

Interpretation of article 46 of the Constitution

Article 46: "The state commits to protect women's accrued rights and work to strengthen and develop those rights.

The state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains.

The state works to attain parity between women and men in elected Assemblies.

The state shall take all necessary measures in order to eradicate violence against women."¹

Monia BEN JEMIA

Article 46 of the Constitution is a text specific to women, which grants them the following rights: accrued rights, which the State commits to protect, support and improve; equal opportunities to have access to all levels of responsibility in all areas and that the State guarantees; parity in the elected bodies that the State shall seek to attain; eradication of violence against women through undertaking specific measures draw an end to it.

A Constitutional provision cannot be interpreted independently from the others and an article cannot be interpreted in isolation to other articles, as advised by article 146. The interpretation of article 46 must be in line with the rest of the Constitution. The aim is to standardise the articles in order to maintain the internal coherence.

Although the text of article 46 is specific to women's rights, it is not the only text that grants rights to women. Other rights and freedoms are granted to women, who are at times referred to as citizens and at times as women or voters. These rights, granted in other Constitutional provisions, must be used to interpret article 46, the internal coherence of which shall also be concluded in reference to the general principles set out in chapter 1 and the values proclaimed in the introduction of the Constitution, which forms an integral part thereof (article 145).

Equality between men and women, and therefore the principle of non-discrimination on the basis of gender was not obtained immediately.

After having stated that women were not equal to men, but their partners in public life and their complement in private family life, the Constitution guarantees equality of rights and obligations before the law of "male and female citizens" (article 21).

Equality in political rights – the rights linked to citizenship – is immediately set out by the use of the term "female citizen". These rights are strengthened by the fact that it is possible for "female voters" to run for President of the Republic (article 74). The issue of parity remained under debate, before being obtained during the final vote of the Constitution, in article 46. Economic, social and cultural rights, in particular the right to work, health, education and the right to security through the fight against violence against women did not raise any specific debates and no one was opposed to the principle of non-discrimination on the basis of gender..

On the contrary, concerns and resistance emerged with regards to the personal status code. Concerns due to the fact that the guarantees of these obtained rights and the reform to eliminate

¹ The translation was provided throughout the text and each time the constitutional provisions are cited.

the remaining discrimination always stemmed from religious sources. The more powerful are the religious references, the less the gains of the personal status code can be safeguarded; the less the powerful, the more the gains are guaranteed and likely to be improved. Since the Tunisian personal status code i.e the family law is the only law connected to religion, Sharia law. Any reform has to be aligned with it. Resistance therefore stems from religion, increasing controversial debates. The consensus that the constituents reached, in interpreting the texts have an impact on the notion of the equality between men and women in the private and family domain.

Article 46, which does not create ambiguity since it does not define the obtained rights, does, however, contain sufficient evidence to not exclude the right to equality in the private and family domain. The very term "accrued rights" suggests that women have accrued rights that the State is committed to protecting and supporting. However, at the same time, if women have accrued rights, this means that they have not obtained all their rights, and that there are therefore rights that remain to be gained, as suggested by the verb "improve" or "develop".

Therefore, it can be said that the accrued rights referred to in article 46 are the right to equality (I) in the enjoyment and exercise of all rights and freedoms (II).

I. The accrued right to equality: The progressive inclusion of the right to equality

The right to equality was not obtained immediately, but after the refusal of the concept of complementarity of men and women (A) and after the concept of equality between citizens without discrimination on the grounds of gender was granted, by the use of the term "female citizen" (B).

A. From complementarity to equality

Complementarity was included in the first draft of the Constitution, of 13 August 2012². Women's rights were guaranteed in article 10.1 of the first book relating to the general principles that provided that "The State protects the rights of women" and in article 28.2 of book 2 relating to rights and freedoms, according to which "The State shall guarantee the protection of the rights of women and shall support the gains thereof as true partners to men in the building of the nation and as having a role complementary within the family. The state shall guarantee the provision of equal opportunities between men and women in bearing various responsibilities. The state shall guarantee the elimination of all forms of violence against women."

