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**The History and Significance of the New
Moroccan Family Code**

Fatima Harrak

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Abstract

The growing religious identity throughout the world is challenging conventional social science wisdom, according to which modernization leads to the marginalization of religion in the public sphere. This discussion suggests different and alternative models for being both Muslim and modern. The focus is the family law reform within the context of a process of democratization and modernization that has been taking place in Morocco since the 1990s under a political system which, if not exactly religious, is at least not secular. After reviewing various initiatives to reform family law since independence, the author describes how a new family code (Mudawannat al-'Usra) came to be adopted in 2004 after a painful process of civil action, controversial debates, and difficult negotiations, in which women's organizations played a primary role. The role of King Muhammad VI also was crucial in ensuring that the new family code was ultimately supported by both its Islamist opponents and its "modernist" supporters. Because the monarchy's symbolic actions can go beyond the boundaries of debate set by the parties in the public arena, the author concludes that the King's arbitration between various positions remains a necessary and vital ingredient in Morocco's development and modernization process.

Fatima Harrak is a historian and the former Director of the Institute for African Studies, Université Mohammad V-Souissi, Morocco.

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Introduction

In modern Muslim societies family law serves as a powerful symbol and its codification, which is a social and political construction, raises fundamental questions about political life and the place of women in this domain. It also involves the issue of representation of Islam in the public sphere. In Morocco, the debate over women and family status has occupied the central stage since 1958, when the first Code of Personal Status (*Mudawwanat al-Abwal al-Shakhsiyya*) was published (Buskens 2003, 70-130).¹

But first, what is the *Mudawwana*? In the history of independent Morocco the *Mudawwana* is the second most important action of the government after the abolition of the Berber customary law, in the sense of the legal unification of the country, in contrast to the legal pluralism promoted by the French. With the abolition of the Berber Dahir, the *Mudawwana* became the symbol of national unity and Islamic identity. The operation of codification was also meant as a symbol of modernity. Elaborated by a commission formed of ten male religious scholars (*ulama*) and jurists, in coordination with the ministry of justice and the royal court, the 1957-58 *Mudawwana* reformulated the precepts of the classical Maliki jurisprudence into a modern code. While the form was new, the substance was not; the code clearly stipulated: "For everything not included in this text you should refer to *al-rajih*, *al-mashhur* or *al-'amal* in the school of Malik."² Also indicating close adherence to the classical Maliki law are the main sections of the *Mudawwana* dealing with topics such as: tutorship for marriage (*wilaya*), right to compel a daughter (*jabr*) to marry, minimum age for marriage set at 15 for girls and 18 for boys, the husband's right to divorce by unilateral repudiation (*taliq*) and to marry up to four wives at any one time (*ta'addud al-zanjat*), judicial divorce (*talaq qada'i*) at the wife's request for specific reasons as determined by Maliki jurisprudence such as lack of maintenance (*nafaqa*), lack of harmony (*shiqaq*) or harm (*darar*), male supremacy invested in the husband as (the) head of the family and its provider, the wife's right to maintenance (*al-qiwama*) and her obligation in return to obey her husband (*ta'a*).³

Calls for Reform

Calls for the reform of the *Mudawwana* never stopped. Many of the ideas proposed by some progressive *ulama*, such as Allal el-Fassi, did not find their way into the 1958 text of the law.⁴ Attempts were made in 1961 and 1962; in 1965 an official commission was formed to look into the shortcomings of the *Mudawwana*. Similar attempts were made throughout the 1970s. However, it was only in 1982 that the issue of women's status became a subject of public debate and was overtly linked to the struggle for human rights.⁵ In 1991, the Union for Feminine Action (l'Union de l'Action Féminine/UAF)—the women's branch of the Marxist-Leninist political party Organisation de l'Action Démocratique et Politique (OADP)—launched a national petition for reforming the Code of Personal Status. Surprisingly, the petitioners were able to collect one million

¹ For a close follow up of the reform attempts in 1965, 1970, 1974, 1979, 1981, 1982 see Léon Buskens, "Recent debates on family law reform in Morocco: Islamic Law as Politics in an emerging public sphere" in *Islamic Law and Society*, 10, 1, 2003, p.70-131.

