party of Progress and Socialism (PPS), which called for full equality between men and women, including in matters of succession⁸⁷.

In Tunisia, a Commission for Individual Liberties and Equality (COLIBE) was established by a presidential decree dated 13 August 2017.⁸⁸ The committee was tasked with drafting a report on legislative reforms to guarantee individual freedoms and equality in Tunisia, in accordance with the 2014 Constitution and international conventions ratified by the Tunisian state. It was chaired by the MP, lawyer and feminist activist Bochra Bel Haj Hamida and was composed of eight members.⁸⁹ COLIBE delivered its report in June 2018. COLIBE’s proposals to amend the main discriminatory rules of the Personal Status Code, such as the abolition of the dowry, the husband’s status as head of the family, the institution of shared parental authority between father and mother, the wife’s contribution to household expenses, the abolition of inequality between legitimate and natural children with regard to inheritance, and the abolition of the waiting period, were not retained. The report was castigated by the conservatives. «The President of COLIBE, as well as most of its members, were personally attacked in the weeks following the publication of the report. On 11 August 2018, a protest demonstration against the COLIBE report was organised in front of the Bardo Palace. The COLIBE report is supported by several human rights activists, by several Tunisian intellectuals and by some of the citizens. On 13 August 2018, on the occasion of Women’s Day, a demonstration in support of COLIBE’s proposals took place

83. CNDH, *Etat de l’égalité et de la parité au Maroc*, Rabéa Naciri, 2015, http://www.cndh.ma/sites/default/files/cndh_-_etat_egalite_final22.pdf

84. http://www.cndh.ma/sites/default/files/cndh_-_etat_egalite_final22.pdf

85. Interview with a PJD leader on Al Jazeera Net quoted by Rabéa Naciri, Moroccan report.

<https://www.aljazeera.net/news/reportsandinterviews/2015/10/27>

86. Quoted in Rabéa Naciri, forthcoming Moroccan report.

87. Quoted in the forthcoming Moroccan report.

88. Presidential Decree No. 2017-111 of 13 August 2017, JORT, No. 65 of 15 August 2017, p. 2613.

89. Ms Dora BOUCHOUCHA, Mr Karim BOUZOUITA, Mr Abdelmajid CHARFI, Ms Iqbal GHARBI, Mr Malek GHAZOUANI, Ms Salwa HAMROUNI, Mr Slaheddine JOURCHI, and Mr Slim LAGHMANI.

in Tunis. COLIBE members appeared several times during the summer of ²⁰¹⁸ to explain the content of the proposals presented, to respond to criticism and unjustified attacks, to remove ambiguities and to defend the project".⁹⁰

Indeed, COLIBE has taken care to justify and substantiate its proposals with sociological data on the changing family model and the role and place of women in society. Its proposals also took care, on controversial points such as the abolition of the dowry, the waiting period, the family name and equality in inheritance, to provide for median solutions. But, for the moment, only a draft law on equality in inheritance has seen the light of day in Tunisia which is already a major step.

The Higher Committee for Human Rights and Fundamental Freedoms in Tunisia,⁹¹ for its part, supported the recommendation to adopt equality in inheritance in its national report on the situation of human rights in Tunisia (2016-2019), published in 2020⁹².

90. FIDH, Analytical reading for the adoption of the Code of Individual Rights and Freedoms (CODLI), experts : Souhayma Ben Achour and Mohamed Amine Jelassi, https://www.fidh.org/IMG/pdf/etude_juridique_web.pdf

91. <http://www.csdhlf.tn/presentation-2/?lang=fr>

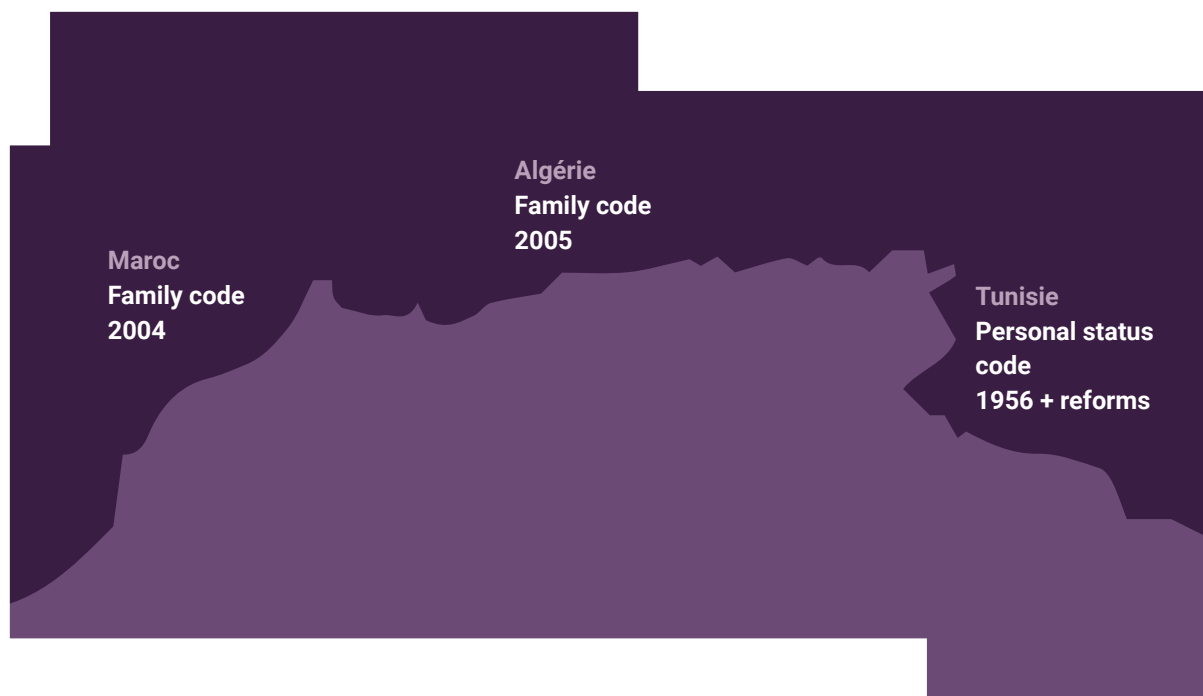
92. Disponible seulement en arabe sur le site du CSDHLF ; <http://www.csdhlf.tn/wp-content/uploads/2020/12/%D8%A7%D9%84%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D8%A7%D9%84%D9%88%D8%B7%D9%86%D9%8A-%D9%84%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D8%A7-%D9%86%D8%B3%D8%A7%D9%86-2016-2019.pdf>.

Chapter 2

The opportunity for reform

Changes in legislation keep pace with social change, except for succession rules. Inheritance rules are discriminatory and run counter to constitutional equality and regional and international human rights conventions.

I. INEQUALITIES BETWEEN MEN AND WOMEN IN INHERITANCE LAW



Tunisia promulgated the Personal Status Code in 1956, Morocco adopted the Mudawana in stages in 1957 and 1958 and Algeria adopted a Family Code in 1984.

The Tunisian legislators were innovative from the outset, prohibiting polygamy, ruling out repudiation and introducing a judicial divorce that was equally open to both spouses. The Algerian and Moroccan legislators remain more traditional, the Mudawana, a true codification of Muslim law in its Malekite interpretation, was partially modified in 1993 on minor points. It was not until 2004 that a Family Code and an overhaul of family law were introduced. In Algeria, the Family Code promulgated in 1984 remained unchanged until 2005.

Henceforth, family law is undergoing the same developments in the three Maghreb countries though at different rates. The reforms introduced, without breaking with the patriarchal structure of the family, make more or less significant inroads, depending on the country.

At the time of the promulgation of the codes, the legislators of the three countries perpetuated the Muslim system of succession and reproduced the traditional rules of inheritance law in its Malekite version.

The rules of devolution are imperative and have a public order character, the will of the testator cannot derogate from them or modify the regime. The testator's freedom to test is limited in the proportions of one third of the inheritance assets, but he/she cannot dispose of them in order to benefit one heir to the detriment of the others. Everything that has not been disposed of in favour of strangers is necessarily distributed according to pre-established rules between family members. These rules are unequal, they favour men, they consecrate the predominance of the agnatic lineage and perpetuate tribal and patriarchal structures.

In Tunisia, the rules of inheritance were reformed only once in 1959; in Morocco, the Dahir of 29 October 1962 introduced the radd, which was subsequently incorporated into the Family Code of 2004, which introduced a few changes. No reforms were made to the inheritance provisions when the Family Code was revised in 2005 in Algeria.

The Muslim law of succession adopted by the legal orders of the three countries is extremely unequal, in contradiction with constitutional equality and the treaties ratified by the three countries, in particular the CEDAW.

Inheritance law is constructed and based on a double inequality. The circle of successors is wider for men than for women, and moreover, for equal kinship and with rare exceptions, women only receive half the share of a man. Breaches have been made to this patriarchal system by the radd in Tunisia, Morocco and Algeria and by compulsory inheritance in all three countries. For the sake of clarity, the most frequent cases will be summarised. Finally, a report on de facto discrimination will be presented.

1. Inequalities in law

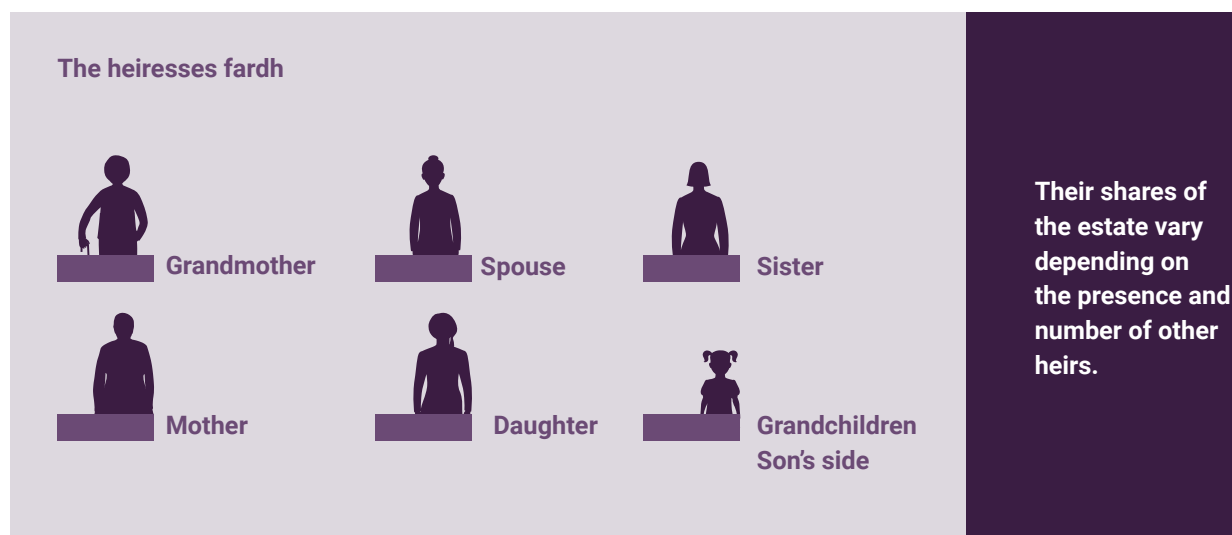
Inequalities are based on the distinction between fardh and aceb (1) and the privilege given to acebs (2).

Fardh and aceb.

The determination of heirs is done in the three codes by taking up the classic distinction between fardh heirs and aceb heirs to which the Algerian Code adds the “Dhawu al-arham”, the heirs by uterine relationship⁹³.

Fardh or reserved heirs are those who have a certain share in the estate and are served first, and there is a limited number of them. These are women but also some men⁹⁴.

The women who are eligible to be heirs are strictly determined by law. They are the mother, the grandmother, the daughter and the granddaughter on the son's side, the sisters and the wife.⁹⁵ In the absence of a will in her favour, no other woman can be an heir. Their shares of the estate vary according to the existence and number of other heirs.



