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## Women and the Making of the Tunisian Constitution

Rangita de Silva de Alwis

*Associate Dean of International Programs at the University of Pennsylvania Law School*

Anware Mnasri

*Administrative Judge in Tunisia*

Estee Ward

*Penn Law School*

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# Women And The Making Of The Tunisian Constitution

Rangita de Silva de Alwis\*  
Anware Mnasri\*\*  
Estee Ward\*\*\*

“The best nations are always those that accord women the greatest amount of liberty.”

(Charles Fourier, 1808)

“Just because we’ve overthrown the regime and managed to cobble together a constitution does not mean the transition is over. It is only the beginning. People need to remember that.”

(Issrar Chamekh, Student and Tunisian activist at i-Watch.)

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\* Rangita de Silva de Alwis is the lead author of the paper and is the Associate Dean of International Programs at the University of Pennsylvania Law School. She led several workshops on women and constitution building in Tunisia as head of the Women in Public Service Project inaugurated by Secretary Hillary Clinton.

\*\* Anware Mnasri is an Administrative Judge in Tunisia.

\*\*\* Estee Ward is a 2L at Penn Law School and the lead researcher for the project.

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## INTRODUCTION

The Jasmine Revolution of 2011 and the cascade of revolutions that followed created a crucial, albeit narrow, window of opportunity for political changes that could shape legal system reform across the Middle East and North African (MENA) region.<sup>1</sup> Revolutionaries in Tunisia, Egypt, Morocco, and Libya pushed for constitutional change as a necessary first step towards transitioning to a more democratic state.<sup>2</sup> Within this discourse, constitutional reform movements became platforms for addressing deep-seated gender inequalities.<sup>3</sup> Women in Tunisia used their country's constitution-making

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1. See generally Katerina Dalacoura, *The 2011 Uprisings in the Arab Middle East: Political Change and Geopolitical Implications*, 88 INT'L AFFAIRS 63 (2012) (discussing the causes of the Arab Spring and its potential geopolitical implications).

2. John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L & COMP. L. REV. 219, 221-24 (2013); see also Issandr El Amrani, Op-Ed., *Egypt: A Constitution First*, GUARDIAN COMMENT NETWORK, Jun. 12 2011, <http://www.theguardian.com/commentisfree/2011/jun/12/egypt-a-constitution-first>. (describing a statement by Egyptian activists that recommends the Tunisian model of political transition).

3. See, e.g., RAINER GROTE ET AL., CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 628, 673 (2012). For a closer look at the popular debates around gender-related issues in North African countries between 2011 and 2013, see generally ANDREA KHALIL, *CROWDS AND POLITICS IN NORTH AFRICA: TUNISIA, ALGERIA, AND LIBYA* (2014).

process as a vehicle for mobilizing local efforts, connecting with gender rights advocates in other MENA countries, and participating in a transnational dialogue.<sup>4</sup> As a result, women's participation became a key determinant of some of the final draft's constitutional guarantees on gender equality, religion-state relations, rights in the family, rights to political participation, and the employment of programmatic rights.

The constitution-making process in Tunisia built upon a long history of attempts in other countries to shift from a top-down model of constitution-making, also known as the Lancaster Model, to one based on popular participation.<sup>5</sup> Over 200 new constitutions have been drafted since the post-colonial era.<sup>6</sup> The earliest projects relied heavily on international experts outside the country who either copy-pasted model provisions from international texts or else borrowed from the country's former colonizers.<sup>7</sup> Since the 1980s, however, countries have worked to adopt more autochthonous or hybrid processes that fit the local context.<sup>8</sup> This is based on the premise that popular participation in constitution-making not only lends legitimacy to the text's provisions, but is in itself an exercise of democratic empowerment.<sup>9</sup> In other words, constitutions can provide new beginnings for a country; in post-conflict scenarios, they give countries a forum for discussing the underlying tensions that gave rise to the initial conflict.<sup>10</sup> The more open a constitution-making process is to the public and the institutions of civil society, the more likely the process will be more democratic and representative.<sup>11</sup>

Based on these underlying principles, a nation's drafting process has been characterized generally by a greater degree of deliberation and is most often led either by the standing legislature or by a nationally elected constituent

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4. Giulia Daniele, *Tunisian Women's Activism after the January 14 Revolution: Looking within and towards the Other Side of the Mediterranean*, 15 J. INT'L WOMEN'S STUD. 16, 26-27 (2014).

5. Uendra Dev Acharya, *Constitutionalism and Democracy in Nepal: What Went Wrong?* in CONSTITUTIONALISM AND DEMOCRATIC TRANSITIONS: LESSONS FROM SOUTH AFRICA 177, 188-91 (Veronica Federico & Carlo Fusaro eds., 2006). Alternative approaches to the Lancaster Model emerged in the late 1990s. Frameworks vary, but the general consensus is that popular participation is highly desirable, if not essential to successful constitution-making.

6. Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1523 (2008).

7. Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014).

8. Heinz Klug, *Postcolonial Collages: Distributions of Power and Constitutional Models*, 18 INT'L SOC. 114, 126-28 (2003).

9. VIVIEN HART, DEMOCRATIC CONSTITUTION-MAKING (2003), <http://www.usip.org/sites/default/files/sr107.pdf>.

10. Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, 15 J. DEMOCRACY 81, 87 (2004).

11. See, e.g., Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. SOC. SCI. 201, 202-206 (2009) (providing a brief literature review on the waves of constitutionalism and a wider discussion of the dynamics between public participation and constitutional design).

assembly.<sup>12</sup> Although the emphasis is on creating a text that embodies a people's history and values, countries in transition will often draw on a "collage of constitutional mechanisms and principles" at the international level to "produce hybrid solutions tailored to" local imperatives."<sup>13</sup> A more recent approach among legal scholars has been to look at the degree to which newly drafted constitutions are "intermestic" – drawing on both domestic and international influences.<sup>14</sup> The hybridization of state reconstruction and the degree to which it occurs has been particularly informative in the area of women's rights. In many instances, women who have played an active role in advancing gender equality through constitutional reform have relied at least in part on a common core of international norms reflected in instruments such as the Convention for the Elimination of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant for Economic Social and Cultural Rights (ICESCR).<sup>15</sup> They have used such texts to reinforce their assertion that participation in the drafting process is not just critical to the end result, rather it must be acknowledged as a normative claim in and of itself.<sup>16</sup> The right to participate in the decision-making affecting women's lives is one of the most significant rights to be claimed by women. The United Nations Entity for Gender Equality and the Empowerment of Women has supported a women's right to engage in constitution-making, stating:

"[G]ender-sensitive processes (e.g., guaranteeing women's representation in constitutional drafting bodies) and decisions on substance (e.g., adoption of a constitutional guarantee of gender equality) set a precedent for women's participation in social, economic, and political life in the post-conflict period, as well as providing a legal base from which women's rights advocates can demand other types of gender-responsive reform that unfolds in transitional periods when laws and institutions are in flux."<sup>17</sup>

This is not to say that the women who participate in the drafting process should be characterized as a uniform force. Context will inevitably shape and diversify women's views of what warrants constitutional protection and whether

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12. Widner, *supra* note 6 at 1532.

13. Klug, *supra* note 8 at 128.

14. Kevin L. Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT'L L. 667, 724 (2013).

15. Diane Elson & Jasmine Gideon, *Organising for Women's Economic and Social Rights: How Useful Is the International Covenant on Economic, Social, and Cultural Rights?* 8 J. INTERDISC. GENDER STUD. 133, 135-138 (2004).

16. See generally HELEN IRVING, *GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN* (2008) (reviewing various strategies and mechanisms to enhance women's participation in the constitution drafting process and the significance of such participation).

17. RANGITA DE SILVA DE ALWIS, *WOMEN'S HUMAN RIGHTS AND NATIONAL CONSTITUTIONS: LEADERSHIP AND POLITICAL PARTICIPATION* (2012), <http://www2.unwomen.org/~media/field%20office%20eseasia/docs/publications/2014/9/womens%20human%20rights%20and%20national%20constitutions%20guidance%20note.ashx?v=1&d=20141202T120321>.

international human rights standards comport with local belief systems or cultural practices. In Tunisia, women's participation consisted of a complex set of interactions influenced by stakeholders with varying and sometimes conflicting socio-political objectives. The inconsistencies that appear in the constitution's final text, as well as some of the challenges to passing implementing legislation, are a testament to this.<sup>18</sup> Yet the ways in which participation unfolded, the forces at play, and their differing interests in drafting the country's gender rights provisions are issues that remain understudied. This article attempts to glean from field interviews and secondary sources some of the sociopolitical complexities that underlay women's engagement in Tunisia's constitution-making process. Elucidating such complexities can provide further insight into how women's engagement impacted the substance and enforceability of the constitution's final text. We argue that, in spite of longstanding roadblocks to implement and enforce constitutional guarantees, the greater involvement of Tunisian women in the constitution drafting process did make a difference in the final gender provisions of Tunisia's constitution. Although not all recommendations were adopted, Tunisian women were able to use an autochthonous process to edify the country and set the foundation for greater rights consciousness.

This article also seeks to define the degree and nature of external influence on national efforts to advance women's rights and on the drafting of Tunisia's gender provisions. Although our research suggests that international forces had less of an impact on the Tunisian constitution-making process than we had assumed initially, we also found that many Tunisian women still saw themselves as part of a transnational women's movement in which they were able to engage with a broad network of international women's groups and transnational stakeholders. Our conclusion, thus, is that the Tunisian constitutional project, at least in regards to its gender provisions, can be regarded as intermestic in the sense that it drew directly or indirectly from both local and transnational sources. This shows that even when drafters are able to create constitutions that fit local contexts, they are still deeply influenced by international human rights provisions and relevant structural frameworks.

Finally, this article summarizes some of the early efforts to translate constitutional guarantees into enforceable legislation. While we have deemed Tunisia's drafting process as a success in participatory constitution-making, the country has a considerable way to go to ensure that "equal opportunities for men and women" as guaranteed in its new constitution become a reality for Tunisians in their daily modes of existence.<sup>19</sup>

Applying Tunisia as a case study more generally, we argue that women's equal engagement can inform the constitutive and transformative nature of constitution drafting. Such engagement allows civil society to address challenges to the empowerment of women, create new narratives of nation

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18. See *infra* Part II.

19. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 46.

building, and ensure that constitutional provisions are drafted in a gender-sensitive manner. Women's engagement should be premised on a dialogic, human rights, analytical framework. While the primacy of rights must guide constitutional change, international human rights must be premised on an ongoing discourse that calls for simultaneous internal and cross-cultural dialogue involving a plurality of voices, including the equal representation of women. The emphasis here is on "ongoing." Constitutional guarantees are not guarantees until they are enforced without bias or exception. Participation in constitution-drafting projects should not end with the final text, but must continue with the formation of institutions that reflect and maintain the constitution's blue print for nation building.

This article proceeds in four parts. Part I provides a historical overview of Tunisia's constitution-making process and defines the major stakeholders involved, as well as the varying dynamics among them. It then introduces a comparative summary of how other countries have gradually shifted from the Lancaster Model to a more participatory process that embraces women's inclusion in drafting constitutional rights provisions. Part II begins our case study of Tunisia by detailing how some of the stakeholders mentioned in Part I shaped the drafting process for certain gender provisions, the proposed texts as well as subsequent revisions. Part II concludes by identifying some of the inconsistencies found within the constitution's final text, as well as preexisting laws that have complicated the enactment of implementing legislation. Part III moves on to consider the international forces involved in the drafting process, and the extent to which international texts and softer modes of influence determined the direction of Tunisia's internal dialogue. It also considers whether international organizations have played a part in resolving inconsistencies in the legal framework. Finally, Part IV makes recommendations to actualize the constitution's gender provisions. It looks at the beginnings of some of these efforts, as well as gives recommendations based on the experience of other countries in transition.

This paper engages not just in textual interpretation and secondary sources, but relies on in-depth interviews with some of the women stakeholders involved. Our hope is that by speaking with those who were present on the ground during the drafting process, we can provide greater insight into how provisions are drafted, to what extent the participatory process succeeded in creating new constitutional norms for a country in transition, and to what effect international sources had in driving the constitution to a particular end result.

## PART I

### *A. A Summary of Women's Engagement in Tunisia's Constitution-making Process*

Any consideration of women's participation in drafting a new constitution in Tunisia requires placing it in its historical context. The next section will

summarize the state of women's activism prior to the revolution, the sociopolitical complexities that challenged participation in the constitution making process, and how women were able to coalesce in spite of these challenges. Women's activism has a long history in Tunisia. The literary works of the author and reformer Tahar el-Haddad are hailed by many today as the genesis of progressive women's rights in Tunisia.<sup>20</sup> His book, *Our Women in Shari'a and in Society* (1930) inspired debate over the role of women in Tunisian society and laid the groundwork for future popular struggles.<sup>21</sup> Haddad was also a pioneer of trade unionism in Tunisia, laying the groundwork for today's largest and most powerful labor union in Tunisia, the General Union of Tunisian Workers (UGTT).<sup>22</sup> His scholarship on women's status in Tunisia was informed, at least in part, by his critique of capitalism and familiarity with European Marxism.<sup>23</sup> Interestingly, Haddad's works seemed to have influenced the reforms included in Tunisia's Personal Status Code (CSP), issued by the country's first president Habib Bourguiba in 1956.<sup>24</sup> The purpose behind the CSP, however, seems to have been less about feminism than about doing away with traditions that impeded Bourguiba's greater modernization program.<sup>25</sup> The Code abolished polygamy and the practice of repudiation, and granted women suffrage and the right to initiate divorce, but did not explicitly make men and women equal in all respects.<sup>26</sup> For example, the CSP adopted a male preference in inheritance law.<sup>27</sup> Though the CSP was hailed by Western observers as a marked improvement in the institutionalization of women's rights, it had the paradoxical effect of creating a Jacobin-like form of feminism that effectively silenced alternative feminist viewpoints.<sup>28</sup> State feminism thus became a strategy to silence opposition while gaining the affections of external allies.

This strategy evolved during the Ben Ali regime to include methods of co-optation and division for the purposes of creating a narrow spectrum of activism that allowed women's organizations to exist only within a limited, heavily monitored sphere.<sup>29</sup> Those who resisted the regime's tactics ultimately lost out

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20. Lilia Labidi, *The Nature of Transnational Alliances in Women's Associations in the Maghreb: The Case of AFTURD and ATFD in Tunisia*, 3 J. MIDDLE EAST WOMEN'S STUD. 6, 9-12 (2007).

21. *Id.* For more information on the creation and development of women's organizations inspired by el-Haddad, see LAURIE A. BRAND, WOMEN, THE STATE, AND POLITICAL LIBERALIZATION 202-22 (1998).

22. JOEL BEININ, WORKERS AND THIEVES: LABOR MOVEMENTS AND POPULAR UPRISINGS IN TUNISIA AND EGYPT 13 (2016).

23. *Id.*

24. BRAND, *supra* note 21 at 178-79.

25. *Id.* at 180.

26. George N. Sfeir, *The Tunisian Code of Personal Status (Majallat Al-Ahw Al Al-Shakhsiy Ah)*, 11 MIDDLE EAST J. 309, 310 (1957).

27. *Id.* at 313-14.

28. Daniele, *supra* note 4 at 18-19.

29. Emma C. Murphy, *Women in Tunisia: Between State Feminism and Economic Reform*, in WOMEN AND GLOBALIZATION IN THE ARAB MIDDLE EAST: GENDER, ECONOMY AND SOCIETY 169-



on political resources and influence but maintained an independent form of feminism that took hold after the regime's fall. For example, The Tunisian Association of Democratic Women (ATFD) and The Association of Tunisian Women for Research on Development (AFTURD), both established in 1989, successfully avoided "dictatorial drift"<sup>30</sup> to become powerful forces of post-regime activism, as we will see below.<sup>31</sup> On the international front, Tunisia continued to hold itself as a progressive Arab state, ratifying CEDAW in 1985, albeit with numerous reservations related to Article 9(2) on equal rights with regard to nationality of children, Article 16 on equality in marriage and family life, and Article 29(1) relating to the administration of CEDAW provisions.<sup>32</sup> Ben Ali became a vocal proponent of women's economic participation, touting state laws with regards to maternity leave and equal employment, but made little actual efforts towards placing women in positions of leadership or providing them with enforceable safeguards against substandard working conditions.<sup>33</sup>

In light of Tunisia's complicated history, the 2011 revolution provided a critical opportunity to replace the old hegemonic framework for women's rights with a new bottom-up model based on popular discourse and civil society-led initiatives. Dr. Najet Limam-Tnani of the University of Tunis has commented that the constitutional process "created a new pulse" for the women's movement.<sup>34</sup> On October 23, 2011, over seven months after the fall of the regime, the interim government held nationwide elections to determine the composition of a 217-member, National Constituent Assembly (NCA) tasked with drafting a new constitution.<sup>35</sup> Women were well represented in most NCA decision-making bodies, though only a handful of women were appointed to significant positions of leadership.<sup>36</sup> Many more women deputies joined the six constituent committees in charge of drafting provisions under specific

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70, 178-87 (Eleanor Abdella Doumato & Marsha Pripstein Posusney eds., 2003).

30. Guadalupe Martínez-Fuentes & Belhassen Ennouri, *Changes and Persistence in the Tunisian Organisational Network for the Promotion of Women*, in PROMOTING WOMEN'S RIGHTS & GENDER EQUALITY IN THE MIDDLE EAST AND NORTH AFRICA 139 (2014), [http://www.feps-europe.eu/assets/bd3344d3-a0fc-4582-9842-e3b8ea4724a4/2014%2009%2003%20women's%20rights%20mena\\_final.pdf](http://www.feps-europe.eu/assets/bd3344d3-a0fc-4582-9842-e3b8ea4724a4/2014%2009%2003%20women's%20rights%20mena_final.pdf).

31. See *infra* Part II.

32. *Declarations, Reservations, and Objections to CEDAW*, U.N., <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last accessed Oct. 25, 2016).

33. Louisa Dris-Ait-Hamadouche, *Women in the Maghreb*, in NORTH AFRICA: POLITICS, REGION, AND THE LIMITS OF TRANSFORMATION 202, 219 (Yahia H Zoubir & Haizam Amirah-Fernandez, eds., 2008).

34. Najet Limam-Tnani, "Quelle Révolution Pour les Femmes Tunisiennes: Printemps Féministe our Hiver Islamiste?" Upholding Gendered Peace at a Time of War Conference, in Beirut, Lebanon (June 9, 2015).

35. Lizzy Davis, *Tunisian Elections: Polling Day as it Happened*, THE GUARDIAN, Oct. 23, 2011, <http://www.theguardian.com/world/middle-east-live/2011/oct/23/tunisian-elections-2011-arab-and-middle-east-protests>.

36. NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, ASSEMBLEE NATIONALE CONSTITUANTE DE LA TUNISIE, <https://www.ndi.org/files/Tunisia-Gender-Assessment-National-Constituent-Assembly-FRE.pdf>.

constitutional themes. Notably, the only committee headed by a woman was the Committee on Human Rights and Liberties, which was responsible for most issues related to women's rights.<sup>37</sup>

The NCA held its inaugural session on November 22, 2011 and drafting began shortly thereafter, on February 13, 2012.<sup>38</sup> The entire project resulted in four drafts of the Constitution and took a little under two years to complete. The final draft was passed by an article-by-article vote on January 26, 2014. From the beginning there was consensus among women NCA members that the new constitution must uphold and advance women's rights. To that end, women took steps to form a caucus that would promote a unified women's rights agenda. However, diverging conceptions of what such an agenda should look like or what the role of women in Tunisian society should be impeded the caucus' capacity to hold together as a unifying force. Though women deputies expressed in interviews a broad range of perspectives on women's rights in Tunisia, most gravitated towards either a moderate Islamist position espoused by the majority party, Ennahda, or the modern secularist position of Ennahda's biggest rival, Nidaa-Tounis. Even when women's views aligned, these political parties were less than eager for their members to be drawn off to an issue-based coalition that crossed party lines. While Nidaa-Tounis feared that Ennahda was not as 'moderate'<sup>39</sup> as it held itself out to be and thus might undermine safeguards set by the Bourguiba regime in the country's 1959 Personal Status Code, Nidaa-Tounis was repeatedly accused of fraternizing with crony capitalists and political elites under the prior regime. Though Ennahda, and in particular Ennahda's women members, insisted on demonstrating good intentions in both maintaining and furthering women's rights guarantees, anti-Islamist rhetoric exacerbated tensions between the two parties and inevitably created an atmosphere of mutual suspicion that often led to serious blockages during constitutional debate. In short, the caucus initiative never fully formalized, though women members did re-coalesce at crucial moments to push through certain rights provisions, most notably Article 46 requiring the state to take steps towards eliminating violence against women.

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37. THE CARTER CENTER, THE CONSTITUTION-MAKING PROCESS IN TUNISIA: FINAL REPORT 2011-2014, 32 (2014).

38. *NCA to Hold Inaugural Session on November 22*, TUNIS AFRIQUE PRESSE (Nov. 12, 2011), <http://www.pm.gov.tn/pm/actualites/actualite.php?lang=en&id=5058>; see also Al-Bawsala, *Drafting the Constitution of the Tunisian Republic* (in Arabic), (Sep. 2012), [http://www.albawsala.com/uploads/documents/Projet\\_Brouillon\\_Constit.pdf](http://www.albawsala.com/uploads/documents/Projet_Brouillon_Constit.pdf).

39. Since its foray into the political scene, Ennahda has held itself out as the latest reincarnation of a moderate Islamist movement led by activists and Islamic intellectuals from the early 1980s onwards. Ben Ali used an aggressive form of secularism to suppress the movement's growth and bar its presence in associative spaces. By contrast, Nidaa-Tounis became a loose conglomeration of leftists, progressivists, and secularists, some of whom were suspected to be a part of the "old guard." Divisions between the two parties, thus, were not purely ideological, but also driven by historical circumstances. Interview with Salsabil Klibi, Professor at La Faculté des Sciences Juridiques (May 27, 2015).

Similar divides created challenges for building a united women's rights movement outside of the NCA. Rapid liberalization of the associative space after the revolution resulted in a flourishing of women's interest groups, representing a wide variety of perspectives.<sup>40</sup> This explosion of civic action was positive in many ways, but it also created difficulties in finding common ground. The most visible debate largely mapped onto what was unfolding in the NCA. Older progressivists, popularly referred to as the "Daughters of Bourguiba," often were at loggerheads with younger Islamists who championed themselves as the "Daughters of Khadija."<sup>41</sup> Supporters in both camps engaged in several competing demonstrations or marches that resulted in competing discourses over various women's rights issues. On the sidelines, however, groups without political representation in the NCA were asserting their own views of the constitution and its role in furthering women's rights. For example, proponents of political Salafism, a more extreme form of Islam that requires Shari'a law as the sole source for legislation, did not win any seats in the NCA but has gained traction since 2011, particularly among the urban poor and youth.<sup>42</sup> Many Tunisian men and women who have felt their country has lost a sense of self have been drawn to Salafism because of its anti-establishment discourse and adherence to traditional values.<sup>43</sup> Many Salafis reject the campaign for women's rights as an imported Western construct unrepresentative of Tunisia's own religious norms and values. The divisions between Salafis and other civil society groups resulted in several clashes with security forces and a wave of reported attacks against unveiled women and secular women's associations.<sup>44</sup>

Tunisian youth also expressed feelings of social and political marginalization during the drafting process. Though young Tunisians were critical stakeholders in the 2011 revolution and have remained vocal during the transition process, many have struggled post-revolution to find a political space in which they can push forward their interests. This is troubling, given that over 54% of Tunisia is under the age of thirty and that youth have been one of the

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40. Some of the organizations mentioned in interviews include: Front of Women for Equality, Nawaas, Women and Dignity, Forum of Tunisian Women, Tunisian Association of Progressive Women, Voices of Women, Equality and Parity, Beity, League of Tunisian Women Voters. Moderate Islamist organizations such as Women and Complementarity, and the Tounissiet Association for Women and Development unified under a common banner to counter anti-Islamist discourse issued by modern secularists.

41. Lamia Ben Youssef, Lecture at Oxford University (Oct. 27, 2014), (audio recording at <https://podcasts.ox.ac.uk/daughters-bourguiba-daughters-khadija-mythical-genealogy-and-future-secular-and-islamic>).

42. See Monica Marks, *Youth Politics and Tunisian Salafism: Understanding the Jihadi Current*, 18 *MEDITERRANEAN POL.* 104, 110-111 (2013).

43. See, e.g., *id.* ("Young women in the movement – for there are many female jihadi Salafis, though their activism is often self-segregated by sex – often appear to revel in expressions of gender performance, such as wearing niqab or refusing to shake hands and mix socially with young men. Such practices set them apart and seem to reinforce feelings of difference and, sometimes, superiority.")

44. Daveed Gartenstein-Ross, *Springtime for Salafists*, *FOREIGN POLICY*, Mar. 26, 2013.

social categories most vulnerable to urgent issues, such as prolonged unemployment and domestic and economic violence.<sup>45</sup> During the constitution-making process, youth criticized the NCA as primarily representing an older generation that could not relate to young Tunisians' experiences or share in a common set of values.<sup>46</sup> This gave rise to a growing mistrust on the part of young people towards establishment organizations that appear to draw too close to political and business elites who benefitted under Ben Ali.<sup>47</sup> Such criticism was reserved in particular for the UGTT and its fellow Quartet members.<sup>48</sup> While the UGTT proved crucial during the interim government as a moderator for brokering interests and held itself out during the drafting process as a representative of working-class interests, some felt that over time, it succumbed to internal fracturing and subsequent disenchantment among its youth chapters. Some even accused UGTT leadership as subservient to moneyed interests rather than to its core members.<sup>49</sup> Disgruntled revolutionaries in their determination to stay relevant began assembling their own civil society initiatives including NGOs like Jamaity,<sup>50</sup> media outlets like Nawaat,<sup>51</sup> and watchdog groups like Al-Bawsala.<sup>52</sup> These new programs were intended to provide an alternative perspective to what was happening on the ground. NGOs and grassroots initiatives, lacking in domestic resources, often allied with foreign organizations for funding and outreach purposes.<sup>53</sup>

These shifting alliances and mounting tensions in both the NCA and civil society is hardly surprising given Tunisia's lengthy authoritarian history and sudden transition to a more democratic state. Yet it is remarkable that, in spite of these challenges, Tunisian women were still able to unite at critical junctures for

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45. See Graham Usher, *The Reawakening of Nahda in Tunisia*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT (Apr. 30, 2011), <http://www.merip.org/mero/mero043011>.

46. See Emily Parker, *Tunisian Youth: Between Political Exclusion and Civic Engagement*, TUNISIA LIVE (June 24, 2013), <http://www.tunisia-live.net/2013/06/14/tunisian-youth-between-political-exclusion-and-civic-engagement/>.

47. Kate McCabe, *Dreams of January*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/dreams-january-tunisia/> (last accessed Oct. 25 2016).

48. Anouar Boukhars, *The Reckoning: Tunisia's Perilous Path to Democratic Stability*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 2, 2015), <http://carnegieendowment.org/2015/04/02/reckoning-tunisia-s-perilous-path-to-democratic-stability/i5cj>. The Tunisian National Dialogue Quartet includes UGTT along with three other civil society organizations. The group was instrumental in the drafting process and won the Nobel Peace Prize for its efforts in 2015.

49. *Id.*

50. Interview with Souhayel Hedfi, via Skype (June 9, 2015); see also Amel Boubekeur, *Islamists, Secularists and Old Regime Elites in Tunisia: Bargained Competition*, 21 MEDITERRANEAN POL. 107, 111-15 (2016).

51. NAWAAT EN FRANCAIS, <http://nawaat.org/portail/fr/> (last visited Oct. 25, 2016).

52. *Infra* notes 147-48.

53. See Daniele, *supra* note 4, at 27.

the purpose of furthering women's constitutional rights.<sup>54</sup> While some women's associations that pre-dated the revolution were discarded as "holdouts" of the Ben Ali era, others rose to become powerful forums of activism, maintaining political independence in order to build broad coalitions covering an array of organizations and corresponding interests. The ATFD and AFTURD were particularly effective in creating inter-organizational activities that centered on common—usually left-leaning—civic campaigns.<sup>55</sup> One example of this was the LamEchaml network consisting of sixty organizations tied together by principles such as gender equality and separation of religion and state.<sup>56</sup> There was also a concerted effort to repeal all existing reservations under CEDAW and incorporate its provisions in the constitutional text.<sup>57</sup> ATFD and AFTURD thus became champions for causes that both radical grassroots organizations and conservative, politically-connected organizations could rally behind.

The greatest coalescing moment for women's groups came immediately after the NCA published its first draft on August 8, 2012.<sup>58</sup> The draft text referred to the "complementarity" of women and men, a term that many women activists felt backslid away from protections under the CSP and threatened the campaign for greater gender parity.<sup>59</sup> A mass sit-in was organized that same day in front of the NCA building and on August 13, Tunisian Women's Day, thousands gathered across the country to support the equal protection of men and women under the constitution.<sup>60</sup>

Women's organizations were also effective as poll-watchers, rigorously monitoring the NCA while identifying inadequacies in the drafting process. Though many have applauded the NCA in its efforts to include civil society, as we will see in Part II, others felt the Assembly could have gone further. For example, the NCA only permitted one multi-day period during which civil society organizations were invited to come and engage in open dialogue with NCA members.<sup>61</sup> Some organizations, including ATFD, LTDH, and International Federation of Human Rights (FIDH) boycotted this event, sensing that the discussion could not be productive if draft guarantees had not been set.<sup>62</sup>

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54. See *Tunisian Women and their Role in the Success of "The Jasmine Revolution"*, DW News (Mar. 8 2011), <http://www.dw.com/ar/الاياسمين-ا-ثورة-انجاح-في-ودوره-التونسي-ة-المرأة>-14896373 (translated by the author).

55. Anna Antonakis-Nashif, *Contested Transformation: Mobilized Publics in Tunisia between Compliance and Protest*, 21 MEDITERRANEAN POL. 128, 135-36 (2016).

56. Martínez-Fuentes, *supra* note 30, at 144.

57. *Id.* at 139-40.

58. Interview with Anware Mnasri (June 2, 2015).

59. *Id.*

60. THE CARTER CENTER, *supra* note 37, at 35.

61. JASON GLUCK & MICHELE BRANDT, PARTICIPATORY AND INCLUSIVE CONSTITUTION MAKING: GIVING VOICE TO THE DEMANDS OF CITIZENS IN THE WAKE OF THE ARAB SPRING 9 (2015).

62. *Des Associations et Organisations Boycottent le Dialogue Sur le Project de Constitution*, TUNIS AFRIQUE PRESSE, Sept. 18, 2012.

Similarly, the NCA held only one national consultation process. Monitoring organizations expressed concern that the process was too rushed to be effective: the NCA held public sessions from December through January 2013 in all of Tunisia's 24 governorates at a rate of six governorates per weekend.<sup>63</sup> The first round of sessions commenced merely two days after the second draft's publication on December 14, 2012, which resulted in low turnout and hardly gave citizens adequate time to review. Monitoring organizations also noted feelings of exclusion among youth—over 45% of individuals ages 15-29 felt like they were not involved in the drafting process and 56% indicated complete unawareness as to the substance of the draft provisions.<sup>64</sup>

By spring of 2013, the situation seemed to be spiraling out of control. Growing resentment towards the NCA resulted in fallouts between political parties and their constituents. Deadlock during revision meetings and the inadvertent release of a third draft on April 22, 2013, did not increase confidence in the NCA's ability to reach a satisfactory final draft. The assassination of opposition politician, Mohamed Brahmi triggered massive protests in July 2013 calling for the government to resign.<sup>65</sup> Over sixty opposition members walked out of the NCA shortly thereafter.<sup>66</sup> When a final draft was finally passed by an assembly vote on January 26, 2014, it came amidst much political unrest and uncertainty of the constitution's future implementation.<sup>67</sup>

The surrounding turmoil did not stop women deputies, with the support of civil society groups, from coming together in the final moments to pass critical provisions guaranteeing the equality of women, as well as state requirements to protect women against violence and abusive working conditions. Such notable steps in the advancement and protection of women's rights should not be forgotten. We should applaud the efforts of women's organizations in Tunisia to rally around common objectives, in spite of the divisions that seemed to permeate among them and the rest of society.

#### *B. Countries in Transition: Building a Public Participatory Framework for Gender Rights*

Stepping back from the constitution-making process in Tunisia and the role of women in enacting gender rights provisions, it is first helpful to look at what

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63. THE CARTER CENTER, *supra*, note 37, at 70.

64. U.N. DEV. PROGRAMME, ENQUETE NATIONALE SUR LES ATTENTES DES JEUNES À L'ÉGARD DU PROCESSUS CONSTITUTIONNEL ET DE LA TRANSITION DÉMOCRATIQUE EN TUNISIE: RAPPORT DE SYNTHÈSE 11 (2013).

65. *Suspect Arrested in Murder of Tunisian Opposition MP*, AL-ARABIYA (Feb. 9, 2011), <http://english.alarabiya.net/en/News/middle-east/2014/02/09/Suspect-arrested-in-murder-of-Tunisian-opposition-MP.html>.

66. *Tunisia Mourns Slain Soldiers*, JORDAN TIMES, July 9, 2013.

67. LA FACULTE DE SCIENCES JURIDIQUES DE TUNIS, PROCESSUS DE REDACTION DE LA CONSTITUTION [The Drafting Process of the Constitution] (January 2015).

other countries have done as a common reference point. National constitutions are recognized today as the supreme law of the land and, as the source of their power, they define both the citizenship rights and the responsibilities that then serve to regulate institutions and government and hold decision makers of the state accountable to those rights. The specific way in which a country's constitution shapes each aspect of state power will either facilitate or limit the opportunities for advancing gender equality. Over the last four decades, over 200 new constitutions have been drafted, including many in post-conflict countries. These constitutions have been written in the Balkans, Cambodia, Lebanon, East Timor, Rwanda, Chad, Mozambique, Bougainville-Papua New Guinea, Nepal, and the Comoros, to name a few. They include countries emerging from colonization from French and British colonial empires and countries in Eastern and Central Europe after the collapse of Soviet Communist rule in 1991.<sup>68</sup>

The Lancaster House Constitution, a top-down model of constitution making developed as part of the negotiations that led to Zimbabwe's independence from the United Kingdom in 1980, is no longer considered a tenable model.<sup>69</sup> The Lancaster House model relied on international experts outside the country to draft provisions without the participation of the people.<sup>70</sup> Constitutions following this method, primarily those during the period of decolonization after the Second World War, tended simply to copy the basic constitutional rules of their former colonial masters.<sup>71</sup> Over the past few decades, however, constitution making has transformed from mimicking the constitutions of colonial rulers to either autochthonous constitution-making or hybrid processes that fit the local context.<sup>72</sup> Even when peace accords were internationally forged or constitutions were informed by foreign experts, there is a general perception that constitutions from the 1980s onward have been shaped by a more participatory process, characterized by a greater degree of deliberation and most often led by a national constituent assembly.<sup>73</sup>

Though the constitution-making process differs from country to country, it usually involves the following stages: (1) assessment of the need for a new constitution; (2) agreement on the rules concerning how to proceed with constitution-building; (3) establishment of a representative body to prepare a

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68. See generally Widner, *supra* note 6 (providing an overview of the constitution-writing process in countries following independence from Britain, France, and the Soviet Union).

69. Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 130-31 (1997).

70. *Id.*

71. Stacy R. Sandusky, *Women's Political Participation in Developing and Democratizing Countries: Focus on Zimbabwe*, 5 BUFF. HUM. RTS. L. REV. 253, 256-57 (1999); see also Robert P. Wasson Jr., *The AIDS Crisis as an Impetus to Law Reform in the United States and Kenya*, 17 SUFFOLK TRANSNAT'L L. REV. 1, 31 (1994) (noting that the extension of "colonial" rights has frustrated the development of a political culture that respects individual rights).

72. See Klug, *supra* note 8, at 126-28.

73. Selassie, *supra* note 69, at 131-32.

draft of the new constitution that includes a public consultation process; (4) consideration and debate of the draft; (5) referendum; (6) adoption of the new constitution; and (7) implementation.<sup>74</sup> The country overviews below focus primarily on stages three, four, and seven. Our effort here is to show that constitution-making is an exercise in democratic empowerment and can help shape nation-building; that the constitution and democratic governance may lose legitimacy if people feel disenfranchised by the process. Public participation allows women and others who have been marginalized from democratic processes to claim a constitution as their own. National dialogue and civic education can address underlying causes of conflict and help citizens to define a national identity and a shared vision for the future. Although international law does not spell out rules for drafting constitutions, most of the constitution-making processes of the past two decades have attempted this in different ways. Preparatory civic education, teaching both large constitutional principles and the finer details of the drafting and adoption processes has become a cornerstone of constitution-making.<sup>75</sup>

The electoral rules and procedures that determine which interest groups are represented on constitution-building bodies are critical for guaranteeing the role of women in the process of drafting, revising, and adopting a constitution. The goal should be to design rules that promote a broad representation of women and overcome traditional gender biases that have led to women's comparative social, economic, or educational disadvantage. For example, South Africa was the first country in which men and women sat in equal numbers in the constitution-making body.<sup>76</sup> Its constitution-making process is regarded as a good example of a participatory constitution-making process.<sup>77</sup> Similarly, Nepal's Interim Constitution established the Constituent Assembly to draft the new constitution on the basis of a mix of first-past-the-post elections, proportional representation, and appointments (with approximately 55% of candidates to be elected through proportional representation), and ensured women's inclusion by requiring that: "political parties... take into account the principle of inclusiveness" while selecting candidates for first-past-the-post elections, and that "political parties... ensure proportional representation of the women, Dalit, oppressed communities/indigenous peoples, backward regions, Madhesi, and other Classes."<sup>78</sup> In addition, the Interim Constitution required that "at least one-third of such total number of candidates nominated... be women."<sup>79</sup>

Once the drafting process has begun, some countries have successfully used women's charters as instruments for consolidating women's rights

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74. DE SILVA DE ALWIS, *supra* note 17, at 1.

75. Benomar, *supra* note 10, at 88.

76. Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L. & COMP. L. 49, 90 (2007).

77. *Id.* at 56-58.

