

## How Southern is Tunisia? Gender Equality in Tunisian Constitutionalism

By *Alma Laiadhi*\*

**Abstract:** Tunisia can be considered as a recent example for gendered constitutionalism in the Global South. In 2014, the country adopted a new constitution in the context of the so-called Arab Spring and enshrined far-reaching women's rights in it. With the enactment of the newest Constitution in August 2022, Tunisia is in a process of rupture with the previous constitutional order. In terms of gender equality, the Constitution of 2022 largely takes over the provisions from the previous constitution of 2014. However, the concrete political context is likely to be less favourable to gender equality.

The Tunisian constitutional experience has the potential to widen the global gendered constitutional conversation while not disregarding seemingly typical southern aspects. One southern aspect is certainly that the Tunisian experience of gendered constitutionalism has so far received too little attention. The historical perspective shows that the so-called women's question recurs again and again as a strategy for identity, power and state-building. The struggle for gender equality is specific, a struggle *à la tunisienne*, so to speak, but it is embedded in the overarching historical (colonial) and regional context. This applies, for example, to the role of Islam in the legal and constitutional order - as a possible restriction of gender equality, but also as an expression of religious freedom or as an identarian aspect. These aspects might be rather southern. Nevertheless, religious arguments and patriarchal nationalisms are possible limitations to gender equality globally.

The Tunisian case shows that female participation in constitutional processes and a gendered constitutional history are important factors for gender equality. The adopted constitutional arrangements can promote gender equality. However - and this is not a Global South specificity - the decisive factor is their implementation; social, economic and democratic factors are of paramount importance. The new Tunisian constitution of 2022 illustrates this impressively.

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\* Dr. Alma Laiadhi holds a PhD from Humboldt University of Berlin. For comments: . Parts of the arguments in this contribution have been elaborated in former work. See *Alma Laiadhi*, *Geschlechtergerechter Konstitutionalismus*, Berlin 2022.

## A. Introduction

This special issue raises the question how far gendered constitutionalism in the Global South might be theorised distinctly from existing studies of feminist comparative constitutionalism.<sup>1</sup> The Tunisian case shows that the feminist analysis with its focus on inequalities and with an intersectional understanding does not need a *distinct* approach for the Global South. It rather seems indicated to further *widen* current approaches and include more diverse experiences into the global gendered constitutional conversation.

Along this line, what one could call “global south aspects”<sup>2</sup> help to open up current approaches to gendered constitutionalism. It is therefore fruitful to specifically look at the Tunisian constitutional experience with regard to gender equality while not disregarding seemingly typical southern aspects. That can be the colonial past seen from a colonized perspective and its impacts to date and different approaches to gender. One challenge here is always to avoid problematic *othering*. Even through the lens of gender equality, it could be suggested that the constitutional status of Islam is a central southern aspect. In this regard, it is important to bear in mind the Tunisian context: a majority Muslim population and a complex history when it comes to political Islam. This first of all means that the frame of reference is Muslim and an Islamic rationale in political positions is conceivable. Secondly, and due to the authoritarian past (and future?) of the country, the lack of political freedom meant for a very long time a lack of the possibility to publicly represent certain Islamic or Islamist political positions. The concrete history also explains a certain obsession with identity aspects: the repeated, constitutional references to Islam and the “Arab-Islamic identity”. This is true for both the 2014 and the new 2022 Constitution.

For a perspective enriched by an experience from the Global South, it is important to underline that female participation and women's rights are used worldwide – and especially towards the Global South - as a benchmark for progress and as a means of identity politics in both the domestic and international perspectives, while other elements were and are neglected.<sup>3</sup>

- 1 *Beverly Baines / Ruth Rubio-Marín*, *The Gender of Constitutional Jurisprudence*, Cambridge 2005; *Beverly Baines / Daphne Barak-Erez / Tsvi Kahana*, *Feminist Constitutionalism*, Cambridge 2012; *Helen Irving*, *Constitutions and Gender*, Cheltenham and Northampton 2017; *Helen Irving*, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge 2008; *Catharine MacKinnon*, *Gender in Constitutions*, in: Michael Rosenfeld / Andrés Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, pp. 397-416; *Susan H. Williams*, *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge 2009; *Alexandra Dobrowolsky / Vivien Hart*, *Women making Constitutions, New Politics and Comparative Perspectives*, London 2003.
- 2 *Philipp Dann / Michael Riegner / Maxim Bönnemann*, *The Southern Turn in Comparative Constitutional Law*, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, p. 14 f.
- 3 *Maha El Said / Lena Meari / Nicola Pratt*, Introduction, in: Maha El Said / Lena Meari / Nicola Pratt (eds.), *Rethinking Gender in Revolutions and Resistance*, London 2015, p. 21 f.

Tunisia can be considered as a recent example for gendered constitutionalism in the Global South. In 2014, the country adopted a new constitution in the context of the so-called Arab Spring and enshrined far-reaching women's rights in it. At the present time and with the enactment of the newest Constitution in August 2022, Tunisia is in a process of rupture with the previous constitutional order.<sup>4</sup>

## B. Historical Perspective on Gender and State Building

At first glance, gendered constitutionalism could be identified as a recent phenomenon in Tunisia. The historical perspective helps to clarify that the contrary is true: the so-called women's question recurs again and again as a strategy for identity, power and state-building. Here I understand gendered constitutionalism not as feminist in the sense of promoting gender equality, but as a gendered perspective on constitutionalism. For an approximation, I will first elaborate on the historical perspective, then look at gender aspects in the transition around 2011, and finally look at the constitutions of 2014 and 2022.

