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Demanding Equal Inheritance Rights For Women: Tension Among Shari'a and Tunisia's New Constitution 2014

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Abstract

President Essebsi (2017) approved the law of gender equality in inheritance in Tunisia. Instead of gaining public appreciation of Islam, this achievement was seen as contrary to sharia. This research seeks to address whether or not there could be a common ground between applying sharia and gender equality through an examination of sharia regarding inheritance, and, finally, an attempt to show the relationship between sharia and the Tunisia's constitution of 2014 in responding to social change. The paper argues that in spite of the constitution's progressive language, women still face legal discrimination in their ability to inherit because of sharia. A good abstract contains the problem statement and purpose, how the research is carried out (the method), the results, and concludes with a brief statement of conclusions. In the abstract keywords are also always included. Keywords are used to index an article and are the label of an article.

Keywords: *gender equality, inheritance, Tunisia, sharia, constitution*

Introduction

Citizenship is multiple and various. It can be an identity; a set of rights, privileges, and duties; an elevated and exclusionary political status; a relationship between individuals and their states; a set of practices that can unify—or divide—the members of a political community; and an ideal of political agency. It can be all these things and more.

In recent decades, citizenship has attracted multidisciplinary attention and analysis. Changing political boundaries, resurgent nationalisms, ethnic hostilities, increased migrations, and the global realignment of military power are among the many recent developments that have destabilized citizenship and impelled states and peoples to reassess longstanding citizenship practices (Beiner 1995). Western European countries have admitted large influxes of immigrants from their respective former colonies. Western countries generally have been engaged for some time now with the presence of non-Western cultural traditions, languages, and identities (Honig 2001; Kymlicka and Norman 2000). Some of those developments followed the collapse of the Soviet Union and the apparent triumph of liberal democracy.

Some followed the end of Western colonialism and the frequent repudiation of liberal democracy.

The economic sphere has been equally instrumental in stimulating interest in citizenship. Western capitalism has become ever more aggressively global, as information technology has encircled the earth, the transnational movement of capital has soared, and multinational corporations have accelerated their searches for cheaper and cheaper labor markets (Held 1995). These trends, too, have destabilized identities, language, boundaries, and traditions. All of these developments have directed both practical and theoretical attention to the nature of citizenship and to what it means to be, as a full member of a community.

At the same time that the practices, conditions, and meanings of citizenship were coming under these pressures in many parts of the world, gender was also undergoing intense scrutiny. The identities, categories, boundaries, and traditions that comprise gender practices have also shifted, attracting their own practical engagement and theoretical attention. Transformations in citizenship and those in gender are mutually relevant in a variety of ways. This is no surprise. Citizenship is one of many sets of social practices in which differentiation by gender is ancient and stubbornly persistent.

Throughout most of human history and in all regions of the globe, women of all classes, races, ethnicities, and religions were, and often continue to be, denied state citizenship of even the lowest rank. So exclusively male has this status been for nearly all of human history that it is a singular development of women's movements in the twentieth century to have ended this exclusion in many places. Substantial numbers of women have made enormous political headway in the past century. In many states, however, women do not yet have a citizenship status equal to that of their male counterparts. In any given state, still today, women and men are likely to differ in the political rights and privileges of citizenship that affect them, and differ in ways that are linked systematically to gender categories as well as categories such as race and class.

Issues of women and citizenship, however, are not merely about the deprivation of political rights to women. Also important is the gendered nature of the practices and contexts of political citizenship itself. The public and political realms in which citizenship is paradigmatically conceptualized and practiced are realms based largely on modes of living as well as attributes that are stereotypically male—the role of wage-earner, for example. This means that even when the rights and privileges of political citizenship are made available to women, practical and conceptual obstacles may make it difficult for women to avail themselves fully of these options. How we understand women (and men) as citizens is, in turn, dependent on these differentiated political elaborations.

At the same time, citizenship is not confined to the public or political spheres. The citizenship practices of the public and political spheres are themselves related to conditions in other social spheres, such as those of family and civil society.