² مالك الامام مذهب من العمل به جرى ما او المشهور او الراجح الى فيه يرجع القانون هذا يشمله لم ما كل

³ *Code du statut personnel et des successions (Moudawana). Dabirs de 1957 et 1958.* Edition synoptique, Casablanca, Sochepresse, 1986.

⁴ In his *Autocritique* Allal el-Fassi proposed the abolition of polygamy, for example.

⁵ The debate was initiated by the leftist Periodical *Lamalif*. See Zakya Daoud, 'La femme mineure,' in *Lamalif* No.140, Nov-Dec. 1982 and Moulay Rchid, « La réforme du code du statut personnel marocain. Une avancée dans la consolidation des droits de l'homme » in *Travaux de la journée d'étude sur les modifications du code de statut personnel*, Rabat, Université Mohammed V-Souissi, 1997.

signatures. This massive support for reform was stunning to all: the political parties, the religious scholars and the King (*amir al-mu'minin*). It was significant that the petition was addressed to the Prime Minister, the head of government, rather than to the King, the Commander of the Faithful and politico-religious leader of the country; thus for the first time in Moroccan history, gender issues were brought up for discussion in the political rather than the religious arena.

But if the massive support for the political framing of gender issues by the petitioners was stunning, some of the responses were predictable. Fierce criticism came from the Islamist groups who considered it a serious threat to Islam in Morocco. One faction of the Islamists, *Jama'at al-Islah wa al-Tajdid* (Association for reform and renewal) even issued a *fatwa* describing the campaign as an act of apostasy. There followed large debates and clashes between the Islamist groups and those who identified themselves as the “modernists” represented by the feminist and human rights organizations.⁶

King Hassan II saw in this confrontation an opportunity for the monarchy to play its role of arbiter and to strike a balance between tradition and modernity. His immediate reaction, which he expressed in his speech on the occasion of the “Throne and Peoples’ Revolution” on 20th August 1992, was to de-mobilize and de-politicize the issue: “the *Mudanwana* is, before anything else, my responsibility and I will shoulder my responsibility arising from the application or the non-application of such a code. Therefore, you (women activists) should refer such matters to me...you should not mix up religious matters with civil and political matters...”⁷

A few months later, King Hassan II received a delegation of women in the Royal Palace—with the notable exception of UAF representatives who were not invited—and announced the creation of a commission chaired by himself as *amir al-mu'minin* which was composed of twenty male and one female religious scholars and one representative of the Royal Court. The commission was charged with preparing the reform of the *Mudanwana* in conformity with the Islamic tradition of *ijtihad* (independent interpretation within Islamic law). In September 1993 the King promulgated the reforms by Royal Decree (*Dhahir*) when the Parliament was dissolved because of upcoming elections. The 1993 reforms of the *Mudanwana* included provisions making it necessary to receive the bride’s verbal consent to marriage and abolishing the right of the father to compel his daughter into marriage (*jabr*).

Other provisions abolished male guardianship over women who have attained the age of majority and whose father is deceased. Polygamy and a husband’s unilateral repudiation of his wife are now subject to the judge’s permission, while rules of financial settlement of repudiation are made more elaborately stringent. Legal guardianship of children is now accorded to the mother with clarification of the rules of custody in favor of the mother.⁸ These reforms were not revolutionary in any way and they were in line with the reformist-Salafist ideology which inspired the 1958 *Mudanwana*. The rights of women and children as laid down in the traditional Maliki jurisprudence were already stressed in the old code, which also contained provisions against male abuse and empowerment of the judges. The 1993 reforms were thus judged by all parties concerned, especially women organizations, as “superficial” but were nevertheless acclaimed as an important step forward. They demonstrated that lobbying yielded results and that the *Mudanwana* elaborated in 1958 exclusively by male religious scholars was not

⁶ Zakya Daoud, *Féminisme et politique au Maghreb. Sept décennies de lutte*. Casablanca, Eddif, 2^{ème} édition, 1996.

⁷ Radio et Télévision Marocaine, 20th August 1992.

