

# Women's rights in Tunisia

## The remaining legal inequalities

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### SUMMARY

Even after the 2011 uprising and a democratic transition, Tunisia’s modern-day legal system is still rife with gender-based inequalities. Despite benefitting from a series of relatively progressive laws passed in the mid-twentieth century, a legal discrimination is still noticeable. Inequality is mainly related to various civil, political and economic rights, such as women’s rights in marriage, their ability to inherit wealth and transmit their nationality as well as their protection from sexual violence. There is a clear need to center on amending specific paragraphs of Tunisia’s penal code and Code of Personal Status to better reflect the constitutionally enshrined principle of gender equality.

### BACKGROUND

When dealing with women’s rights, Tunisia has always stood out from other countries and contexts of the Middle East and North Africa due to its progressive Code of Personal Status (CPS) laws, promulgated in 1957 under President Habib Bourguiba. Bourguiba was aiming to change the Tunisian society by changing its first cell: the family. The Code made major changes in the field of marriage and, by extension, the field of the family, one of its main contributions being the prohibition of polygamy in a Muslim society. This even applied to Muslim foreigners wanting to marry Tunisian women, who henceforth had to provide a certificate of celibacy from their national country authorities for a wedding in Tunisia. The code also introduced a minimum age for marriage and a requirement of clear consent by the wife. Moreover, the code abolished all existing forms of marriage by exclusively recognizing civil marriage.<sup>1</sup>

In matters of divorce, the code introduced several novelties, granting Tunisian women more rights

than elsewhere in the Muslim world. First, the code instituted judicial divorce as the only method of dissolution of marriage. Thus, the Tunisian husband was deprived of the discretion granted to him by repudiation in Islamic law, a privilege he continues to enjoy in most Muslim countries. In addition to divorce by mutual consent and for damage, the Code also recognized the right of Tunisian women to divorce unilaterally. Known as *caprice divorce*, this allows women to divorce without special justification while keeping the right to alimony (if she maintains custody over her children) as well as a divorce rent (i.e. the financial support a husband must provide to his former wife after divorce). The CPS also introduced new rules in matters of succession, allowing a daughter to be the sole heir of her parents contrary to Islamic law, which only allows her to get a part of the inheritance and give the rest to the male relatives of her father.

Advances in women’s rights are not restricted to the favorable provisions of the Code of Personal Status; other legal provisions have built a corpus favorable to women, their empowerment and mastery of their bodies. Law No. 65-24, passed on 1 July 1965, first authorized abortion under specific conditions (such as a maximum pregnancy length of three months and a minimum number of surviving children, the latter condition was lifted in 1973). Since the first decade of independence, Tunisia has also implemented a family planning program, enabling women to access contraceptive techniques and thus putting them in charge of their fertility. The Tunisian Nationality Code was a pioneer document in recognizing a matrilineal right to Tunisian nationality for children born to a foreign or unknown father.

### ASSESSMENT

In spite of all these favorable laws, Tunisian women still suffer from several gender-based inequalities. These inequalities are visible on the levels of civil rights and the right to physical safety.

#### Civil rights

Even though gender equality was enshrined in the Tunisian constitution of 1959 (Article 6) and in the new one of 2014 (Article 21), and even though Tunisia lifted all its reservations to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Code of Personal Status and the Tunisian Nationality Code still contain the legal inequalities dating from their promul-

<sup>1</sup> In Tunisia, prior to the Code of Personal Status, family law was adjudicated in keeping with the *millet* system used in all of the Ottoman Empire, whereby religion determined the applicable laws for marriage, divorce etc. Christians used to marry in the Church or according to the French civil marriage, while Muslims and Jews used to have their own religious marriages.

gation in 1957 and 1963, often reflecting inequalities proper to Islamic law.

Regarding inheritance, women still receive only half of what their brother gets from the parents. The same inequality is visible between widows and widowers. Regarding marriage, inequality persists as some restrictions on the freedom of choice of spouse only concern women. Even though the law makes no demands on the religion of the spouse (the marriage conditions are the same for men and women), an administrative circular from 1973 forbids the celebration of a wedding in Tunisia if the *husband* is a non-Muslim. Therefore, a conversion certificate is required from the husband. However, the problem does not arise for the non-Muslim wife of a Tunisian man. Meanwhile, Tunisian women who marry a non-Muslim abroad are also discriminated, as they will always be considered single by the Tunisian state. The problem comes from a misinterpretation of Article 5 of the CPS in its Arabic version. The article provides that “the two future spouses do not have to be in one of the cases of legal impediments.” The Arabic version uses “*sharii*” for ‘legal,’ which can also mean ‘in conformity with Sharia law.’ As Sharia law does not allow a Muslim woman to marry a non-Muslim man, this leads to the assumption that such unions must not be celebrated in Tunisia. Islam being the official state religion, as ambiguously stated in the constitution, such a union still requires the husband’s conversion to Islam.

