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Speech of Dr. Yousef Dajani from the Board of Directors of MIFTAH at the Inauguration of the Workshop on Constitutional Principles

Dear attendees,

Ladies and gentlemen,

On behalf of the MIFTAH Board of Directors, Constitutional Studies Center of An-Najah University and the Women Media and Development Association (TAM), we hereby inaugurate the workshop on constitutional principles in Palestine.

This workshop comes at a time in which the Palestinian people face tremendous challenges on the international level; and especially with the launching of the so-called “economic peace talks” in Manama today. These talks were rejected by the Palestinian people and leadership, as expressed through the numerous protests and demonstrations in the various Palestinian localities.

Despite the political tensions, we proceed in discussing the vital issues related to the Palestinian political system and highlight the challenges that stand in the way of building the Palestinian state institutions. This will include discussing the fundamental issues pertaining to constitutional principles, as well as enhancing the principle of democracy and referring to the people as the main source of authority. This was clearly expressed by President Mahmoud Abbas during his talk with the relevant stakeholders about holding new Legislative Council elections in the upcoming period.

Today’s workshop is a continuation of the first phase of interventions by MIFTAH and its partners with regard to constitutional awareness. The aim of this workshop is to broaden the circles of social dialogue on constitutional principles towards promoting a democratic approach by involving different social sectors in dialogue and discussions. These sectors include, among others, the youth, women, national forces, political parties, civil society organizations and universities in the various Palestinian governorates of the West Bank and Gaza Strip to emphasize the importance of dialogue and discussions about the democratic values and principles in a way that would guarantee respect for pluralism in the Palestinian society.

In conjunction with these activities, we provide support to a civil society team which includes several organizations, experts, activists, academics, jurists and lawyers to uphold the constitutional principles and foundations in the Palestinian political, economic and social contexts. MIFTAH and its partners aim to support the civil society team by learning from different experiences on the international level. This will lead to enhancing the work of the said team and exerting pressure for the formulation of constitutional provisions that guarantee citizenship rights for all persons without discrimination, as well as enhancing the values of democracy and equality, respect of pluralism, and the creation of a legal and legislative environment that protects all people's rights and freedoms and combats violence.

I would like to use this opportunity to welcome international expert Dr. Francesco Biagi, Professor of Comparative Constitutionalism in the University of Bologna, Italy and the "Center for Constitutional Studies and Democratic Development" of John Hopkins University. We also welcome Dr. Sana' Sargali, Director of the Constitutional Studies Center and Professor of Constitutional Law in An-Najah National University, and Mrs. Anwar Mansari, Founding Member of the League of Tunisian Women Voters. This will truly enrich our dialogue and discussions about the integration of constitutional principles in the Palestinian context.

We extend our gratitude and appreciation to the Norwegian Representative Office for its crucial strategic support to MIFTAH in its interventions for promoting democratic values and enhancing the principles of good governance and supporting women's participation in the public life (and especially the political life). We also thank our partners from Women Media and Development Association (TAM), Constitutional Studies Center of An-Najah University, and the working group of MIFTAH.

The Role of Civil Society in Constitution-Writing during the period of Democratic Transition in Tunisia

Prepared by: Mrs. Anwar Mansari

Humanitarian expressions must be made in an environment of true freedom and responsibility in order to preserve the right of people to express their opinions and assess the various actions, practices and decisions related to them. This right (i.e. the right to express one's opinion) was enshrined in different international conventions for both men and women. However, the impact of these conventions can be much greater if the related work was done collectively while specifying a crystal-clear vision and mission inside the society.

The society has seen that collective action can disseminate messages in a robust manner. Therefore, collective action provides a fertile ground for civil society organizations to position themselves better in the public sphere.

The revolutionary path did not only liberate the male and female citizens from the chains of oppression and dictatorship, but it also paved the way for the national organizations that were established before the revolution to work more comfortably and independently, as well as giving the chance for newly-emerging organizations to take part in public affairs through the freedom of association in the public sphere. This mobilization and the eruption of the revolutionary climate in the region had a direct effect in Tunisia through the CSOs' motivation of governments to carry out serious reforms by reviewing their constitutions and legislations in order to have them uphold the rights of women [who were an integral part of the revolution].

The Path of Constitution-Writing in Tunisia

Human rights associations and NGOs underwent immense pressures from the Tunisian authorities and their activities were restricted in a number of fields. Nevertheless, the feminist movement – which is deeply rooted in the Tunisian culture – was relentlessly working for the recognition of women's rights. The

movement's primacy goal was to oppose the [former] authority and reduce its abuses and oppression.

It should be noted that the Jasmine revolution, which lasted from 17 December 2010 until 14 January 2011, was a revolution for employment, honour, freedom and equality. In other words, it was a revolution for human rights. Amidst a pluralistic and diverse society, the implementation of the revolution's slogans and principles required the upholding of rights and freedoms by enabling all citizens to formulate the laws and policies in order to translate them on the ground. Therefore, women must be represented in decision-making positions in an equal manner and societal diversity should be taken into consideration.

