



Contextualised analysis of access to justice in Morocco

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Abstract

This paper provides an analysis of access to justice in Morocco with a focus on access for women. This article will address the historical and religious influence on the legislation in force under the magnifying glass of international standards, in particular international human rights conventions.

Moroccan legislation, having made great progress with the Moudawana (Family Code), is a law that guarantees the minimum right of access to justice for Moroccan women. However, in view of the evolution of society and international standards, it is imperative to update this legislation to guarantee the full enjoyment of women's rights, including access to justice.

Keywords— Access to justice, Morocco, ICCPR, human rights, international law, family code.

I. INTRODUCTION

Access to justice is protected for all people under the Constitution and further supported by Morocco's international

obligations. Although many nations strive to provide equal access to justice for all people, frequently differences in socioeconomic class, gender, citizenship, religion, race, or other factors prevail. In Morocco, these infirmities apply also, particularly at the intersection between gender and geographic location, which is tied, predominantly, to the formal justice machinery, socioeconomic class, belief systems, and level of education. Theoretically speaking, because access to justice is a multi-layered and complex phenomenon, rather than simply a term, it is useful to employ several indicators to describe it. Indeed, any evaluation of such a complex notion needs to consider multiple factors to examine the different



constituents of the concept. Scholars argue that evaluation of the performance of a judicial system must consider that system's level of independence, efficiency, and accessibility.¹

This paper examines the dimensions and history of the justice system and how it has formed the concept of access to justice in Morocco. It assesses the compatibility of the Moroccan justice system and conception of access to justice with corresponding international standards. The paper sheds light on women's access to justice under the family code as an example. To achieve this, it reviews the legislative and constitutional framework codifying these rights and the customs and Sharia that inform their formation and implementation, particularly in informal justice.²³ Informal justice systems in Morocco occupy a crucial space for rural communities that are separated from formal legal systems by resources, literacy, and mistrust. These communities turn to the efficiency of informal justice.⁴ Accordingly, no attempt to strengthen access to justice in the Moroccan context can be complete without a specific focus on working within informal justice as well as formal.

II. QUALIFYING REMARKS

At the outset of this paper, it is important to note some qualifying remarks as they pertain to the methodology and language applied herein.

First, as to the source of the information that guides the analysis of both what the term access to justice means and the accuracy with which it is attained, the information used is only that which is recorded. The nature of the IJS is such that detail on the procedure and resolution of cases is less frequently available. Informal justice systems are most widely used in rural regions, often in areas where Amazigh communities flourish.⁵ These areas also tend to have the lowest literacy and school enrollment rates in Morocco. One national study comparing both gender and rural v. urban illiteracy found that the illiteracy rate among men was 25 percent compared with over 47 percent among women in 2012.⁶ Among females, the illiteracy rate is nearly double in rural areas, up to 60 percent. The disparity becomes even more pronounced when comparing fundamental competence instead of mere literacy.⁷ Although recent changes have improved the statistics countrywide, significant gaps persist.⁸



Urban Moroccans are 1.2 times more likely to be enrolled in primary school than their rural counterparts.⁹ Accordingly, there are far fewer people with the means to record the information in courts. Moreover, in Amazigh communities, the language is distinct from urban Morocco, where Arabic and French are spoken; the Amazigh languages are less universal. Thus, any existing records are less accessible to individuals outside the community.¹⁰ The reporting practices in the lower level and less centrally located formal courts are sometimes subject to the same problems of record keeping.

When possible, direct records receive primacy. In lieu of such information, however, anthropological studies, the work of NGOs and intergovernmental organizations, and news sources supplement primary sources. A note regarding terminology: ‘justice’ and ‘access to justice’ in this paper refer to a broader conception than the one used in the thesis as a whole. Where relevant, reference is made to the way these terms apply in family law and gender-based legislation. However, to identify the specific needs and shortcomings of access to justice in the context of the Moudawana, it is crucial to identify which aspects are

system-wide and which are unique flaws in the implementation of these laws. Accordingly, where the term should be read to apply specifically to family law, it is expressly stated with a general notion of justice as the assumed constant.

III. The Legal System

This section synthesizes the main characteristics and sources of the Moroccan legal system and the development of the justice system. The history of Morocco shows a divide between the rigid and enforceable nature of the French civil code and the traditional Amazigh informal justice system as well as Sharia law that focuses more on custom than strict adherence to the text. Thus, there is a strong basis for access to justice and the legal system generally, but with room to follow a less legally principled path. This paper further considers the way these primary influences coexist in the context of legal pluralism.