Gender is generally salient to the meanings and practices of citizenship in these other social realms as well. These nonstate realms of citizenship practice provide options for women's political agency that may circumvent the restrictions of the political sphere, for example, agency based on women's traditional roles as nurturers. If citizenship is about full membership in one's community, then these additional realms of culture and society are necessary contexts and conditions for its practice. Gender and citizenship thus intersect and engage each other in a variety of ways, often through the mediation of other

social institutions. The essays in this collection explore a number of these various political and cultural dimensions of citizenship and their relevance to women and gender.

These essays were presented at a conference on "Women and Citizenship" at Washington University in St. Louis, Missouri, in April 2002 (see the acknowledgments at the end of this introduction). Some of these essays take account of contexts and practices of citizenship in the United States while the other essays focus on contexts and practices of citizenship elsewhere. Together, these studies survey a variety of ways in which citizenship—full membership in the community—has been politically and culturally engendered, for better and worse, yet is open to transformation through women's agency.

Citizenship, Government, and Law

Iris Marion Young's essay, "The Logic of Masculinist Protection: Reflections on the Current Security State," draws attention to practices of citizenship that can arise under a government at war. However, in contrast to literature that explains war in terms of stereotypically masculine tendencies toward violence (see the overview in Goldstein 2001), Young instead explores the logic of the masculine role of protector. A government acting in accord with this role protects its members in an overly aggressive fashion from external dangers as well as from internal dissension. This role, which Young calls the "security regime," threatens to undermine democratic practice. A state acting as a security regime expects to be rewarded by its population with uncritical obedience and submissiveness. A security regime plays a role toward its citizens that is analogous to that played by a protective family patriarch toward the women and children of his family. Young argues that adult citizens do not accept this sort of political relationship with their government. Even from a protective government, what adult citizens want instead are relationships that respect their autonomy and equality.

The question of whether women should be formally included in representative numbers in their respective legislative assemblies has been a part of the citizenship debates for some time now. In "French Universalism in the Nineties," Joan W. Scott brings out the complex nature of the processes that enacted this requirement in France in 2000. The *parité* law, enacted that year, calls for equal numbers of women and men to serve in various elected assemblies at all levels of government. The law challenged a theory of representation that was attributed to the French Revolution and that took the abstract individual to be the unit of citizenship. Although this notion of the individual was meant to be neutral (without religious, social, or economic identity), in fact it was consistently taken to be masculine. Even when women were granted the vote, the typical representative chosen for political office was a man.

The *parité* movement sought to rectify discrimination against women in political office by insisting that the individual also be abstracted from any association with sex. In order to do this, they drew a distinction between anatomical duality (an abstract notion) and sexual difference (an attribution of meaning to sexed bodies). The abstract individual, they argued, came in two sexes, but this had nothing to do with cultural ideas about gender. In the course of the debates about *parité* (and they were many and fierce), the original distinction between anatomical duality and sexual difference was lost. The law that passed seemed to implement an essentialist vision, when in fact that was not the intention of its first supporters. The strategy of "sexing" the abstract individual was, thus, both fruitful

and dangerous. Scott believes this tension in the support for *parité* is an unresolvable feature of the nature of representation in liberal or, like France, liberal republican states.

Sandra Bartky, in "Battered Women, Intimidation, and the Law," highlights features of legal institutions that obstruct women's attempts to use the law to reduce domestic violence. A large literature has dealt with domestic violence for several decades. Bartky's analysis brings out some less remarked dimensions of the law's resistance to women's use of it to end domestic battery. One of these dimensions is the material embodiment of law; law is practiced in buildings of intimidating size and scale. In addition, law is practiced in forms of language that are inaccessible to ordinary women. Furthermore, judges and lawyers may abuse their power, intimidate the women who seek their help, and collude with each other in virtue of gender or class connections that the women do not share. Insofar as women are unable to gain redress from the legal system for the domestic violence they suffer, they fall outside the citizenship protection of the Social Contract, argues Bartky, and are effectively returned to the state of nature.

Citizenship is exercised in a variety of domains, not simply those of government and law. Civil society is a particularly important sphere for practices of citizenship. The practices of citizenship available to women in the realms of culture and civil society interweave in important ways with those of the political sphere.

