



LEGAL STRUCTURES

Introduction

Social and cultural structures affect women's issues by influencing values and establishing individual and institutional norms. Yet the state, through its enactment of laws, plays a direct role in organising social relations in a way that reflects on women's positions in any society. Thus, what is the impact of the law on women in the Arab world? That is to say, where does the Arab legislator stand on women's issues? Does this position conform to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other international agreements? Are there legally sanctioned forms of discrimination on the basis of gender? How do practitioners of law – judges, legislators, interpreters of the law, law enforcement officials – regard the principle of equality between men and women?

The law is an explicit expression of the orientation and governing values of the state as well as its most practical and effective instrument for managing social relations, particularly in societies in which the state is prominent in regulating society. Consequently, women's status under law not only reveals how far the official establishment is committed to women's issues and the principle of equality, but it also indicates how popular culture views gender equality since the law is, to some extent, a reflection of this culture.

This chapter, therefore, begins by exploring the position of the Arab States on the ratification of the Convention. It considers, in particular, the reservations entered by Arab signatory parties to some of the articles of this Convention, reservations that have tended to void their ratification of substance. This is followed by an analysis of the provisions of Arab civil law relevant to

the principle of gender equality and finally by an assessment of the attitudes of Arab practitioners of law towards this principle.

ATTITUDES TOWARDS THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Most Arab States have signed and ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and are thus bound by its provisions, reservations excepted. There is also an optional protocol annexed to the Convention with regard to which no reservations may be entered and which grants individuals and groups the right to lodge grievances with the United Nations Committee on the Elimination of Discrimination against Women. The only Arab State to have signed this protocol is Libya.

Under Article 19 of the Vienna Convention on the Law of Treaties, a state may formulate reservations when ratifying or acceding to a treaty. The Vienna Convention defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” (Article 2, Paragraph 1 (d)).

Article 28 of CEDAW, too, provides that States may enter reservations at the time of signature or ratification or accession to the treaty, but on the condition, as stated in Paragraph 2 of this article, that the reservations are not “incompatible with the object and purpose of the present Convention”. Almost all Arab States Parties have exercised the right to enter reservations.

The reservations entered by Arab signatory parties to some of the articles of (CEDAW) have tended to void their ratification of substance.

Particularly worrying are reservations with regard to Article 2, which establishes the principle of equality of men and women.

CEDAW is one of the weakest links in the chain of international human rights law since it has weak implementing mechanisms and is encumbered with reservations.¹ Those entered by Arab States (and they are many) give cause for concern; they put in doubt the will to abide by the provisions of CEDAW. Particularly worrying are their reservations with regard to Article 2, which establishes the principle of equality of men and women, for reservations to this crucial article effectively render the ratifications meaningless.

The declarations and reservations entered by Arab States were confined to the following articles:

- Article 2, which stipulates equality before the law and prohibits discrimination against women in national constitutions and legislation (Egypt, Iraq, Libya, Morocco, Algeria, Bahrain, Syria, and UAE);
- Article 9, pertaining to nationality rights (Egypt, Tunisia, Iraq, Jordan, Morocco, Kuwait, Algeria, Lebanon, Saudi Arabia, Bahrain, Syria, UAE, and Oman);

TABLE 8-1

Ratification by Arab countries of CEDAW and declarations and reservations to it, as of 3 July 2006 (in ascending order, by date of ratification)

Country	Date of signature	Date of receipt of the instrument of ratification, accession or succession	Articles on which declarations and reservations are made						Notes
			2	7	9	15	16	29	
Egypt	16 July 1980	18 September 1981	*						All that contradicts shari'a
Yemen	30 May 1984	30 May 1984							-
Tunisia	24 July 1980	20 September 1985							
Iraq	13 August 1986	13 August 1986					*		All that requires Iraqi-Israeli relationships
Libya	16 May 1989	16 May 1989	*				*		
Jordan	3 December 1980	1 July 1992							
Morocco	21 June 1993	21 June 1993	*				*		
Kuwait	2 September 1994	2 September 1994					*		
Comoros	31 October 1994	31 October 1994							
Algeria	22 May 1996	22 May 1996							
Lebanon	21 April 1997	21 April 1997							
Djibouti	2 December 1998	2 December 1998							
Saudi Arabia	7 September 2000	7 September 2000							All that contradicts shari'a
Mauritania	10 May 2001	10 May 2001							All that contradicts shari'a
Bahrain	18 June 2002	18 June 2002							
Syria	28 March 2003	28 March 2003					*		All that requires Syrian-Israeli relationships
UAE	6 October 2004	6 October 2004							
Oman		7 February 2006							And all that contradicts shari'a
Qatar									
Sudan									
Somalia									

* All that contradicts shari'a

Source: www.un.org/womenwatch/daw/cedaw

¹ The total number of countries that ratified CEDAW reached 180 by March 2005, i.e., more than 90 per cent of the United Nations Member States. In spite of the fact that more than 20 countries have withdrawn their reservations – whether partially or totally – since the Fourth World Conference on Women in 1995, including countries such as France, Ireland, Lesotho and Mauritius, 54 countries still have reservations on important Articles of the Convention.

- Article 15, regarding women's equality with men in their legal capacity in civil matters (Tunisia, Jordan, Morocco, Algeria, Bahrain, Syria, UAE, and Oman);
- Article 16, relating to marriage and family relations (Egypt, Tunisia, Iraq, Libyan Arab Jamahiriya, Jordan, Morocco, Kuwait, Algeria, Lebanon, Bahrain, Syria, UAE, and Oman); and
- Article 29, pertaining to arbitration between States Parties and the referral of disputes over the interpretation or application of the Convention to the International Court of Justice (Egypt, Yemen, Tunisia, Iraq, Morocco, Kuwait, Algeria, Lebanon, Saudi Arabia, Bahrain, Syria, UAE, and Oman).

Arab States based their reservations to the provisions of the Convention on one of two grounds: that the articles concerned contradicted national legislation or that they conflicted with the provisions of shari'a (Islamic law). For the most part, the latter justification was applied specifically to individual provisions of the Convention that the signatory State deemed to conflict with shari'a (Egypt, Saudi Arabia, Mauritania and Oman). There were also cases in which the reservation was intended generally so as to absolve the State of its commitment to any provision of the Convention it deemed conflicted with shari'a (the reservation of Libya and Morocco to Article 2).

This was the case, for example, with the reservations entered by the Libya to this article which refer to the rules of inheritance in the shari'a as between women and men. Morocco had reservations on the same Article after noting the constitutional regulations affecting the inheritance of the throne which bar women from succession and adding the Personal Status Laws while arguing that women's rights differ from those of men, as derived from the shari'a, which, in turn, seeks to maintain equilibrium between them.

In this context, too, come the reservations made by Iraq, Libya, Morocco, Kuwait and Syria to Article 16, which refers to eliminating discrimination within marital and family relations, the reservation referring to contradictions between the article and the provisions of shari'a. (Amnesty International report on the reservations by countries of

the Middle East and North Africa to the Convention on the Elimination of All Forms of Discrimination against Women, AI Index: IOR 51/009/2004).

Occasionally, States entered reservations without providing specific reasons, whether incompatibility with national legislation, conflict with shari'a or any other justification. This applies, for example, to the reservations made by Egypt and Kuwait to Article 9, Paragraph 2, regarding women's equality with men with respect to the nationality of their children.

Another type of reservation was entered only by Iraq and Syria, both of which insisted that their accession to the Convention should in no way entail dealings with Israel.

There are numerous examples of reservations entered on the grounds that the article concerned contradicted national legislation. They include: Algeria's reservations to Articles 9 (Paragraph 2), 15 (Paragraph 4) and 16; Kuwait's reservations to Article 9 (Paragraph 2); Morocco's reservations to Articles 2, 9 (Paragraph 2) and 15 (Paragraph 4); and Tunisia's reservations to Articles 9 (Paragraph 2), 15 (Paragraph 4) and 16. None of these States, moreover, restricted the duration of their reservation until national legislation could be reviewed and made consistent with CEDAW. Many provisions of the national legislation of these States are discriminatory. Instead of correcting these provisions to eliminate discrimination and to protect women, States that have entered reservations on such grounds are effectively enshrining discriminatory provisions in their national legislation.

In the case of reservations made by Arab countries citing incompatibility with shari'a, there is no consistent approach among the States that have entered reservations on this basis. It further appears that there is no consistent interpretation or definitive concept acceptable to all the Arab States for applying shari'a in reference to the provisions of the Convention.

It clearly is important for Arab States to take the initiative in reconsidering their reservations. Reference is made, in this regard, to the Beijing Declaration and Platform for Action of 1995, which stresses that, in order to protect the human rights of women, resort to reservations

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must be avoided as far as possible. The Declaration's Platform for Action recommends that states "limit the extent of any reservations to the Convention on the Elimination of All Forms of Discrimination against Women; formulate any such reservations as precisely and as narrowly as possible; ensure that no reservations are incompatible with the object and purpose of the Convention or otherwise incompatible with international treaty law, and regularly review them with a view to withdrawing them; and withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law".

In a number of Arab States and at the urging of civil society and some national institutions, legislative reviews are under way to reconsider the State's stand on reservations. This positive move deserves to be encouraged.

It is important that this move coincide with an intensification of efforts by the state and civil society institutions to raise awareness of the Convention among the public and in legislative circles and law enforcement agencies. The public survey indicated that only a small minority of the Arab public is familiar with CEDAW (Box 8-1). Similar efforts need to be undertaken to bring attention to the violations that take place both in the legislative context as well as in practice.

