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Concepts of Justice and Injustice in the Gender Inheritance-Debate: Flexibility as a Doctrine for Contemporary Ijtihad

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Abstract

In the post-Arab Spring era, inheritance/ ‘*Almyrat*’ practices still stand to deny Moroccan women’s access to equal rights in succession. *Ta’syb* (a customary inheritance calculation system for residuaries known as ‘Asabah’) and *Alfard* (an Islamic legal mechanism which marks out the fixed inheritance formula of the heirs) both define a frame of religious firmness in the practices of family law. As will be shown in this manuscript, the unequal distribution of wealth among genders runs counter to the principle of social and economic equality. A more equitable division of assets translates into the realization of women’s capabilities, secures their access to social quality life and advances their freedom and autonomy. Patriarchal inheritance authority on the other hand, influences the fair distribution of wealth among female heirs, naturalizes their economic dependency and affects their economic wellbeing and/or opportunities. Drawing upon the critical feminist perspective, the current paper tries to question the dominant ideology in the inheritance cycle in an attempt to argue that transformation in the hegemonic patriarchal knowledge along with flexibility in the interpretive scope of the religious text might lead to both social and economic empowerment; as the most adequate generators of sustainable dynamism and growth. The discussion further continues to argue that the underlying societal dynamics are very complex and that the call for a “woman’s rights as human rights” approach (World Conference on Human Rights, Vienna 1993) in the Moroccan inheritance system causes tension between all parties (religious, political and civil society), therefore; a softer gender-inclusive *Ijtihad* language is required for a smoother transition to occur from non-equality to the stage of “elimination of all forms of discrimination against women” (CEDAW, 1979).

Keywords: Inheritance Practices, contemporary Ijtihad, Flexibility, Gender Empowerment, Equality



0. Introduction

The process of revolutions in the countries that went through the 2011 Arab Spring drives cultural changes, and in turn calls for a change in the gender system. Inspired by the events in Tunisia and Egypt, Morocco avoided outright revolt and drafted a new Constitution that sweeps new rights for women. The new constitution leads the country into a new phase and promises to offer protection of women and men's full rights: *'The man and the woman enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural and environmental character...'* (Article 19 Title 2).

Article 19 as a legal force enshrines the principle of equity and guarantees equal opportunities, including an implicit statement of equal access to resources between the genders. However, meeting social and/or economic demands of total and realistic equity/equality remains far-fetched. The current inheritance system (Family Law) remains untouched as it is based on Jurisprudential/customary considerations that set out firm rules of inheritance divide shares. Equality therefore, as governed by article 19, is half implemented in most aspects of Moroccan life and still requires clearer and explicit articulation of the legal text. Needless to say, that realizing equal inheritance rights would ultimately lead to social and economic independence for women; central to the achievement of gender democracy.

The researcher adopts a critical feminist position in this paper, bearing in mind the thinking of Gramsci and Connell, to both question the ideology in the inheritance cycle and further call for a positive transformation of hegemonic knowledge (Shor, 1992). The current paper seeks to understand the complexities of the inheritance system in light of both jurisprudential/customary (*Sharia/ Ourf*) frameworks and the global women's/human rights conventional dynamics. The researcher attempts to answer a leading question: to what extent can it be argued that the Moroccan society is prepared to shift the discussion around gender equality in inheritance from "the firm strict divide shares' approach" to a more flexible realistic understanding of the social change factor? The researcher seeks to further debunk the conceptualization of the *'taqlid'* mode's rigidity, as dictated by the Sunni/Conformist legal tradition in Morocco, in an attempt to call for the utilization of flexibility/creativity as a 'doctrine' for individual reasoning. The researcher believes that this might help shift the discussion around 'flexibility' in interpretation from being an act of *'Ta'wil Azanadiqa'* to a



more positive act of esoteric reasoning. The article claims that a continuum of academic discussion around issues of inheritance can mobilize the whole society against the long-experienced injustices, assuming that this might lead to a possible realistic gender democratic implementation of social and economic promises.