On the other hand, the revolution also (unfortunately) led to the emergence of some voices which did not believe in a civilian state and the principle of equality. These voices, which were also deprived of the freedom of expression for decades, tried to manipulate the climate of freedom to dispose of some things that have become part of Tunisian culture 50 years ago. This includes their demands to allow polygamy, implement Sharia law, and request to combat unemployment by having women stay in their houses and "leave their positions to men". In the name of the freedom of expression, some of them even proposed going back to the Caliphate rule.

Since this wave was not being controlled properly, it started going too far and gaining a lot of naive followers only because it held the banner of religion. This led to a strong reaction from women who refused to undo all the gains that they have achieved thus far. In this framework, there was the creation of a network of human rights organizations led by women's rights associations. This included the "League of Tunisian Women Voters" (French: *Ligue des Electrices Tunisiennes*/LET) which aimed to confront the backward thinking that was becoming active outside the realm of the law.

The Civil Society's Adaptation to Political Changes:

Civil Society played a positive role after the revolution following the dissolution of the Tunisian Assembly of Representatives and the Chamber of Advisors. Therefore, it became an alternative which filled the great vacuum that resulted

from the state's absence. On 14 January 2011, the "Higher Authority for the Realization of Objectives of the Revolution and Democratic Transition" was created. This authority played the legislator's role on the ground despite that, according to its relevant decree, it should have only proposed draft decrees to the Tunisian President who would later ratify them. This authority represented all the political parties and important personalities from the civil society, and it also assumed the role of writing decrees in a liberationist language that respects international standards and human rights principles. Therefore, civil society experienced a great recovery and launched a number of initiatives; including those which were concerned with public affairs. The great enthusiasm of male and female activists helped them gain valuable experiences that led to the emergence of capable experts in different fields; and especially in the field of elections. Moreover, capacity building activities were conducted with foreign experts and international organizations that were based in Tunisia.

The Tunisian experience saw some good practices which accompanied the democratization process. This process adopted a participatory approach which enabled the various civil society parties (such as associations, unions and professional organizations) to play a pivotal role in enhancing a rights-based orientation. Through this orientation, the CSOs took into consideration the transitional process and supported the protests that demanded the upholding of human rights and freedoms in the constitution (which is considered the most supreme legal provision). Moreover, strong pressures were exerted to orient the public policies towards the respect of human rights and confront all attempts to undo the various gains achieved by the Tunisian society.

Alongside the organizations that were established after the Revolution of 2011, women's organizations monitored the decision-makers upon the presence of any threats against women's gains or with regard to writing the constitution. This work was culminated through the "Tunisian National Dialogue Quartet" which aimed to avoid a civil war by finding grounds for dialogue between the different influential political parties, along with launching a civilian initiative for the peaceful handover of power and formulating a road map that the various parties commit to.

It should be emphasized that the work on the Tunisian Constitution of 1959 was suspended after the revolution. However, on 26 October 2011, there was the election of male and female members in the National Constituent Council which was given the duty of writing the new constitution.

Although the Islamic Ennahda Movement had a great influence and control over the National Constituent Council, the latter's work was not only related to the constitution but also the ratification of other laws under the supervision of civil society.

The civil society in Tunisia changed from being a protesting power to oppose the [former] authority and eliminate its oppression and abuse to becoming a means for pressure and suggestion, which contributed effectively in building the path of transition and creating an effective space for public affairs. Through this new approach, the civil society was able to play a new role that was based on "partnership through suggestion" and the creation of different initiatives for change, as well as providing guidance on policies and imposing rights-based orientations.

This openness led to strengthening the level of cooperation between international and national organizations on the technical, financial and logistical levels; and especially on the level of sharing experiences through partnership programs between international organizations and national associations.

Mechanisms of Organizational Action: The League of Tunisian Women Voters as an Example

The League of Tunisian Women Voters adopted a strategy that combined dialogue with decision-makers with the holding of different public discussions in order to bring about changes that would lead to upholding women's rights and adopting the field-based approach. This was done by empowering women in different areas of the Tunisian Republic and raising their awareness with regard to their rights. The League of Tunisian Women Voters also played a prominent role in mobilization activities alongside other associations in order to gather crowds to protest and demand change and create a communication network with the most popular media outlets.

With regard to influencing decision-makers:

The creation of the League of Tunisian Women Voters produced women who were suitable for the democratization and constitution-writing processes. For example, its members included female judges, lawyers and legal experts who played a pivotal role in examining the constitution's legal provisions because of their attended seminars and acquired experiences.

Direct Communication with Male and Female Parliamentarians in the Different Seminars:

The League of Tunisian Women Voters (hereby referred to as "The League") closely followed up the activities of the National Constituent Council and aimed to create bridges of communication with female parliamentarians from the National Constituent Council who attended their seminars. Some of these women had a legal background and a critical eye, thus enabling the League members to enhance their arguments more thoroughly. Meanwhile, some female parliamentarians who did not have a legal background asked the League to train them in the legal field and women's rights aspects along with the ways of formulating legal provisions. This was successfully achieved, and the female parliamentarians started receiving constant support and advice from the League of Tunisian Women Voters in order to strengthen their stances related to women's rights.

