Access to Justice

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1. Introduction

Access to justice for women must be equal and effective. The securing of equal and effective access to justice entails gender-sensitive engineering of the entire chain of justice in a way that guarantees not only formal but also substantive equality[[1]](#endnote-1). The chain of justice extends from international courts and tribunals, Optional Protocol committees, Special Procedures, regional mechanisms, state courts and other formal and informal justice systems within the state.

The link in the chain of justice that I will discuss in my presentation is the constitution. A constitutional guarantee of equality for women, in line with international standards, most especially CEDAW, and regional standards, is essential in order to establish a universal imperative of equality for women on which the entire chain of access to justice within the state will rest. Constitutional guarantees of equality are the source of authority for effective judicial review of legislative and governmental action and empower women to process their claim for equality through the courts. Beyond state courts, the possibility of recourse to international and regional mechanisms opens access to an interpretation of the constitutional provisions that is in line with international and regional state obligation to respect, protect and fulfill women’s right to equality. The inclusion of any clause in the constitution that derogates from the guarantee of gender equality, by deferring to another order of justice such as religious principles, clearly undermines the equality standards of international human rights law. Many of the countries that have derogation or exclusion clauses in their constitutions have entered reservations to the human rights treaties, and these reservations have been addressed within the concluding comments of the treaty bodies[[2]](#endnote-2).

There is, furthermore, a tension between the constitutional guarantees of a universal imperative of equality for women and the co-existence of plural or parallel systems of traditional justice, which are usually patriarchal both institutionally and in the substantive norms that they apply. Some states delegate authority to parallel systems, usually by bestowing jurisdiction on religious or customary courts to adjudicate on family law issues, creating a plural legal order. In some states, there is state recognition of community arbitration, quasi-judicial systems, alternative dispute resolution, marriage ceremonies etc. In all states, there may be non-state informal systems of justice, which are not formally recognized or state-sanctioned. The tension with constitutional guarantees of equality for all parallel systems of justice exists on two levels. First, some constitutions, as stated above, authorize an exception or override for the issues dealt with by parallel systems of justice granting them impunity for discrimination against women. Second, even where the constitutional guarantee of equality applies to the parallel systems of justice, there are problems in providing effective access to constitutional justice and the right to equality.

Constitutional guarantees of equality

A constitutional guarantee of equality is a critical component in securing gender equality in access to justice. While constitutional guarantees of equality do not necessarily guarantee that equality rights will be available to women in practice, the articulation of equality for women is a significant and essential foundation for the realization of women’s rights and is an indispensable expression of political will. Constitutional rights are never interpreted or implemented in a political or ideological vacuum[[3]](#endnote-3), which means that political, cultural and social norms may continue to impact women’s ability to access their human rights. However, having the legal and constitutional framework in place within the state is a first step in the chain of access to justice.

In order for constitutions to ensure equal and effective access to justice for women, more than a general equality guarantee is required. Increasingly, women’s rights and non-discrimination clauses have been incorporated into new constitutions or are part of constitutional reform efforts in different regions. This, in part, is a result of ratification of the CEDAW Convention together with organized campaigning by women’s activists in the final decades of the 20th century[[4]](#endnote-4). Thus, in the constitutions drawn up after CEDAW, many constitutions included equality guarantees for women: the 1982 Canadian Charter; the 1991 Colombian Constitution; the 1996 South African Constitution; the 1997 Eritrean; the 2003 Rwandan; the 2005 Iraqi; the 2004 Cambodian; 2004 Afghan; 2008 Bhutan; and Malaysia 2009. However, there are also counter examples, such as the 2012 Egyptian and Libyan Constitutions which, like the earlier Kuwait and Lebanon Constitutions, are without mention of women’s right to equality: “Law applies equally to all citizens, and they are equal in rights and general duties. They may not be discriminated against due to race, origin, language, religion, or creed.”[[5]](#endnote-5) These clauses are particularly problematic in that, by citing some forms of discrimination and omitting sex or gender, they give rise to a presumption that equality for women is intentionally excluded.

The constitutional provisions for gender equality should be specific and it is critical that the requirement of sex equality and non-discrimination should be incorporated to frame the equality priorities throughout the entire document[[6]](#endnote-6). Research on the constitutional provisions that specifically grant or protect the rights of women in both Canada and Colombia has shown that while women’s protection clauses cannot be shown to be the exclusive cause of improved legal protection of women, they are associated with gains in women’s rights[[7]](#endnote-7). The Rwandan Constitution provides a model example, ensuring respect for equality, human rights and fundamental freedoms, as well as international treaties in the Preamble, and specifying equality between men and women and incorporating a prohibition of discrimination based on gender equality[[8]](#endnote-8). Most Latin American and Caribbean constitutions also prohibit gender discrimination in their equality clauses[[9]](#endnote-9). Many countries in Asia Pacific, such as China, India, Korea, Malaysia, Vietnam, Kuwait and Iraq[[10]](#endnote-10) have equality for women and men and non-discrimination clauses on the basis of sex in their constitutions. In Europe, many countries have specific equality provisions for women. Almost all the countries of Western and Eastern Europe and North America have equality for women and men and non-discrimination clauses on the basis of sex in their constitutions, with the outstanding exception being Ireland[[11]](#endnote-11). The French Constitution has specific provisions on equality for women and gives precedence to CEDAW over domestic law[[12]](#endnote-12). Another example is article 10 of the amendment to the Belgian Constitution 2002, which affirms the principle of equality between men and women, and enjoins the legislature to adopt measures, which are designed to guarantee equality, specifically fostering equal access for men and women to elective and public office[[13]](#endnote-13).

A particularly good practice in this respect is the 2011 Moroccan Constitution which systematically throughout its provisions, confers constitutional rights expressly on women as well as men, and seeks to ensure parity between them: “The man and the woman enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural and environmental character … The State works for the realization of parity between men and women.”[[14]](#endnote-14) The new 2009 Constitution of Bolivia also contains approximately 34 references to the rights of Bolivian women. It also contains a noteworthy catalogue of civil, political, economic, social, and cultural rights that apply to both women and men. Among the rights protected are the right to be free from every form of discrimination and to political participation[[15]](#endnote-15). Article 11 clarifies the goal of a participatory, representative, and community democracy. Ecuador also adopted a new Constitution in 2008[[16]](#endnote-16). This Constitution contains a series of principles pertinent to equality of the sexes and non-discrimination. It also guarantees important economic, social, and cultural rights such as social security for women who do unpaid work; a reference to the care-giving economy; and the right to water[[17]](#endnote-17). The Ecuadorian Constitution codifies the principle of parity and provides for its application in all policy-making entities and instances, such as popular elections, cabinet-level ministries, the justice system, and political parties[[18]](#endnote-18). The Constitution stipulates that in regards to political parties, “their organization, structure and functioning shall be democratic and shall guarantee the rotation of power, accountability, and parity membership between women and men on their governing boards.”[[19]](#endnote-19) The women’s civil society movement was very involved in this Ecuadorian constitutional process[[20]](#endnote-20), illustrating the importance of activism to pressure for the creation of a constitutional framework that supports women’s rights and non-discrimination between men and women. The Ecuadorian Constitution is particularly progressive in relation to indigenous women’s rights. When the Constituent Assembly was announced in 2007, the Kichwa Women’s Network of Chimborazo developed an agenda for equality that focused on ending violence against women and on expanding women’s participation in indigenous governance and decision-making. The women’s network participated in public consultations to call on the State to guarantee collective and indigenous cultural rights, and when the Constitution was approved in 2008, it included far-reaching recognition of both gender equality and indigenous rights, including article 171 guaranteeing women’s participation and decision-making in indigenous governance and justice systems[[21]](#endnote-21).