A. HISTORICAL INFLUENCES

The first known inhabitants of Morocco were Amazighs and other tribal groups. Their legal structure was defined by informal systems based primarily on Islamic and non-Islamic customary law.¹¹



Initially, most Amazighs were Christian, but through encounters with Arabs, beginning in the 7th century, many converted to Islam, and thus, their informal legal systems became increasingly informed by Islamic teachings.¹² Despite having converted to Islam, the Amazighs followed a unique brand of Islamic Shi'ism in which they incorporated their own cultural differences.¹³ The Amazigh culture is distinguished from other Moroccan cultures primarily through language, an obstacle that leads many Amazigh children to drop out of school because they are taught in a 'foreign' language, Arabic.¹⁴ Approximately two-thirds of the Amazigh population in Morocco live in rural regions, where the culture remains the strongest.¹⁵ The Amazigh political system is centered on tribes and family. Families remain close together, and patriarchy is strong. Each tribe has a chieftain, and communities often have Sharifs, families who claim descent from the Prophet, who are afforded significant respect in the mediation of matters.¹⁶

The rejection of formal education based on language barriers and the value of traditional authority figures lead modern-day Amazigh communities, particularly in

rural areas, to be most affected by IJS as defined by the original Amazigh inhabitants. The other major influence in Morocco, outside of the Arabic-Islamic majority, comes from European colonialists from the 15th century onward. The Portuguese, Spanish, and French all had a stake in Morocco at some point. In the early 1900s, Morocco was primarily divided between Spain and France, with the central area dominated primarily by the French, while the North and South had more Spanish influence.¹⁷ Britain recognized the French sphere of influence and, by 1912, Morocco was declared a French protectorate. It was, thus, legally controlled and protected by France.¹⁸ Until it acquired its independence from France in 1956; the remaining Spanish colonialists withdrew at approximately the same time as their French counterparts.

The primacy of French control is evident through the continued prevalence of the French language throughout Morocco, particularly in higher education, and the Moroccan legal system's adoption of several principles of the French civil code. The civil code focuses on clearly defining legal obligations instead of relying on case law precedent.¹⁹ It codifies the legal rights and obligations of citizens and laws of



property, inheritance, and civil procedure. The French influence presses for secular government, particularly in the judiciary.²⁰

Morocco has established civil, criminal, and commercial codes, as well as outlining procedures for such cases.²¹ The final and preeminent source of the Moroccan legal system is Islamic law. Despite its history of tolerance and diversity, modern-day Morocco is rather homogenous.²² Ninety-nine percent of the population is Muslim, and of them, virtually all are Sunnis, less than 0.1 percent are Shi'a Muslims. The other one percent is Christian, Baha'i, and Jewish. Muslims have been present in Morocco since the 7th century when soldiers of the Prophet Mohammed spread throughout North Africa. In 1961, Islam was declared the official state religion, but full religious freedom was maintained according to Christians and Jews.

Moroccan law is based on Sharia law as rooted in the legal system of Sunni Islam.²³ Sunni Muslims regard themselves as the more traditional and orthodox branch of Islam. The name Sunni comes from Ahl al-Sunna, meaning people of the tradition. The two branches were divided over who should succeed Mohammed (Peace Be Upon Him) as leader of the Muslim

community: Sunnis believed the successor should be one who had attained seniority, demonstrated piety, and had adequate qualifications, whereas Shi'ites believed the successor should be among his descendants. Sunni Muslims also differ from Shi'ites because they do not exalt leaders the way they do prophets and, thus, have a less elaborate and rigid religious hierarchy. There are four schools of Sunni teachings; Morocco law follows the teachings of the Maliki school of thought.²⁴ Under the Maliki teachings, legal decisions are based more on community practice, traditions, and analogous reasoning than strict adherence to hadith – the sayings of the Prophet and his companions.

Sharia law is assured through the constitutional provisions naming the King as Commander of the Faithful, tasked with ensuring respect for Islam throughout the legal system. Where civil law governs contracts, commercial law, administrative law, civil procedure, and criminal law, Sharia law applies to family law, succession, and personal status.²⁵ Islamic law is pronounced in first instance courts by Taoutiq judges with assistance from traditional clerks, Adouls.²⁶



B. Legal Pluralism in Morocco & Women's Access to Justice

There are at least two segments of legal and judicial life that coexist in Morocco: codified laws and regulations – along with an informal justice system of dispute resolution based on customs (urf). The two systems are considered to be conflicting; attempts to integrate both orders in the same centralized political system, from the pre-protectorate era to post-independence, failed due to the exclusion of informal justice operators in the integration process.²⁷ Legal pluralism provides a more inclusive conception of access to justice where the use of the two segments is divided, as is the case in Morocco. Several studies have highlighted the relevance of the existence of “urf” and the growing field of informal justice for the development and evolution of the Moroccan legal system. Informal justice is a means of dispute resolution that falls outside the court system. Generally, IJS differ from formal mechanisms because they take a more holistic view of the interests and positions of the parties, as opposed to addressing only those claims that arise under law. The role of the factfinder tends to be more mediation-driven rather than making a ruling, and

they rely more heavily on social and cultural norms and pressures.²⁸ On a strict legal level of the analysis, this is a key issue because it provides an opportunity to raise the question of legal pluralism throughout the historical development of Morocco.

Communities that rely more heavily on IJS face even greater struggles with judicial independence because the constitutional checks and balances, as well as appellate provisions, do not apply to informal justice procedures. The mediators of informal systems have substantial discretion; thus, their morals frame the outcomes. This discretion often presents itself in the form of discrimination towards women because of traditional values held in the community. Particularly in Amazigh communities, which exist largely in the rural regions of Morocco, the tribal judges tend to be conservative in their application of the law despite progressive movement by the formal government. Today, there is growing tension between the constitutional guarantees of the universal imperative of equality for women and the coexistence of plural systems of traditional justice in rural Morocco, which are usually patriarchal, both structurally and in the substantive norms that they apply.