1. Literature Review

Gramsci's concept of hegemony along with Connell's 'gender regime' and 'gender order' have particular pertinence to this paper. From a Gramscian perspective, the issue of restrictions in people's lives lies in their idea of superiority. He introduces a definition that acknowledges dominance as a legitimate state of manipulation (to refer to modes of dominance achieved by some social classes mainly by agreement rather than force). As a psychological term hegemony, according to Gramsci, involves consideration of the relationship of coercion as well as agreement to the maintenance of power. All throughout this paper the family structure will act as an agent for the propagation of hegemonic gender constructs through kinship-inheritance reflected in the Moroccan Family Law, *Sharia'* and '*Ourf.'*

The essence of social ties between the genders is based on the allocation of authority and the calculation of prestige measures as well as acceptance of each gender's role in a society. According to Scott, gender has traditionally been used as a key means of signaling kinship power ties (Scott, 1989). The power at issue here is the power of dominance and subordination; unequal gender kinship-authority over wealth or access to materials. The gender kinship relationship in this study blends to form a vision of a male character who is endowed with the right social traits that enables him to conquer the other sex' property space. Masculinity and femininity blends again to reflect the structured image of inequality; one gender is inferior while the other manipulates the power structures of the patriarchal order to gain inheritance power. Now, by placing resources in the hands of the patriarchal men, gender oppression aggravates to lead to the development of hierarchical roles placing women outside the circle and center of control. The gender role stratification is thus emphasized in the inheritance cycle that shapes and reshapes asymmetrical power relations between the genders to fulfil social and economic disempowered outcomes for the weaker sex. In this manner, power is conceived as a characteristic of positions rather than individuals. When women have more power, it is because they occupy a position with more resources or more authority and when they have less



power and fewer resources this implies that they are excluded from social and economic positions and structures of society.

It was necessary in this paper to also understand how issues of power asymmetry are reflected in the customary practices that deny women most of their inheritance rights. Moroccan women *sulaliyat* for example; have no right to their families' lands because the customary law that applies to communal lands denies their right to land ownership and possession. Under such '*ourf*', 4,631 '*jmâas*' (tribes) deny rural women the right to own communal lands. The royal decree issued in 1919 denies further *sulaliyat* women's access to equal inheritance with the aim of keeping them financially vulnerable to social and economic violence. In fact, the exclusion of *sulaliyat* from land allocation of one million hectares of agricultural lands in the '*Al Gharb*' region does not match the principles of gender equality outlined in the new Constitution. Amina Bouayach, the current female president of the National Council for Human Rights, has been slow to convince the Moroccan authorities to implement and initiate the necessary reforms in favor of these *sulaliyat* women.

Conflicts related to land allocation have not been much discussed by Moroccan researchers; only few scholars tackled the issue but within a limited scope. Yasmine Berriane is a Moroccan author and academic who expressed her opinion in a short publication¹ of less than three pages where she describes vaguely the rural women's case; she said that these women would only lose their lands if they marry outside the same kinship, and that they can indirectly benefit from the lands when their sons or brothers inherit land assets. Berriane (2015) argued further in, 'including the « non-entitled »: Collective Land and Gender Inequality in Morocco,' that the *sulaliyat*' right "was eventually given to them via a series of ministerial circulars issued by the ministry between 2009 and 2012". Berriane, in fact, overlooked their non-inclusion as the beneficiaries of land assets; ministerial directives have proven unable to completely implement and enforce equal land ownership.

In 2019, Robert Hoppe and Nasser Yassine, accounting on the rural women issue in Morocco claimed that rural women "...have no interest in challenging *sulali* men's power", they added that the current "patriarchal system fosters male domination within the household and in the society, and confines *sulaliyat* women to procreative role" (p: 101). Souad Eddouada

¹ Yasmine Berriane, "Terres Collectives et Inégalités : Le Combat des Soulaliyates", *Economia*, April, 2014



(2021) in her manuscript entitled “Land Rights & Women’s Rights in Morocco” published by Duke University Press, explored the notion of the gendered silent subaltern *sulaliyat* in an attempt to voice their concerns. Her analysis of the women *sulaliyat* issue retraces/implies a return to Gayatri Spivak’s postcolonial reading of female agency. Eddouada’s paper is a consideration of a traditional discourse of the marginalized gender aspiring to be voiced for personal satisfied inclusion.