Method

This article attempts to delineate the arguments on the law for equal inheritance presented in public to different audiences through media portals, including television and social media. Sixty-three arguments were extracted from forty-one randomly chosen media pieces from YouTube, Facebook, television channels, and other news portals online, from which forty were against the law of equal inheritance, two entries were neutral on the law, and twenty-one entries were for equal inheritance. The number of entries was reached through covering the major statements issued by party representatives, civil society, religious scholars, activists, academics, and protestors in the streets of Tunisia; specifically those covered by important news channels, and after that, those issued through Facebook and blogposts. The number of media statements against the law being almost double those in favour of the law has to do with the nature of Tunisian society; and that since the majority of society is actually conservative, those speaking against the law, be they sheikhs, political activists, or people in the street are bound to outnumber those who support the law, namely a section of the Tunisian elite. This article mainly focuses on statements made in the public sphere to the general public, not intellectual writings confined to intellectual circles. Academic studies and papers are not included in the content analysis. As a framework, we will discuss the relationship between public reason and religion through Jürgen Habermas and Maeve Cooke, to show the tensions gravitating between dogmatism and open-mindedness, and between shutting down the public sphere from debate, and opening it to a variety of valid opinions.

Result and Discussion

Inheritance has been a stumbling block for supporters of women's rights in Tunisia. Branded an "anomaly" as the only Arab Spring country involved in the democratization process, Tunisia has also earned a reputation as the "front line of the Arab World" when it comes to women's rights. That reputation stems from the reforms of Islamic family law

from the 1950s to the 2010s that increased women's autonomy in marriage, divorce, custody, and other areas. However, inheritance laws have remained essentially the same throughout the centuries. Attempts to reform them all failed. We consider the issues below around inheritance, Islamic law, and current debates.[1]

Several authoritarian regimes have long ruled the Arab world has long been ruled by authoritarian regimes, which push monocultures in line with official meta-narratives, pushing other narratives into the private and semi-private spheres. The absence of the Habermasian public sphere, which is necessary for intellectual cross-fertilization, has contributed to the deepening rift between large segments of the liberal/non-Islamist/leftist and Muslim Islamists/democrats.[2] The fault here lies with both sides, albeit to varying degrees, not on the state or on one side alone. It is accurate to say that since the beginning of the Arab uprisings we have witnessed semi-civil wars between these political sides, as happened in Egypt, Syria, Yemen, and Libya. Each camp has failed to understand the "other", seen as the same domestic and external power. The acute dichotomy of trying to reduce the liberal/non-Islamist camp to the label of modernist, secular, western versus Islamist, instead of being labeled as traditional, reactionary, and fundamentalist, will not explain the spectrum of current debates in the Arab world. This sharp, drawn-out binary over the decades has produced identity politics that fosters contestation over the nation's identity, and furthermore, the format of its laws. But is the ongoing transition to democracy unsettling identity politics and facilitating healthier debate? This paper will discuss the current heated debate on the inheritance of gender equality in Tunisia, a country that has undergone a democratic transition and witnessed a coalition between Muslim liberals and democrats (as Ennahdha [al-Nahḍa] himself branded).

The significance of the Tunisian revolution is because of its highly complex nature, not only because it has been a catalyst for other Arab uprisings. Mūld al-Aḥmar (Mouldi Lahmar) sees its importance stemming from overthrowing authoritarian regimes that cripple freedoms and ignore rights and morals in a political context and addresses the need for "dramatic historical articulations that occur between the social, cultural, political, moral and legal content of the demands of the protesters, and the changes that Tunisian society is witnessing at the level of rebuilding individual identity" (Aḥmar 2014). The debate on inheritance equality reopened in Tunisia on 13 August 2018, when president Beji Caid Sebsi (al-Bāḥī Qā'id al-Sibsi, d. 2019) declared his support for the law of equal inheritance, as opposed to mainstream fiqh of inheritance, which is summarized as men take twice the inheritance of women when their parents die (Reuters 2018). This article examines the modes of reasoning used by supporters and opponents of the new law project by examining forty-one media statements offered by various Tunisian politicians, academics, and media figures since August 2018. Three research questions are the main concern of this article: What kinds of arguments are put forward for and against equal inheritance? How is religion navigated through common sense? Does the debate demonstrate the persistence of identity politics and the polarization between different elite formations in Tunisia or is it moving towards a more peaceful and rational debate?