CONSTITUTIONAL CONDITIONS

The constitutions of most of the Arab States contain provisions affirming the principle of equality in general and the principle of equality between men and women in particular.² Some of these constitutions contain specific provisions for equality of men and women in, for example, employment in public office,³

political rights,⁴ and rights and duties.⁵ Some also contain provisions stipulating the right to equal opportunity;⁶ affirming the state's obligation to preserve the family, to protect motherhood and children, and to guarantee a proper balance between women's duties towards their families and their work in society;⁷ and prohibiting the employment of women in certain types of industries or at specified times of day.⁸

Much to their credit, Arab legislators, and constitutional lawmakers in particular, have respected the principle of gender differences and have made provision for regulating the effects of these differences legislatively. Unfortunately, in many areas of law, legislators have leaned so heavily towards the principle of gender differences that they have codified gender discrimination, thereby violating the principle of equality, which is sanctified in religious canons and rendered an international obligation under international treaties. Clearly, respect for gender differences in law is commendable only insofar as it does not give rise to discriminatory legislation incompatible with the values and spirit of the age.

WOMEN'S POLITICAL AND PUBLIC RIGHTS

National legislation in many Arab States contains provisions guaranteeing women's political rights and stipulating the principle of equality of men and women in the exercise of the right to participate in electoral processes and to stand for public office. Kuwait has recently joined those States whose legislations stipulate the enjoyment by women of their political rights on the same footing as men, following the legislative amendment passed in May 2005. In some countries, reference to

² Article 40 of the Egyptian constitution, Article 52 of the Jordanian constitution, Article 7 of the Lebanese constitution, Article 6 of the Tunisian constitution, Article 29 of the Algerian constitution, Article 5 of the Moroccan constitution and Article 18 of the Bahraini constitution.

³ Article 14 of the Egyptian constitution, Article 22 of the Jordanian constitution and Article 12 of the Lebanese constitution.

⁴ Article 21 of the Lebanese constitution and Article 8 of the Moroccan constitution.

⁵ Article 6 of the Tunisian constitution and Article 31 of the Algerian constitution.

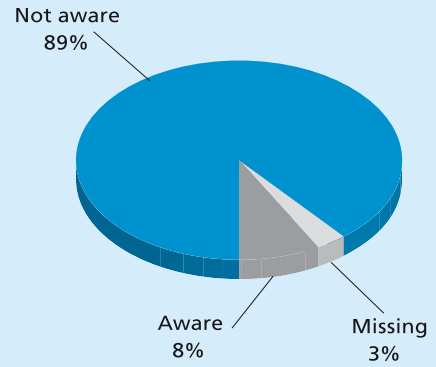
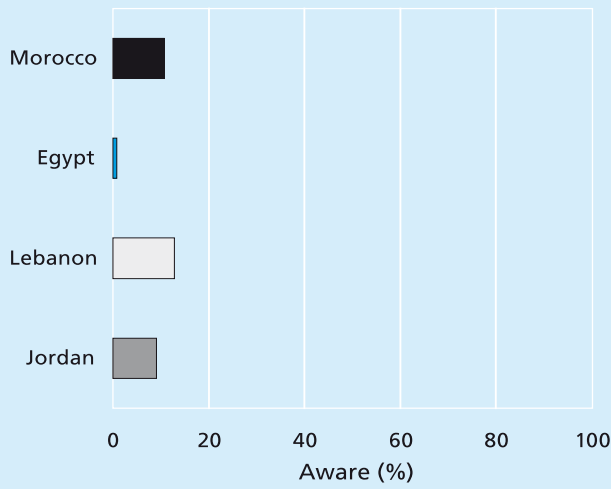
⁶ For example, Article 8 of the Egyptian constitution.

⁷ Articles 10 and 11 of the Egyptian constitution, for example.

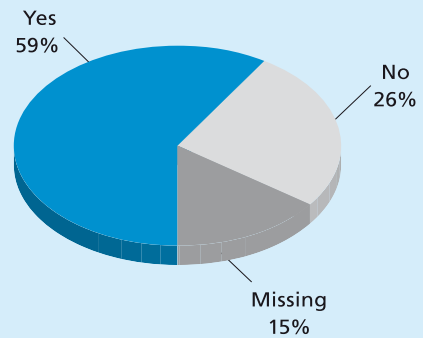
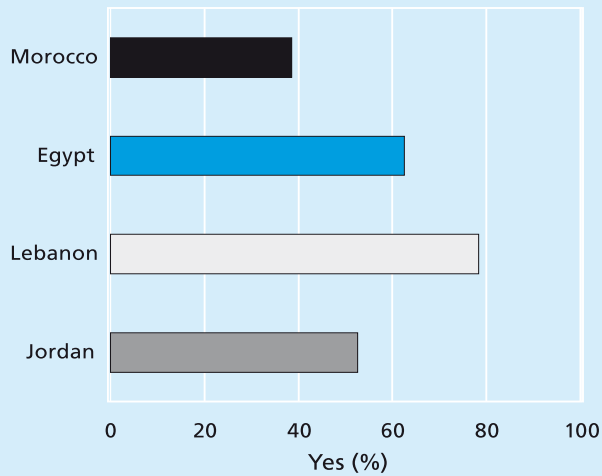
⁸ Article 69 of the Jordanian constitution.

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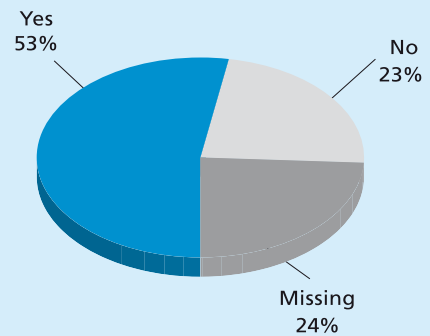
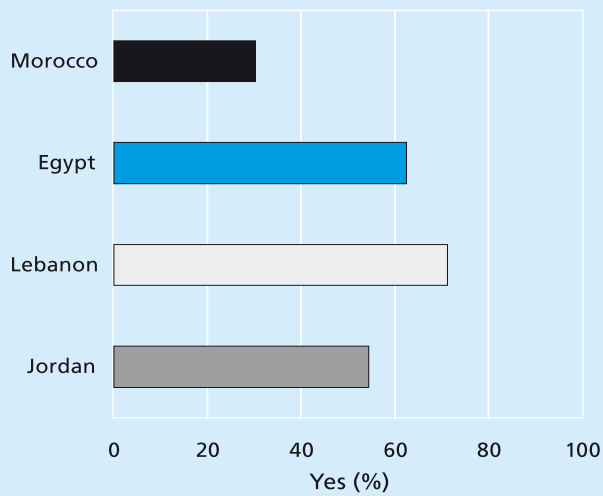
Are you aware of CEDAW?



If so, do you approve of the full implementation of CEDAW in your country?



If so, do you approve of the full implementation of CEDAW in all Arab countries?



Parliamentary quota systems for women do not conflict with the principle of equality under law.

Laws have been entered on the books explicitly depriving women of the right to political participation.

*Article 4 of CEDAW allowed temporary affirmative action, stating:
"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination.*

women's enjoyment of political rights appears in the text of the constitution itself.⁹

Nevertheless, despite these constitutional and legislative guarantees of women's right to political participation, the actual extent of this participation is still miniscule. The paltry representation of women in parliament in the Arab Mashreq (eastern Arab world) should compel States of this region to seriously consider emulating the example of the Arab Maghreb (North Africa), where most States have adopted quota systems to ensure a significant representation of women in their parliaments. Although Egypt had at one point adopted a form of quota system, this was later revoked on grounds of possible unconstitutionality even though the Supreme Constitutional Court had not issued a ruling to this effect.

PARLIAMENTARY QUOTA SYSTEMS FOR WOMEN

Contrary to what some imagine, parliamentary quota systems for women do not conflict with the principle of equality under law. Arab women have historically suffered enormous injustice from their political exclusion, and Arab laws have been traditionally formulated so as to perpetuate this exclusion. Indeed, laws have been entered on the books explicitly depriving women of the right to political participation. However, even when Arab legislators have taken steps to establish gender equality in political participation under law, such formal equality has been of little aid to women in a cultural and social environment inimical to women's acquisition and free exercise of their political rights. It follows, therefore, that affirmative legislative intervention to allocate a quota of parliamentary seats for women aims to help society make amends for its historical injustice against women and to make up for lost time in giving effect to the principle of equal opportunity enshrined in many Arab constitutions.

In this regard, Article 4 of CEDAW allowed temporary affirmative action, stating:

"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved". Naturally, the affirmative measures referred to in this paragraph and that CEDAW regards as legitimate also include legislative measures. The stipulation that such measures are temporary is also understandable since the presumption is that these measures are intended to help overcome an historically entrenched condition, namely, the de facto inequality of women. However, that the Convention uses the term "temporary" in conjunction with the term "special measures" does not imply that the actual legislation effecting these measures must stipulate that they are time-bound.

The Beijing Declaration and Platform for Action urge governments to review the impact of their electoral systems on the political representation of women in elected bodies. It is precisely because of this impact that the Fifth Recommendation of the Committee on the Elimination of Discrimination against Women urged States Parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems in representative bodies. Similar recommendations of the Inter-Parliamentary Union and the United Nations Commission on the Status of Women state that 30 per cent representation should be a minimum threshold for the quota of women in decision-making positions at the national level in both the legislative and executive domains (Farahat, in Arabic, 2003).

Experiences around the world in applying legislative instruments to enhance the parliamentary profile of women have varied. Some governments have applied quota stipulations to political party electoral lists (Finland, France, Norway and Sweden); others,

⁹ See, for example, Article 21 of the Lebanese constitution, Article 8 of the Moroccan constitution, Articles 34, 35 and 42 of the Qatari constitution, Article 1 of the Egyptian Law for the Exercise of Political Rights, Article 2 of the Jordanian Chamber of Deputies Law, Article 2 of the Tunisian Electoral Code, and Article 1 of the Bahraini Law for the Exercise of Political Rights.

where there is a proportional parliamentary electoral system in which candidates run as individuals, reserve a set number of seats for women (Germany). Among the African countries to apply quota systems and realise a significant increase in the ratio of women to men in parliament are Eritrea, Ghana, Morocco and Senegal ('Abd al-Mun'im, in Arabic, 2002, 26).