Now, as far as family law is concerned, it combines both customary practices that deny equal inheritance rights for women (e.g. *Taäsib*) and *Sharia* rules which sets out the inheritance shares for both genders. Jurisprudence as the chief source of legislation in family law restricts any kind of reform at this level; the traditional interpretations of the Islamic religion cannot be contradicted in any mean by family law. As a result, the Moroccan Constitution indicates that the state is required to uphold Islamic principles. Family law defenders base their argument of *non-Ijtihad* on the Quranic reference which claims both genders are true equals in heaven and on earth: *‘The believers, men and women, are protectors one of another; they enjoy what is just and forbid what is evil: they observe regular prayers, practice regular charity, and obey Allah and His apostle. On them will Allah pour His mercy: for Allah is Exalted in power, Wise’* (Quran 9:71). For the case of inheritance, Quran states that males get double of what each female gets: *(Allah commands you as regard to your children’s (inheritance); to the male, a portion equal to that of two females)* Quran (4:11). So, do males and females do not inherit equally simply because *‘... men are a degree above women...’* (Quran 2:228)? Or, is the religious text misinterpretation the real reason why women are excluded from the gender equal possession realm? In fact, whatever is ordained by the Divine is not open for debate by most religious scholars. The codification of *‘Ahkam Almirat’* is Divine in nature and requires a non-debatable enactment. The Coran provides systematic mathematical calculations of shares to each *‘Warith’* (heir), what to inherit and who we inherit from and who is to be inherited. *Sharia’s* regulations, then, according to some researchers, is pre-established on a significant sense of equality between the genders deriving its legitimacy from Qur’anic verses (Arshadul Hoque, Jalal Uddin and Saidul Islam, 2013). Arshadul Hoque, Jalal Uddin and Saidul Islam (2013) argue further that the gate of *‘Ijtihad’* has been closed since the classic Islamic period and that women according to the traditionalist movement already enjoy a privileged position of honour and respect; the Quran provides them with total protection of all rights. Mutaz al-



khatib (2019) takes a different stand; he justifies the position of '*ijtihad*' as a modern engagement in the context of the nation state. Mutaz al-khatib (2019) went further to link '*ijtihad*' to modernity; according to him '*ijtihad*' practices are debatable across time.

The current paper extends the current literature on gender inheritance-debate and argues that flexibility and individual reasoning are the best tools for initiating reforms. Contemporary *Ijtihad* as suggested by the researcher is discussed as '*ijtihād al-mukhallifūn*'; it is the sole right and choice of an individual to debate around gender equality in inheritance. *Ijtihad* according to the researcher is an individualized practice rather than being an activity that only religious scholars perform; as al-Shāṭibī explains in his *al-I'tisām* in explanation of what the prophet calls for: "Seek a legal (*fatwa*) from your heart (*al-qalb*) even if they (i.e. religious scholars) have issued you a legal fatwa". In other words, it is the individual who assesses her or his own situation; the religious discourse is addressed to a plurality of Muslims but the individual as a *fard* is the one intended to decide what harm is or not likely to occur to him or her. It is upon the individual, besides the governing authority, to exercise *ijtihād* with respect to preserving and prioritizing the universal *Maqasid/Masalih*: life, wealth, intellect, and family relation. *Ijtihad* in the religious discourse must also be addressed to the authority in the case of the nation state; as the responsibility of the individual is at the hand of the religious '*ummah*' at large. In this case, the highest authority can anticipate outcomes with respect to the causes, impediments and conditions of *ijtihad* and in accordance with what is akin to core values for individuals.

2. Methodology

The current study relied on women interviews; the researcher interviewed women who belong to families that have and do not have a male heir (also known as '*Āasib*'). The male heir '*Āasib*' either hinders or permits family members to inherit through *Tāasib* association, *Tāasib* by joining with others or independent *Tāasib*. In the case of this research, women who do not have a male *Āasib* (a relative who is very close in the family hierarchy) and women who inherit in any ways but fall within the category of *Tāasib* by joining with others have been interviewed. Data was collected in 2018 and summer 2019 using semi-structured interviews to get Moroccan women's perspective and their experiences with regards to inheritance rights. The forty interviewees, from different Moroccan cities (Rabat, Tangier, Kenitra and Casablanca) agreed to embark on this journey. The researcher adopted a non-probabilistic