*Summary of good practices*:

The widespread inclusion of guarantees of gender equality or equality for women in post-1980 constitutions might well be regarded as sufficient evidence of state practice to serve as a basis, together with the *opinio juris* of the CEDAW Committee, of a customary international law requirement that women’s right to equality be entrenched in explicit constitutional provisions.

Good practices in constitutional guarantees of equality for women, which enhance women’s equal and effective access to justice, may include the following:

* guarantee of women’s equality in all fundamental rights, including both civil and political, social , economic and cultural rights[[22]](#endnote-22)
* incorporation of international women’s human rights law, such as CEDAW, in order to make the human rights treaties self-executing within the constitution[[23]](#endnote-23).
* applicability of the constitutional equality guarantees to both the public and private and the civil and criminal spheres
* prohibition of direct/indirect discrimination in all fields[[24]](#endnote-24)
* prohibition of intersectional discrimination[[25]](#endnote-25)
* prohibition of violence against women[[26]](#endnote-26)
* gender equality in representation in political and public life, including quotas[[27]](#endnote-27)
* providing for affirmative action and temporary special measures[[28]](#endnote-28)
* availability and accessibility of judicial review or mechanisms needed to monitor or implement the constitutional provisions

1. Judicial Review

Where the right of women to equality is guaranteed in the Constitution, it lays the groundwork for challenges to gender inequality in other areas of law, such as the civil code, family law and criminal law. This empowers women to challenge discriminatory legislation and discriminatory governmental policies in the courts[[29]](#endnote-29). Provisions for gender equality provide a more solid legal basis for rights claims and give women’s rights activists the “tools to challenge state activity in the courts”[[30]](#endnote-30). Research on the Equal Rights Acts in various states in the US suggests that equal rights provisions increase the likelihood of a favourable judicial decision regarding the assertion of women’s rights and increase the likelihood of a court applying a higher standard of law[[31]](#endnote-31).

In 1992, in the Unity Dow case, a Botswana Court invalidated the section of the Citizenship Act, which restricted women’s right to bestow the rights and privileges of citizenship on their children if they married a foreigner, because it violated the equality provisions of the Constitution. The Indian Supreme Court in 1997 introduced a prohibition of sexual harassment in the workplace on the suit of Bhanwari Devi, who had been gang raped by local men when doing her job as a social worker; the Court based the prohibition on the constitutional right to a safe working environment free from sexual abuse on the Constitution and CEDAW[[32]](#endnote-32). The Constitutional Court of South Africa decided in the 2004 Bhe case, that the rule of primogeniture in customary law was unconstitutional because of its discriminatory intersectional impact “mainly on African women and children, regarded as arguably the most vulnerable groups in our society”[[33]](#endnote-33). In a 2006 decision, the Constitutional Court of Colombia overturned a restrictive abortion law which prohibited therapeutic abortions, holding that the law violated Martha Solay’s fundamental right to an abortion which would enable her to have received life-saving chemotherapy[[34]](#endnote-34). In 2010, the Nepal Supreme Court held that the non-criminalization of marital rape was unconstitutional in the context of CEDAW and the ICCPR: “Women do not lose human rights because of marriage. So long as a person lives as a human being he/she is entitled to exercise those in-born and natural human rights. To say that the husband can rape his wife after the marriage is to deny independent existence, right to live with self-respect and right to self-determination.”[[35]](#endnote-35) In 2011, the courts in the Netherlands found a confessional political party’s exclusion of women from their parliamentary candidates list to be in violation of the State’s Constitution[[36]](#endnote-36).

Examples of cases from different regions in which courts overturned discriminatory legislation or regulations, by relying on constitutional equality provisions, demonstrates the importance of constitutional guarantees of women’s right to equality for women’s access to justice in the courts.

*Summary of good practices*:

Access to judicial review is an indispensable element of an effective constitutional guarantee of equality for women.

1. International and regional adjudication

Access to adjudicatory tribunals or committees at the international or regional level is an important link in the chain of access to justice, even where constitutional guarantees of equality and access to judicial review are in place at the national level. Thus the human rights treaties optional protocol mechanisms and regional adjudicative mechanisms play an important role in ensuring women’s access to justice.

An example is the classic 1981 Lovelace Case in which the Human Rights Committee effectively overturned the previous decision of the Canadian Supreme Court in Attorney General of Canada v. Jeanette Lavell, Richard Isaac et. al. v. Yvonne Bedard [1974] S.C.R. 1349, which had held that the provision of the Indian Act, under which an Indian woman who married a non-Indian lost her Indian status, was valid as it was not rendered inoperative by section 1 (b) of the Canadian Bill of Rights providing for "equality before the law...without discrimination by reason of... sex”[[37]](#endnote-37).

The CEDAW Optional Protocol Committee overturned the decision of a Philippine court in the Karen Tayag Vertido case. Judge Virginia Hofileña-Europa had acquitted the accused of raping Ms. Vertido, citing insufficient evidence to prove beyond all reasonable doubt that the accused was guilty of the offence charged. Having found violations of articles (2)(c), 2(f) and 5(a) of CEDAW, the CEDAW Committee called on the Philippines to provide appropriate compensation to Ms. Vertido. It called for measures that are essential for women’s access to justice, including systemic changes to the justice system such as gender sensitive judicial training. The OP Committee held that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner; and that effective steps must be taken to ensure that decisions in sexual assault cases are impartial and fair and not affected by prejudices or stereotypes as “stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim”[[38]](#endnote-38).

*Summary of good practices*:

Ratification of the human rights treaties, of CEDAW and of the Optional Protocols is an essential link in the chain of access to justice, allowing recourse to an international interpretive authority of the state’s treaty obligations.

1. Constitutional override clauses: derogation or exclusion for customary or religious principles

Constitutions that have an override clause, which includes derogation from the gender equality guarantee for any system of norms that may discriminate against women, violate the equality standards of CEDAW.

