

# Background Paper on Women's Access to Justice in the MENA Region

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## **Introduction**

Access to Justice scholars have moved from a uni-dimensional focus on the procedural and cost barriers that prevent individuals from bringing their claims to court to a more holistic assessment of all aspects of the legal system. Focus has widened from simply an emphasis on “access” to an examination of “justice” as well. The trend is towards thinking of access to justice as three distinct yet interdependent components: substantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy; procedural aspects which focus on the opportunities and barriers to getting ones claim into court (or other dispute resolution forum); and, the symbolic component of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment.

This paper focuses on women’s access to justice in the Middle East and North Africa (MENA) region. Emphasis throughout the paper is on the formal legal system which I also refer to as the “judicial system.” Of course the formal judicial system never operates in a social or political vacuum and it represents only one alternative site of dispute resolution. Nonetheless, there is a need to better understand the judicial system and its impact on women because the courts can help alter (or entrench) social norms as well place limits on government action and create opportunities for women’s legal empowerment.

This study does not purport to provide a complete or exhaustive picture of access to justice in the MENA. This would be an impossible undertaking primarily because of the diversity and breadth of the legal, social and political regimes involved. The ultimate goal is to set out some of the main substantive, procedural and symbolic considerations that must be brought to bear in thinking through an access to justice strategy in the MENA context.

## **The Precursor Access To Justice Question: To What Extent Can Law Be Harnessed To Progressive Social Change?**

Can law be harnessed to progressive social change? It is important to ask this question if only to determine how much time, energy and resources should be directed towards pursuing legal reform as an avenue to women's citizenship and empowerment. The literature concerning litigation and social change is immense.<sup>1</sup> At one end of the spectrum, skeptics maintain that legal reform is the bastion of the naïve and law is merely another instrument of social and economic power. Legal optimists, by contrast, recognize that much work remains to be done before women can claim justice through the legal system. However, they maintain that piece-meal legal reforms can be interpreted as signs of progress and that the legal system can promote women's rights and women's development.<sup>2</sup> From this perspective, legal instruments such as constitutional equality guarantees should be embraced and legal strategies for promoting women's equality should be developed and implemented with the expectation that law will eventually "work itself pure."

I prefer a bifurcated relationship to law which recognizes it both as a source of oppression and liberation. I prefer this image of law because it reflects and presupposes a particular image of marginalized peoples as both objects of oppression and yet not entirely powerless makers of their own meaning.<sup>3</sup> I also prefer this bifurcated relationship to law because it captures law's true complexity. Law can offer hope to those who find little hope in the realm of economics, politics or social status. Thus, constitutional equality guarantees, international human rights instruments and progressive interpretations of religious texts can combine with social and political forces to produce gains for equality seekers. Legal norms can have a hegemonic effect; however, they also possess possibilities of transformation and resistance.<sup>4</sup>

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<sup>1</sup> See generally William A. Bogart, *Consequences: The Impact of Law and Its Complexities*

<sup>2</sup> See generally Reem Bahdi, *Understanding Women's Use of the Internet Through The Rights Debate*

<sup>3</sup> This image has been captured in the works of authors like Nadira Shelhoub Kavorkian.

<sup>4</sup> Michel Foucault, "Space, Knowledge and Power" in Paul Rabinow (ed.) *The Foucault Reader* (1986) 245.

What does this mean for access to justice within MENA? The simple point is legal analysis remains a highly contextualized enterprise. Several points flow from this observation. First, we must remain vigilant of law's own ability to perpetuate injustice and its tendency to rebound against those who seek change by invoking legal means. We must approach law with the realization that even the most carefully crafted legal strategies can produce unintended and undesirable results because the consequences of seeking social change through law have as much to do with untamed legal contexts as with undefined legal texts. Second, it is impossible to assess law or law's impact across MENA as a whole because the differences within legal language, legal cultures and legal traditions are just as important to assessing the possibilities and barriers to women's access to justice as are the similarities.

Nonetheless, one can still set out a typology of access to justice in the hopes of developing a common framework for discussion and a basis for comparing results, strategies and experiences across the MENA region. A common framework can also help identify the reasons for the gaps between formal equality rights and women's lived realities across MENA notwithstanding the differences in the legal cultures. Finally a common framework can promote strategic sharing across national contexts and can facilitate a periodic stock-taking and (re-)evaluation of methods that have proven effective over time.

### **The Substantive Component of Access to Justice**

The following sections consider the substantive component of women's access to justice in MENA. It begins by setting out two sites of potential promise for women's access to justice within MENA: constitutional equality guarantees and transnational human rights instruments. It then illustrates how these promises are retracted through the law itself. Retraction comes in several forms. References to religion and culture within national constitutions and reservations to international treaties place constitutional equality guarantees and international norms in doubt. This section thus briefly identifies the debate about the meaning of religion and culture and its significance for national and

international law. It then moves beyond constitutions and international instruments to ordinary statutes and legal practices and discusses how they impinge on women's equality. Some statutes are explicitly gendered and have an adverse impact on women, others fail to extend needed protections to women, and others have been interpreted or applied by either public or private actors so as to discriminate against women.

### **Equality Guarantees in National Constitutions**

With the exception of Saudi Arabia, most countries in the Middle East and North Africa have constitutions which unequivocally prohibit discrimination or guarantee equality. The precise formulations vary from country to country; they differ in their particular approach to gender equality but can be interpreted as promising gender equality. Extremely important work has been produced about the meaning and nature of Islamic law and whether or how it limits women's rights; this debate proves highly significant in the legal context because all MENA constitutions identify Islam as the source of law and/or identify themselves as Islamic. Debates about the character and precepts of Islam are simultaneously debates about visions of women and women's (in)equality. Yet, relatively little academic and legal scholarship focuses on the equality provisions themselves.

The following chart summarizes the various approaches to equality in various MENA constitutions. The seven headings provide differing formulations of equality. The formulations identify language that can have a broad interpretation and also indicates where specific language can prove potentially limiting of equality. Subsequent research might identify the extent to which expansive or limiting language has controlled the interpretation given to a particular provision by judges and other decision-makers

Country Constitution Example	Formulation 1 Duty of State re. Gender Equality Recognized	Formulation 2 Gender Enumerated –General Equality Guarantee	Formulation 3 No Enumerated Grounds	Formulation 4 Gender Enumerate – Narrow Set of Rights	Formulation 5 Enumerated Grounds Exclude Gender	Formulation 6 Gender Equality Guarantee Explicitly Tied to Islam	Formulation 7 No Equality Guarantee
Syria	Art. 45	Art. 45			Art. 9		
Algeria	Art. 31	Art. 29, 32					
Bahrain		Art. 18					
Qatar		Art. 35			Art. 34		
Egypt			Art.8	Art.40		Art. 11	
Morocco				Art. 8	Art. 5		
Lebanon			Art.7				
Tunisia			Art.6				
Jordan					Art. 6		
Palestine		Art.9					
Iran						Art. 20	
Saudi Arabia							Art.26

### **Formulation #1: The Duty To Take Positive Measures To Promote Gender Equality**

Some constitutions specifically recognize the right to equal treatment and equal benefit of the law on the basis of sex and further establish the duty of the state to ensure such a result. The Algerian and Syrian constitutions are perhaps the most robust in this regard because they explicitly stipulate that the state has obligations to take positive measures to promote gender equality. Article 29 of the Algerian Constitution states that “[a]ll citizens are equal before the law” and explicitly prohibits discrimination on several grounds including sex “or any other personal or social condition or circumstance.”<sup>5</sup> The duty of the state to “ensure equality of rights and duties of all citizens, men and women” is contained in article 31 which requires the state to remove “the obstacles which hinder the

<sup>5</sup> Constitution of the People's Democratic Republic of Algeria available at [http://www.servat.unibe.ch/law/icl/ag00000\\_.html](http://www.servat.unibe.ch/law/icl/ag00000_.html)

progress of human beings and impede the effective participation of all in the political, economic, social and cultural life.” Article 32 provides further gender equality guarantees: “The fundamental human and citizen's rights and liberties are guaranteed. They are a common heritage of all Algerians, men and women, whose duty is to transmit it from generation to another in order to preserve it and keep it inviolable.”