sampling method; relying on conveniently available respondents (Leiner, 2014). The interviewer applied convenience sampling simply because it helped her interview women who were convenient sources of data and conveniently located around underprivileged neighborhoods (women are deprived their rights of economic security mainly in underprivileged neighborhoods which make them relevant to the current study). The researcher did not apply randomized sampling because the population is large, and believes that she can still create generalizations pertaining to the entire population as she included in her sample 4 locations to serve as a kind of location triangulation; reducing the risk that the particular location she chooses may carry more special characteristics than the average ones. In this feminist approach to interviewing, the researcher intended to allow more visibility to the subjective experience (Ramazanoglu & Holland, 2002); the focus was not research-oriented, but rather respondent oriented and the open-ended questions were flexible and invited a ‘free-flowing conversation’.

Within this study, efforts were made to maintain credibility in interviews. After each interview, the researcher used the member’s check technique. This approach allowed the applicant to assess the accuracy of the interview. Each participant was asked to validate or check the claims for consistency and completeness. (Lincoln & Guba, 1985). After qualitative data collection, the audio-recorded data were transcribed and translated from Moroccan Arabic to English. Thematic analysis was later used to analyze qualitative data. For ethical reasons, the names and the specific locations of the interviewees have been disguised to ensure anonymity. The researcher also interviewed *sullaliyat* women and sought not to include their interview comments given that the data collected was incomplete because of the current Covid 19 situation. The researcher intends to carry interviews with the *sullaliyat* women any time in the future when there will be no risk neither for anyone.

3. Findings

The female interviewees agreed that female and male difference ability is what defines their shares according to *Sharia*, that inheritance rights education inside the family should be encouraged and that guaranteeing their equal entitlements to access/control related inheritance resources would lead to ‘*Al Adl*’ or justice. Most interviewees agreed that sex differences influence the social role/behaviour. Because of their sex, males are more likely to have high-



status roles than females simply because society categorizes people and distributes them into social roles that vary based on personal attributes. A female interviewee from Casablanca and who does not have a male relative as *Asib* states that *'...Parents are the ones who design the future of children...not religion or even Sharia...I blame my deceased father (crying) I don't have male siblings.... he should have divided the shares when he was alive..... male relatives in my family took everything, what is left for me is just "Sriyyef" (few dirhams).'* Another female interviewee in one of the locations where the researcher conducted her interviews in the region of Kenitra *'Al Gharb'* connected the biased social and religious culture to religious education inside the family. According to her, family religious education naturalizes the gender role division and heavily influence women's inheritance rights. She added that most interactions between males and females occur within the structural frame of the family where role or status relationships are binary and that *"...the same process takes place in the structural context outside the family to justify inequality...religious values are reinforced in mosques"*. A female interviewee in Tangier thinks that *"Males, in certain cases, get double the share of a female which I found unfair and unjust.... I am not against the Divine's law "Hasha wa Lilah" there must be a secret that I am not aware of, but I want to have a legal share, an equal possession that I expect the law to secure... 'O'lama' must rethink what they ask people to do"*. A female intellect who happened to visit her family in Rabat's underprivileged area took the interview and states *"...we all sought equality of rights amid the Arab Spring...sadly, the Arab world is still bound up with customary practices and matters of faith that hinder gender equality"*.

The female interviewees went further to argue that patriarchy powerfully shapes the social condition in which women are expected to live; in other words, patriarchy draws the line of control for women. It operates in a way that preserves male supremacy by creating 'masculine' and 'feminine' characteristics that fit in the private-public realms. Family as a pillar of the patriarchal structure is an agent that perpetuates this control over many areas of women's lives, including inheritance; the family is producing and reproducing ideologies that keep women away from power. A female interviewee from Casablanca said that *"...men don't let us inherit, they wrongly believe that these are Islamic principles"*. One of the females in Kenitra (who happened to know much about the *sulaliyat* case) states that *"...despite some recent social changes that aimed at improving women's status, there is no immediate shift in*



the state of sulaliyat women....they can't own lands". The powerful patriarchal system, the religious/customary powers, the traditions all alienate women to achieve 'gender democracy' in inheritance. The interviewees insinuated that women rights and justice go hand in hand; any exclusion of women from equal inheritance imply serious discrimination. In fact, only 5 interviewees (from Tangier) made an exception and seem to have a firm conviction in inheritance attributes, as one of them states "*...God's justice is absolute, if men inherit more than women this is simply because they have a financial responsibility*". Another female interviewee adds "*..... there are cases where women inherit the same amount as men, God is a fair judge*".