93. Art 139-3 CFA. According to Article 168 CFA, first category cognates are the children of the deceased's daughter and the children of the son's daughters to whatever degree they may be. The cognates are involved in the succession in the absence of aceb heirs and reserved heirs but before the surviving spouse, whether husband or wife (Art. 167 CFA).

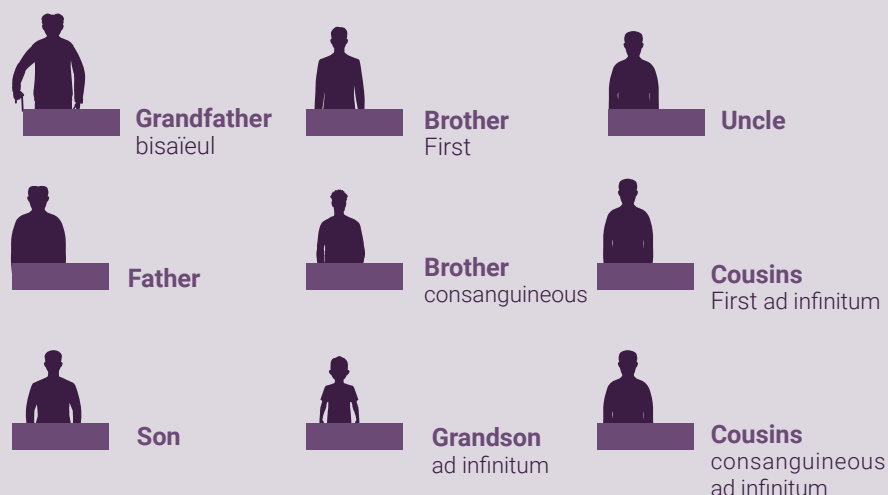
94. These are the father, the paternal grandfather, the uterine brother and the husband. Art 91CSP, art. 337 and 339 CFM, art141 CFA which adds the first-born brother according to the Omani thesis.

95. Art. 142 Algerian CF, art 337 Moroccan CF, art. 90 CSP,

There are three kinds of acebs, acebs in their own right, acebs as a result of the existence of other heirs and acebs with others.

**the acebs by themselves
are the male relatives of the
deceased by the males.**

- Ascendants
- Descendants
- Firts and consanguineous
Brothers
- Firts and consanguineous
Paternal uncle
- Firts and consanguineous
Cousins



Acebs in their own right are agnates, i.e. males related to the deceased by males. Any woman who interposes between males causes them to lose their agnate status. The acebs in their own right are recognised as having the right to inherit the rest of the estate after the reserved heirs have been served. Thus all ascendants on the paternal side, father, grandfather or great-grandfather are aceb heirs in their own right. The descendants are subject to the same principle; sons, grandsons and great-grandsons are heirs in their own right. Similarly, all male collaterals related by males are acebs in their own right, such as first-degree brothers (born of the same father and mother of the deceased) and consanguineous brothers (born of the same father but not of the same mother) as well as their sons and sons of sons ad infinitum. There are also more distant collaterals, the paternal uncles by whole or half-blood of the deceased and their male descendants ad infinitum.

Tunisian and Moroccan legislations add to this list the Treasury in accordance with the Maliki rite.

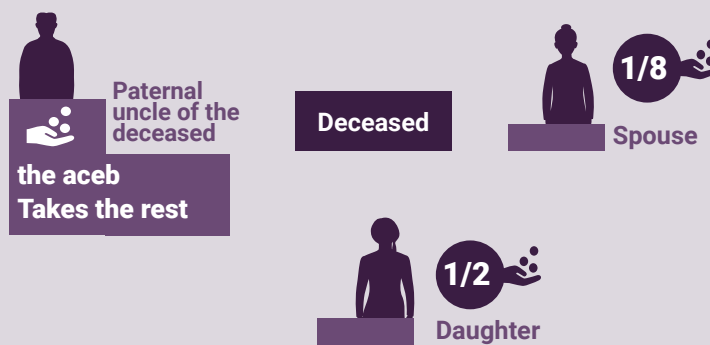
Acebs in their own right are divided into classes in order of priority, the descendants, the father, the ascendants and the brothers, the descendants of the brothers, the first uncles and their descendants, and finally, for Moroccan and Tunisian law, the Treasury. The heir whose class is the closest dismisses the others (hajb), thus the descendants dismiss the father, the brothers dismiss the more distant collaterals, uncles and cousins.

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As a result of this classification of fardh and aceb, distant acebs may compete with women closer to the deceased. According to the traditional rules, the only son, aceb in his own right, inherits the entire estate, but in the absence of male descendants, the daughters and daughters of the son receive only one share of the estate as fardh heirs. The sole female descendant is entitled to half, and if there are several female descendants, they are entitled to two-thirds, with the rest of the estate going to the acebs, father, brothers, uncles and paternal cousins. This solution was corrected in Tunisia by the Radd, but it remains in force in Morocco and Algeria.

Practical example 1

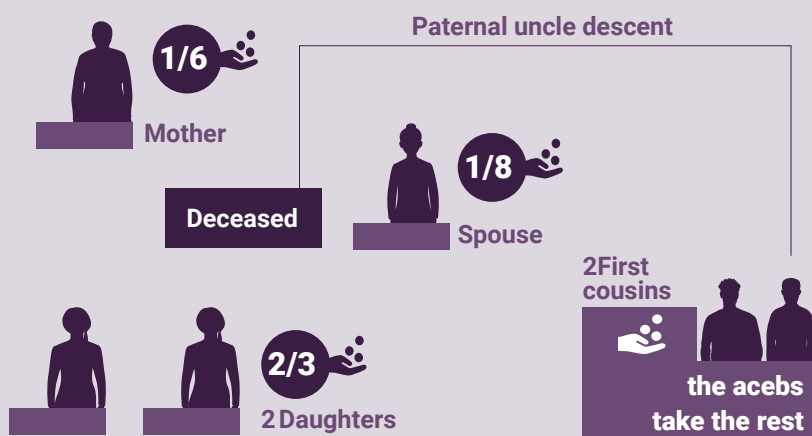


A man dies and leaves a wife, a daughter and a paternal uncle

The uncle is aceb

This classification also means that in the absence of descendants, ascendants and brothers and sisters, more distant collaterals, the uncle, nephew and cousins can inherit, whereas the aunt, niece and female cousin are excluded from the succession. In any case, they cannot inherit since the law only attributes the status of successor to the mother, grandmother, daughter, granddaughter, sister and wife. Men and women do not have the same rights within the same degree of kinship.

Practical example 2



A man dies and leaves a mother, a wife, two daughters and paternal first cousins

the cousins are the acebs

This classification also means that in the absence of descendants, ascendants and brothers and sisters, more distant collaterals, the uncle, nephew and cousins can inherit, whereas the aunt, niece and female cousin are excluded from the succession. In any case, they cannot inherit since the law only attributes the status of successor to the mother, grandmother, daughter, granddaughter, sister and wife. Men and women do not have the same rights within the same degree of kinship

Similarly, if the deceased leaves no descendants or ascendants, his only brother will inherit the entire estate, while the only sister will inherit half, and if there are several sisters, they will inherit two thirds. The remainder will go to the more distant relatives, uncles, cousins, nephews. The more distant relative competes with the closer relative only because one is a man and the other a woman

The other two categories of *aceb* are women. The agnate with others is any woman who will become a universal heir jointly with another⁹⁶, the agnate as a result of the presence of other heirs is any woman who becomes an agnate by competition with a man⁹⁷, it is with this last category that the privilege of masculinity is asserted.

Privilege of masculinity

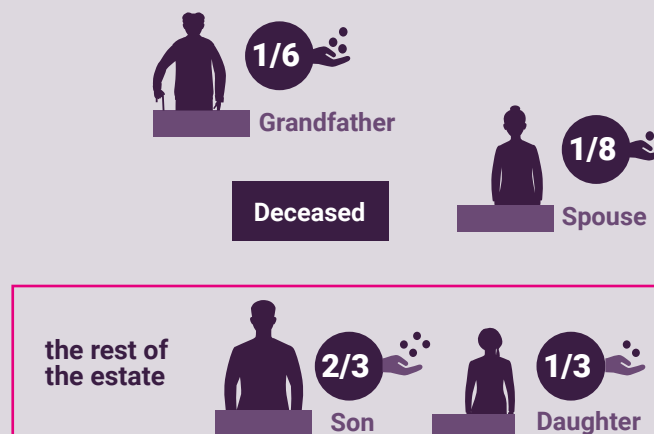
Some women, *fardh* by definition, can be agnatised by competition with a male heir. These women who benefit from agnatisation are strictly determined by the law; they are the daughter, the granddaughter on the son's side, the first-born sister and the consanguineous sister. The daughter is agnatised by her brother, the granddaughter on the son's side is agnatised by her brother as well as by her first cousin of the same degree. The first cousin and the consanguineous sister are agnatised by their brother and their grandfather⁹⁸.

But being agnatised does not mean that a woman has the same rights as a man. A rule is then imposed, that of the attribution to the male heir of a double share of that due to the woman. The Algerian and Moroccan codes merely state the solution⁹⁹, while the Tunisian Personal Status Code describes it as a «principle» and states on several occasions that «their participation shall be carried out in accordance with the principle according to which the male heir shall have a share double that allocated to a female heir¹⁰⁰».

A man dies and leaves a father, a wife, a son and a daughter

The daughter is agnatised by her brother. With him she will inherit the rest after their mother and grandfather have been served. But the daughter will inherit half of her brother's share.

Practical example 3



96. Art. 121 CSP.

97. Art 119 CSP.

98. Art 119 CSP.

99. Art 155 in fine CFA: "In all cases, the division is carried out in such a way that the heir receives double the share of the heiress". Art. 351 in fine CFM.

100. ART 103, 104-5, 105-3, -106-4, 108-3 CSP.

2. Breaches to the system

Radd (1) and compulsory bequests (2) are mechanisms unknown to the Maliki rite, adopted by the three legislators by drawing on other rites. They were both introduced in 1959 in Tunisia. In Morocco, the Mudawana had provided for the compulsory bequest but not the radd, and it was provided for in a separate text, the Dahir of 29 October 1962, then integrated into the Family Code. In Algeria, the Family Code, promulgated later, provides for both.

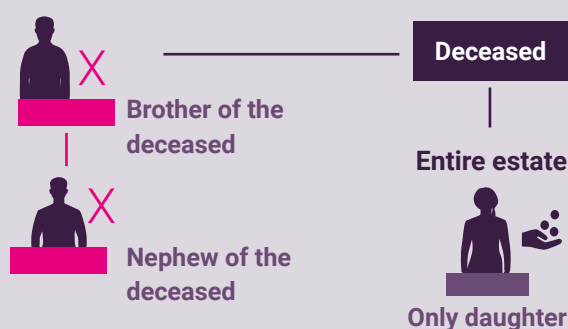
Radd

is the technique according to which, in the absence of an aceb heir (father, brother, paternal uncle, nephews and paternal cousins) and whenever the estate is not entirely absorbed by the fardh heirs, the remainder is returned to the latter and distributed among them in proportion to their share¹⁰¹. In Tunisia and Morocco, this technique makes it possible to exclude the Treasury, which is classified among acebs according to the Maliki rite.¹⁰² In all three countries, this technique allows the fardh heirs to be allocated the entire estate.

In Tunisia and Morocco, the surviving spouses will benefit from the radd with the other fardh heirs, they will share the remainder with the other fardh heirs and if they are alone, they will be allocated the entire estate. Algeria adopts a different solution, the remainder is shared between the reserved heirs in proportion to their inheritance shares, excluding spouses. This remainder goes to the surviving spouse in the absence of a reserved heir or a *Dhawu al-arham* cognate¹⁰³.