Syria’s Constitution also provides explicit and robust gender equalities. In addition to a general equality clause which recognizes “[t]he citizens are equal before the law in their rights and duties,”<sup>6</sup> the Syrian constitution contains a provision which not only specifically recognizes women’s rights to equality of opportunity but which also acknowledges the state’s duty to produce equality of results for women “enabling them to fully and effectively participate in the political, social, cultural, and economic life.”<sup>7</sup>

Recognition of the state’s positive duty to promote equality -- as opposed to a negative duty to refrain from interfering with certain rights -- is consistent with international human rights norms. However, few national constitutions are as explicit as the Algerian and Syrian constitutions in expounding the obligation of the state to take positive measures to promote equality. The Canadian Charter of Rights and Freedoms, for example, sets out the right to equality in section 15(1) which reads

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>8</sup>

Canadian law places no positive obligation on the state to provide for a particular policy or benefit; however, once a benefit is made available, it must be distributed without discrimination. By contrast, the Algerian and Syrian constitutions recognize, at least on

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<sup>6</sup> Article 25(3) of Syrian Constitution available at [http://www.servat.unibe.ch/law/icl/sy00000\\_.html](http://www.servat.unibe.ch/law/icl/sy00000_.html)

<sup>7</sup> Article 45, *Ibid*

<sup>8</sup> Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 available at <http://laws.justice.gc.ca/en/charter/>

their face, the obligation on the state to remove barriers and actively promote women's equality.

## **Formulation #2: Gender As An Enumerated Ground of Non-discrimination**

The majority of MENA state constitutions read more like the Canadian Charter; they recognize the right to equality on the basis of gender but do not explicitly recognize the duty of the state to promote and ensure these rights. Article 9 of the Palestinian Basic Law declares that “all Palestinian are equal under the law and judiciary, without discrimination because of race, sex, colour, religion, political views, or disability.”<sup>9</sup> Bahrain provides that “People are equal in human dignity, and citizens are equal before the law in public rights and duties. There shall be no discrimination among them on the basis of sex, origin, language, religion or creed” [article 18].<sup>10</sup> Qatar, for its part, states that “[t]he Qatari society shall be based on justice, kindness, freedom, equality and morals” [article 18]; “[a]ll citizens are equal in general rights and duties” [article 34]; and, “[a]ll people are equal before the law. There shall be no discrimination on account of sex, origin, language, or religion” [article 35].<sup>11</sup> Gender or sex represents an enumerated ground of non-discrimination in relation to the general equality guarantee. The Egyptian constitution is somewhat unique in that it sets out a general right to equality of its citizens but defines the right as “equality of opportunity.”<sup>12</sup> This is somewhat restrictive language in that it focuses on formal equality but does not set out explicitly the right to substantive equality or equality of results. Nonetheless, there is nothing within the text of the constitution itself which necessarily prohibits equality of results.<sup>13</sup>

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<sup>9</sup> The amended Basic Law (2003) available at <http://muqtafi.birzeit.edu/mainleg/14138.htm>

<sup>10</sup> Constitution of the Kingdom of Bahrain available at [http://www.servat.unibe.ch/law/icl/ba00000\\_.html](http://www.servat.unibe.ch/law/icl/ba00000_.html)

<sup>11</sup> Constitution of Qatar available at <http://www.al-bab.com/arab/docs/qatar/constitution2003.htm>

<sup>12</sup> Article 8, Constitution of the Arab Republic of Egypt available at <http://www.uam.es/otroscentros/medina/egypt/egypolcon.htm>

<sup>13</sup> See esp. Article 40, *Ibid*: All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed (emphasis added – the significance of “public rights” is not clear on the face of the text but some would worry that this implies that anything which is private cannot be the subject of rights)

### **Formulation #3: Gender As An Enumerated Ground In Relation to Narrow Set of Rights**

Some MENA jurisdictions recognize a general right to equality without reference to gender but explicitly guarantee gender equality in relation to a particular set of rights. The Moroccan Constitution, for example, stipulates that “[a]ll Moroccan citizens shall be equal before the law” [article 5] and that “[m]en and women shall enjoy equal political rights” [article 8].<sup>14</sup>

### **Formulation #4: General Right to Equality, No Enumerated Grounds Recognized**

Still other MENA constitutions recognize the right to general equality in law without enumerated grounds and hence make no explicit reference to sex. The preamble to the Lebanese Constitution declares that “Lebanon is a social democracy based on ... social justice and equality in rights and duties between all citizens without discrimination or preference.”<sup>15</sup> It further recognizes that “[a]ll Lebanese are equal before the law. They equally enjoy civil and political rights and equally are bound by public obligations and duties without any distinction.”<sup>16</sup> Similarly, article 6 of the Tunisian Constitution provides that “[a]ll citizens have the same rights and the same duties. They are equal before the law.”<sup>17</sup> No grounds or basis for non-discrimination (such as gender, race, class etc.) are enumerated.

### **Formulation #5: Gender Specifically Excluded As an Enumerated Ground**

Yet another group of MENA nations have constitutions which guarantee equality as a general matter and then set out grounds of non-discrimination which *exclude gender*. Article 6 of the Jordanian Constitution, for example, sets out that “Jordanians shall be equal before the law” and further provides that “There shall be no discrimination between them as regards to their rights and duties *on grounds of race, language or religion*.”

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<sup>14</sup> Constitution of Morocco available at <http://www.al-bab.com/maroc/gov/con96.htm>. See also Article 21 which references Islam and set out duties of the government in relation to the rights of women.

<sup>15</sup> Constitution of Lebanon cited in Welchman and Hossain, *Honour: Crimes, Paradigms and Violence Against Women* at 119.

<sup>16</sup> See Constitution of Lebanon available at [http://www.servat.unibe.ch/law/icl/le00000\\_.html](http://www.servat.unibe.ch/law/icl/le00000_.html)

<sup>17</sup> Constitution of Tunisia available at [http://servat.unibe.ch/icl/ts00000\\_.html](http://servat.unibe.ch/icl/ts00000_.html)

## **Formulation #6: Gender Equality Explicitly Tied To Islam**

Egypt's constitution contains a potentially self-restricting clause: article 11 recognizes gender equality to the extent consistent with Islamic law. Article 11 reads:

The State shall guarantee the proper coordination between the duties of woman towards the family and her work in the society, considering her equal with man in the fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.

Iran's constitution follows a similar pattern. Article 20 recognizes equality between citizens in conformity with Islamic law. Article 20 reads: "All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria." Article 21 stipulates that the government must ensure women's equality and must accomplish a prescribed list of social goals related to women's role in society including, *inter alia*, the growth of women's personality, the protection of mothers, and special insurance for women without support.<sup>18</sup>

There is, of course, significant debate about whether Islamic jurisprudence ultimately supports or limits women's equality rights. The equality provisions remain ambiguous on this point. For example, there is nothing in the Egyptian equality guarantee which says that Islam limits women's equality. Instead, one can interpret the provision as recognizing that gender equality is desired by and consistent with Islam.

## **Women's Equality & Other Rights in Transnational Human Rights Guarantees: Significance Within MENA**

All MENA states, with the exception of Qatar and Iran, are parties to *The Convention on the Elimination of All Forms of Discrimination Against Women* (The Women's Convention). Of these states, all but Bahrain, Brunei Darussalam, Djibouti and the

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<sup>18</sup> Constitution of the Islamic Republic of Iran available <http://www.iranonline.com/iran/iran-info/Government/constitution.html>

United Arab Emirates have filed reports with the Committee on the Elimination of Discrimination Against Women (CEDAW) setting out their progress in promoting gender equality within their territory.<sup>19</sup> Ratification or accession to international conventions constitutes a politically significant act in that it indicates a willingness to adopt a set of values and be subjected to international scrutiny. Ratification also has legal significance, because it creates the possibility of appealing to international norms as legal standards within domestic courts.

Ratification of international instruments carries different legal significance for national laws depending on the country under consideration. In general, monist states accept the paramountcy of international law upon ratification of a specific instrument. Some MENA countries are monist in their orientation. Algeria, for example, accepts that international legal obligations supersede Algerian domestic law.<sup>20</sup> Lebanon acknowledges the same by virtue of article 2(2) of the Law of Civil Procedure.<sup>21</sup> Dualist states, by contrast, require an act of incorporation before international treaties become part of the domestic law.

Yet, the impact of international law upon national orders – as opposed to its formal status - does not always depend on whether a given state is monist or dualist in its orientation. Studies across jurisdictions have demonstrated that international law can have more of an impact upon dualist states that one might expect, even absent an act of incorporation, because judges rely upon international law as an interpretive aid. In this manner, international norms are brought to bear on the development of national laws regardless of the monist-dualist political divide.<sup>22</sup> Hence, creative litigation or adjudication based on international norms remains a possibility across MENA countries.

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<sup>19</sup> CEDAW – Status of Country Reports (Updated September 25, 2007)  
<http://www.un.org/womenwatch/daw/cedaw/reports.htm>

<sup>20</sup>Initial Report of Algeria (1998) to CEDAW at par. 3.2

<sup>21</sup> *Honour* at 119.

