10 Women's rights and constitutional implementation in the MENA region: challenges and perspectives

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Several constitutional reforms adopted in Middle Eastern and Northern African countries (MENA region) following the Arab uprisings have significantly strengthened the provisions on women's rights and gender equality. The 1996 Moroccan constitution, for example, only granted political rights to women (Article 8), while the new 2011 Moroccan constitution declares that: "The man and the woman enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural, and environmental character […]" (Article 19). In Egypt, "equality between women and men in all civil, political, economic, social, and cultural rights" has become an object which the State "commits to achieving" (Article 11(1)). The 2014 Egyptian constitution also declares that "The State commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by the law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination" (Article 11(2)). In Tunisia, the 2014 constitution states that "All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination" (Article 21), and that the right to work is "a right for every citizen, male and female" (Article 40). The Tunisian constitution also guarantees "equality of opportunities between women and men to have access to all levels of responsibility and in all fields" (Article 46), and provides that "every male and female voter" has the right to stand for election as President of

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the Republic (Article 74). In Algeria, the February 2016 constitutional reform[2] introduced a provision that stipulates that the State promotes "equality between men and women in the labour market" and "encourages the advancement of women in positions of responsibility in public institutions and administrations, as well as at a company level" (Article 36).

However, in order to assess the sincerity of these innovations, *the process of constitutional implementation* will be decisive. The latter will be undoubtedly extremely complicated, since North Africa and the Middle East is a region in which – more than in other parts of the world – women's rights and the principles of gender equality and non-discrimination have often remained 'on paper'.

In this short paper, I will address some of the most relevant *factors* that may influence the process of constitutional implementation, i.e. (1) the nature of the constitution, (2) the role played by the constitutional courts, (3) the 'limitation clauses', (4) international treaties and conventions on human rights, (5) women's representation in elected institutions, and (6) the social, cultural, and religious context.

1. The nature of the constitution

The first factor that may deeply influence the process of implementing constitutional provisions concerning women's rights and gender equality relates to the *very nature of the constitution* in question. In particular, it is crucial to verify whether constitutions in the Arab world are considered *legally binding documents*, the *highest laws of the land*, or whether they are merely perceived as *political and/or symbolic texts*, deprived of any legal value. This question is of the utmost importance since only a constitution which is considered the supreme law of the State will be able to effectively protect women's fundamental rights (and more generally human rights).

2. Currently, there is not an English version available online of the updated Algerian constitution; quotes are translated from the official French version.

It should be recalled that for a long time, the significance of the constitution in Europe was radically different from the significance that the constitution had in the United States (US). In the US, the constitution has been considered, since the very beginning, the "superior, paramount law" – as it was made clear by the Supreme Court in *Marbury v. Madison* (1803) –, with the consequence that statute laws in contrast with the constitution had to be considered void.

In Europe, on the contrary, the notion of constitution was for a long time deeply affected by the Jacobin ideal of the 'law as the expression of the general will', which denied the normative character of the constitution. The latter was considered a symbolic text, or, in a best case scenario, a political document aimed at regulating the organisation of the branches of government (Blanco Valdés, 1997; García de Enterría, 2006). This idea of the constitution only changed starting from the end of World War II, thanks to the establishment of constitutional courts which regarded constitutions as legally binding texts (Biagi, 2016). In this way, the normativity of the constitution became a "brute fact of the legislator's world" (Stone Sweet, 2000, p. 196).

In the MENA region, the constitutions adopted following the decolonization process were mainly perceived as political and/or symbolic documents. Indeed, once they became independent, many Arab States promulgated constitutions "as an expression of national sovereignty" (Brown, 2002, p. 10), and the role of these texts was "less legal than symbolic or programmatic" (Le Roy, 2012, p. 110).

This notion of the constitution has changed gradually over time. On the one hand, nowadays constitutions are perceived as more legally binding than in the past. An example of this trend towards the normative value of the constitution is given by the fact that the preambles to several constitutions (i.e. Morocco, Syria, Tunisia, Egypt, and Algeria) are classified by the constitutions themselves as constituting an 'integral part' of the constitution in question. This means that these preambles – which proclaim, *inter alia*, the principles of gender equality, non-discrimination, and equal opportunities – constitute a parameter for constitutional review (*bloc de constitutionnalité*).