### I. Colonial Past and its Impacts on the Plurilegal System

One starting point to understand the Tunisian experience is, is to lay out the impact of colonialism on gender in the constitutional context. For long, the Tunisian legal system<sup>5</sup> was characterized by a legal pluralism based on the religious affiliation ascribed to each person. During the 19th century different legal systems and social norms coexisted. Religious affiliation determined the applicable law, one's assigned place in society, and one's right to work.<sup>6</sup> The monarchy of the Beys was based on Islamic law, while Christians and Jews were subject to their own legal systems and jurisdictions.<sup>7</sup> In addition, the Ottoman Empire's capitulations to the European powers, which included regulations on gender relations, applied throughout the Mediterranean region. Until 1856 for example, a law was in

4 For an overview of the main changes with the new constitution of July 2022 see: *Salsabil Klibi*, *Le projet de constitution proposé au référendum du 25 juillet 2022: la revanche de la constitution de 1959?*, *Leaders*, (last accessed on 30 March 2023) ; *Azza Filali*, *Nouvelle constitution: les mots ambigus ou absents*, *Leaders*, (last accessed on 30 March 2023).

5 It is imprecise to speak of "Tunisia" as a state as early as the 19th century since Tunisia was not founded as a nation-state until 1959. Until then, one could speak of "the territory that later became Tunisia". For the sake of simplicity, however, the article uses the term "Tunisia," even though there were still border conflicts in the meantime and overlaps with other states defined today as nation-states were more pronounced, especially due to the plurilegal system. See *Mounira Charrad*, *States and Women's Rights: The Making of post-colonial Tunisia, Algeria and Morocco*, Los Angeles 2001, p. 88 f.

6 *Julia Clancy-Smith*, *Gender in the City: Women, Migration and Contested Spaces in Tunis, c. 1830-1881*, in: David Anderson / Richard Rathbone (eds.), *Africa's Urban Past*, Oxford 2000, pp. 192 ff.

7 *Viktor Silvera*, *Le régime constitutionnel de la Tunisie*, *Revue française de Science Politique* 10(2) (1960), p. 367.

force that made any interreligious sexual contact between a Muslim woman and a Christian or a Jew punishable by death.<sup>8</sup>

Tunisia was considered the most centralized state in the Maghreb at this time.<sup>9</sup> Tribal groups played a less significant role than in other states of the Maghreb, which is why the state structures were able to gain in importance. Moreover, the Beys had developed an administrative state whose administrative arms covered almost the entire territory and whose power was concentrated in Tunis.<sup>10</sup> During this period, Tunisian society was characterized by a heteronormative division of gender roles and patriarchal hierarchy: Overall, women tended to be responsible for the private sphere with household management and family, while men took on tasks in the public sphere.<sup>11</sup>

In 1857, under pressure from the European powers and in order to legitimize the power internally, the Bey issued a basic pact with rights for the subjects of the kingdom.<sup>12</sup> This was complemented in 1861 by a Constitution, which, however, was suspended shortly after in 1864.<sup>13</sup> These documents constitute an important historical moment with regard to the question of gendered constitutionalism. First of all, they contain the first equality regulations<sup>14</sup> and are used discursively to prove a long constitutional tradition up to the present day (although most Tunisians were generally unaware of the existence of these documents at the time).<sup>15</sup> These documents also shaped the elite involved in these political as well as judicial processes, which had their first experience of power sharing within the state structure and of ruler's accountability.<sup>16</sup>

This period also saw the first theoretical and political discussion of the "women's question". In the confrontation with the European colonial values - particularly around the

8 *Clancy-Smith*, note 6, p. 192 ff.

9 *Charrad*, note 5, p. 89.

10 *Ibid.*, p. 95.

11 *Lilia Ben Salem*, Tunisia, in: Sanja Kelly / Julia Breslin (eds.), *Women's Rights in the Middle East and North Africa*, New York 2010, p. 487; *Sophie Bessis*, *Histoire de la Tunisie*, Paris 2019, pp. 182 f.

12 *Bessis*, note 11, pp. 217 f.

13 *Habib Boularès*, *Histoire de la Tunisie*, Tunis 2012, pp. 463 f.

14 The 1857 pact guaranteed in articles 3 and 8 the freedom and equality of all subjects of the Kingdom before the law - Muslim and non-Muslim alike. Likewise, the 1861 constitution provided for equality of all subjects of the Kingdom in article 86. This equality also referred only to non-discrimination on the basis of religion. However, equality of legal subjects before the law could not be achieved because, for example, in family and inheritance law, the different legal systems continued to coexist and were applied independently of each other by the courts. This shows that the guarantee of equality was primarily intended to achieve a better legal position for Europeans on the ground. Few of the articles were really designed to improve the legal situation of Tunisians, but rather to serve European economic interests.

15 *Theresa Liane Womble*, *Early Constitutionalism in Tunisia, 1857–1864: Reform and Revolt*, Princeton 1997, pp. 163 ff.