⁸ *Moudanwana. Code de Statut Personnel et des Successions*, Casablanca, Sochepresse, 1994. The reforms of 1993 concerned also parts of the Code of Civil Procedures and the Civil Code (published in the Official Bulletin, No. 4222 (Sept. 1993).

an untouchable sacred text.⁹ On the other side, the King and the political class understood that it was time to start giving in to women's demands, leading to the first entry of women into the Parliament and into the government.¹⁰

Plan d'Action

In March 1998, the late King Hassan II asked Abderrahmane El-Youssofi, socialist leader and former exiled dissident, to form a coalition government, which was called the "alternate" government. El-Youssofi was the first opposition figure to become prime minister in modern Moroccan history. Hopes were high that his government would make progress on human rights, and address thorny issues such as impunity for previous abuses and women's rights. Indeed, el-Youssofi made gender equality among his government's priorities.¹¹ In this favorable context women's NGOs, with the support of the World Bank, launched a vast campaign to promote women's participation in public life and development. The Secretary of State for Childhood and Family Issues, Saïd Saadi, a member of the formerly communist Parti du Progrès et du Socialisme (PPS) joined the campaign. He presented in March 1999 a proposal for the improvement of women's status in Morocco: *Plan d'action national pour l'intégration de la femme au développement* (Plan for the Integration of Women in Development).¹² Expressly linking its proposals to the UN declarations and the 1995 Beijing conference resolutions, the plan covered four domains of priorities: literacy, reproductive health, economic development, and female empowerment. In the field of family law it proposed, among other things: abolition of wife repudiation, polygamy, guardianship for women who have attained majority, and called for equal division of property acquired in the course of marriage among spouses in case of divorce as well as the creation of family courts.¹³

While backed by the parties in government, particularly the Union Socialiste des Forces Populaires (USFP) and the Parti du Progrès et du Socialisme (PPS), with the Istiqlal party adopting an ambiguous attitude, the Minister's initiative was never endorsed by the government as a whole. It received the full support of women and human rights organizations, but was opposed vehemently by the Minister of Islamic Affairs. This latter contributed to the public debate provoked by this Plan with a book.¹⁴ It was also disputed by the league of the *ulama* of Morocco who considered it "a product of secularization."¹⁵ For the Parti de Justice et de Développement (PJD) and the Islamist groups, the debate served as a precious opportunity to provide a platform to present their programs and advance their position in the political arena. There ensued a public confrontation of ideas¹⁶ which polarized the political elite around two opposite positions organized in two national networks (the *Réseau pour le soutien et la mise en oeuvre du plan d'action pour l'intégration de la femme au développement*¹⁷ and the *Instance nationale pour la protection*

⁹ For an analysis of the 1993 amendments to the Mudawwana see Moulay Rchid (note 4 above).

¹⁰ One of these ministers was Nawal al-Mutawakkil, Olympic champion and graduate of Iowa State University.

¹¹ *L'Economiste* (daily newspaper), 13 August 1998.

¹² *Projet plan d'action national pour l'intégration de la femme au développement*. Rabat: Royaume du Maroc. Ministère du Développement Social, de la Solidarité, de l'Emploi et de la Formation Professionnelle. Secrétariat d'Etat chargé de la Protection Sociale, de la Famille et de l'Enfance (March 1999). Text is also found on www.maghreb-ddh.sgdg.org/asdholm/plan.html

¹³ *Ibid.*

¹⁴ Alaoui Mdaghri, Abdelkbir, *Al-mar'a bayna abkam al-fiqh wa al-da'wa ila al-taghyir*. Mohammedia: Imprimerie Fedala, 1999.

¹⁵ See the weekly *Al-Tajdid*, No.51, 12 January 2000.

¹⁶ See also the weekly *Liberation* (25 June 1999) and *La Vie Economique* (23 July 1999).

¹⁷ On the network, see *La Vie Economique*, 23 July and 26 November 1999.

de la famille marocaine comprising 41 associations.¹⁸ Soon the discussion of the plan became a debate about identity and cultural authenticity,¹⁹ culminating in two gigantic rallies in March 2000, one in Rabat in favor of the plan attended by 500,000 people, and another in Casablanca opposed to the plan and attracting more than 2 million people.²⁰ Clearly, the plan has sparked the interest of many citizens.

The “modernists”—as the proponents of the plan identified themselves—attacked the opponents of the plan as “an obscurantist horde of Moroccan Taliban”²¹ financed by “petro-dollars” to establish a “Shi’a-like state” in Morocco²² and use religion to defend their corporate privileges. They denied the scholars’ claims for the exclusive right to interpret Islam and referred to the Constitution, the international conventions and universal human rights.