On the other hand, however, the full recognition of the normative value of the constitution in most of the Arab countries is yet to come. In a similar manner to the role played by European constitutional courts in the last century, Arab constitutional courts, whose powers and competences have been strengthened – as discussed below – may be crucial in clearly recognizing and guaranteeing the normativity and supremacy of the *entire constitution*, with particular attention to the principle of equality and the provisions on fundamental rights and freedoms.

2. The role played by constitutional courts

Another factor that may influence the process of implementation of the constitutional provisions concerning women's rights and gender equality is given by the role played by constitutional courts. It should be noted that judicial review, generally in the form of constitutional courts and councils, was a common feature in the MENA region even before the Arab uprisings. However, "only a few of the bodies charged with the task [were] viewed as effective defenders of constitutionalism" (Brown, 1998, p. 85). One of the very few exceptions was given by the Egyptian Supreme Constitutional Court, which, during the period from the mid-eighties to the end of the nineties, struck down several laws adopted by the regime, thus seriously challenging Mubarak's government (Moustafa, 2007).

Interestingly enough, the Arab upheavals gave rise to the *emergence and strengthening* of constitutional courts in the MENA region. Jordan and Palestine established a constitutional court for the first time in their history, respectively in 2012 and 2016; Morocco, Syria, Tunisia, and Algeria reinforced the position and the competences of their respective constitutional courts; in Egypt, the Supreme Constitutional Court continues to be an extremely powerful and influential body (Frosini & Biagi, 2015, p. 129).

The most significant novelty is probably given by the *procedural gateways* to the constitutional courts. While in the past the referrals to these bodies mainly came from governmental entities (such as the president of the republic,

the speaker of the parliament…), the recent constitutional reforms have widened access by granting to *ordinary courts* the power to challenge the constitutionality of laws before the constitutional courts. This undoubtedly represents a fundamental step, since in this way individuals (including women) can have access – at least indirectly – to constitutional courts. Indeed, thanks to the introduction of concrete constitutional adjudication, when an ordinary judge concludes (either following a request by one of the parties or *ex officio*, depending on the country) that the law that has to be applied to the specific case violates the constitution, he/she must suspend the case and refer a question of constitutionality to the court. This system is therefore likely to increase the likelihood of constitutional courts ruling on the constitutionality of laws that violate the principle of equality (including gender equality) and human rights (including women's rights).

A distinction, however, has to be drawn between the countries that have adopted a 'single filter' system and the countries that have adopted a 'double filter' system. Indeed, some countries (e.g. Egypt and Tunisia) have followed the system that can be found, for example, in Germany, Italy, and Spain, where all courts – including lower courts – can directly refer questions of constitutionality to the constitutional court ('single-filter' system). Other countries (e.g. Jordan and Algeria), on the contrary, have followed the French model, where lower courts have to refer the question of constitutionality to the apex courts (such as the Court of Cassation and the Council of State), which then decide whether to refer the question to the constitutional court ('double-filter' system).

As previously mentioned in Biagi (2017), it should be noted that the French and the Jordanian experiences have shown that the 'double-filter' system can be rather problematic, especially at the outset. In France, during the first year of operation of the *question prioritaire de constitutionnalité*, the Court of Cassation (but not the Council of State) displayed a certain level of "resistance" (Molfessis, 2011, p. 83) when referring questions of constitutionality to the constitutional council. In Jordan, five years after the establishment of the constitutional court, the extremely low number of judgments issued by the constitutional court would appear to be related – amongst other things – to a certain reluctance on the part of

the Court of Cassation to refer questions of constitutionality to the constitutional court. The Venice Commission (2011) has underlined that "from the viewpoint of human rights protection, it is more expedient and efficient to give *courts of all levels* access to the Constitutional Court" (p. 18, emphasis added). Therefore, the 'single filter' system seems to be more suitable for guaranteeing protection for women's rights.