But Tunisian law goes further, allowing, thanks to this technique, to exclude certain acebs from the succession. Article 143 bis al 2 provides: "The daughter or daughters, the granddaughter of the paternal lineage ad infinitum benefit from the return of the surplus even in the presence of aceb heirs in their own right from the category of brothers, paternal uncles and their descendants as well as the Treasury". This reform is important, as henceforth daughters and granddaughters on the son's side, (but not daughters of daughters), will no longer be competing with the brothers of the deceased, his uncles and nephews, only the ascendants, father and grandfather, are not concerned by the radd. Thus, apart from the surviving spouse, when the deceased leaves a descendant, the estate will be entirely absorbed by the vertical line, ascendants and descendants. The radd thus

Practical example 4 Tunisian case



A man dies and leaves an only daughter

the estate will be entirely absorbed by the vertical line the daughters will no longer be competing with the deceased's brothers, uncles and nephews.

101. Art 143 bis CSP, art 167 CFA, art 349-6 CFM

102. Algeria does not list the Treasury among the acebs.

103. Art 167 CFA.

shows the transition from the extended family to the nuclear family by favouring descendants to the detriment of collaterals.

Compulsory bequest

According to traditional Muslim law, grandchildren whose father or mother died before their own parents are either excluded or marginalised from the estate of their grandparents. In competition with the own children of the deceased, grandchildren are completely excluded from their grandparents' estate if there is a son among the heirs. The latter excludes all his nephews and nieces from the succession. In the absence of an heir son, the children of a predeceased daughter are still not heirs, but the grandchildren of the son are; in fact, the son of the predeceased son is an agnate, and is entitled to receive the entire estate after the shares due to the fardh heirs have been taken. In the absence of a grandson from the son, the granddaughters from the son, who are fardh heirs, can inherit part of the estate.

The three legislators will come to the rescue of the grandchildren while remaining within the limits of Muslim law but with a few differences.

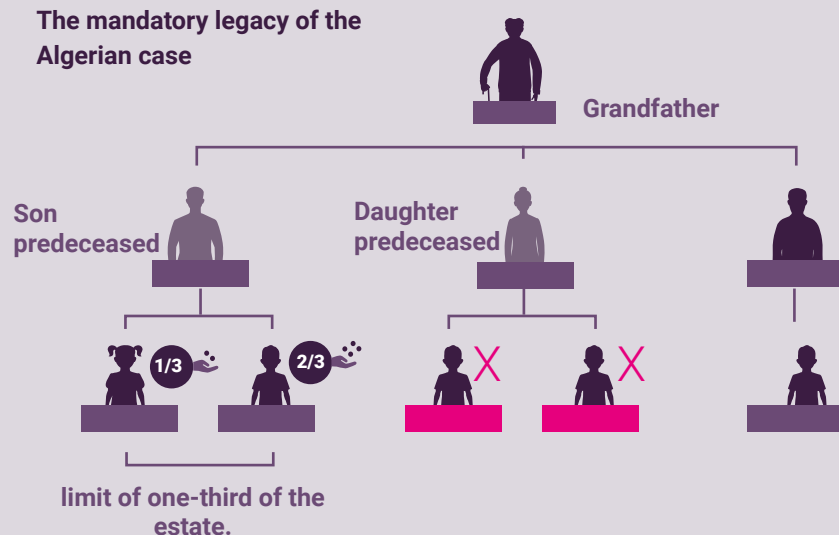
The compulsory bequest is not a bequest; it is not conditional on the existence of a will. It is an institution by which the law substituting itself to the deceased grants the children of a predeceased person a share in the estate of their grandparents equal to the share that their father or mother would have received from his or her ascendant had he or she survived. However, the compulsory bequest is part of the general rules on bequests, and can only come into play if the grandchildren are not heirs and within the limit of one third of the estate.

In Tunisia, the compulsory bequest only benefits the first line of grandchildren born of a male or female offspring¹⁰⁴. In Morocco, the compulsory bequest is granted to the children of a son and daughter and the children of sons of sons ad infinitum.¹⁰⁵ In Algeria, the compulsory bequest only applies to the descendants of the son, it does not concern the descendants of the predeceased daughter.¹⁰⁶ In the codes of the three countries, it is specified that the division between them takes place in the form of two shares for the son and one share for the daughter¹⁰⁷.

Thus, even in wanting to help grandchildren who have lost their father or mother prematurely, the legislators of the three countries implement a policy that discriminates against women

Algeria
The compulsory legacy only applies to the descendants of the son, it does not concern the descendants of the predeceased daughter

The mandatory legacy of the Algerian case

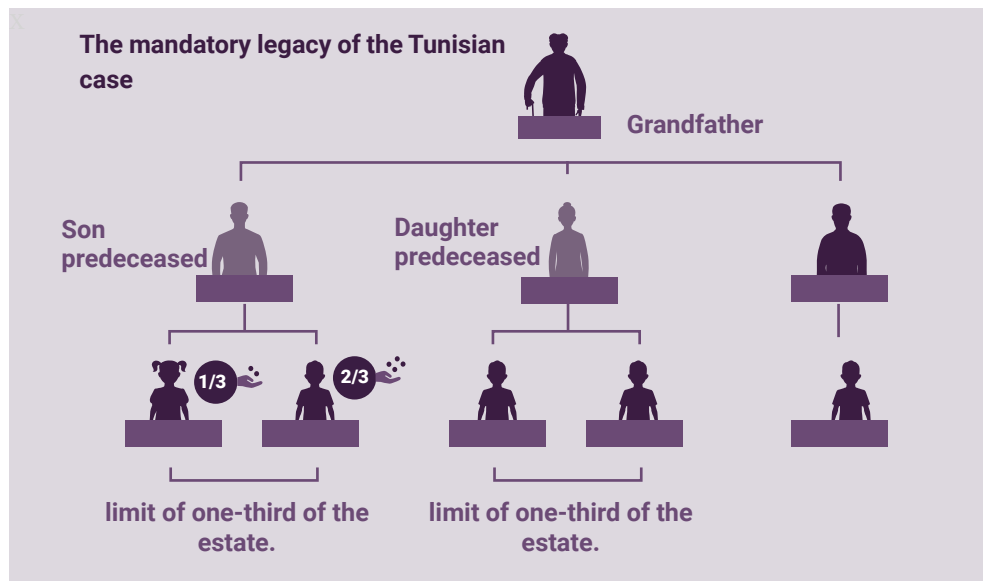


104. Art 191 CSP.

105. Art 372 CFM.

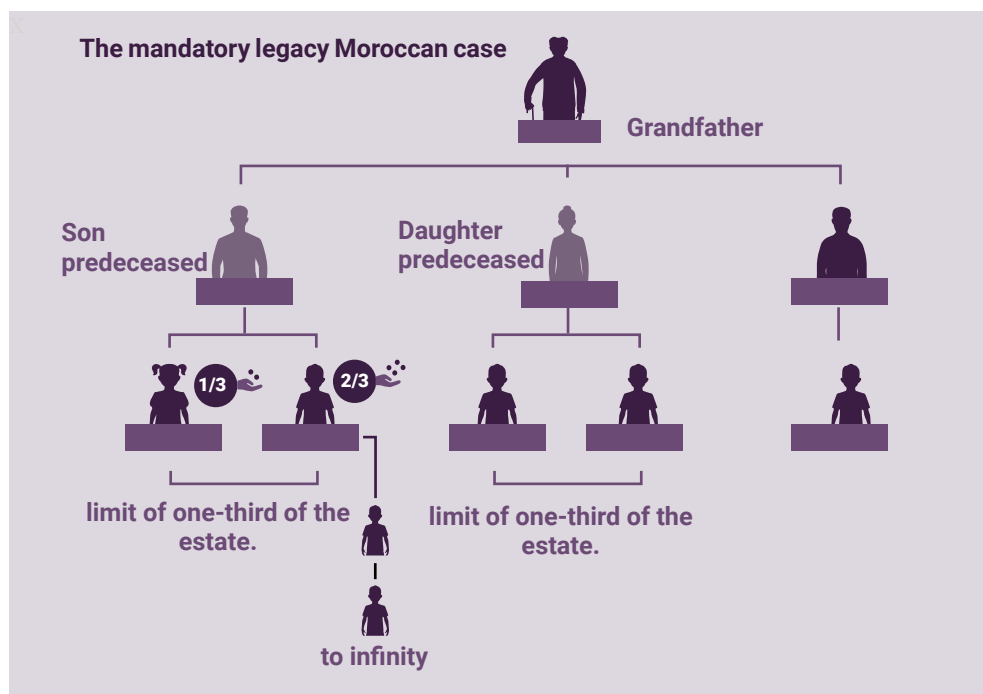
106. Art 169 CFA: «If a person dies leaving descendants of a son who died earlier or at the same time as him, these descendants must take the place of their progenitor in the succession of the deceased according to the conditions defined below».

107. Art 172 al 2 CFA, art 372 CFM, art 192 CSP.



Tunisia
The compulsory legacy benefits only the first strain of grandchildren from a child of either sex

Perfect equality between the grandchildren



Morocco
The compulsory legacy benefits the children of sons of sons ad infinitum

the children of the daughter of the first generation

3. Summary: The inequality of shares between men and women

The review of the most frequent cases between men and women, taking into account the different rules outlined above, reveals a striking inequality.

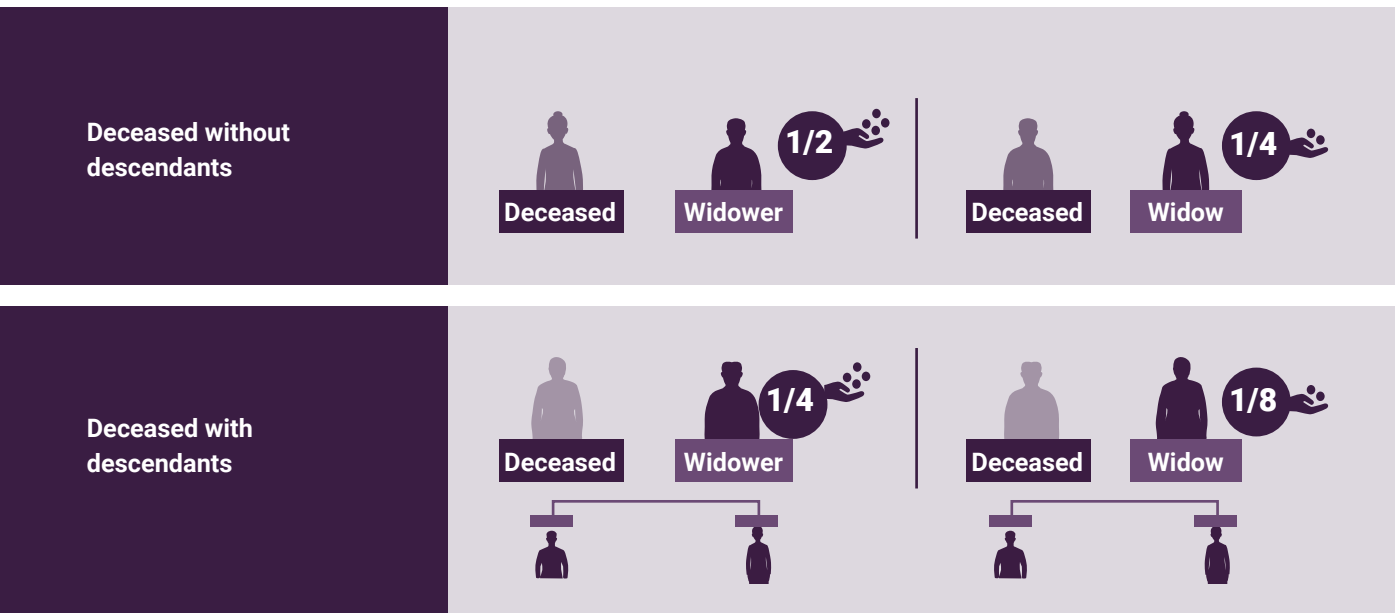
The surviving spouse

Whether male or female, this is always a fardh. In all three countries, the husband is entitled to half if the wife dies without descendants. He is entitled to a quarter if the wife leaves descendants entitled to the estate.

The surviving wife is entitled to a quarter if the husband dies without descendants and to one eighth if the husband leaves descendants entitled to inherit

In all situations, it does not matter whether the descendants are of the surviving spouse or not.