These successes from other countries are examples for those Arab States that have not yet adopted affirmative action measures. The latter should overcome their hesitation and establish quota systems guaranteeing women a minimum level of representation in their parliaments whether elections to these bodies are held on the basis of individual candidatures or electoral lists.

LABOUR RELATIONS

Labour legislation in many Arab States contains provisions establishing legal protection for working women. Indeed, such protection is explicitly stipulated in some national constitutions, as is the case in the Jordanian and Egyptian constitutions (Article 69 and Article 11, respectively), and the labour laws of some States contain provisions explicitly prohibiting gender discrimination in the work place.¹⁰

Moreover, many States have laws guaranteeing women the right to maternity leave,¹¹ prohibiting the dismissal or termination of service of working women during maternity leave¹² or pregnancy,¹³ and guaranteeing them the right to child care leave¹⁴ and to a period for nursing infants.¹⁵ In addition to the foregoing provisions, Jordanian labour law provides a male or female worker the right to take extended leave in order to accompany

his or her spouse if the spouse has moved to a new work place located in another province or abroad (Article 68).

In spite of the equality in the right to work granted to women in most Arab corpuses of law, these same corpuses contain scattered restrictions on this right. The family laws in many Arab countries, for example, penalise wives who leave their matrimonial home for work without their husbands' consent. This occurs in spite of the fact that public opinion in countries such as Lebanon and Morocco tends to agree that a wife should be free to travel on her own (Box 8-2).

Libyan labour law prohibits the employment of women in work that does not suit "their nature".

Saudi Arabia has severe restrictions on women's right to work. A royal decree of 1985 prohibits women from employment in all fields of work apart from female education and nursing. It also prohibits women from associating with men in the workplace (Hijab and El-Solh, 2003).

As previously mentioned, many labour laws contain provisions prohibiting women from working at certain times (i.e., at night)¹⁶ and in certain types of work even if there are stipulations for exceptions. Regardless of whether these provisions are ostensibly intended to protect women, they constitute an unwarranted restriction on women's right to work, as will be explained below.

To illustrate, Egypt's Labour Law prohibits the employment of women at night except under those conditions and circumstances stated by decree of the Minister of Manpower and Emigration. It further prohibits the employment of women in occupations harmful to their health or moral well-being, in physically

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¹⁰ Article 5 of the Tunisian Labour Law.

¹¹ Article 91 of the Egyptian Labour Law, Article 61 of the Bahraini Labour Law, Article 25 of the Kuwaiti Labour Law, Article 37 of the Moroccan Labour Law and Article 64 of the Tunisian Labour Law.

¹² Article 92 of the Egyptian Labour Law and similar articles in other Arab legislation.

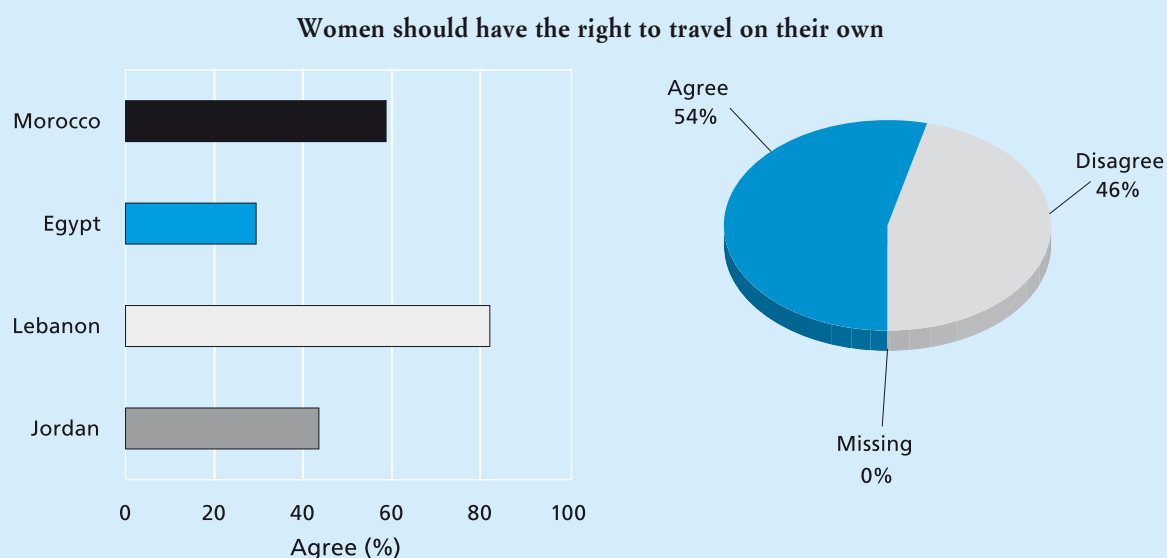
¹³ Article 27 of the Jordanian Labour Law and similar articles in other Arab legislation.

¹⁴ Article 94 of the Egyptian Law of the Child and Article 67 of the Jordanian Labour Law.

¹⁵ Article 71 of the Egyptian Law of the Child and Article 70 of the Jordanian Labour Law.

¹⁶ See, for example, Articles 89 and 90 of the Egyptian Labour Law; Articles 67, 68, 77 and 78 of the Tunisian Labour Code; Articles 23 and 24 of the Kuwaiti Civil Sector Labour Law; and Articles 59 and 60 of the Bahraini Labour Law.

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The argument that prohibitions against the employment of women in certain occupations or at certain times of day are intended to protect women morally simply does not hold.

strenuous jobs and other types of employment designated by ministerial decree. The Minister of Manpower and Emigration has decreed that women may work at night in certain fields of work, such as the hotel industry and other institutions supervised by the Ministry of Tourism; theatres, cinemas and other such establishments that offer theatrical or musical entertainment; commercial establishments in ports that remain open at night; and hospitals, clinics, pharmacies and other health care establishments. Another ministerial decree prohibits the employment of women in such commercial activities as bars and gambling establishments; domestic service in furnished flats and boarding houses that do not fall under the supervision of the Ministry of Tourism; and dancing establishments unless the women are professional dancers or performers of legal age. It further prohibits women from working in the manufacture of alcoholic beverages, below ground in mines and quarries, in smelting furnaces, in the manufacture of explosives and in other industries that are hazardous to health.

Similar provisions exist in other Arab labour laws, albeit with variations in the types of employment permitted or prohibited to women. Article 27 of the UAE Labour Law

states, "Women may not be employed at night, by which term is meant a period of no less than 11 successive hours that includes the period between 10:00 p.m. and 7:00 a.m." Article 59 of the Bahraini Law for Employment in the Civil Sector states, "Women may not be employed at night between 8:00 p.m. and 7:00 a.m., exception being made for health care establishments and other facilities designated by a decree from the Ministry of Labour and Social Affairs".

In Lebanon, the women's rights movement was instrumental in repealing the prohibition of the employment of women at night.

The argument that prohibitions against the employment of women in certain occupations or at certain times of day are intended to protect women morally simply does not hold. In some of these countries, women are permitted to work in tourist facilities, bars, discotheques and other entertainment establishments licensed by the tourist authorities to operate around the clock. Nor does the argument that these laws aim to safeguard women's physical well-being by sparing them employment in strenuous activities stand up to scrutiny, for women in these countries engage in strenuous labour, in the home and in agriculture, for example, with no legal protection whatsoever. Indeed, the

researcher is hard put to identify a standard criterion for such prohibitions; ultimately, they are governed by ad hoc and varying impressions as to what types of employment are or are not suitable for women. One is thus forced to conclude that Arab legislators have accorded themselves a mandate over women entitling them to expropriate their right to work.

One also observes that many Arab laws governing women's employment at night have so narrowed the scope for women's night employment as to render prohibition the rule and permission the exception. This contravenes the International Labour Organisation (ILO) Convention concerning Night Work of Women Employed in Industry (Revised 1948), which solely prohibits the employment of women at night in industrial undertakings as specifically defined by the Convention. Furthermore, the Arab legislator has gone to such extremes in restricting women's work as to prohibit their employment in entire fields of activity, in contravention of the principle of equal opportunity of men and women to work.

Many Arab States have signed the ILO Equal Remuneration Convention: Algeria, Djibouti, Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Syria, Tunisia, the UAE and Yemen. Again, however, national legislation in this regard varies considerably. Some States explicitly provide for equality in remuneration in the same job (as is the case with Iraq, Kuwait, Libya and Syria, for example), others have no legal provision for this at all (Bahrain), and yet others only stipulate equality in remuneration in the civil service sector (Qatar and Saudi Arabia).

In spite of the many guarantees for the protection of women in the work place in Arab legislation, various forms of discrimination still persist either because the law explicitly sanctions them or because it fails to intervene to remove them. A significant segment of the female working population is employed under temporary contracts, in which capacity they are unprotected by national labour laws. Another large segment, which is engaged in seasonal work, agricultural activities or domestic service, has no legal protection whatsoever. Many women in a number of Arab States suffer from the lack of a binding

law to enable the unification of families in the event that the spouses work in separate or geographically remote areas. In addition to the foregoing, women are barred from many positions of responsibility even though no legal prohibitions exist to this effect. Leaving aside the positions of president and prime minister, women in many Arab countries are excluded from becoming governors, mayors, university deans and the like. In many countries, too (such as Egypt and the Gulf States), women are still not appointed as judges. Although one female judge has been appointed to the Supreme Constitutional Court in Egypt, the positions at the lower, middle and most of the higher echelons of the judiciary remain out of reach for women.

Arab women are sometimes subjected to various forms of sexual harassment in the workplace from their bosses. The term "sexual harassment" is understood internationally as the abuse of authority by persons in positions of power with the purpose of coercing persons under their authority into granting sexual favours.