Another shortcoming of the CPS concerns underage marriages. Even though the Code of Personal Status stipulates eighteen years as the minimum age for marriage for both genders, Articles 5 and 6 allow marriages under this age, stating that “below this age, the marriage may be contracted only under a special permission from the judge granted only for serious reasons and in the interest of both future spouses” and that “the marriage of a minor is subject to the consent of his/her guardian and his/her mother.” Tunisian judges generally allow marriage below the legal age in cases of pregnant minors and in application of Article 227 of the Tunisian Penal Code which allows a man who had sex with a minor girl over the age of thirteen without physical coercion to marry his victim and at the same time terminate any criminal proceedings.<sup>2</sup>

We can also notice discrimination relating to the *body* of a married woman. Her body seems to “belong” to the husband, since unlike in many other countries, Tunisian law does not recognize marital rape. Article 13 of the CPS provides that “The husband cannot, if he has not paid the dowry, force the woman to the consummation of marriage;” this would mean that once the dowry is paid, the husband may force his wife to sexual intercourse. The criminalization of marital rape seems difficult to integrate into a legal and social system conditioned not to recognize the possibility of such violence within marriage.

The CPS is not the only code containing gender-based forms of discrimination. They can also be found in the Code of Nationality. Though reformed in 2010 to allow both men and women to transmit their nationality to their children (Article 6), it appears that this equality only applies abroad. For children born in Tunisia, Tunisian fathers and mothers do not have the same rights, as Article 7 provides that a child born in Tunisia is Tunisian “if the child’s father and grandfather were also born there.” No reference to the maternal lineage is mentioned in the article, making the equality of Article 6 only applicable for children born abroad. The discrimination is also evident when it comes to Tunisians transmitting their nationality to their spouses: The husband of a Tunisian woman faces significant hurdles compared to the wife of a Tunisian man. According to the Code of Nationality, the wife of a Tunisian man can acquire the Tunisian nationality for the benefit of law by a simple declaration (Article 13) while the husband of a Tunisian woman needs to be naturalized (Article 21), which is a different procedure. To be naturalized, the code requires, among other conditions, that the couple’s official residence is in the country at the time of application (Article 39). The husband also has also to prove knowledge of Arabic, whereas this condition is not applicable for the wife of a Tunisian man (Article 23) and once naturalized, he is deprived of certain political rights and access to the Tunisian job market for five years according to Article 26 of the Code.

The same discriminatory regulations are found in the decree 1968-198 regulating the entry and stay of foreigners in Tunisia: Dealing with those who can obtain a permanent residence permit, Article 18 of the decree only mentions the wives of Tunisians.<sup>3</sup>

2 Tunisian laws only apply the principle of no possible child consent to children under 13 years old.

3 Article 18 “Ordinary resident permit may be given to 1) Foreigners residing in Tunisia in temporary residence for five years without interruption; 2) To foreign women married to Tunisians; 3) Foreign parents of Tunisian children; 4) To foreigners who have rendered valuable services to Tunisia.”

## The right to safety

Granted by the new constitution in its Article 23, the right to protection of physical integrity seems to be granted for man more than woman. In spite of their constitutional rights, women are submitted to more violence than men. According to the report on gender-based violence made by the Center of Research, Study, Documentation and Information on Women (CREDIF), 53.5% of Tunisian women say they have suffered some form of violence in a public space during the last four years (2011-2015) and 41.2% say they have suffered some form of physical violence in public space in this period.<sup>4</sup> The same report highlighted the prevalence of violence against women in the private space. These conditions are in part due to the inadequacy of the legal framework.

Regarding sexual violence in public space, the penal code still distinguishes between rape (Article 227) and molestation (Article 228). Tunisia’s legal definition of rape is awkward and incomplete: Rape is defined as a non-consensual vaginal penetration by the penis of a man. This seems to imply that only women can be raped, discriminating against other possible victims of rape. The code also offers a very limited perception of rape, as in its wide definition rape includes all forms of penetration. Moreover, the code does not consider nonviolent nonconsensual sexual acts to fall into the category of rape. The code also considers that consent is by definition inexistent when the victim is younger than thirteen years old. This implies that women are able to consent or to refuse a sexual act after this age. The inadequacy of this definition contributes to a lack of legal protection for women’s bodies. In addition, since rape is punishable by death penalty or life imprisonment, judges tend to recur to molestation as a ground more often than rape in an effort to lighten the sentence. The excessively narrow definition of rape contributes to the increase of sexual violence against women. In addition, allowing the rapist to stop the procedure by marrying the victim in cases of rape without physical coercion is itself violence against women.