<sup>22</sup> See generally Reem Bahdi, “Transjudicialism and the Five Faces of International Law in Commonwealth Courts”

International treaties provide a foundation for promoting women's equality because they set out basic human rights guarantees and stipulate that these rights must be provided on an equal basis to all individuals living with the territory or subject to the jurisdiction of the state. Rights recognized in international treaties which are relevant to MENA include, *inter alia*, the right to housing, the right to be free from domestic violence, the right to freedom of movement, the right to full development of one's personality, the right to an adequate standard of living and the right to vote. Some rights, such as the right to be free from domestic violence, are not specifically enumerated in a treaty but have been read into its provisions through progressive interpretation by committees which oversee the development and implementation of the treaties.<sup>23</sup> *The International Covenant on Civil and Political Rights* also includes also contains a free-standing right to equality which been interpreted to apply to national laws and not simply enumerated covenant rights.<sup>24</sup>

*The Arab Charter on Human Rights*<sup>25</sup> also recognizes the important of gender equality. The Charter has not yet come into force; however, it provides a powerful statement that gender equality constitutes a fundamental value in MENA states. Article 3(1) of the Charter prohibits discrimination on the basis of gender:

1. Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, color, sex, language, religion, opinion, thought, national or social origin, property, birth or physical or mental disability.

Furthermore, Article 3(2) requires states to “undertake necessary measures to guarantee effective equality.” This reflects the duty in international law to “respect, protect and

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<sup>23</sup>CEDAW, General Recommendation No. 19 available at <http://www1.umn.edu/humanrts/gencomm/gener19.htm>

<sup>24</sup>Human Rights Committee, General Comments No. 18 and 31 available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>25</sup>For a concise overview, see *The League of Arab States and the Arab Charter on Human Rights By Mohammad Amin Al-Midani* Arab Center of International Humanitarian Law and Human Rights Education, Strasbourg, France. (October 20, 2005) available at [http://www.acihl.org/articles.htm&article\\_id=6](http://www.acihl.org/articles.htm&article_id=6)

ensure” rights. In other words, states have a positive duty to effect the realization of rights. Significantly, the Charter also refers to the rights of women under the *Shari'a* as mandating “positive discrimination,” implying that the *Shari'a* gives women rights and protections that men do not have and that affirmative action programmes aimed at ameliorating the disadvantaged position of women in society would be in keeping with Islam.<sup>26</sup>

Other regional instruments also set out the right to gender equality. The Organisation of the Islamic Conference passed its *Covenant on the Rights of the Child in Islam* (2004), which expressly protects the equality of children, regardless of sex, to enjoy their rights and freedoms. Moreover, *The Cairo Declaration on Human Rights in Islam*, adopted by the Nineteenth Islamic Conference of Foreign Ministers states in Article 1 that all men (by implication, all persons) are equal in terms of basic human dignity, as well as in terms of basic obligations and responsibilities, regardless of, *inter alia*, sex. Finally, Article 6 of *The Cairo Declaration on Human Rights in Islam* states that:

- (a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform; and has her own civil entity and financial independence, and the right to retain her name and lineage.

Hence, regional human rights documents applicable to MENA nations and specific to Islam reflect international human rights values and uphold the basic principle of gender equality.

### **Limits on Formal Equality Guarantees in National and International Law**

The precise and proper relationship between the declaration of Islam as the state religion, the emphasis upon Arab history and culture, the privileging of the family as the foundation of society and the equality guarantees set out in the various constitutions remains contested across MENA jurisdictions. The following section identifies areas in

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<sup>26</sup> Article 3(3): Men and women are equal in human dignity, in rights and in duties, within the framework of the positive discrimination established in favor of women by Islamic *Shari'a* and other divine laws, legislation and international instruments. Consequently, each State Party to the present Charter shall undertake all necessary measures to guarantee the effective equality between men and women.

which the law limits women's equality. It also briefly identifies the parameters of the debate between those who argue that Islam and women's equality can co-exist and those who argue that equality can only be fully realized within a secular understanding of rights and women's relationship to the state.

### **Religion and Culture Within National Constitutions**

Saudi Arabia is the only state which does not unambiguously recognize some form of equality among its citizens as a constitutional principle. Adopted by Royal Decree of King Fahd in 1993, Saudi Arabia's Basic Law sets out human rights protection in article 26 which simply reads, "[t]he state protects human rights in accordance with the Islamic *Shari'ah*."<sup>27</sup> All of the MENA constitutions include a reference to Islamic law and Arab culture as the source of legislation or as the defining feature of the state.<sup>28</sup> As with the rights guarantees, the specific formulations vary.

Some constitutions simply recognize Islam as the religion of the state without drawing implications from this fact. Article 2 of the Jordanian Constitution, for example, simply states that "Islam is the religion of the State and Arabic is its official language." Article 2 of Algeria's constitution similarly observes that "Islam is the religion of the State." Other constitutions contain references to culture and religion by references to the family's place in society. Bahrain's Constitution is illustrative. Article 5(b) in particular focuses on women's duties to the family. It reads

b. The State guarantees reconciling the duties of women towards the family with their work in society, and their equality with men in political, social, cultural, and economic spheres *without breaching the provisions of Islamic canon law (Shari'a)*.

Qatar's constitution also explicitly links family, religion and nation. Article 21 defines the relationship between the triad.

The family shall be the foundation of the society. Its pillars shall be religion, morals and love for the nation. The law shall organise means of protecting the family, supporting its principles, bolstering its ties, preserving ideals of matrimony, childhood and the elderly.

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<sup>27</sup> Basic Law (1993) available at [http://www.servat.unibe.ch/law/icl/sa00000\\_.html](http://www.servat.unibe.ch/law/icl/sa00000_.html)

<sup>28</sup> Example

MENA states tend to define the family as the basic unit of society. As a result, women's relationship with the state has been largely mediated through the family which is itself mediated and defined by the administrative state. This can prove a double-edged sword for women and women's rights. On the one hand, it can support laws which promote equality based on different needs of men and women. Maternity leave for women is one such example.<sup>29</sup> On the other hand, situating women within the family can (and has) produced a series of laws which reify conservative social norms and expectations about women's proper role in society and which ultimately serve to undermine women's rights.

Conservative interpretations of constitutional texts have helped justify women's inequality by using references to religion and culture to cut holes in women's equality guarantees and then subsequently invoking those holes to justify statutes and laws that discriminate against women. According to this view, women's rights are defined by religion and culture so that the equality guarantees set out in national constitutions and international provisions are subordinated to religion and culture. Religion and culture define the nature and scope of the claims to equality and not visa-versa. The general interpretive approach is to insist that religious texts set out the range of women's rights claims. Thus, for example, limits on women's standing in both the formal and informal legal system are sometimes derived from The *Quranic Verse 282.2* which reads "...and get two witnesses out of your own men and if there are not two men then a man and two women such as ye choose for witnesses so that If one of them errs the other can remind her ...' This is often interpreted to mean that a woman's testimony requires corroboration and is not of equal weight to a man's testimony.

### **Religion and Culture as Reservations to International Conventions**

MENA states also tend to file reservations against international human rights instrument indicating that their provisions do not apply to the extent that they contradict Islamic *Shari'a* or specific laws which impact upon women, particularly in the area of family or

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<sup>29</sup>See *Arab Human Development Report: Towards The Rise of Women in the Arab World*

personal status laws.<sup>30</sup> In other words, they seek to preserve a space within the domestic law that cannot be touched by international human rights norms. Rooting themselves firmly within a cultural relativist position, critics of international law sometimes argue that international law is Western, non-Arabic or non-Islamic in its orientation. They thus claim that invocation of international norms, particularly as it relates to women, amounts to an imposition of Western values upon the Arab culture or Islamic faith. Some critique the Western liberalism for failing to understand and cherish the relational self – that is, the value of not simply being “left alone” to do as one chooses but the ability to build a life of connection to friends and family.<sup>31</sup>

### **What Is The Relationship Between Equality and Religion/Culture?**

One of the most pressing and complex questions in women’s access to justice scholarship concerns the extent to which the Islamic faith and Arab culture prove *necessarily* antagonistic to women’s rights. Some argue that Islam and the Arab culture do recognize women’s rights to equality but that they have been misinterpreted over time. This reformist position relies on a particular interpretive move: it generalizes specific *Quranic* pronouncements into broad principles, and then seeks to apply those broad principles into present socio-economic contexts. Asma Barlas, for example, notes that “[t]he theme that men and women commenced from a single Self and constitute a pair is integral to *Quranic* epistemology.”<sup>32</sup> She on this basis argues that The *Quran* recognizes differences between men and women but does not sanction inequality between them. Accordingly, even Saudi Arabia’s exclusive reliance on religious norms within its

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<sup>30</sup> Reservations by Algeria to The Women’s Convention, for example, reads: 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.