In general, Arab penal codes contain no concrete definition of the crime of sexual harassment. There are laws punishing sex crimes such as rape, sexual assault, sexual abuse and extorting sexual favours. However, while these laws provide for harsher penalties against offenders in a position of power over their victims, the crime of sexual harassment, as defined internationally, is not punishable by law unless it overlaps in some manner with the sex crimes designated in Arab penal codes. Arab legislators should, therefore, take steps to define sexual harassment as a crime in its own right even if it is not as grave as the crimes of rape, sexual assault and sexual abuse that are already addressed in existing legislation.

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Arab penal codes contain no concrete definition of the crime of sexual harassment.

BOX 8-3

Al-Tahir al-Haddad: Women in the Judiciary

There is nothing in the Qur'anic texts to prevent women from assuming any post in the state or society, however exalted. This indicates that such matters have

nothing to do with the essence of Islam, for otherwise the Qur'an would not have omitted to address them with the required clarity.

Source: Al-Haddad, in Arabic, 1929, 17-18.

INCRIMINATION AND PUNISHMENT

In general, Arab penal codes and criminal procedures deal with women either as a symbol of honour and virtue, as an object that needs to be protected for its childbearing functions, or as a component of a family unit that needs to be safeguarded against desertion and neglect. The statutes orbiting around these three conceptual loci in Arab penal policies towards women abound. There are numerous provisions penalising the crime of adultery¹⁷ whether committed by the husband or wife; others penalising the crimes of sexual assault, rape¹⁸ and the kidnapping of women; and another set penalising the crimes of prostitution and sexual debauchery (*fujur*). There are laws against abortion, laws for ascertaining the validity of marriages and laws to protect family cohesion.

Arab legislation offers several instances of laws aiming to protect the family. Article 279 of the Jordanian penal code calls for the imprisonment of anyone found guilty of contracting a marriage in violation of the Family Rights Law or any other law, or anyone who marries or conducts the marriage rites for a female minor. Article 281 of the Jordanian penal code stipulates a prison term for anyone who divorces his wife without applying to a judge, or a person deputising for a judge, within 15 days to have the divorce officially registered. Under Article 483 of the Lebanese penal code, a cleric who officiates at the marriage of a minor (below the age of 18) without registering in the marriage contract the approval of the minor's guardian is subject to payment of a fine. Articles 479 to 482 of the Moroccan criminal code detail several punishable offences against the family.

Some articles in the criminal procedure codes of these countries also observe gender-specific considerations. These include special provisions regarding the conduct of physical searches on women, the execution of physical punishments (death penalties may not be

carried out on women who are pregnant or nursing children) and the implementation of punishments that deprive individuals of their freedom (special conditions apply to female prisoners).

This said, discrimination against women is firmly ingrained in the penal codes of some Arab States. In Egypt, this appears most blatantly in the differentiation between men and women in the crime of adultery. This applies both to the definition of what constitutes the crime and to the stipulations of punishment. In terms of crime, men are guilty of adultery only if the act takes place in the marital home, whereas women are guilty of adultery regardless of where the act takes place. In terms of punishment, male adulterers are subject to imprisonment for a period not to exceed six months, whereas women are subject to a maximum penalty of two years.¹⁹ It should be noted that this discrimination has no basis in shari'a; rather, it is inherited from foreign law. The Egyptian penal code is also discriminatory in the material status it accords to murder committed by a husband or wife upon discovering his or her spouse in flagrante delicto with a third party. Whereas a husband found guilty of this crime is only subject to the penal provisions for non-felonious crimes (Article 237 of the criminal code), a wife similarly provoked is subject to those governing felonies.

As in Egyptian law, Article 562 of the Lebanese penal code provides for a lighter sentence for a husband who kills his adulterous wife and her partner when caught in the act than that for a wife found guilty of murder under the same circumstances. In Lebanese penal code, Articles 487, 488 and 489, pertaining to adultery, are also heavily biased against women in terms of the conditions that establish the crime, the punishment of the perpetrators and the burden of proof. Under Lebanese law, an adulterous woman is one guilty of extramarital intercourse regardless of where this takes place whereas a man is regarded as adulterous only

Discrimination against women appears most blatantly in the differentiation between men and women in the crime of adultery.

¹⁷ For example, Articles 282-286 of the Jordanian penal code, Articles 487-491 of the Lebanese penal code and Articles 274-277 of the Egyptian penal code.

¹⁸ Articles 292-299 of the Jordanian penal code, Articles 505-510 of the Lebanese penal code, Articles 267-269 of the Egyptian penal code and Articles 486-487 of the Moroccan criminal code.

¹⁹ Articles 274 and 277 of the Egyptian penal code.

if guilty of extramarital intercourse in the conjugal home (as in Egyptian law) or if he openly takes a mistress. Whereas an adulterous man is liable to a prison sentence of one month to a year, an adulterous woman faces three months to two years in prison. An adulterous woman's partner is subject to the same sentence as the woman only if he is married, while the adulterous man's partner is subject to the same penalty as the man regardless of her marital status. Proving the crime of adultery is also discriminatory as it is much easier to incriminate wives than it is husbands.

On the other hand, some Arab penal codes are free of gender bias as pertains to the crime of adultery (see, for example, Articles 491 the Moroccan criminal and 316 of Bahraini penal codes).

Efforts are in progress to eliminate the current bias in penal code law. In Egypt, Article 291 – now repealed – once read: “If a kidnapper legally marries the woman he kidnapped, he will be exempted from punishment”. The ostensible purpose of this provision was to provide a way to cover up the crime so as to spare the victim and her family from its social and psychological fallout and to allow for the stability and continuity of the family unit emerging from this marriage. In practice, this provision was extremely detrimental to women. Instead of acting as a deterrent, the law rendered abduction more attractive to potential offenders, offering an avenue for evading punishment for kidnapping and even rape. In light of this consideration and others, Article 291 was abolished so as to reinstate the full deterrent power of the law against the kidnapping of women by closing off all avenues for escaping punishment.

In spite of this and other inroads made by Arab legislators towards eliminating gender bias in Arab penal codes, the approach remains ad hoc and piecemeal. Attention must be given to developing a more intensive and comprehensive approach.

PERSONAL STATUS LAWS

If legally sanctioned discrimination means disparity in the rule of law in spite of the presumed equality in legal status of citizens, then Arab personal status laws, with regard to

Muslims and non-Muslims alike, are witness to legally sanctioned gender bias. This stems from the fact that personal status statutes are primarily derived from theological interpretations and judgements. The latter originate in the remote past when gender discrimination permeated society and they have acquired a sanctity and absoluteness in that confused area where the immutable tenets of religious creed interact with social history.

Fortunately, evidence from the Report's public opinion survey indicates that the Arab public is moving towards a more liberal perspective on personal status issues, such as asserting women's right to choose a spouse (Box 8-4).

THE LACK OF CODIFICATION IN SOME ARAB STATES:

Arab personal status laws remain conservative and resistant to change because a number of Arab States are reluctant to develop a national personal status code. Instead, they favour leaving matters entirely to the judiciary, which is heavily influenced by the conservative nature of classical Islamic jurisprudence (*fiqh*).

Some Arab States, such as Bahrain, Egypt, Lebanon and Qatar, lack any unified personal status code whereas others have unified personal status codes for Muslims.

In Egypt, for example, there exist several personal status laws for Muslims, some dating back to 1920 and 1929. However, where a textual provision is not available in law, recourse is made to the prevailing views of the Hanafi school of jurisprudence. Deferring to classical Islamic jurisprudence can produce rulings repulsive to the spirit of the age and to a human rights culture. A notable instance is to be found in the ruling, upheld by the Court of Cassation, ordering the divorce of an Egyptian intellectual from his wife on the grounds of his alleged apostasy in certain books that he had published. The ruling was founded upon the Hanafi opinion that an apostate must be divorced from his spouse. Clearly, then, it is essential to have clear, precise codification of personal status regulations; the legislative clarity to which this will contribute is a precondition for combating discrimination.

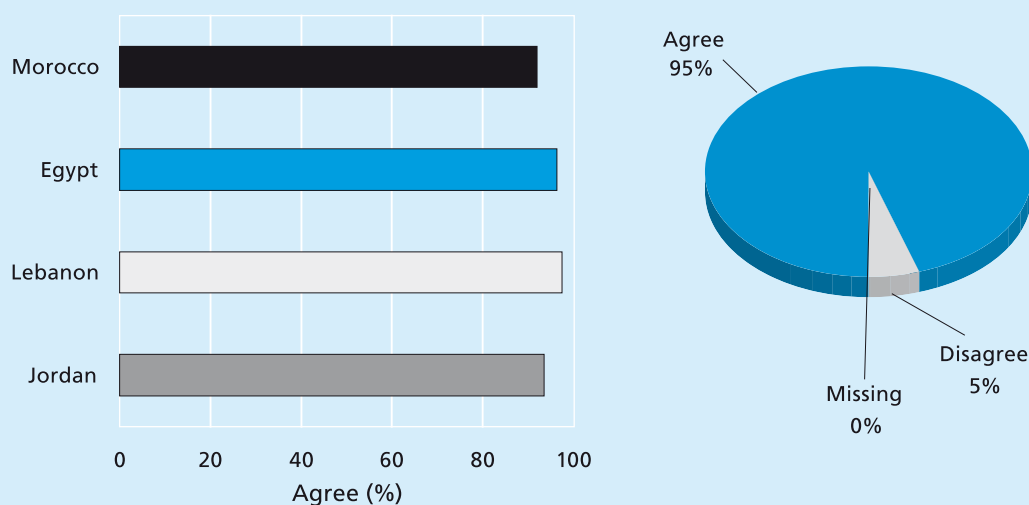
Arab personal status laws, with regard to Muslims and non-Muslims alike, are witness to legally sanctioned gender bias.

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Clear, precise codification of personal status regulations... is a precondition for combating discrimination.