Attendance of Hearing Sessions in the National Constituent Council:

Through the diligent work of the League of Tunisian Women Voters and their communication with male and female parliamentarians, the League was elevated to a high status in the public scene and became a party of trust in the eyes of decision-makers. This enabled the League of Tunisian Women Voters to become the first women's organization that was asked (on 26 April 2012) to join the Committee of Rights and Freedoms in the National Constituent Council to listen to the League's viewpoint and the results of its studies and proposals.

During the committee's meeting, the League of Tunisian Women Voters recommended to write the constitutional provisions in a way that would use a gender-sensitive language and adopt the principle of equality in the law and before the courts, as well as the promotion of equal opportunities between men and women. This was vital to create a solid constitutional ground that paves the way for laws which encompass positive measures that support women, promote gender equality and prevent gender discrimination in the society.

What distinguished the League of Tunisian Women Voters is that they presented recommendations related to different fields during the committee meeting; such as recommendations related to elections, independence of the judiciary, principles that must be upheld, transitional justice, and the ways of combating corruption. This made the League become a party of reference in several fields and enabled them to position themselves as a multi-disciplinary women's organization that integrates a gender-based approach in all the relevant sectors.

Method of Preparing Advocacy Documents:

During the preparation of advocacy documents, the League of Tunisian Women Voters did not only use a theoretical foundation and constitutionalism of women's rights, but it also formulated the legal bases that oblige the State of Tunisia to commit to these principles in accordance with international conventions. The League supported its work by using statistical data and conducting field studies which focus on women's rights in the constitution so that the stipulated laws would respect these rights. This was done in order to change the current reality and overcome the various shortcomings mentioned in their studies. For example, the League succeeded to have the Tunisian constitution mention the elimination of violence against women in its provisions, as seen in Article 46 of the Tunisian constitution. This article (i.e. Article 46) was also the basis for adopting Law No. 58 of 2017 dated 11 August 2017 which was concerned with eliminating violence against women.

During its various discussions, the League of Tunisian Women Voters used legal and social evidence and even referred to Islamic sources in some cases since many of the parliamentarians had an Islamic orientation.

Moreover, the League of Tunisian Women Voters practiced discipline and self-control and was persistent when dealing with parliamentarians. For example, some parliamentarians tried to provoke the League and refute the arguments that were not in line with their convictions. However, the League responded to them with strong counter-arguments.

Before every meeting, the League of Tunisian Women Voters would proactively study the possible viewpoints and stances of decision-makers in order to prepare their arguments and distribute roles among the League members attending these meetings. It should also be emphasized that most of the League's recommendations were translated into proposed articles that were reviewed and constituted a basis for the work of parliamentarians.

The Impact of the League's Work in the Field

- **Intellectual Seminars and Communication with the Media:** In order to follow up the writing of constitutional provisions in cooperation with other women's rights and human rights organizations, a number of seminars were held to propose some alternatives for constitutional provisions which did not respect women's rights. These seminars were concluded by having the participating organizations prepare a collective Working Paper that was considered a basis for communication with the media. This was important for creating a public opinion that supports these recommendations. The media outlets were also used as a space through which civil society activists and male and female parliamentarians discuss the various constitutional provisions. Therefore, the media involved the different social classes in public affairs, such as raising the awareness of women concerning their rights. Also, the threats of some movements to eliminate the right of women made them become more vigilant in protecting their rights.

- **The Constituent Courses:** The League of Tunisian Women Voters were active in many villages and cities in order to reach out to the targeted women who are affected by constitutional provisions. This included women who were not concerned with human rights issues. The League also provided training to young women to make them become the voice of the League in different areas. These trainees also took part in different protests organized by the League.

The League of Tunisian Women Voters also did a great mobilization on various levels including the leadership level. This created a strong power to demonstrate against all constitutional provisions which did not respect women's rights and included expressions that undermine the status of women in preliminary drafts. For example, a preliminary draft included the term "complementary" when it stipulated that "men and women play a complementary role in building the homeland". This was unacceptable by human rights activists who organized a huge demonstration on International Women's Day in Tunisia to support the Code of Personal Status of 1956 which promoted equality between women and men in a number of areas.

On the 13th of August 2013, the female and male demonstrators succeeded in pressuring the National Constituent Council to cancel the article related to "complementarity" and replacing it with an article that stipulates equal rights and duties for male and female citizens without any discrimination. Note that this article was formulated by the women of Tunisia and not the members of the Constituent Council.

The various organizations were also incubators for dialogue through their peaceful demonstrations and sit-ins (such as Al-Qasaba sit-in, Bardo sit-in and so on) in order to pressure for change. This led to the adoption of a participatory constitution that was not only written by officials but also by the civil society based on the national dialogue and consensus.