4. Discussion

4.1 Ideology/Hegemony, the Individual & Inheritance

Social institutions configure gender identities that align with the patriarchal views of gender differences, they are central to the reproduction and continuation of hegemony. Family as a social institution disseminates ideological values that serve the interests of those who control the social system at large (Colette Guillaumin, 1995). Consequently, both genders indirectly validate their positions by understanding that they are either 'superior genders' or 'inferior genders'. Power manifests itself within binary opposition inside the family to leave no space for the construction of females and males' identities outside patriarchal frameworks (Butler, 1988). The framework that regulates inheritance is therefore consistent with the ideological views that legitimize domination.

Whatever is contained in '*ourf*' or '*sharia*' is based on selective traditions; in other words, someone's decisions and ideas. Family hegemonic mechanisms proliferate gender unequal codifications, the individual in his turn (female or male) produces and reproduces the unequal system via succession rules. The supremacy male heirs may have over female heirs is then naturalized to reflect the total ideology of society at large. Fairclough (2001b) argues that: "hegemonic struggle penetrates all domains of social life, cultural, economic and political...hegemonies are sustained ideologies, in the 'commonsense' assumptions of everyday life" (p.232). Thus, hegemonic power becomes naturalized, or taken for granted, in this struggle for dominance.



According to the current inheritance system in Morocco, a male receives double what a female relative would inherit in a way that reflects the rulings of the male discourse serving the social expectations of gender assimilation to resemble the dominant Moroccan culture. Individual genders are conditioned through inheritance law to believe that all Moroccan women are inferior to men, and that masculinity retains the dominant position of Moroccan social life (Connell, 1987). The inheritance cycle in Morocco lay out a scene of Moroccan women conforming entirely to the hegemonic blueprint that systemically devalues their contribution to the social/economic life.

Power according to Foucault (1983), is a question of governing the behavior of individuals and communities in every sphere of life. The idea of government in this context refers to the structuring of people's actions and convictions, often by rules of inheritance, in order for certain ideas of power relations to be internalized and manifested in the social body. Institutional representation of truth, embedded in the family system, does reflect an objective reality; it is governed by so-called power to indoctrinate certain kinds of a privileged knowledge. In other words, families exercise power via inheritance religious discourse to define and impose hegemonic cultural and socio-economic knowledge on the individual. In relation to this study, one must “emancipate truth from every system of power...detaching (it) from the forms of hegemony within which it operates” (Foucault, 1980a: 133). Through the critical questioning of ‘represented truth(s)’, this paper attempts to create critical awareness of the role of the family and the role of the individual (and his reasoning) in a way that leads to transformation a change.

4.2 Women's Rights/Human Rights & Gender Democracy

What lies at the heart of the human rights approach is the idea that human beings are endowed fundamental natural rights. However, human rights as derived from international documents failed a huge number of women around the world who still suffer from gender gap, pay bias, domestic abuse, sexual assault and abuses of unequal inheritance power. According to some feminists “women's rights as human rights” frame must include an ‘insider’ viewpoint (Oloka-Onyango et al, 1995) derived from women's experiences that comprise their family and home to be valid. For them, abuses for women occur within the private sphere: inside the family and when a woman is a victim of inequality in inheritance this is also seen as a violation of her



human rights. In the same vein, the current paper strives for an emic understanding of Moroccan women's inheritance case.

Social and economic sustainability is about gender democratic practices that shape people's lives towards more democratic relationships. Morocco, as a country, cannot achieve democracy, which is an important part of sustainability by undermining women as a group, nor can it implement the women's rights as human rights 'approach without rethinking the current democratic or non-democratic inheritance distribution. Non-allocation of economic resources to women (through inheritance) raises doubts then as to the consistency of such acts with the principles underlying the Constitutional framework (Article 19).