In the absence of an aceb heir, the surviving spouse, male or female, benefits with the other reserved heirs from the radd in Morocco and Tunisia. In Algeria, this benefit is granted in the absence of an aceb, a reserved heir and a cognate Dhawu al-arham.



Descendants

a) Children

Once the fardh have been served, the only son will receive the whole of the remainder, and if there are more than one, they will share the remainder. The same does not apply to daughters. The only daughter is entitled to half, if there are two or more daughters, they will share two thirds, the rest will go to the acebs. The rule is maintained in Algerian and Moroccan law. It has been corrected by the radd technique in Tunisian law, the daughter or daughters will receive the totality first as a fardh and then the rest by the radd mechanism¹⁰⁸.

If the deceased leaves any number of sons and daughters, the latter are agnatised by their brother, and the division will be based on the rule according to which the male heir has double the share of that attributed to a female heir.

b) Grandchildren

In competition with one or more uncles, sons of the deceased, the grandchildren, boys and girls, are not heirs according to the traditional rules. They are reintegrated into the estate, in all three countries, through the compulsory bequest. They are henceforth assured of obtaining the share that their predeceased mother or father would have had, without this exceeding one third of the succession.

In the absence of a son of the deceased, a distinction must be made between the children of a predeceased daughter and the children of a predeceased son.

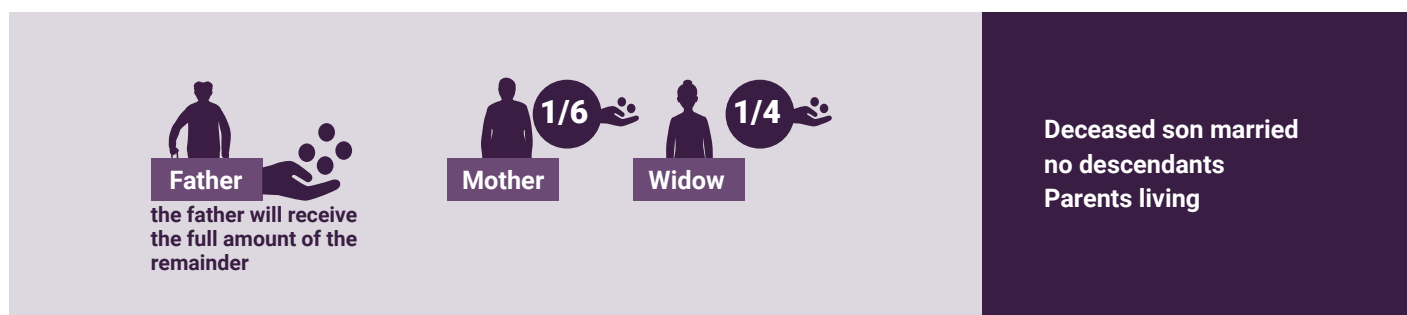
- When they are the only descendants of the deceased, the children of the predeceased daughter will only receive one third of the succession, the rest going to the more distant acebs, brothers, uncles and male cousins of the deceased. Similarly, in competition with an aunt, daughter of the deceased, they will receive only one third, whereas their living mother would receive half of the succession according to the rules of inheritance and the radd.

108. Art. 143 bis al. 2.

- The sons of the son enter the succession of their grandparents as aceb heirs and, if they are not preceded by the deceased's own sons, they are entitled to receive the whole of the remainder, after deduction of the shares of the fardh heirs. The grandson agnates his sisters and their share will be shared according to the rule of attribution to the male heir of a share double that of the women.

Ascendants

- The father receives one sixth as fardh heir in the presence of a male descendant of the deceased, regardless of his degree, whether son or grandson. In the presence of a female descendant of the deceased, daughter or daughter of the son, he receives one sixth as fardh and the remainder as aceb after deduction of the legal shares of the fardh heirs. If there are no descendants of the deceased, the father inherits as aceb after deducting the legal shares of the other heirs. Thus, if the deceased leaves only a father and a wife, the wife receives a quarter and the father the remainder.
- The mother receives one-sixth as fardh if there is a male or female descendant of the deceased, regardless of their degree, or if she inherits jointly with two or more sisters, whether whole-blood, consanguineous or uterine¹⁰⁹. One third of the total estate is awarded to her in the absence of descendants and sisters. Tunisian law specifies that one third of the remainder of the estate is awarded to her after deduction of the share of the surviving spouse, the aceb father having the remainder.



Note: Both the father and the mother receive one-sixth in the presence of descendants of the deceased, this is one of the few cases of equality between men and women, but the father is always favoured, he can also be involved, in some cases, as **aceb**, which is not possible for the mother.

Brothers and sisters

In the presence of an agnate descendant, son or son of the deceased's son, brothers and sisters do not inherit. Siblings will not also inherit in the presence of their father, who is an aceb who takes precedence over collaterals.

In the absence of a male descendant and of the father, brothers who are aceb heirs join the succession and agnate their sisters. In Morocco and Algeria, they inherit with the daughters of the deceased if he leaves daughters or daughters of sons. In Tunisia, they are also excluded from the succession, because of the radd, even if the deceased leaves only daughters or daughters of sons. Apart from these cases, brothers are aceb heirs and are entitled to receive the remainder of the estate once the fardh have been paid.

In addition to these de jure inequalities, there are de facto inequalities through the use of institutions or the application of customs that exclude women from the inheritance.

109. Art 107 CSP

4. De facto inequalities: circumvention of institutions, customs and exclusion of women from inheritance

Women can be totally excluded from inheritance, notably through habous or dead hand property. Abolished at independence in Tunisia (1957), habous still exist in Morocco and Algeria (wakf). In Morocco, a recent reform corrected this abuse, but it remains insufficient. In Algeria, a custom totally excludes Kabyle women from inheritance, while in Morocco, they are de facto excluded from the exploitation of collective lands called soulalas.

The private family wakf or habous (dead hand property)

Abolished in Tunisia, it is still in force in Morocco and Algeria. It has often been used to exclude women from inheritance.

Although it is in the process of extinction, the private family wakf¹¹⁰ - a means of excluding women from inheritance - is maintained in Morocco by the 2010 reform. However, the Dahir of 23 February 2010 forming the Awkaf Code¹¹¹ sought to limit, to a certain extent, the abus-es aimed at excluding women from inheritance through the private family wakf.¹¹²

According to Article 110 of this Code, male and female descendants of the first, second and third generations are entitled to the family wakf / moaâkab (para. 1). In the event of the exclusion of male or female children or the designation of specific children of the settlor to the detriment of others, the wakf is valid for all of them and the provision is null and void (art. 14, para. 2).

However, despite the progress it has achieved, the Awkaf Code maintains several gender discriminations, including :

- The family wakf includes the male and female descendants of the first generation and the descendants of the sons of the second generation but not those of the daughters unless the settlor names them or their mother (art.110).
- The income of the private family wakf is shared equally between the devolving men and women, unless the settlor decides otherwise (art. 113). The freedom given to the settlor to decide on the quotas in the sharing of the wakf income, paves the way for the perpetuation of de facto gender discrimination in view of the dominant patriarchal culture.
- The law provides for the liquidation of private family or mixed wakf, under certain conditions, and the division of property among the heirs in accordance with the rules of inheritance (para. 2, art. 128). However, as the family wakf has historically been used to exclude women from inheritance, justice and equity would dictate that the proceeds of the liquidated property be divided equally between the heirs of both sexes.

110. Three types of wakf coexist in Morocco: the public or charitable wakf (khayrî), whose income is allocated, in an absolute and exclusive manner, to religious, charitable or public works as ultimate beneficiaries. The private family wakf khâss, moaâkab (معقب) or dhurrî (ذري) and finally the mixed wakf in which the income generated is shared simultaneously between a religious and/or charitable organisation and the descendants of the constitute.

ذري مدونة الأوقاف. الجريدة الرسمية رقم 5847 بتاريخ 14 يونيو 2010

111. مدونة الأوقاف. الجريدة الرسمية رقم 5847 بتاريخ 14 يونيو 2010

112. The 2010 Code restricted the number of private wakf beneficiaries to three generations in order to avoid their multiplication, the dismemberment and degradation of property and to promote a rapid return of the property to the religious organisations, i.e. to the department of guardianship (para. 2, art.109). The latter takes one third of the liquidated assets with the exception of the beneficiary's home (para. 1, art. 128).

In Algeria, the wakf is regulated by articles 213 to 220 of the Algerian Family Code, none of which prohibits the exclusion of women from the constitution of a habous (exploitation or donation of real estate) to women. But in practice, the situation is often different.

The exclusion from the use of ethnic community land (Morocco)

In Morocco¹¹³, with nearly 12 million hectares, the collective, inalienable land belonging to some 4631 ethnic communities can be divided into shares allocated to the rightful owners or exploited by the entire community. Representing the largest land reserve in the country, these lands were governed until 2019, for the most part, by a law promulgated by the French Protectorate in 1919. This law fixed complex ancestral customary practices, consisting, in the majority of cases, in not recognising the women of ethnic communities (soulalyates) as beneficiaries of the usufruct of these lands.

Following the long advocacy of the Soulalyate women's movement, supported by the Democratic Association of Moroccan Women (ADFM), a law promulgated in July 2019 enabled members of Soulalyate communities, both men and women, to be able to claim the property of the community to which they belong. It also provides for the possibility for women to have access to the representative bodies of their community on the same basis as men.

Nevertheless, the decree implementing this law stipulates that only people living on collective land, i.e. owning a house or a plot of land, can be members. Women cannot fulfil this condition as they have always been excluded from ownership or the right to use the land. In fact, despite the intervention of the legislator, they are still excluded from owning or using collective land. Circular No. 6303 of 13 May 2020 by the Ministry of the Interior on the privatisation of collective land in non-irrigated areas confirms this exclusion by allowing only the beneficiaries of this privatisation to be ethnic communities, permanent residents, cultivators and having full enjoyment of community plots whose surface area must not be less than 10 ha. As only a tiny proportion of women meet the conditions set out in the circular, it perpetuates the exclusion of women from land ownership.

The disinheritance of women in Kabylia

In Kabylia, according to a custom dating back to the mid-18th century, women were totally excluded from inheritance. However, according to some authors, the habous was used to allow women to benefit from the estate and thus circumvent the customary law that excluded them. However, on the death of these women, the habous reverts to their male heirs. "Thus a private habous can be set up for the benefit of a woman; this is a sort of usufruct donation, given that the habous, whether private or public, always remains inalienable. On the death of the usufructuary, the private habous reverts to male heirs. Thus, Jean Paul Charnay, in dealing with the habous, noted that "it is increasingly used in Kabylia to correct the barbarity of customs that disinherit women..."¹¹⁴.

This disinheritance also exists in Tunisia, where customs in certain regions totally exclude women from inheritance, not to mention the hypotheses of donations or sales made during the lifetime of the deceased and favouring the males of the family¹¹⁵.

113. Ibid.

114. Khaloune (Tahar), « Le Habous, le domaine public et le trust », *Revue internationale de droit comparé*. Vol. 57 N°2, 2005. pp. 441-470 ; https://www.persee.fr/doc/AsPDF/ridc_0035-3337_2005_num_57_2_19355.pdf

115. See the Tunisian report, forthcoming.

II. GENDER EQUALITY IN THE CONSTITUTIONS

In all three countries, the Constitution is placed at the top of the hierarchy of norms, followed by regularly ratified treaties (Article 20 of the Tunisian Constitution of 2014 (chapter on rights and freedoms); paragraph 4 of the preamble of the Moroccan Constitution of 2021; Article 154 of the Algerian Constitution)¹¹⁶.