In Morocco, one cannot deny the presence of legal pluralism.²⁹ The specific issue in the country is that of the inheritance of different laws from past colonial periods that disharmonized within the legal system. There is an urgent need to harmonize the system and draft new laws that consider the needs of the population. The State is not and cannot be indifferent to non-state law. The coexistence of two legal systems is even positively assessed by stakeholders, urf being praised as the expression of positive social values.³⁰ Nevertheless, it cannot be denied that there is a strong contradiction between the informal justice style of dispute resolution and that personified by the state courts.

The eras of legal development milestones show a perpetual shift in the predominant influence in the judicial system without meaningful integration. In the pre-protectorate era, prior to 1912, informal justice was controlled in the kingdom. The sultans of Morocco were predominantly responsible for overseeing the judiciary system. In their capacity as Islamic rulers, they would oversee and appoint judges, called Kadi Al-Kudat³¹, who were known in the communities for their Islamic and legal knowledge. At this time, the Shura consultation principle was the guiding

concept in legal matters in accord with Islamic teachings.³²

From 1912 to 1956, under the French and Spanish protectorate, informal justice and customary courts were ostensibly supported alongside protectorate courts, but, in reality, the power of sultans and informal justice were greatly reduced. In the Protectorate Agreement, France made a series of judicial reforms that functioned mainly to abolish the Sultan's courts and to establish protectorate courts, Mahakim Makhzania, under the direct control of the French.³³ These courts were organized in the form of councils, presided over by Bashas in cities and Kayed in rural communes. During this period, victor's justice was employed, in lieu of a system of laws, to meet the French and Spanish settlers' needs. The protectorate established the Courts of Tradition, Mahakem Urf, beginning on September 11th, 1914, as a means to maintain some secular aspects of Berber law to facilitate the French takeover of Berber lands with legal protection. The establishment of such courts was formally codified under the Ministerial Order of April 8th, 1934.³⁴ However, the protectorate did not legally deprive Morocco of its status as a sovereign state or the Sultan of his title as



the country's leader. However, in practice, the Sultan had no real power, and the country was ruled by a colonial administration that controlled the judiciary to meet its political interests.

The modern judicial structure follows the post-independence changes that began in 1956. In the months following independence, the returning King Mohammed V proceeded to build a modern governmental structure under a constitutional monarchy, in which the Sultan would exercise an active political role.³⁵ Following the country's independence, Mohamed V reinstated the Moroccan court system and abolished the judicial system initiated by the protectorate.³⁶ As part of these reforms, civil affairs divisions in first instance courts became officially tasked with family law issues. In 1974, the Moroccan Government attempted to integrate tribal laws into the formal justice reforms by recognizing the inclusion of tribal law through the appointment of rural commune traditional judges, known as Hakim, as state mediators. The Government initiated an election process for these traditional judges at the level of each rural commune, but the attempt failed because of disagreement between the Moroccan

Government and the rural communes on financial compensation for such roles. Following this failed attempt, the Moroccan legislature did not reattempt to set a policy towards codifying, controlling, or containing the work of informal justice, until the adoption of the 2004 Moudawana; whereby unregistered tribal marriage, known as *Zawaj bil-Fatiha*³⁷, can be formalised in the Family Court through the application of Article 16 of the Moudawana, which registers the marriage retroactively.

Internationally, recent years have seen an upswing in research and reporting on the potential for gaps in legal protection and negative human rights outcomes that may develop within the context of legal pluralism, notably discrimination based on the interests of the powerholders, who define the community rules, depending on their religious or cultural identity. Hence, many of the barriers to women's justice found in the formal legal system can exist in informal mechanisms and vice versa.³⁸ Hence, women's justice-seeking options in Morocco's plural legal system continue to be wedged between male-dominated, informal decision-making bodies; gender bias in the judiciary; limited access to legal aid services; social pressures within family



and community; and a lack of faith in the formal legal system as an adequate delivery service for justice.

It is necessary to develop more innovative approaches to improve women's access to justice in legally plural environments where the formal justice sector faces access and performance issues. Customary systems are neither essentially bad nor good for women; it depends on how they are interpreted and applied by various groups in society and on the power dynamics and general inequities that inform justice processes. Most discriminatory elements are not engrained in a specific justice system but in asymmetric power relations in society, including those between men and women.³⁹ Practically, the judiciary cannot gain people's confidence if it does not take into account long-standing social values and norms. In that sense, the coexistence of two separate legal orders is a sign of the incapability of the Moroccan formal justice system to integrate non-state⁴⁰ law despite its widespread usage, in terms of both prevalence and the size of the disputes it resolves. Incorporating IJS must be conditioned on the system being effective, impartial, and protective of fundamental rights and being held to the same standards

of fairness in resolving disputes as the formal system.

C. Modern Structure of the Legal System

Morocco's legal system embodies the principles of its mixed lineage. It is a constitutional, democratic, parliamentary, and social monarchy. The King presides over both the legislative and executive branches and it is his duty to ensure compliance with the Constitution and the perpetuation of the State. As Commander of the Faithful, he must also ensure that the laws of Morocco do not contravene Islamic obligations. He exercises his governmental authority through the appointment of his Cabinet.