The opponents of the plan considered the proposed reforms as a pure product of Western influences which did not take into consideration the Islamic dimension of Moroccan identity. In their view, the goal of the plan was not simply to address the issue of family law, but was geared towards a radical social and economic change of Moroccan society (*c’est un projet de société*).²³ Some of the slogans carried by the Casablanca anti-plan march were: “No to foreign intervention in an internal issue;” “No to forcing a societal project in a non-democratic way;” “Any reform of the Moroccan Muslim society has to take into account its Muslim cultural dimension and should be elaborated in consultation with its religious scholars;” and “Yes to the integration of women in development; No to westernization and submission to the West’s dicta.”

Shaken by the Islamists’ reaction and their massive rally, and before withdrawing the plan altogether, the government distanced itself from the Secretary of State and his project, which the government then referred to as the “Projet de Plan.” That was the end not only of the plan but also of the political career of Said Saadi, the Secretary of State who prepared it. During these confrontations and debates, all the parties appealed to the king to intervene as *amir al-mu’minin*. For the traditionalists, only the king, in consultation with the *ulama*, is entitled to change the family law. As for the modernists, the king alone had the right to exercise *ijtihad* and decide the content of Islamic law of the land. In fact, the modernists were the most vulnerable party needing the King’s arbitration.

From Altering to Replacing the *Mudawwana*

When King Mohammed VI acceded to the throne following the death of his father in July 1999, there were high hopes that a new era of reform was about to begin in Morocco. The new king, who quickly projected the image of a more accessible leader interested in political and social reform, stated on more than one occasion his support for human rights and his belief that protecting these rights was consistent with Islam. Mohammed VI had been in office for only six months when the Casablanca and Rabat

¹⁸ On the Instance see notably *al-Tajdid* (No.51, Jan. 2000).

¹⁹ Following are some texts which belong to this debate : Bu Bakr Nureddine, *Ra’y fi mashru’ al-*khutba al-wataniyya li-idmaj al-mar’a fi al-tanmiyya*...*, Oujda, Manshurat Jaridat al-Difa’, 2000 ; Haddush Abdeslam, *Idmaj al-mar’a fi al-tanmiyya fi mihakk al-siyasa al-shar’iyya*. Tanger: Tubaris, 2001 ; Harakat al-Tawhid wa al-Islah, *Mawqifuna mimma summiya « mashru’ *khutbat al-’amal*...*Rabat : Tubaris, 2000 ; Ligue Démocratique pour les Droits de la Femme, *Droits de la femme marocaine et le Code du Statut Personnel* . Casablanca : LDDF, 2000 ; Mouvement de l’Unification et de la Réforme, *Notre position à propos du dit « *Projet de plan d’action national* »*. Casablanca : al-Forqane, 2000.

²⁰ See press coverage of the two rallies.

²¹ *Libération*, 22-23 January 2000.

²² *Al Bayan*, 24 January 2000.

²³ See note (16) above.

rallies took place. In the face of this open confrontation between liberal and conservative Moroccans, the King was called upon to play his traditional role of arbiter. A year later, and on March 5, 2001 precisely, King Mohammed VI met with women representatives from political parties and human rights organizations and announced the formation of a royal commission charged with preparing the appropriate reform of the *Mudawwana*. The Commission, headed by a Supreme Court Justice, was composed of a cross-section of people, including men and women, religious scholars, political parties, intellectuals of traditional, liberal and independent orientations, human rights and women's NGOs. But while the commission was holding its meetings, Mohammed VI took a number of symbolic steps to advance the status of women, thereby signaling the orientation in which he wanted the reform to go.