<sup>31</sup> This position is recognized and discussed in the *Arab Development Report* at 6: The spread of the concept of “women’s empowerment” in the Arab region has excited the rancour of certain socio-political forces. They have tended to see it as “imposed” by the West and not emerging from either the realities or needs of Arab societies, which are based on the entrenched role of the family as society’s basic building block.

<sup>32</sup> Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur’an* at 134.

constitution need not defeat gender equality. This reformist message has been adopted to differing degrees within MENA.

Others, however, contend that lasting change can only be secured by disassociating faith and culture from the law. Lama Abu Odeh, for example, chronicles how Islamic law has gradually lost its jurisdiction over most social affairs within Muslim countries except in the area of family law. She then argues that Egypt's ruling elites have attempted to chart a middle path between feminists who call for women's equality and liberation and conservative forces who oppose them. The process of "splitting the difference" has created limiting legal precedents and ultimately boxed women's rights into a corner. The only way to push for reforms in family law is to continue the agenda of secularizing the legal system.<sup>33</sup>

Ultimately, experiences of women's groups across MENA reaffirm that the texts themselves do not control the debate. This is hardly a complicated or controversial observation. Much depends on the social and political context against which texts are interpreted. Consequently, it is often difficult to know what legal strategies prove the most progressive. Legal developments such as the women's right to no-fault divorce are welcome by some women's groups but criticized by others. It may be however, that strategies which appear conceptually inconsistent may prove strategically synergistic. A pluralistic approach which not only tolerates but fosters seemingly contradictory approaches to women's equality may help enlarge the field of possibilities by expanding the poles of argumentation. The more radical the margins, the more space there is in the middle.<sup>34</sup>

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<sup>33</sup> Lama Abu Odeh explored this idea in "Modernizing Muslim Family Law: The Case of Egypt" (2004) Oxford U Comparative L Forum 3 at [ouclf.iuscomp.org](http://ouclf.iuscomp.org)

"one wonders if there is a way that the religious texts could have been done away with altogether for representing a set of ethical teachings or rules that are bound by their historical context. Such an act would have furthered the cause of secularism in modern day Egypt."

<sup>34</sup> See the section below relating to "voices in the wilderness"

## **Relationship Between International Human Rights and Religion/Culture**

Much of the debate concerning the relationship between Islam and women's equality in the domestic realm applies to international norms. In response to those who argue that international law is the repository of Western values, proponents of international law make several arguments in favour of international norms. They acknowledge that gender equality can be turned into an instrument of Orientalism, but argue that such need not necessarily be the case.<sup>35</sup> They reject the claim that international human rights conventions represent the unilateral imposition of Western identity upon Arab or Muslim entities because such arguments rely false assumptions.

First, international human rights norms are not imposed upon states. When states ratify a convention, they express their willingness to be bound by international norms.<sup>36</sup> While MENA states tend to file reservations indicating that their international commitments should be read in light of Islamic legal obligations or that certain areas of law such as personal status laws should be exempt, this begs the question of what exactly the Islamic texts require. Second, it is not easy to disentangle international, Western, Arab and Islamic norms. Arab culture and Islamic faith not only receive international and transnational norms, including those concerning women's rights, but also participate in shaping them.<sup>37</sup> Islamic law has helped shape the foundations of the common law<sup>38</sup> and Arab leaders helped draft and ensure the adoption of the Universal Declaration of Human Rights. For example, Charles Malik of Lebanon, was part of the Executive of the Commission on Human Rights (UDHR). As United Nations Third Committee Chairman and Commission on Human Rights Rapporteur, Malik played an important role in the drafting of the UDHR. At various stages in the drafting, the UDHR was sent to a small

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<sup>35</sup> See for example Reem Bahdi, *Truth and Method* In the Domestic Interpretation of International Human Rights Norms, CJLJ

<sup>36</sup>Vienna Convention on the Law of Treaties

<sup>37</sup> See generally Mary Ann Glendon Waltz and Susan Eileen, "The Rule of Law in the University Declaration of Human Rights" and "Universal Human Rights: The Contribution of Muslim States" in *Human Rights Quarterly* - Volume 26, Number 4, November 2004, pp. 799-84

<sup>38</sup>John Makdisi, *The Islamic Origins of the Common Law*

drafting sub-committee which included Omar Loutfi of Egypt. Arab states figured prominently among those who voted in favour of the UDHR.

Thus, the notion that a deep historical and conceptual divide exists between the West and Arab or Islamic cultures and that therefore some norms are purely Arab or Islamic while others remain purely Western proves historically and conceptually inaccurate. All states, including MENA states, partake of multiple identities. They are not simply “Arab” or “Islamic” in nature but also transnational entities that participate in the community of nations. Recent scholarship from the West which posits relational conceptions of rights across legal contexts helps reinforce that the conceptual divide between Arab and West may not be as great as the cultural relativists imagine.<sup>39</sup>

### **Beyond Constitutions and International Treaties:**

#### **National Laws Which Are Gendered On Their Face**

While many laws across the MENA region do acknowledge women’s rights to be treated the same as men, some laws dictate that men and women should be treated differently. Difference in treatment need not prove detrimental to women.<sup>40</sup> Sometimes, however, difference in treatment can have adverse impact on women’s individual and collective lives. Nationality and citizenship laws, personal status laws<sup>41</sup> and penal codes all contain provisions which treat men and women differently in a way which undermines women’s equality and citizenship. Examples can be drawn from across the MENA region.

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<sup>39</sup> See for example, Martha Minow and Mary Lyndon Shanley, “Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory”

<sup>40</sup> See the discussion of substantive equality below.

<sup>41</sup> There are a number of specialist areas within Islamic Personal Laws but the areas where the discrepancies and divergences in interpretations are most blatant are :

- i.) Choice of Spouse (Rights of a Guardian to interfere with a Woman's Right to Choose)
- ii) Polygny ( The existence of this right? Extent of Judicial interference and monitoring?)
- iii) Unilateral right to repudiate a marriage contract under the *Shari'a*
- iv) Women as Witnesses
- v) Bodily integrity/ reproductive rights.

Algeria's nationality and family codes, for example, treat women as legal minors. Algerian women, unlike men, cannot confer citizenship on their children unless the father is unknown, stateless or foreign but born in Algeria.<sup>42</sup> Moreover, Algerian women's equal housing rights are recognized in practice or in the legal texts. Article 52 of the Algerian family code provides that if there is only one family home, it should go to the husband in the case of divorce because he is considered the head of the family.<sup>43</sup>

Laws across MENA jurisdictions also discriminate against women because they fail to protect them from murder. Penal codes permit reduced penalties or exoneration for so called "crimes of honour." For example, the Jordanian Penal Code provides for a reduced penalty for men who murder their female relatives in cases of honour killings.<sup>44</sup> Various amendments to the Code have been defeated in Parliament, with some representatives complaining that proponents of the amendments were "succumbing to the West, legalising obscenity and harming the society and women's morals."<sup>45</sup>

Distinctions in treatment based on gender also characterize inheritance laws across MENA. Women's rights to inheritance derives from a complex matrix of legal texts and traditions which are partly inspired by religion and culture and partly shaped by history. While one cannot generalize across MENA, it is generally presumed that women are entitled to half the inheritance of similarly situated male heirs. Scholars and advocates who advance this position tend to ascribe it to Islam and justify it on the basis that men are under an obligation to maintain the family while women remain free from such

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<sup>42</sup>Sameen Nazir, Women's Right in the Middle East and North Africa: Citizenship and Justice (Freedom House) available at <http://www.freedomhouse.org/template.cfm?page=170>

<sup>43</sup>*Ibid*

<sup>44</sup> See generally Reem Abu Hassan and Lynn Welchman, "Changing the Rules? Developments in 'Crimes of Honour' in Jordan" in *Honour*:

<sup>45</sup> Jordan Times Thursday, January 27, 2000 Lower House again rejects canceling Article 340 of Penal Code By Rana Husseini available at <http://www.jordanembassyus.org/01272000001.htm>

burdens.<sup>46</sup> Laws and practices concerning inheritance rights differ drastically across MENA; however, even the most equality inspired states such as Tunisia have retained differences based on sex within their laws.

While some argue that gendered laws simply reflect the different needs and obligations between the sexes within society, at least some women's groups tend to regard such laws as discriminatory for several reasons. First, they argue that honour crimes represent a blatant violation of the right to life as recognized in both national constitutions and religious tradition. Second, they point out that the socio-economic conditions which may have supported certain laws have changed and thus the laws themselves must change. Inheritance rights, for example, might at one point have been justified on the basis that men have a duty to provide for their families. However, society has changed: women want, need or can provide for the family. Moreover, inheritance laws have produced the opposite effect – rather than ensuring that women are well provided for, they have served to disenfranchise women across MENA who, as a whole, are worse off than women in most parts of the world. Hence, the traditional justification for unequal inheritance – that men will take care of women – is no longer valid.