3. The 'limitation clauses'

A factor that might have a positive impact on the process of implementation of the constitutional provisions concerning women's rights and gender equality is given by the 'limitation clauses', i.e. the clauses which are aimed at guaranteeing that the core, the essence of fundamental rights, is not affected by the implementing legislation. These clauses – that can be found, for example, in the Constitutions of Germany (Article 19(2)), South Africa (Article 36) and Kenya (Article 24) – were also included in the Constitutions of Jordan (Article 128(1)), Tunisia (Article 49) and Egypt (Article 92). Their introduction was clearly aimed to overcome the practices of the past, when laws implementing the fundamental rights and freedoms declared by the constitutions often 'hollowed out' those very same rights.

It has been rightly pointed out that the limitation clause contained in the Tunisian constitution is "probably the Arab region's most detailed [one]" (Al-Ali & Ben Romdhane, 2014, n.p.). Article 49 of the Tunisian constitution states that legislation limiting rights can only be adopted if it is "necessary to a civil and democratic society" and "provided there is proportionality between these restrictions and the objective sought". This provision, however, also states that limitations to fundamental rights can be put in place "with the aim of protecting the rights of others, or based on the requirements of *public order, national defence, public health, or public morals*," (Article 49, emphasis added) which leaves room for potential abuses. The constitutional court will play a key role in assessing whether the core, the essence of fundamental rights (including women's rights), has been violated or not.

4. International treaties and conventions on human rights

Following the Arab uprisings, a number of countries have adopted a noticeably *favourable stance towards international treaties and human rights conventions (including those on women's rights)*. On the other hand however, the *will to preserve national identity (especially in relation to religion)* has thus far prevented their full incorporation into domestic legal systems. These two opposing trends can be easily seen in Tunisia and Morocco.

Tunisia, which has long been at the forefront of the Arab world with respect to women's rights, took another historical step in 2014 when it became the first Arab country to withdraw all its reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). At the same time, however, Tunisia decided to maintain a general declaration which states that the country "shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution".

Chapter I of the Constitution states – *inter alia* – that the religion of Tunisia is Islam (Article 1). It is to be seen, then, whether the withdrawal of the reservations will be translated into actual laws, or whether the retention of the general declaration will prevent major changes to ordinary legislation from taking place.

In Morocco, Article 19 of the 2011 Constitution stipulates that "the man and the woman enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural, and environmental character, enounced in this Title and in the other provisions of the Constitution, as well as in the international conventions and pacts duly ratified by Morocco and this, with respect for the provisions of the Constitution, of the immutable values [*constantes*][3] of the Kingdom and of its laws". The 'immutable values' clearly recall Islam, which

3. The French 'constantes' is usually translated by the leading literature as 'immutable values'.

is the religion of the State (Article 3 of the 2011 Moroccan constitution). When applying this provision, the judges may base their reasoning on the reference of the constitution to the "international conventions and pacts duly ratified by Morocco", or, alternatively, give greater emphasis to the "immutable values and the laws of the Realm" – which, as noted above, are also expressly enshrined within the constitution. Therefore, it would appear that the constitution permits two diametrically opposed interpretations in relation to the principle of gender equality: one "in favor of universalism", and one "towards conservatism" (Bernoussi, 2012, 2016, p. 225 and p. 705, respectively).

Striking a balance between the respect of international treaties on human rights – and in particular on women's rights – on the one hand, and the preservation of national identity (especially when it comes to religion) on the other, now more than ever represents one of the major challenges for Arab countries.

5. Women's representation in elected institutions

Securing greater participation by women in political parties and representation in public institutions, and consequently increasing the chances of the effective implementation of the constitutional provisions on gender equality, can contribute enormously to guaranteeing full citizenship for women. This seems to be of the utmost importance in North Africa and the Middle East, where women very often can hardly make their voices heard.

Although they are not immune from criticism, it seems that *electoral gender quotas* can contribute to achieving this aim. Electoral quotas for women are nowadays provided for in a number of Arab countries. In Algeria, for example, thanks to the electoral quota, 26% of the seats of the Lower House are held by women. Electoral quotas for women are provided for also in other countries, such as Egypt, Morocco, and Jordan, but women's representation in Parliament is lower.