16 *Ibid.*

topic of religion - the first demands for a legal improvement of the situation of women were formulated. Although these demands were not linked to the desire for a higher-ranking norm like a constitution, the idea of progress through law that still prevails today has its origins here. The so-called women's question was analysed independently of the function of the state. In addition to analysing the legal situation of women, these writings called in particular for access to education for women. Equal rights or equality were not contemplated.<sup>17</sup>

France's colonial rule in the Tunisian protectorate<sup>18</sup> lasted from 1881 to 1956. During this time, France prevented the enactment of a constitution. Essential aspects of state and colonial law were regulated by the state treaties between Tunisia and France that introduced the protectorate. During the colonial period, legal and judicial pluralism were intensified. French law was applied to French citizens and other Europeans.<sup>19</sup>

Although a study of the city of Tunis shows that already at the beginning of the 19th century, women became an arena for cultural authenticity, this further intensified with the beginning of the protectorate.<sup>20</sup> Law for Tunisians was pronounced in confessional (on Sharia<sup>21</sup> or rabbinic basis) or secular courts. The religious courts dispensed justice, especially with regard to family and inheritance law, but also in property matters. The French colonial power left these areas, which were particularly relevant to gender relations, practically unchanged, since the advanced bureaucratization or centralization of the state and the almost complete absence of tribal sources of law made intervention unnecessary from the French perspective.<sup>22</sup>

## II. *State Feminism in a Muslim Context*<sup>23</sup>

Against this backdrop, the importance of gender aspects at the end of the colonial period is not surprising. Like in other states in the southern Mediterranean, the so-called women's

- 17 One of the earliest documents is considered to be the "Letter on Women" of 1856, published by the court chronicler Ahmad ibn Abi Diyaf in response to a list of questions on the status of women from the French consul in Tunisia, Léon Roches. See *Béehir Tlili*, *A l'aube du Mouvement des Reformes a Tunis: Un Important Document de Ahmad Ibn Abi al-Diyaf sur le Féminisme (1856)*, *Ethnies* 2 (1972), pp. 167-230.
- 18 On the critical classification of the term: *Wolfgang Egner*, *Protektion und Souveränität, Die Entwicklung imperialer Herrschaftsformen und Legitimationsfiguren im 19. Jahrhundert*, Berlin and Boston 2018, pp. 320 ff.
- 19 *Kenneth Perkins*, *A History of Modern Tunisia*, New York 2014, p. 50.
- 20 *Clancy-Smith*, note 6, p. 192 ff.
- 21 For an explanation of how and why family and inheritance law was further governed by Islamic law, see: *Wael B Hallaq*, *Can the Shari'a be Restored?*, in: *Yvonne Yazbeck Haddad / Barbara Freyer Stowasser* (eds.), *Islamic Law and the Challenges of Modernity*, Walnut Creek 2004, p. 25.
- 22 *Charrad*, note 5, p. 13.
- 23 Headline inspired by the similar title of *Sana Ben Achour*, *Féminismes laïques en pays d'Islam*, in: *Mélanges offerts à la Doyenne Khaltoum Mziou*, La diversité dans le droit, Tunis 2012, pp. 1-13.

question in a postcolonial context shows the duality of a rootedness in the supposedly authentic Islamic culture and a modernization of the new states in the postcolonial period.<sup>24</sup>

The new leadership around President Habib Bourguiba used its power to shape women's policy. His intent was less to establish (substantial) equal rights, he rather used the so-called women's question to consolidate his power as part of his state-building strategy.<sup>25</sup> This is the origin of the so-called state feminism.<sup>26</sup> Sana Ben Achour defines the Tunisian state feminism as a state strategy to promote the transformation of the socio-legal situation of women through political activity. Unlike feminism in the form of an autonomous social movement, which is supported by collective demands for gender equality and social change, this kind of feminism became a doctrine of the state and its apparatus.<sup>27</sup> The best-known example for this policy is the new status law (personal status code, PSC) enacted after independence.

While women in particular were clearly granted better legal status in many areas after independence,<sup>28</sup> they were not formally involved in the development of the new state and constitutional order.<sup>29</sup> The improvements were limited to status law. Political participation and representation of women were not considered in this context. The development of a modern nation-state had been the primary goal.<sup>30</sup>

Interestingly, legal improvements towards gender equality were codified by simple law, independently of a constitutional guarantee of equality. As the first cornerstone of the national state-building strategy, this code was formative for the constitutional order.<sup>31</sup> The CSP brought about a significant change in gender relations, but it did not completely change the social hierarchy. Both partners' consent to marriage was required, as well as the

24 Zahra Ali, *Egalité de Genre et Transition „démocratique“ dans l'Irak Post 2003*, in: *Égalité de Genre et Transition Démocratique*, Tunis 2013, p. 121.

25 Nabila Abbas, *Das Imaginäre und die Revolution*, Frankfurt and New York 2019, p. 138; Laurie A. Brand, *Women, The State, and Political Liberalization: Middle Eastern and North African Experiences*, New York 1998, p. 10; Ben Salem, note 11, p. 488.

26 The concept of state feminism is attributed to Helga Hernes and was used to describe a phenomenon in the Scandinavian States. See Helga Hernes, *Welfare State and Woman Power: Essays in State Feminism*, Oslo 1987, p. 11.

27 Sana Ben Achour, *Féminisme d'Etat*, in: *Mélanges en l'honneur de Mohammed Charfi*, Tunis 2001, p. 413.

28 For an overview see: Alma Laiadhi, *Geschlechtergerechter Konstitutionalismus*, Berlin 2022, pp. 160 ff.

29 Monica Marks, *Women's Rights before and after the Revolution*, in: Nouri Gara (ed.), *The Making of the Tunisian Revolution*, Edinburgh 2013, p. 224.