In many regions, and especially in Africa, the Middle East, Asia Pacific and in religious states such as the Vatican, structural impediments to gender equality are firmly embedded within the constitutional texts, containing provisions or derogation clauses that either specifically subjugate constitutional equality to religious principles or exclude family and customary law from constitutional non-discrimination[[39]](#endnote-39). The countries that entrench religious law are mostly the Islamic Republics and Arab Republics.

In the Asia-Pacific region, Buddhist, Shinto and Christian countries do not give primacy to religious principles. Thus, for instance, China and Japan’s constitutions have no mention of religion and the Korean Constitution expressly provides: “No state religion shall be recognized, and church and State shall be separated”[[40]](#endnote-40).

Eastern European constitutions for the most part expressly provide for separation of church and state, for example, in Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Kazakhstan and the Russian Federation. Others, such as Poland, do not expressly provide for separation of church and state but provide that “the sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.”[[41]](#endnote-41)

In Europe and North America, many constitutions provide for separation of church and state, for example, the US and France. While some constitutions accord legal status to the Church, such as Andorra, Denmark, Greece and Iceland, none of them give primacy to religious norms over human rights guarantees.

In Latin America & the Caribbean, many constitutions provide for the separation of church and state, such as Bolivia, Brazil, Ecuador, and Guyana. Or, some do not mention religion at all provided that their legal systems are founded on human rights and freedoms, for example, Bahamas, Colombia, Dominican Republic and Trinidad, Uruguay and Venezuela. Other states in the Latin American and Caribbean region accord legal status to the Church but do not give primacy to religious norms over human rights guarantees, such as Argentina and Costa Rica; and some states exclude personal law matters from the injunction against discrimination. For example, the constitutions of Bahamas and Barbados exclude adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law.

Although some of their constitutions articulate a commitment to gender equality, the derogation clauses in Islamic and Arab republics severely undermine that commitment to equality as they do not establish a constitutional requirement of equality that will override any possible discriminatory interpretation of the religious law. There are variations between different Middle Eastern and Asia Pacific countries, in the nature of their constitutional derogation provisions and in the impact of those provisions on the rights of women[[42]](#endnote-42). In some cases the constitutions themselves impose Islamic law on the entire range of legislative policy; in others, there is only specific application of religious law in the context of matrimonial status (the personal law). Examples include: Bahrain and Palestine: “The Islamic Shari’a is a principal source for legislation…. The State guarantees reconciling the duties of women towards the family with their work in society, and their equality with men in political, social, cultural, and economic spheres without breaching the provisions of Islamic canon law. … Inheritance is a guaranteed right governed by the Islamic Shari’a.”; Algeria: “the institutions shall not indulge in…practices contrary to Islamic morals and the values of the November Revolution”; Iraq: “No law may be enacted that contradicts the established provisions of Islam”; and Afghanistan: “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”. The constitution in Iran specifically relates the application of Sharia to women: “The government must ensure the rights of women in all respects, in conformity with Islamic criteria”. Finally, the constitution of Pakistan states that “Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; ... (Preamble) ...Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set-out in the Holy Quran and the Sunnah ... (Preamble) Islam to be State religion. Islam shall be the State religion of Pakistan…. Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah”.

In contrast, although the Indonesian Constitution provides that “The State shall be based upon the belief in the One and Only God”, it does not apply Sharia law in its constitution and also gives priority to human rights in accordance with the principle of a democratic and law-based state. Malaysia provides that Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation. It adds that “nothing in this article derogates from any other provision of this Constitution” and this includes the provisions of the Malaysian constitution, which guarantee equality for women.[[43]](#endnote-43)

A number of countries in the African region have retained claw-back clauses that exclude personal and customary law, including Botswana, Gambia, Kenya, Lesotho, Mauritius, Sierra Leone, Zambia and Zimbabwe. Family and customary law have a direct and indirect impact on women’s participation in public and political life. There is evidence of good practice in many countries in the sub-Saharan African region in explicitly providing that the guarantee of equality for women has primacy over customary law or in defining the state as a “democratic, unitary and secular state”, amongst such countries are Angola, Gambia, Chad, Burundi, Mozambique, Republic of Cameroon, Republic of Congo, and Burkina Faso. In Kenya, the 2010 constitution states that customary law is subordinate to the Constitution, and that it is ‘void’ if it is inconsistent with the Constitution[[44]](#endnote-44). In Swaziland, Section 28(1) of the Constitution provides that a woman shall not be forced to undergo a custom to which she is by conscience opposed[[45]](#endnote-45). The Ethiopian Constitution guarantees the “right of women to eliminate the influences of harmful customs”[[46]](#endnote-46).

The drafting of constitutions in the Maghreb states in the period after the Arab Spring has been accompanied by attempts to derogate from the supremacy of the right to gender equality. In Egypt’s 2012 constitution, the right to equality and non-discrimination does not include discrimination on the basis of sex and it is provided that “The principles of Islamic law are the chief source of legislation.”[[47]](#endnote-47) An example has been in the drafting of the Tunisian constitution. The HRC Working Group on Discrimination against Women in Law and Practice (Working Group) called on the Government of Tunisia to keep intact the constitutional equality rights of women. The Working Group sent a communication to the Tunisian Government in which it said: “In recent years, Tunisia has been at the forefront of aspirations for change, with popular demands for democracy and human rights inspiring the “Arab Spring”. On 14 January 2011, its political transition started and in December, an interim Government was appointed. Tunisia stood as a beacon of hope for further development and progress when it lifted key reservations to CEDAW at the outset of its political transition. The Working Group is deeply concerned that in the drafting of a new Constitution, in particular, its article 28, there are attempts by Parliamentarians to rollback gains on equality and women’s human rights and women’s status in society. The approved text places women on unequal footing with men and does not consider them as independent, full persons. It delineates their role as ‘complementary to the one of the men in the family’ and fails to ensure that this provision is reciprocal.”

*Summary of good practices*:

Where constitutions give recognition to religious or customary law principles, it is good practice to provide explicitly that the guarantee of equality for women has primacy.

1. Reservations

There are two different trends discernible as regards derogation from equality clauses. In some countries, particularly sub-Saharan Africa, there is a trend to expressly subject customary law to the constitutional right to equality, while in other countries the supremacy of the constitutional guarantee of equality is being called into question.

This can be illustrated by the heavy reservations to CEDAW articles that pertain to family and customary law. The CEDAW Committee regrets that customary and/or religious laws that discriminate against women are allowed to persist and sometimes prevail over civil laws, which would otherwise protect women’s rights[[48]](#endnote-48). The CEDAW Committee urges States to harmonize their civil and customary legal systems so that discrimination against women does not persist. States have begun to respond to these calls for reform. Algeria and Egypt recently lifted their reservation on Article 9 on nationality and Morocco and Tunisia have recently withdrawn all of their reservations. Jordan withdrew its reservation to Article 15(4) on freedom of mobility and choice of residence[[49]](#endnote-49).