This article challenges cliches, confronts religion with secularism, and examines whether the binary holds in the Tunisian context. We use Maeve Cooke's (2005) concept of authoritarian versus non-authoritarian practical reasoning when he interprets "context" and "history" as what fundamentally distinguishes authoritarian claims from non-

authoritarian claims. It is important to frame the mapping and qualification of the public debate on gender equality.

In several cases, Tunisia has liberalized the Islamic law reform. It can be seen from some examples including the prohibition of polygamy and the prohibition of remarrying an ex-wife who has got triple repudiation.⁵⁴ Such reform is strongly influenced by the reformist figures, such as Thâhir al-Haddad with his controversial ideas.^[3]

The Maliki school of thought itself claims that men have more rights than women. Imam Malik was once asked about a man who died and had sons and daughters. He replied the inheritance right for both of them in the situation is that the men get twice as much as the women.

This means Tunisia does not adopt the opinion of Tahir al-Haddad stating men and women have equal rights in getting the portion of the inheritance. According to him, the law of inheritance is also considered as one of the *tadarruj fi al-tashri'* practices. At the time of Prophet Muhammad (peace be upon him), the share that a woman gets is only a half of that of a man. Such a phenomenon was indeed revolutionary seeing the social conditions at the time did not give women any inheritance rights at all. This indicates giving half to a woman is not a definite limitation that will be valid eternally. Back in the days, the social conditions were patriarchal, which certainly made it impossible to equalize the inheritance rights for women and men. However, in this era when women and men both take part in every aspect of life, some change might need to be done.

Although it acknowledges that Islam is the religion of the state, the constitution of Tunisia remains secular in practice. The Tunisian government is not obliged to directly arrange a standardized or a required practice based on the doctrines of a particular Islamic legal school. The state would neither categorize its subjects into religious communities nor delegate any power to authorities of religious communities. The state, instead, would deal with Tunisian people directly as autonomous individuals. ^[4]

Law Proponents' and Opponents' Reasons in the Inheritance Debate

Proponents and opponents of equal inheritance have referred to three sets of arguments: jurisprudential/textual, sociological and legal. In the Report of the Committee on Individual Liberties and Equality, the issue of equality is appealed to through several arguments. The first set of arguments is jurisprudential, appealing to the higher objectives of Shari'a (maqāsid al-Sharī'a): – The Qur'an emphasized the equality of men and women in numerous verses. However, they traditionally had different rulings with their differing social roles. Since they have the same social roles now, they should have the same rulings, affirming original equality.

Inequality between men and women is similar to slavery. Just as the former was rejected in light of the higher objectives of Shari'a, so should the latter. Inheritance does not fall under ritualistic acts of worship ('ibādāt). It's a worldly matter systematized by religion (mu'āmalāt), and thus should be subject to worldly reconsiderations. The committee states that equal inheritance is in line with the condition of the times in which we live, as well as the higher objectives of Shari'a. The second set of arguments is sociological: – The report states that socio-economic changes occurred in Tunisia over the past decades. Women are a major participator in the education sector, reaching 63.5% of the students in public

education, and have strongly entered the workforce. Women have also become the breadwinners in many households. Since the status and role of women has changed, so should the rulings which are based on that status and role. Inheritance regulations are determined by: (1) relational proximity to the deceased individual, (2) the location of the inheritor, (3) the material and moral obligations of the inheritor. Those three transcend the sole element of gender. More variables must be considered. While there are cases where women inherit more than men, cases where men inherit more than women form 80% of inheritance occurrences in Tunisia. The third and final set of arguments presented in the report take a legal perspective, based on the texts of the constitution and international agreements that support equality between men and women. Some legal texts mentioned may be ambiguous, but the point made is that there is substantial legal ground to complete gender equality. Thus, for legal consistency, inheritance laws should be adjusted. In examining the three sets of arguments propagated by political actors who support and oppose the report, different arguments were proposed, and they will be divided, along the same lines, into: (1) legal arguments, (2) jurisprudential/textual argument, and (3) sociological arguments.