Women's rights advocates across MENA have found varying success in seeking abolition of laws which discriminate against women. Tunisia is often cited as the hallmark of progressive reforms. Tunisia modified its legislation prohibit polygamous unions by a revolutionary reinterpretation of *Quranic* injunctions. Verse 4.3 explicitly allows up to 4 wives but goes on to say '*if you fear that you will not be equitable then marry only one*'. And verse 129.3 states '*and you have it not in your power to be equitable between wives, even though you may wish it*'. The first verse may be enabling but the requirements of equity between wives and its elaboration in verse 129 were interpreted as being disabling. Therefore, the reading given to the issue of polygamy in Tunisia is that the *Quran* prefers monogamy and thus polygamy is outlawed as prevention of injustice is better than curing

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<sup>46</sup> Centre on Housing Rights and Evictions, "In Search of Equality: A Survey of Law and Practice Related to Women's Inheritance Rights in the Middle East and North Africa" (2007) hereinafter COHRE available at [http://www.cohre.org/view\\_page.php?page\\_id=180](http://www.cohre.org/view_page.php?page_id=180)

it. The above is a milestone example of effecting reform in the substantive reading of *Quranic* injunctions to further gender parity.

### **Discriminatory Interpretation and Application of Gender-Neutral Laws By Public and Private Actors**

Even where the law is either neutral on its face or purports to provide special protection for women, discriminatory interpretation and enforcement of laws present another type of barrier to women's equality across a number of legal regimes. A recent study of Islam, law and inheritance, for example, suggests that Islamic teachings can in fact support generous inheritance rights for women but those charged with interpreting the law choose to adopt less charitable interpretations. And, in any event, practice results in women getting less than their rightful share of their inheritance even as defined under less generous interpretations of existing laws.<sup>47</sup>

Women also face discriminatory application of the law in housing. In Algeria, for example, women are systematically denied or prevented housing by municipal authorities on the claim that they can be taken care of by their families. Presumably women who have families with whom they want to live would not be seeking housing beyond the family structure. But, authorities work on the assumption that families should take women in. Accordingly, housing advocates in Algeria have been pressing for more protections for women in housing, particularly in the case of divorced, widowed or single women.<sup>48</sup>

So called "crimes of honour" also betray patterns of discriminatory interpretation and application of the laws across MENA countries. Of course honour crimes directly discriminate against women (and thus fall into the first category of barriers to women's equality). However, they also fall into the second category – indirect discrimination – because judges use their interpretive discretion to expand the cases and circumstances in which honour can be invoked by the defense. The Lebanese case proves instructive.

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<sup>47</sup> See generally COHRE

<sup>48</sup> Nazir, Freedom House, Algeria

Article 562 of the Lebanese Penal Code<sup>49</sup> permits judges to mitigate the sentence of a man who kills a female relative whom he catches engaging in sex outside of marriage. This provision is intended to benefit an accused who acts out of outrage over a violation of “family honour.” Article 562 reads:

Whosoever surprises his spouse or one of his ascendants or descendants or his sister in a crime of observed adultery, or in a situation of unlawful intercourse, and kills or injures one of the without deliberation shall benefit from the excuse of mitigation.<sup>50</sup>

This provision clearly imposes several condition precedents before mitigation of a sentence can be invoked: the male relative must surprise the female relative, the adultery must be observed, and the harm must be inflicted upon her “without deliberation.” Clearly, the individual judge is left to determine whether the facts in a given case meet the criteria for mitigation set out in Article 562. Mitigation is mandatory if the conditions are met although the extent of mitigation is not prescribed by law and is thus also left to the discretion of the judge.

Interestingly, a study of cases involving the murder of a woman by a male relative reveals that Article 562 has never been applied by the court.<sup>51</sup> Nonetheless, it casts its shadow on this genre of murder cases. First, its mere existence in Lebanon’s legal books permits the accused to try to disguise the motivations and circumstances of the murder.<sup>52</sup> Second, it opens the door to and legitimizes the notion that mitigation should be afforded the accused where “family honour” is claimed as the motivating force behind the murder or harm inflicted on a woman. Indeed, some commentators conclude that Article 562 has never been applied by the court because of the difficulty of establishing the necessary elements. Instead of meeting the strict terms of Article 562, Lebanese courts have instead allowed the “defence of honour” to be invoked within the confines of other penal

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<sup>49</sup> *Honour* at 115

<sup>50</sup> *Honour* at 118

<sup>51</sup> *Honour* at 121

<sup>52</sup> *Honour* at 121

provisions as justification for imposing a lenient sentence upon an individual convicted for killing a female relative.<sup>53</sup>

### **Failing To Address Women’s Different Needs: Formal and Substantive Equality**

Gender discrimination can also be perpetrated in the name of women’s legal equality. In order to understand this claim, we need to understand the differences between two types of legal equality. Legal equality guarantees can be divided into formal equality and substantive equality. Formal equality generally calls for gender neutral laws which do not draw distinctions in treatment on the basis of sex. Gender-neutral laws presuppose equality of treatment, means or opportunity. Formal equality envisions equality of treatment or opportunity and rests on the notion that “like cases be treated alike.” Generally, a formal equality paradigm in relation to gender aims at securing the same rights for women as are available to men. The quest, in other words, is for gender neutral laws which treat men and women the same.

To be sure, formal equality claims have produced important gains for women in various parts of the world, including MENA nations. For example, Egypt<sup>54</sup> and Algeria<sup>55</sup> both cited no fault divorce as a sign of progress for women in their reports to the Committee on the Elimination of Discrimination Against Women (CEDAW). Under the old regimes, women were required to petition for divorce and had to demonstrate cause while men could seek a no-fault divorce.

Gender neutral divorce rights are consistent with women’s formal equality in several ways. It recognizes the equal decision making capacity of men and women and it makes it easier for a woman to leave a violent marriage. Women’s groups which support the move towards no fault divorce point out that the requirement that woman give up dowry

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<sup>53</sup> *Honour* at 111 to 134: article 253 is the most commonly used provision – this provisions allows the judge to reduce the penalty imposed on the convicted individual if extenuating circumstances exist

<sup>54</sup> Egypt, Initial Country Report to CEDAW

<sup>55</sup> Algeria, Initial Country Report to CEDAW

and other payments from the former spouse can be justified on the basis that both partners are relieved of their obligations under the marriage contract. No fault divorce undoubtedly advances women's access to justice because at least some women will be able to afford to invoke the new laws.

### **Why Substantive Equality And What Does It Require?**

Yet, the formal equality approach can also generate or perpetuate inequality for at least some women. The formal equality approach can mean that the law remains silent where it should loudly and clearly provide much needed protection for women. Access to justice scholars and advocates across jurisdictions tend to agree that equal enjoyment of rights cannot be achieved simply through the passage of laws and policies which are gender-neutral. Rather, states have a positive obligation to ensure substantive equality for their nationals without distinction on the basis of gender. Substantive equality between the sexes requires that men and women, as a group, enjoy equality of results and not simply equality of treatment or opportunity. States therefore have a duty to pass laws that specifically protect women. They cannot rely on gender neutrality as a legal strategy.

As the Montreal Principles on women's economic, social and cultural rights stress

Gender neutral laws and policies can perpetuate sex inequality because they do not take into account the economic and social disadvantage of women; they may therefore simply maintain the status quo.

When viewed through the lens of substantive equality some legal developments appear less progressive than when viewed through a formal equality lens. Some human rights groups, for example, argue that Egypt's much touted family law reform has only created the illusion of progress because most women cannot afford a no-fault divorce and thus the law will have little impact on their lives.<sup>56</sup> Moreover, divorce remains stigmatized in MENA culture because a woman who seeks a divorce is considered either inappropriately

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<sup>56</sup> See for example Human Rights Watch, *Divorced From Justice* available at <http://hrw.org/reports/2004/egypt1204/>

disobedient or uncaring about her family life and thus morally flawed. She can be shunned by family and friends and may be considered to have brought shame upon her household.<sup>57</sup> Such social judgments are of course magnified if children are involved. While the right to divorce represents a legal victory it may generate social and economic costs which most women can ill afford to pay. Thus, despite the law on the books, women and men do not effectively share equal rights to unilaterally repudiate their marriage. Women still face greater barriers than men in seeking divorce.