The constitution-writing process in Tunisia adopted a participatory approach that was not imposed by decision-makers but stemmed from civil society which proved to be a strong alternative in a number of fields. The civil society constantly made constructive and attainable suggestions and succeeded in guaranteeing the

basic rights of women. For example, it confronted the various parties that aimed to take the society backwards. In order to protect the rights of women as a strong reaction to backward-thinking parties, the constitution went as far as stipulating an article which mentioned that the state “shall preserve the gains of women and their development”.

The Tunisian experience shows that women’s organization played a pivotal role in protecting women’s rights and other rights in the constitution by using a strategic plan that takes political changes into consideration. These organizations also used the right timing to support their recommendations and prepared the civil society for immediate responses to confront all deviations from the plan. Moreover, the civil society established a network with all parties that believe in human rights since not all active organizations have a legal background.

This path led to the adoption of the participatory approach in formulating the constitution. Also, there is still some follow-up with the Assembly of People’s Representatives and the Tunisian government with regard to the various laws and policies that must integrate the gender approach and uphold the rights of all civil society segments.

Constitution-building in New Democracies: Comparative Perspectives

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Premise

In the first place I would like to thank all the organisers of this workshop, i.e. the Palestinian Initiative for the Promotion of Global Dialogue and Democracy (MIFTAH), the Constitutional Studies Center at Al-Najah University, and the Women Media and Development Association (TAM). It is really a pleasure and honour for me to be here.

My presentation will be about constitution-building in new democracies from a comparative perspective. In particular, I will focus on the processes of constitution-making and constitutional implementation in North Africa and the Middle East (the MENA Region) following the “Arab Spring”. I will also make some references to the constitution-building processes that took place in Europe in the last century, which I believe can offer some interesting lessons to the Arab countries currently undergoing a transition process.

When analysing constitutional transitions, it is crucial to examine the procedure adopted for drafting the constitution (i.e. the constitution-making process), since *the nature of a constitution is strictly linked to the way it is drafted*. The constitutional-implementation process is equally important: a constitution which looks good on paper, but is not effectively implemented is just a piece of paper without any practical relevance. In other words, then, the process of constitutional implementation is essential *to make sure that the “law in the books”* (i.e. what is formally stated in the Constitution) *corresponds as much as possible to the “law in action”*. In this presentation I will look at one specific actor which often plays an important role in constitutional implementation processes, i.e. the constitutional court.

The Constitution-making Processes

When examining constitution-making processes, one has to take into consideration, in the first place, the *body responsible for drafting the constitution*, and in particular the procedure for selecting the members of this body. It is possible to draw a distinction between “top-down” and

“bottom-up” processes. The majority of North African and Middle Eastern countries after the “Arab Spring” have followed “top-down” processes. I am referring in particular to the cases of Morocco, Jordan and Algeria, where the constitution-drafting processes were to a large extent controlled by the Head of State, who is also the leader of the executive branch (the King in Morocco and Jordan, the President of the Republic in Algeria). In all these countries the members of the commissions responsible for drafting the new constitution (Morocco), or for amending the constitution (Jordan and Algeria), were directly appointed by the Head of State. Therefore, the impression is that the new constitutions, or the new constitutional reforms, represented mere “concessions” by the Head of State and were not so much the result of the popular will.

The case of Tunisia is diametrically opposed because the 2014 Constitution, which currently represents the most democratic constitution in the Arab world, was drafted by a Constituent Assembly directly elected by the population through a system of proportional representation. For this and other reasons that I will discuss below, it is evident that the Tunisian Constitution was really the result of a “bottom-up process,” in which the people played a key role (on the distinction between “top-down” and “bottom-up” processes see Biagi 2018b, 407-9).

In the case of Egypt one has to differentiate between the 2012 Constitution and the 2014 Constitution. Indeed, the members of the Constituent Assembly which drafted the 2012 Constitution were indirectly elected by the people (since the people elected Parliament and then Parliament elected the Constituent Assembly), whereas the members of the Constituent Assembly responsible for drafting the 2014 Constitution were directly selected by the President (Abdelaal 2018, 43 ff.).

The second element that one has to take into account when analysing constitution-making processes is *public participation*. Compared to the past, public participation has increased in the recent processes of constitution-making and constitutional-reform taking place in the Arab world, even if in the majority of cases this participation continues to be quite weak. Thus, for example, the processes that took place in Jordan, Morocco and Algeria were characterised by a limited public participation. In Tunisia, on the contrary, public participation played a pivotal role, and it is not a coincidence that the 2014 Constitution has been defined as “the Constitution of the people”, or an example of a “participatory Constitution”.