4.3 'Ijtihad' as a Mechanism to Secure Gender Equal Inheritance Rights

Female interviewees call for justice or *Al Adl*, in other words *ijtihad*, as a generalized understanding for change. Most of them agreed that Moroccan women are traditionally tied to the economic structure only as dependents of their male relatives (who always have inheritance wealth command). Realizing their economic justice-oriented independence then, lies in their full access to equal inheritance rights. The consideration of *Al-Maslaha* (common good, welfare or public interest), which is a deep-rooted concept in the Divine Law, is then the best argument for women to softly debate around their economic rights; it is what would guarantee their existence inside the organization of power in the Moroccan society.

A discussion around Gender equality in inheritance should be consistent with '*Al Maslaha*' discourse which favors current interest over any related interpretations of the religious text. This is to say that *Al Maslaha*, as an old/new approach must be the source of legislation in Family Law. Current and future negotiations around equality in inheritance then, must be in accordance with local *Adat* and *Taqalid* that seem to welcome the *Maslaha* discourse than the technical implementation of gender equality rights as a human right.

Al Maslaha therefore simply implies that whenever there is interest there is God's law. Abid Al Jabiri (1996), a Moroccan Scholar who made a pertinent contribution to the field of Arab-Islamic philosophy, argues in his book '*Al-Din Wa al-Dawla wa Tatbiq al-Shariah*' that the shares in the inheritance category are just 'branches' and 'details'. To my understanding, divide shares stand for the margin, while *Al-Maslaha* is the centre that embeds full justification of gender equality in inheritance. So, moving beyond the periphery *Ahkam Al Myrath* to the



centre *Al Maslaha* might help women living in the margin of fixed shares have a voice at the centre of *Al Maslaha*. *Al Maslaha* then, as related in contemporary times to welfare state (namely liberal, social and democratic welfare), drawn from the global reference of gender equal rights is an adequate flexible key enabler to boost transformation. However, this global/local reference should be approached with extreme delicacy given what happened in 2015 following the Moroccan Council for Human rights recommendation for equality in inheritance and how the council was accused of stepping over the authority of the Supreme Religious Council. According to the Moroccan tradition or *ourf*, the Supreme Religious Council is the only highest institute that has the right to announce any legal pronouncement or *fatwa* of this kind.

Gender equality in inheritance needs to be discussed with a flexible realistic understanding of the social change factor represented by *Al Maslah*. A mindset revolution is then needed to move away from what Abid Aljabiri calls ‘the retired mind or reason’ ‘*al-aql al-moustaquil*’ so that we can make use of our ‘renewed mind’ ‘*al-aql Al moubtakir*’ and be open to discuss even the most delicate social issues.

5. Conclusion

We do not act freely; we behave in ways that conform to the social expectations associated with our sex. Individuals, as part of the agnatic core of the family, are recipients of knowledge at an early age; they are trained to acquire polarized attitudes towards patriarchal forms of power (Bergman, 2009). Creating transformation then, we can say, lies in the ‘gender regime’ of the family as a changeable social organization. Now, all throughout this manuscript flexibility comes to pave the way for a more robust social transformation to occur for female individuals. The researcher, in fact, maintains its position of total equality rights as human rights only when society progresses to welcome the change. In this sense, the conception of gender equal inheritance as human right is internally linked with the whole construction of rights that constitute democracy ideals (Habermas, 1996).

By upholding the right of Moroccan women to equal inheritance (as the personification of human dignity and the goal of human rights), the democratic organization of moral life, the author believes, can either fulfil its mission of preserving social welfare or shake the essential foundations of democracy ideals especially as related to gender. However, determining how



the Moroccan society can be engaged in the democratic discourse of gender equal inheritance is a challenge that needs to be balanced for an easy-to-digest transformation format to exist.

Flexibility, in its holistic/non-restrictive use of *Al Maslaha* as drawn from the local reference, is what guarantees women inclusion in the *jama'a/ummah's* affairs. Flexibility further can conceptualize a legitimate negotiation of the centre/periphery gender interactions; gender power relations in inheritance then are, according to the researcher, not static. We can say that the flexibility mode echoes a new dynamism in the gender inheritance debate that invites us to renew our vision of the solidified gender fixed rights categories anchored in *Ahkam Almyrath*.

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