Legal Arguments in the Public Debate

In this section, legality will be analyzed based on Dworkin's (1978) variables of specific rules and principles. This section will examine how legal arguments move between legal literalism focused on rules (literalist appeals to international conventions leading to a concept of equality as a decontextual absolute value) and appeal to legal principles which account for the social context. Legal arguments reflect the conceptual and value-based debates that arose in the process of developing both sides of the argument. The five main legal arguments provided by both sides were: the interpretation of the constitution, the implementation of international conventions, the tasks of the Committee, the nature of the civil state, and the nature of equality.

Firstly, law proponents stated that since the Tunisian state is a civil state, and the reference for inheritance laws is the Code of Personal Status (CPS, *Majallat al-Aḥwāl al-Shakhṣiyya*), religious laws are not to be imposed. (Ten TV 2018) This contention points to the debate over the identity of the state; a debate which has permeated the Tunisian political scene since the revolution. The post-Revolution Tunisian Constitution of 2014 attempted to navigate the relationship between religion and state. It stated that the Tunisian state is a civil state. Nowhere did it mention that the source of legislation is Islam. The 21st Article of the constitution states that men and women should have equal rights and responsibilities⁷ (France 24 Arabic 2017; Medi1TV 2018; Mosaique FM 2018).

Opponents of the law refer to the preamble of the constitution which states that Tunisia is a Muslim country,⁸ and the first article which states that Tunisia's religion is Islam.⁹ Legal arguments over equal inheritance reflect the tension between and ambiguity of these different articles. This is where the voluntariness of the law is important. Voluntary inheritance laws allow some citizens to follow *fiqh* law, and those who do not wish to follow that law are given the freedom not to do so. This was an argument used by several actors advocating the law (Sky News Arabia 2018; Ten TV 2018). However, problems arise when inheritors disagree over the method of allocation of inheritance; some wanting equal inheritance and others requesting Islamic inheritance. The law in this case states that

equality takes precedence, hence having referential superiority over the Islamic inheritance. The second legal argument is about the implementation of international conventions. Tunisia is a signatory of CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women, which makes the case for equal inheritance to be an obligation of the state (France 24 Arabic 2017; Mosaïque FM 2018). In addition, in 2014, Tunisia revoked all reservations on the CEDAW agreement (FIDH 2014). This strengthens the case for Tunisia's international legal commitment to equal inheritance, and that the law should be adjusted accordingly. The third argument concerns the tasks of the Committee on Individual Liberties and Equality. Law opponents assert that the Committee was assigned the task of evaluating laws and determining which ones are in line with the 2014 constitution and the international commitments of Tunisia. It was not assigned the role of legislating and proposing new laws. The action the committee took, by drafting a new law, is not within its scope. This means the whole proposal of the law is unacceptable (Bū'ushba 2018). The fourth argument is about the nature of the civil state, and whether grounding the laws in religion goes against the notion of a civil state. If so, how is the civil state defined? If it is by what the majority wants, then that leaves room for the interference of religion in the public sphere through the majority's vote (al-Jazeera Live 2017; al-Nahar TV 2018). If this is not the case, then secularized laws need to be enforced by the state regardless of what the people want, a point argued for by many proponents of equal inheritance (BBC News 2018; Sharaf al-Dīn 2017; Kapitalis Anbā' Tūnis 2018). Hence, legally-pluralistic voluntary inheritance laws seem more plausible in this case, compared to enforced Islamic inheritance or enforced equal inheritance laws (Sky News Arabia 2018).

The final argument was about the nature of equality. Does equality mean equality of opportunity, or equality of outcome, enforced by the state in order to decrease the wealth gap? It has been argued, for example, that reducing income inequality in Tunisia is more important than promoting equal inheritance (al-Jazeera Live 2017), as equal inheritance laws presume the presence of wealth in certain families, which is not the case in many rural and more impoverished areas in Tunisia. However, this argument, as previously argued, can be seen as a red herring, as the government can work on multiple fronts simultaneously. As one can see, the concept of equality was discussed more by the law's proponents as a legal ruling that should be enforced, and not as a legal principle that should be contextualized, and as a standard that takes into account Dworkin's concept of legal principles, well-situated in societal conceptions of justice and morality.