The executive branch consists of the Prime Minister and ministers.⁴¹ It is responsible for administrative law and introducing certain proposed legislation and issues for decision by the legislative branch. The Prime Minister works in conjunction with the Cabinet, particularly because his actions apply to issues regarding military force, proposing bills, and proposed revisions of the Constitution. The specific topics on which he makes recommendations and designates a



program for the legislature include economic, cultural, social, and foreign affairs. The Prime Minister may delegate some of his powers to the ministers, who pursue similar functions in more specific fields, for instance, communication, energy, and transportation.⁴²

Parliament is the main body in control of the legislature and is divided into two houses: the House of Representatives and the House of Counsellors. Parliament meets for two normal sessions per year but can be convened for additional special sessions by decree.⁴³ The House of Representatives is elected for five-year terms by popular vote, whereas the House of Counsellors is elected for six-year terms by regional electoral colleges and a national Electoral College representing working Moroccans. Parliament is responsible for proposing and passing most bills.

The judicial branch is the only branch of Government that is not subject to the King's direct supervision, and the Constitution further proclaims its independence from the legislative and executive authority. The King is the guarantor of this independence. The judiciary is divided into three types of

courts: general jurisdiction courts, specialized courts, and special courts. The Moroccan court structure was revised, following independence in 1956, to create a more unified system of courts out of what had previously been several independent court systems. A law promulgated in 1965 was the final step in consolidating the system. The Municipal and District Courts were established in 1974 to settle minor criminal offenses. These courts are empowered to impose monetary penalties only and may not imprison offenders. There is no appeal from these courts.

General jurisdiction courts can hear any matter, besides those designated to special courts.⁴⁴ There are 837 Municipal and District Courts headed by a single judge who is generally an elected official, not a career judge. The courts deal with more minor infractions, hearing only minor criminal offenses or civil matters where less than 110 United States Dollars (USD) is in dispute. They are not permitted to hear cases regarding personal status or real property. Within the purview of general jurisdiction courts, there are 71 first instance courts that, unlike the Municipal and District Courts, can hear cases on civil, social, commercial, real property, and



personal status claims and criminal cases involving petty offenses and misdemeanors. Panels of three judges sit on first instance courts. The final category of general jurisdiction courts is appeals courts, of which there are 26. In addition to hearing appeals from the lower courts, they may hear more serious criminal claims. Specialized jurisdiction courts have been established, largely through legislative amendments, to deal with audits, commercial claims, and administrative law, respectively.⁴⁵

The existing specialized jurisdiction courts are widely respected; however, the political tide has turned away from establishing more specialized courts; to push for subdivisions within the general jurisdiction courts. The Ministry of Justice and Liberties believes this will offer both the necessary specialization for certain types of cases, including family law while allowing for flexibility in courts.

Special courts primarily deal with government matters that would be unwise to deal with in general courts due to potentially sensitive issues. Both the High Court and the Special Court of Justice primarily deal with cases of corruption involving judges, prosecutors, and civil

servants. The Permanent Armed Forces Court addresses claims regarding military personnel and offenses involving national security.

The Supreme Court is the highest appellate court in Morocco that addresses only issues of law, not facts. It can acquire jurisdiction in general matters in which the parties have pursued all lower levels of appeal. The Supreme Court also has jurisdiction where the claim concerns bias or the partiality of judges, magistrates, and courts, or regarding a decision by the Prime Minister.

IV. SOURCES OF LAW DEFINING ACCESS TO JUSTICE IN MOROCCO

A. INFORMAL JUSTICE IN MOROCCO

The various influences in Morocco have each left their mark on the nation's legal traditions. While the teachings of Islam have permeated nearly all aspects of Moroccan society and are mandated to be the basis of all legislation, the French and Amazigh influences are most apparent in their diverging approach to adjudication. The formal justice system under the Moroccan Government is easily



comparable to French and other European style means of adjudication. On the other end of the spectrum, the pre-colonial and pre-Arab tradition of informal justice continues to be pervasive in Moroccan society, particularly in rural regions that are more densely populated by Amazigh people. Accordingly, it would be remiss to conduct an analysis of the legal system without considering this key element of Morocco's history and modern pluralistic justice system.

The idea that informal systems should be a key part of justice reform strategies due to their greater accessibility and their reflection of local norms and conceptions of justice was promoted in the first major UN report on the post-conflict rule of law efforts in 2004, as well as the high-level Commission for Legal Empowerment of the Poor.⁴⁶⁴⁷ International Development studies have further highlighted the importance of including informal justice systems within discussions of ensuring equality and access to justice because its inclusion aids in making legal rights a practical reality. The studies held that mere legislative guarantees of equality are not enough; reforms must engage with informal justice operators and empower local women to take on leadership roles in

the justice mechanisms, all of which are more easily accomplished when one reaches out to local providers of justice. The continued prevalence of these alternative dispute mechanisms also indicates some resistance to imposed Western norms of what form adjudication should take. This resistance may likely be a cultural norm that ought to be respected insofar as it does not withhold women, or other disadvantaged groups, from exercising their rights.