30 Charrad, note 5, p. 220.

31 Ben Achour, note 27, p. 415.

possibility for both to enforce the divorce in court. Polygamy was prohibited. Differences remained in inheritance law<sup>32</sup> and the male dominance was maintained overall.<sup>33</sup>

The introduction of the constitution at the top of Tunisia's hierarchy of norms marked the completion of the secularization of the legal system. The 1959 Constitution can be seen as the motor and result of the decolonisation process.<sup>34</sup> At the time of independence, this secularization of national law was already advanced in many areas. With the PSC came the secular codification of the private sphere,<sup>35</sup> and finally fundamental rights were also established by the state. The drafting of the 1959 Constitution clearly shows ambivalence of male leadership to real change in gender relations: Even though the constitution enshrined the first provision on gender equality in its article 6 of the 1959 Constitution, women were denied active participation in the constitutional process.<sup>36</sup> The constitution had little emancipatory potential during this period. Significant steps toward equalizing the legal situation of gender were taken at the level of legislation. The legislation that was contrary to equality remained resistant to change, particularly in family and inheritance law.

Women participated in the struggle for independence as much as others. Nevertheless, aspects of gender equality had to take a back seat to the cause of independence.<sup>37</sup> Later on, the state-captured feminism limited the field of action of feminist groups. After Tunisian independence only one women's movement was legally allowed to exist and had to support the only political party of President Bourguiba (Union Nationale des Femmes Tunisiennes, UNFT).<sup>38</sup> At a later stage, the state allowed more groups, but only with a secular orientation.

The origin of these movements in Tunisia is considered to be the Tahar Haddad Cultural Circle, founded in 1974. The circle included women from the Tunisian bourgeoisie who published their critical sociological texts in the journal *Nissa* from 1985 onwards. The

32 *Imen Gallala-Arndt*, Tunisia after the Arab Spring, Women's rights at Risk?, in: Rainer Grote / Tilmann J Röder (eds.), *Constitutionalism, Human Rights, and Islam after the Arab Spring*, New York 2016, p. 601.

33 For analysis of the compatibility of the CSP regulations with international human rights conventions, see *Sina Fontana*, *Universelle Frauenrechte und islamisches Recht*, Tübingen 2017, pp. 285 ff.

34 *Antoni Abat i Ninet / Mark Tushnet*, *The Arab Spring, An Essay on Revolution and Constitutionalism*, Cheltenham 2015, p. 149.

35 *Monia Ben Jémia*, *Le juge tunisien et la légitimation de l'ordre juridique positif par la charia*, in: Baudouin Dupret (ed.), *La Charia aujourd'hui*, Paris 2012, p. 158.

36 On 8 April 1956, the Constitutional Assembly began its work with five specialised commissions. It was composed exclusively of men from the Neo-Destour Party. Bourguiba convinced the Bey to enact a majority voting system. This enabled the Neo-Destour List to win all 98 seats in the Assembly. See *Bessis*, note 11, p. 360; *Kenneth Perkins*, note 19, p. 136.

37 *Perkins*, note 19, p. 104.

38 *Khedija Arfaoui*, *The Development of the Feminist Movement in Tunisia 1920s–2000s*, *The International Journal of the Humanities* 4(8) (2007), p. 56; *Emma C Murphy*, *Women in Tunisia*, in: Eleanor Abdella Doumato / Marsha Pripstein Posusney (eds.), *Women and Globalization in the Arab Middle East*, Colorado and London 2003, pp. 173 f.

circle gave rise to the Association of Tunisian Democratic Women (Association Tunisienne des Femmes Démocrates, ATFD) and the Association of Tunisian Women for Research and Development (Association des Femmes Tunisiennes pour la Recherche sur le Développement, AFTURD), both founded in 1989.<sup>39</sup> In contrast to the women's movements that existed until independence, these new movements can probably be described as feminist movements. They were not "merely" a mobilization of women, but addressed the relationship between genders directly, as well as social constructs of female subordination and gender-based discrimination. They explicitly demanded legal gender equality and criticised the democratic and constitutional restrictions imposed by state feminism.<sup>40</sup> In this context, the focus on legal improvements may be surprising. But it can be understood precisely within the state feminist structure. Lacking the possibility of public debate, groups like the ATFD focused their work on improving the legal situation. The state became the main addressee of their demands. Mirroring state feminism, they were convinced that social change could be initiated by changing the legal situation.<sup>41</sup>

In the 1990s, the first movements based on the teachings of Islam emerged.<sup>42</sup> In Tunisia, the majority of Islamic women's movements did not focus on the compatibility of a new reading of Islamic sources with the universality of "women's rights", but on the family as a unit and on the complementarity of the sexes (as opposed to equality or equal rights).<sup>43</sup> For them, women were to be empowered within the framework of the family.<sup>44</sup>

Paradoxically, it was precisely the strong persecution of Islamists under Tunisia's authoritarian regimes that encouraged Muslim women in their activism. Quite a few of the women who belong to today's Islamic women's movements in Tunisia were often socially isolated as wives of (male) Islamist activists and could not find jobs that corresponded to their education. While their husbands were often in prison, they had to provide for their families.<sup>45</sup> In this historical context of state repression and the more or less secular oriented state feminism, the focus on the demand for religious freedom and especially with regard to the right to dress according to religious commandments can also be understood.<sup>46</sup>

39 *Lilia Labidi*, The Nature of Transnational Alliances in Women's Associations in the Maghreb, *Journal of Middle East Women's Studies* 3(1) (2007), pp. 16 ff.