*Summary of good practices*:

It is good practice for states to withdraw any reservations to CEDAW that exclude any system of principles of religious or customary law from the obligation to promote women’s right to equality and to eliminate discrimination against women in all fields of life.

1. Plural and parallel legal systems

There is a growing recognition that access to justice does not take place only, or even mainly, in state courts. In this presentation, I will make a preliminary suggestion regarding the classification of the various forms of constitutional arrangements, in terms of the different kinds of parallel systems of justice and their impact on women’s access to justice. The proposed classification is: personal law systems, in which jurisdiction is bestowed on religious or customary court systems by the state; indigenous systems of justice recognized by the state; alternative dispute procedures; and informal systems of community justice, which are not officially sanctioned by the state.

Personal law systems

Personal law systems are legal systems where, in the same country, different bodies of law are applied to different persons, according to their ethnic or religious identity[[50]](#endnote-50). These different bodies of law have a personal application, which are applied in accordance with a person's religious identity. Personal law systems most often regulate matters of family law, capacity, succession and inheritance and possibly some other specific property matters.[[51]](#endnote-51) These personal family law systems are a legacy of colonial occupation and to be found in most Middle Eastern and North-African countries, and have been historically referred to as regulating "*statut personnel*" in the countries colonized by the French, and "personal status" in those countries colonized by the British Mandate.[[52]](#endnote-52) These terms have come to signify family law, as this is the major topic governed by personal law systems.

In the Middle East and Asia Pacific regions, [Muslim majority countries](http://en.wikipedia.org/wiki/Muslim_majority_countries) that have promulgated some form of Muslim Personal Law include [Saudi Arabia](http://en.wikipedia.org/wiki/Saudi_Arabia), [Afghanistan](http://en.wikipedia.org/wiki/Afghanistan), [Pakistan](http://en.wikipedia.org/wiki/Pakistan), [Libya](http://en.wikipedia.org/wiki/Libya), [Sudan](http://en.wikipedia.org/wiki/Sudan), [Senegal](http://en.wikipedia.org/wiki/Senegal), [Tunisia](http://en.wikipedia.org/wiki/Tunisia), [Egypt](http://en.wikipedia.org/wiki/Egypt), [Indonesia](http://en.wikipedia.org/wiki/Indonesia), and [Bangladesh](http://en.wikipedia.org/wiki/Bangladesh). Israel has maintained the Millett system, delegating the personal law of the Jewish, Moslem and Christian communities to the religious courts of each. This extends to license and prohibition in marriage and divorce and subsists alongside civil legislation, which regulates other issues of family law. Many of these laws are derived from the colonial era, such as the Turkish Millett system, which was adopted by the colonial powers. It is interesting to note that almost none of the countries in these regions completely abolished these colonially established personal family law systems in the post-colonial era. A notable exception is Tunisia, which applied uniform civil law and jurisdiction to all its citizens, introducing significant reforms yet still maintaining significant Islamic features in its territorial family legislation.[[53]](#endnote-53) Nonetheless, different post-colonial countries have introduced various changes to their personal family law systems and it seems that in all of them the regulation of family law constitutes a struggle site between traditional and modernizing forces, governments, religious establishments, and women's and human rights groups.

Looking at observations and conclusions of the Human Rights Committee and CEDAW Committee, made with respect to countries that have personal systems of family law, leads to the observation that the two committees take somewhat different positions on this issue[[54]](#endnote-54). Thus, in a sample of the Human Rights Committee concluding comments on states' reports, the committee emphasizes the necessity of implementing civil marriage and divorce and amending gender discrimination within different personal laws, but does not consider the possibility that such multiplicity needs to be abolished altogether, in view of the intractable problems that it presents[[55]](#endnote-55).

By contrast, statements made by the CEDAW committee in recent years hint more at the position that multiple personal laws should be abolished and replaced by a uniform civil code, though this position is neither consistent nor explicit. Thus, CEDAW Committee's Concluding Comments on India (2000) report: "The Committee notes that steps have not been taken to reform the personal laws of different religious and ethnic groups, in consultation with them, so as to conform with the Convention… *The Committee calls upon the Government to* follow the directive principles in the Constitution and Supreme Court decisions and *enact a uniform civil code* *that different ethnic and religious groups may adopt.*"[[56]](#endnote-56) In its Concluding Comments on other countries' reports, the necessity for such uniform legislation is also expressed, and in particular in its comments on Israel's report in 1997 in which *"…*The Committee suggested that in order … to comply fully with the Convention, the Government should complete the secularization of the relevant legislation, place it under the jurisdiction of the civil courts and withdraw its reservations to the Convention."[[57]](#endnote-57) In its Concluding Comments on Lebanon in 2005, it "…urges the State party to adopt a unified personal status code which is in line with the Convention and would be applicable to all women in Lebanon, irrespective of their religious affiliation…."[[58]](#endnote-58) The CEDAW Committee's Concept Note (2009) further states that "Many State parties have multiple legal systems, in which marriage and divorce may be undertaken according to civil law, religious law, or ethnic or indigenous custom. The Committee frequently has cited such multiple systems as inherently discriminatory."[[59]](#endnote-59)

The unprecedented number and scope of reservations from Article 16 of CEDAW, as well as from Article 23 of ICCPR, is evidence of the tension between women’s equality rights and personal law systems. CEDAW Committee has rejected as invalid far-reaching reservations, as it has found that they contradict the purpose of the convention. Moreover, it requires reports and it monitors the implementation of Article 16, even in those state parties that entered such reservations. Yet, the political climate manifested by these reservations and the strong political sensitivity to these issues cannot but affect efforts to inspect and criticize the particulars of the family law systems in such countries.[[60]](#endnote-60) UN Women conclude: “The State has responsibility for ensuring that compliance with human rights standards extends to all justice practices, including non-state legal systems that exist without formal state sanction”[[61]](#endnote-61). In order for states to fulfill this obligation there are essential measures. The first is the application of constitutional equality guarantees for women to all plural and parallel systems of justice. The second is the empowerment of women through NGOs, education and funding policies to promote equality in the institutional decisions and procedures of religious courts and informal systems of justice.

The progressive reinterpretation of religious laws is a good practice to advance women’s rights. Since 2000, 13 states in northern Nigeria have formally adopted Sharia laws and penal codes, in addition to the secular laws. Under these religious laws, a number of women have been convicted of extramarital sex, which carries the death penalty. A Nigerian women’s organization, BAOBAB for Women’s Human Rights, took on the legal defense of these women and argued that the current Muslim laws are a product of a particular interpretation of religious laws and that women have been excluded from participating in the process of defining them. BOABAB has made advances in critiquing, popularizing and integrating women’s rights into religious frameworks, using religious arguments in protection of these women. As a result of this work, in all cases so far, the Sharia court of appeals have rejected the former convictions[[62]](#endnote-62).