I want to stress the fact that when I talk about public participation I am not referring to a formal involvement of political parties, trade unions and civil society, but I am talking about a type of participation in which the people can *really, effectively, and concretely* influence the drafting of the constitution. A comparison between Morocco and Tunisia can better clarify this point. Some scholars argued that the 2011 Moroccan Constitution should not be considered as a

mere “concession” by the King to the population (i.e. a modern example of an “*octroyée*” Constitution), because it was ratified in a popular consultation, in which 98% of the population voted in favour of the new Constitution. However, this argument is decidedly weak, above all in the light of the fact that during the two weeks running up to the consultation, the Monarchy took every effort to promote the reform as much as possible, and strongly restricted the space available to those (such as the representatives of the 20 February Movement) who by contrast promoted a boycott of the vote. Even sermons by imams in mosques across the kingdom invited the population to vote “yes”. Moreover, on election day, reports of fraud came from all over the country. Thus, there was never going to be any doubt over the referendum result. It is evident, then, that this consultation was much more similar to an authoritarian plebiscite than to a democratic referendum (Biagi 2018a, 64-5). Indeed, authoritarian plebiscites are “motivated more by a desire to legitimize the autocrat’s control of a polity than to allow the citizens to render a considered verdict on the constitution” (Blount 2011, 50).

Let’s now compare the case of Morocco with the case of Tunisia, in which there was no referendum to ratify the 2014 Constitution, because the Constituent Assembly had adopted the Constitution with a 2/3 majority, which was sufficient to avoid a popular consultation. Can we say that the constitution-making process in Tunisia was less participatory than the constitution-drafting process in Morocco? The answer is “no,” not only because in Tunisia the people directly elected the members of the Constituent Assembly, but also because the population was able to participate directly in the constitution-making process through public demonstrations, meetings between MPs and students and the so-called “e-participation”. For example, the first draft of the Tunisian Constitution (adopted in August 2012) contained a very controversial provision (Article 28) which stipulated that “the State assures the protection of women’s rights [...] under the *principle of complementarity* with man within the family [...]” (emphasis added). The risk of incorporating such an equivocal article into the Constitution was evident: women could “no longer aspire to more than ‘complementarity’ with men, thus limiting their status to that ‘of wife’ and ‘mother’” (Tajine 2012). Luckily, following major protest demonstrations by women’s associations (in particular on August 13, 2012, on Tunisian Women’s Day, which commemorates the adoption of the 1956 Code of Personal Status), this provision was removed, and the principle of gender equality was clearly proclaimed in the second draft Constitution from December 2012, as well as in later drafts and in the final Constitution of 2014. This example clearly shows that in Tunisia, unlike the vast majority of countries in the MENA region, the people, including women, really had the chance to make their voice heard, and played a very important role in the constitution-drafting process (see Abbiate 2016; Cherif 2018, 69 ff.).

The third element that must be considered when examining constitution-making processes is the *transparency and openness of the process*. In the first place, one has to verify whether the meetings of the body in charge of drafting the constitution are open or not to the public. It should be noted that secrecy in itself is not an absolute evil, whilst on the contrary

“debates in front of an audience tend to generate rhetorical overbidding and heated passions that are incompatible with the kind of close and calm scrutiny that ought to be the rule when one is adopting provisions for the indefinite future. By denying the public admission to the proceedings and by keeping the debates secret until the final document has been adopted, one creates conditions for rational discussion that are less likely to prevail in the presence of an audience” (Elster 2006, 191).

However, initial secrecy should be offset by subsequent publicity, for example in the form of discussions in a plenary assembly: in fact, with total secrecy, “partisan interests and logrolling come to the forefront” (Elster 1995, 395).¹ In this sense, the Spanish constituent process was considered as one which came closest to striking an “optimal balance” (Elster 1995, 395) between secrecy and publicity. Initially in fact, the Constitutional Affairs and Public Freedoms Committee appointed a *Ponencia* (comprised of seven members from the main political parties) with the task of drawing up a Draft Constitution, and the decisions of this body were taken in secret. The Draft Constitution was only subsequently presented to the *Cortes* and discussed publicly in both houses of Parliament (de Esteban 1989, 275 ff.).

With respect to the constitution-making and constitutional reform processes in the MENA region following the “Arab Spring,” one can notice that these processes continue not to be particularly transparent: in Morocco, Jordan or Algeria, for example, the meetings of the commissions responsible for drafting the constitutional reforms took place behind closed doors. Also from this point of view the difference with respect to the Tunisian constitution-making process is extremely evident, for at least three reasons. First, in Tunisia the meetings of the Constituent Assembly were open to the public. Second, four drafts of the Constitution were made public, discussed and revised (in August 2012, December 2012, April 2013 and June 2013) before the final version was adopted. In Morocco, on the contrary, the political and social organisations never really had the chance to make any comment or recommendation on the draft of the Constitution, since they only received a copy of it on the day before the King’s speech to the Nation (June 17, 2011), when the latter announced that the constitutional referendum would take place on July 1. Third, in

¹ With regard to this aspect two diametrically opposed processes of constitution-making are the 1787 Federal Convention in Philadelphia (which met in complete secrecy) and the 1789 French Constituent Assembly (which was fully public). On this point see Elster 2000, 345 ff.