40 *Bessis*, note 11, p. 427.

41 *Abbas*, note 25, pp. 370 f.

42 *Aitemad Muhanna*, Islamic and Secular Women's Activism and Discourses in post-uprising Tunisia, in: Maha El Said / Lena Meari / Nicola Pratt (eds.), note 3, pp. 439 f.; *Loes Debussere*, Tunisian Women at the Crossroads: Antagonism and Agonism between secular and Islamist Women's Rights Movements in Tunisia, *Mediterranean Politics* 21(2) (2015), p. 227.

43 *Debussere*, note 42, p. 230.

44 *Muhanna*, note 42, pp. 454 ff.

45 *Béatrice Hibou*, La force de l'obéissance, Économie politique de la répression en Tunisie, Paris 2006, pp. 6 ff.

46 *Abbas*, note 25, pp. 388 f.

### C. Gender and Constitutional Transition from 2011-2014

The state feminist tradition explains why gender aspects increased in importance during the time of transition from 2011 to 2014. The historical look back and the international context underly the importance of the colonial influence and the post-colonial implications. Nevertheless, the international community and international law –especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) –had a major impact on the constitutional process during 2011 - 2014.

Gender equality was not the primary cause of the upheavals in Tunisia between 2011 and 2014. The protests were primarily directed to the old regime, which was criticized for corruption and a lack of freedom of expression and political freedom. Socioeconomic aspects also played a role.

Following these political demands, several developments took place that are particularly relevant when viewed through a gendered constitutional lens. Large sections of Tunisians associated the demand for a new constitution with the hope of substantial change. Parallel to the demands for a new constitution, gender relations became a central issue. Tunisian women were very present in the public and political sphere during the revolution.<sup>47</sup> With regard to gender relations, it becomes clear that political activism was very heterogeneous. The differences were evident in the political positions or positioning and ideologies (secular-religious, class, educational background).<sup>48</sup>

Another significant reason why gender relations came into focus was a destabilisation of gender concepts during the social upheavals, which affected not only the respective roles and legal positions, but also the relationship to the state. Due to the state-feminist bias, the question of the (masculine) state as the protector of "the women" became particularly relevant in the public discourse on the constitutional making process.<sup>49</sup>

The international context and the (re)appearance of the Islamist Ennahda party on the scene were of importance, too. Women's political participation and women's rights are used worldwide as a bench mark for progress and as a means of identity politics in both the domestic and international perspectives, while other elements were and are neglected.<sup>50</sup> Closely related to this is what I have elsewhere called femopatriotism.<sup>51</sup> This refers to Tunisian pride in the alleged progressiveness with regard to gender equality in the regional as well as international context. Based on the country's longstanding state-feminist

47 *Gallala-Arndt*, note 32, p. 607.

48 *Giulia Daniele*, Tunisian Women's Activism after January 14 Revolution: Looking within and towards the Other Side of the Mediterranean, *Journal of International Women's Studies* 15(2) (2014), p. 21.

49 *Elisabeth Johansson-Nogués*, Gendering the Arab Spring?, *Security Dialogue* October-December 44(5-6) (2013), p. 396.

50 *El Said et al*, note 3, pp. 21 f.

51 *Alma Laiadhi*, note 28, pp. 199 f.

imprint, this patriotism derives from two elements in particular: the perception of law as an instrument of progress and the focus on women's rights.<sup>52</sup>

Gender equality also played a central role in the 2011-2014 constitutional process itself. This can be shown by the composition of the constituent assembly (*Assemblée Nationale Constituyente*, ANC) and the controversies during the process.

The state feminist tradition, the strong feminist activism and the international context might explain why some feminist elements during the constitutional transition were uncontested. For example, the vertical parity electoral law for the ANC was more or less uncontroversial among the members of the relevant body.<sup>53</sup> Because of the requirement to alternate women and men on the parties' electoral lists after the election in October 2011 the ANC was composed of approximately 70 % male and 30 % female members.<sup>54</sup> The ANC was also politically more heterogeneous because of the large number of parties. An important example of the heterogeneity is the Islamist Ennahda party, which had been banned as a party up to that point. Ennahda won most of the seats and sent most of the female members to the assembly.

While women were represented on most of the ANC's bodies, only a handful were given relevant leadership positions.<sup>55</sup> ANC Vice-President Meherzia Maïza Labidi (Ennahda) chaired many plenary debates. The fact that the constitutional assembly was more diverse than before led to the adoption of a constitutional text goes much further than the 1959 constitution in the area of gender equity.

It is reasonable to conclude that the presence of 30% women MPs was essential for the adoption of some provisions.<sup>56</sup> Overall, it is likely that the fact that equality, rights in the private sphere, socio-economic rights, protection against gender-based violence and the sources of law were discussed controversially and publicly in a constitution-drafting body with 30% female members played a role.

Initially, there were thoughts among female MPs to set up an (informal) body consisting exclusively of women. This "*Comité de femmes parlementaires*" was supposed to push an agenda for shared concerns and proposals by women. Apart from a joint statement in the

52 *Alma Laiadhi*, Femopatriotismus à la tunisienne, *Geschlechtergerechtigkeit in Tunesien*, STREIT 40(2) (2022), pp. 63 ff.