### **Pursuing Substantive Equality: Social Context**

A substantive equality approach recognizes that *patterns of disadvantage* and oppression exist in society and requires that law makers and government officials take this into account in their actions. It examines *the impact of law* to make sure that it promotes full participation in society by everyone, regardless of personal characteristics or group membership.<sup>58</sup> Substantive equality requires that rights be interpreted, and that policies and programs - through which rights are implemented - be designed in ways that take women's socially constructed disadvantage into account. In short, laws and policies must secure equal benefits for women.<sup>59</sup>

Substantive equality demands that patterns in women's lives be recognized from individual women's stories and that these patterns be addressed in fashioning and applying law. It necessitates an understanding of social context or a careful assessment of women's lives. Given that substantive equality requires an in-depth understanding of social context, one must make claims about strategies aimed at promoting equality with

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<sup>57</sup>See for example the debate surrounding reform in Jordan. On June 27, by a vote of 44–39 by the deputies present, the lower house of the parliament narrowly rejected the Personal Status Law, which would have given women the right to divorce their husbands in return for monetary compensation. Opponents of the law, which would also have raised the legal age of marriage to 18 for both sexes, argued that it would undermine family values, increase immorality, and contravene Islamic law. Source: <http://www.britannica.com/eb/article-9398360/Jordan#812491.hook>. See also See Gihane Tabet, Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine Syria (2005) available at [http://portal.unesco.org/shs/en/files/8090/11313662721Women\\_in\\_Personal\\_Status\\_Laws.pdf/Women\\_in\\_Personal\\_Status\\_Laws.pdf](http://portal.unesco.org/shs/en/files/8090/11313662721Women_in_Personal_Status_Laws.pdf/Women_in_Personal_Status_Laws.pdf)

<sup>58</sup>Court Challenges Programme <http://www.ccppcj.ca/e/rights/rights-charter.shtml#equality>

<sup>59</sup>Montreal Principles on Women's Economic, Social and Cultural Rights, article 9

caution. Such strategies must be devised with the direct input of those whose lives they are designed to protect. This can usually only be attained through direct communication with the women whose lives are under consideration. Such an approach proves respectful of the right to self-determination. It also results in an understanding of the real barriers to equality and the kinds of solutions which must be fashioned to produce such results.

### **Pursuing Substantive Equality: A Cautionary Note**

Substantive equality requires difference in treatment for the purposes of securing women's rights and respecting the right to live a life of dignity. One must be careful that substantive equality concepts are not turned on their head to justify different treatment between men and women so as to promote a status quo which adversely affects women. Indeed, resistance to legal change sometimes is grounded in the claim that men and women bear different responsibilities and that they must therefore be accorded different rights. MENA inheritance laws, for example, are sometimes justified in this manner. Substantive equality arguments thus risk becoming a double-edged sword in the hands of those who resist change.

However, *difference of treatment is not an end in and of itself*. Substantive equality mandates difference of treatment for the purpose of promoting equality of ends. One must therefore define the basis on which they are seeking equality between the genders, or, in other words, the ends which must be made equal. For example, if inheritance laws aim, at least in part, to produce financial security, then any differences in treatment between men and women within these laws must produce financial security for both men and women in their result. Differences in treatment are tolerated in so far as they further equality.

### **The Procedural Component of Access to Justice**

This section focuses on the laws and legal policies or practices which impact on women's participation and/or the ability to bring forward women's rights claims. The procedural component of access to justice should be broadly understood to mean the types of

institutions where one might bring a claim, the rules that govern the complaint and conduct of the parties once the complaint is brought within a particular institution, the particular mandate of a given institution and the factors – outside of the substantive law itself -- which influence the nature and quality of the encounter for women within a particular legal institution.

The following section identifies two sites of access to justice within MENA states that are or can be of relevance to women: the courts and informal legal systems.

## **Courts**

Courts can help entrench social and political inequalities and thus perpetuate injustice but they can also send a strong signal against discriminatory social tides. On 18 May 2000, The Tunisian Court of First instance recognized that an individual should not be denied inheritance on religious grounds and established, for the first time, a secularized conception of family and inheritance laws. (TPI, no. 7602/2000)<sup>60</sup> The presiding judge emphasized that non-discrimination on grounds of religion is one of the founding principles of the Tunisian State as recognized in article 5 of the Tunisian Constitution and articles 2, 16 and 18 of the Universal Declaration of Human Rights, as well as in Article 2, Paragraphs 1 and 2 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which Tunisia ratified without reservation. Finally, the judge also emphasized that inequality of succession is contrary to the constitutional principle of equality of citizenship.<sup>61</sup> The Tunis Court of Appeal confirmed this lower-court decision in 2002, supporting the strict limitations on interpretations of Article 88 of the Personal Status Code regarding reasons for exclusion from inheritance. The Court asserted the unlawfulness of giving a meaning to a text other than its literal expression.<sup>343</sup> According

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<sup>60</sup> It is important to note that the court case was part of a concerted campaign by women's organizations and experts in Tunisia.

<sup>61</sup> Source: unofficial translated version of Kalima Tunisie, ATFD and AFTURD plea for equality in inheritance, September 15, 2006 available in the original french at <http://islamlaique.canalblog.com/archives/2007/01/index.html>

to the Court, no interpretation of law may induce inequality that is not supported either implicitly or explicitly in the Personal Status Code itself. Above all, the Court emphasised that protection of the free exercise of belief pursuant to Article 5 of the Constitution prohibits the linkage of inheritance rights to religious factors. These two decisions respecting the Constitution were subsequently confirmed by the highest court in Tunisia, the Court of Cassation.<sup>62</sup>

Ultimately, courts cannot be ignored by those seeking social change. A victory in court can secure justice for the individual involved in the claim and can send a strong signal to society about the need to alter the social order.

### **Informal Justice Systems**

The term informal justice refers to dispute resolution processes that fall outside of the court system. The range of practices, actors and mechanisms involved in informal dispute resolution vary across MENA. The informal system is sometimes referred to as “alternative dispute resolution” or “tribal justice.” I have eschewed these terms. “Alternative dispute resolution” is not appropriate because this type of dispute resolution is invoked more frequently than the courts; hence, it is not “alternative” at all. The phrase “tribal justice” is useful to the extent that it suggests the importance of community participation and tradition. However, it also carries a negative connotation in some contexts because it suggests absolute inferiority.

In theory, there are three conceptual distinctions between formal and informal systems. While formal systems focus on rights and seek to decide between competing rights claims, informal systems focus on interests and seek to reconcile the different interests of the parties. Second, informal systems resemble mediation more than adjudication – a high ranking or respected individual within the community actively tries to create agreement between the parties rather than sitting in judgment of them as a judge would sit in formal courts. Finally, the procedures adopted and norms referenced vary with the

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<sup>62</sup> COHRE at 99.

participants in the process. The person who is chosen to lead the informal dispute resolution process usually adopts the procedures and norms that have proven historically acceptable to the local community rather than those defined in written laws or adopted by state sanctioned courts. Once a resolution is reached, community pressure rather than fear of state sanction motivates the parties to comply with the terms of resolution.

Informal justice systems are often more accessible to poor and disadvantaged people and may have the potential to provide quick, cheap and culturally relevant remedies. Critics of informal justice argue that the reliance on custom, tradition, community leaders and community pressure favours socially or economically powerful parties and too often sacrifices rights for the sake of generating agreement. Informal justice systems are present throughout the world, especially in developing countries. Despite their prevalence they have been largely neglected by legally trained access to justice scholars.<sup>63</sup>

Informal justice systems are deeply entrenched in MENA nations, to varying degrees, because of historical and cultural reasons as well by modern necessity. In Palestine, for example, informal justice remains the dominant mode of dispute resolution in part because of its deep cultural roots and because its local nature renders it more accessible than the formal courts for several reasons, including the ubiquitous restrictions on travel that have plagued the Palestinian state, including its justice sector.

A study by the Institute of Law at Birzeit University found that women and women's organizations took opposing stances about the desirability of the informal justice system. Some embraced it as the only feasible dispute resolution mechanism available to women, others rejected working within the system altogether because it results in women waiving their rights, while still others did not like the system on principle but found themselves engaging it out of necessity.<sup>64</sup> Several representatives of women's organizations

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<sup>63</sup> Ewa Wojkowska, *Doing Justice: How informal justice systems can contribute*, December 2006 UNDP outlines the potential benefits and limits of the informal justice sector. Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>

<sup>64</sup> *Between State and Tribe* at 107.

successfully engaged with the informal system and used it to successfully resolve disputes, particularly those concerning violence against women.<sup>65</sup>

Overall, the study reveals how the informal system operates with respect to women. First, women may be pressured to accept certain forms of settlement as a way of bringing peace between families even if they do not necessarily agree with the terms. The Penal Code, for example, stipulates that if a proper marriage is performed between a woman accused of “honour crime” and the man in question, then the prosecution is halted and any penalty which may have been imposed through legal proceedings is suspended. The study found that the informal system often dealt with such matters by trying to effect settlement through marriage.<sup>66</sup> Second, the informal system interacted with the formal system at several levels. For example, settlements reached within the informal justice system influenced rulings given by judges in the formal system if a case was brought before it on the same set of facts. For example, in exercising their sentencing discretion in certain cases brought before them under the Penal Code, judges within the formal court system considered the fact that the individual involved had waived personal rights as part of the informal settlement process a mitigating factor.<sup>67</sup> Third, the reverse was also true. This is highlighted by the fact that disputes concerning an alleged honour crime are resolved through marriage of the alleged perpetrator and victim. Ultimately, however, the Birzeit study concluded that gender did not necessarily influence results in the informal system. Family status - particularly social and political status - played a more significant role in influencing outcomes.<sup>68</sup>

Informal legal systems constitute the norm across MENA. More analysis is needed about their relationship to the formal legal system. The two systems do not operate in isolation from each other and their permeability requires closer analysis to determine how they impact upon each other in relation to specific issues, including but not limited to violence against women. Such analysis should bear in mind that the procedural barriers to access

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<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid* 51.