First, on the personal level, Mohammed VI closed his father's harem, and announced his intention to marry a twenty-four year old computer engineer from a modest urban family who was presented to the Moroccan people. The message was clear: the royal house is now modern and open on the future. Second, 10 percent of the seats in the lower House of Parliament were reserved for women in the general elections of September 2002, and several women were nominated to senior government and administrative positions, including Ministers, Ambassadors and Royal Advisors. Finally, in March 2003 and after much waiting and speculation, the Commission announced that instead of amending the *Mudawwana* it intended to recommend a new law. A few months later the Commission submitted its plan to Mohammed VI.²⁴ In his opening speech at the Fall parliamentary session on October 10, 2003, the King formally presented the Moroccan parliament with his plan to replace the *Mudawwana* with "a modern Family Code." The new law, he declared, was "meant to free women from the injustices they endure, in addition [to] protecting children's rights and safeguarding men's dignity."²⁵ Mohammed VI explained that the provisions of the new family code found their justification in "the tolerant aims of Islam which advocates human dignity, equality and harmonious relations." They also conform to Maliki jurisprudence and to the tradition of *ijtihad* of which he was the warrant as *Amir al-mu'minin*, for, as he put it, "as Commander of the Faithful, I can neither prohibit what is legal nor sanction that which is illicit."²⁶ Moreover, and in an attempt to reconcile the differences which had arisen between the traditionalists and the liberals, King Mohammed VI declared that the proposed reform should not be perceived as a victory of one side or the other: "As the King of all Moroccans I do not make legislation for a given segment of the population or a specific party. Rather, I seek to reflect the general will of the Nation, which I consider to be my extended family."²⁷ The royal speech was greeted with jubilation by all parties and the new family law was ratified by the two houses of parliament in January 2004 after lengthy discussions and numerous amendments.

This historical event, described by the Moroccan weekly *L'Economiste* as a "big bang," was followed by a national campaign of information, advertising, television programs, seminars, conferences and workshops throughout the year and throughout the country, as well as the establishment of Family Courts, and the creation of programs for training Family Judges.

The Substance of the New Family Code

²⁴ Some rumors said that two projects were submitted to the King, one more limited in scope and one more far-reaching.

²⁵ <http://www.mincom.gov.ma/english/generalities/speech/ParliamentFallSession101003.htm>

²⁶ Ibid.

²⁷ Ibid.

The new Family Code constitutes a landmark in the history of Moroccan women's struggle for equality. This new legislation, which replaces the *Mudawwana*, introduces the following major reforms. To begin with, it upholds the principle of equality between men and women through the introduction of the joint and equal responsibility within the family, equality in terms of rights and obligations within the household, and suppression of guardianship of a male member of the family. Other provisions for equality between men and women include equal minimum age of marriage for men and women, the principle of divorce by mutual consent under judicial supervision. Furthermore, dissolution of marriage via divorce becomes the prerogative of both husband and wife under the judicial supervision of a judge, thereby ending a husband's right to unilateral repudiation of his wife. Equality between the sexes is now extended to allow the grandchildren on the daughter's side to inherit from their grandparents just like the grandchildren on the son's side. The minimum age for orphans to choose a custodian is now set at 15 for both girls and boys.

Polygamy is now subject to stringent legal conditions: a prospective wife can stipulate that contract of marriage is conditional on the pledge of the husband-to-be not to take a second wife; the consent of the wife is necessary before any new marriage can be contracted; the wife reserves the right to ask for divorce if she does not accept the polygamous situation; and the Family Judge is responsible for ensuring that there is no presumption of iniquity and that the husband has the ability to guarantee equal treatment of wives. The new family code is concerned with establishing fairness and justice by assigning key role to the judiciary (creation of Family Courts, establishment of a family mutual assistance fund, and the involvement of the public prosecutor in every legal action involving the Family Law). It protects the family institution by enhancing the chances of reconciliation between the spouses through the judge and through the family; and since verbal repudiation by the husband is no longer valid, divorce is now subject to Family Court ruling. Monies due to the wife and children must be paid fully in advance before the divorce can be pronounced and duly registered. Failure to fulfill any of the conditions stipulated in the marriage contract entitles both the wife and husband to file for divorce. Husband and wife are now obligated to share property acquired during marriage, while still affirming the Islamic principle of separate estates. This is made possible through the introduction of a separate contract signed by the two spouses defining the management of assets acquired during marriage.

Marriage contracts drawn outside Morocco²⁸ are accepted and registered at the Moroccan consulates on the condition that they be drawn in the presence of Muslim witnesses at least and in accordance with the procedures in force in the country of their residence. Foreign divorce documents concerning Moroccans residing abroad are recognized as legally valid provided they are in keeping with the general regulations in force in Morocco.