There is an important role for feminist movements in family and customary legal reform. Feminist activism alone does not suffice to produce change, but feminist pressure can facilitate change and progress in women’s rights and anti-discrimination. The successful case of reform of the Moroccan “Moudawana” family code in 2004 reveals a combination of factors conducive to reform, including feminist mobilization, state allies, and a window of opportunity to undermine the religious opposition[[63]](#endnote-63). The new Moudawana code made significant advances for gender equality, including establishing that both spouses share the family responsibility; raising the minimum age for marriage for both men and women to age 18; limiting the terms of polygamy and divorce; and granting women more rights in the negotiation of marriage contracts. Women’s NGOs in Morocco pushed these reforms to transform the economic and social landscape, through the creation of networks to fight against gender-based violence; to advocate for the reform of the Moudawana; to campaign to raise public awareness about equality, violence, the promotion of human rights, tolerance and citizenship; and to create initiatives to boost women’s participation in public and political life[[64]](#endnote-64).

The global Musawah initiative for equality and justice in the Muslim family is another civil society campaign that calls for reforms to discriminatory family laws and practices, some of which impact women’s participation in public and political life. Musawah reclaims and promotes the Islamic principles of justice, non-discrimination, equality and human dignity, to advance women’s rights in Muslim contexts in private and public life[[65]](#endnote-65). In addition, Sisters in Islam is an Islamic group in Malaysia that advocates for equal rights for women, human rights, and justice in Malaysia and throughout the world. The Equality Without Reservations campaign brings together women’s organizations from across the Middle East and North Africa region to call for the removal of reservations to CEDAW and the CEDAW-Optional Protocol. More than 600 organizations from the region and from all over the world are part of this campaign and have signed the Rabat Call for Support, which calls on states to remove their reservations to CEDAW and to harmonize their national legislation with their CEDAW obligations[[66]](#endnote-66).

Indigenous legal systems

In Latin America, 11 states have introduced plural legal systems in order to recognize and respect indigenous peoples’ forms of law, recognizing the right of indigenous communities to decide their own forms of law and conflict resolution, creating pluralism within the state system[[67]](#endnote-67).

However, where the constitution confers recognition on the justice system of the indigenous communities, it in many cases requires the autonomous community legal systems to respect and enforce the human rights of women. Thus, for instance, in Jamaica and also in Paraguay, the Constitution provides: “This Constitution recognizes and protects the indigenous peoples’ right to self determination and, consequently, the right to autonomy, so that they can…apply their own legal systems to regulate and solve their internal conflicts, subjected to the general principles of this Constitution, respecting the fundamental rights, the human rights and, above all, the dignity and safety of women. The law shall establish the way in which judges and courts will validate the aforementioned regulations”[[68]](#endnote-68).

Alternative Disputes Procedures

In some developed countries, there is a trend to authorize minority communities’ adjudication of claims or conflicts in community systems of justice[[69]](#endnote-69). In both developed and developing countries there are increasingly common forms of alternative dispute resolution, which are authorized by the state and hence constitute a quasi-legal pluralism. This may allow private religious arbitration for minority communities such as that of Jewish and Muslim institutions in the UK and Jewish and Native-American arbitration in the US. A similar attempt to introduce faith-based arbitration for the Muslim community in Canada was dropped because of majority opposition to any faith-based arbitration and, indeed, existing arbitration for the Jewish community was also banned.

There may also be systems of alternative dispute resolution for the general population on specific issues. In Brazil, Special Criminal Courts were established for mediation in minor offences. The dangers of this privatization of criminal adjudication became apparent when it was reported that 90% of domestic violence cases ended at the first stage of conciliation either because the woman was intimidated by her abuser or the judge pressed for the case to be closed. In 2006, Brazil banned compulsory mediation and created domestic violence courts that have the power to impose penal sentences and protection orders.[[70]](#endnote-70)

Where any of these alternative dispute procedures undermine women’s right to equality on the basis of traditional religious or customary rulings that are patriarchal, they create a barrier to women’s access to justice. Even where consent is required for jurisdiction or where there is the possibility of an appeal to the regular courts from an arbitration decision, the implications for women’s access to justice may be serious in that women may be pressurized by patriarchal communities to consent and, even with their consent, the very existence of a decision which adversely affects the equality rights of the woman party to the proceedings adds an additional hurdle in the legal procedure.

Informal justice systems

The importance of informal justice systems for women’s access to justice is crucial as it is estimated that 80% of women’s claims or conflicts in the developing world are settled in these systems and not in state courts. The UN Secretary-General’s Report on the Rule of Law in 2011 recognized the potential of informal justice mechanisms for strengthening the rule of law[[71]](#endnote-71). This empirical reality and growing recognition presents a challenge for women, as informal justice systems are male dominated, inclined to embody inequalities and patriarchal interpretations of culture, producing patriarchal outcomes.[[72]](#endnote-72)

The IDLO Report on accessing justice has analyzed the important work which has been carried out to inculcate women’s human right to equality into informal justice systems in Rwanda, Morocco, India, Melanesia, Mozambique, Namibia, Tanzania and Afghanistan[[73]](#endnote-73). The strong message which emerges from these case studies is that constitutional or statutory guarantees of equality are not enough and that it is essential to engage with customary law and practice, empower local women to participate as headwomen and community judges, and improve awareness of women’s rights. Nevertheless, an equally strong message is that, while the constitutional and statutory guarantees of women’s rights must take into account customary justice systems, the applicability of the human rights standards to community women can be used as an important part of the strategy for their empowerment.

Informal systems have often been criticized for failure to uphold international human rights standards, in particular those relating to women[[74]](#endnote-74). The CEDAW Committee has expressed concern about the growing integration of informal laws into the state hierarchy[[75]](#endnote-75).

*Summary of good practices*:

It is good practice to ensure that all plural and parallel legal systems, including religious personal law systems, indigenous legal systems, alternative disputes procedures and informal justice systems, are subject to international, constitutional and statutory guarantees of women’s right to equality and that, in case of violation of women’s right to equality, there is effective recourse from such systems to judicial review by state institutions.

1. **Criminal law**

The criminal law deserves special mention in the chain of access to justice. By means of the criminal law the state may directly victimize women. The criminal law may either target women by criminalizing behaviours that are not criminalized or punished in the same way when performed by men or by not criminalizing behavior in which women are the sole or main victims.

The criminalizing of women’s sexual and reproductive behavior in some states includes: prohibition and punishment of abortion, including pregnancy resulting from rape and therapeutic abortion to save the woman’s life; adultery, including sexual relations of unmarried women or girls, with or without their consent; prostitution; immodesty in dress or behavior[[76]](#endnote-76).