<sup>67</sup> *Ibid* at 52 and 54.

<sup>68</sup> *Ibid* at 109.

to justice might not vary to the extent one would imagine given the vastly different procedures associated with each system.

## **Barriers to Procedural Access to Justice**

### **Costs and Standing Rules**

Cost rules refer to the financial costs shouldered by parties to a legal proceeding and the types and extent of indemnification available should they not prevail in the proceedings. Indirect costs include such things as lost work-time, travel, and time spent away from children and other family members. Standing rules can also deter or promote access to justice. Standing refers to the person or institution which has been recognized as competent and legitimate by the courts for the purpose of bringing a claim. In some jurisdictions, women who suffer violence cannot bring legal proceedings without the permission of their husband or fathers (sometimes even in cases of domestic violence where the husband or father is the alleged perpetrator). This is clearly problematic and can also have serious affects on the ability to pursue justice through the formal legal system. Moreover, public interest litigation procedures are not fully developed across MENA jurisdictions. Cost and standing rules have implications for procedural access to justice in both the formal and informal legal systems.

### **Access to Lawyers/Representatives**

Lawyers are often beyond the means of most individuals. Moreover, if experiences in MENA parallel those in other jurisdictions, then one can conclude if where lawyers can be found, they are not always “gender competent.” In other words, they often do not see or understand the gendered or discriminatory dimensions of a given law. In some jurisdictions, legal aid and legal clinics have been developed to specifically respond to women’s needs. “Centers for legal support to help women in litigation are important

assets in the struggle for rights, but most women do not know about them. Even if they do, the centers provide them with consultation, but not with support in court.”<sup>69</sup>

Access to a representative who will present the woman’s needs and perspectives is also an issue within the informal legal system. The study of the informal system within Palestine, for example, revealed that women are sometimes pressured into accepting solutions that they may not otherwise accept for the sake of “keeping the peace.”<sup>70</sup>

### **Access to Information**

Laws can be complex and confusing. In MENA jurisdictions (like others), “the law” is not easily accessible by members of the public and people do not know their rights so they cannot claim them. While we want to avoid creating the impression that knowledge of rights necessarily leads to greater access to justice, surely the reverse is true: one cannot claim one’s rights if one does not know what they are.

The problem of access is information cannot be resolved simply by providing access to court decisions or making the law easier to understand as some proponents of “plain language” suggest. The problem is two-fold. First, knowledge is sometimes deliberately withheld from potential rights claimants by governments precisely because they do not want individuals to know their rights. The adage “knowledge is power” rings loud and clear in this context. Studies across Canada, for example, suggest that government departments and individual bureaucrats sometimes deliberately refrain from providing information about programmes, rights and accountability mechanisms precisely because they do not want users to know about them. Second, the problem of access to information is tightly wound up with the question of how one determines exactly what

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<sup>69</sup> Azza Soliman, Director General of the Center for Egyptian Women’s Legal Assistance cited in *Habitat International Coalition – Housing and Land Rights Network* at 60.

<sup>70</sup> The concern about power imbalances and pressure on weaker parties in giving up rights is a common critique of “alternative dispute resolution” or ADR systems around the world. I recognize that the term “alternative” is not appropriate in this context as the informal legal system is more mainstream than alternative.

kind of information should be provided. This itself requires carefully crafted consultations with affected communities.<sup>71</sup>

### **The Myth of Judicial Neutrality**

The legal system relies on the notion that the judge is a neutral arbitrator who resolves disputes without fear or favour. Some contend that the vision of judicial neutrality has had a negative impact on women's equality in large part because it has led to the establishment of the "unspoken male norm." Women's experiences and needs, in short, are not reflected in the law and legal doctrine.

Critics argue that law would better reflect women's experiences and needs if women were appointed to the bench. Those who take this position would be dismayed by the relatively low level of gender representation on the bench in most MENA countries and by the fact that in some jurisdictions women are prohibited from hearing cases in areas like personal status laws.

Others criticize as "essentialist" the claim that women judges can make a difference by representing women's perspective. The claim of the critics is that women are as divided by factors such as religion and class; hence, it does not make sense to speak of "women's experiences" as a coherent category. Ultimately one cannot assume that just because the decision-maker is a woman that she will be more attuned to gender needs or differences.<sup>72</sup> Critics also charge that men should not be absolved of the responsibility of promoting women's equality; hence, it should not make a difference with regards to the content of judgments whether women or men are appointed to the bench. Both should promote equality. Accordingly, the myth of judicial neutrality is best addressed by providing social context and other forms of education to all judges. Social context education invites

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<sup>71</sup> There is of course a direct link between information and the pursuit of substantive equality

<sup>72</sup> See for example Nazir, Freedom House, Algeria: "Women are judged-by both male and female judges-with more or less severity based on the degree to which their behavior conforms to the traditional role expected of Algerian women. The prejudices and conservative attitudes of judges and lawyers, therefore, can lead to discrimination in practice that does not exist in the legal texts."

judges to examine their own assumptions and to attempt to see a legal claim not from a position of assumed neutrality but as journey towards impartiality.

Judicial impartiality within MENA can also be compromised by threats to the judiciary, corruption and nepotism. In Palestine, for example, members of the judiciary have become vulnerable to threats and attacks.<sup>73</sup> Corruption represents a serious threat to judicial independence and erodes the public's confidence in the judicial system.

### **Police & Prosecutors**

Police and prosecutors represent the gatekeepers to the justice system. Their specific responses can deter or support rights claimants. Reports from various MENA jurisdictions indicate that police often show open hostility to women's rights claims. They can hinder access to justice by refusing to take such claims seriously by, for example, refusing to investigate or prosecute. The situation is particularly complicated in cases involving allegations against individuals with high social status.<sup>74</sup> Police have also been known to further victimize women by beating them or their family members.<sup>75</sup> And, they can intimidate, traumatize and stigmatize women and girls by failing to protect the privacy of women who do file complaints.<sup>76</sup>

### **Enforcement**

Enforcement represents a good measure of access to justice. Enforcement has at least two components. In the first place it refers to the mechanisms that are available for rights

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<sup>73</sup> See for example, A Question of Security, [http://hrw.org/reports/2006/opt1106/4.htm#\\_Toc148851335](http://hrw.org/reports/2006/opt1106/4.htm#_Toc148851335) at fn. 46

<sup>74</sup> Social workers and lawyers also noted that powerful clan leaders, members of the political elite or highly ranked members of the various Palestinian security services are "above the law" and are able to close police files implicating them in culpable conduct. One lawyer told Human Rights Watch that "when a person from an important family commits a crime, the police think a hundred times of the consequences for themselves before pursuing the case." *Ibid* at fn. 197.

<sup>75</sup> "When we met women in Sinai, for example, who find out that they were not entitled to inheritance, they cannot go to the police. They can be – and often are – beaten, or their children are beaten." Azza Soliman at 60.

<sup>76</sup> See A Question of Security

claimants to pursue their rights. It also refers to the mechanisms available to the rights claimant who has already had their rights pronounced upon by a competent authority.

Substantive laws across MENA recognize women's rights to equality; however, the gap between women's rights and women's realities remains wide. Sameena Nazir's 2005 survey of women's access to justice in MENA determined that only Egypt provided a mechanism for women to file complaints against gender discrimination. Generally, enforcement mechanisms are absent across MENA. Women have no mechanism to make a confidential complaint or to see redress under the constitution aside from using the courts or the informal justice system. Given the gap between women's equality guarantees and women's reality, Nazir concludes that "the absence of special commissions or legal entities to enforce legal protections against gender discrimination reflects a lack of interest in women's rights on the part of government officials. It also reinforces women's inferior status in society and allows violations of women's rights to take place with impunity."<sup>77</sup>

### **Social Stigmatization**

Women who complain about their treatment in public are often stigmatized and isolated by their communities, particularly if they seek to press their claims in court. This stigmatization creates constitutes a powerful psycho-social barrier to claiming one's rights. The following case study tells the story of "Haifa" from Syria.<sup>78</sup>

This is the case of a family whose daughters have been regularly subjected to sexual assault by their father. One was engaged and confessed it to her fiancée, he advised her to complain to the police, which she did before going to court.