In Tunisia, Article 46 of the constitution guarantees "equality of opportunities between women and men to have access to all levels of responsibility and in all domains. The state seeks to achieve equal representation for women and men in elected councils"[4]. This gender sensitive provision is reflected in the electoral legislation. Indeed, the electoral law for parliamentary elections provides for the principle of 'vertical equality' – according to which electoral lists have to be established in such a way to alternate between men and women. Currently, 31% of the seats of Parliament are held by women. Moreover, the electoral law for municipal and regional elections adopted in February 2017 took a further step by providing for the principle of 'horizontal equality' – according to which "political parties will be obliged to respect the equality of sexes, not only in the same list but also between the lists that they present in different constituencies in such a way that if in Constituency A the lead candidate of a list is a man, the lead candidate in Constituency B must be a woman" (Mekki, 2017, n.p.).

It should be noted, however, that an electoral quota *per se* is not enough to guarantee women's representation. This has to be complemented with an electoral system that favors women's representation (it is generally agreed that *proportional systems* are favourable to the election of women and make the quota system work better), and with an *electoral management body* in charge of verifying that the measures aimed at guaranteeing women's participation in elections are respected, i.e. "exemptions from candidacy fees, access to official media, access to public resources, [and] imposing sanctions on the political parties that fail to comply, including elimination of lists that exclude women" (Suteu & Draji, 2015, p. 63).

6. The social, cultural, and religious context

In spite of the fact that in the past two decades several countries have taken important steps to strengthen women's rights, the path towards creating real

4. Translated from the official French text of the 2014 constitution.

equality between men and women in the MENA region is still very long and difficult. The *social, cultural, and religious context* is the factor that – probably more than others – has thus far prevented women from obtaining full citizenship in the Arab world. In particular, for a long time women have been fighting against a patriarchal interpretation of Islamic texts, which have been used to legitimize various legal and social restrictions against them. It has been rightly pointed out that

> "it is necessary to deconstruct this politicized structure and reconstruct it, by relying again on the spirit of the Quranic text, which gives all the possibilities to contextualize the equality between man and women. Therefore, women have to regain what was usurped from them over centuries" (Gaté, 2014, p. 10).

For the moment, resistance to greater gender equality from certain sections of society, political parties, and public institutions is extremely strong, and will not be uprooted easily.

Examples of discrimination against women in Arab societies are boundless. It is emblematic, for example, that at the beginning of October 2016 a member of the Egyptian parliament called for mandatory virginity tests for women seeking university admission. The aim of these tests would be to prevent informal marriages (known as '*gawaz orfy*') between young people who choose to have premarital sex (New York Times, 2016). Another example is given by Morocco, where, on the 23rd of November 2016 (i.e. two days before the International Day for the Elimination of Violence Against Women), a program on state television demonstrated how women could use makeup to cover up evidence of domestic violence, thus helping them to "carry on with [their] daily life", as the host said at the end of the segment (Ait Akdim, 2016, n.p.).

It goes without saying that social and cultural changes cannot be imposed 'from above', although parliaments, governments, courts and all the other public institutions can facilitate these changes. The case of Italy during the sixties is

emblematic. In 1961, the Italian constitutional court delivered a judgment (no. 64/1961) in which it declared that Article 559 of the Criminal Code – which only punished women's adultery (and not men's) – did not violate the provisions of the Constitution that guarantee the equality between men and women. Indeed, according to the court, women's adultery – more than men's adultery – could threaten the unity of the family.

Seven years later, in 1968, the Italian constitutional court (judgment no. 126/1968) was asked to re-examine the issue. This time the court decided to strike down the provision of the Criminal Code that punished only women's adultery, stating that the *historical and the social conditions had deeply changed*, and that men and women had to be considered on the same footing within the family and the entire society.

As mentioned at the beginning of this short paper, several constitutional reforms adopted in the MENA region following the Arab uprisings have significantly reinforced the provisions on women's rights and gender equality. Now, it is up to public institutions to respect and implement these provisions, thus spearheading positive changes in Arab societies.

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