The inclusion of informal justice systems within the access to justice framework is further supported by its high rates of use. Informal justice is a widely used means for accessing justice throughout the world. In the developing world, an estimated 80 percent of women's judicial claims are settled in informal systems, as opposed to state courts. The high use of IJS by women can be explained by a number of factors that both drive women away from the formal legal system and draw them towards informal justice systems. They might arise from biased laws and gendered institutions but may also stem from women being personally more reluctant than men to rely on formal justice channels to resolve conflicts. Lack of confidence in the legal and government systems prevails,



especially where these systems are perceived as biased against women. A series of United Nations Arab Human Development Reports identified structural discrimination against women as an important norm governing the everyday private and public life of women in the region, ‘mainly derived from the concept of the preservation of the family.’ As such, within the family, roles are defined along gender lines, and the man becomes the counterpart to the outside world and the State. This also means that women’s access to, and acceptability within, government structures and public institutions often depends on the consent and backing of a male relative or the guardian of the family. This tends to result in women not seeking to address state institutions on their own when not supported by a male guardian.

In Morocco, informal justice dates back to the pre-colonial era and has not lessened post-independence because of the considerable concern about the country’s overburdened court system, decreased accessibility to civil justice, and public dissatisfaction with the courts. Informal justice refers to informal dispute resolution mechanisms outside the span of the formal justice system and that is anchored in

customary and tribal structures. Informal justice has surged in popularity as an alternative to the court system. It derives its power from tribal community structures. In the rural communities sampled for this research, the informal justice leaders enjoyed widespread community legitimacy. The rural tribes’ long-standing interaction with IJS as the only forum for dispute resolution and their interest in maintaining the status quo of asymmetric power structures tend to solidify the legitimacy and authority of IJS justice providers at the local level. Furthermore, customary beliefs and practices legitimize IJS procedures as locally embraced dispute resolution options, compared with those of formal justice systems. As such, informal justice can provide avenues for the delivery of justice, particularly where formal justice systems lack capacity in rural regions.

The perceived advantages of the informal system over the formal system are often explained as lower cost of services, speedier proceedings, and easy access in rural Morocco. Also, the weakness of the overall state system, particularly the judiciary, solidifies the perceived advantages of the informal system. Usually, in rural areas where illiteracy and



poverty levels are high among the female population, they tend to not have recourse to the formal system for many reasons, such as misunderstanding of the law; fear and/or intimidation; lack of resources; issues pertaining to language; and a lack of familiarity with formal procedures. Women's sense of disconnect from the formal governmental channels of justice motivates them to seek more community-based sources of advice, regardless of the quality of dispute-solving skills in family-related disputes. As such, despite the quality of informal justice systems, they become the cornerstone of access to justice and dispute resolution for the majority of these women who perceive themselves as divorced from the formal system of justice delivery.

Unfortunately, informal justice systems are riddled with their own shortcomings. Notably, informal justice systems tend to be male-dominated and culturally tied to enforcing and embodying the existing patriarchal bias. They are also outside of the State's consideration and control. Hence, there is little oversight that would require them to apply the law in accordance with written provisions. There are also no enforceable standards to hold decision-makers within the traditional

adjudicating bodies to certain methods of reasoning, sources of law and interpretation, or impartial judgments. Those who seek judicial remedies from these informal judicial bodies cannot rely on any consistency between cases or courts. Moreover, as they are disconnected from the Moroccan Government, they lack the ability to seek enforcement of the judgments as one would with a formal court order.

1. HISTORICAL OVERVIEW OF INFORMAL JUSTICE IN MOROCCO

Within the Morocco country context, informal justice refers to an ancient judicial system with Amazigh roots, governed by tribal traditions. Informal justice is widespread in rural areas as the trusted means of settling disputes between litigants outside the framework of the formal justice system. The principles of informal justice stem from various sources: Moroccan Amazigh historical, social, and cultural heritage. Additionally, the Quran is an essential source to understand modes of conflict control and reconciliation in Amazigh tribes. In cases of revenge, it calls for equity and for forgiveness in cases of remission. Unlike the formal justice system, which emphasizes rights, in the



informal Amazigh justice system, customary practices shape the legal framework. Often, problems are viewed as relating to the whole community as a group. Solutions strongly emphasize reconciliation and restoring social harmony. The focus is on duties rather than individual rights, unlike the formal justice system. Under this framework, decisions aim to find solutions to problems that move beyond a rights-based win-lose approach to solutions that recognize each party's rights through a restorative focus.

Throughout Moroccan history, the methods used to settle disputes in IJS have been referred to as 'tribal' laws. Tribal law has undergone different stages of development throughout Moroccan history. Its rules are drawn from the dominant Amazigh traditions in the rural areas where they are practiced. Opponents of informal justice in Morocco argue that informal systems are not held to the same standards of fairness in resolving disputes as formal systems and that they fail to deliver outcomes that are timely, impartial, and protect fundamental rights. Furthermore, tribal law can best be explained by examining their respective representatives. A tribal judge, Amghar, representing tribal law, is a person who

specializes in solving disputes presented to him through issuing a final verdict to both parties, usually in a verbal and non-written format, given the high illiteracy rates in rural Morocco. This decision is usually based on tribal ruff and decided upon through the accreditation of proofs and conjectures presented to him by the parties to the disputes. The requirements of the judge, appointed for one year, are to possess personal qualities such as the ability to convince, eloquence, and family reputation in order to achieve a conciliatory outcome to the demands of the parties to the disputes while relying on a number of sources, mostly Urf. Tribal law implies a tribal world order, in which the tribe or the clan plays the central role, and not, as with modern justice systems, the individual. If a member of one group violates the property, physical integrity, or the honor of a member of another group, a case will erupt between the two tribes to which the perpetrator and victim belong and not between the two individuals themselves.