78. INTERIM CONSTITUTION OF NEPAL 2007, January 15, 2007, art. 63 §4.

79. *Id.* at art. 63 §5.



demands. Turning back to South Africa, this technique proved crucial for unifying the women's movement where no unification had previously existed. In 1992, the South African Women's National Coalition began raising public awareness and promoting considerable debate on women's issues. During this process it identified several major concerns: inclusivity in decision-making, promotion of women's awareness and rights, gender equality and women's unity.<sup>80</sup> When the drafting of a new constitution began in April 1994, the South African Constituent Assembly began an expansive participatory process built on three major pillars of inclusivity, accessibility and transparency.<sup>81</sup> The first building block was an educational campaign (using newspapers, billboards, radio, TV and a hotline) to educate the public about cardinal constitutional issues and their right to participate in the constitution-making process.<sup>82</sup> More than 1,000 educational workshops were held over a period of a year.<sup>83</sup> Public consultations gave members of the Constituent Assembly the opportunity to meet with members of the community and all recommendations were transcribed and collated.<sup>84</sup> Public consultations were also held on specific subjects, such as the bill of rights, the judiciary and the administration.

The South African Constituent Assembly held two years of transparent deliberations with ample public input. All constitutional debates were published and broadcast, citizens could tune in to educational radio programs, and parties carried out consultations at the provincial level.<sup>85</sup> Citizens at large submitted two to three million proposals and suggestions to the Assembly.<sup>86</sup> As a result, the constitution of South Africa has enjoyed remarkably high legitimacy,

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80. Ronalda Murphy, *Constitutional Rights Discourse: Canadian and South African Feminist Engagements*, in *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* 20, 21-32 (Alexandra Dobrowolsky & Vivien Hart eds., 2003).

81. Catherine Albertyn, *Towards Substantive Representation: Women and Politics in South Africa*, in *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* 20, 99-102 (Alexandra Dobrowolsky & Vivien Hart eds., 2003); *see also* Rangita de Silva de Alwis, *Implementing the Constitution: The Way Forward* (working paper) (2014), <http://www.50x50movement.org/sites/default/files/inline-files/Tunisia-Working-Papers.pdf>.

82. MICHAEL BRANDT ET AL., *CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS* 93 (2011), <http://constitutionmakingforpeace.org/wp-content/themes/cmp/assets/handbooks/Constitution-Making-Handbook-English.pdf>.

83. DEMOCRACY REPORTING INTERNATIONAL, *LESSONS LEARNED FROM CONSTITUTION-MAKING: PROCESSES WITH BROAD BASED PUBLIC PARTICIPATION* 6 (2011)

84. Catherine Barnes & Eldred De Klerk, *South Africa's Multi-Party Constitutional Negotiation Process*, in *OWNING THE PROCESS: PUBLIC PARTICIPATION IN PEACEMAKING* (2002). For more information on the public consultation process, *see* HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* 32-33 (1998).

85. Brandt, *supra* note 82, at 94; *cf.* Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 *AM. J. COMP. L.* 67, 70-71 (1999) (questioning the extent to which public participation impacted the final text and notes some level of skepticism that political party dynamics may have overshadowed citizens' input).

86. Albie Sachs, *The Creation of South Africa's Constitution*, 41 *N. Y. L. SCH. L. REV.* 669, 675 (1996).

particularly in regards to women's rights and programmatic rights affecting the status of women in South African society.

Efforts to foster long-term public participation through adequate transparency have also been effective in other African countries, such as Namibia and Eritrea. In Namibia, the public was well-informed about constitutional issues through the election campaigns of political parties, and the national radio network helped educate the public on key issues. The Eritrean process's initial public-education phase included four-day training seminars for around four-hundred Eritreans.<sup>87</sup> These trainees would then conduct public consultations at the village level regarding the constitutional commission's proposals. Comments were considered during the revision process. The third phase included the recordation and collection of opinions expressed at public debates in various localities around the revised version of those proposals.<sup>88</sup>

In contrast, the Cambodian public never got to participate closely with the constitution drafting sessions and had little input in the text of its constitution.<sup>89</sup> Structural barriers excluded Cambodia's human rights organizations from consultation and limited their role to lobbying the Constituent Assembly for stronger women's rights provisions. With assistance from the UN mission, human rights organizations were able to promote civic education and raise public awareness of the constitution's importance for human rights.<sup>90</sup> Buddhist clergy were especially helpful at reaching people in remote areas. NGOs hosted members of the constituent assembly at public meetings.<sup>91</sup> Villages were reached indirectly through leaflets, brochures, stickers, posters, and broadcasts.<sup>92</sup> It is unclear however, how this impacted the final version of the constitutional text and its implementation.

Sometimes non-governmental organizations with deep networks into civil society can influence the content and direction of the constitution-making process. For example, in Nicaragua, the influential Luisa Amanda Espinoza Association of Nicaraguan Women (AMNLAE), a Sandinista mass organization, helped women participate in the open forums organized to evaluate the different drafts of the Constitution. AMNLAE helped women to understand the intricacies of writing a constitution and helped to explain technicalities by describing the constitution as the mother law and statutes as its progeny.<sup>93</sup> Seven forays were held specifically for women. Women's participation helped to change both the content of the Constitution and the discourse that followed its

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87. Selassie, *supra* note 69, at 132-33.

88. *Id.* at 134-37.

89. Stephen P. Marks, *The Process of Creating a New Constitution in Cambodia*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 207, 219-24 (Laurel E. Miller ed., 2010).

90. *Id.* at 220-21.

91. *Id.* at 218.

92. *Id.*

93. *Id.* at 217.

promulgation. In calling for a more inclusive definition of family, the women's groups challenged discrimination against children born out of wedlock. Women also advocated for equal pay for equal work and equality in the military. Even when they failed to reach their goals, such as establishing a right to divorce, women's participation helped ignite a debate on issues that were hitherto considered taboo.<sup>94</sup>

Facilitating public participation through a policy of transparency appears easier in an age of social media. Novel mechanisms that utilize social media platforms might be particularly successful in small states. In Iceland, a mass social media campaign was deployed as a key impetus for drafting the country's constitution.<sup>95</sup> Through media advertisements and social media, the drafters solicited the public at large to send messages and submit comments online.<sup>96</sup> These messages were posted after review and clearance by the council's staff.<sup>97</sup> Daily posts by the council's staff included interviews with council members on social media, and live broadcasts of the council's weekly meetings appeared on the council's website and on Facebook.<sup>98</sup>

Transparency efforts, however, require a sense of security for effectiveness. A lack of security can inhibit true participation during the drafting process, even when there is a participatory framework in place. For example, in Afghanistan, official reports asserted that "the Ministry of Women's Affairs collected ideas from women, which were forwarded to the Constitutional Commission."<sup>99</sup> The Ministry also held women's community meetings in groups of 30-60 to have them prepare statements on their ideas to submit to the Constitutional Commission.<sup>100</sup> Finally, the Ministry established community radio broadcasts and went to villages raising awareness of women about the Constitution. In spite of these efforts, the drafting process has been described as only a tepid step in the right direction with mixed end results. A number of organizations involved in the constitution-making process expressed that a pervading lack of security hampered women's ability to participate in the formal process, though the opportunity to participate was present in theory.<sup>101</sup>

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94. See Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U.L. REV. 1, 19 (1990).

95. Katrín Oddsdóttir, *Iceland: The Birth of the World's First Crowd-Sourced Constitution*, 3 CAMBRIDGE J. INT'L. & COMP. L. 1207, 1213-16 (2014).

96. *Id.* at 1215-16.

97. *Id.*

98. *Id.* at 1215; see also Pere Simon Castellano, *The Rule of e-law*, in PROCEEDINGS OF THE 12<sup>TH</sup> EUROPEAN CONFERENCE ON E-GOVERNMENT 128, 131-32 (2012).

99. *Women's Participation in the Constitution-Making Process in Afghanistan: Fact Sheet*, U.S.-AFGHAN WOMEN'S COUNCIL (Sep. 15, 2003), <http://2002-2009-usawc.state.gov/news/24277.htm>.

100. *Id.*

101. Elizabeth Katz, *Women's Involvement in International Constitution-Making*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 204, 205-07 (Beverly Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012).

Once provisions of the text have been adopted, stakeholders in the constitution-making process must continue efforts to ensure that constitutional guarantees are implemented in legislation to push new norms. The promise of a participatory constitution-making is fulfilled only when constitutional guarantees are enforceable. Unfortunately, few countries have created institutional arrangements and accountability frameworks that are successful. A part of enforceability is dependent on the precision of the text itself. In other words, some of the constitutional provisions go beyond the normative guarantees to enshrine institutional frameworks for the application of those norms. For example, the Rwandan Constitution in its preamble states that it is “committed to ensuring equal rights between Rwandans and between women and men without prejudice to the principles of gender equality and complementarity in national development.”<sup>102</sup> However, it does not stop at the preamble—Chapter 2 of the Rwandan Constitution, which outlines the fundamental principle of the state, commits to “equality of all Rwandans . . . by ensuring that women are granted at least thirty percent of posts in decision-making organs.”<sup>103</sup>

Several constitutions recognize the multiple grounds of discrimination based on gender and require state action against such discrimination. For example, the South African Constitution prohibits discrimination based on sex, pregnancy, marital status and sexual orientation and binds both private and public actors to this guarantee. Section 9 of the South African Constitution calls for “legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination.”<sup>104</sup> The Ugandan Constitution also calls upon parliament to make relevant laws, including laws for “the establishment of an equal opportunities commission.”<sup>105</sup> Article 48 of the Constitution of Paraguay was amended in 2011 to read: “Men and women have equal civil, political, social, economic and cultural rights. The State will promote the conditions and will create the adequate mechanisms for, making equality real and effective, by leveling [allanando] the obstacles that prevent or hinder its exercise and facilitating the participation of women in all areas [ámbitos] of the national life.”<sup>106</sup> Though there is reason for skepticism as to the effectiveness in implementation, such provisions at the very least place a *constitutional* obligation on the state to establish mechanisms protecting against gender discrimination in its various forms.

Finally, some countries have placed certain guarantees, such as equality in employment and the right to affirmative action, directly in the constitutional

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102. CONSTITUTION OF THE REPUBLIC OF RWANDA MAY 26, 2003, preamble §10.

103. *Id.* at art. 9 §4; *see generally* ELIZABETH POWLEY, RWANDA: THE IMPACT OF WOMEN LEGISLATORS ON POLICY OUTCOMES AFFECTING CHILDREN AND FAMILIES 2, (2007) (debating the significance and impact of gender equality provisions in Rwanda’s gender equality provisions).

104. S. AFR. CONST., 1996, §9(2).

105. CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995, art. 32 §2.

106. CONSTITUTION OF THE REPUBLIC OF PARAGUAY, 1992, art. 48.

text. At a minimum, where a constitution contains provisions governing employment, such provisions should comprise a general guarantee of the right to work alongside a guarantee of equality or non-discrimination, such as stating that “The right to work is recognized and is equal for all” (Burkina Faso, see below) or requiring equal pay for equal work. Another set of more protective constitutional provisions are those which would explicitly prohibit employment discrimination on the basis of sex and/or gender, including specific aspects of labor rights such as access to employment and remuneration. For example, Article 35 of the Ethiopian Constitution provides that “[w]omen shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.”<sup>107</sup> Such specific rights guarantees can become important tools for advancing gender equality in a society, provided the protections for these guarantees are contained elsewhere and also apply to women. For example, Article 116(2) of the Greek Constitution guarantees affirmative action as a way to address a legacy of discrimination against women: “Adoption of positive measures for promoting equality between men and women does not constitute discrimination on the basis of sex. The State shall attend to the elimination of inequalities actually existing, especially to the detriment of women.”<sup>108</sup>

Despite the importance of comparative practices, the most important aspect of designing a strategy for national reconstruction is the critical role played by context.<sup>109</sup> Strategies for creating and enforcing rights guarantees do not always migrate very effectively between countries.<sup>110</sup> A plan that produces good results in one country cannot simply transfer itself wholesale to another. Too many of the enabling conditions will be different, and the opportunities and limits for promoting gender equality will vary depending on whether constitutional reform is post-conflict or an effort to revise an existing constitution.

One kind of enabler that is often overlooked is the constitutional provisions defining the structure and mechanisms of government. Key structural issues that may impact gender equality relate to: whether government is decentralized (e.g., through federalism); the electoral system and its design (e.g., whether it includes gender quotas); and the relationship between the branches of government, including the role and composition of the judiciary and the extent to which gender is mainstreamed in legislative and administrative processes. The impact of decentralization on women’s rights will again vary depending on local conditions. On the one hand, women may have greater access to local decision-making entities than at the national level, and may be able to achieve change that is more immediate and responsive to gender realities than that which comes from centralized governments. Local governments are also often mandated to implement laws that have particular relevance to women, such as family law,

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107. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, art. 35, §8.

108. 1975 SYNTAGMA [SYN.] [CONSTITUTION] ART. 19.

109. DE SILVA DE ALWIS, *supra* note 17, at 1-2.

110. *Id.*

meaning that women may have a greater opportunity to participate more directly in government decisions that significantly impact their lives. However, at the same time, there may be resource constraints in local government centers, and traditional or religious authorities are more likely to dominate at local levels; both of these factors may limit the capacity of local government centers to fully advance women's rights and gender equality. Moreover, devolution of power tends to benefit groups that are regionally or territorially defined (e.g. indigenous or other minority groups); because women are not a homogenous group, decentralization will not strengthen their autonomy but instead mean that their rights will vary from region to region.

*C. The Role of International Actors in Drafting Gender Sensitive Provisions*

The international arena has given unprecedented visibility to the plight of women globally. As a group of scholars have commented, “[w]omen’s rights as humans rights’ has become a familiar slogan, bandied about by even the most unlikely international bureaucrat.”<sup>111</sup> There have been a slew of international efforts to tackle a range of issues related to the inequality of women, from domestic violence, to political representation, to freedom of choice in cases of abortion and reproductive health, as well as a right to decent working conditions, including maternity leave and the creation of safe spaces. Many of the constitutional provisions cited above are deeply influenced by international actors seeking to diffuse gender norms reflected in international law. The creation and application of treaties has been the most common and arguably most powerful tool for legitimizing calls for greater women’s rights and gender equality. Women’s rights activists on both the international and national level have pointed to provisions in widely ratified treaties and accepted interpretations of those provisions as the basis for incorporating such provisions at the national and subnational level.

The Universal Declaration of Human Rights (UDHR) refers to the rights, freedoms, and equal protection for men and women in Articles 2, 7, 16, and 25.<sup>112</sup> Drawing on the UDHR, the International Covenant on Civil and Political Rights (ICCPR) requires that “[e]ach State Party. . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>113</sup> Further, “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of

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111. Doris Buss et al., *Introduction to ‘Sexual Movements and Gendered Boundaries: Legal Negotiations of the Global and the Local’*, 14 SOC. & LEGAL STUD. 5, 5 (2005).

112. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

113. G. A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, Art. 2 (Dec. 16, 1966) [hereinafter ICCPR]; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

public affairs, directly or through freely chosen representatives.”<sup>114</sup> General Comment 25, paragraph 6 of the United Nations Human Rights Committee (UNHRC), the body responsible for protecting and promoting provisions of the ICCPR, further defines the conduct of public affairs to encompass constitution-making processes.<sup>115</sup> The UNHRC has likewise recommended that countries, particularly countries in transition, “should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis.”<sup>116</sup>

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), often referred to as the international bill of rights for women, more adequately defines discrimination on the basis of sex,<sup>117</sup> and in Article 7 calls for states to ensure women’s equal rights to participate in political and public life and to have equal access to all aspects of civil society.<sup>118</sup> It has been ratified by 189 countries, and the convention’s committee oversees ongoing efforts to incorporate its text and general principles at the national as well as local level.<sup>119</sup> Beyond formal incorporation, however, the CEDAW General Recommendation No. 23 further clarifies Article 7 by stating that: “While removal of de jure barriers is necessary, it is not sufficient. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented. . . .”<sup>120</sup> The General Recommendation goes on to reiterate the Beijing Platform of Action and the need to close the gap between de jure and de facto rights of women in political participation.<sup>121</sup> The General Recommendation states that only “if women’s participation reaches 30 to 35 percent (generally termed a “critical mass”) is there a real impact on political [life]”.<sup>122</sup>

Finally, United Nation Security Council (UNSC) Resolution 1325, passed in 2000, “[u]rges Member States to ensure increased representation of women

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114. ICCPR, *supra* note 113, at art. 25.

115. U.N. Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶6, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

116. U.N. Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding observations of the Human Rights Committee: Bosnia and Herzegovina*, ¶8, U.N. Doc. CCPR/C/BIH/CO/1 (Nov. 22, 2006).

117. G. A. Res. 34/180 Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979).

118. *Id.* at art. 7.

119. *See Convention on the Elimination of All Forms of Discrimination against Women: Country Reports*, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last visited Oct. 26, 2016).

120. Commission Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23, Women in Political and Public Life*, U.N. Doc. A/52/38, 16th Sess. [hereinafter “General Recommendation”] (1997).

121. *Id.*

122. *Id.*

at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.”<sup>123</sup> This policy is further broadened in subsequent UNSC resolutions addressed in the Women, Peace, and Security Agenda, which calls for the increased participation of women in the processes and institutions of peace building and security.<sup>124</sup>

There is little empirical evidence revealing to what extent international texts affirming women’s rights are incorporated and enforced as constitutional guarantees at the national level. Lack of clarity in this realm may be incidental to divisions in the literature on constitution-making more generally. Legal scholars on constitution-making have largely gravitated towards one of two poles: those who deem written constitutions as local creatures driven by the interests and values of national actors on the one hand, and those who see constitutions as amalgamations of external, transnational or international constructs on the other.<sup>125</sup> The former, sometimes referred to as national-identity constitutionalism, views constitutions as texts that adopt unique identities reflective of a nation’s past experiences.<sup>126</sup> Constitution-making should thus be primarily driven by locally-inspired political aspirations and commitments.<sup>127</sup> From this perspective, the framing of certain rights provisions and the way they interact with other substantive or structural/procedural provisions may differ depending on the social, political, and geographic contexts in which they emerged.<sup>128</sup> While national identity and interests have historically been defined by a country’s political elites,<sup>129</sup> scholars have moreover raised the normative claim that broad public participation stands as a barometer for the constitution-making process’s overall legitimacy, as well as a harbinger for the constitution’s future effectiveness.<sup>130</sup> Implicit within this claim is the idea that efforts to include a cross-section of the population from various geographic, socioeconomic, and ideological backgrounds reduces the risk of a top-down imposition of constitutional norms.

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123. S.C. Res. 1325, ¶ 1 (Oct 31, 2000).

124. See generally *Women, Peace and Security*, U. N., <http://www.un.org/en/peacekeeping/issues/women/wps.shtml> (last visited Oct. 26, 2016) (providing a list of all United Nations Security Council resolutions on gender and peacekeeping work).

125. Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 3, 8-16 (Denis J. Galligan & Mila Versteeg eds., 2015).

126. See, e.g. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY*, 70, 133 (2010) (suggesting that constitutions are a reflection of norms, values and principles of a nation, and that the constitutional identity should evolve with and emerge from changes in national identity).