Public Opinion on Aspects of the Rise of Arab Women, Four Arab Countries, 2005

Women should have the right to choose their spouses on an equal footing with men



Over twenty years ago, the secretariat of the Council of Arab Ministers of Justice drafted a model Unified Personal Status Code. The project adopted the personal status regulations that prevailed in Arab States at the time and that continue today in many of them, bearing the stamp of classical Islamic jurisprudence.

Non-Muslims in Egypt are subject to their denominational canons in personal status matters. However, in the event of a dispute between spouses of different denominations, sects or faiths, shari'a, as the principle source of state law, is brought to bear. Some Coptic clerics regard this as another form of discrimination.

Lebanon, too, does not have a unified personal status code. Rather, family matters are subject to the strictures of the religious community, whether Muslim or Christian. Lebanon recognises 18 religious denominations, each of which has its own religious canon. Perhaps this is why Lebanon entered a reservation to Article 16 of CEDAW, which establishes the principle of equality in family relations.

Bahrain, Qatar and Saudi Arabia also have no unified personal status code. Rather, it is the religious judges in these countries who rule on family matters in accordance with the provisions of Islamic jurisprudence. Recently, however, the King of Bahrain formed a committee to prepare a family law bill. Although the committee has completed its work, the bill has yet to be passed into law.

In some States, the situation is far better in terms of the instrument of legal regulation. In Jordan, for example, the Law of Personal Status for Muslims No. 61 of 1976 has codified the provisions of Islamic jurisprudence as they

pertain to family relations, from engagement through marriage dissolution. Non-Muslims in Jordan remain subject to their own assorted religious laws on these matters. Algeria, Kuwait, Morocco and Tunisia also fare much better in their regulation of personal status affairs, as is described in detail below. In fact, the Tunisian Personal Status Law is applied to all Tunisians regardless of their religious affiliation.

UNIFIED CODIFICATION OF PERSONAL STATUS AFFAIRS IN ARAB STATES

Over twenty years ago, the secretariat of the Council of Arab Ministers of Justice drafted a model Unified Personal Status Code. The project adopted the personal status regulations that prevailed in Arab States at the time and that continue today in many of them, bearing the stamp of classical Islamic jurisprudence. It featured no notable attempts to weed out gender bias in Arab personal status laws. Rather, it adopted a juristic approach in an effort to reconcile modern needs and requirements with the higher aims of shari'a. Article 31 of the draft code permits a man to take up to four wives unless there is doubt over his ability to treat them equitably. The article failed to clarify a procedural mechanism for invalidating a polygamous marriage in the event of demonstrable inequity. Article 52

places the burden of economic support on the husband alone even if his wife is well off. Article 83 defines the dissolution of a marriage initiated by the husband as divorce (*talaq*) and the dissolution of a marriage by mutual consent as repudiation (*mukhala'a*). In the latter case, it is the wife who must pay the husband compensation. Article 96 contrasts with more progressive legislation subsequently adopted by some Arab States restricting such compensation (*khul'*) to marital annulment initiated by the wife.

Nevertheless, the draft code did contain some positive points intended to alleviate gender bias in Arab personal status laws. For example, Article 6 permits the stipulation of conditions in marriage contracts and provides that, in order for a divorce to be valid, the husband must deposit a declaration with a judge who, in turn, must attempt to reconcile the spouses before accepting the declaration.

In all events, given that the draft Unified Personal Status Code is decades old and has long since been surpassed in many areas by subsequent legislation in Arab States, the Arab League should take upon itself two tasks. The first is to revise the draft code so as to bring it into conformity with the demands and spirit of the times and with the international obligations of Arab States. The second is to work to make this legislation a reality through a treaty adopted by the Arab League Council, followed by efforts to enter its provisions into the national legislation of member States.

THE GENERAL CHARACTERISTICS OF ARAB FAMILY LAW

Before turning to the specifics of how family laws in individual Arab States fare in terms of gender equality, the Report will focus on certain characteristics common to family law in all Arab States from the same perspective. Most Arab legislation is characterised by a marked deficit in gender equality in family law. The notion that men are women's keepers and have a degree of command over them is sustained in Islamic scriptures. In legal practice, this has translated into laws requiring husbands to support their wives financially, laws ordaining wifely obedience, laws granting men alone the

right to dictate divorce and laws granting men the right to the compulsory return of their wives in the event of a revocable divorce (*talaq raj'i*).

A husband's custodial authority over his wife is evidenced in other provisions. In many Arab States, the right of women to work and to freedom of movement is restricted by the need to obtain the approval of their husbands. Trusteeship over the money and property of minors is held by the father and then passes to the paternal grandfather. In spite of the amendments that have been introduced to the nationality laws of some Arab States, the nationality of the father remains the primary criterion for granting nationality to the spouse and children; however, the reverse might not be true.

Arab legislators generally rest their justification of men's superiority over women in marital relations on the premise that men are in an economically stronger position than women and are therefore obliged to support their wives and children. It was this premise that led some Arab States to enter reservations to Article 16 of CEDAW, which provides for equality of men and women in all matters relating to marriage and family relations. The fact is, however, that the economic justification for perpetuating inequality in marital relations no longer holds water in the face of the reality of many contemporary Arab societies. That wives in these societies are compelled to work alongside their husbands in order to provide for their families applies as much to average-income families as it does to those of limited income.

For the most part, Arab attempts to modernise family laws with an eye to alleviating gender discrimination have focused on halting the more pernicious practices while preserving the original principles intact. For example, Arab legislators have prohibited use of force in the enforcement of rulings ordering wives to return to their marital homes. Husbands must now officially inform their first wives if they intend to take a second wife and men's right to polygamy is restricted by the need to provide acceptable grounds for taking an additional wife and by demonstrable ability to treat the wives equitably. Legislators have also

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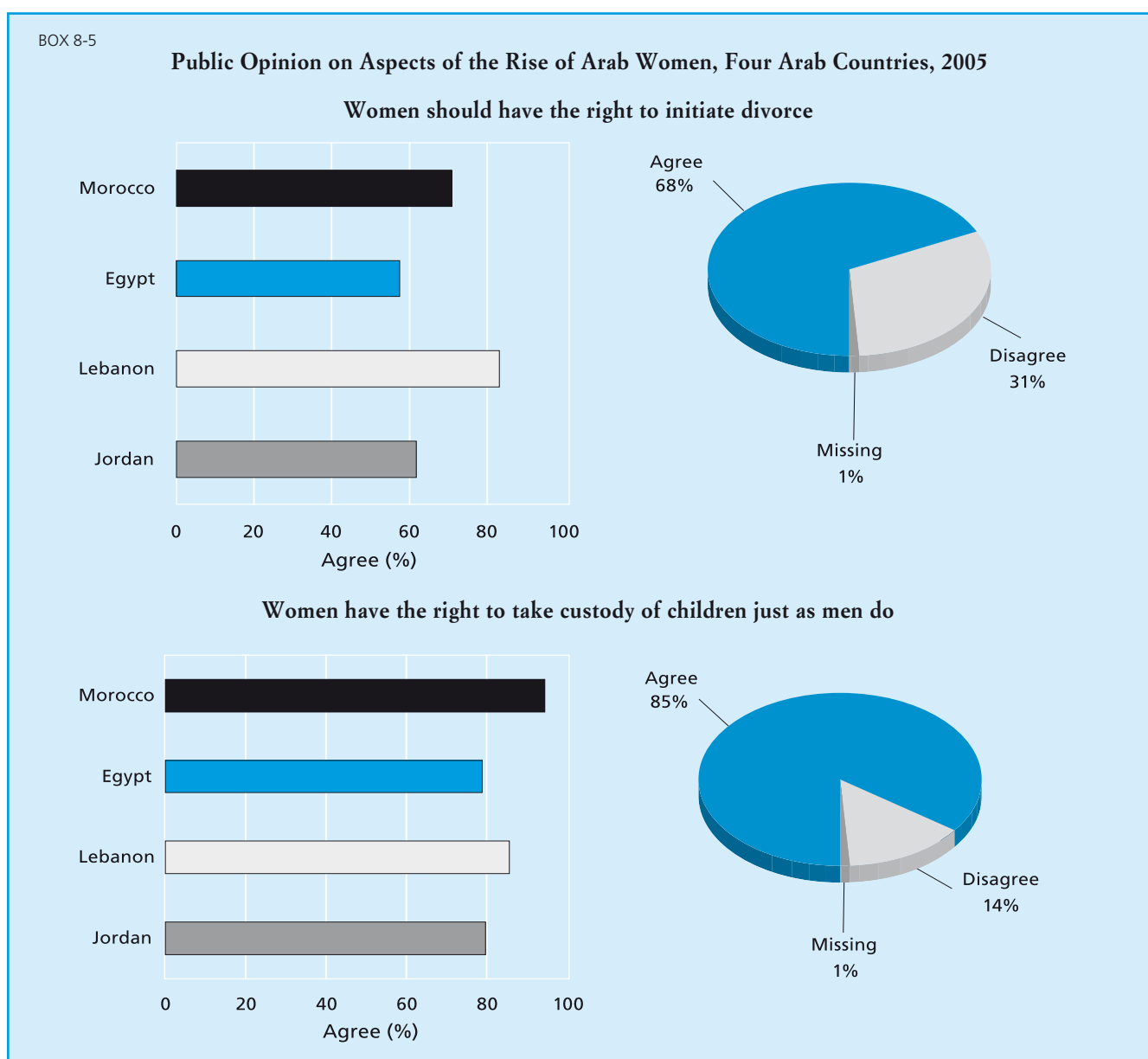
Arab public opinion tends to take a more progressive stance than current legislation when it comes to women's rights to seek divorce and custody of children.

established the right of the wife to demand a divorce on the grounds of personal injury if her husband takes a second wife and her right to *khul'*, thereby balancing the spouses' rights to terminate the matrimonial relationship. A husband is now required to inform his wife of his intent to divorce her and register her acknowledgement of having been so informed, and he is required to notarise the divorce and officially notify his former wife of this. Women now have the right to stipulate certain conditions in the marriage contract as long as those conditions do not conflict with shari'a. Finally, legislators have established the right of a wife to retain custody of her children beyond the age at which custody normally passes to the

father, if that is deemed in the interests of the children, and to retain the marital home as the custodial dwelling.