Non-criminalization of behavior in which women are the sole or main victim includes: impunity for marital rape; impunity or reduced sentences for domestic violence, honour killings or crimes of passion; impunity for child or forced marriage; or failure to prosecute rape[[77]](#endnote-77).

The discrimination in the criminal law is particularly egregious since the state is using its police power to discriminate against women, to negate their control over their sexual, family and reproductive life.

International and constitutional guarantees of equality for women can enable women to challenge this discrimination in the use of the police power of the state. Thus, as we have seen, in the case of the dismissal of a rape charge in the Philippines, the CEDAW Committee found a violation of the Convention[[78]](#endnote-78).

1. **Concluding Points for Consideration**

(i) A constitutional guarantee of equality is a critical component in securing gender equality in access to justice.

(ii) Good practices in constitutional guarantees of equality for women, which enhance women’s equal and effective access to justice, may include the following:

* guarantee of women’s equality in all fundamental rights, including both civil and political, social , economic and cultural rights[[79]](#endnote-79)
* incorporation of international women’s human rights law, such as CEDAW, in order to make the human rights treaties self-executing within the constitution[[80]](#endnote-80).
* applicability of the constitutional equality guarantees to both the public and private and the civil and criminal spheres
* prohibition of direct/indirect discrimination in all fields[[81]](#endnote-81)
* prohibition of intersectional discrimination[[82]](#endnote-82)
* prohibition of violence against women[[83]](#endnote-83)
* gender equality in representation in political and public life, including quotas[[84]](#endnote-84)
* providing for affirmative action and temporary special measures[[85]](#endnote-85)
* availability and accessibility of judicial review or mechanisms needed to monitor or implement the constitutional provisions

(iii) Ratification of the human rights treaties, including CEDAW and of their Optional Protocols provides an essential link in the chain of access to justice.

(iv) Where constitutions give recognition to religious or customary law principles, it is good practice to provide explicitly that the guarantee of equality for women has primacy.

(v) Withdrawal of any reservations to CEDAW that exclude any system of principles, of religious or customary law, from the obligation to promote women’s right to equality and to eliminate discrimination against women in all fields of life.

(vi) Plural and parallel legal systems must be subject to international, constitutional and statutory guarantees of women’s right to equality and there must be effective recourse from such systems to judicial review by state institutions.