Tunisia, even external actors played a role in the constitution-making process. For example, on June 3, 2013, the Speaker of the Constituent Assembly requested the Venice Commission's opinion concerning the final draft constitution.² In its observations the Venice Commission recommended that the Constituent Assembly make certain changes to the provisions regarding fundamental principles and rights, as well as to the provisions of the Chapters dedicated to the legislature, the executive and the judiciary in order to ensure compliance with international standards and comparative best practices (Venice Commission 2013). In Tunisia this high degree of transparency and openness undoubtedly contributed to the adoption of a profoundly democratic Constitution.

The last element I would like to discuss with respect to constitution-making processes refers to the *role played by political parties*. Political parties are often the protagonists (for better and for worse) of constitutional design. It is interesting to compare the completely different approach adopted by Ennahdha in Tunisia and the Muslim Brotherhood in Egypt (during the process that led to the adoption of the 2012 Constitution). In Tunisia Ennahdha displayed from the outset of the constitution-drafting process its commitment to consensus and its willingness to cooperate with the secular parties represented in the Constituent Assembly. Ennahdha's approach was characterized by "moderation and compromise" (Pickard 2015, 4 ff.), and this approach contributed enormously to the positive outcome of the constitution-making process. In fact, Ennahdha, in relation to some key aspects of constitutional design, decided to take a step back and accepted the requests of the secular parties. For example, it decided to withdraw its proposal to include a *Sharia* clause in the Constitution, and it also decided to withdraw its proposal to adopt a parliamentary system, and accepted the requests of the secular parties to establish a semi-presidential form of government.

The approach of the Muslim Brotherhood in Egypt during the 2012 constitution-making process was diametrically opposed. In fact, unlike Ennahdha, the Brotherhood – which held a majority of the seats within the Constituent Assembly – assumed a winner-takes-all attitude with respect to the drafting of the Constitution. In particular, the Brotherhood made a number of concessions to the Salafists, and considered the requests originating from non-Islamist parties only to a very limited extent. This resulted in the withdrawal from the Constituent Assembly of several non-Islamist members, who accused the representatives of the Muslim Brotherhood of doing their best to draft a constitution that was designed to turn Egypt into a radical Islamist state.

The consequence of this completely different approach followed by Ennahdha in Tunisia and the Muslim Brotherhood in Egypt is evident. On the one hand, the 2014 Tunisian Constitution,

² The Venice Commission is the advisory body of the Council of Europe on constitutional matters. Its role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. See <https://www.venice.coe.int/webforms/events/>

which represents a compromise among the main political forces represented within the Constituent Assembly, enjoys an extraordinary degree of legitimacy. On the other hand, the short-lived 2012 Egyptian Constitution, which lacked a consensual approach, was perceived by many people as the Constitution of the *Muslim Brotherhood* rather than the Constitution of all Egyptians (Frosini & Biagi 2015, 135 ff.).

It should be underlined that a consensual approach also characterised several constitution-making process taking place in Europe in the last century. In fact, many XX century European constitutions represented a compromise among different political parties which were ideologically very distant among each other. The 1948 Italian Constitution, for example, was a compromise between the Christian Democrats, the Liberals, and the Socialist and Communist Parties (Barbera 2009, 314). In Spain, the 1978 Constitution represented a compromise between the center-right and the center-left parties (Solé Tura & Aja 1984, 79 ff.). If European constitutions still enjoy a very high degree of legitimacy, this is also because of their consensual origins.

The Constitutional Implementation Process

As mentioned above, the constitutional implementation process is as important as the process of constitution-making. I was asked by the organizers of this workshop to examine the role played by one specific actor, i.e. the constitutional court.

Before discussing the role played by constitutional courts in the MENA region after the “Arab Spring,” I would like to say something regarding the role played by constitutional courts in Europe during the processes of transition to democracy that took place in the last century. In the XX century Europe experienced three big “waves” of democratization. The first wave started after the end of World War II following the military defeat of the Nazi and Fascist regimes in Germany and Italy; the second wave took place at the end of the Seventies with the collapse of Franco regime in Spain and Salazar regime in Portugal; finally, the third wave of democratization took place in Central and Eastern Europe after the fall of the Berlin Wall and the collapse of the Communist regime.

All these countries adopted new democratic constitutions, which provided for constitutional courts. These bodies played a fundamental role in the processes of democratization, and contributed enormously to the establishment of democratic regimes in Europe (Biagi 2014, 985 ff.; Biagi 2016). In Italy, for example, the Constitutional Court, especially during the first 15 years of its activity (from 1956 until the end of the 1960s) focused on the elimination of the Fascist legislation that continued to severely constrain civil, political, religious and social rights and freedoms. By declaring the unconstitutionality of the previous authoritarian legislation, the Italian Constitutional

Court contributed to making a clean break with the Fascist regime, and to strengthening the principles of democracy and rule of law. The Court became the first constitutional body to unequivocally uphold the normative force and supremacy of the entire Constitution. If the Italian Constitutional Court still nowadays is one of the most respected institutions in the country, this is also thanks to this crucial role played at the beginning of its activity.