53 *Michael Lieckefett*, La Haute Instance, *Confluences Méditerranée* 3(82) 2012, p. 135.

54 *Selma Mabrouk*, 2011-2014, *Le bras de fer*, Tunis 2018, p. 56. The numbers can be explained because most parties had male members on the first position of their electoral lists and some parties did not comply with this obligation; see *Silvia Suteu*, Women and participatory constitution-making, in: Irving (ed.), note 1, p. 33.

55 National Democratic Institut for International Affairs, Tunisia's National Constituent Assembly Gender Assessment, p. 8; The Carter Center, *The Constitutional-Making Process in Tunisia: Final Report*, 2011-2014, 2014, p. 32.

56 The intervention of MPs Mabrouk and Chabaane for articles 34 para 2, 40 and 46 of the 2014 Constitution are examples of this. The decisive intervention of ANC Vice-President Labidi before the vote on article 46 of the 2014 constitution against her party comrade Brahim (Ennahda) is also one of them.

*Affaire Meriem*<sup>57</sup>, this Comité could not take any significant action.<sup>58</sup> The group was never translated into reality, as there were different ideas about what such an agenda should include and what role "women" should have in Tunisian society.<sup>59</sup> Nevertheless, female ANC members across party lines acted together in a few key moments, such as the adoption of certain provisions.<sup>60</sup>

But the functioning of the ANC and the drafting of the constitution were also marked by unplanned events, non-transparent arrangements and lack of organisation.<sup>61</sup> This was despite the high degree of formalisation by internal rules<sup>62</sup> and the participation of civil society through various mechanisms. The non-existence of a time limit for the drafting of the constitution and the political situation in the country after the politically-motivated killings in 2013 were also essential. These aspects tended to benefit gender justice in some regulations, such as the adoption of Article 46 of the 2014 Constitution. External influences on the ANC strongly shaped the process and led to considerable pressure. In some cases, ANC members withdrew articles, for instance, in relation to the concept of complementarity between women and men or the enshrinement of the Šarī'a as an explicit source of law. ANC members did not pursue certain demands such as the right to abortion or equality in inheritance, because they assumed an opposing public opinion.

Actors from outside of the ANC also participated in the constitutional process 2011-2014. This shows in the emergence of new public spheres and the concrete impacts on the representatives in the Constituent Assembly. The demonstration for equal rights on August 13, 2012 (anniversary of the status law, CSP) is a case in point.<sup>63</sup> It was also

57 In September 2012, the *Affaire Meriem* made it clear that it is precisely in times of political upheaval that women's behaviour is used to negotiate questions of morality and moral concepts. In the incident, a woman who was spending the evening on the beach with a man was raped by several police officers during a police check. She was later accused of behaving inappropriately. She was subsequently charged with causing public nuisance and then acquitted. See *Manel Derbeli*, *Tunisie: La fille violée par les policiers a été "trouvée dans une posture irrespectueuse"*, Tunisie Numérique, (last accessed on 31 March 2022).

58 *Selma Mabrouk*, note 54, p. 111; *Rangita De Silva de Alwis / Anware Mnasri / Estee Ward*, *Women and the Making of the Tunisian Constitution*, *Berkley Journal of International Law* 35(1) (2017), pp. 98, 116.

59 *Nadia Chaabane*, *Tunisie Deuxième République, Chronique d'une Constituante 2011-2014*, *Tunis* 2018, p. 262.

60 *De Silva de Alwis et al.*, note 58, pp. 98, 116.

61 Throughout the constitution-making process, the population and civil society were given formal opportunities to participate. All drafts of the constitution were published on the ANC website, public consultations were held in more than 2000 town hall meetings, and especially in the first months the new constitution was the dominant topic in the mass media. See: *De Silva de Alwis et al.*, note 58, p. 115.

62 Essential aspects of the functioning of the ANC were laid down in the Provisional Rules of State, which were enacted as a constitutional law on December 23, 2011, and the Rules of Procedure adopted on January 20, 2012.

63 *Selma Mabrouk*, note 54, p. 205.

due to pressure from civil society that gender complementarity was taken out of the 2012 draft constitution.<sup>64</sup> The August 2012 draft constitution provided for "complementarity" (*mutakamila*) of women and men as opposed to equality (*musawa*). According to this reading, the sexes have different (natural) responsibilities and complement each other.<sup>65</sup> An example of pressure from external influences, is the failure to enshrine equality *in* the law in areas such as inheritance, because the impression arose there that this constitutional provision would cause social discord.<sup>66</sup>

In this respect, it was a decisive change that the discourse on the constitution was no longer shaped only by the authoritarian state and the elites. What is likely to have been new in 2011-2014 is the discussion of the constitutional anchoring of specific women's rights and also their scope. Good examples are regulations on affirmative action to reduce gender-based disadvantages and the discussion of sexual and reproductive rights and the explicit discussion of violence against women.

#### D. Gender Equality under the Tunisian Constitutions of 2014 and 2022

The Tunisian constitution of 2014 is a far-reaching example for feminist design while taking into account Tunisian specificities. In terms of gender equality, the Constitution of 2022 largely takes over the provisions from the previous constitution of 2014.<sup>67</sup> However, the concrete political context is likely to be less favourable to gender equality.