Laws and other norms (decrees, dahirs, circulars, etc.) must be in conformity with regularly ratified Conventions. However, it should be noted that in Tunisia, in accordance with the exceptional measures taken by Presidential Decree No. 117 of 22 September 2021, the hierarchy of norms was overturned. The Constitution was suspended, with the exception of its preamble and Chapters 1 and 2, relating respectively to general principles and rights and freedoms, which have been maintained. Article 4 of the Decree specifies that "When issuing decree-laws, the gains in human rights and freedoms guaranteed by the national and international legal systems may not be compromised." Since Parliament was suspended (Article 1), all its powers, including that of enacting legislation on personal status, fall within the competence of the Presidency of the Republic (Article 5). A revision of the Constitution is provided for in the same Decree (Article 22). Insofar as to date no Decree-Law has been issued in the area of personal status, and the rules governing non-discrimination between men and women being stipulated in the Preamble and Chapters 1 and 2, these rules remain in force.

It should also be noted that, with the exception of the Tunisian Personal Status Code, the Moroccan and Algerian Family Codes make Muslim law a formal source to which the judge refers in interpreting the law. Article 222 of the Algerian Code provides that: "In the absence of a provision in the present law, reference shall be made to the Sharia". If there is a gap, the judge will have to fill it by referring to the Sharia. The Moroccan Code is more open, as it refers to the values of justice and equality. It stipulates in Article 400 that: "In all matters not expressly set out in this Code, reference shall be made to the requirements of the Maliki rite and/or to the conclusions of the jurisprudential effort (Ijtihad), in order to give concrete expression to the values of justice, equality and harmonious coexistence in common life, as advocated by Islam ».

In contrast, the Sharia was established in Tunisia as a formal source of the personal status code by part of the jurisprudence. Based on this reading, the prohibitions on inheritance between Muslims and non-Muslims, which are legal in the other two codes, were initially instituted. In the most recent decisions, it would seem that Tunisian jurisprudence has moved in the opposite direction, namely towards lifting the prohibition on inter-religious inheritance¹¹⁷.

Nevertheless, whether in Tunisia, Algeria or Morocco, the unchangeability of the provisions governing inheritance is always based on its formal source (established by law) or material source (guiding legislators), namely Muslim law. The constitutional or conventional provisions establishing non-discrimination between men and women are mitigated by the religious reference, present in all three constitutions. These provisions are ambiguous and allow for both interpretations, those advocating equal inheritance and those favouring the maintenance of the unequal status quo, in the name of Islam. The latter interpretation is also the basis for the declarations or reservations made to international conventions and in particular to the Convention on the Elimination of Discrimination against Women (CEDAW).

116. In all three countries, the preamble is of normative value.

117. Sana Ben Achour, *Le Code tunisien du statut personnel, 50 ans après : les dimensions de l'ambivalence*, <https://journals.openedition.org/anneemaghreb/89?lang=en>

1. Constitutional ambiguities: Islam and the principle of gender equality

In Algeria, the 2020 Constitution states in Article 2 that: "Islam shall be the religion of the State." At the same time, it enshrines equality between male and female citizens in Articles 35 and 37, the latter namely prohibiting any discrimination based on gender. Article 35 stipulates: «Fundamental rights and freedoms are guaranteed by the State. The institutions of the Republic shall seek to ensure equality of rights and duties of all citizens by removing the obstacles impeding the development of the human personality and preventing the effectual participation of all in the political, economic, social and cultural life." Article 37 reads: "All citizens shall be equal before the law and shall be guaranteed the right to equal protection. There shall be no discrimination on the grounds of birth, race, gender, opinion or any other personal or social condition or circumstance." Article 34 adds that: "Constitutional provisions regarding fundamental rights, public freedoms and guarantees apply to all public authorities and institutions. Any restriction of rights, freedoms and guarantees may only be imposed by legislation and for reasons related to maintaining public order and security, national fundamental values as well as those necessary for safeguarding other rights and freedoms protected by the Constitution. In all cases, these restrictions shall not prejudice the essence of these rights and freedoms. In order to guarantee legal security, the State, in implementing legislation relating to rights and freedoms, shall ensure the readability, accessibility and the stability of legal texts." This article, while asserting that legislative limitations may be made to protect "national fundamental values" that may be interpreted as a reference to Islam as a state religion, prohibits such limitations from undermining the substance of these rights and freedoms. It is clear that inheritance inequality undermines the very essence of the right to equality and non-discrimination between genders.

The same ambiguity can be found in Morocco. The preamble to the 2011 Constitution states: "The pre-eminence accorded to the Muslim religion in the national reference is consistent with the attachment of the Moroccan people to the values of openness, of moderation, of tolerance and of dialogue for mutual understanding between all the cultures and the civilisations of the world." Article 3 states: «Islam is the religion of the State, which guarantees the free exercise of worship to all." Equality is enshrined in Article 9: "Men and women are entitled, on an equal basis, to the civil, political, economic, social, cultural and environmental rights and freedoms set forth in this article and in the other provisions of the Constitution, as well as in the international conventions and covenants duly ratified by the Kingdom, in accordance with the provisions of the Constitution, the fundamental values and the laws of the Kingdom. The Moroccan State is committed to achieving parity between men and women. An Authority for parity and the struggle against all forms of discrimination is created, to this effect." In this article, the principle of equality, including in the civil and therefore family sphere, is mitigated by the reference to the fundamental values and laws of the Kingdom, which may also be a reference to Islam. Equality between male and female citizens is also enshrined in the first paragraphs of Article 6 of the Constitution: "The law is the supreme expression of the will of the nation. All natural and legal persons, including the public authorities, are equal before it and must submit to it. The public authorities shall endeavour to create the conditions for the widespread effectiveness of the freedom and equality of male and female citizens, and of their participation in political, economic, cultural and social life. The principles of constitutionality, hierarchy and obligation of publication of legal norms are affirmed. The law may not have retroactive effect."

C'est par référence à ces constantes, à l'Islam religion d'Etat, mais aussi à l'article 43 qui n'autorise la succession au trône que de père en fils¹¹⁸, que les oppositions à l'égalité vont se faire.

It is through reference to these fundamental values, to Islam as the state religion, but also to Article 43, which authorises succession to the throne only from father to son, that opposition to equality will arise.

118. Article 43 : "The Crown of Morocco and its constitutional rights are hereditary and are transmitted from father to son through male descendants in direct line and by order of primogeniture of His Majesty The KING MOHAMED VI, unless the King has designated, in His lifetime, a successor from among His sons, other than His eldest son. When there are no male descendants in direct line, the succession to the Throne is devolved in the closest male collateral line and in the same conditions."

The same ambivalence is found in Tunisia, both in the preamble and in the Constitution, which refer to Islam, but also to the civil State (interpreted as a non-theological State), and to universal values, including equality between male and female citizens, as provided for in Articles 21 and 46, which prohibit any questioning of women's gains and place an obligation on the State to protect, consolidate and uphold them. These gains, without expressly defining them, implicitly refer to the reforms introduced in the Personal Status Code (prohibition of polygamy, judicial and egalitarian divorce, etc.). And Article 49, which authorises limits to be placed on rights and freedoms, prohibits these limits from undermining the very essence of these rights.

Preamble: "Expressing our people's commitment to the teachings of Islam and its aims characterized by openness and moderation, and to the human values and the highest principles of universal human rights. Inspired by the heritage of our civilization, accumulated over the travails of our history, from our enlightened reformist movements that are based on the foundations of our Islamic-Arab identity and on the gains of human civilization, and adhering to the national gains achieved by our people; With a view to building a republican, democratic and participatory system, in the framework of a civil state founded on the sovereignty of the people, exercised through the peaceful alternation of power through free elections, and on the principle of the separation and balance of powers, which guarantees the freedom of association in conformity with the principles of pluralism, an impartial administration, and good governance, which are the foundations of political competition, where the state guarantees the supremacy of the law and the respect for freedoms and human rights, the independence of the judiciary, the equality of rights and duties between all citizens, male and female, and equality between all regions". Article 1: "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended." Article 2: "Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law. This article might not be amended." Article 21: "All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees freedoms and individual and collective rights to all citizens, and provides all citizens the conditions for a dignified life." Article 46: "The state commits to protect women's accrued rights and work to strengthen and develop those rights. The state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains. The state works to attain parity between women and men in elected Assemblies. The state shall take all necessary measures in order to eradicate violence against women." Article 49: "The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution

2. Islam as a reference in the Constitutions is not opposed to gender equality

In Morocco and Algeria, while making Islam the religion of the State, the constitutions do not institute Sharia as the main source of law, in contrast with the constitutions of other Arab countries¹¹⁹. In Tunisia, the wording of Article 1 of the Constitution “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended” has been interpreted in different ways. For some, the text does not establish Islam as the state religion, but it does establish it as the religion of Tunisia. As a simple sociological observation, it is therefore descriptive and not prescriptive. For others, it establishes Islam as a state religion. But both interpretations agree that the text does not establish Sharia as a source of law.

Nevertheless, in all three countries, opponents to equality base their rejection of egalitarian inheritance law reform on the state religion or the value of Islam. As the Algerian sociologist Belkacem Benzenine puts it: “The difficulty of reform is due in particular to the normative values of the Sharia which limit, or even hinder, the process of reforming family law and to the influence of ideological issues which weigh on the occasionally violent debates about the Sharia and its place within the State and society¹²⁰”

In Morocco, conservatives, namely the Islamist PJD party, rely more specifically on constitutional provisions referring to national fundamental values (Art.39), the Islamism of the state (Art.3 of the constitution) and the status of the monarch as “commander of the believers” (Art.41). They also add that any reform is likely to “change the nature of the political and constitutional system of Morocco, whose constitution stipulates that the throne of Morocco and its constitutional rights are transferred by inheritance to the eldest male son of the king’s progeny [...]”¹²¹.

In Tunisia, the COLIBE Report¹²², in accordance with its constitutive text, interprets Articles 1 and 2 of the Tunisian Constitution of 2014 in such a way as to reject the argument of the proponents of the religiosity of the law, whereby the Sharia would be the source of legislation.

According to COLIBE, Article 1 of the Constitution, which states that “Tunisia is a free, independent and sovereign state”, means “the power of the state and its authority to promulgate its laws freely and to develop them in the interests of its citizens. Thus, asserting that there are laws [divine or Sharia laws] beyond the authority and will of the State is a denial of sovereignty...» .

The report added that while it is true that “the aforementioned Article 1 affirms that Tunisia is a state whose «religion is Islam”, this does not mean that our country is a religious state, whose will, translated into its laws, is subject to the precepts of religion. The legislative power, in accordance with Articles 3 and 50 of the Constitution, is in the hands of the people, who hold sovereignty and are the source of the powers they exercise through their elected representatives or by referendum, and there is no commission or higher religious power that prevails over the legislative power and controls the promulgation of its laws».

The report added that while it is true that “the aforementioned Article 1 affirms that Tunisia is a state whose “religion is Islam”, this does not mean that our country is a religious state, whose will, translated into its laws, is subject to the precepts of religion. The legislative power, in accordance with Articles 3 and 50 of the Constitution,

119. Ben Jemia M., “Constitutionnalisation du droit et mutations du statut personnel”, Droit constitutionnel et vie privée, compilation of the courses of the international academy of constitutional law, Vol. XVII, p.59 et seq.

120. RRéformer les droits des femmes en Algérie, Appropriations multiples et contraires de la norme islamique Éditions de l'EHESS | « Cahiers d'études africaines » 2021/2 n° 242 | pages 287 to 306, cited in the Algerian report.

121. See the forthcoming Moroccan report.

122. <https://www.euromedwomen.foundation/pg/fr/documents/view/8054/rapport-commission-libertes-individueles-egalite>

is in the hands of the people, who hold sovereignty and are the source of the powers they exercise through their elected representatives or by referendum, and there is no commission or higher religious power that prevails over the legislative power and controls the promulgation of its laws

Hence, the report does not question the interpretation made by the conservatives, led by the Islamist party Ennahdha, according to which the first article of the constitution makes Islam the state religion, but its consequence, according to which the Sharia would be the source of the law

Slim Laghmani, an influential member of COLIBE, noted that "When the National Constituent Assembly began drafting the constitution, the chairman of the Constitutional Committee in charge of the preamble and principles proposed the inclusion of Sharia law as a source of legislation. On 20 March 2012, demonstrations took place and almost led to clashes. On 25 March 2012, the Shura Council of the Ennahdha movement party (the party's deliberative body) met and considered that it was not necessary to cite Sharia as a source of law and that it was sufficient to use the text of Article 1 of the 1959 Constitution. In other words, the absence of the reference to Sharia in the Tunisian Constitution is not accidental, it is neither a coincidence nor an oversight; it was a choice, a decision. The decision not to make the Tunisian state a confessional state"¹²³.