Turning now to the constitutional courts established in North Africa and the Middle East following the “Arab Spring,” the impression is that these bodies have significantly strengthened their position within the new constitutional frameworks, and that they have acquired (at least at a formal level) the potential to place adequate checks on the executive branch and thus contribute more effectively to the processes of democratization. In the past few years some very important judgments on the protection of fundamental rights have been handed down. For example, in 2013 the Supreme Constitutional Court of Egypt declared the law on the state of emergency partially unconstitutional (judgment of June 2, 2013), and in 2017 it granted Coptic Christians the right to paid work leave for one month to make a pilgrimage to Jerusalem (judgment of February 4, 2017). One may also recall the judgment delivered in 2013 by the Constitutional Court of Jordan which granted civil servants the right to form unions (judgment no. 6/2013).

However, there are four major challenges that Arab Constitutional Courts have to face in order to contribute more effectively to the processes of democratization. First, in some countries the *excessive influence of the executive branch* (and in particular of the Head of State) in the appointment process of the members of constitutional courts still represents a very serious threat to the full independence of these bodies.

Second, despite major improvements, *access to constitutional courts is not always easy*. For example, in some states (such as Lebanon) ordinary courts have not been granted the power to raise exceptions of unconstitutionality to the Constitutional Council. Moreover, other countries provide for certain mechanisms that may hinder access to constitutional justice (such as the “double filter” system,³ or also preventing the judge from raising the exception of unconstitutionality before the constitutional court *ex officio*, as is the case in Jordan, Algeria and Tunisia).

³ With respect to the exception of unconstitutionality, a distinction must be drawn between the countries that have adopted a “single filter” system and the countries that have adopted a “double filter” system. Some states (such as Egypt, Kuwait and Palestine) have followed the system that can be found, for example, in Italy, Germany and Spain, where all courts – including lower courts – can *directly* refer questions of constitutionality to the constitutional court when they conclude that the law that has to be applied to the specific case violates the constitution (“single-filter” system). Other countries (such as Jordan and Algeria), on the contrary, have followed the French model (which was introduced by the 2008 constitutional reform), whereby lower courts must raise the exception of unconstitutionality before the apex courts (i.e. the Court of Cassation or the Council of State), and it is then for these apex courts to decide whether or not to raise the exception before the constitutional court (“double filter” system). This “double filter” system risks to hinder access to the constitutional courts, especially when the apex courts are reluctant to refer cases to the constitutional courts, or when there are tensions between the apex courts and the constitutional courts (see Biagi 2017, 11-12; Biagi forthcoming 2019).

The third obstacle refers to the *delays in implementing the new constitutional provisions on constitutional adjudication*. In Morocco, for example, the Constitution was adopted in 2011, but the Constitutional Court was only established in 2017, and the Organic Law regulating the exception of unconstitutionality has not yet been promulgated. In Tunisia, where the Constitution entered into force in 2014, the Organic Law on the Constitutional Court was adopted in 2015, but the Court still has to be set up. Postponing the establishment of constitutional courts and the adoption of the relevant laws risks to weaken the “innovative force” that these institutions have when they are set up in a timely manner.

The fourth obstacle is represented by the *context* in which a number of constitutional courts operate. Indeed, these bodies often have to carry out their functions in countries characterized by a weak separation of powers and a weak constitutional culture, which is something that clearly hinders their action (on all these challenges see Biagi forthcoming 2019).

Having said that, constitutional courts always need time to consolidate their position and prerogatives within the constitutional architecture. Therefore, a more precise and accurate assessment of the performance of these bodies in the Arab world needs to be made in the medium and long run. In any case, it is important not to forget that just as “one swallow does not make a summer,” neither a constitutional court makes a democracy. In other words, a constitutional court might be extremely important, but in itself is not sufficient to guarantee the positive outcome of a democratic transition process.

Concluding Remarks

To conclude, I would like to stress the extraordinary relevance of today’s event. This workshop is of the utmost importance because it is contributing to reinforcing a *constitutional culture* in the country, and in particular among the civil society, which is a *condicio sine qua non* for a successful constitutional transition process. Indeed, this type of events contributes enormously to creating a *sense of public ownership* of the constitution-drafting process. Furthermore, strengthening the participatory dimension of the constitution-making process is crucial because it is a way to reinforce the *legitimacy* of the constitution itself.