127. Fredrick Schauer, *On the Migration of Constitutional Ideas*, 37 *Conn. L. Rev.* 907, 912 (2005).

128. See Galligan, *supra* note 125, at 11.

129. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 *U. ILL. L. REV.* 201 (2008).

130. Noah Feldman, *Imposed Constitutionalism*, 37 *CONN. L. REV.* 857, 858-60 (2005).



Alternatively, others describe constitution-making as an ongoing exercise in constitutional diffusion.<sup>131</sup> Countries either borrow from foreign constitutions or draw from international templates intended to mainstream human rights language and propel a transnational movement of human rights norms.<sup>132</sup> Countries may choose to incorporate international human rights provisions as a way to gain clout and reputational benefits at the international level. Others see incorporation through the lens of soft coercion: a state's more powerful allies may try to condition the terms of their relations or the provision of foreign aid on the enactment of certain provisions.<sup>133</sup> Ideational theory argues that ideas are intrinsically influential,<sup>134</sup> that their acceptance at the international level changes state behavior over time through modes of persuasion.<sup>135</sup> Observing constitution-making processes can provide insights into how and to what degree transnational norms are infused in the final text. For example, the involvement of international nongovernmental organizations (INGOs), foreign NGOs and development or rule of law consultants may be evidence of diffusion.<sup>136</sup>

Our research in Tunisia showcases the value of using both domestic and international texts to fortify constitutional rights guarantees. There has been a recent call to adopt a dualistic approach that observes both national and international influences at once.<sup>137</sup> In "intermestic constitutionalism," one would recognize both transnational and local processes.<sup>138</sup> For example, South Africa's 1996 constitution, often touted as a model constitution for post-conflict countries, is a product of both international and national influences. South African scholar Heinz Klug has asserted that "a thin, yet significant international political culture" propelled the country towards a Western constitutional model in spite of its history of imperialism and apartheid, and that this resulted in the incorporation of treaty texts such as CEDAW, primarily in order to acquire international esteem.<sup>139</sup> Yet South Africa's preamble, which drives the object and purpose of the rest of the text, implicitly recognizes apartheid by noting the

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131. See, e.g., Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009) (describing how aspects of local law, like the separation of powers, will have to accommodate the increasing globalization of constitutional processes).

132. GROTE, *supra* note 3, at 672-73; see also David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002) (exploring the potential harms of the international human rights movement).

133. Goderis, *supra* note 7, at 4.

134. Ran Hirschl, *The Strategic Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 158, 158-61 (Denis J. Galligan & Mila Versteeg eds., 2015).

135. Beth A. Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 INT'L ORG. 781, 795-99 (2006).

136. Cope, *supra* note 14, at 678 (noting that the efficacy of such consultants is largely unknown, though organizations "often make a point of publicly trumpeting their efforts and successes, sometimes claiming partial credit for the adoption of certain rights").

137. GROTE, *supra* note 3, at 683.

138. *Id.*

139. HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 7 (2000).

“injustices of our past” and honoring “those who suffered for justice and freedom in our land.”<sup>140</sup> Likewise, a recent case study by Cope on constitution-making in Sudan suggests that rights provisions are largely driven by international actors, while structural/institutional elements of the constitution are more tightly controlled by local actors.<sup>141</sup> Whether this exact combination of transnational and local elements is the most effective for guaranteeing gender rights for countries in transition is debatable.

Nevertheless, there is value in recognizing that constitution-making processes may result in a confluence of local and international influences. The legitimacy of the final text may depend on striking an appropriate balance between the two and recognizing the ways in which they emerge. We see benefit in incorporating international human rights standards for women in rights provisions. We also encourage drawing on international or foreign law to guide administrative and judicial interpretations of the gender rights provisions when there are conflicts between them and other constitutional guarantees. External examples can also guide legislatures in adopting laws that integrate women’s rights standards with local context. The comprehensive guarantees of women’s human rights set out in international and regional law only become real when they are embraced—and made actionable—at the national level. This may only occur if international law is adapted to a people’s values, histories, memories, and blueprints for nation building.

Tunisia’s constitution, while hailed as a product of national interests and broad grassroots engagement, still garnered much international attention and received the benefits of much international expertise. The degree to which both domestic and international influences played a role in drafting in constitutional guarantees for women’s rights is rather unclear. The next section thus will dive deeper into Tunisia’s process, looking at the stakeholders involved in constitution-making and the specific gender-specific provisions at issue.

## PART II

### A. *A Participatory Constitutional Process*

Tunisia’s National Constituent Assembly was elected on October 23, 2011 and was dissolved on January 26, 2014 when the new Constitution was promulgated.<sup>142</sup> It took two years, three months and three days for the NCA to complete and pass a new constitution, though three draft texts were issued along the way. Drafting began on January 14, 2012, and a first draft of the Constitution was made available on August 13, 2012. The second draft was released on December 14, 2012. On April 22, 2013, a third draft of the constitution was introduced. The fourth draft followed shortly after, on June 1,

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140. S. AFR. CONST., 1996, preamble.

141. Cope, *supra* note 14, at 723-24.

142. THE CARTER CENTER, *supra* note 37, at 34-42.

2013.<sup>143</sup> After an intense period of debate and subsequent amendment, the final text was passed by an assembly vote on January 27, 2014.<sup>144</sup>

Although some have criticized the process as unnecessarily prolonged,<sup>145</sup> NCA members have justified the span of time in terms of the process that it followed.<sup>146</sup> The Assembly took significant steps to introduce each draft to stakeholders in civil society for their input. In the beginning, the constitution-making process was the all-consuming interest of the Tunisian people. One young activist noted, “Before the revolution, café conversations centered around TV shows and football. For months after the revolution it was all politics—you couldn’t escape it. But the excitement didn’t last—of course there was a lot of discussion, but the process took so long that it inevitably led to a degree of apathy if not exasperation.”<sup>147</sup>

As much as possible, debates were also carried out in full transparency. The plenary sessions were formally open to the public,<sup>148</sup> and each constitutional draft was subject to public consultation and over two thousand town hall meetings.<sup>149</sup> While drafting committees invited local experts to contribute to each issue of discussion, each discussion was followed by a release of compiled notes and proposed amendments and made available to the public on the assembly’s website.<sup>150</sup> Individual members of the assembly coordinated tours of cities and universities around Tunisia to discuss the process and obtain feedback.<sup>151</sup> Professor Salsabil Klibi, professor at La Faculté des Sciences Juridiques stated: “Overall people put a lot of thought into the drafting process. Though there were some problems, it was overall very complete.”<sup>152</sup> One academic at La Faculté de Sciences Juridiques was impressed with the constant transfer of information, updates on the drafting process, and the ease of navigation of the assembly’s website. The level of accessibility, however, seemed to differ between the capital and more remote areas: “We weren’t able to get a lot of participation from people in the southwest and the interior. There

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143. *Id.*

144. *Id.*

145. *Tunisia Assembly Passes New Constitution*, BBC NEWS (Jan. 27, 2014), <http://www.bbc.com/news/world-africa-25908340>.

146. Interview with Hela Hammi, Ennahda party member (May 27, 2015).

147. Interview with Issrar Chamekh, Student and Tunisian activist (June 2, 2015).

148. THE CARTER CENTER, *supra* note 37, at 59.

149. Klibi, *supra* note 39.

150. *Arshif Ashghal Almajlis Alwatani Alttasisi*, MAJLIS NUWWAB ALSHAEB [ASSEMBLY OF THE REPRESENTATIVES OF THE PEOPLE], [http://www.anc.tn/site/main/AR/docs/archive\\_anc.jsp](http://www.anc.tn/site/main/AR/docs/archive_anc.jsp) (last visited, Oct. 26, 2016).

151. *Altaqrir Aleamm hawl Mashruaa Aldustur*, ALMAJLIS ALWATANI ALTTASISI [GENERAL REPORT ON THE DRAFT CONSTITUTION] (June 14, 2013), [http://www.anc.tn/site/main/AR/docs/anc/rapport\\_general\\_const.pdf](http://www.anc.tn/site/main/AR/docs/anc/rapport_general_const.pdf); see also THE U.N. CONSTITUTIONAL, A NEWSLETTER ON UNITED NATIONS CONSTITUTIONAL SUPPORT, Issue 2 Spring/Summer 2014, at 16.

152. Klibi, *supra* note 39.

were efforts to engage with them, but it was for obvious reasons more difficult.”<sup>153</sup>

The extent to which women in Tunisia proactively engaged in the constitution-making process was unprecedented. Drafting safeguards for gender equality in all circumstances became the rallying point for women on both ends of the political spectrum.<sup>154</sup> According to Hela Hammi, a deputy in Ennahda, “there [were] a lot of political tensions among members of Parliament, but the women worked more or less in tandem.”<sup>155</sup> At the early stages of constitution drafting, one of the members of Parliament organized a lunchtime meeting for all of the female members to sit down and discuss what they perceived as primary issues.<sup>156</sup> Follow up discussions resulted, during which women deputies wrote down their common concerns and proposals, which they then presented to the greater assembly.<sup>157</sup> A part of this process included transnational experts from other countries, such as South Africa, who spoke to them about the role of women in their own countries’ drafting process.<sup>158</sup>

Outside the political sphere, women were likewise eager to form broad rights-based coalitions, particularly those who were already members of a larger associational networks. For example, UGTT women leaders at the local and regional level provided significant support to other newer women’s rights efforts.<sup>159</sup> These leaders leveraged the UGTT’s broad membership network to push forward initiatives favorable to working class women and their social and economic interests.<sup>160</sup> Similarly, the ATFD was instrumental in bringing together a cross-section of women’s organizations to push through revisions for certain provisions including Article 21 on gender equality<sup>161</sup>, Article 34 on political representation<sup>162</sup>, and Article 46<sup>163</sup> on protections for women against all forms of violence.<sup>164</sup> The association’s galvanizing efforts during the drafting

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153. Interview with masters candidate (names withheld by request of interviewee), La Faculté de Sciences Juridiques de Tunis, in Tunis, Tunisia (May 26, 2015).

154. *Id.*

155. Hammi, *supra* note 146.

156. *Id.*

157. *Id.*

158. *Id.*

159. Interview with Habiba Mizoumi, National Secretary General for Dentists & Nurses for the General Union of Tunisian Workers (UGTT) (May 29, 2015); William Rogers, *Tunisian Union Nominated for Nobel Peace Prize*, LEFT LABOR REPORTER (Apr. 21 2014), <https://leftlaborreporter.wordpress.com/tag/ugtt/>. For more information on Mizoumi’s role in UGTT, see Part III, *infra*.

160. Mizoumi, *supra* note 159.

161. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 21 (“All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination.”).

162. *Id.* at art. 34 (“The rights to election, voting, and candidacy are guaranteed, in accordance with the law. The state seeks to guarantee women’s representation in elected bodies.”).

163. *Id.* at art. 46 (“The state commits to protect women’s accrued rights and work to strengthen and develop those rights.”).

164. Interview with Saida Rached, President of The Tunisian Association of Democratic

process has allowed it to continue as a key actor in creating implementing legislation to turn these guarantees into a reality.<sup>165</sup> “We rely heavily on the advice of experts and academics,” says ATFD’s current president Saida Rached, emphasizing the importance of the association’s network in carrying out its work. Having a pulse on all gender-related matters is also critical: “Our current focus has been on political participation and gathering information about women and rural labor, but we try to focus on all issues related to gender equality.”<sup>166</sup>

Yet coalitions by their very nature are prone to ideological and political divides. In spite of the UGTT’s efforts to remain neutral, its continuous involvement in politics at the national level inevitably made it susceptible to political influences. Despite laudable movements early on, internal divisions eventually emerged between local members and their national leadership over the role UGTT should play moving forward.<sup>167</sup> Some feared that the national board, based in Tunis, had spent too much time accommodating political elites and their business allies at the expense of advocating for greater employee’s rights.<sup>168</sup> There were also rumors of conflict between UGTT and other well-established organizations such as LTDH and the Bar Association. Although ATFD’s internal divisions have not been as public, it too has received criticism for being either too unwieldy or else too tied up in tackling certain ‘elite feminist’ issues at the expense of issues facing the rural poor and middle class.<sup>169</sup> Such divides within and among civil society groups inevitably hurt the ability of women’s rights coalitions to achieve the aims they seek.

The UGTT and AFTD are among a handful of nationally recognized civil society organizations in Tunisia that existed long before the revolution started. While these groups were perhaps the most visible during the early stages of the drafting process, a number of newer, youth-led organizations joined the associative landscape to become effective mobilizers in their own right. These organizations largely emerged as civil society watchdogs over the country’s transition to a democratic state. Most notably, Al-Bawsala, a monitoring body made up of young Tunisian activists and journalists, was one of the first organizations to receive significant attention early on as a key player in monitoring Tunisia’s constitution-making process and thereafter movements in the national assembly regarding new policies and budget allocation.<sup>170</sup> Al-Bawsala, which means “compass,” has become a distributor of information that

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Women (ATFD) (May 29, 2015).

165. *Id.*

166. *Id.*

167. Hanane Zbiss, *Tunisian Labor Union Faces Internal Rifts*, AL-MONITOR (Mar. 31, 2014), <http://www.al-monitor.com/pulse/politics/2014/03/tunisia-labor-union-internal-rifts-jomaa.html#>.

168. Chamekh, *supra* note 147. This is a reflection of the larger generational divide noted in Parker, *supra* note 46.

169. KHALIL, *supra* note 3, at 54.

170. MONICA L. MARKS, BROOKINGS INST., *CONVINCE, COERCE OR COMPROMISE: ENNAHDA’S APPROACH TO TUNISIA’S CONSTITUTION* 5 (2014); Chamekh, *supra* note 147.

other civil society groups and grassroots movements have used to launch parallel advocacy efforts.<sup>171</sup>

Civil society's overall ability to influence the drafting process still largely hinged on the strength of the relationships between the various demographics within civil society and those in Tunisia's inner political sphere. Though the NCA was diligent about setting up websites with recordings of the debates, and some deputies went so far as to organize village discussions, the effects of these efforts varied. Many individuals, particularly youth, were disenchanted by the process.<sup>172</sup> One student from Thala<sup>173</sup> felt that watching the debates only contributed to his discontent and apathy: "It was too much politicking. It was often frustrating to watch."<sup>174</sup> Others have noted that the effort to create transparency through online streaming spurred conversation. "There are nightly debates among commentators now," noted one civil society volunteer from Sidi Bouzid. "Newspapers still have their own political affiliations, but the discussion on social media now is much more open and nuanced. Before there was one paper and one TV show. It is so diverse now."<sup>175</sup> Even those frustrated by the way in which the NCA structured the constitution-making process cannot deny the role social media played in introducing a wide representation of views on what the constitution's rights provisions should be and how they should be enforced. Online chat forums provide young women and men, especially those outside the capital, with a means for indirect participating in definitions of "equality" and the role of women in society.<sup>176</sup>

Despite a relatively participatory process, the sentiment among Tunisians regarding the final text is mixed – many approve of the 2014 constitution but are concerned about its implementation.<sup>177</sup> A broad constituency of political activists and civil society organizations (CSOs) supported by technical advisors is necessary to help keep gender equality at the center of the new constitution,

171. AL-BAWSALA, <http://www.albawsala.com> (last visited Oct. 26, 2016); *see also* Sarah Mersch, *Tunisian NGO Fights for Political Transparency*, DW NEWS (Dec 9, 2012), <http://www.dw.com/en/tunisian-ngo-fights-for-political-transparency/a-16235400> (explaining the work that Al Bawsala does to monitor the Tunisian Government).

172. TUNIS AFRIQUE PRESSE, *supra* note 62.

173. Thala is a small rural municipality in Tunisia's interior, not far from Sidi Bouzid, where the revolution started, and Al-Kasserine, which has seen a spike in extremist activity in recent years. Like Sidi Bouzid and Al-Kasserine, Thala was heavily suppressed under the Ben Ali regime and saw high levels of unemployment, particularly among youth. For a brief summary of Thala and other interior municipalities, see Rosa Moussaoui & Hassane Zerrouky, *Tunisie La Source de la Révolution*, L'HUMANITE (Oct. 24 2011).

174. Interview with Thala Solidaire, Student and community organizer (May 24, 2015).

175. Interview with student and activist, Association Tunisienne pour l'Intégrité et la Démocratie des Elections (June 2, 2015).

176. *Id.*

177. Margaret Williams & Youssef Mahmoud, *The New Tunisian Constitution: Triumphs and Potential Pitfalls*, GLOBAL OBSERVATORY (Feb. 27, 2014), <https://theglobalobservatory.org/2014/02/the-new-tunisian-constitution-triumphs-and-potential-pitfalls/>.

through a policy framework and an agenda for action. Neila Chabaâne, the former Minister of Women's Affairs, has said that young Tunisian women, in particular, seem at a loss as to how to apply the constitution's ideological provisions to realities on the ground.<sup>178</sup> Though participation was relatively high during the drafting process, civil society's ability to participate in implementing constitutional provisions remains an open question. Further, there is a fear that certain groups, particularly reintegrated old regime elites, will dominate the discussion to the exclusion of others.<sup>179</sup>

### *B. Drafting Gender Sensitive Provisions in the Constitution*

Although the NCA conceived of the drafting of gender rights provisions as an organized, transparent, dialogical process between assembly members and civil society, the process became one much less formal and direct than designed. The NCA tasked the Committee of Human Rights and Liberties, one of six drafting committees, with shaping all rights provisions based on civil society and foreign recommendations. As such, the committee was responsible for all provisions that directly *and* indirectly touched on gender rights. Express guarantees for women are included in Article 21 on gender equality, Article 34 on political guarantees for women, and Article 46 protecting women against all forms of violence.<sup>180</sup> Article 39 on the right to public education, Article 44 on the right to water, and Article 40 on the right to work, are programmatic rights that indirectly address a woman's right to accessing basic human services.<sup>181</sup> The express women's rights provisions will be considered in this section and the next, and a discussion of the Constitution's programmatic rights as they relate to women will follow.

Throughout the drafting process, the Committee of Human Rights and Liberties sought input from civil society representatives and relevant experts, as well as women deputies within the NCA.<sup>182</sup> Women deputies gathered together early in the process for discussion lunches, where they would also invite those from outside the political sphere.<sup>183</sup> Despite this engagement, Salsabil Klibi notes, "There could have been more time for collaboration. There were a few 'open days' where civil society organizations were invited to meet with drafters at the assembly building, but the time was narrow."<sup>184</sup> There was in fact only one

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178. Interview with Neila Chabaâne, former Minister of Women's Affairs (May 27, 2015).

179. See generally Boubekeur, *supra* note 50 (analyzing the ways in which new and old elites 'bargain' for dominance in Tunisia's new institutional framework).

180. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, arts. 21, 34, 46.

181. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, arts. 39, 44, 40.

182. NCA COMMITTEE ON HUMAN RIGHTS AND LIBERTIES REPORT, NOTES AND PROPOSALS OF THE SHARED ORGANIZATION FOR COORDINATING AND DRAFTING TO THE COMMITTEE ON HUMAN RIGHTS AND LIBERTIES (in Arabic), [http://www.anc.tn/site/main/AR/docs/rapport\\_final/rapport\\_final\\_5\\_2.pdf](http://www.anc.tn/site/main/AR/docs/rapport_final/rapport_final_5_2.pdf).