1. See UN Women, *In Pursuit of Justice: Progress of the World’s Women*, 2011 for an additional detailed analysis of the entire justice chain and gender considerations in access to justice. [↑](#endnote-ref-1)
2. See the concluding comments of the CEDAW Committee on reservations, especially articles pertaining to family and customary law. The CEDAW Committee urges States to harmonize their civil and customary legal systems so that discrimination against women does not persist. See: Equality Now, “Discrimination against Women in Law: A Report Drawing from the Concluding Observations of the Committee on the Elimination of Discrimination Against Women” May 2011. [↑](#endnote-ref-2)
3. Hirshl, Ran and Shackar, Ayelet, “Constitutional Transformation, Gender Equality and Conflict in Israel” in Beverly Baines and Ruth Rubio-Marin, eds. *The Gender of Constitutional Jurisprudence*, Cambridge: Cambridge University Press, 2004. [↑](#endnote-ref-3)
4. Irving, Helen, “Where Have All the Women Gone? Gender and the Literature on Constitutional Design” Sydney Law School, Legal Studies Research Paper, No 10/50 (May 2010) [↑](#endnote-ref-4)
5. UN Women, “Gender Equality and Constitutions of Arab States and North Africa” <http://www.unwomen.org/wp-content/uploads/2013/02/MENA-Constitutions.pdf> [↑](#endnote-ref-5)
6. Morgan, Martha. “How constitution-making, interpretation, and implementation can contribute to protecting and promoting women’s rights”. Remarks to the Working Group, October 3, 2012. For instance, in the Unity Dow Case, it was argued by the appellants that the Botswana Constitution’s failure to specifically mention sex as one of the grounds of prohibited discrimination under Article 15 of the Constitution meant that women were not protected against discriminatory nationality laws despite an Article 3 guarantee of equality on grounds of sex; the Botswana Court of Appeals rejected this argument. [↑](#endnote-ref-6)
7. Lucas, Laura E. “Does gender specificity in constitutions matter?” *Duke Journal of Comparative & International Law*, Vol 20: 133 (2009). [↑](#endnote-ref-7)
8. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-8)
9. Mukhopadhyay, Maitrayee and Singh, Navsharan, eds. *Gender Justice, Citizenship and Development*, IDRC: 2007 at 89 [↑](#endnote-ref-9)
10. See for example: Concluding Observations of the CEDAW: Kuwait. CEDAW/C/KWT/CO/3-4(2011) [↑](#endnote-ref-10)
11. UN Women, “Gender Equality and Constitutions of Europe and North America” <http://www.unwomen.org/wp-content/uploads/2013/02/Europe-and-North-America-Constitutions.pdf> [↑](#endnote-ref-11)
12. The French National Assembly, Constitution of October 4, 1958. <http://www.assemblee-nationale.fr/english/8ab.asp> [↑](#endnote-ref-12)
13. Article 11, CEDAW country report: Belgium. CEDAW/C/BEL/6 (22/06/2007) Pg 61. <http://www.bayefsky.com/reports/belgium_cedaw_c_bel_6_2007.pdf> [↑](#endnote-ref-13)
14. The Constitution, Morocco, 2011; As promulgated 29 July 2011. Included in the Country Visit Report of the WG on Discrimination against Women in Law and Practice 2012. [↑](#endnote-ref-14)
15. See text of Constitution of Bolivia, 2009, <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html> [↑](#endnote-ref-15)
16. See text of Constitution of Ecuador, 2008, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> [↑](#endnote-ref-16)
17. Ibid. [↑](#endnote-ref-17)
18. See Articles 65, 116, 176, and 434 of Constitution of Ecuador (2008), Ibid. [↑](#endnote-ref-18)
19. See Article 108 of Constitution of Ecuador (2008), Ibid. [↑](#endnote-ref-19)
20. Solanda Goyes, Quelal, *Real Equality as a Normative Principle and Parity as a Right: The Case of Ecuador*, *in A Citizen’s Democracy: Visions and Debates from the Perspective of Women’s Rights in the Americas,* Agora Democrática/International IDEA, Ecuador (2012), pp. 218-227. [↑](#endnote-ref-20)
21. This case study comes from UN Women, Progress of the World’s Women, In Pursuit of Justice, 2011. [↑](#endnote-ref-21)
22. This corresponds with Irving’s conception of a ‘whole constitution approach’. Irving, Helen (2010) [↑](#endnote-ref-22)
23. Both the German and the Slovenian Constitutions provide explicit provision that international law supersedes federal and local laws. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-23)
24. For instance, both the South African and the EU Constitutions codify the prohibition of direct and indirect discrimination. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-24)
25. For example, the South African gender equality provision stipulates the prohibition of intersectional discrimination on five grounds: gender, sex, pregnancy, marital status and sexual orientation. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007; Morgan, Martha. “How constitution-making, interpretation, and implementation can contribute to protecting and promoting women’s rights”. Remarks to the Working Group, October 3, 2012. [↑](#endnote-ref-25)
26. The Kenyan Constitution explicitly prohibits all forms of discrimination including violence against women. AWC “Women Gains in the Proposed Constitution of Kenya” April 2010. [↑](#endnote-ref-26)
27. For example, the Colombian Constitution states, “The authorities will guarantee the adequate and effective participation of women in decision-making levels of Public Administration”; The Ugandan and Rwandan Constitutions have also been praised for going further to introduce concrete thresholds for female representatives in political bodies, prohibiting political discrimination against women and also institutionalizing gender quotas in political bodies. UNIFEM, “Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-27)
28. UNDP, Enhancing Women’s Political Participation: A Policy Note for Europe and CIS, Bratislava 2009. [↑](#endnote-ref-28)
29. Waylen, Georgina, *Engendering Transitions: Women’s Mobilization, Institutions, and Gender Outcomes*, Oxford, New York: Oxford University Press (2007), pg. 538 [↑](#endnote-ref-29)
30. Baines, Beverly & Rubio-Marin, Ruth, “Introduction: Towards a Feminist Constitutional Agenda” in *The Gender of Constitutional Jurisprudence*, Beverly Baines and Ruth Rubio-Marin, eds. Cambridge: Cambridge University Press (2004), pg. 9 [↑](#endnote-ref-30)
31. Baldez, Lisa, Epstein, Lee, and Martin, Andrew. “Does the US Constitution Need an Equal Rights Amendment?” *Journal of Legal Studies*, 35: 243-283 (2006). [↑](#endnote-ref-31)
32. Vishaka and others V. State of Rajasthan and others. (AIR 1997 SUPREME COURT 3011) [↑](#endnote-ref-32)
33. Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) [↑](#endnote-ref-33)
34. Constitutional Court of Colombia, Case C-355-06, May 10, 2006. [↑](#endnote-ref-34)
35. Forum for Women, Law and Development (FWLD) vs. His Majesty’s Government/Nepal (HMG/N)
Writ No. 55 of the year 2058 BS (2001-2002) [↑](#endnote-ref-35)
36. The ECtHR upheld the national court’s decision: Staatkundig Gereformeerde Partij (SGP) v. Netherlands, 10/7/12. [↑](#endnote-ref-36)
37. Human Rights Committee, Lovelace v. Canada, Communication No. 24/1977,14 August 19. See also UN Women, *In Pursuit of Justice: Progress of the World’s Women*, 2011. [↑](#endnote-ref-37)
38. Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010) <http://opcedaw.files.wordpress.com/2012/01/vertido-v-the-philippines.pdf> [↑](#endnote-ref-38)
39. Bond, Johanna E. “Constitutional Exclusion and Gender in Commonwealth Africa” *Fordham International Law* Journal, Vol 31, Issue 2. Article 1 (2007). [↑](#endnote-ref-39)
40. The Constitution of the Republic of Korea, 1987 <http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf> [↑](#endnote-ref-40)
41. The Constitution of the Republic of Poland, of 2nd April 1997, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [↑](#endnote-ref-41)
42. The information below on constitutions is taken from: UN Women, “Gender Equality and Constitutions of Asia and Asia Pacific” <http://www.unwomen.org/wp-content/uploads/2013/02/Asia-and-Asia-Pacific-Constitutions.pdf> and UN Women, “Gender Equality and Constitutions of Arab States and North Africa” <http://www.unwomen.org/wp-content/uploads/2013/02/MENA-Constitutions.pdf> [↑](#endnote-ref-42)
43. UN Women, “Gender Equality and Constitutions of Asia and Asia Pacific” <http://www.unwomen.org/wp-content/uploads/2013/02/Asia-and-Asia-Pacific-Constitutions.pdf> [↑](#endnote-ref-43)
44. Tripp, Aili Marie, “Women and Constitution-Making in Africa” Presentation to the Working Group, (10/3/2012) [↑](#endnote-ref-44)
45. The Constitution of the Kingdom of Swaziland Act 2005 [↑](#endnote-ref-45)
46. Constitution of the Federal Democratic Republic of Ethiopia, 1994. <http://www.ethioembassy.org.uk/about_us/constitution.htm> [↑](#endnote-ref-46)
47. UN Women, “Gender Equality and Constitutions of Arab States and North Africa” <http://www.unwomen.org/wp-content/uploads/2013/02/MENA-Constitutions.pdf> [↑](#endnote-ref-47)