2. THE RITUALS OF SETTLEMENT ('SULH'), RECONCILIATION (MUSSAFAH) & MEDIATION (AL WASATA)



In rural Morocco, rituals are used in private modes of conflict resolution. Private modes are processes not controlled by the State. To foster reconciliation, both private and official justices are sometimes invoked simultaneously to foster reconciliation. The rituals of ‘sulh’ (settlement) and ‘musalaha’ (reconciliation) are both alternative forms of conflict resolution. The ‘sulh’ ritual, deeply rooted in Islamic teachings and Amazigh tribal contexts, accentuates the close link between the psychological and political dimensions of communal life through “its recognition that injuries between individuals and groups will fester and expand if not acknowledged repaired, forgiven, and transcended.” Morocco’s formal judicial system does not recognize “sulh” rituals as a legally acceptable tradition in the family dispute resolution process unless a judge conducts it.

In Islamic law, the purpose of ‘sulh’ is to resolve conflict and disputes among Muslims so that they may conduct their relationships in peace and amity. ‘sulh’ is a form of contract (akd) which is legally binding at the individual and community levels. For Amazigh tribes, “‘sulh’ is the best of judgments” for reconciliation. Amazigh justice leaders make a distinction

between public ‘sulh’ and private ‘sulh.’ Public ‘sulh’ is conducted between large groups, such as tribes. In family issues, private ‘sulh’ takes place between the parties with the purpose of avoiding a cycle of dispute. Regarding the final outcome of ‘sulh,’ there are two types: total ‘sulh’ and partial or conditional ‘sulh.’ The former ends all kinds of conflict between the two parties, who thenceforth decide not to hold any grudges against each other. The latter type ends the conflict between the two parties according to conditions agreed upon during the settlement process.

Al Wasata is characterized by the fact that one or more persons intervene in a dispute either of their own initiative or at the request of one of the parties to the dispute. The independent mediator must then seek to advance an amicable settlement by proposing solutions to the parties. Obviously, mediation can only be successful if the parties accept the proposed solutions.

B. CONSTITUTIONAL PROVISIONS

A constitutional guarantee of equality is the first step in the chain of access to justice. Constitutional guarantees of equal



rights are indispensable for the realization of women's rights, though political, cultural, and social norms may continue to impact women's ability to access justice. Constitutional provisions tend to establish the ideals that are held in the highest regard within the nation; thus, the inclusion of equality therein is indicative and helps to create a wider social acceptance of that value. Their other integral function is to guide all government action thereafter so as to be in conformity with the Constitution. Hence, no branch of the Government can rightfully take actions that are in contradiction with the principles contained within the Constitution. In many cases, the provisions are a progressive hope for the nation and thus guide future legislation to mandate the specifics that will bring that overarching goal into practice.

Much like the legal system at large, Morocco's codified sources for access to justice paint an optimistic picture for adherence. The Constitution is foremost in defining this notion, as well as taking steps to ensure the meaning of justice is met. It expressly states that all people are equal before the law. It further specifies that men and women are entitled to equal enjoyment of all rights and freedoms related to

economic, social, cultural, civil, and political issues. The State is given the duty and authority to pursue parity between the genders and combat discrimination. Accordingly, all laws must be dually adhered to by both men and women, and, in theory, failure to comply would accrue the same punishments. Men and women's equal position in the legal system is guaranteed regarding the electorate process. Although no comparable express provisions regarding gender equality in the judicial system exist, the natural meaning of the term 'every person', especially taken in the context of the assurance that both men and women are entitled to civil and political rights, guarantees access to the judicial system. Without question, articles 118 and 120 bestow upon both men and women access to justice in defense of their rights and interests at law and 'the right to an equitable process and to a judgment rendered in a reasonable time.'

The Constitution goes on to define what rights and practices establish an 'equitable process' in the judiciary. Where the individual is a criminal defendant, special guarantees are assured. No one may be arbitrarily detained, and all are guaranteed the benefit of juridical assistance in the event that the individual is indigent



assistance will be provided. They are further ensured the presumption of innocence until proven guilty. Regardless of subject matter, all decisions must be made on the sole basis of the application of the law to the facts at hand. All people are assured public hearings where the decision and conditions of the decision are publicly declared and explained. The judge is tasked with the protection of the rights, freedoms, and judicial security of all people that come before him.