183. Hammi, *supra* note 146.

184. Klibi, *supra* note 39.

open day for CSOs to speak directly with NCA members, held before the release of the second draft.<sup>185</sup> Some have suggested that invitations were limited to CSOs already involved in the process and that, further, the assembly did not have a channel for individuals or informal groups to submit draft proposals. A number of those invited boycotted the open day in protest of its timing and exclusivity.<sup>186</sup>

Regardless of whether the NCA took sufficient steps to *formally* include civil society, many Tunisians *informally* engaged with the constitution-making process through social media, the press, and local politics.<sup>187</sup> The extent to which Tunisia's constitution would guarantee women's rights was one of the most widely debated issues outside the political sphere. One journalist described the early drafting stages as a "national hunger" to participate in a popular debate that had been silenced under Ben Ali.<sup>188</sup> State feminism starting with Bourguiba through Ben Ali had succeeded in suppressing popular debates over the appropriate role of women in Tunisian society and relevant legal protections.<sup>189</sup> Dictated policies of progressive feminism had created the false narrative that women in Tunisia enjoyed equal rights with men and that the country had made important advances compared to women in other parts of the Arab and Muslim world.<sup>190</sup> The 2011 Revolution unveiled a complex reality incongruent with rights formally recognized by the prior regime.<sup>191</sup> This disconnect, exacerbated by deep ideological divides in the Tunisian political scene, complicated discussions over whether the new constitution's proper role should be to push for universal gender norms or norms that reflect a competing type of feminism "emphasizing religious freedoms and rights."<sup>192</sup> Unfortunately, the final draft does not necessarily bring this debate to a clear resolution. Article 21 champions gender equality in broad and general terms: men and women have "equal rights and duties" and are "equal before the law" but the text fails to reach greater specificity.<sup>193</sup>

The generality of the language in Article 21 is a product, first, of the lack of transparency between the NCA and civil society stakeholders, and second, of the prolonged popular disputes that came to define much of the constitution-making process for provisions related to women's rights. When the NCA released its first draft on August 8, 2012, the article (then Article 28) included

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185. *Id.*

186. Interview with Hiba, Law Student, in Thala, Tunisia (May 24, 2015).

187. *Id.*

188. Interview with Myriam Ben Ghazi, in Tunis, Tunisia (May 29, 2015).

189. BRAND, *supra* note 21, at 176.

190. Loes Debuysere, *Antagonism and Agonism between Secular and Islamist Women's Rights Movements in Tunisia*, 21 MEDITERRANEAN POLITICS 2, 226, 235 (2016).

191. *Id.* at 226-27.

192. Jeremy Farrell, *Tunisian Constitution: Text and Context*, JADALIYYA, (Aug. 23, 2012), [http://www.jadaliyya.com/pages/index/6991/tunisian-constitution\\_text-and-context](http://www.jadaliyya.com/pages/index/6991/tunisian-constitution_text-and-context).

193. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 21.



complementarity (*mutakamila*) language as opposed to the equality (*musawa*) language proposed by Nidaa-Tounis and left-leaning CSOs. Those internal to the process described the insertion of complementarity as a soft proposal by one of the members of Ennahda.<sup>194</sup> Some deputies insisted that the language issued in the first draft was either a “naïve misstep”<sup>195</sup> resulting from a rushed drafting process or a mistranslation taken out of context.<sup>196</sup> The opposition nevertheless contended that even the suggestion of complementary status posed a threat to freedoms formally secured in the CSP and joined hands with CSOs to change the language to equality (*musawa*).<sup>197</sup> As a part of their campaign, activists upheld the CSP as precedent that could not be reversed. The march onto Bourguiba Street on Tunisian Women’s Day was in fact a nod to Bourguiba himself, who established the holiday to commemorate the CSP and its advancements.<sup>198</sup> Although his efforts were influenced primarily by his desire to gain international favor among Western powers, women’s rights activists have nevertheless heralded the CSP for both its significance and ongoing influence.<sup>199</sup>

The selective referencing of Tunisia’s past in order to legitimize certain values over others became part of a larger popular struggle to control not only the language of the constitution, but also the political narrative surrounding it.<sup>200</sup> Pro-Bourguiba rhetoric was perhaps more a reflection of popular conceptions of women’s rights during the drafting process than an accurate understanding of women’s rights as applied under the Bourguiba regime. Many individuals who participated in the August 13 march on Bourguiba Street did not in fact champion Bourguiba or his policies, but rather represented a mix of political and religious viewpoints. As Hadia Bilhadj, CAWTAR Director stated, “[i]t wasn’t one strand of civil society or one opposition party. There were men and women, a diverse range of NGOs and other civil society organizations – not just secular groups pushing a certain narrative of women’s rights.”<sup>201</sup> Likewise, though the complementary language proposal came from members of Ennahda, not all Ennahda members were in support. Regarding the initial proposal, Hela Hammi member of the Ennahda party, commented: “We knew from the beginning that complementarity language would be abused in Tunisia. France has complementarity language but the text in its constitution implies that there is submission on both sides – there was a valid fear that men in Tunisia would

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194. Hammi, *supra* note 146.

195. MARKS, *supra* note 170, at 23.

196. Monica Marks, “Complementary” Status for Tunisian Women, FOREIGN POLICY, (Aug. 20, 2012), <http://foreignpolicy.com/2012/08/20/complementary-status-for-tunisian-women/>.

197. See discussion *supra* Part I, Overview of Women’s Engagement in Tunisia’s Constitution Making Process.

198. Tunisian Women Rally to Preserve Gender Equality, AL-ARABIYA, (Aug. 13, 2011), <https://www.alarabiya.net/articles/2011/08/13/162169.html>.

199. See discussion *supra* Part I.

200. Debuysere, *supra* note 190, at 229-33.

201. Interview with Hadia Bilhaji, in Tunis, Tunis. (June 3, 2015).

interpret complementarity to mean only the submission of women.”<sup>202</sup> Nevertheless, some secularist feminist discourses sought to paint Ennahda with one brush as a misogynist party with patriarchal motivations.<sup>203</sup> To that effect, these groups released speculative and unofficial versions of the drafted provision before the August 13 march to garner greater opposition to Ennahda control.<sup>204</sup> Ennahda then responded by launching a counter campaign and march on August 13, also on Bourguiba Street, that highlighted positive statements made by the then President Rachid Ghannouchi. Though activists eventually succeeded in removing complementary language from the final draft, it is evident that control over the text’s “legislative history” became as important to the debate as the text itself.

Similar to its efforts surrounding Article 21, elements of civil society pushed for more actionable language under Article 46. The Article states that “[t]he State shall commit to protecting women’s achieved rights and seek to support and develop them.”<sup>205</sup> In addition, it reaffirms equal opportunity between men and women in “all various responsibilities in all fields,” and guarantees that the state “will take necessary measures to eliminate violence against women.”<sup>206</sup> Secular groups feared that without this provision and its enforcement clause, Islamists would alter, if not remove the CSP as source of law. However, Ennahda’s ultimate support for the addition during the final vote in January 2014 seems to convey the party leadership’s intent to at least maintain protections provided under the CSP.

Ennahda’s leadership in bringing about the final versions of Articles 21 and 46 should not go without mention. Achieving a guarantee of gender equality, without exceptions, was among the most heralded accomplishments of the final text. A large part of the battle for Ennahda as the controlling party was to overcome disagreements and possible misunderstandings to reach a general spirit of collaboration. The multiplication of civil society interests in 2011 and onward meant that consensus on all sides would be crucial to passing a women’s rights provision championing equality and parity. “Under the Ennahda government, Islamists opened a new path for women’s rights,” says Dr. Khedija Arfaoui from University of Tunis.<sup>207</sup>

While Dr. Arfaoui’s statement is put to question in the next section, Ennahda, for all of its faults, led a constitution-making process marked by greater consensus and public input than that of other transition states in the region. Egypt’s drafting process in 2012 offers the most relevant comparison.

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202. *Id.*

203. MARKS, *supra* note 170, at 22-23; *see also* Monica Marks, *Can Islamism and Feminism Mix?*, N.Y. TIMES, Oct. 26, 2011, [http://www.nytimes.com/2011/10/27/opinion/can-islamism-and-feminism-mix.html?\\_r=0](http://www.nytimes.com/2011/10/27/opinion/can-islamism-and-feminism-mix.html?_r=0).

204. Hammi, *supra* note 146.

205. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 46.

<sup>206</sup> *Id.*

207. Interview with Khedija Arfaoui, in Beirut, Leb. (June 10, 2015).

While both Ennahda and its ruling counterpart in Egypt, the Muslim Brotherhood, had to reconcile Islamist interests and the interests of secular or left-leaning parties, the process in Egypt suffered from relative lack of public participation and input.<sup>208</sup> Egypt's 2012 Constitution reflected more of a political compromise among parties than a response to calls from women's rights advocates. While the text outlawed violence against women, including the practice of Female Genital Mutilation (FGM), it provided only tepid support for other forms of women's rights.<sup>209</sup> It has in effect taken a step back from some of the gender rights embedded in the 1971 text. As noted by former Egyptian Minister Moushira Khattab, the new Egyptian Constitution places "women under the constitutional chapter on moral foundations instead of rights and freedoms."<sup>210</sup> In terms of political participation rights, the 2014 Constitution does not include the 64-seat quota established in 1971 and merely promises to take measures to guarantee women "appropriate representation" in elected councils.<sup>211</sup>

Analysts have considered several theories as to why the drafting processes in Egypt and Tunisia brought forth such divergent results, particularly given that both constitutions were produced by an elected constituent assembly that made room for some level of public participation. Some suggest that while Islamists in both countries held the most seats in their constituent assemblies, the Muslim Brotherhood-affiliated Freedom and Justice Party (FJP) was ultimately much less willing to compromise on the gender rights provisions than Tunisia's Ennahda party during drafting negotiations.<sup>212</sup> Conversely, Ennahda espoused a platform of moderate Islamism that lent itself to concessions early on. There is some reason to believe that a simple majority win for the FJP allowed for its intransigence, while the Ennahda's plurality win, though significant, exposed the party to strong counter-coalitions.<sup>213</sup> Others suggest that the difference was in starting points: while Tunisia opted for a blank slate, Egypt worked off of its

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208. Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007, 1055 (2015).

<sup>209</sup> For example, Article 33 in the 2012 Constitution does not affirmatively recognize gender equality, but rather pledges equality for all citizens. Such broad wording leaves the definition and scope of 'equality' unclear. See David Lunde, *If You Want to Know Whether Islam & Democracy Are Compatible, Look to Egypt & Tunisia*, MUFTAH, May 1, 2015, <http://muftah.org/islam-democracy-egypt-tunisia/>.

210. Moushira Khattab, *EGYPT'S POST-REVOLUTION CONSTITUTIONS: RELIGION VERSUS HUMAN RIGHTS* 5 (March 14, 2014) (unpublished).

211. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *as amended*, Jan. 18, 2014, art.11, pg. 7-8. ("The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by Law. The State shall also guarantee women's right of holding public and senior management offices in the State and their appointment in judicial bodies and authorities without discrimination.").

212. Zaid Al-Ali & Donia Ben Romdhane, *Tunisia's New Constitution: Progress and Challenges to Come*, OPENDEMOCRACY, (Feb. 16, 2014), <https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia-s-new-constitution-progress-and-challenges-to->.

213. Hammi, *supra* note 146.

1971 constitution's text.<sup>214</sup> One factor that deserves greater consideration, however, is how Tunisia's constitution-making framework incorporated mechanisms for ongoing public engagement and further, public accountability. Participation from outside the political sphere was not restricted to online comments or a final up-down referendum vote<sup>215</sup>—rather, input from watchdog organizations and grassroots coalitions became an integral part of the drafting process.

In summary, the drafting process became less about the text itself than about surrounding discourses and the competing narratives that shaped women's rights in Tunisia post-revolution. Constitution-making became an opportunity for political and civil society stakeholders to address deep-seated issues long suppressed under Bourguiba and Ben Ali. Starting with a tabula rasa as opposed to an older constitutional text encouraged individuals to assert their personal conceptions of women's rights more vigorously, resulting in greater transparency on every side of the debate. Ennahda, though not without its weaknesses and challenges, should be commended for its willingness to foster such debate and compromise with its more progressive counterparts early on. An inability to reach greater consensus, however, has led to a text that supports gender equality in broad terms but leaves room for gaps in both enforcement and implementation.

### C. *Reconciling Islam and Human Rights in the Constitution*

As noted in the previous section, Article 21 guarantees men and women "equal rights and duties" and equality "before the law" but fails to reach greater specificity or include clear enforcement provisions.<sup>216</sup> Critics of Ennahda suggest that the ruling party permitted such ambiguity to erode women's rights.<sup>217</sup> Others argue that ambiguity was not so much an intentional result as a reflection of Ennahda's internal struggle to place moderate Islamist principles within a historically secular framework.<sup>218</sup> Regardless of its intended purpose, however, an ambiguous provision on gender equality would have perpetuated

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214. COMPARATIVE ANALYSIS BETWEEN THE CONSTITUTIONAL PROCESSES IN EGYPT AND TUNISIA – LESSONS LEARNT – OVERVIEW OF THE CONSTITUTIONAL SITUATION IN LIBYA. EUROP. PARL. REP. PE 433.840 (2014), [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET\\_NT\(2014\)433840\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT(2014)433840_EN.pdf).

215. Tamir Moustafa, *Drafting Egypt's Constitution: Can a New Legal Framework Revive A Flawed Transition?*, BROOKINGS DOHA CENTER-STANFORD PAPER 1, 11 (2012), <http://www.brookings.edu/~media/research/files/papers/2012/3/12-egypt-constitution-moustafa/new1-drafting-egypts-new-constitutionenr03.pdf>.

216. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 21.

217. Student and activist, *supra* note 175.

218. Edward Cody, *Tunisia Faces Political Struggle over Islam*, WASH. POST, Jun. 16, 2013, [https://www.washingtonpost.com/world/tunisia-faces-political-struggle-over-islam/2013/06/16/1000670a-cdef-11e2-8845-d970ccb04497\\_story.html](https://www.washingtonpost.com/world/tunisia-faces-political-struggle-over-islam/2013/06/16/1000670a-cdef-11e2-8845-d970ccb04497_story.html); see also Shadi Hamid, *Tunisia Field Report: The Islamist Balancing Act*, MARKAZ (Feb. 12, 2015), <http://www.brookings.edu/blogs/markaz/posts/2015/02/12-tunisia-islamists-ennahda-hamid>.

the struggle to constitutionally define the role of women in Tunisia, as well as conflicting de jure and de facto realities.

This tension between what is law and what is practiced is particularly visible with the hijab. Prior to the revolution, women were banned from wearing the hijab or headscarves in all state institutions including universities, hospitals, and public administrations. Thus, many women after the revolution asserted their right to independent expression by wearing the hijab or niqab. Some Ennahda members went so far as to endorse student protests at Manouba University, among others,<sup>219</sup> that called for the right to wear a hijab or niqab in all public settings. Conversely, women who did not cover their face or hair feared that though Ennahda's leadership championed women's rights and freedom of expression in broad terms, its policy while in power would be to shift towards enforcing such freedoms selectively.<sup>220</sup> Indeed, Arfaoui notes that the revolution sparked for the first time in Tunisia's history "a wave of abuses of women without a covering" that then fueled not only a general sense of insecurity, but also a greater concern that if Ennahda did not impose its religious preferences by law, it would find opportunities to permit imposition by popular might.<sup>221</sup>

A journalist and young Tunisian women's rights activist notes that inconsistencies between what is law and what is practiced will persist if rights are only acknowledged in the text and not more: "Tunisia fascinates people because it is a paradox when it comes to gender equality. And it has always been this way."<sup>222</sup> Some attribute this to ambiguities in Tunisia's constitution citing to Islam and its role in Tunisia's political system and culture. One scholar has noted that when Bourguiba gave credence to women's rights under the CSP, he was "careful to locate these changes . . . within the framework, not of dismissing religion, but of a modernist reading of Islam."<sup>223</sup> By contrast, the constitution of 1959 recognizes Islam as the official religion of Tunisia, but does not constrict Islam to any one practice or interpretation.<sup>224</sup> Neither text, in effect, fully reconciles Islam with more 'modern' societal values. Hadia Bilhadj emphasizes the importance of acknowledging Tunisia's Islamic heritage as significant, while also acknowledging the tension it creates with modernist notions of human rights: "Tunisia, like its neighbors Algeria and Morocco, must work in contradictions. It is an Arab, Islamic state subject to a long period of colonial occupation. Some think this has to be a decision between secularism and

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219. See Loic de Pape, *Peut on convertir un epave? Le cas des mobilizations 'salafistes' a l'universite de La Manouba (Tunis)*, CAHIERS D'ÉTUDES DU RELIGIUX, 16-23 (2014) <https://cerri.revues.org/1397>; see also Fatime El-Issawi, *Islamists of Tunisia Reconciling National Contradiction*, LSE BLOG, (Apr. 13, 2012), <http://blogs.lse.ac.uk/ideas/2012/04/islamists-of-tunisia-reconciling-national-contradictions/>.

220. Arfaoui, *supra* note 207.

221. *Id.*

222. Ben Ghazi, *supra* note 188.

223. BRAND, *supra* note 21, at 178.

<sup>224</sup> THE TUNISIAN CONSTITUTION OF 1959, art. 1.

Islamism, but our situation is much more complex than that.”<sup>225</sup> A tendency to oversimplify views of Islam and women’s rights in Tunisia is perhaps a product of top-down policies under Bourguiba that then carried over to Ben Ali: “[Ben Ali] manipulated women’s rights as a tool to accrue international favor, with little if any internal application,” says Hadia Bilhaji, “All women’s associations at that time were headed by Ben Ali’s wife, who propped up Tunisia as a false paragon of women’s rights.”<sup>226</sup> Such obvious statism created some semblance of a women’s national machinery that formally aligned with UN mandates and acquired praise from the international community but had little impact on the actual status of Tunisian women. To ensure a uniformly progressive image of women’s rights, alternative viewpoints were either watered down or heavily suppressed.

The constitution-making process was thus driven by a desire to replace a state-defined culture of rights with a text reflecting broad consensus between “values of Islam and values of modernity.”<sup>227</sup> NCA members sought to create a constitution that would satisfy and respect all visions of women’s rights in Tunisian society. What resulted, however, was a patchwork of provisions that fail to fully reconcile all stakeholders’ interests. Most notably, the Tunisian constitution’s preamble expresses both a “commitment to teachings of Islam” and to “the principals of universal human rights,” without clarifying the nature of the relationship between these two sources.<sup>228</sup> Although these commitments are not necessarily mutually exclusive, there is significant confusion over how they should be considered, independently and collectively, during the early phases of implementation. Similar confusion emerges when we look at Article 1 and its assertion that “Tunisia is a free. . .sovereign state” and “Islam is its religion,” compared to the assertion in Article 2 that the state is based on “the will of the people, and the supremacy of law.”<sup>229</sup> In regards to “Islam is its religion,” it is not clear to what “it” refers. Is “it” Tunisia as a society, or the political nature of its government? If the intent is the latter, then Article 2 declaring Tunisia as a “civil state” creates a contradiction that the constitutional court, once established, must address. This contradiction is exacerbated by the last sentence in Article 1 stating, “this article cannot be amended,” and Article 146, which requires that “the Constitution’s provisions shall be interpreted as a harmonious whole.”<sup>230</sup>

Even within Ennahda there was much debate during the drafting process over the interpretation of Islamic texts and their various applications to Tunisian

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225. Bilhaji, *supra* note 201.