Conclusion

This mapping of the inheritance debate has shown three sets of arguments: jurisprudential/textual, sociological, and legal. While the position of the proponents of gender equality are based primarily on legal, then sociological, then jurisprudential/textual arguments, opponents use the textual, then legal, and finally sociological arguments. For example, the weakness of the sociological argument of the latter is clear when they rely on the idea that there is still a gendered division of labor within the family, in which the man bears the major financial burden of the family helping parents and siblings in case of distress, as they did not provide neither statistics nor empirical evidence. Yet, the discussion occurring in Tunisia uses common language (interpreting the religious text, among other things), which allows for the reduction of

authoritarian tendencies, and the reduction of longstanding polarization through means of dialogue. We have witnessed less tension than aptly described by Khaled Abou El Fadl (1997) between the authoritative and the authoritarian in Islamic discourse, i.e., the process by which the authoritative is used to produce the authoritarian. In the same vein, Alexandre Caeiro (2019) argues, based on his study of Qatar's muftīs, that some religious figures have started drawing on "the textual resources of the Islamic tradition and to affirm some of its key commitments while adopting modern sociological ideas and adjusting to emerging moral orders." Appeals to texts and values, whether religious or universalist, is a more tricky proposition, as these arguments tend to fall in the realm of absolutist authoritarianism on both ends of the spectrum. However, the debate in Tunisia still needs to be grounded more in the socio-political reality, which might reveal the way through which Tunisia can find its way to a better future, avoiding deep conflict with its historical heritage and zeitgeist. History and context, which facilitate ijtihād and maṣlaḥa, were used by most actors to justify their reasoning, and this embodies non-authoritarian conceptions of knowledge and justification, yet this was not sufficiently deployed, thus making the authoritarian tendencies linger nonetheless.¹² A voluntary implementation of inheritance regimes (a sort of a legal pluralism) may allow all to mediate their tendencies, and practice whatever they believe to be just, regardless of whether others agree with them or not. These legal arrangements may enable fair litigation and feed the construction of a salient 'rights-versus-rites binary' in law and politics in the complex reality of the political constitution of religion and the religious constitution of politics (see for the case of Malaysia: Moustafa 2018). It is not surprising that Tunisia has become a laboratory for such relatively healthy debate and to speak with Karim Sadek (2012) a laboratory to "unleash the emancipatory potentials of Islamic politics while curbing its authoritarian potentials," thanks to the dissident Islamic thought of Rached Ghanouchi (Rāshid al-Ghannūshī). It is useful to compare the Tunisian debate of inheritance law to the statement of al-Azhar, being so unreconciliatory with those who are in favor of equality in inheritance, considering them apostates. In this article, we use Maeve Cooke's qualification of what constitutes a non-authoritarian practical reasoning, necessary for a public debate. This framework is quite different from Jürgen Habermas' post-metaphysical—secularist— model that unnecessarily restricts the access of religious community to the formal deliberation of public reason. His post-metaphysical model internalized the particular historical and cultural traditions on the basis of which the secular basis of political authority was once regarded as justified (Cooke 2007, 234; Asad 2003). In the processes of revolution and counter-revolution in the Arab world, and in debates identifying democratic forces, attention is rarely given to the elite's practical reasoning, with the emphasis almost exclusively being on the secularization paradigm. Secular forces were seen as systematically immune to the authoritarian practical reasoning, while the Islamic movements by definition operate within such frameworks. Of course, this is simplistic, and needs to be scrutinized, as authoritarian citizens can be found among both these elite formations. The use of the Maeve Cooke framework in studying the Tunisian debate helped us to deconstruct the binary logic of the religious juxtaposed to the secular which situates people as inherently inferior or different, creating what Nancy Fraser called a 'field of multiple, debinarized, fluid, ever-shifting differences' (Fraser 1997). This debate is part of the ongoing process of realization of Alex Honneth's socio-political principle of recognition (Honneth 1996). Through dialogue, proponents and opponents of the inheritance law start to recognize the needs of each other without

applying the exclusionary labels of 'Western' or 'traditionalist'. Any denial of religious groups, women and men, as legitimate voices in the public debate is an act of misrecognition and would reinforce identity politics. In the same vein, those who believe in the virtue of the individual and individualism in a changing Tunisian society are also legitimate grassroots voices (Hénia 2015) that cannot be reduced to foreign influence and westernized taste.

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CERTIFICATE

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