Judges are further regulated beyond the procedural guidelines by their duty of independence and impartiality. The judiciary is independent of the executive and legislative power, and the King oversees it as the guarantor of independence. Intervention in judicial matters is strictly forbidden; interveners and judges who fail to maintain impartiality or fall victim to bias are subject to sanctions. If damages result from judicial error, the State is responsible for paying reparations to the party that was harmed. The Superior Council oversees duties of impartiality and independence, and parties who feel they have suffered as a result of judicial bias may pursue the claim in the Supreme Court.

In the context of the Moudawana, parties do not fall within the criminal defendant category and are thus not entitled to those procedural benefits, including gratuitous representation, and so are obliged to fund their own representation or apply for government-sponsored legal aid services. Hence, in practice, this is unlikely to be a viable solution for many women. Furthermore, the Constitution does not speak, at any length, of the appropriate procedures in informal justice systems. Therefore, they are subject to fewer regulations and, as a result of logistics, oversee ability is limited in this context as well.

C. INTERNATIONAL LAW AND MOROCCO'S CONCEPTION OF ACCESS TO JUSTICE

The Moroccan Constitution highlights the nation's commitment to maintaining its role in the international community and to fulfilling its obligations under duly ratified international conventions and treaties. It limits the extent to which it will adhere to such conventions insofar as they can be achieved "within the framework of the provisions of the Constitution and of the laws of the Kingdom." As a member of international organizations, it adheres to



the principles and rights of the primary charters and conventions, as well as respecting rights as they are universally recognized. This can be understood to apply directly to the United Nations Charter and the Universal Declaration of Human Rights. As a member of the international community, Morocco's conception of access to justice is shaped by international principles. "As an international principle of justice, access to justice encompasses several components: the right of an individual to bring a claim before a court of law; to have his or her case adjudicated in accordance with substantive standards of fairness and justice; and to obtain access to legal aid, particularly for those whom legal costs render the court process prohibitive."

The Hague Conference on Private International Law reflects one of the only efforts to establish a universal guide for contextualizing and understanding access to justice. The Convention on International Access to Justice was designed to deal primarily with individuals being tried in a country other than that of their habitual residence; thus, while it does not expressly create obligations on states regarding the treatment of its citizens, it provides persuasive rhetoric with regard to the basic

conceptions of access to justice in the international arena. The Convention includes state guarantees with regard to access to the competent authority, access to legal aid, timely process, and protections to ensure meaningful participation in the judicial process, such as language services. Morocco is a signatory to the Convention on International Access to Justice but has not gone on to ratify it, so is not bound by it except in as far as Morocco cannot go against the object and purpose.

Universal human rights treaties have not directly addressed the concept of access to justice, but their factors are found within several related treaties. The primary international conventions and charters relevant to women's rights, access to justice, and equitable processes thereof are the Convention on the Elimination of All Forms of Discrimination Against Women and the ICCPR. Thus, it is bound under international law and its constitutional commitment to respect its treaties to follow the provisions of both treaties insofar as they have not reserved from them.

Morocco has issued no reservations, understandings, or declarations with regard



to the ICCPR, thus binding itself to all provisions contained therein. The Covenant clearly establishes its incompatibility with any form of discrimination at the outset, stating that the rights contained therein must be guaranteed to all persons within the territory or jurisdiction of the State's parties, regardless of distinction of any kind. It further specifies its commitment to the non-discriminatory application regarding gender by expressly stating that men and women must have equal access to all civil and political rights.

Much like the Moroccan Constitution, the International Covenant on Civil and Political Rights establishes special measures to be taken for criminal defendants, including a speedy trial, protection from arbitrary detention, and the right to adequate representation. The major rights afforded to parties in non-criminal cases are equality before the courts and equal protection of the laws, fair and public hearings, and competent, independent, and impartial judges. One distinction between the domestic obligations and the international obligations regarding what constitutes due process of the law is that under the ICCPR, the competent, independent, and impartial

tribunals must be 'established by law.' Hence, IJS that are not established by law and not subject to the checks and remedies under the law are not permissible.

The Convention on the Elimination of All Forms of Discrimination Against Women largely assures the same rights: equality before the law and legal capacity identical to men's, resulting in treating women 'equally in all stages of procedure in courts and tribunals.' The CEDAW Convention goes beyond mere legislative ideals, such as those codified in both the Constitution and the ICCPR. It creates an obligation on states to take appropriate measures to modify discriminatory social and cultural patterns manifested through prejudice and customs. This should extend beyond the reach of the structured court system itself and reach IJS and the means of educating and representing oneself in a tribunal of any kind. Under Article 2, the Convention lists the obligations states must undertake; it broadly requires the legislative embodiment of the principle of equality in constitutions and other laws, the legal protection of rights, and additional duties to regulate the actual practice. States must 'ensure that public authorities and institutions shall act in conformity' with the obligation not to practice



discrimination against women and to take appropriate measures to eliminate discrimination by private parties. Hence, it reaches actions and biases held by individual magistrates and judges and entities such as informal operators. The Convention goes beyond the mere distinction between men and women, addressing the unique situation of women in rural regions, and imparts a duty on states to ensure that anti-discrimination provisions are granted in a meaningful way.