Following the astounding mobilisation of civil society, its refusal of the concepts of partnership and complementarity in order to guarantee equality in the public and private spheres, the texts were modified in the second draft of 14 December 2012. Article 10.1 became article 7, and provided that the State protect the rights of women and support the gains thereof. Article 28.2 became article 37. The concepts of partnership and complementarity were abandoned and the article provided that: "The state shall guarantee the provision of equal opportunities between men and women in the bearing of various responsibilities. The state shall guarantee the elimination of all forms of violence against women." Draft 2 bis, presented by the constituent committees on 10 April and 1 July 2013, uses the same wording for article 7 and article 37, which became article 41, using the same content but changing the expression "all forms of violence" to "violence against women".

²Three drafts (no. 1 of 13 August 2012, no. 2 of 14 December 2012, no. 2 bis of the constituent committees (10 April/1st July 2013), no. 3 of 22 April 2013 of the constitution) preceded the final draft (1 June 2013); see the comparative table of the different versions of the Tunisian constitution, drawn up by the Carter Centre: <http://www.chawki.gaddes.org/6.html>

B. From equality among all citizens to equality among male and female citizens

Article 21 of the Constitution guarantees equality between male and female citizens under these terms: "All citizens, male and female, have equal rights and duties. They are equal before the law without any discrimination. The state guarantees freedoms and individual and collective rights to all citizens. It provides all citizens the rights for a dignified life."

In the first draft (13 August 2012), it was not equality between men and women that was guaranteed, but equality between all citizens, in articles 6.1 (general principles) and 22.2 (rights and freedoms). These articles respectively provided that "all citizens shall have equal rights and obligations and shall be equal before the law" and that "citizens shall, before the law, be equal in rights and obligations without any discrimination of any form". Aside from the fact that it only referred to equality before the law, this latter article did not specify the various discriminations - in particular on the basis of gender - that are banned.

It was only from the second draft of the Constitution onward that discrimination between the sexes was prohibited, by the specification that it is male and female citizens who are equal in rights and obligations and the new wording includes equality in rights and obligations, as well as equality before the law, still with no discrimination of any form. However, this equality was only set out in the general principles chapter. It was only in the final draft of the Constitution (1 June 2013) that this equality was included in the chapter regarding rights and freedoms.

The third draft of 22 April 2013 brings together the content of the previous articles (7 and 41) in a single article, article 42, while using the wording "all forms of violence against women".

The draft Constitution of 1 June 2013 uses the same wording as the former article (42), which became article 45, but the expression adopted was "violence against women" and not "all forms of violence". The final text became article 46.

Women's rights became accrued rights and the State committed not only to protecting and supporting them, but also improving them. Parity was added here, after having added that the guarantee of equality of opportunities in the bearing of various responsibilities applies in all areas. Finally, the guarantee to fight against violence towards women was reinforced by the State's commitment to take the necessary measures in order to eradicate violence against women.

A real improvement of the guarantee of women's rights can be observed between the first drafts, final draft and the adopted version. This can be seen first of all in the inclusion of these rights in book 2 relating to rights and freedoms, after the first two drafts as well as draft 2 bis divided these rights between chapter 2 and chapter 1 relating to the general principles. Including these rights in the chapter for rights and freedoms actually gives more strength to these rights, which become enforceable and no longer simple principles that the legislator must respect. As well as adding the Constitutionalisation of parity. Finally, the State's obligation to develop women's rights, in addition to protecting and supporting them,

II. Accrued rights to equality in the enjoyment and exercise of all human rights

The question that is raised upon reading article 46 is whether equality is granted solely with regard to the rights mentioned (A) or if it can be extended to rights that are not expressly mentioned (B).