The report then invokes Article 2 of the Constitution, which «explicitly enshrined the civil nature of the State, which is based on citizenship, the will of the people and the rule of law».

Slim Laghmani further stated: "This Article 2, combined with the renunciation of Sharia as a source of legislation, means that the claim that Islam is the religion of the State does not result in the establishment of a confessional State (it is a civil State), nor a state based on faith (but on nationality), nor a state based on divine will (but on the will of the people and their sovereignty, as confirmed in Article 3 of the Constitution), nor a state based on the supremacy of religious law (but on the supremacy of the Constitution). Article 1 therefore simply means that the official religion of the state enjoys positive discrimination. This is the case in three areas: the religion of the Head of State, who must be a Muslim (Article 74), education (Article 39) and the financing and administration of the Muslim faith"¹²⁴.

Thus, «any assertion that there are rules beyond the will and authority of the State can only result in a contradictory position with the Constitution." »

Finally, the report relies on Article 49, which prohibits any limitation to rights and freedoms that might result in «*compromising their essence*». These limitations can only «*be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution*».

The report therefore considers "that discrimination against women and between children has no place in a civil state and cannot be justified by the defence of the rights of others, public safety and public morality. Thus, the right to equality is an absolute right, without any exception or restriction."

Lastly, the report refers to the freedom of belief and conscience guaranteed by Article 6 of the Constitution in order to rule out any interpretation that makes the Sharia the source of law, and more particularly of family law.

123. Laghmani (S.), "L'égalité hommes femmes en matière d'héritage d'un point de vue constitutionnel", *Ecrits politiques et constitutionnels depuis la révolution*, Nirvana, 2020, p. 207 et seq.; also see on this issue Ben Achour (Y.), *Tunisie, une révolution en pays d'Islam*, CERES éd. 2016 ; Bras (J-P) « Un État « civil » peut-il être religieux ? Débats tunisiens », *Pouvoirs* 2016/1 (N° 156), pages 55 to 70, <https://www.cairn.info/revue-pouvoirs-2016-1-page-55.htm>

124. Laghmani (S.), article op. cit.

But this will not prevent the opponents of equality, in particular the Islamist party Ennahdha, but also the current President of the Republic, who has now seized all powers (legislative and executive) in Decree 117 of 22 September 2021, from relying on Article 1 of the Constitution and therefore on the reference to Islam in order to refuse any reform of the unequal inheritance provisions.¹²⁵

The human rights referent is set aside especially when it comes to establishing gender equality and the reservations and/or general declarations to the related Conventions are only made for those that include this equality, in particular CEDAW

III. EQUALITY IN INTERNATIONAL CONVENTIONS REGULARLY RATIFIED BY THE THREE STATES

1. Ratified Conventions and international non-binding commitments

As noted previously, Conventions rank higher than laws. Regional and international conventions were ratified by the three countries, knowing that in case of conflict between them, the latter prevails. Finally, it is important to mention the international commitments that are not binding.

Regional Conventions

Both Algeria (2016) and Tunisia (2018) ratified the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (known as the Maputo Protocol) adopted in 2003 by the African Union, which refers to inheritance.

However, both countries undertook to ensure equity in inheritance, rather than equality, in accordance with Article 21 of the Protocol, which states that: "1. A widow shall have the right to **an equitable share** in the inheritance of her husband's property. The widow shall have the right, irrespective of the matrimonial regime, to continue to live in the marital home. In the event of remarriage, she retains this right if the home belongs to her in her own right or became her property by inheritance. 2. Women, like men, have the right to inherit their parents' property **in equitable shares**."

The term equity replaces equality and the emphasis in several international forums has been on the need to adopt the latter instead of the former. Generally, it is in the name of equity that equality between men and women is rejected by Arab states. It is argued that Muslim inheritance law is equitable in that the lower share of women is justified by the fact that it is the man who is required to provide for his family. However, women, just as much as men, participate in the material support of the family. However, the notion of equity is always the argument that is opposed to equality in inheritance and it is on this basis that the current President of the Tunisian Republic, in his speech of 13 August 2020, rejected any reform of inheritance law.

In its Recommendation No. 28 (2010) concerning the core obligations of States parties under Article 2 of the Convention¹²⁶, the CEDAW Committee stated that "Equity is the moral imperative to dismantle unjust differences based on principles of fairness and justice. It requires a focus on the most disadvantaged and the poorest.

125. See the speech of the President of the Tunisian Republic of 13 August 2020

126. General Recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women ; <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/61/PDF/G1047261.pdf?OpenElement>

Many development organizations have made equity a central part of their agenda. However, from a human rights perspective, relying on equity has certain risks because its definition is a malleable concept that is not legally binding. While equity may denote justice, it may dilute rights claims if considered separately from equality and non-discrimination and risks being defined arbitrarily according to political and ideological expedience.”

Also noteworthy is the decision of the African Court of Human and Peoples’ Rights in 2018, following a referral from the Association for the Progress and Defence of Malian Women’s Rights (APDF) and the Institute for Human Rights and Development in Africa (IHRDA). The court found that the new Family Code of Mali, which adopts Muslim inheritance law and the inequality of shares between men and women, is contrary to Article 21 of the Maputo Protocol. It thus interpreted the term equity used in the said Article in the sense of equality, referring in particular to the above-mentioned recommendation of the CEDAW Committee¹²⁷.

International Conventions

All three countries ratified most of the international human rights conventions, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantee equality between men and women, including in marriage and the family (ICCPR), without any specific reservations to their provisions.¹²⁸

The Convention on the Elimination of All Forms of Discrimination against Women adopted by the United Nations in 1979 was ratified in 1985 by Tunisia, in 1993 by Morocco and in 1994 by Algeria. All had reservations, some of which have been withdrawn in both Morocco and Algeria. Tunisia withdrew all its specific reservations, but maintained its general declaration which, in the French text, relates to Chapter 1 of the Constitution and in the Arabic text, which is authoritative, relates only to Article 1 of the Constitution which refers to Islam. The reservations initially made to Article 9(2) have been lifted in both Morocco and Algeria and their nationality codes reformed so that women can transfer their nationality to their children. Morocco has also lifted its reservation to Article 16 of the CEDAW. Let us recall that this Article in its paragraph h grants: «The same rights for both the spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration»

127. Points 108 to 115 of the decision of the African Court: “With regard to women, Article 21 of Maputo Protocol stipulates that ‘a widow shall have the right to an equitable share in the inheritance of the property of her husband and that, like men, women have the right to inherit their parents’ properties in equitable shares’. Regarding the child, Article 3 of the Children’s Charter below ((paragraph 101) recognises for the child all rights and freedoms and proscribes all forms of discrimination regardless of the basis. The Children’s Charter therefore does not make any distinction between children and they all have the right to inheritance. The Court notes from the foregoing provisions, that in matters of inheritance, a predominant place is granted to the rights of women and children, given that the widow and children born out of wedlock have the same rights as others. These guarantee equality of treatment for women and for children without any distinction. The Court notes that in the present case, the Family Code applicable in Mali enshrines religious and customary law as the applicable regime in the absence of any other legal regime or a document authenticated by a notary. Article 751 of the Family Code stipulates that “inheritance shall be devolved according to the rules of religious law or provisions of this cod.” Furthermore, the documents on record also show that in matters of inheritance, Islamic law gives to the woman half of the inheritance a man receives, and that children born out of wedlock are entitled to inheritance only if their parents so desire. The Court notes that the superior interest of the child required in matters of inheritance as stipulated under Article 4 (1) of the Children’s Charter in any procedure, were not taken into account by the Mali legislator in the elaboration of the Family Code. The Court finds that the Islamic law currently applicable in Mali in matters of inheritance and customary practices are not in conformity with the instruments ratified by the State. The Court therefore holds that the Respondent State has violated Article 21 (2) of the Maputo Protocol and Articles 3 and 4 of the ACRWC <https://fr.african-court.org/images/Cases/Judgment/046%20-%202016%20-%20Association%20Pour%20le%20Progr%C3%A8s%20et%20la%20Defense%20Des%20Droits%20Des%20Femmes%20Maliennes%20-%20APDF%20c.%20Mali%20-%20Arr%C3%AAt%20du%2011%20Mai%202018-%20Optimized.pdf>

128. It is also worth mentioning the conventions relating to violence, none of which has been ratified by the three States. More specifically, this concerns the Istanbul Convention of the Council of Europe, which is open to signatories from third countries, with the clarification that a draft ratification law was submitted to the ARP in Tunisia in 2020. This is the case with regard to the Security Council resolutions on «Women, Peace and Security» which refer to the Conventions guaranteeing equality between men and women, including CEDAW, and consider that violence against women (particularly in times of conflict) can only be resolved by eliminating all forms of discrimination against women. However, the rate of gender violence in the three countries is high and concerns at least one woman in two, i.e. approximately 50% of women are victims of all forms of violence, with a prevalence rate of violence in the couple and the family which generally reaches the national rate. Because the rate of violence is high in the private and family sphere, egalitarian reform of family law is necessary, as violence feeds on power relationships and discrimination. The Tunisian law n°58 of 11 August 2017 on the elimination of violence against women recognises that the cause of violence is discrimination against women, which should lead to the reform of unequal laws, including inheritance law. On the other hand, all three countries have ratified the International Convention on Combating Organised Crime and its Palermo Protocol on Combating Trafficking, which recognise the need to eliminate the causes of trafficking, namely gender discrimination.

Non-binding international commitments: Sustainable Development Goals

The United Nations Conference on Sustainable Development ("Rio+20") brought together heads of states and governments in Brazil in 2012 to assess progress in implementing agreements reached since the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.

At Rio+20, the countries renewed their commitment to sustainable development, agreed on a set of sustainable development goals and established a High-Level Political Forum for Sustainable Development. The outcome document entitled "The Future We Want" reiterated the determination of states "to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making" and explicitly referred to the need to accelerate the implementation of the International Convention on the Elimination of All Forms of Discrimination against Women, among others.

The outcome document also asserts that "gender equality and women's effective participation are important for effective action in all areas of sustainable development» and calls for the repeal of discriminatory legislation and for ensuring that women have equal access to justice.

A 2030 Agenda for Sustainable Development (2030 Agenda) was negotiated and agreed by the 193 member states of the United Nations. Broken down into 17 Sustainable Development Goals (SDGs), 169 targets and 232 indicators, it addresses the economic, social, environmental and political dimensions of sustainable development in a comprehensive and integrated manner. The 2030 Agenda includes a separate goal on gender equality and the empowerment of all women and girls (SDG 5). It further recognises gender equality as a «critical contribution to the achievement of all goals and targets». In essence, it states that women's issues are cross-cutting. Equality in inheritance is specifically mentioned in point 5.a which calls for "the adoption of reforms to give women equal rights to economic resources, as well as access to ownership and control of land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws." This last provision may seem limiting, but it can be interpreted in an equality-sensitive way. When international Conventions are given a higher rank than laws, once ratified they become part of the domestic legal order. Hence the need for the three countries to lift all reservations and declarations to CEDAW. This interpretation is all the more valid as the Commission on the Status of Women at the Economic and Social Council in 2016 concluded in point 10 of its report that "the Commission recognises that women's equal and independent economic rights and empowerment are essential for the implementation of the 2030 Agenda. It emphasises that legislative and other reforms are needed to enable men and women, and where appropriate girls and boys, to enjoy equal rights to economic and productive resources, including land and natural resources, property and inheritance, appropriate new technologies and financial services, including microfinance, and to ensure that women have equal opportunities to achieve full and productive employment and to obtain decent work and equal pay for work of equal value...»¹²⁹.