226. *Id.*

227. Robert Joyce, *Leader Says Ennahda to Steer Clear of Presidential Race*, TUNISALIVE, (Feb. 27, 2014) <http://www.tunisia-live.net/2014/02/27/leader-says-ennahdha-to-steer-clear-of-presidential-race/>.

228. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, Preamble.

229. *Id.* at arts. 1-2.

230. *Id.* at arts. 1, 146

law. One of the party's greatest challenges was—and still is—to define women's rights within an Islamic framework.<sup>231</sup> While Ennahda held itself out as a moderate Islamist coalition resting on a unified platform, its members and supporters represented a broad spectrum of perspectives on the rights of women.<sup>232</sup> This led to disagreements around what the scope and definition of the rights of women should be at the constitutional level. Conservative streams pushed for clear, separated gender roles in line with individual interpretations of *sharia* law, in some cases including a return to polygamy or a repeal of national abortion laws.<sup>233</sup> Hela Hammi, a deputy of Ennahda in the current government, remarked that her “feminist beliefs” are not universally encouraged by her colleagues, and that differences stem from cultural, not religious stigmas: “There is a societal norm in Tunisia that men come home and read the paper and women cook, clean, and take care of the home – there is nothing in the Qur’an or in the Sunna delegating these roles.”<sup>234</sup> During the drafting process she pushed conservative members to scrutinize Tunisia's patriarchal structures as independent from values of Islam and not to be tolerated, let alone validated, by the country's future legal system.

In the discourse over women's rights and Islam there is no single, uniform perspective.<sup>235</sup> The revolution, its aftermath, and the constitution-making process reveal divergent views extant within Tunisia's Muslim community about the role of women in Tunisian society. A cross-cultural dialogue between the Islamic community and the international human rights community is important for a shared basis for human rights and towards advancing the legitimacy of universal human rights norms to local communities that are defined by religious affiliation. Religious communities in Tunisia are internally contested, heterogeneous, and constantly evolving through internal debate and interaction, and women are demanding change within their religious communities in order to bring their faith in line with democratic norms and practices.<sup>236</sup> Cross-cultural, cross-gender, and cross-class dialogue is critical to resolving conflicts within Islam as well as between Islam and human rights. Such dialogue also triggers discussions on controversial issues implicating Islamic values and human rights norms and dispels notions that there is one absolute or final notion of Islam or that any one person can claim to have the one true teaching. This allows women activists to articulate a Muslim feminist jurisprudential basis that is consistent with gender equality.

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231. Moataz El-Fegiery, *A Tyranny of the Majority? Islamists' Ambivalence About Human Rights* 7 (Fride, Working Paper No. 113, 2012), [http://fride.org/download/WP\\_113\\_Islamists\\_Ambivalence\\_about\\_Human\\_Rights.pdf](http://fride.org/download/WP_113_Islamists_Ambivalence_about_Human_Rights.pdf).

232. Hammi, *supra* note 146; see also Christopher Alexander, *Tunisia's Islamists I: Ennahda Withdraws*, WOODROW WILSON CTR. (Dec. 18, 2013), <https://www.wilsoncenter.org/article/tunisi-as-islamists-i-ennahda-withdraws>.

233. Hammi, *supra* note 146.

234. *Id.*

235. Boubekeur, *supra* note 50, at 107.

236. Debuysere, *supra*, note 190, at 229.

Ennahda, within the political sphere, has appropriated a modern face of Islam but continues to struggle internally in defining what this stance will entail.<sup>237</sup> Apart from Ennahda is the rise of Salafist groups, both quietist—those who do not participate in politics or warfare—and activist, with each faction holding to a different vision of gender roles in Tunisian society.<sup>238</sup> Men and women alike vigorously defend these groups. In fact, there are indications in recent years that women, particularly those who come from impoverished circumstances or have been underserved by the state, have been drawn to these groups' ideologies and practices as an alternate form of security.<sup>239</sup> Going forward, the role of Salafism in Tunisian society cannot be ignored and requires further attention.

#### D. Freedom from Violence as a Constitutional Right

The remainder of this section will take a look at how a guarantee of gender equality in the constitution applies to other guarantees for women, namely, protection against violence, political guarantees, and programmatic rights. The Tunisian Constitution under Article 46 outlaws violence against women and assures that “the State shall take the necessary measures to eradicate violence against women.”<sup>240</sup> Although Article 46 recognizes national security not just in the context of border security and armed forces, but also as security at home and in the streets, inconsistencies in the law prevent the state from further considering the latter.

Several existing national laws are in indirect conflict with the new constitution's commitment to end violence against women in all its forms. For example, men are legally recognized as the head of the household, which as one Tunisian analyst noted “only works to reinforce economic and social patriarchal structures.”<sup>241</sup> Civil society groups are also urging for changes to the penal code, which, similar to laws in other Arab countries, does not explicitly acknowledge marital rape and grants a man convicted with rape the option to marry his victim with the benefit of dropping charges.<sup>242</sup> In terms of economic violence, labor

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237. Francesco Cavatorta & Fabio Merone, *Post-Islamism, Ideological Evolution and 'La Tunisianité' of the Tunisian Islamist Party al-Nahda*, 20 J. POLITICAL IDEOLOGIES, 27, 28 (Apr. 17, 2015).

238. Elham Alkasimi, *Tunisian Identity & Fears of Salafism*, MUFTAH (June 20, 2013), <http://muftah.org/tunisian-identity-fears-of-salafism/#.Vc8phVNViko>.

239. *Tunisia: Violence and the Salafi Challenge*, INT'L CRISIS GROUP (Feb. 13, 2013), <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/Tunisia/137-tunisia-violence-and-the-salafi-challenge.pdf>; see also Dorthe Engelcke, *Lecture, Party Identification in Post-revolutionary Tunis: Nida Tunis and Ennahda Compared*, U. OXFORD (Oct. 27, 2014), <https://podcasts.ox.ac.uk/party-identification-post-revolutionary-tunisia-nida-tunis-and-ennahda-compared>.

240. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 46.

241. Interview with Jeunesse Tunisie, Unité EUROMED conference participant, in Tunis, Tunis. (May 29, 2015).

242. *Id.*



laws make room for gender wage disparity and have historically failed to protect female agricultural workers from substandard working conditions and abusive contractual relationships.<sup>243</sup> The Secretary of State for Women Affairs is collaborating with NGOs to harmonize the existing legal framework with constitutional provisions, but such efforts will need cross-sector and horizontal support across ministries to be effective.

To date the law on violence against women remains a draft law. Though still in draft form, many seem hopeful that the law will pass. “Civil society efforts and support from international organizations are strong,” says Neila Chaâbane, one of the key drafters of the law during her time as Minister of Women.<sup>244</sup> A national survey conducted in 2010 showed that 47 percent of women in Tunisia had faced at least one form of violence, a daunting number given that women make up 52 percent of the population.<sup>245</sup> Yet, increasing extremist violence, such as the attack on the Badaro Museum, the resort attack in Sousse, and the bus bombing in central Tunis, has turned the focus away from social forms of violence towards greater security in the militaristic or police force sense.<sup>246</sup> A greater police presence to “fight terrorism” does not in any way guarantee a decrease in sexual or physical violence against women. Unearthed accounts of police violence against women under Ben Ali as well as numerous cases of rape by police during the protests in 2011 are further evidence of this.<sup>247</sup>

Efforts to draft an anti-violence against women law were present even before the revolution. “It was one of the issues that the Ben Ali regime selectively chose to support.”<sup>248</sup> The draft law, however, is an effort to create a legal framework that is comprehensive.<sup>249</sup> It addresses all forms of violence, including physical, psychological, economic, and inter-family.<sup>250</sup> Some of its provisions include a formalized framework for victims to prosecute perpetrators and state protection for those who seek justice.<sup>251</sup> Efforts such as the

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243. *Infra* note 273, at 40, 64.

244. Chabaâne, *supra* note 178.

245. Press Release, Fédération Internationale des Ligues des Droits de l’Homme, Sexual Violence in Tunisia: From Denial to Dawning Recognition (June 2, 2014), <https://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/tunisia/15425-sexual-violence-in-tunisia-from-denial-to-dawning-recognition>.

246. Sara Hashash, *Deadly Attacks Risk Casting a Shadow on Human Rights in Tunisia*, AMNESTY INT’L, (Nov. 25, 2015), <https://www.amnesty.org/en/latest/news/2015/11/deadly-attacks-risk-casting-a-shadow-over-human-rights-in-tunisia/>.

247. Eileen Byrne, *Tunisians Protest Over Charges Against Woman Allegedly Raped by Police*, THE GUARDIAN, Oct. 3, 2012, <http://www.theguardian.com/world/2012/oct/03/tunisians-protest-charges-woman-police>; Carlotta Gall, *Women in Tunisia Tell of Decades of Police Cruelty, Violence and Rape*, N.Y. TIMES, May 28, 2015, <http://www.nytimes.com/2015/05/29/world/africa/women-in-tunisia-tell-of-decades-of-police-cruelty-violence-and-rape.html>.

248. Mnasri, *supra* note 58.

249. *Id.*

250. *Id.*

251. *Id.*

establishment of victim shelters and a stable, advertised hotline will be expanded and supported by the state.<sup>252</sup> “The biggest challenge has been to convince certain members of society, of the assembly, that this issue is relevant,” notes Chaâbane. “Unfortunately, public officials at the top are removed and thus create a lot of push back. But judges in penal courts recognize this law as necessary.”<sup>253</sup>

Lobbying efforts have sought to reframe violence against women as an economic cost in order to appeal to parties who would normally not lend support.<sup>254</sup> Studies guided by the Ministry of Women have quantified the negative impact of violence in terms of a woman’s ability to enter the labor force and be an active participant in family and society.<sup>255</sup> Groups actively involved in the passage of the law are concerned, however, that civil society initiatives are fractured and not unified.<sup>256</sup> Some feel that while the law provides access to justice for survivors of violence and free access to medical care for victims, it does not go far enough in providing shelters and legal aid.<sup>257</sup> On the other hand, Tunisia’s willingness to define domestic violence as a public crime and enshrine it in the supreme law of the land sends an important message both nationally and globally. Moreover, the Tunisian provision defines domestic violence against a woman as a crime against the personal security of the woman.<sup>258</sup>

#### *E. Political Rights*

Another focus has been on fixing parliamentary and election laws, with a particular emphasis on increasing women’s participation at the local level. Well-established civil society groups are involved in reforming the electoral law to mandate horizontal as well as vertical parity. The ATFD and groups like League of Tunisian Women Voters (LET) are particularly concerned with how parity laws steer political elections, arguing that what is currently in place is either ineffective or does not go far enough.<sup>259</sup> Both Articles 34 and 46 in the constitution provide certain political guarantees for women, including quotas in government offices.<sup>260</sup> While Article 34 upholds a general commitment to

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252. *Id.*

253. Chaâbane, *supra* note 178.

254. *Id.*

255. *Id.*

256. *Id.*

257. Nessryne Jelalia, *Still a Long Way to Equality for Tunisian Women*, AL-ARABY (Jan. 14, 2015), <http://www.alaraby.co.uk/english/comment/2015/1/14/still-a-long-way-to-equality-for-tunisian-women>.

258. It is interesting to contrast Tunisia’s individualistic conception of protection against domestic violence from the conception conveyed in relevant provision in the Colombian Constitution, which frames domestic violence as a crime destructive of the “harmony” and “unity” of the family. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 42.

259. Interview with Kelthoum Kennou, President of LET, in Thala, Tunis. (May 24, 2015).

260. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 34 (“The State seeks to guarantee

guarantee women representation in elected councils, Article 46 specifically creates a state obligation to achieve gender parity, creating a strong constitutional foundation for legislation to increase women's political participation at the national, regional and local levels.<sup>261</sup>

In an attempt to embody political gender equality in principle, elections lists during the 2011 election of the constituent assembly were “vertically zippered” such that every second candidate on each list was supposed to be a woman.<sup>262</sup> Some hailed this rule as a good first step: women composed over 25 percent (57 out of 217 seats) of the national assembly post-2011 and in the 2014 elections, which mandated similar rules, women voter turnout was marginally higher than that in 2011, even while the youth turnout took a significant dive.<sup>263</sup> Yet, some women's activists argue these rules do not fully embrace the guarantees provided in the constitution, noting that many of the women elected were already plugged into the political system or else used as spot-fillers with little opportunity to contribute as representatives of their electors.<sup>264</sup> Furthermore, male candidates headed the vast majority of the lists submitted. Critics of the current election rules have thus made a push for horizontal zippering on top of vertical zippering in the next election.<sup>265</sup> Critics also believe that in order to increase public support given to women who seek political office, there must be greater solidarity among women in local municipalities and heightened political awareness among young women nationally.<sup>266</sup>

#### *F. Programmatic Rights in the Tunisian Constitution:*

The Tunisian Constitution enshrines both negative and positive rights, or civil and political and economic and social rights. Economic and social rights, or programmatic rights, are sometimes referred to as second-generation rights that demand additional resources for the fulfillment of these rights. Constitutions are no longer limited to restraining the exercise of power; they deal with the

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women's representation in elected councils”); art. 36 (“The State shall seek equal representation for women and men in elected councils.”)

261. *Id.*

262. PROJECT ON MIDDLE EAST DEMOCRACY, *TUNISIA'S PARLIAMENTARY & GENERAL ELECTIONS GUIDE* 25-26 (Oct. 2014), <http://pomed.org/wp-content/uploads/2014/10/Tunisia-Election-Guide-2014.pdf>.

263. *Id.*

264. Interview with Alia Alyouta Benkefi, in Thala, Tunis. (May 24, 2015).

265. *Id.*

266. It is instructive to examine other laws in light of the Tunisian Constitution. The Canadian Charter of Rights and Freedoms includes several women's rights clauses including affirmative action programs designed to ameliorate a legacy of discrimination against women. The Colombian Constitution of 1991 also “grants a broad array of rights to women—articles 13 (equality), 40 (political participation), 42 (women's status in the family), 43 (equal rights, non-discrimination, protection of pregnant women, and special support to female heads of households), 53 (workplace protection for women and mothers), 96 (citizenship based on mothers), and 323 (women as alderwomen).” See Laura E. Lucas, *Does Gender Specificity in Constitutions Matter?* 20 *DUKE J. COMP. & INT'L L.* 133, 143 (2009).

redistribution of power. While negative rights curtail the power of government, prohibiting or limiting the exercise of governmental power, positive or programmatic rights call upon the government to provide resources, services, and programs for their fulfillment. Substantive rights encompass positive programs to fulfill those rights and address inequality. However, without mechanisms and procedures for the actualization of these rights, they remain largely limited to the realm of rhetoric. In 2004, when National Women Outreach on Constitutional Reform in Nigeria made a set of recommendations to make the constitution more women-friendly, it called for the justiciability of current constitutional socio-economic rights.

Tunisia is a party to the ICESCR, and the Tunisian Constitution has included social and economic rights in the Constitution.<sup>267</sup> These rights include the right to health, right to water, and right to education.<sup>268</sup> These programmatic rights, although inextricably linked to civil and political rights, are not directly enforceable in the way civil and political rights are, but must await implementation through legislative or executive action and through budgetary appropriations.

Social guarantees with respect to matters such as education can be defined as women's rights. Article 44(1) of the Sudanese Constitution asserts that "[e]ducation is a right for every citizen and that the State shall provide access to education without discrimination as to . . . gender . . ." Alternatively, Article 39 of the Tunisian Constitution mandates education until the age of sixteen and makes free public education a right "at all stages," but does not specify gender.<sup>269</sup> This provision, if implemented properly, can have a powerful impact on young women and can help combat early marriage. Mandating education for all children, including the girl child, can be a powerful vaccine against early marriage and is a cardinal and non-negotiable human right for girls and women.

Article 44 of Tunisia's constitution similarly guarantees the right to water and is one of the first constitutions in the world to do so.<sup>270</sup> Article 44 further requires the state to implement government policies that promote conservation and rational use in order to protect this right.<sup>271</sup> This is especially important for marginalized women in rural areas or women laborers in the agricultural sector. Recent water shortages have sparked debate over exactly how this right can be implemented, such that rational use also results in equal distribution.<sup>272</sup> Proposals include convertible energy initiatives, alternative methods of farming,

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267. See Part III: Supremacy of International Law.

268. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, arts. 38, 39, 44.

269. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 39.

270. South Africa was the first country to include water rights within its constitution in 2004. See John Scanlon, Angela Cassar & Noemi Nemes, *Water as a Human Right?* 9 (IUCN Environmental Policy and Law Working Paper No. 51, 2004) (stating that, at the time, only the South African Bill of Rights "enshrines [in a constitution] an explicit right of access to sufficient water").

271. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 44.

272. Interview with Jaouahar Ben Mubarak, in Tunis, Tunisia. (May 29, 2015).

and new irrigation techniques, but their relation to matters such as labor conditions for women is unclear.<sup>273</sup>

Article 40 in Tunisia's constitution stipulates that "[w]ork is a right for every citizen, male and female alike" and gives all citizens "the right to adequate working conditions and a fair wage," but does not go further.<sup>274</sup> Yet, the political discourse on rights implementation does not, as of yet, incorporate a gendered perspective. One reporter and human rights activist notes that outside of political forums, "[P]eople do not even discuss economic issues in terms of the *constitution*, at least not how to connect women's rights with economic rights. It is merely aspirational at this point."<sup>275</sup> For example, while the UGTT has been a major supporter for raising the overall minimum wage, it has not placed much emphasis on wage gender disparity.<sup>276</sup>

### PART III

The extent to which the constitution-making process in Tunisia drew on international influences is unclear. Unlike in countries like South Africa or Sudan, the NCA in Tunisia never clearly manifested its intent to incorporate aspects of international law into its constitutional text.<sup>277</sup> Inconsistencies between state practices at the international level versus national and subnational levels further question the relevance of international law in Tunisia's transition efforts moving forward. Transnational entities did work closely with local CSOs as advisors, monitors, and co-coordinators and provided significant funding to various CSO initiatives. This first section of Part III will take a brief look at some of the discrepancies between relevant international agreements and the priority given to international law in relation to Tunisia's new constitution and national legislation. The section thereafter will look at the interaction between Tunisian civil society and visible international actors. Our conclusion is that while the rights provisions in Tunisia's constitution do not fully incorporate standards of international law, those provisions can be seen as "intermestic" in the sense that they are the product of softer modes of international influence, predominantly the role of international actors in promoting liberal notions of human rights within Tunisia's civil society.

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273. For more information on proposals and the conditions of Tunisian women in agriculture more generally, see ENQUETE SUR LES CONDITIONS DE TRAVAIL DES FEMMES EN MILIEU RURAL, ASSOCIATION TUNISIENNE DES FEMMES DEMOCRATES. (2015), <http://femmesdemocrates.org.tn/bibliotheque-atfd/livre-pdf/livre%20français.pdf>.

274. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 40.