A. The rights mentioned

There is no doubt that political rights as well as the right to security are accrued rights. On the one hand since they are guaranteed in other Constitutional provisions, and on the other hand because they are reinforced in article 46 which adds to parity (1) and undertaking the necessary measures in order to eradicate violence against women (2).

1. *Political rights: parity*

The participation of women in political life is a right that was not the subject of real controversy during the creation of the Constitution. The fact that women have the right to vote and the right to be elected was not disputed. Although, for the first time, Tunisian women had access to a constituent assembly, which created the Constitution of 27 January 2014, they have had the right to vote and eligibility for more than half a century (1957). This right was first enforced in the Constitution of 27 January 2014, by the possibility for women to access the highest office, the Presidency of the Republic, which was not permitted under the previous Constitution of 1959. This right to political participation leaves no doubt, especially as it refers to male and female citizen, each time that equality of rights and obligations is granted, whether it is in the introduction or in the actual body of the Constitution, since political rights are attached to citizenship.

Article 46 therefore certainly refers to political rights, since it supports these by establishing parity, which is considered an affirmative action that allows women to effectively exercise these rights. Parity gave rise to debate and controversy, both during the creation of the Constitution and during the voting of the electoral laws. For some, this affirmative action, is deemed ineffective, as it is a sign of failing to recognise equality between men and women. The argument is that as long as women are capable then they can effectively participate in the political life. Such a point of view was ultimately rejected on the grounds that women are inferior to in particular in private and family domain and the violence committed against them in public and private life are the main cause of their inactivity and lack of political participation. Only affirmative action can address the lag of exercise of citizenship and eligibility rights. Although the conditions for quotas were discussed at the High Court in order to achieve the objectives of the Revolution, political reform and the democratic transition³ during the vote on the electoral law by the National Constituent Assembly (ANC) which ultimately reached consensus of alternate vertical parity⁴, as the only parity that was discussed during the vote on the Constitution. The Constitutionalisation of parity prompted heated debates within the ANC, with certain members even threatening not to approve the Constitution if it was included therein. Eventually, the concept was included, since experience demonstrated that without parity, women would not have been able to sit on the ANC, or at least fewer would have, and that even with parity in the electoral lists, there are still fewer women than men.

Vertical, but also horizontal parity (the same number of men and women at the top of lists)? This question was raised in particular during the creation of the electoral law of the Assembly of Representatives of the People (ARP)⁵. Here again, it sparked heated debates and since horizontal parity was not selected,⁶ an appeal⁷ was launched before the Provisional Court for the Constitutional

³ Body created by the Statutory Order n°2011-6 of 18/02/2011, JORT [Official Journal of the Republic of Tunisia] of 1 March 2011, n°13.

⁴ Statutory order n°2011-35 of 10 May 2011 relating to the election of the national constituent assembly, JORT n°33 p. 647.

⁵ Main law n°16 of 26 May 2014 relating to elections and referendums http://www.chawki.gaddes.org/resources/code_electoral_bilingue.pdf

⁶⁶ Article 24 of the law of 26 May 2014 provides that: "Candidacy is presented on the basis of the principle of parity between men and women and the rule of alternation between them on the list. Any list that does not respect this principle is rejected, except in the case of an odd number of seats, reserved for a few constituencies"

Review of Laws, which refused to consider that the inclusion of only horizontal parity was contrary to the Constitution⁸. This body indeed considers that the State's obligation is simply an obligation of means and does not necessarily require equal assemblies with the same number of men and women, based, in particular, on the use of the verb "guarantee" used respectively in articles 46 and 34 of the Constitution. This decision may have been further criticised since, due to its inclusion in the electoral law of the ANC and then in the Constitution itself, where parity would become an accrued right that the State not only protects, but also supports and develops. However, this development was not carried out since horizontal parity was not selected. Without allowing that we cannot consider the Constitutional provisions as simple recommendations, simple obligations of means, regardless of the terms used. The Constitution applies to government authorities and to citizens; it is not a simple set of recommendations.