It is important to note that Arab public opinion tends to take a more progressive stance than current legislation when it comes to women's rights to seek divorce and custody of children (Box 8-5).

Personal status regulations for non-Muslims are derived from the canons of their respective religious sects or denominations. For the most part, these regulations sharply curtail the right of both spouses to divorce and, in some cases, prohibit it altogether. Adherents of Orthodox Christian denominations may, on various grounds, appeal for a judicial ruling



granting a divorce, whereas Catholics may only sue for physical separation, in spite of allowing for the possibility of annulment of the marriage contract or declaring it invalid owing to flaws inherent from its initiation. On the whole, the notion of male superiority appears to have governed the formulation of such provisions pertaining to matrimonial relations.

A COMPARATIVE VIEW

One cannot help but observe that personal status law in the Maghreb (North Africa) is more progressive and less discriminatory than that in the Mashreq (the Arab East). Most of the Maghreb states (Algeria, Morocco and Tunisia) have made significant inroads, albeit in varying degrees, towards alleviating the injustices against women in personal status matters without infringing upon the principles of shari'a.

Tunisia is the most progressive country in respect to legislation that approaches the stipulation of the principle of equality in family relations, followed by Morocco and then Algeria, as illustrated below. Taken together, many legislative texts from the Maghreb prove it is possible for Arab legislators to preserve the principles of shari'a by applying interpretations favourable to the equality of men and women and to alleviating the historical bias against women in family relations.

It is instructive to compare the most important provisions of the Kuwaiti Personal Status Law with their counterparts in Maghrebi personal status laws, which will illustrate the progressive nature of the latter. The family law in Kuwait will be the basis for this comparison as it reflects, both in its general and in many of its specific characteristics, family law and judicial practice throughout the Mashreq. The Report will focus here on those areas of family law that are generally the most vulnerable to discriminatory legislation: eligibility for marriage and contracting marriages, the effects of the contractual arrangement and the dissolution of the marital contract.

The Kuwait Unified Personal Status Code for Muslims contains means of protecting women even where there are numerous instances of gender discrimination. Marriages

between Muslims in Kuwait are concluded with the assent of the guardian of the fiancée and the acceptance of the fiancé or of a person acting on his behalf (Article 9). Polygamy is unrestricted for men apart from the provision (stated in Article 23) that "[A] man may not marry a fifth wife until he dissolves his marriage with one of his four wives and the divorced wife's 'idda (stipulated waiting period until she can remarry) has elapsed". The article also states that "[A] marriage contract may not be notarised or otherwise authenticated unless the girl has reached the age of 15 and the boy 17 at the time of authentication". Article 31 gives a deflowered woman (*thayyib*) or a woman 25 years or older the right to voice an opinion regarding her marriage, but the contract itself must be concluded by her guardian. If a guardian unjustifiably opposes a woman's wish to marry, she may seek recourse to a judge who may or may not rule in her favour. The same applies in the event that a woman has more than one guardian of equal status with respect to her and who collectively obstruct her wish or disagree with one another over the matter (Article 34). One of the conditions for a Kuwaiti marriage contract to be binding is that the man be competent (*kuf'*) for marriage at the time the contract is concluded. A wife and her guardian have the right to annul the contract in the event that the husband no longer meets this condition (Article 35). The law defines competence (*kafa'a*) in terms of religious strictures (Article 36). It defines divorce as the dissolution of a legitimate marriage contract at the behest of the husband or a person acting on his behalf through the utterance of a specific formula (Article 85).

Among the provisions of the personal status code intended to protect women is Article 88, which stipulates that a husband may not bring a second wife to live in the home of his first wife without the latter's consent. The code also prohibits the use of force in the implementation of a court ruling ordering a wife to return to her marital home.

Tunisia's Personal Status Code stands alone in the Arab world as a model for promoting the principle of equality in marital relations in law by avoiding archaic interpretations of shari'a prejudicial to the rights of women.

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Tunisia's Personal Status Code stands alone in the Arab world as a model for promoting the principle of equality in marital relations in law.

The family laws of Algeria and Morocco reflect a trend in these countries to restrict polygamy.

Tunisia's personal status law is also the only Arab personal status code that applies to all the country's citizens regardless of religious affiliation. The value that Tunisia accords to equality is evinced in numerous provisions in its family law. Article 18 of its Personal Status Code prohibits polygamy and penalises violators. A woman has the right to act on her own behalf when entering into marriage even if still a virgin.

Tunisia's divorce provisions, too, are founded upon the principle of complete equality of women and men. Divorce, according to Article 30 of the Personal Status Code, can be obtained only "through the courts". Article 31.2 states that either spouse has the right to compensation for any material or moral harm resulting from a divorce, whether filed on the grounds of injury or with no stated cause. The Code is equally impartial with regard to the rights of parents. Article 57 states that "The custody of children is a right shared by both parents as long as their marital life lasts". In the event of divorce, according to Article 67, custody is transferred to the parent whose custodianship a judge determines is in the best interests of the child.

The family laws of Algeria and Morocco reflect a trend in these countries to restrict polygamy through the provision of more stringent conditions and closer judicial supervision. Article 8 of the Algerian family law permits men to take several wives up to the limit stipulated under shari'a. However, they must demonstrate cause and the ability to sustain multiple wives equitably. In addition, a husband must officially notify his current spouse or spouses of his intent to take another wife and any of his current spouses, be they one or more, has the right to demand a divorce if she does not consent to the marriage. In addition to the approval of his current wife or wives, a husband must obtain a permit for an additional marriage from the competent court. Article 40 of the Moroccan Personal Status Code contains a similar provision.

Article 13 of the Algerian family law prohibits coercion into marriage, stating that a guardian may not force a woman under his custody to marry and he may not contract her into a marriage without her consent. In

Morocco, women of legal age have full right to act on their own behalf. Article 24 of the Civil Status Code states that "Self-guardianship is a woman's right, to be exercised by an adult woman freely and independently". Article 25 states that "An adult woman may act on her own behalf in entering into a marriage contract, or she may authorise her father or another relative to act on her behalf".

In Algeria, under no circumstances can a divorce be granted or considered valid without a judicial ruling to this effect. Moreover, before such a ruling can be issued, there must be an attempt at reconciliation. In addition, a woman has the right to file for khul' divorce (Article 54), which, if granted, obliges her to pay compensation to her husband. In Morocco, divorce is a prerogative of both a husband and a wife, in accordance with legal provisions for each party, and is exercised under judicial supervision. A husband who wants a divorce must request permission from a court, substantiating his case with the testimony of two witnesses of good standing (Article 79). Before a divorce is granted, there must be an attempt at reconciliation and two attempts in the event the couple have children. Article 83 states that, if reconciliation fails, the court will designate a sum of money to be paid in order to meet the requirements of the wife and children. The husband must deposit this sum with the court within 30 days. If, according to Article 86, the husband does not do so within the stated time, the court will take this as indicating that he has reversed his decision about the divorce. If, on the other hand, he does deposit the required sum, the court will issue him permission, as stated in Article 87, to certify the divorce in the presence of two witnesses of good standing residing within the area of jurisdiction of the court.

Also under the Moroccan civil code, a wife has the right to divorce her husband if he has granted her this right in the marriage contract. Otherwise, a woman has the right to demand a divorce on the grounds of personal injury, abandonment or violation of the conditions of the marriage contract. In addition, in Morocco, a couple may resort to a khul' dissolution of the marriage contract by mutual consent, contrary to the situation in Egypt where *kbul'* is only the wife's prerogative.

From this brief reading of personal status provisions in the Mashreq and the Maghreb, one can only reach the following conclusions. First, there is an urgent need for unified personal status codes in those Arab States that still lack them, such that there is no space for judges to evaluate interpretations and jurisprudential opinions. Second, such new codes must strive to regulate family relations on the basis of the principle of gender equality. Finally, family laws in the Maghreb show that it is possible for shari'a to coexist harmoniously with the principle of equality between husbands and wives. Thus, gender inequality in Arab legal systems is more the product of history, customs and conventions than of authentic religious precepts. Such considerations make it all the more imperative to revise Arab family law in order to end discrimination against women.

AWAY FROM OFFICIAL LAW

The social environment is frequently a crucial factor in discrimination against women regardless of what the law may say. Because of what is commonly considered appropriate or inappropriate behaviour for a dutiful, decent and virtuous wife, recourse by a woman to the courts to demand her rights or those of her children is widely frowned upon as a form of public indecency. As a result, many women refrain from pursuing their family rights through official legal processes. Instead, matrimonial disputes in many Arab societies are resolved either within the family or through the unofficial channels of tribal arbitration. As these mechanisms, as a whole, evolved in the context of a male-dominated culture and male-oriented values, their biased outcomes are often a foregone conclusion.

Even when women do attempt to obtain their legally stipulated rights through family courts, however, they confront a maze of stubbornly slow, needlessly complex and tortuously intimidating procedures that fail to take into account the material, social and psychological properties and needs of the family. From this perspective, the family courts that have been introduced in Egypt merit praise for the practical social considerations that were taken into account in their structural, procedural and

functional design. This innovative experience deserves both encouragement and further study as a model for the Arab world even if work needs to be done to filter out whatever negative aspects may have come to light through practical application. It is important that these courts be improved in such a way that judges are provided the necessary time and expertise as well as the required human and financial resources to effectively undertake their job.