48. Equality Now, “Discrimination against Women in Law: A Report Drawing from the Concluding Observations of the Committee on the Elimination of Discrimination Against Women” May 2011. [↑](#endnote-ref-48)
49. Ibid. [↑](#endnote-ref-49)
50. Galanter, M. & J. Krishnan. “Personal Law Systems and Religious Conflicts: A Comparison of India and Israel,” in Religion and Personal Law in Secular India: A Call to Judgment. Ed. G.J. Larson. Bloomington: Indiana University Press, 2001, pg. 271 [↑](#endnote-ref-50)
51. For example, the Article 51 of the Palestine Order in Council, 1922-1947, L.S.I 2738 (Hebrew), 2569 (English) which states that "personal status means suites regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons." [↑](#endnote-ref-51)
52. Ibid; For example, Art. 9 of the Lebanese Constitution, as modified in 2004, states that "l'Etat… garantit également aux populations, à quelque rite qu'elles appartiennent, le respect de leur statut personnel et de leurs intérêts religieux," Constitution Du Liban (Modifiée En Août 2004), available at <http://www.judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/documents/Liban_CONSTITUTION.pd>f. The term "personal laws" is used in International Council on Human Rights Policy, “When Legal Worlds Overlap: Human Rights, State and Non-State Law” 2009, p. 63 footnote 223. [↑](#endnote-ref-52)
53. Such as restrictions on the marriage of Muslim women with non-Muslims, see Charrad, Mounira "Becoming a Citizen: Lineage Versus Individual in Morocco and Tunisia". In *Gender and Citizenship in the Middle East*, Suad Joseph, ed. Syracuse, New York: Syracuse University Press, 2000, pp. 78-79. For a fascinating socio-political analysis of the factors that made family law reform possible in the newly founded independent see Charrad, Mounira *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco* (University of California Press, 2001)  [↑](#endnote-ref-53)
54. Interestingly, the HRC and CEDAW express a similar opinion, with respect to the situation of Muslim women in Greece, which can choose to be governed by Shari'a law rather than the general law. Both committees express concern that this amounts to gender discrimination, thus hinting that having an option to civil law by itself does not satisfy requirements of non-discrimination, although both Committees stops short of mandating abolishment of personal law, but rather require the government to inform women of their legal options, see Human Rights Committee's Concluding Observations about Greece's report in 2005, CCPR/CO/83/GRC, para. 8; CEDAW Committee's Concluding Comments on Greece (2006)CEDAW/C/GRC/CO/6, Para. 33. [↑](#endnote-ref-54)
55. Hadass Tagari, “Personal Family Law Systems – a Comparative and International Human Rights Analysis”, *International Journal of Law in Context*, Vol 8, Special Issue 2, (June 2012), pp 231-252 [↑](#endnote-ref-55)
56. Report of CEDAW, U.N Doc. Supplement No. 38 (A/55/38) (2000), paras. 60-61 (emphasis added) [↑](#endnote-ref-56)
57. Report of CEDAW: Israel. U.N. Doc. CEDAW/C/ISR/1-2 (1997) paras. 157-158. [↑](#endnote-ref-57)
58. Report of CEDAW: Lebanon. U.N. Doc. A/60/38 (2005), para. 100. The reference to a uniform code is not repeated in CEDAW's Concluding Comments on Lebanon (2008), CEDAW/C/LBN/CO/3, para. 45. [↑](#endnote-ref-58)
59. CEDAW, General recommendation on economic consequences of marriage and its dissolution: concept note. (CEDAW/C/2009/II/WP.2/R), para 13. Also noteworthy is the Committee's Statement to commemorate the twenty-fifth anniversary of the adoption of the Convention on the Elimination of All Forms of Discrimination against Women issued on 13 October 2004, in which the Committee stated that "The co-existence of multiple legal systems, with customary and religious laws governing personal status and private life and prevailing over positive law and even constitutional provisions of equality, remains a source of great concern." [↑](#endnote-ref-59)
60. The particular sensitivity and attention the family law topic draw is evident by the fact that other articles covering some of the same areas, yet not explicitly referring to family matters or law, did not receive similar amount of reservations, i.e. Art. 5 of CEDAW (Raday, Frances, “Culture, Religion and Gender”, 1 *International Journal of Constitutional Law 663*, 2003, pp. 679-680.) [↑](#endnote-ref-60)
61. UN Women, In Pursuit of Justice, Progress of the World’s Women 2011 at 67 [↑](#endnote-ref-61)
62. UN Women, In Pursuit of Justice, Progress of the World’s Women 2011. [↑](#endnote-ref-62)
63. Htun, Mala and Weldon, Laurie “The Civic Origins of Progressive Policy Change: Combating Violence Against Women in a Global Policy Perspective” *American Political Science Review*, Vol 106, Issue 3 (August 2012), pp. 548-569. [↑](#endnote-ref-63)
64. See the new Moudawana code at: <http://www.hrea.org/moudawana.html> [↑](#endnote-ref-64)
65. This case study is noted in UN Women, Progress of the World’s Women, In Pursuit of Justice, 2012. See also the Musawah website: <http://www.musawah.org/> [↑](#endnote-ref-65)
66. UN Women, Progress of the World’s Women, In Pursuit of Justice, 2011. [↑](#endnote-ref-66)
67. UN Women, Progress of the World’s Women, In Pursuit of Justice, 2011 at 68. [↑](#endnote-ref-67)
68. UN Women, “Gender Equality and Constitutions of Latin America and the Caribbean” [http*://*www.unwomen.org/wp-content/uploads/2013/02/LAC-Constitutions.pdf](http://www.unwomen.org/wp-content/uploads/2013/02/LAC-Constitutions.pdf) [↑](#endnote-ref-68)
69. UN Women, In Pursuit of Justice, Progress of the World’s Women 2011 [↑](#endnote-ref-69)
70. UN Women, In Pursuit of Justice, Progress of the World’s Women 2011 at 70 [↑](#endnote-ref-70)
71. UN General Assembly, “Strengthening and coordinating United Nations rule of law activities: Repot of the Secretary-General” (A/66/133) 8 August 2011. [↑](#endnote-ref-71)
72. International Development Law Organization, Accessing Justice: Models, Strategies and Best Practices on Women’s Empowerment, 2013 [↑](#endnote-ref-72)
73. Ibid. [↑](#endnote-ref-73)
74. Ibid at 17 [↑](#endnote-ref-74)
75. CEDAW Committee Concluding Observations: Namibia 37th Session UN Doc. CEDAW/C/NAM/CO/3 (16-17) [↑](#endnote-ref-75)
76. See UN General Assembly, “Right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Note by the Secretary-General” 3 August 2011 (A/66/254) for an analysis of the negative impact of the criminalization of women’s sexual and reproductive rights. [↑](#endnote-ref-76)
77. For example, see UN General Assembly “Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo” 23 May 2012 (A/HRC/20/16) for information on gender-based killings. [↑](#endnote-ref-77)
78. Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010) <http://opcedaw.files.wordpress.com/2012/01/vertido-v-the-philippines.pdf> [↑](#endnote-ref-78)
79. This corresponds with Irving’s conception of a ‘whole constitution approach’. Irving, Helen (2010) [↑](#endnote-ref-79)
80. Both the German and the Slovenian Constitutions provide explicit provision that international law supersedes federal and local laws. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-80)
81. For instance, both the South African and the EU Constitutions codify the prohibition of direct and indirect discrimination. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-81)
82. For example, the South African gender equality provision stipulates the prohibition of intersectional discrimination on five grounds: gender, sex, pregnancy, marital status and sexual orientation. UNIFEM, ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007; Morgan, Martha. “How constitution-making, interpretation, and implementation can contribute to protecting and promoting women’s rights” Remarks to the Working Group, October 3, 2012. [↑](#endnote-ref-82)
83. The Kenyan Constitution explicitly prohibits all forms of discrimination including violence against women. AWC “Women Gains in the Proposed Constitution of Kenya” April 2010. [↑](#endnote-ref-83)
84. For example, the Colombian Constitution states, “The authorities will guarantee the adequate and effective participation of women in decision-making levels of Public Administration”; The Ugandan and Rwandan Constitutions have also been praised for going further to introduce concrete thresholds for female representatives in political bodies, prohibiting political discrimination against women and also institutionalizing gender quotas in political bodies. UNIFEM, “Engendering Constitutions: Gender Equality Provisions in Selected Constitutions” November 2007 [↑](#endnote-ref-84)
85. UNDP, Enhancing Women’s Political Participation: A Policy Note for Europe and CIS, Bratislava 2009. [↑](#endnote-ref-85)