Regarding sexual harassment against women, the penal code includes it in the section dedicated to indecency and punishes harassment by one year imprisonment and a fine of three thousands dinars (Article 226 ter). Despite the code provision, sexual harassment suffers from the difficulty of proof. The very definition of harassment requires proving

a repetitive action. Therefore isolated acts of sexual harassment cannot be judged. Moreover, women risk having to pay financial reparations if their charges are deemed a calumnious denunciation or if the case is rejected for lack of evidence.

Regarding sexual violence in the private space, marital rape, as mentioned above, is not covered by the Tunisian legal system despite the fact that women often suffer violence at the hands of their spouses. If the perpetrator is the victim’s spouse, the penal code considers this element as an aggravating circumstance in cases of physical assault, but not for murder or mutilation. Another crucial aspect is the fact that the code limits the definition of spouse to the husband even though the Tunisian context knows other forms of partnership (boyfriend, fiancé, etc.)

## RECOMMENDATIONS

Tunisia has to improve its legal system in accordance with international standards and its international commitments, particularly the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). After the 2011 uprising, Tunisia lifted all reservations on the convention, but no legal reform was made to adapt the national legal system accordingly. Tunisia should generalize and strengthen parity. As gender equality is a constitutional right, the soon to be constitutional court will certainly play a major role in fighting discrimination. In particular, legal reforms must focus on:

- Abolishment of the quality of chief of family of the husband in the CPS.
- Recognition of the maternal family lineage as equal to the father family lineage.
- Revocation of Article 13 of the CPS which indirectly permits marital rape.
- Implementation of inheritance equality among siblings and between widowers and widows.
- Revocation of the circular of the Ministry of Justice prohibiting marriages of a Tunisian Muslim woman with a non-Muslim man.
- Recognition of the maternal line in transmitting nationality to children born in Tunisia.
- Recognition of the right of Tunisian women to pass on their nationality to their foreign spouse.

<sup>4</sup> Slim Kallel (et al.), *La violence fondée sur le genre dans l’espace public en Tunisie*, CREDIF, Tunis 2016.

ses under the same conditions as foreign wives of Tunisians men.

- Recognition of a right of residence for foreign husbands of Tunisian women under the same conditions as for wives of Tunisia men.
- Revocation of the distinction between rape and molestation in the penal code.
- Revocation of Article 227ff. of the Penal Code which allows the rapist to end criminal procedures by marrying his victim.
- Implementation of equality and definition of the age of consent and the possible consent to sexual activity for girls and boys at eighteen years.
- Incorporation of the concept of moral restraint in addition to physical coercion in matters of sexual violence, as well as expansion of the definition of harassment to cover even a single serious occurrence.
- Revocation of Article 226 quarter related to compensation in case of calumnious declaration or dismissal of the case for lack of evidence.
- Integration of a larger definition of partner (beyond spouse).
- Consideration as an aggravating circumstance for murder, mutilation and for all types of assaults when the partner is the perpetrator, even in cases of harassment or sexual violence.

## CONCLUSION

Despite many advances set down in Tunisia's legal code and the reinvigorated discussion surrounding the situation and rights of women following the 2011 revolution, there are persisting sources of gender inequality in the country's body of laws. Among other, these concern women's rights in marriage, their ability to inherit wealth and determine their children's nationality as well as their protection from sexual violence. The measures suggested in this policy paper to reduce law-based inequities between men and women will not be a cure-all: In addition to the legal inequalities outlined above, other forms of gender discrimination are still entrenched in Tunisia, for instance regarding parental duties and labor rights. There is no equal sharing of parental duties and no recognition of the work done by women at home. Housekeeping and parenting are perceived as exclusively feminine activities. Lastly, it must be noted that all these discriminations worsen once women are marginalized and discriminated in other political, economic or social dimensions. Rural women are more discriminated than the urban ones as are women from ethnic, sexual or religious minorities, such as black, LGBT, Jewish and atheist women. Thus, adopting the policy measures recommended above will be an important, but only a first step towards ensuring gender equality in a democratic Tunisia.

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