Another problem inimical to women's rights resides in the different types of conjugal arrangements available in Arab societies. Some of them look like conventional marriages in that they fulfil the religious formalities for marriage with regard to consent and acceptance, public notarisation and dowry. Yet in substance, they are incompatible with the rationale of the institution of marriage as a domestic bond characterised by mutual affection and compassion and intended to serve as the foundation for the creation of a sound, healthy family. In these marriages of convenience, which go by various names in Arab societies (*misyar* in Saudi Arabia and *siyahi* in Yemen, for example), a wife is contracted to a man in exchange for his payment of a dowry but without his commitment to house or support her permanently. This phenomenon has spread in poorer Arab environments where families are more vulnerable to the temptation of the money offered by wealthy Arabs (generally older men) in exchange for a *misyar* marriage to their daughters (often under age). In effect, the arrangement is a form of legitimised female enslavement that results in many human tragedies, which is why some Arab legislators have been fighting to contain it (as in Egypt).

A related phenomenon is the common law (*'urfi*) marriage (i.e., marriage that is not documented by a public official). Effectively a form of secret, uncertified marriage, it has become the increasingly widespread recourse of young Arab men unable to afford the financial responsibilities of marriage. Some husbands also find it useful as a way to escape the rights granted to the wife in a legally documented marriage since, as a general principle, the courts refuse to consider the claims of wives in such marriages if the husband denies the marriage relationship.

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In general, in Arab legislation, native nationality is determined by paternal descent.

Nationality laws are biased against women and contravene Article 9 of CEDAW, which explains why so many Arab States have entered reservations to this article.

These circumventions of official law, justified on the grounds that they do not conflict with religious formalities regardless of how they may conflict with the spirit and rationale of marriage, are detrimental to the rights of women as stipulated under law.

NATIONALITY

In general, in Arab legislation, native nationality is determined by paternal descent. If a father is a citizen of a particular Arab country, his children acquire his nationality automatically. The children of a female national only acquire their mother's nationality if the father's identity is unknown or if he is stateless (see Article 6 of the Tunisian Nationality Code. It should be noted, however, that under Tunisian law the child of a Tunisian mother and foreign father may acquire Tunisian nationality with the approval of the father. See also, Paragraphs 3 and 4 of Article 2 of the Jordanian Nationality Law, which grant Jordanian nationality to children of a Jordanian father or children born in Jordan to a Jordanian mother if the father is unknown or stateless. The nationality laws of Bahrain and Morocco –Articles 4 and 6 respectively – contain similarly worded provisions).

Clearly, these nationality laws are biased against women and contravene Article 9 of

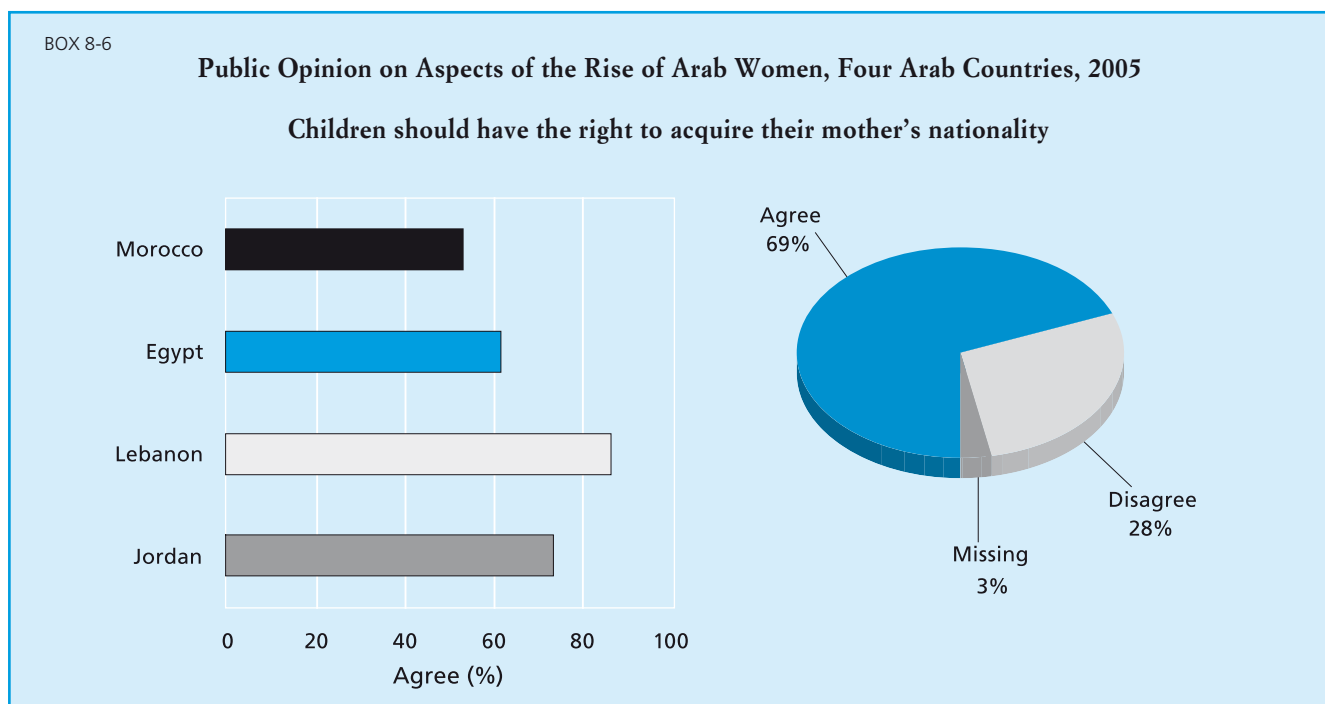
CEDAW, which explains why so many Arab States have entered reservations to this article.

Recently Arab lawmakers have been working to counter the inhumane consequences of Arab States' long-held refusal to grant nationality to the children of female citizens married to foreigners. For example, Egypt recently passed Law 154/2004, which grants children of an Egyptian mother and a foreign father the right to nationality. This law consequently addresses the problems of thousands of people with an Egyptian mother and a foreign father who had previously been unable to obtain the Egyptian nationality.

From the Report's public opinion survey, it is clear that Arab society is prepared to accept a woman's equal right to pass on her citizenship to her children (Box 8-6).

The new Algerian nationality law, issued in 2005, states in Article 6 that a child born of an Algerian father and/or mother is deemed Algerian. Under Morocco's nationality law of 1958, a child is only entitled to Moroccan nationality if the father is Moroccan. The law has since been amended so that children of Moroccan mothers may also obtain Moroccan nationality.

Lebanon reveals another facet of discrimination in nationality law. Lebanese law takes paternal descent as the basis for granting native nationality, as is the case with all Arab



countries. With regard to the circumstances under which a Lebanese woman may confer her nationality upon her children, Lebanese law has added a refinement: a foreign mother who has acquired Lebanese nationality may confer this nationality upon her children if they are minors, and if she outlives her foreign husband, whereas a native-born Lebanese woman (married to a foreigner) does not have this right. Civil society organisations in Lebanon have been pressing for the elimination of this discrimination and for an amendment to the nationality law to provide for equality between the parents with respect to the nationality of their children. They have also called for Lebanon to withdraw its reservation to Article 9, Paragraph 2 of CEDAW. It is noteworthy that Lebanese civil society organisations are acclaimed in this regard as they played a critical role in repealing the law that dropped citizenship from Lebanese women who married foreigners.

AWARENESS OF GENDER EQUALITY AMONG ARAB LEGAL PRACTITIONERS

For equality between men and women to exist, it is not enough to incorporate the principle into law, especially with a legal culture or awareness that is overtly or tacitly opposed to equality between the sexes. Legal awareness here refers to the set legal values that govern and guide practitioners of law in the course of drafting and applying legislation. Practitioners of law refer to all those involved in the practice of law in the Arab world. This ranges from legislators who write the laws and judges who use their discretionary authority in applying them to lawyers who help judges to understand and apply the law and other interpreters of law in the judiciaries, universities or elsewhere. Awareness of the principle of equality of men and women by all these people is a prerequisite for its practical application.

Although there appears to be no field research that has attempted to measure the level of Arab legal practitioners' awareness of gender equality, the available information suggests that pro-male gender bias is widespread in these professions. It requires little scrutiny of

history to realise that Arab tribal culture, which sanctions discrimination against women, has strongly influenced the discriminatory juristic interpretations that establish the inferiority of women to men. Otherwise put, the male-dominated culture has been a crucial factor in shaping juristic judgments and endowing them with religious sanctity.

The positions of some Arab legislators evince hostility towards gender equality, despite the provisions of their national constitutions and the international conventions to which their States are party. Two examples illustrate this bias. The first is the opposition of most representatives in the Kuwaiti National Assembly to granting Kuwaiti women their political rights (Al-'Awadhi, background paper for this Report). The second is the opposition of many members of the Egyptian People's Assembly to establishing a woman's right to terminate her marriage voluntarily in accordance with the Islamic *khul'* system. In both instances, male opponents to the bills in question grounded their position in Salafi fundamentalist jurisprudence asserting men's superiority to, and custody of, women. Indeed, a member of the Egyptian People's Assembly cited the behaviour of chickens in their coops as proof that females, among birds, animals and above all human beings, are subordinate to males by nature (his remarks were struck from the minutes of that session).

Frequently, the application of the principle of gender equality founders on the reservations of Arab judiciaries, a resistance fuelled by the growth of fundamentalist trends and their increasing impact on the legal consciousness of Arab judges. The depth of male chauvinism among members of the judiciary in some Arab States can be seen in their opposition to the appointment of female judges. The arguments against such appointments have varied from the assertion that women are unsuitable by nature for these demanding positions to the claim that such appointments would go against the grain of society's culture and traditions. Obviously, few have reflected upon the fact that the ancient Egyptian goddess of justice, Maat, was a female deity. In the middle of the last century, 'Abd al-Razzaq al-Sanhuri, perhaps the most famous Egyptian jurist and, at the time in question,

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chairman of the Council of State (the judicial body that rules in administrative disputes), ruled against the eligibility of women to serve as judges. Although he acknowledged a woman's constitutional right to serve in this capacity, he held that appointment of women to the judiciary would not be appropriate to Egyptian society. Considerations of social propriety still obstruct women's access to positions at all levels of the judiciary in Egypt. In an attempt to exonerate themselves on this issue, Egyptian authorities appointed a woman counsellor to the Supreme Constitutional Court, but this was not followed by a decision to accept women at all levels of the Egyptian judiciary.