At the time of ratification, Morocco issued several reservations and declarations to the CEDAW. Of particular relevance is its declaration regarding Article 2's broad obligations to ensure non-discrimination, in both law and practice, by the State through its officers and by private parties. Morocco proclaimed its willingness to adhere to the obligations, but only insofar as they were compatible with Sharia law. Because the interpretation of Sharia law can be vastly different between nations and schools of thought, this is a troubling and ambiguous declaration. If one is to assume that Sharia law in the context of this declaration applies to the King's understanding of Sharia law as Commander of the Faithful, it may be safe

to assume that the interpretation put forth in the Moudawana reforms constitutes the meaning. The King proposed the legislation and provided the Islamic impetus and basis for its passage; thus, reflecting the obligations under Sharia law as he understands it. If, however, Sharia law in the declaration refers to the law as various religious groups within the country understand it, such a declaration could provide an exception for failure to adhere to the principles set forth. In 2008, Morocco lifted all reservations to CEDAW in an effort to improve women's rights and Morocco's image vis-à-vis the international community.

D. COMPLIANCE WITH INTERNATIONAL STANDARDS

The outline of the codified standards in both Moroccan domestic law and its international obligations demonstrate coalescence on several aspects of access to justice for all persons and the definition of justice itself. Across all the legal frameworks described, there is a clear prohibition of discrimination, especially in the exercise of legal rights and treatment under the law. The Constitution also addresses the International Convention on Civil and Political Rights' requirement of



fair and public hearings, as well as establishing detailed provisions pertaining to the legal guarantee of independent and impartial judges. The special rights afforded to criminal defendants are also nearly equivalent. Thus, at least in the text, Morocco's domestic law falls in line with the international obligations codified in the ICCPR.

The same degree of conformity to CEDAW does not exist. It holds states to a high standard, not only in legislation but in practice. At the time of accession to the Convention, the former Moudawana was still in effect and failed through the law on the books to guarantee certain equalities. For instance, prior to the reforms, the minimum marriage age for females was 15 years old. Now, post reforms, much of the legislation has come into line with the requirements under the Convention. The law in practice, however, shows how judges continue to authorize child marriages, and the rate at which minor females are marrying continues to increase.

Based on the legislative interpretation of justice and access to justice as codified at both the domestic and international level, the primary aspects of a well-functioning

and lawful judicial system are judicial independence, judicial efficiency, and judicial accessibility. Through these three criteria, one can identify whether the judicial sector is performing to the standards it has set for itself through codified law.

V. CONCLUSION

This paper set out to explore some key-related issues of access to justice in Morocco. It draws on research that shows that there is a complex interaction of factors that might contribute to providing fair access to justice. The discussion of the legal framework helped in understanding how the plurality of the legal system and customary practices determine access to justice in Morocco. The analysis in this paper shows that the development of the justice sector has a significant part to play in explaining the extent of accessibility of justice for people. One important conclusion drawn is that reform to provide fair and equal access to justice is associated with development and empowerment because being poor relates to being disadvantaged in terms of choices, basic resources, legal information, and a voice in seeking justice.



The perception of justice and access thereto in Morocco is largely shaped by disharmony between the multifaceted legal system and its colonial, tribal, and religious influences. The Government's unwillingness to view the judicial system as a whole, comprising both formal and informal systems, has allowed them to grow apart instead of pursuing integration. Accordingly, formal justice mechanisms have been painted with an unfavorable brush; they are generally regarded as inefficient and lacking independence. Meanwhile, informal justice systems while close to the cultural heart of many Moroccans (men over women), do not benefit from oversight and reforms.

Morocco's reforms following the Arab Spring took vast steps towards correcting a broken legal and judicial system. The 2011 Constitution is largely reflective of international legal standards and provides clear guidelines for pursuing judicial remedies for protected interests. Yet, its commendable ideals have not yet been realized in practice. Essentially, the Constitution has provided a law-on-the-books framework that has not been fulfilled. This is true for both the formal and informal justice mechanisms. However, the reforms completely fail to

consider the informal systems, and thus men and women who rely on informal justice have been overlooked by progress. The system, at large, places women, the poor, and those living in rural communities at a distinct disadvantage when pursuing access to justice. Both women and men are burdened by inadequacies in the justice sector in Morocco, which include lengthy proceedings, complicated procedures, and corruption. The poor are further burdened by limited resources to access services provided by courts and lawyers, and there is no functional legal aid system to assist them. Women, particularly, continue to face considerable obstacles in accessing justice. Women's access is constrained when compared with men by relatively less control of the economic assets needed to navigate justice sector services and restrictive social norms that discourage them from filing cases and complaints. When they do access services, women remain subject to the discriminatory practices in force in the judiciary.

Access to justice is defined by power and choice; both are inherently lacking for women and rural residents of Morocco, in particular. Financial, logistic, ethnolinguistic tradition, and social concerns preempt them from choosing



between formal and informal systems and from successfully navigating either. Where IJS are not included in integration and reform, there can be no empowerment for people in such circumstances, and legal changes have no meaning in their practical realities. Hence, there is a pressing need to synchronize the system to reflect the cultural reality. The State is not and cannot be indifferent to non-state law. Neither sector of the legal system can be undermined because of the positive assessment by stakeholders of urf, as well as its socio-cultural ties and the capacity for standardization and transparency in formal legal systems. The strong contradictions apparent between the two cannot be overlooked and urgently require harmonization.

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