275. Interview with Oumayma Ben Abdallah, in Tunis, Tunis. (May 29, 2015).

276. *Id.*

277. See Part I: Countries in Transition: Building a Public Participatory Framework for Gender Rights.

### A. Supremacy of International Law

Tunisia has signed and ratified human rights treaties CEDAW (1985),<sup>278</sup> ICCPR (1969),<sup>279</sup> and ICESCR (1969).<sup>280</sup> It officially removed reservations “not in conflict with provisions in Chapter I of the Tunisian Constitution” in 2014.<sup>281</sup> While Tunisia’s new constitution does not expressly incorporate provisions from these texts, international observers have recognized a general incorporation of international standards for women’s rights under customary international law.<sup>282</sup> There is some ambiguity, however, regarding the relationship between international law and national law, particularly in the context of judicial interpretation. Article 20 of the Tunisian Constitution gives primacy to “international agreements approved and ratified by the Chamber of the People’s Deputies” over national laws but will remain “inferior to the Constitution.”<sup>283</sup> International observers as well as organizations like the International Court of Justice (ICJ) have questioned this ordering of laws, pointing to other models that maintain international law as supreme.<sup>284</sup> Members of the constitutive committee responsible for drafting Article 20 explain, however, that the intent was not to undermine Tunisia’s international obligations, but to allow for the use of international laws as interpretive tools in clarifying ambiguities in the national laws, especially in relation to women’s rights.<sup>285</sup>

The constitutionalization of international agreements as supreme over Tunisia’s national laws is significant. However, there are ways the state can limit, if not make obsolete, the relevance of international law at the national level. Tunisia’s repeal of all reservations under CEDAW is a good example of this. In April 2014 Tunisia released a general statement committing itself to the elimination of all forms of discrimination against women and withdrew all reservations it submitted when it signed the CEDAW.<sup>286</sup> Though lauded as a move toward greater international accountability for gender equality, Tunisia

278. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

279. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967).

280. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.; S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

281. See General declaration under “Tunisia” or footnote 79. Chapter I of the Tunisian Constitution is comprised of Articles 1-20 affirming the general principles upon which the constitution is based.

282. Joint Statement by Al Bawsala, Amnesty International, and Human Rights Watch, *Tunisia: Let constitution Herald Human Rights Era – Judges should base interpretation on international standards* (Jan. 31, 2014).

283. TUNISIAN CONSTITUTION OF 2014, Jan. 26, 2014, art. 20.

284. *The Tunisian Constitution in Light of International Law and Standards*, INT’L COMM. OF JURISTS (Jan. 31, 2014), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/01/ICJ-Tunisian-Constitution-Position-Paper-31-01-14.pdf>.

285. Ben Mubarak, *supra* note 272.

286. *Tunisia: Landmark Action on Women’s Rights*, HUMAN RIGHTS WATCH, (Apr. 30, 2014), <https://www.hrw.org/news/2014/04/30/tunisia-landmark-action-womens-rights>.

maintains that it will not make legislative decisions that contradict Chapter I of the Constitution.<sup>287</sup> This leaves open the question of how Tunisia will balance cultural practices with international standards.

*B. The Role of International Actors in Constitution-Making*

“International organizations have been working with us closely – it is a good dynamic and we like that they are wanting to be involved,” says Saida Rached.<sup>288</sup> Notable international supporters included UN agencies like UN Development Programme (UNDP), which helped bring politicians and representatives from other countries to speak to the assembly.<sup>289</sup> The British Embassy was likewise supportive by inviting members to hear from and consult with foreign analysis.<sup>290</sup> The Venice Commission also coordinated international experts with Tunisian politicians to present “foundational best practices” and facilitated brainstorming among local NGOs.<sup>291</sup>

Countries that sent democracy experts included the US, France, Canada, Belgium, Spain, and Poland.<sup>292</sup> Interviewees also noted significant participation of former Soviet and Sub-Saharan states. Both regions seemed eager to share insights, given their recent drafting experiences and ongoing transition efforts. Many echoed a sentiment that there was at most “influential pressure- we felt their opinions were important, and they let us know when we were on the ‘right track’, or how we could make the drafting process more effective. There was no sense that they were imposing their ideas on us.”<sup>293</sup> A healthy level of skepticism seems to color remarks towards the international presence in Tunisia, but no one has yet expressed frustration that ideas were imposed or entirely irrelevant.<sup>294</sup>

Others have suggested that some international organizations were less imposing than others. Salsabil Klibi argues that, “Yes there were and are concerns about an international takeover, direct or indirect. But I would say that final decisions, the final document was left to Tunisians.”<sup>295</sup> On the other hand, there are several reports that frame the process as a period of excitement followed by disillusionment, spurred in part by a “deluge” of international interests that did not translate into true expertise.<sup>296</sup> International organizations, rather, came with a set of pre-packaged provisions not molded to the social or

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287. *Declarations Reservations and Objections to CEDAW*, *supra* note 32.

288. Rached, *supra* note 164.

289. *Id.*

290. *Id.*

291. *Id.*

292. Klibi, *supra* note 39.

293. *Id.*

294. Bilhaji, *supra* note 201.

295. *Id.*

296. *Inside the Transition Bubble: International Expert Assistance in Tunisia* 18, INST. FOR INTEGRATED TRANSITIONS (Apr. 2013), <http://www.ifit-transitions.org/publications/inside-the-transition-bubble-international-expert-assistance-in-tunisia>.

political context. Some interviewees suggested that the priorities of international organizations were misaligned with priorities of Tunisians.<sup>297</sup> Foreign development groups such as USAID overemphasized the fostering of ideological values such as democratic awareness and gender equality at the expense of substantive, arguably more critical issues related to youth unemployment, openness in the media, and economic stability.<sup>298</sup> There was concurrently a tendency to generalize Tunisia's situation with that of Egypt and Libya: "Tunisians do not universally align themselves with other North-African states," remarked one activist. "Some are more francophonized, others connect with countries like Morocco and Algeria, and still others just see our country as unique unto itself."<sup>299</sup>

"International support is very important, but what is more important is developing a power structure that connects regions within Tunisia. UGTT is less involved with what is happening internationally and more engaged with local interests," said Habiba Mizoumi, National Secretary General for Dentists & Nurses for the UGTT.<sup>300</sup> Indeed, decades of political and economic repression of Tunisia's southern interior under both the Bourguiba and Ben Ali regimes created high disparity between this region and Tunisia's coastal regions.<sup>301</sup> Thus, other individuals, like Habiba, have felt that establishing local autonomy and strengthening channels of interregional communication will be of greater significance in determining Tunisia's future than in establishing relationships with international forces.

Young civil society organizations (CSOs) in particular have been willing to work with international funders as a way to jump-start their initiatives. Hadia Bilhajj, director at CAWTAR stated, "we can't shut the door on the international community. It plays a necessary role in financing and investing in our broken economy. But Tunisians are certainly skeptical of whether the interests of the international community are truly aligned with their own. So we take a risk, out of necessity."<sup>302</sup> Souhayel Hedfi from Jam3ity—a civil society organization aggregator and networking platform—sees his relationship with foreign funders as more of a mutually beneficial learning experience:

"Some funders still want to contribute to human rights and democratization exclusively. We wanted that in the beginning, but now the situation is different. Many NGOs in the southern interior for example are now focused on environmental or infrastructural issues. The funders are slow to catch on but they're receptive to feedback when we

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297. Interview with Student and Activist, NGO workshop, in Bizerte, Tunis. (June 4, 2015).

298. Inst. for Integrated Transitions, *supra* note 296, at 10.

299. Student and Activist, *supra* note 175.

300. Mizoumi, *supra* note 159.

301. Issandr El Amrani, *Tunisia Moves to the Next Stage*, MIDDLE EAST RES. & INFO. PROJECT (Nov. 8 2011), <http://www.merip.org/mero/mero110811>.

302. Bilhajj, *supra* note 201.



tell them the requirements for funding don't match our interests or what we see as priority in our country."<sup>303</sup>

Many international democracy and rule of law organizations limit or narrow the reform process to a fight against corruption and the formalization of liberalism through free and fair elections, while overlooking the need for structural reforms. "Transparency" and "good governance" metrics nested within a market model are prioritized over the public protection of individual human rights. The key, thus, will be to see if international entities moving forward will view their efforts as a collaborative rather than delegated process. International support in implementing the rights enshrined in Tunisia's constitution will largely depend on reception of and adaptability to local interests.

#### PART IV

##### *A. The Way Ahead: Challenges and Opportunities*

A constitution is both fundamental, and authoritative, but it is also dependent on robust institutions for implementation and enforcement, as well as legal and political will and a culture of constitutionalism. A critical question before the Tunisian framers of the constitution is the question of a normative hierarchy in rights. Tunisian civil society is defined by its heterogeneity and its goal of translating the constitution into national laws. The passage of the constitution from the transitional into the permanent phase requires the collaboration of efforts of inter-governmental agencies and the constant vigilance of civil society.

Tunisia can learn from other countries, from both those countries' successes and failures. But there must be a fine balance in place to reach out for international assistance where needed without letting international actors hijack the reform process altogether. Hailed as a success, the text accomplishes this goal. It will be important in this next phase for local processes to continue to drive implementation initiatives, albeit with ample access to international resources and support. International and foreign actors must likewise support local actors in facilitating transparency and open society while maintaining respect for local interests.

In the context of enforcement, quite often gender equality and women's rights can be jettisoned at the altar of competing rights. The courts must enforce gender equality as a non-derogable right that cannot be subordinated by culture or religion. Taking into account these concerns among others, this section examines the way forward for women in Tunisia and the next steps in the Tunisian constitution reform process.

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303. Hedfi, *supra* note 50.

*B. Advancing a Culture of Constitutional Rights*

Strengthening a culture of constitutional rights involves ensuring that institutions are governed according to the constitution and that the independence of the judiciary is safeguarded to adjudicate constitutional rights claims and to hold state and non-state actors compliant with the constitution. This involves providing access to justice and strengthening the rule of law so that all persons, including women, can access courts and other adjudicatory mechanisms to enforce the constitution and the laws made to implement it.<sup>304</sup> Protecting the integrity of the constitution involves limiting the erosion of constitutional guarantees, and in particular preventing a narrow interpretation of the constitution in a way that undermines human rights and women's human rights guarantees.

While the adoption of the rights and freedoms in the Constitution is important, it may be equally important to educate citizens about these rights and ways to safeguard them, including how citizens can vindicate their rights in courts.<sup>305</sup> As set out in Article 102 of the Tunisian Constitution, "The judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the Constitution, the sovereignty of law, and the protection of rights and freedoms."<sup>306</sup> This Article emphasizes that the independence of the judiciary from legislative and executive interference is a bedrock principle of the rule of law. That is why the constitution-making process does not end at the promulgation of the constitution but is a continuing process that sparks the development of rights and establishing mechanisms to protect constitutional guarantees.

A culture of constitutionalism must also help to build a strong, integrated civil society that has the capacity and motivation to monitor governmental institutions. Political transparency during the drafting process must become the norm, such that civil society can act as a watchdog and impose accountability on state actors without fear of repression. Activists outside the political sphere are in the best position to ensure that there is a balance of powers among governmental institutions and that those powers are being used in the best interests of the people. In Tunisia, many of the youth who participated in the 2011 protests have turned to civil society groups as a way to stay active in their country's transition towards democracy. Disillusionment with the current government is widespread among youth, as exhibited by low voter turnout during the last national elections in 2014. Yet, many believe there is still space and opportunity to build a civil society platform upon which youth can communicate with local politicians and have their voices heard.<sup>307</sup> Alia, a young

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304. Kathleen E. Mahoney, *International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts*, 1 AUSTL. FEMINIST L.J. 115, 118-28 (1993).

305. *Id.*

306. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 102.

307. Benkefi, *supra* note 264.

graduate from Thala stated, “many youth have never visited places outside of their own region. Civil society organizations have included workshops where people from all over Tunisia can meet together and network. It’s a great aspect of the education process and only helps our own activism locally.”<sup>308</sup>

Similar comments were made during a civil society workshop in the northern coastal town of Bizerte. Participants were young activists from various municipalities across the country, all of whom were involved and committed to building small NGOs in their own communities. Hatem ben Romdhane, the leader of an association called *Irada* (meaning “will” or “desire”) in Djerba acquiesced, “there are a lot of internal challenges, but we’re doing our best.”<sup>309</sup> Workshop activities thus centered on networking and lobbying strategies, as well as understanding the new government’s constitutional structure.

Under Ben Ali, all civil society groups were subject to co-optation, monitoring, and outright repression.<sup>310</sup> Thus, most civil society groups, like *Irada*, are young. Educational opportunities for those involved in such groups are frequent. “[It] seems like every month we’re sending at least one representative to an event like this,” remarked Hatem.<sup>311</sup>

Although many civil society groups acknowledge that the Constitution contains strong rights provisions, they are concerned about the gap between reality and the text of the document. Many felt driven to civil society because of a lack of youth representation in government. “Low youth voter turnout in 2014 was a reflection of both economic and political frustrations,” commented one participant. “For some of my friends it was a decision between going to the polling station and going to a football match. And they chose the football match!”<sup>312</sup> Another participant noted that while the last elections had significantly more international observers than in 2011 and a healthy number of youth monitors, the problem was less process and more lack of trust: “We are all scared of a slide back to tyranny. We are skeptical of whether our government is truly democratic but we must continue to push for democratic elections.”<sup>313</sup>

It is again instructive to look at other countries to see how constitutional provisions can guarantee their own enforcement and implementation. For example, the Colombian Constitution of 1991 created a Constitutional Court and the tutela, which empowered individuals to bring suits when their constitutional

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308. *Id.*

309. Interview with Hatem ben Romdhane, in Bizerte, Tunis. (June 5, 2015).

310. Christopher Alexander, *Authoritarianism and Civil Society in Tunisia: Back from the Democratic Brink*, MIDDLE EAST RES. & INFO. PROJECT (Winter 1997), <http://www.merip.org/mer/mer205/authoritarianism-civil-society-tunisia>.

311. *Id.*

312. Interview with NGO workshop participant and community organizer, in Bizerte, Tunis. (June 5, 2015).

313. Interview with NGO workshop participant and law student, interviewed by author, in Bizerte, Tunis. (June 5, 2015).

rights have been abridged.<sup>314</sup> Litigants have used the new women's protection clauses with success in many cases. Without the tutela and the new Constitutional Court, the women's protection clauses may have been meaningless.

The Tunisian state has institutional responsibility to implement the Constitution through enabling legislation and institutions. Implementation of a constitution can be predicated upon strengthening or setting up new institutions provided for by the constitution, allocating powers and responsibilities, jurisdiction, resources (including finances and staff), and monitoring mechanisms. At the same time, the state must also stay accountable to civil society. The constitution created three ministries of civil society, one under each branch of government— executive, parliamentary, and judiciary.<sup>315</sup> The strength of these ministries relative to others, however, remains to be seen.<sup>316</sup>

### C. *Developing Enabling Legislation*

There continues to be a push to create laws that are not just nominally supportive of gender equality, but contain technical safeguards ensuring equality in various spheres. Yet, it is too early to predict how the Tunisian National Assembly will formulate enabling legislation. There is also uncertainty around how the judiciary will go about constitutionality review. The Supreme Judicial Council, which is tasked with the responsibility of assembling a constitutional court, has been the subject of much controversy. Tension surrounding the selection of members delayed its formation, which has inevitably delayed its appointment of a new constitutional court, the deadline for which was initially set for October 2015.<sup>317</sup> The administrative tribunal has been designated as a constitutional court and will hold that role until a separate court is formed.

There is general certainty among judges and legal scholars that before assessing constitutionality of laws, the court will have to deal with contradictions internal to the constitution itself. "It is too early to project how these contradictions will be reconciled, let alone how the constitution will be

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314. Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution*, in BEVERLEY BAINES & RUTH RUBIO-MARIN, *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 75, 76 (2005).

315. *5 years after the Arab Spring: What's Next for Women in the MENA Region?*, WOODROW WILSON CTR. (Mar. 8 2016) (quoting from remarks by Rangita de Silva de Alwis).

316. *Id.*

317. Election for the Council took place on October 23, 2016. It has yet to appoint the constitutional court. For more information, see Rahma Guettari, *Members of Supreme Judicial Council Announced After Historic Vote*, TUNISIA-LIVE, Oct. 25, 2016, <http://www.tunisia-live.net/2016/10/25/members-of-supreme-judicial-council-announced-after-historic-vote/>; Rebecca Chaouch, *Tunisie: Trois Ans Après la Constitution Toujours dans L'Attente de ses Garde-Fous*, JEUNE AFRIQUE, Jan. 27, 2017, <http://www.jeuneafrique.com/398018/politique/tunisie-trois-ans-apres-constitution-toujours-lattente-de-garde-fous/>.

applied to forthcoming legislation,” noted Jaouahar ben Mubarak, a scholar of constitutional law and president of the network *Destourna* (Our Constitution).<sup>318</sup>

President of LET Kelthoum Kennou insists that the Tunisian civil society has played a critical role in shaping the constitution and continues to play a pivotal role in its enforcement. This was best illustrated, she notes, in the allocation of a communication channel by initiating the position of coordinator with the civil society not only in the parliament but also in government and in the presidency. This channel was particularly effective concerning the promulgation of the law of the supreme judicial council:

Some specialized associations have worked on presenting recommendations to the parliament. Some of them also took part in a technical committee within the ministry of justice that is granted the power to suggest legislations. Other associations not only made suggestions but also presented proposal provisions to deputies for adoption in the parliamentary committee. This was an initiative of the League of Tunisian Women Voters (LET), which, as a part of its mission, focuses its project on the presence of women judges as decision makers in this council.<sup>319</sup>

One of the major impediments to implementing the constitutional guarantees is budgetary constraints. Our interview with Hadia Bilhadj revealed that there are currently no funds for women’s empowerment efforts, and that even if there is in the short-term, it will likely come in the form of conditional international aid. Resolving Tunisia’s debt and revamping the economy has taken precedent, though this does not seem unique to women’s rights: “We aren’t able to deal with things in parallel. We focus on one issue and ignore the others.”<sup>320</sup> One assembly member has noted that the strategy thus far has been not so much to fight for a percentage of the budget, but to show how improving the status of women will have positive economic ramifications, as described above, regarding the draft law to combat violence against women.<sup>321</sup>

Enabling legislation plays a crucial role in securing legal equality. A constitution on paper is hardly a constitution at all, however progressive its contents and however careful its design. Though there is consensus that enabling legislation is crucial to securing legal equality, such a task requires the reform of old laws as well as the passage of new laws providing assistance to pressing public concerns. The state, for all of its aspirations, has struggled to tackle both simultaneously, while in the background sort itself out internally. Laws out of sync with the constitution but not deemed critical have thus been placed on the backburner. Government efforts under the current ruling coalition *Nidaa Tounes* have more or less been dictated by realities on the ground, a game of whack-a-mole with a central focus on fighting terrorism, weeding out corruption, resolving bad debt, and increasing employment.

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318. Ben Mubarak, *supra* note 272.