Although both Constitutions combine a general and symmetrical requirement for equality with a separate article for women's rights with gender-specific provisions to reduce disadvantages for women (Articles 21 and 46 of the 2014 Constitution, Articles 23 and 51 of the 2022 Constitution) and the protection against gender-based violence (Articles 46 para 4 of the 2014 Constitution and 51 para 4 of the 2022 Constitution),<sup>68</sup> there are several inherent limitations. The wording chosen in these gender-specific articles show a paternalistic approach. In the context of gender-based violence masculinity remains the yardstick from which women deviate in need for protection.

Furthermore, a neutral state structure in the secular sense cannot be assumed. Islam is clearly privileged as a religion. Both Constitutions grant Islam a special position in Tunisia's constitutional structure. Article 1 of the 2014 Constitution stated that Islam is the religion of Tunisia. Article 5 of the 2022 Constitution highlights that Tunisia is part of the Islamic community. Under Article 74 of the 2014 Constitution, Candidates for the presidency need to be of Muslim faith. Similarly, Article 88 para 2 of the 2022 Constitution

64 Ibid, p. 208.

65 *Monica Marks*, *Convince, coerce, or compromise?*, Doha 2014, pp. 1-35 (23); *Monica Marks*, „Complementary“ Status for Tunisian Women, *Foreign Policy*, 20 August 2012.

66 *Selma Mabrouk*, note 54, p. 183.

67 *Filali*, note 4.

68 *Mejda M'Rabet*, *Violence à l'égard des femmes*, in: *Rafâa Ben Achour / Hajer Gueldich* (eds.), *Dictionnaire des Termes et Expressions de la Constitution Tunisienne de 2014*, Tunis 2017, p. 354.

states that the President's religion is Islam. Both Constitutions declare schooling to be compulsory until the age of 16 and that the state must ensure that the younger generations are rooted in their Arab and Islamic identity (Articles 39 of the 2014 and 44 of the 2022 Constitution). This is where a certain "obsession with identity" might be detected: the repeated, constitutional references to Islam and the "Arab-Islamic identity".<sup>69</sup>

It might seem that even while focussing upon gender equality, the constitutional status of Islam is a central conflict of the constitutions. It is important to keep in mind that the frame of reference is Muslim and the country's past explains certain Islamic or Islamist positions. The reference to Islam fulfils a function of pacification to a special degree. The constitutional reference to Islam allows the legislature to take religious argumentations into account when making law, although the normative influence on legislation varies. The same applies to the judiciary's interpretation of laws. Although this has made clear the importance of Islam in Tunisia's constitutional order, I still urge not to overstate it. It rather shows a political instrumentalization of Islam.

The state feminist tradition and the "Arab-Islamic" self-image as well as the international context can explain the fact that the traditional conceptions of gender as a point of reference for law, as well as the heteronormative gender framework remain nearly unchanged. The differences within the group "Tunisian woman" are hardly addressed, the same applies to intersectional aspects. The "Tunisian man" continues to be the neutral norm, which highlights the underlying hierarchies and power relations.

The legislature has exercised its obligation to reduce gender-related discrimination, we can see clear progress. It should be noted that in regional and local elections not only vertical but also horizontal parity in electoral lists applies. Tunisia has elected its first female major in 2018, Souad Abderrahim (Ennahda). The law for parliamentary elections kept the vertical parity requirement. This might explain the decline in the participation of women in parliament.

In the political sphere in particular, persistent gender discrimination, especially against women, shows that further positive action is needed within political parties themselves, including party bodies and leadership, to achieve gender-equitable participation and representation.<sup>70</sup> This is especially true in order to counteract the common gender-based hierarchization. Especially in leadership positions that are appointed rather than elected, such as within the government, there is a clear lack of gender-equal representation and participation. Again, this is not a Tunisian specificity.

In 2017 the legislature took another key step with the Law on the Elimination of All Forms of Violence against Women, which, with its holistic approach, addresses structural,

69 See *Sabwa Hamrouni*, Les valeurs fondatrices de la deuxième République dans le préambule et principes généraux de la Constitution, in: *La Constitution de la Tunisie*, Tunis 2016, p. 386.

70 Democracy Reporting International, *Analysis of the legal framework of the elections in Tunisia*, Tunis 2017, p. 63.

gender-based discrimination.<sup>71</sup> Article 1 of this law aims to introduce measures to eliminate all forms of violence against women based on gender discrimination in order to ensure gender equality and respect for human dignity. It is noteworthy that according to Article 3, violence should be addressed in all its aspects: any physical, psychological, sexual and economic injury or impairment can be regarded as violence against women if it occurs due to gender-specific discrimination. In addition to the lack of full implementation, a recent study by the Centre for Research, Documentation and Information on Women (CREDIF) also found that, particularly in the area of violence against women, gender-specific stereotypes and patterns of justification are so substantial that it is likely to be difficult to reduce gender-based violence.<sup>72</sup>

It is also interesting to note what steps the legislature has not yet taken or been able to take. This concerns in particular unconstitutional norms of family and inheritance law. On August 13, 2018, Tunisia's National Women's Day, then-President Essebsi announced that he would first focus on reforming the inheritance law in order to give women equal rights. The corresponding legislative proposal was introduced to Parliament in November 2018.<sup>73</sup> The reform enshrined equal rights for men and women in inheritance law, regardless of whether the heir is the mother, daughter, wife or sister. Equality in inheritance law should thus become the rule. In addition, the possibility of inheritance according to Islamic law was supposed to be retained, which also forms the basis of the regulations in inheritance law of the CSP that are still in force.