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<sup>77</sup> Nazir, Sameena, Challenging Inequality: Obstacles and Opportunities Towards Women's Rights in the Middle East and North Africa, *Journal of the Institute of Justice and International Studies* 31-42 (2005) <http://www.cmsu.edu/cjinst/JournalIssue5.pdf>

<sup>78</sup>Alexandria Consultations at 93

Abuses needed to be proved, and the daughters went to the hospital for a medical examination of their case. Both were escorted by police who insulted and mistreated them, saying that the girls were not deserving of respect anymore since they were no longer virgins. Their brother took their father's side in the story, because he needed his father's financial support and worked in his factory.

The wife complained and asked for divorce but in Syria, divorced women are thrown away in the streets. The three women were morally ostracized and ended up changing their testimonies after 25 days, saying that they had illegal relations, because the social pressure was too hard to bear.

The mother had to live again with the father, because she had no independent financial means. The younger daughter had to go to school and was harassed there, because the city is small and everybody knew the story. She was so ashamed that she underwent a nervous breakdown. They have been considered as prostitutes and completely socially outcast. The mother has no role at all anymore in the house and is fully dependent upon her husband. Women are often illiterate in Syria and they are not protected, even by the larger family, and not at all by the government.

“Haifa's” story reflects that of many women in Syria as well as Palestine, Jordan and other MENA nations.<sup>79</sup>

### **The Symbolic Component of Access to Justice**

Laws can have an impact on social relations that do not get sufficiently recognized by legally trained access to justice scholars and analysts. Law's impact upon social relations manifests itself in several ways. For example, studies from various jurisdictions suggest

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<sup>79</sup>Alexandria Consultations at 93

that formal legal systems can influence informal dispute resolution processes, even where the laws are not binding and the mechanisms for enforcement are not present.<sup>80</sup> Second, law acts as a social mirror: it is both constitutive and declarative of prevailing social norms.<sup>81</sup> Finally, developments within the law can sustain social and political dialogue even where the direct impact of the legal change remains relatively minute.<sup>82</sup>

Symbolic access to justice therefore serves as an important measure of social progress for those concerned about gender equality. Yet, symbolic access to justice often proves difficult to measure. It is also difficult to define a cause and effect relationship between changes in the legal order and parallel changes in the social and political sphere. Such changes can take decades to manifest themselves and the connections are usually too disparate to document. Thus, the value of pursuing social change through litigation cannot easily be measured.<sup>83</sup> In many respects, the pursuit of symbolic access to justice requires a leap of faith or the conviction that the work is meaningful even direct cause and effect relationships between legal reform and social change cannot be precisely defined.

### **Access to Justice and International Contexts**

Studies about access to justice, especially those which purport to understand law in social context, cannot ignore the transnational and extra-regional factors which impact on access to justice. The Arab Development Report stressed that policies such as anti-

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<sup>80</sup> A study of the informal justice system in Palestine suggests that formal laws impact upon the types of settlements that parties will accept within the informal justice system. The norms of the formal system also helps define the negotiating strategies adopted by the *islah* men or mediators within the informal system. Thus, the formal system cannot be ignored even by those who tend to favour the informal legal system. The formal and informal permeate each other.

<sup>81</sup> For example, nationality laws across MENA deny women the right to pass on their nationality to their children. Not only do gendered nationality and citizenship laws negatively impact on the lives of women and children on an individual basis, they also constitute a symbolic statement about the capacity and value of women's citizenship.

<sup>82</sup> Thus, for example, changes in Egypt's divorce laws may prove significant beyond the impact that these changes may have on a relatively small group of women who take advantage of no fault divorce.

<sup>83</sup> We have come full circle and return to the question of what is law's relationship to social change which opened up this paper.

terrorism laws and globalization have had a negative impact on women's social, economic and political status. Research in this area remains in its preliminary stages but we have seen enough to understand that some of the most profound barriers to women's equality come not only from within MENA regions but are imposed from the outside by societies that purport to care about human rights. In Iraq, for example, sanctions imposed and enforced by the United Nations as well as Arab and Western nations had a profound impact on women's lives.<sup>84</sup> Sanctions helped turn back the hands of time in Iraq and unfortunately may have the same profound impact on Palestine. Occupation of course adds yet another dimension for consideration. It is important to access to justice analysis not make the mistake of focusing criticism on internal domestic MENA structures while ignoring how international actors and actions help to reinforce domestic structures that ultimately undermine the quest for equality.

### **Is Gender A Meaningful Category?**

Few scholars or women's rights advocates dedicated to equality deny the importance of intersectionality. Intersectionality analysis posits that individuals have various identities and that gender can interact with other constituents of identity such as class or family status to produce markedly different experiences for women. Assertions that women are not a homogenous group are common; however, the consequences of this premise have yet to be fully explored either in women's legal advocacy or in programming aimed at supporting such advocacy. The tendency in many reports and studies is to simply note that "poor women are especially impacted" or to remark that "family status affects outcomes."

Yet, analysis often proceeds as though markers such as class and family status simply compound gender barriers when in fact they transform them. The study of women's experiences within the informal legal sector in Palestine is instructive: the study found that gender was not the overriding barrier to justice. Instead, there was a greater correlation between outcomes and family status. Yet, the report at the same time noted

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<sup>84</sup> See for example Reem Bahdi, Iraq, Sanctions and Security: A Critique

that laws are skewed against women. The apparent inability to grapple with this paradox may well flow from a lack of attention to the concept of intersectionality. In other words, gender on its own may not have proven a barrier to justice; however, gender combined with lower social status may produce its own dynamic of oppression which needs to be explored and explained. This particular dynamic will be missed or glossed over if one is simply asking whether “gender” on its own contributes to injustice or inequality.

By emphasizing that the combination of identities does not simply compound gender experiences but produces substantively distinct experiences, intersectionality aims to bring forward the claims and needs of those who have been most marginalized by law. It is thus closely connected to the substantive equality approach to gender discrimination in so far as substantive equality calls for an understanding of how differences should be taken into account in devising specific legal strategies. Intersectionality stresses that these differences can extend beyond a simple gender axis while remaining distinctly gendered at the same time.

There is a need to develop further understanding of intersectionality and its implications within MENA legal systems. This might extend, for example, to thinking about how and when the category “women” proves limiting when developing strategies for substantive or procedural legal reforms simply because women’s needs vary according to other constituents of identity such as class, religious affiliations and family status. Accordingly, the priorities established within legal reform, the individuals and groups consulted and the legal strategies adopted

### **Celebrating Voices In The Wilderness**

Sometimes it is important to nurture ideas, arguments and debates that may not produce results except in the long term. They ideas not produce results because they do not have wide spread resonance or that are not particularly popular or practical. This is as true for the lawyer as it is for the poet. Space must be preserved within legal strategic thinking

that will not likely win. In other words, it is important to strategically back a loser. Strategic losers advance arguments that are out of step with the mainstream but which nonetheless advance a desired result. They push the boundaries of the possible. Strategic losers challenge the present and ultimately transform the mainstream – but such transformations may not take place for decades after the owners of the voices have themselves transpired.

Yet, donors want results. They have to be accountable to their constituents and they want their partners to deliver on promises. Thus, there is an emphasis on RBM frameworks, cause and effect dynamics, and strategies that produce results with a defined time line. Lawyers also like to produce results. Too often lawyers are focused on developing “winning” strategies. This is understandable because much time and resources go into litigating claims and people’s rights are on the line. Thus, they tend to want to focus on arguments that will win in court or that will prove successful by some concrete measure in the short term. Access to Justice, however, requires us to think beyond single court victories and to consider the complicated relationship between litigation and social change. This relationship ebbs and flows with time and cannot always be captured within a cause and effect matrix.

## **Conclusion**

Law regulates social relationships, defines individual rights and reflects the values of a society. It is also an instrument of social and economic power and often promotes the interests and needs of those who hold social and economic power. Yet, law also contains transformative possibilities. It can be harnessed to promote equality within MENA for women. However, the precise conditions that give rise to its transformative possibilities need to be further examined and explored while recognizing that law is complex and unpredictable. If these transformative possibilities are to benefit women across contexts, then strategies need to be developed to address the barriers to women’s access to justice in its substantive, procedural and symbolic forms. While addressing the barriers does not

guarantee gender equality, failing to address them has - as women's experiences across jurisdictions attests - profound consequences for women lives.