319. Kennou, *supra* note 259.

320. Bilhaji, *supra* note 201.

321. Interview with Mehrezia Labidi, *Ennahda* party member (May 27, 2015).

Hela Hammi, one of the most vocal proponents of women's rights in the assembly, commented that "for right now, we are leaving women's rights efforts in the hands of civil society, with government encouragement and support of course. This is partly because of prioritization, but partly because civil society organizations are tapped in."<sup>322</sup>

Some gender issues, carried over from the Ben Ali era, continue to hold some political weight. The draft law against violence<sup>323</sup> and new efforts add vertical parity to election laws,<sup>324</sup> both discussed in Part I, and have gained relevance as an issue tied to universal security concerns. Other issues such as the *mirath*, or inheritance laws, wage disparities, and benefits for mothers in the workplace, such as maternity leave, are discussed but have not been fully addressed in legislation thus far.<sup>325</sup> Administrative judge and women's activist Anware Mnasri argues that the *mirath* laws are not a widely debated issue among Tunisians – they are considered problematic for poor families, but that the bigger issue is giving women an equal opportunity in the labor market and improving the economy so that people do not have to rely on *mirath*.<sup>326</sup>

Some have pushed for increasing maternity leave as a part of reform in public services law.<sup>327</sup> At 30 days, currently Tunisia has the shortest maternity leave of all countries in the MENA region.<sup>328</sup> Civil servants are allowed 60 days leave and can extend for another 60 days with a 50 percent reduction of their wages.<sup>329</sup> Policies that permit institutionalized forms of gender discrimination are the most important policies for women's rights activists to overcome. Yet, because they are not as visible as political discrimination or as shocking as cases of sexual violence, they may also be the most difficult issues to tackle.

There is some acknowledgment that Tunisia's new era of gender rights rides on guarantees under the old regime: "We don't like to admit it, but some laws from the Ben Ali years have benefitted women. Ben Ali was selective with which laws he chose to support, enacting laws to further his own political interests, but the effect of these laws has been positive."<sup>330</sup> Examples include a

322. Hammi, *supra* note 146.

323 The bill was set to become law by the end of 2016, but as of February 2017, it has not been put to vote. See Harriet Sherwood, *Tunisian Coalition Party Fights for Women's Rights with Gender Violence Bill*, THE GUARDIAN, Oct. 26, 2016, <https://www.theguardian.com/global-development/2016/oct/24/tunisia-gender-violence-bill-substance-progressive-image>.

324 See, e.g., *La Parité Horizontale et Verticale lors de Municipales, Cheval de Bataille d'un Collectif d'Associations*, HUFFPOST MAGHREB, May 5, 2016, [http://www.huffpostmaghreb.com/2016/05/10/parite-elections-tunisie\\_n\\_9886734.html](http://www.huffpostmaghreb.com/2016/05/10/parite-elections-tunisie_n_9886734.html) (announcing the launch of a new civil society campaign urging vertical and horizontal parity in municipal elections along with other amendments to the country's electoral law).

325. Interview with Anware Mnasri, in Tunis, Tunisia. (May 21, 2015).

326. *Id.*

327. Mnasri, *supra* note 325.

328. § 64(a) of the Labour Code 1966, last amended in 2011, <http://www.ilo.org/dyn/travail/docs/778/Labour%20Code%20Tunisia.pdf>.

329. § 48 of the Act No. 83-112.

330. *Id.*

law requiring a minimum standard of pediatric health for newborns, a law allowing women to travel without her husband or father, and a set of policies that opened up educational opportunities to women.<sup>331</sup>

Given the plethora of concerns and reformist initiatives in the pipeline, it is important to mandate a specific time period for the promulgation of institutions and policies. Independent bodies for the enforcement and oversight of constitutional rights, such as commissions and ombudsperson bodies, should be passed in a timely manner. For example, the 1992 Constitution of Ghana called for laws establishing nine institutions within six months of the first meeting of the parliament after its constitution came into effect.<sup>332</sup> The 2010 Constitution of Kenya included a time schedule from six months to three years within which laws on more than sixty subjects were to be passed, and it provided a cause of action if a law listed in the schedule was not promulgated within the time specified.<sup>333</sup>

Additionally, there must be a constitutional review of the legal system to ensure that all laws are in compliance with constitutional guarantees and if necessary the repeal of laws that are inconsistent with the Constitution.

Finally, steps should be taken to monitor the implementation of the constitution. It is important to carry out a regular evaluation of institutions established under the constitutions to ensure that they have the resources, including financial and human resources, to implement the constitutional guarantees. For example, Section 5 of the sixth schedule of the 2010 Kenyan Constitution calls for a commission on the implementation of the constitution to “monitor, facilitate and oversee the development of legislation and administrative procedures as required to implement the Constitution.”<sup>334</sup>

Remedies for inaction on the part of the government in meeting constitutional guarantees create a remedy for non-enforcement of rights. Constitutional courts can be moved through a writ petition or, as in India, where Article 32 (1) provides that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights is guaranteed.<sup>335</sup>

#### *D. A Focus on Gender and Economic Rights*

Tunisian women’s rights activists are concerned that the debates on constitutional guarantees have not focused sufficiently on economic

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331. *Id.*

332. The Constitution calls for the establishment of at least 14 different positions or offices within the first six months after the first meeting of parliament. *See, e.g.* CONSTITUTION, art. 9, art. 231, art. 269 (1992) (Ghana).

333. CONSTITUTION, FIFTH SCHEDULE—LEGISLATION TO BE ENACTED BY PARLIAMENT (2010) (Kenya).

334. CONSTITUTION, art. 262 (2010) (Kenya).

335. INDIA CONST. art. 32(1).

development and its corresponding impact on women.<sup>336</sup> Development initiatives ranging from the expansion of global trade, to structural readjustment programs, to a diversion of public spending from social to military programs, all have a disproportionate impact on women and the burdens they carry. While the discourse on women's rights often centers on a narrow range of 'genderized' issues such as sexual violence, women's political participation, and discriminatory rape laws, there is a need to acknowledge that gender-neutral policies can have equally negative implications. All issues, be it social, economic, political, or legal, have wider, gender-based implications that must be assessed within their specific local contexts.

The question of how to pair economic development with women's rights ties in to concerns around social stability and security. A Pew poll showed that 69 percent of women in Tunisia (compared to 55 percent of men) prefer stability to democracy, although their conceptions of stability and security are different from that of men – for example, women see security as the ability to go out alone, to be free from harassment on the street, at work, and on the part of police.<sup>337</sup> Men see security as more the presence of a police force and a reduced threat of terrorism.<sup>338</sup> This did not, however, correlate with waning support for equal rights for women (66 percent), a fair judiciary, and competitive elections.<sup>339</sup> Nevertheless, a preference for stability over democracy leaves open the possibility for women to forgo ideological agendas that require long-term foresight in exchange for practical, short-term solutions.<sup>340</sup>

Preference for stability is increasing in light of Tunisia's economy, which has stagnated if not receded since the revolution. High unemployment rates among young women, reaching 50 percent in some areas, have created increasing dependence on male figures in their household as the primary breadwinners.<sup>341</sup> The situation is particularly volatile for women in Tunisia's historically underserved and economically repressed interior regions. Agricultural work – mainly on small plots or family farms – provides employment for the vast majority of women laborers in this region. Women activists in rural areas and in the capital are grappling with how to undo decades of state-intervention that has led to price distortion, inequitable profit distributions, and substandard working conditions for women in this sector.<sup>342</sup>

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336. Ben Abdallah, *supra* note 275.

337. *Tunisian Confidence in Democracy Wanes*, PEW RESEARCH CTR. (Oct. 15, 2014), <http://www.pewglobal.org/2014/10/15/tunisian-confidence-in-democracy-wanes/>.

338. *Id.*

339. *Id.*

340. *Id.*

341. THE WORLD BANK, DEVELOPMENT POLICY REVIEW: THE UNFINISHED REVOLUTION BRINGING OPPORTUNITY, GOOD JOBS AND GREATER WEALTH TO ALL TUNISIANS 27-36, REPORT NO. 86179-TN (May 2014).

342. ASSOCIATION TUNISIENNE DES FEMMES DEMOCRATES, ENQUETE SUR LES CONDITIONS DE TRAVAIL DES FEMMES EN MILIEU RURAL 25-30 (Sept. 2014).



Habiba Mizoumi, National Secretary General for Dentists & Nurses for the UGTT, has also felt that gender equality must be approached holistically and has worked within her role to weave health and other welfare services into economic development proposals. “You can’t rid society of gender based violence and expand rights for women without improving the economy and a woman’s ability to participate within it. So we have to think about all of these aims at once.”<sup>343</sup> She says the key to UGTT’s strength has been its vast network that allows even those at the national level to interact with laborers in remote areas at the “bottom rung” of Tunisia’s economy. “I work with midwives, nurses, and other wage laborers in hospitals across the country. It is eye opening to hear their concerns, hear about their working conditions, and identify what their interests are.”

Nevertheless, the approach to infusing gender initiatives within economic development is not systematic. As noted by Hammi, the government has not tackled gender as a cross-sector issue, but rather as a separate item to be dealt with after more pressing issues have been addressed.<sup>344</sup>

This fear that gender equality and security takes second place to other issues that are considered more pressing is concerning and haunts many communities in post conflict and transitional justice. However, unless gender equality is treated as an imperative to democracy building and the rule of law, security cannot be sustained.

#### *E. The Need for Accelerated Civil Society Engagement*

Women are often mobilized during revolutions and nationalist struggles, but afterwards they are re-marginalized. Common themes emerge from research into women’s participation in revolutionary struggles: men may be reluctant to embrace women’s participation in the struggle, but do so in order to reach the desired and common goal.<sup>345</sup> The re-emergence of male prerogative follows the achievement of the goal and any attempt to deal with women’s subordination is viewed as a distraction from the struggle, and revolutionary rhetoric fails to translate into post-conflict policy changes.<sup>346</sup> However, women who participated in revolutionary struggles often develop a political awareness that changes the construction of the political community.

Women who feel marginalized by the transitional process have turned to civil society activism. Efforts in Tunisia seem to focus on increasing youth voter turnout in the next elections, pushing for horizontal parity layered on top of vertical parity to increase women political representation, and passing laws against violence against women.

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343. Mizoumi, *supra* note 159.

344. Hammi, *supra* note 146.

345. Sita Ronchod-Nilsson, *Gender Politics and Gender Backlash in Zimbabwe*, 4(4) *POL. & GENDER* 642, 643-44 (2008) (referencing a number of scholars who have looked at this phenomenon in particular contexts).

346. *Id.*

### F. Building Institutions

The promise of the Tunisian Constitution can only be attained through institutional design. For example, in Scotland, the Standing Orders of the Parliament mandate that all bills are accompanied by a statement of their potential impact on equal opportunities, including gender equality.<sup>347</sup> Similarly, Section 187 of the South African Constitution called for the setting up of a Commission for Gender Equality and its role is to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.<sup>348</sup>

Tunisia's transition has largely centered on its Law on Establishing and Organizing Transitional Justice, passed during the last days of the Ennahda government on December 24, 2013. One of its most critical provisions allows for criminal accountability for past human rights violations.<sup>349</sup> Chambers in the civil court system will have the jurisdiction to adjudicate past violations and abuses by military and security forces. The law also includes provisions for victim reparation,<sup>350</sup> institutional reform, vetting of civil servants,<sup>351</sup> and national reconciliation.<sup>352</sup>

The Truth Commission was intended to be one of the primary mechanisms established under the new law to dismantle the old regime and pave the way for transition. Its task is to uncover past abuses committed from independence in July 1955 to 2013. It is composed of a 15-member panel of human rights activists, representatives of opposition associations under the Ben Ali regime, and independent jurists.<sup>353</sup> The powers of the commission are broad, including the ability to subpoena witnesses, access state archives, summon public hearings, provide protections for testifiers, and even reopen past cases, though some challenge this as unconstitutional.<sup>354</sup> Finally, the commission can refer gross violations to specialized chambers, which have yet to be formed.<sup>355</sup> The

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347. Standing Order of the Scottish Parliament, R. 9.3 (Scot.), <http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>.

348. S. AFR. CONST., 1996 §187.

349. *Organic Law on Establishing and Organizing Transitional Justice*, Republic of Tunisia, Ministry of Human Rights and Transitional Justice, art. 42, <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>

350. *Id.* at arts. 1, 11, 12, 43.

351. *Id.* at arts. 40, 43.

352. *Id.* at art. 43.

353. Rim El Gantri, *Tunisia in Transition*, INT. CTR. TRANSITIONAL JUST., at 3 (Sep. 2015), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Tunisia-TJLaw-2015.pdf>

354. Carlotta Gall, *Torture Claims in Tunisia Await Truth Commission*, N.Y. TIMES, May 19, 2015, <http://www.nytimes.com/2015/05/20/world/africa/torture-claims-in-tunisia-await-truth-commission.html>.

355. Law No. 2013-53 of 2013 (Organic Law on Establishing and Organizing Transitional Justice), 24 Dec. 2013, Art. 8 (Tunisia) <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf> (or also <https://www.ilo.org/dyn/natlex/docs/SERIAL/95319/112171/F-313159060/TUN-95319.pdf>). *But see* Louise Bonhour, *Truth and Dignity Commission Opening Ceremony Tomorrow*, TUNISIALIVE (Dec. 9, 2014), <http://www.tunisia-live.net/2014/12/09/truth-and-dignity-commission-opening-ceremony->

deadline was last set for the end of 2015.<sup>356</sup> The law mandates that judges for such chambers cannot have “participated in trials of a political nature,” but it does not specify further.<sup>357</sup>

The commission’s formation and validity, however, have been subject to strict scrutiny. Individuals who participated in the Ben Ali regime and continue to hold positions in government expressed concern that they would be unfairly targeted. Many critics who later formed part of the Nidaa Tounes coalition pushed to amend the commission rules and replace its members. “There was a lot of drama between Essebsi and the commission’s president Sihem Ben Sedrine. He accused her of conspiring with Marzouki [the former president], being too radical, too driven by her own vendettas, and on and on,”<sup>358</sup> commented one journalist following the commission’s developments. Others question her ability to guide the commission with adequate insight, given her prolonged absence outside of Tunisia prior to 2011.<sup>359</sup> There is some acknowledgment that the media in Tunisia has been particularly hostile towards the Commission, fueling further public skepticism.<sup>360</sup> Juan E. Mendez, UN Special Rapporteur on Torture expressed his concerns in 2014 and called for a need for “impartial, thorough investigations,” noting that “[t]orture and ill treatment continues to take place in Tunisia” and that in spite of this reality he remained hopeful that the commission would bring “access to justice and redress for victims.”<sup>361</sup>

To smooth over tensions, on May 25, 2015 the Minister of Justice released a statement on the state’s ongoing efforts in the realm of transitional justice, including its commitment to bring expert judges on transitional justice into the process and to create spaces for civil society groups to access information and give feedback on judiciary reform and the dignity and rehabilitation fund.<sup>362</sup>

Closed-door testimonies began in May 2015, with public hearings following in June. Since hearings began, over 20,000 victims have come forward as testament of the state’s systematic use of sexual violence to silence women members of the opposition.<sup>363</sup> Although the details of these hearings is

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356. *Tunisia*, INT’L COMM. ON MISSING PERSONS, <http://www.icmp.int/the-missing/where-are-the-missing/tunisia/> (last visited Feb. 6, 2017).

357. Organic Law, *supra* note 355, art. 8.

358. Interview with journalist at Upholding Gendered Peace at a Time of War Conference, in Beirut, Leb. (June 10, 2015).

359. *Id.*

360. Carlotta Gall, *Silenced for Decades, ‘Victims of Despotism’ Air Torture Claims in Tunisia*, N.Y. TIMES, Nov. 18, 2016, <https://www.nytimes.com/2016/11/19/world/africa/silenced-for-decades-victims-of-despotism-air-torture-claims-in-tunisia.html>.

361. United Nations Human Rights, Office of the High Commissioner for Human Rights, *Tunisia: More than Political Will is Needed to Eradicate Torture*, OHCHR (June 6, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14671&LangID=E>.

362. Tawfiq al-Masoudi, *Tunis- During an academic symposium attended by the Ministry of Justice: Transitional Justice is . . . in Danger*, AL-CHOUROUK (May 25, 2015), <http://bit.ly/1TFtFHO>.

363. Hind Ahmen Zaki, *Tunisia Uncovered a History of State Sexual Violence. Can it do*

beyond the scope of this Article, the establishment of the commission and its work, though politically polarizing, logistically incoherent, and as of yet incomplete, has been noted as a “rare opportunity to push forward new rights claims for Tunisian women that move beyond the secular/Islamic division.”<sup>364</sup>

#### CONCLUSION

The historic exclusion of women from official peace processes and constitutional reform processes brings into question the validity of the model upon which constitutional processes rest. A review of fourteen peace negotiations since 1992 shows that less than 8 percent of the negotiating teams were women and less than 3 percent of the signatories were women. It is then not surprising that “of the 585 peace agreements signed since 1990, only 92 mention women.”<sup>365</sup>

Tunisia’s constitutional process provided the terrain for the coalescence of women as a critical presence. It was a moving, diverse, and electrifying terrain upon which women gathered across political divides to build common cause. The constitution-making process provided a landscape for women to move their concerns from the margin to the center of the constitutional debates and to articulate a visionary and detailed agenda for action. The official constitution has laid the groundwork for future work, but much more must be done to ensure that women’s rights that exist in theory come to exist in reality.

What the Tunisian constitution-drafting project shows is that women’s participation in constitution-making is critical to ensuring women’s rights and priorities are included in a nationwide dialogue. The very legitimacy of a constitution hinges on whether women are engaged in the creation, adoption and implementation of their constitutions. Nevertheless, we should resist characterizing the nature of women’s participation in constitution-making uniformly. Women were present on both sides of the debate. Perhaps their greatest contribution was in ensuring that everyone’s voice was heard and one narrative did not wholly drown out the other.

Similarly, international actors can aid constitution-making processes by protecting and promoting processes that are both democratic and transparent. International women’s groups can also provide needed resources and technical support. Of course, while transnational groups are helpful in building transnational coalitions, they in no way stand as a proxy to national and local civil society groups. National and local NGOs should lead efforts to galvanize existing women’s groups and form broad-based coalitions. Transnational groups

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*Anything?*, WASH. POST, Apr. 11, 2016, [https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/11/tunisia-uncovered-a-history-of-state-sexual-violence-can-it-do-anything/?utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=New%20Campaign&utm\\_term=%2AMideast%20Brief](https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/11/tunisia-uncovered-a-history-of-state-sexual-violence-can-it-do-anything/?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=%2AMideast%20Brief).

364. *Id.*

365. Tony Lavers, *Aggression, Intervention and Powerful States: Missed Lessons from Feminist Methodologies on Peace and Security Issues*, 5 AMSTERDAM L.F. 122, 134 (2013).

should only step in as second-fiddle supporters who can further assist or facilitate such grassroots efforts. This will be important to note with the growing number of local participants in Tunisia's women's rights discourse and the emergence of transnational solidarity links.

Meaningful participation of women in the Constitution drafting in Tunisia involved two singular aspects: (1) women in the constituent assembly and (2) an active and organized coalition of women's groups. Although women in the constituent assembly symbolized the state's commitment to gender equality, the mere appointment of women to the body was insufficient. The most vital aspect in this project was an effective coalition of women's groups. The open forums are an educational opportunity for the entire country and they allowed for debate and discussion on issues that were considered outside the public realm. As founding mothers of a landmark constitution, the involvement of women energized and empowered women like never before and had significant influence on raising constitutive and transformative aspects of constitution drafting. However, if the process is to be truly transformative, women must continue to participate beyond the initial promulgation of the constitution.