2. The right to security: Eradicating violence against women

There is no doubt that this right is granted to women as the right to life (Article 22), the right to protection of their physical and moral integrity through the ban of all forms of moral and physical torture (article 23), just as they benefit from right to litigation, in particular in the case of infringement of their right to security (article 105). Article 46 supports this right to security with the recognition of any inequality in the actual enjoyment of the right. By providing that the State must take the necessary measures to eradicate violence against women, the constituent recognises that women suffer from more violence than men, a fact that is supported by worldwide surveys and relevant international conventions⁹.

Although the wording adopted only refers to "violence" against women, the initial drafts referred to "all forms of violence". This change of wording should not have an impact on the forms of violence to eradicate and should not authorise that only certain forms of violence should be eradicated, with exclusion of others. The national and international report show that women suffer from violence more than men. On the other hand, the basic reason for this violence lies in the legal and de facto discrimination women still suffer from. Finally, it is also established that women suffer from all forms of violence (physical, sexual, moral and economic), in particular in private and family domain, where this violence generally has several forms, and types. Another characteristic of this violence is that the perpetrator benefits from a high degree of impunity.

Therefore, we cannot fight violence against without addressing all its forms; as the wording of the first version "all forms of violence" should not result in addressing only one form of violence. Violence against women must cover all forms of violence, whether it is committed in the public or in the private or family sphere, whether it is physical, moral, sexual or economic, and whether the perpetrator is a public or private employee.

The relevant international instruments recommend taking the necessary measures to eradicate it, i.e. fulfilling a care duty that consists of investigating violence, preventing it, supporting the victims, granting them compensation and ending the impunity which the perpetrators benefit from.

⁷⁷ See the text of the appeal presented by the members of the opposition: <http://www.chawki.gaddes.org/resources/recours+IPCCL.pdf>

⁸ Decision n°2014/02, JORT 23 May 2014, n°041, also available at: http://www.chawki.gaddes.org/resources/DEC_IPCCL.pdf

⁹ See the handbook for legislation on violence against women, UN Women: <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20VAW%20%28French%29.pdf>

Preventing it requires acting on the causes of violence and therefore eliminating all discrimination that still exists in laws and, in particular, in the personal status code, especially since the investigations and relevant international instruments demonstrate that it is in the family domain where women suffer from the most forms of violence. The reason for this is that discrimination still embedded in this domain, since the family remains a place of power. Prevention also requires educating about gender equality. Education based on "the Arab-Muslim identity" (article 39) must not teach enforcing the sacredness of inferiority or complementarity of men and women, but to emphasize equality. This cannot be done through education that uses a literal interpretation of Sharia law, but through use of reformist perspective as the only way that allows "diffusion of the culture of human rights" (article 39) in accordance with the Arab and Muslim identity. This therefore must not be able to legitimise any form of violence against women.

Supporting victims through the guarantee of their right to health, in particular to free care, also constitutes a necessary measure, in the same way as compensation for the injured. Finally, impunity must be eradicated, by taking legal action against and punishing the perpetrators of acts of violence. Investigating violence as a phenomenon enables better understanding of the prevalence of violence, as well as evaluating the effectiveness of the undertaken measures..

B. The rights not clearly mentioned

Article 46 does not mention economic, social, cultural and environmental rights (1), or civil and family rights (2), but one can consider that these are accrued rights that the State must protect, support and improve.

1. Economic, social, cultural and environmental rights

The right to work is a right guaranteed by article 40 of the Constitution, which specifies that it is "a right for every citizen, male and female" and that "all citizens, males and females, shall have the right to decent working conditions and to fair wage". Although, admittedly, the addition of the term "female" was only made in the final draft, it remains a right for women that has never been contested, nor been the subject of debate within the constituent assembly. The guarantee of the right to work is, a condition to presuming public office and activities that are paid.