129. <https://undocs.org/pdf?symbol=fr/E/2016/27>

2. Maintained reservations and general declarations to CEDAW

To date, the text of the reservations and declarations maintained in the three countries is as follows

Algeria

Reservation to Article 2: "The Government of the People's Democratic Republic of Algeria declares that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code."

Article 15, paragraph 4: "The Government of the People's Democratic Republic of Algeria declares that the provisions of article 15, paragraph 4, concerning the right of women to choose their residence and domicile should not be interpreted in such a manner as to contradict the provisions of chapter 4 (art. 37) of the Algerian Family Code."

Article 16: "The Government of the People's Democratic Republic of Algeria declares that the provisions of article 16 concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code."

Article 29: «The Government of the People's Democratic Republic of Algeria does not consider itself bound by article 29, paragraph 1, which states that any dispute between two or more Parties concerning the interpretation or application of the Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration or to the International Court of Justice.

The Government of the People's Democratic Republic of Algeria holds that no such dispute can be submitted to arbitration or to the Court of International Justice except with the consent of all the parties to the dispute.»

Maroc

«1. With regard to Article 2: The Government of the Kingdom of Morocco expresses its readiness to apply the provisions of this article provided that: - They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco; - They do not conflict with the provisions of the Islamic Shariah. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life. «

2. With regard to Article 15 paragraph 4: The Government of the Kingdom of Morocco declares that it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status.

Réserves : «3. With regard to Article 29: The Government of the Kingdom of Morocco does not consider itself bound by the first paragraph of this article, which provides that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. The Government of the Kingdom of Morocco is of the view that any dispute of this kind can only be referred to arbitration by agreement of all the parties to the dispute.

Tunisie

Declaration: On 17 April 2014, the Government of the Republic of Tunisia notified the Secretary-General of its decision to withdraw the declaration with regard to article 15(4) of the Convention and the reservations to articles 9(2), 16 (c), (d), (f), (g), (h) and 29(1) of the Convention made upon ratification which read as follows: «The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution»

With the exception of the reservations maintained by Morocco and Algeria to Article 29 (of a procedural nature) and Article 15 paragraph 4 relating to the freedom of choice of domicile by women and more generally to their freedom of movement, and based only on the articles that have an impact on equality in inheritance, i.e. Articles 2 and 16 of the Convention, these are considered by the CEDAW Committee to be contrary to the purpose and object of the Convention. The maintenance of the reservations to Article 2 of CEDAW, as well as the Sharia reservation (i.e. the necessary non-opposition of the provisions of CEDAW to Muslim law) are also considered unacceptable by all UN authorities.

3. The opposition of reservations to the purpose and object of CEDAW

Only Algeria and Morocco made reservations to Article 2¹³⁰ and maintained them. The CEDAW Committee, either in its recommendation on Article 2 or when examining the reports of these two countries, outlined that these reservations are contrary to the object and purpose of the Convention and, therefore, should be withdrawn. Recommendation No. 28 states that «The Committee considers that Article 2 is the Convention's core provision outlining the measures that the State Party is required to undertake under the Convention. It therefore considers that reservations to Article 2 or its subparagraphs are, in principle, incompatible with the object and purpose of the Convention and are therefore impermissible, as provided for in Article 28, paragraph 2¹³¹.

In its concluding observations on the report submitted by the Algerian State in 2012, the Committee reaffirms that the reservations to Articles 2 and 16 of the Convention are incompatible with the object and purpose of the Convention and therefore contrary to Article 28(2) of the Convention. In point 14 of these observations, the Committee urges the Algerian State to ensure the full implementation of the Convention and, to this end, recommends in point 14 b: To accelerate the legislative reforms, in particular that of the Family Code, in order to withdraw the reservations to Article 2, Article 15, paragraph 4, and Article 16 of the Convention according to a specific time-frame. In its 2018 concluding observations on the report submitted by Morocco, the Committee made the same observations regarding the need to withdraw the reservation to Article 2, on the same grounds¹³².

130. **Article 2 :** States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

131. General Recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women; (op.cit.)

132. https://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.MAR.CO.4_fr.pdf

Only Algeria maintained its reservation to article 16 of the Convention relating to equality in marriage and the family, a reservation that the CEDAW Committee also considers contrary to the aim and purpose of the Convention in the above-mentioned observations. Article 16, relating to equality in marriage and the family, is the one that guarantees equality in inheritance, the CEDAW Committee having explicitly stated this in points 34 and 35 of its recommendation relating to article 16, in which it also considers that any reservation to this article is contrary to the aim and purpose of the Convention: « 34. Reports of States parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and in Economic and Social Council resolution 884D (XXXIV), in which the Council recommended that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession. That provision has not been generally implemented. 35. There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished¹³³.

Finally, all maintained reservations contain an explicit and implicit reference to Sharia law. These are indeed maintained in all three legal orders. In Tunisia, through the maintenance of the general declaration that invokes Article 1 of the Constitution referring to Islam, implicitly refers to the Sharia. Morocco refers to it explicitly in its reservation to Article 2 of the Convention and Algeria through its reservations to Articles 2 and 16, which involve the non-contradiction of the Convention's provisions with the Family Code, which, as previously mentioned, must be interpreted in accordance with the Sharia.

4. Non-conformity of reservations and declarations with international law

The International Law Commission (ILC) considered that “the right to formulate reservations cannot go as far as to give priority to internal law in a general manner, since this would be contrary to the principle of good faith in the implementation of the treaty”¹³⁴; It also considered that reservations with an object and purpose contrary to the Convention are automatically null and void, in accordance with the Vienna Convention on the Law of Treaties. These reservations are, therefore, devoid of any legal effect¹³⁵, which is the case of reservations limiting the obligations under the Convention to compliance with family codes or their source, the Sharia, considered to be contrary to the object and purpose of the CEDAW. As for the Tunisian declaration aiming at the compliance with Article 1 of the Constitution, it is irrelevant insofar as in any case the Constitution has a higher rank than Treaties.

However, if at the international level, these reservations are considered to be either opposed to the purpose and object of the Convention, or irrelevant (reference to the constitution which is in any case superior to the Convention in Tunisia and Morocco), at the domestic level, these reservations or declarations will still be used to oppose equality in inheritance. This is notably the case of Tunisian jurisprudence, which for a time refused inter-religious successions (2014 order)¹³⁶.

133. General Recommendation No. 21: Equality in marriage and family relations (CEDAW Committee), [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38\(SUPP\)_4733_F.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38(SUPP)_4733_F.pdf)

134. El MEKKI (A.), “Les évolutions récentes de la pratique des réserves aux traités multilatéraux relatifs aux droits de l’homme” Typewritten thesis for a doctorate in public law, 2015-2016, FSJPST, p.216

135. Ibid p.424

136. See the Tunisian Report, forthcoming.

As for national jurisprudence, the validity of reservations formulated in the course of a dispute may be assessed under Articles 20, 21 and 23 of the Vienna Convention on the Law of Treaties, but it must be noted that such control is rare. Nevertheless, it can be pointed out that at least one decision referred to the CEDAW without referring to the reservations (before they were lifted) in order to refuse recognition of an Egyptian repudiation (Tunis Court of First Instance, 2000)¹³⁷.

Because of the effect of reservations in domestic law, which can be used to oppose equality, particularly in inheritance, civil society, together with the FIDH, formed a regional coalition including feminist associations from the three countries called «Equality without reservations».¹³⁸ Indeed, it is thanks to the mobilisation of the feminist movements that the reservations are gradually being lifted.

In Tunisia, the reform has been initiated with a draft law adopted following the COLIBE report and proposals have been made by the ADFM in Morocco..

VI. THE BEGINNING OF REFORM

A first draft law was made in 2016 by a number of MPs whose first article states: «In the absence of an express and written agreement of the heirs to the contrary, the sharing is done equally between men and women when they are of the same degree of kinship.» This is the most important article, the other two are procedural. The proposal was not pursued and was eventually withdrawn.

However, following the COLIBE report, a draft law supplementing the personal status code (n°2018/90 of 28/11/2018) was submitted to Parliament and discussed in a parliamentary committee where it was opposed by the conservative and Islamist party¹³⁹.

COLIBE proposed to set aside the agnation system and to achieve, as a first step, gender equality in the most common cases, which are :

1. Descendants, children and grandchildren
2. Ascendants
3. Spouses
4. Brothers and sisters

1. Descendants

Children : For the daughter, if there is a son, ensuring equality between them, so that she has a share equal to that of the brother instead of half, as is the case at present, according to the rule of attributing to the male heir a share double that of the female. If there is no son, but there is a father and a grandfather: the current legislation only grants one half (one daughter) or two thirds (two or more daughters) and the remainder goes to the father and the grandfather. It is proposed to give her the whole minus one sixth which would go to the father and grandfather.

Grandchildren : Granting them the same status as their direct ascendant if he or she has died. This removes the one-third limit that they cannot exceed under the current provisions. The compulsory bequest is thus discarded and replaced by inheritance representation, whereby the grandchildren take the place of their predeceased parent without making any difference between men and women.

137. Ben Jemia (M.), note under TPI Tunis, 27 June 2000, *Revue Tunisienne de Droit*, 2000, p.429.

138. Égalité sans réserves: <https://www.fidh.org/fr/themes/droits-des-femmes/Campagne-egalite-sans-reserve>

139. Committee on Health and Social Affairs, 30 May 2019 <https://majles.marsad.tn/fr/event/2019/05/30/09/sante>

2. Spouses

For spouses, it has been proposed to remove the distinction between the husband's and wife's share (currently the husband's share of his wife's inheritance is half if there are no descendants and one quarter if they exist, while the wife's share of her husband's inheritance is one quarter if there are no descendants and one eighth if they exist). The spouse's share becomes half if there are no descendants and a quarter if they are present. In addition, the surviving spouse, widow or widower, is granted the right to residence in order to protect him or her from the risk of displacement if the other heirs wish to liquidate the marital home. He or she will thus enjoy the right to live in the marital home for life, provided that he or she has descendants or if their marital relationship has lasted at least four years. This right is revoked in the event of remarriage.

3. Collaterals: brothers and sisters

For the sister, ensuring equality between her and her brother. Thus, she will have an equal share instead of half of her share according to the rule of attributing to the male heir a share double that of the female.

In addition to this legal equality, which is the subject of a first proposal, COLIBE has made a second proposal: to guarantee legal equality, while allowing to oppose equality during lifetime. The deceased can leave a written document during his lifetime recommending a distribution according to the rule that the male heir should receive twice the share of the female heir. The system would thus be a binary one, the principle being an egalitarian distribution and the exception being the distribution according to the rule of attribution to the male heir of a share double that of the female heir, provided that this choice was made explicitly by the deceased. The will of the deceased must be recorded in an official document recorded by notaries. In return, equality is encouraged by facilitating its recognition: Thus, the person who has prescribed inequality with notaries does not need to return to the notary to confirm his or her retraction; he or she only needs to record this decision in writing, just as he or she can use any other means to confirm this decision.

It is this second proposal that has been the subject of the bill, with amendments relating to this last point. On the one hand, the withdrawal must follow the same procedure (intervention of the notary) and in addition to this procedure, the notarial act or acts have to be recorded in the civil status.

The third proposal, consisting in a choice of equality made by women after the death of the testator, was not retained.

The report further proposes to review the entire part of the Code relating to inheritance in the near future. The rules of inheritance as laid down in the Code are complex, sometimes contradictory and use vocabulary that is no longer used in common speech (such as *acebs*, male heirs by males, who are universal heirs).

This project has still not been adopted by the ARP, which was suspended by Presidential Decree n°117 of 22 September 2021.

Its adoption, with the main amendments proposed by civil society, which challenges its optional nature and proposes equality in principle with no possibility for exception, would be a tremendous step forward, not only for Tunisia, but for the whole region.