Another important set of provisions of the law are aimed at enhancing the protection of children's rights with reference to international agreements ratified by Morocco on this subject. A mother will now enjoy priority for children's custody, even if she remarries or moves out of the area where the father lives; the father comes in the second place, then the grandmother on the mother's side. Should this prove impossible, the judge will entrust custody to the best qualified relative in the child's family, keeping in mind the child's interest. Acknowledgement of paternity from marriage not officially registered (i.e. children born out of wedlock) is made easier by expanding the scope of the legal evidence to be submitted to the judge, with a five-year period for settling

²⁸ Two million Moroccans are living in Europe alone!

outstanding paternity cases. It is now required that children get suitable accommodation consistent with their living conditions prior to the parents' separation in divorce.

A fact worth highlighting is the provision in the new law for protecting the rights of Moroccan citizens of the Jewish faith: the new Family Law confirms the principle that Moroccan citizens belonging to the Jewish faith shall be governed by the Hebraic Moroccan Family Law. This is an old practice but it had never been enshrined in an official body of Laws.

Conclusion

If this reform is hailed as an exceptional event in the history of Morocco's women rights movement it is not because of its substantive provisions, which are very positive but not revolutionary. It is rather because, first, it represents a successful test for Morocco's progress in the field of human rights. It is the result of a long and painful process of civil action, controversial debates, and difficult negotiations and tensions in which women's organizations played a primary role, alongside the other components of civil society. It is an example of the remarkable lobbying efforts made by women NGOs.²⁹ Moroccan women organizations have learned the hard way that they must fight for their rights.

Thanks to this mobilization and to the support of *amir al-mu'minin* and King, Muhammad VI, Moroccan women have been able to win this and several other battles: the transmission of the Moroccan nationality through mothers (*Code de la nationalité*), the freedom and right of both spouses to establish residence wherever they choose, and the freedom of wife to start family planning. Moreover, and thanks again to the firm engagement of Morocco for the defense of women rights, women have been involved in the elaboration and implementation of all the national initiatives taken in the Kingdom since 2004, including: the Justice and Reconciliation Commission *c.* 2003-2006, the National Initiative for Human Development since 2005, the reform of the Labor Code in 2004, the program of "Cities Without Shanty-towns" since 2004, the Medical Coverage Project in 2006, and the national campaigns to fight women and girls' illiteracy and to stop violence against women.

Among the latest victories of Moroccan women are the election of the first Woman Mayor, a female president of the Organisation Marocaine des Droits de l'Homme, and the graduation of the first 50 women preachers in the history of Morocco. Thus, there is no doubt that Moroccan women, whether organized in political parties, professional associations or NGOs, have been empowered by their long battle for the revision of the *Mudammwana* and by their numerous victories in the field of women rights. They have become active agents of political, economic, social and cultural changes. Their impact in lobbying for the promotion of Moroccan women's rights and for the improvement of their life conditions is considerable. They have imposed themselves, in fact, as a veritable "*force de proposition*."

However, these parties, associations and NGOs assemble and mobilize the intellectual elite, mainly professors, teachers, senior executives, lawyers, doctors, and civil servants in public administration: these are persons less exposed to socio-economic hardships though they might suffer from the same legal restrictions. They are also mainly based in urban areas, particularly in the largest cities; this means that they inevitably

²⁹ "The Spring of Equality" (*le printemps de l'égalité*) collective was made up of 27 women's NGOs who sought to form a network and adopt a common strategy within the Royal Commission in charge of the reform of the code of personal status.

exclude a large number of women. So, while we can affirm that women in Morocco have ceased to consider themselves a “vulnerable minority,” they still face major challenges of difficult economic conditions, exacerbated by the negative impact of globalization, and illiteracy. Illiteracy is indeed an enormous obstacle to Moroccan women’s empowerment given the wide gap showing that in 2000 illiteracy among Moroccan men stood at 55 percent compared to 64 percent among women. Five years later the gap was wider despite the modest decrease in men’s illiteracy rate at 43 percent compared to 57 percent among women. So long as the literacy rates of women in Morocco remain as catastrophic as they are today—in spite of the enormous efforts of government, NGOs, and civil society at large—and so long as the majority of women bear the burden of poverty, we cannot speak of women’s “empowerment” in Morocco. Investing in the education of women and girls might be the best way of empowering them, for it is only by giving them equal capabilities that we enable them to profit from the rights, resources and opportunities afforded to them by the law.

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