The same applies for social rights, such as the right to health guaranteed by article 38 of the Constitution, which perceives this as being a "right for every human being", without any modification since the first draft of the Constitution. Women also have the right to education, guaranteed by article 39. In the first draft, this right was guaranteed "to all". Therefore, it was never claimed that women were deprived of this right.

Cultural rights, the right to culture, the right to innovation and intellectual property are also guaranteed, in articles 41 and 42 of the Constitution. They were specifically mentioned in the first drafts as guaranteed to all citizens.

Finally, it was never considered to deprive women of environmental rights, which, is almost impossible. This right, guaranteed in article 45, cannot apply to some citizens without others as they live in the same environment, which must be "healthy and balanced" and with no signs of "pollution"

2. Civil and family rights

Equality in civil and family rights is certainly the point that was mostly subject to reluctance, if not controversy. In this respect, it is not clear if the Constitution explicitly grants these rights, nor refers to the personal status code, and prevents any reform of the personal status code without referring to a referendum (article 82).

However, unlike political, economic, social and cultural laws, for which equality was granted in the previous texts (Constitution of 1959, labour code, civil service law...), there is no equality in personal status code and therefore in civil and family rights. The family remains hierarchical and authoritarian, placed under the authority of the father and the husband. Incidentally, accrued rights and more specifically, "rights accrued in the personal status code" are often mentioned with regards to the Code of Personal Status. The integration of the concept of accrued rights in article 46 is therefore quite certainly a reference to the personal status code. The result of a compromise, between those who were in favour of the elimination of all discrimination that remained, and those in favour of the status quo, in particular concerning inequality with regard to inheritance, article 46 maintained the concept of accrued rights.

The resistance was clear from the start, in the provisions relating to family in the first drafts of the Constitution, but also through the place initially reserved for religion.

The first draft (13 August 2012) contained two provisions relating to family. The first featured in the chapter regarding rights and freedoms and provided that the State "protect family structures and maintain the coherence thereof". The second was contained in the chapter relating to rights and freedoms. Article 21.2 provided that: "The state shall guarantee the rights of families, it being a natural component of society. The state shall seek to care for families and their stability and shall enable families to undertake their respective roles in an environment of equality between spouses. The state shall seek to furnish favourable circumstances for marriage, shall guarantee a suitable place of residence and a minimum level of income to maintain the dignity of family members."

There is only equality between men and women in marriage (equality of spouses), but this is an equality with complementarity, as specified by article 28.2 of the same draft. These last two provisions then disappeared from other drafts, which only maintained the provision that features in the chapter of general principles, with a slight modification concerning the preservation of stability that was removed from the final draft and which became article 7 in the adopted text: "The family is the nucleus of society and the state shall protect it."

The place of religion is another element of resistance to non-discrimination in civil and family rights. Personal status is the only branch of law in which Sharia law is considered not only as a material source of inspiration for the legislator, but also, by some case law, as a formal source to which the interpreter must refer in order to interpret any shortcomings or ambiguity. It is also with regard to civil and family law that Tunisia issued special reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW - CEDEF), which have now been lifted¹⁰. However, the CEDAW-CEDEF remains the only international convention for which Tunisia issued and maintained a general declaration that referred to religion and, more specifically, the first article of the Constitution¹¹.

¹⁰ Statutory order n°103-2011 of 24 October 2011, JORT n°82 of 28 November 2011.

¹¹ It is the expression of the first chapter that is used in the text in French, but only the Arabic version refers to the first article of the constitution - unchanged in the new constitutions - as valid; See, with regard to this, "The lifting of reservations to the CEDAW, but not the general declaration": <http://www.unfpa-tunisie.org/images/stories/pdfs/cedaw%20français.pdf>

After an agreement was reached between the political forces not to include Sharia law as a source of legislation, and to keep the first article of the Constitution of 1959 unchanged, the first draft does, however, make Islam the religion of the State. Article 3.9 provided that: "No amendment to the Constitution may be prejudice to the republican nature of the regime; the civil capacity of the State; Islam, being the religion of the state; Arabic being the official language; the human rights guaranteed under this Constitution or an increase of the number of presidential terms". Complementarity was included in this same draft. By making Islam the religion of the State, Sharia law is made a formal source of the law and the personal status code in particular. Any reform must be in compliance with the above.