Since the 2014 Constitution came into force, Tunisia has been waiting for the establishment of the planned constitutional court. As a result, the responsibilities can only be fulfilled to a limited extent. The provisional body (*Instance Provisoire de contrôle de constitutionnalité des projets de lois*, IPCCPL) did valuable work as a transitional solution in the interpretation of constitutional norms and, in particular, the review of laws a priori.<sup>74</sup> However, insofar as the constitutional court's assigned jurisdiction to reject norms is concerned, which could come into play precisely in the area of legislative gender justice, the lack of constitutionalisation is highly relevant. The delay in establishing the constitutional court is certainly not a Tunisian peculiarity, as historical experience in Germany, France or Italy shows. Nevertheless, no review of constitutionality with a corresponding monopoly on condemnation by the constitutional court takes place during this period. The harmonization of the infraconstitutional legal system is thus primarily the responsibility of the legislature

71 *Sana Ben Achour*, *Violences à l'égard des femmes*, Tunis 2016, pp. 94 ff.

72 CREDIF, *Les représentations sociales des violences faites aux femmes chez les hommes, jeunes et adultes*, 2019, (last accessed on 31 March 2022).

73 Democracy Reporting International, *Report on the implementation of the constitution*, Tunis 2021, No. 12, p. 26.

74 On functioning, competence and decision-making practice see *Leila Chikhaoui-Mahdaoui*, *Le rôle de l'Instance Provisoire de contrôle de la constitutionnalité des projets de loi en période de transition*, *Revue Juridique des Étudiants de la Sorbonne* 2(1) (2019), pp. 39-75.

or creative interpretation by the specialized courts. The new constitution of 2022 provides for a constitutional court as well - but with uncertain power and starting date.

It is also clear that existing socially anchored stereotypes, social norms and other forms of gender-specific discrimination can only be addressed to a limited extent. In this respect, the new regulations and the retention of unconstitutional norms only give an impression of how the constitutional or, legal order and, in the broadest sense, the constitutional culture has developed or can develop. The current constitutional situation and the socioeconomic situation in Tunisia make it clear that many other factors can have a significant influence on gender equality.

## E. Conclusion

The Tunisian case shows that there is no need for a different theorisation of gendered constitutionalism in the Global South, but rather for an extension of previous approaches.

Key elements of a gendered constitutionalist analysis are relevant in the Tunisian case. This includes aspects of the constitution itself (sources of law, gender equality, socio-economic rights, the structurally private, protection against gender-based violence, political participation and representation, concepts of gender and gender equitable language), the historical antecedents and consequences, as well as the focus on constitutional reality with regard to enforcement and agency, but also to socio-economic and democratic-political factors.

Tunisia's concrete (gendered) constitutional history is closely linked to the Global North due to the geographical proximity and shared colonial past. The comparative perspective underlines that globally, gender equality has a long history with relatively recent, actual progress and is by no means a completed process. Rather, patriarchal and religious counterarguments have and will continue to have an important place. This is not to equate patriarchally shaped constitutional systems, but to sharpen the view of commonalities and differences in the respective context.

One southern aspect is certainly that the Tunisian experience of gendered constitutionalism has so far received too little attention. The Tunisian case and especially the historical perspective show that the so-called women's question recurs again and again as a strategy for identity, power and state-building. The struggle for gender equality is specific, a struggle *à la tunisienne*, so to speak, but it is embedded in the overarching historical (colonial) and regional context. This applies, for example, to the role of Islam in the legal and constitutional order - as a possible restriction of gender justice, but also as an expression of religious freedom or as an identarian aspect. The effects of colonialism and the connections with Islam - as an identity shelter and mobiliser against the coloniser, but also against authoritarian regimes, might be rather southern aspects in an analysis. Nevertheless, religious arguments and patriarchal nationalisms are possible limitations to gender equality globally.

To this day, the "Arab-Islamic identity" is used to distinguish oneself from perceived external influences. This can be seen, for example, in the emphasis on the incompatibility of gender equality and a conservative reading of Islam, or in regulations based on religion or attributable to religion that codify an asymmetrical relationship between the sexes (for example, in family and inheritance law). Although the situation of women in the Maghreb is shaped just as much by patriarchal and agrarian structures as by Islamic guidelines, Islam nevertheless plays a central role. Islamic law, as passed down schools of law, was and is decisive for many areas of life. Even during the period of secularization, Islam played a central role in the legal shaping of gender relations.

The 2011-2014 context shows that female participation in constitutional processes and a gendered constitutional history (for Tunisia e.g., state feminism and femopatriotism) are important factors for gender equality. The described, far-reaching constitutional arrangements can promote gender equality. What is indispensable – and this is not a Global South specificity - however, is their implementation; social, economic and democratic factors are of paramount importance for gender equality. The new Tunisian constitution of 2022 illustrates this impressively. In terms of gender equality, the provisions are largely taken over from the previous constitution of 2014.

However, the concrete political context and the current constitutional situation are likely to be less favourable to gender equality. The suspension of Parliament eliminates an important actor in the implementation of constitutional postulates in the field of gender equality. In addition, restrictions on the democratic-legal foundations generally mean diminished opportunities for gender equality.



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