Discrimination by the legal community against women is also evident in the way judges in criminal courts use their discretionary authority to deliver lighter or harsher sentences in cases where a woman is one of the litigants. One notes that in crimes of honour, judges tend to deliver lighter sentences for male offenders against women than for female offenders against men. In murder cases, courts tend to hand down death sentences against women found guilty of murdering their husbands regardless of the woman's motives or circumstances whereas the same does not apply if the genders of the assailant and victim are reversed. There is a hypothesis, supported by casual observation and, therefore, requiring empirical proof, that male judges think of honour crimes as acts perpetrated against males, for which reason they lighten penalties in crimes of honour against women. This prejudice may account for the harshness with which legislators in some Arab countries deal with women. Under many Arab penal codes, female adulterers face far harsher penalties than male adulterers. While as a general principle attempted crime is punishable by law, the attempt to cause a woman to miscarry is not. A woman who kills her adulterous husband upon discovering him *in flagrante delicto* will not receive a reduced sentence, whereas, in the reverse situation, a man will. Clearly, the bias of the judiciary against women has its twin in Arab legislation.

Many interpreters of legislation echo this discriminatory tendency when faced with the principle of equality before the law. The Report team will not emphasise here the commentaries

of some modern scholars of shari'a, who still recite the views of classical Islamic jurists regarding men's custodianship over women. In sharp contrast to such views, there exists a body of enlightened Islamic jurisprudence that interprets such texts in their context and inclines, to a considerable extent, to the espousal of the principle of gender equality. However, the first – conservative – school of thought still finds a sympathetic ear in practice and still appeals to the man on the street because of the support it receives from conservative clerics. Merely to illustrate this, there was not a single woman candidate in Egypt's recent presidential elections. Some women did submit candidacy applications; however, they were rejected on the grounds of not meeting the qualifications stipulated under the controversial amendment to Article 76 of the Egyptian Constitution. Odder yet, the former Mufti of Egypt issued a fatwa, published in *Al-Abram* of 28 February 2005, to the effect that women should not be permitted to run for the presidency. He based his ruling on the opinion of Islamist jurists that held that women should not assume "political leadership" (*wilaya 'amma*), which he took by extension to mean the presidency of the republic.

Of greater concern, however, is the conservative position on gender matters of civil law experts. Most, for example, reject the notion of quotas for women in parliament on the grounds that it violates the principle of equality before the law (Al-Sharqawi and Nasif, in Arabic, 1984, 350). This argument flies in the face of humanitarian rights jurisprudence, which, as noted earlier, sanctions positive discrimination in favour of women in order to eradicate the historically entrenched injustice against them, a principle upheld by CEDAW (see, for example, Ja'far, in Arabic, n.d., 127).

The resistance of a large segment of contemporary Arab legal practitioners to the full principle of gender equality helps explain why all major legislative changes in favour of women have come about under the auspices of Arab presidential offices. (Sceptics may say that this reflects Arab rulers' hopes of acquitting themselves of human rights violations by establishing a positive record on women's rights). The recent legislative amendment in

The bias of the judiciary against women has its twin in Arab legislation.

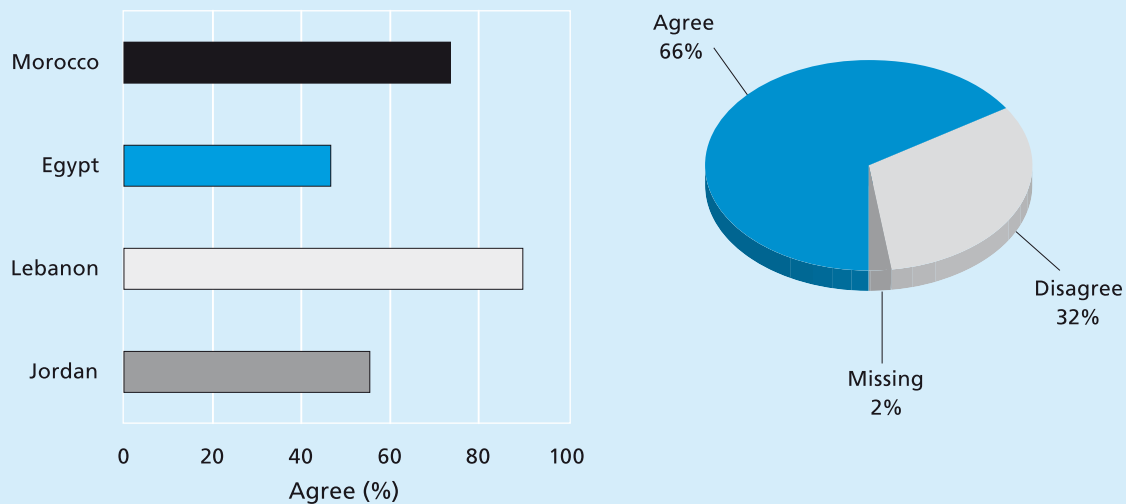
Social Propriety Prevents the Appointment of Women Judges

“Higher constitutional principles dictate equality of women with men in rights and duties. The application of this equality to public positions and activities necessitates that women must not be barred absolutely from assuming these positions and activities, for to do so conflicts with the principle of equality and constitutes a breach of this essential higher constitutional principle. This entails that it must be left to the discretionary authority of the administration to determine, with respect to a particular position or occupation, whether women have attained that degree of development that would render them suitable for that position or that occupation. If the administration deems that women have indeed attained that degree of development and met the criteria of suitability, it may, indeed must, open the door to women as it has to men, without infringement of the equality between them.

Egyptian women in our current age have demonstrated their suitability for many positions and fields of activity, such as medicine, nursing and education, many occupations in the Ministry of Social Affairs and the Ministry of Religious

Endowments and positions in the Probate Office of the Public Prosecution and the Office of the Notary Public. Indeed, due to the particular qualities with which they are endowed, women may be preferable to men in some of these occupations. Therefore, the preference of women over men in these domains does not constitute a breach of the principle of equality between men and women. Diverging from the foregoing, the administration may also assess, without arbitrariness, whether, for certain social considerations, the time has not yet come for women to assume certain public positions and occupations. On this basis, the administration may take the liberty to exercise its discretionary authority to weigh the societal impact of these occupations, taking guidance in so doing from the conditions of the environment and the limits and conditions imposed by traditions...” – excerpt from the ruling of the Egyptian Administrative Court of 22 December 1953 on Case 243 for Judicial Year 6.

Public Opinion on Aspects of the Rise of Arab Women, Four Arab Countries, 2005
Women should have the right to become judges



Kuwait permitting the participation of women in politics would not have passed the hurdle of fundamentalist opposition had it not been for the direct and active support that it had received from the government. The personal status measures making it possible for Egyptian women to sue for *kbul* divorce would not have been passed into law had it not been for the open support that they received from the president's office. Similarly, in Morocco,

the King put all his personal and religious influence behind the new family code, which alleviated many forms of injustice against women. It would thus appear that Arab ruling establishments are trying to compensate for the underdeveloped awareness of the Arab legal establishment, but only on issues of women's rights.

This, in turn, raises the question as to what would compel traditional legal structures

Lest Women Take All the Seats in Parliament

“... The provisions that discriminate between women and men by reserving specified parliamentary seats for them in addition to keeping open to them the possibility of obtaining other seats are unconstitutional and illogical. They are unconstitutional because they conflict with Article 40 of the Constitution which states that all citizens are equal before the law . . . They are illogical because they allocate to women a certain compulsory number of seats while at the

same time women have the right to field themselves in all electoral constituencies and the electorate has the right to elect women in all these constituencies. It follows, then, that this legislation opens the way to the possibility – albeit a remote possibility, but a possibility nevertheless – for a legislative authority consisting entirely of women, whereas the reverse does not hold”.

Source: Ja'far, in Arabic, n.d., 127.

Reforms in the law will require the creation and development of a domestic movement for change.

to shed their discriminatory stance against women at a time when the prevailing legal culture forms an obstacle to this. To date, as just noted, change has come from the direction of Arab ruling elites, which may have acted in part under overt or covert foreign pressures. However, sustainable and wide reforms in the law will require the creation and development of a domestic movement for change centred on civil society. It will also require changes in public awareness so as to generate a grass-roots culture favourable to gender equality.

SUMMARY

The foregoing pages have covered the most salient characteristics of how the Arab legal system regulates legal relations to which women are a party. In sum, although women have now been granted their political rights under most Arab constitutions, they remain deprived of the opportunity to fully exercise these rights for reasons outside the framework of the law. The labour laws, penal codes and nationality laws in these countries, on the other hand, still harbour many forms of gender discrimination although tangible legislative steps have been taken to eliminate such discrimination, particularly as it relates to nationality rights and some personal status issues.

This having been said, the most visible discrimination against women in Arab legal systems resides in the domain of personal status law. Although legislators in several Mashreq nations have acted to amend such laws in order to end the crueller consequences of legitimised discrimination, these attempts remain far behind the progressive stance that characterises the current personal status codes in Tunisia, Morocco and Algeria.

Gender awareness within the legal community itself is marred by a distinct bias against women as a general principle. Testimony to this is to be found in equal measure in the legislative process, in the application of the law by the judiciary and in legal exegesis. Such testimony supports the contention that the business of writing the law, applying the law and interpreting the law in the Arab world is governed above all by a male-oriented culture. By no means does this deny the existence of trends in favour of gender equality and affirmative action for women; however, such trends remain insufficiently influential.