In the second draft, Islam was maintained as the religion of the State. However, the place of religion changed: while in the first draft, this value came after that of the republican regime and the civil State, it moved to first place in article 148. This article gives a hierarchical order to the different supra-Constitutional values, by providing that: "No amendment to the Constitution may be prejudice to:

- Islam, being the religion of the state
- The Arabic language, being the official language
- The republican regime
- The civil state
- Human rights gains and freedoms guaranteed under this Constitution
- The number of presidential terms, their number not being subject to increase."

The complementarity added in this second draft and the promotion of Islam as the religion of the State rules out any possibility of reforming the personal status code to eliminate the remaining discrimination. By making Sharia law a principle source of legislation in this way, all discrimination that remained in civil and family law may be maintained.

The content of article 148 was maintained in the drafts that followed and in the final draft, in what became article 141, with a slight modification. The civil State proclaimed in article 2 of the draft joins the republican regime in third place, and therefore after Islam as the religion of the State and Arabic as the official language.

Islam as the religion of the State disappeared from the Constitution at the time of its adoption but, notably, the provision was added to articles 1 and 2 that they cannot be revised. They both have a super or supra Constitutional position. The same applies to the rights and freedoms provided in the Constitution, already in the draft Constitution (with a different, less restrictive wording), and then in the adopted text. This gives the same Constitutional value to these rights and freedoms and forbids arbitrary limitations thereof. Indeed, article 49 provides that: "limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic State and with the aim of protecting the rights of others, or based on the requirements of public health or public morals, and provided there is proportionality between these restrictions and the objective sought."

What can we learn from this development? On the one hand, since Islam is not the religion of the State, Sharia law does not constitute the source of the legislation. On the other hand, it is not the principle source because religion is not valued higher than the civil State, nor the rights and freedoms granted by the Constitution. It could be considered that religion cannot be invoked, either to limit equality in civil and family rights, or to oppose the full granting thereof by the elimination of all forms of discrimination in marriage and family.

However, religion must be invoked and this must be reconciled with women's rights and non-discrimination by opting for a less literal interpretation of Sharia law, more in keeping with its spirit, in accordance with the interpretation by the Tunisian reformist movement, cited in the introduction of the Constitution.

One can therefore say that the accrued rights also include the right to non-discrimination in civil and family rights. Moreover, one can set forth that human rights that have the same Constitutional ranking as religion are indivisible - one right cannot be granted without the other. And if a right is not granted, the other rights cannot effectively be exercised.

Maintaining women in a position of inferiority in the private and family domain prevents them from effectively exercising their political rights, but also their economic, social and cultural rights. With these arguments, one can protest that equality in the Constitution only concerns women in their capacity as citizens (introduction and article 21), that the Constitution only explicitly mentions the rights related to citizenship (political rights, economic rights (right to work in particular) and that article 49 only applies to the rights and freedoms granted by the Constitution and therefore clearly mentioned in the Constitution. We can also add that article 46 only guarantees equal opportunities for responsibilities and therefore in obligations and not rights, as opposed to equality in all family rights.

However, such interpretation is inadmissible, for the reasons that we just set out, that is to say the indivisibility of human rights and their inter-dependency, but also due to the State's commitment to taking the necessary measures in order to eradicate violence against women. As we have seen, violence is fed by discrimination and, in order to eradicate violence in the private and family domain, the rates of prevalence of which is the highest according to the national investigation published in 2011, it must be considered that women have an accrued right to equality, including with regard to civil and family rights.