Since 2018, the debate has resurfaced in both Algeria¹⁴⁰ and Morocco. Nadia Ait Zai of the CIDEFF states that «the law must protect female heirs in the absence of a male in the succession of the husband and father by

140. Cited in the Algerian Report, forthcoming.

opting for the RADD technique, i.e. the return to the daughters of the share that belongs to the Acebs (...), or by attributing to them the usufruct of the conjugal and family home'. And she adds that, 'in practice, in Berber-speaking regions, women are excluded from inheritance so as not to dislocate the property, in return for which they have the right to the usufruct of the family home'¹⁴¹

In Morocco, a petition published online on 21 March 2018 and endorsed by a hundred Moroccan intellectuals of both sexes, called «for the abrogation of the ta'asib inheritance rule in Morocco» and the introduction of a right to «restitution of shares» (haq radd), with sole heirs, daughters without brothers, entitled to recover the entire inheritance following the example of Tunisia.¹⁴³ The petition was rejected by those opposed to any change and was considered by the feminist and human rights movement as minimalist and mortgaging any possibility of a global and substantive reform of the law of succession, **so an optional regime was proposed in which the maintenance or not of the ta'asib would be subject to the discretion of judges.**

The ad hoc Commission appointed by King Mohammed VI to draw up the New Development Model (NMD) project, in its general report of 25 May 2021, addressed the issue of the reform of inheritance law in the following terms "...concerning inheritance, it could be envisaged that **the ta'asib should no longer be considered as a default option, but that it should be subject to the discretion of judges** in its application according to a case-by-case approach, and according to criteria referring in particular to the responsibility of the parent claiming the right to the 'issaba in the care and protection of the deceased during his or her lifetime»¹⁴⁴.

In response to this recommendation, which was deemed unacceptable, an ADFM statement, widely circulated on 8 June 2021¹⁴⁵, challenged the NMD commission in the following terms: "The report proposes to entrust the judge with the possibility of examining, on a case-by-case basis, whether or not to authorise ta'asib. Isn't this an incongruous recommendation, to say the least, which provides for different rules for female citizens according to their capacity to sue in court, contributing to clogging up the family courts, opening the door to abuses and corruption and exacerbating family conflicts?»

Others advocate a return to the Kad wa si'aya rule. Without referring directly to inheritance law and its reform, the association "Forum Azzahrae de la femme marocaine", which is close to the PJD (Islamist), calls for an equitable sharing of property acquired during marriage, following a divorce or death, in accordance with the ancestral rule of Kad wa si'aya. Under the slogan: "What we have acquired in common, let's share it fairly"¹⁴⁶, this organisation intends to present a legislative motion¹⁴⁷ at the beginning of the 2021 parliamentary session with a view to revising Articles 49, 51 and 322 of the Family Code.

The proposed revision of Article 49 (Agreement of the spouses on the conditions of development and distribution of property acquired during their marriage) and Article 51 of the FC (Reciprocal rights and duties between spouses)¹⁴⁸ provides for the inclusion of the recognition of domestic work carried out by the wife as a contribution to the growth of the family assets. As for Article 322, which deals with the five rights included and deducted from the inheritance¹⁴⁹, the initiative proposes to remove the woman's shares and contributions to the property acquired during the marriage before proceeding with the division of the inheritance among the heirs.

141. « Les discriminations... », op.cit. article .

142. Proportional return of the remainder to the Quranic heirs in the absence of agnate relatives.

143. Petition published online on 21 March on the website : https://secure.avaaz.org/community_petitions/fr/Appel_Pour_labrogation_de_lheritage_par_tasib_au_Maroc/. En date du 20 aout 2021, cette pétition a recueilli 9 030 signatures.

144. Special Commission on the Development Model, General Report, 17 April 2021, p. 121

145. The ADFM statement, entitled: «The proposed new development model: this is not the Morocco we want», highlighted the fact that «the universalist reference, and more particularly the CEDAW - to which Morocco is party -, is almost absent from the report, whereas religious and cultural distinctiveness is evoked and invoked repeatedly to justify the anachronism of the measures dedicated to the 'reinforcement' of women's rights and freedoms». Is religious specificity only invited into political debates when it is exclusively about women's rights? Do other sectors of economic and social life conform to religious precepts? Have they not long since sunk into religious indistinction? ».

146. «الي شركناه بالفضل تنقسموه بالعدل» <http://www.fz.ma/news744.htm>

147. Article 14 of the Constitution recognises the citizens' right to submit legislative proposals. Furthermore, Organic Law 64-14 establishing the conditions and modalities for the exercise of the right to submit legislative motions stipulates that these motions must be supported by at least 25,000 signatures.

148. These are: 1) legal cohabitation, which implies good conjugal relations...; 2) the maintenance of good relations of common life, mutual respect, affection and solicitude... 3) the responsibility for the management of household affairs and the protection of children being borne by the wife jointly with the husband; 4) consultation in decisions relating to the management of family affairs, children and family planning; 5) the maintenance by each spouse of good relations with the partner's parents and relatives...; 6) the right of each spouse to inherit from the other.

149. Namely, in the following order: 1) duties on real property forming part of the inheritance; 2) funeral expenses paid within reasonable limits; 3) the deceased's debts; 4) a valid and enforceable will; 5) inheritance duties in the order set out in this code

Contributing to the public debate on the NMD, under the title 'The Morocco we want', the Damir Movement's memorandum¹⁵⁰ (November 2019) proposes two different inheritance schemes. The first is «built on the rules of Muslim law with a double share reserved for the man in relation to the woman», while the second is «based on perfect equality between the two sexes with no legal possibility of disinheriting one of the beneficiaries».

According to this organisation, «the common law system will remain the one that refers to religious principles, while the civil system will be optional and the expression of the deceased's wishes will have to take the form of a will. This hierarchy of inheritance schemes will have to be applied for a period of three to five years, then after this transitional period, when behaviour and mentalities have evolved, the hierarchy will have to be reversed so that the egalitarian civil scheme becomes that of common law and the religious scheme becomes the exception which must be formalised by means of a will ».

In reaction to the petition "For the abrogation of inheritance by ta'sib in Morocco", nearly 50 feminist and human rights associations published a statement in March 2018 under the title "For a global and in-depth revision of the Family Code." This widely disseminated statement calls for a comprehensive and in-depth revision of all the sections of the Family Code, including the one relating to succession, on the basis of equality and non-discrimination based on gender, belief and the family situation of children, in accordance with the provisions of the Constitution and the Convention on the Elimination of All Forms of Discrimination against Women.

The 2018 ADFM Memorandum, entitled «Towards an Equal and Just Succession System», focuses on the following five main areas for reform :

1. Abrogation of the ta'âsib rule by limiting the right of succession to spouses, descendants and ascendants ;
2. Abrogation of the prohibition of inheritance between a Muslim and a non-Muslim and consecration of the right to inheritance between spouses, descendants and ascendants regardless of the difference in religion;
3. Abrogation of discrimination on grounds of gender in the inheritance quotas and consecration of equality between male and female heirs placed at the same degree of relationship to the deceased;
4. Recognition of the right of the surviving spouse to benefit from the marital home, its furniture and equipment until marriage or death;
5. Amendment of Article 280 of the Family Code, which provides that "A will cannot be made in favour of an heir without the permission of the other heirs", in order to enshrine the unconditional right of the deceased to make a will in favour of the legal heirs within the limit of one third of the property.

Lifting discrimination in inheritance would lead to the collapse of the patriarchal citadel of which it is the pillar.

150. Created in 2013, the Damir Movement is a non-governmental organisation representing a democratic and human rights sensitive group

General conclusion

Discrimination in inheritance, which has been almost identically maintained in the three Maghreb countries, is contrary to constitutional equality and to international conventions regularly ratified by the three countries. It is also contrary to the sustainable development objectives to which they are committed.

The fight against this discrimination is not only a question of respect for human rights, but also an important lever for effectively combating the poverty from which women are increasingly suffering. This discrimination also prevents women from participating fully in the economic activity of their country, which hampers their economic and social development.

The debate on the necessary reform of inheritance law, initiated in the three countries, must be maintained so that it leads to egalitarian reforms. These reforms, advocated by civil society and more specifically the women's movement, are all the more possible as an important step has been taken in Tunisia with the adoption of a draft law instituting equality in inheritance on an optional basis. Although it has not yet been adopted, it remains on the agenda of parliament and its very existence shows that society is ready for egalitarian reform.

This egalitarian reform, the broad lines of which will be presented in the recommendations, nevertheless requires the adoption of measures, such as the lifting of reservations to ratified international conventions, CEDAW in particular.

Recommendations to States

1. Withdrawing the reservations to CEDAW

Algeria

• *Withdrawing all reservations to CEDAW namely those to Articles 2, 15 §4, 16 and 29.*

Morocco :

• *Withdrawing the reservations to Articles 2, 15 §4 and 29.*

Tunisia

• *Lifting the General Declaration according to which: «The Tunisian Government declares that it will not adopt, by virtue of the Convention, any administrative or legislative decision which might be contrary to the provisions of Article 1 of the Tunisian Constitution.»*

2. Abolishing the wakf

As many Muslim/Arab countries have done, such as Turkey (1926), Syria (1949), Egypt (1952), Iraq (1954), Tunisia (1957) and finally Libya (1973)¹⁵¹, or prohibiting it from being made to benefit male heirs in Morocco and Algeria.

3. Ensuring equality in inheritance in order to align it with constitutional equality

Heirs of the same rank, i.e. those who have the same degree of relationship to the deceased, must be treated in the same way and receive the same share.

- Abolishing the taasib and the aceb and fardh distinction which enshrines inequality.
- Removing the quota system currently in force.
- Removing the impediments to inheritance based on religion.
- Maintaining the surviving spouse (husband or wife) in the marital home by specifying the cases in which he or she loses this right: remarriage, unoccupied premises, etc....
- Maintaining the rule that the deceased cannot distribute more than one third of his or her property by will and the prohibiting the bequest of property to favour an heir. As long as there is equality between the heirs, the solution is justified. Not bequeathing more than one third protects the heirs, not bequeathing to an heir maintains equality between the heirs..
- Providing for the mechanism of representation in inheritance: This is a fiction of the law whose effect is to bring the representatives into the place, degree and rights of the represented. This allows children whose mother or father is predeceased to join the inheritance of their grandparents. The compulsory bequest will then be abolished.

151. See the Morocco report for more details on recommendations regarding wakf.

4. Ensuring the effectiveness of legal provisions

At present, while formal equality has still not been achieved, women are in practice often excluded from the allocation of shares to entitled beneficiaries, including for the shares recognised by law. An egalitarian policy that respects constitutional principles and aims to combat direct and indirect discrimination as defined in Article 1 of the CEDAW, implies taking into account this inequality of situations in order to re-establish real equality and women's access to their inheritance. This is all the more urgently required for women who are de facto excluded despite the few legal reforms adopted, such as for soulalyates in Morocco.

RECOMMENDATIONS TO CIVIL SOCIETY

- Strengthening the regional momentum for equality in inheritance by involving pro-equality political parties and the media to raise awareness of the urgency of reform..
- Building joint advocacy across the three countries.
- Consistently maintaining joint advocacy and lobbying for reform with a focus on the impact of inheritance inequality on women's impoverishment and economic and social development. This advocacy would end or at least mitigate conservative opposition to equality in inheritance as they are generally supportive of women's political, economic and social rights, while rejecting any family law reform.
- Developing and proposing a joint draft reform proposal for the three countries.
- Lobbying with the regular international monitoring mechanisms (with the CEDAW Committee and in the reports on the MDGs) to exert pressure on the States.

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152. More detailed and country-specific bibliographies are available in the three forthcoming reports (Moroccan, Algerian and Tunisian).

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Director of publication:

Alice Mogwe

Editor in chief:

Éléonore Morel

Coordination :

Hafidha Chekir
et Khadija Chérif

Project Director :

Khitem Bargaoui

Authors :

FIDH et ATFD

With special thanks to :

Yosra Frawes,
Alice Bordaçarre
Mouna Dachri
Felipe Vidal

Design :

LMDK Agency

fidh

CONTACT

FIDH

17, passage de la Main d'Or

75011 Paris - France

Tel: (33-1) 43 55 25 18

www.fidh.org

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