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The Constitution We Desire? A Women's Perspective

By Sanaa Alsarghali

A lecture presented during the workshop on "Constitutional Principles" held by MIFTAH in partnership with the Constitutional Studies Center at An-Najah National University and the Women Media and Development Association (TAM) (The information in this lecture are taken from 'The Constitution We Desire? A Women's Perspective' a forthcoming book from Dr. S. Alsarghali)¹

Premises

It is no longer unusual for women to have a direct involvement in the constitution-making process². Indeed, the notion of 'founding mothers', as well as 'founding fathers', is now a valid and established principle when constitutions are drafted.³ In the aftermath of the Arab Spring, the revolutionary event that shook the Middle East and North Africa (MENA) region, an opportunity for newly drafted constitutions to embrace these women-centered principles in patriarchal societies was opened up.⁴ The newly crafted Tunisian constitution is perhaps the most emblematic example of a post Arab spring constitution embracing gender equality. Known worldwide for its drafting process which allowed the Tunisian women's movement to make constitutional revisions, the Tunisian constitution was an unprecedented document that has both founding mothers and fathers and includes gender equality clauses. Whilst Tunisia is seen as a shining light in the MENA region in regards to constitution building, Palestine's constitution stands at the threshold of collapsing due to the pressures of a long lasting occupation and the

¹ Assistant Professor of Constitutional law- Director of the Constitutional studies Center at an-Najah University & Charwoman of TAM. The first part of this lecture was written in English, the rest has been translated from the Arabic version to English by a translator.

² Helen Irving, *Constitutions and Gender* (Edward Elgard Publishing Limited) 1-9

³ Ibid.

⁴ This idea was presented at Miftah round table discussion (2019)

ongoing Fatah-Hamas clash that has divided Palestine into two regions, the West Bank and Gaza.⁵ The consequence of this pressure has meant that any attempts to rebuild the constitution in Palestine has often pushed the issue of women's rights to the side-lines, a problematic issue due to Palestine's history of an over extending patriarchy.⁶

Although women are marginalized in Palestine, their lack of acknowledgment in the constitutional sphere does not come from an absence of female-led organization. Indeed, Palestinian women are often seen as activists, troublemakers, and nuisances by both the Israeli government on one hand and their male professional counterparts on the other hand. Women in Palestine have been fighting for their needs and inclusion for the past two decades with varying amounts of success.⁷ In my own experience of working with the various constituencies of the women's movement in Palestine, the depth and variety of the pathways they use in order to gain constitutional participation is quite remarkable.

In recent years, this topic of women and constitution, historically untouched and ignored in Palestine, has been highlighted much recently by civil society organizations, largely via a successful constitutional awareness campaign.⁸ These organizations, as well as the Centre for Constitutional Studies,⁹ are investigating how to help women's groups achieve their main goal of obtaining a seat at the decision-making table at the next stage of the constitution-making in Palestine. Throughout several meetings starting in September 2018, I caught a glimpse into the struggles and triumphs of the women who are advocating for an engendered constitution. In my conversations with these women, the most moving aspect of their work was their continued insistence that having engendered articles in the constitution is not enough, but that the newly

⁵ Mounira M. Charrad & Amina Zarrugh (2014) Equal or complementary? Women in the new Tunisian Constitution after the Arab Spring, *The Journal of North African Studies*, 19:2, 230-243, DOI: [10.1080/13629387.2013.857276](https://doi.org/10.1080/13629387.2013.857276)

⁶ Miftah (2018)

⁷ Miftah (2019)

⁸ The Constitutional awareness campaign is a joint effort between The Palestinian Initiative for the Promotion of Global Dialogue and Democracy- MIFTAH and partner organizations; the Constitutional Studies Center- Al Najah University, Women Media and Development Association (TAM), and the Palestinian Constitutional Court.

⁹ An-Najah Constitutional Studies Centre (Hereinafter NCSC) is a new and innovative centre. sesucof ertneC eht ,evtialsigel fo epocs eht ;srewop fo notiarapes eht no ylraluctirap eht no dna srewop laiciduj dna ,evtiucexe eht ;ycarcomed lanotiuttisnoc fo erutcurtsfreedom of speech, gender studies within constitutional agendas, press, and religion. In .entiselaP ni gnidliub lanotiuttisnoc fo tnempoleved eht ot detoved si ertneC eht ,mus

established constitutional court also uses a method of interpretation that is gender sensitive. In order to understand what kind of engendered constitution is required and how to achieve it. This Lecture is divided into four sections. First, the lecture will begin by exploring the concept of a constitution. Second, the Lecture discusses the constitutional drafting process from a theoretical point of view. Third, with the context now established, the paper then explores how a constitution can become inclusive of women and gender sensitive. Finally, this theoretical discussion is applied to the Palestinian case study, exploring the extent that its new constitutional draft (of 2016) is engendered.

Understanding the Constitutional Concept

Most contemporary constitutions were written or re-written in the last quarter of a century.¹⁰ The process of constitution drafting is crucial, especially for developing states, as constitutionalists believe that these documents serve people's rights and guarantee their basic freedoms.¹¹ This is based on the grounds that constitutions are closely connected to the life of the state, and they prove the existence of this legal entity. In other words, constitutions define the shape of the state and the political system that shall be applied in the country.¹² In this sense, the constitution is seen as the supreme law, which organises and constrains power.¹³ Following this definition, it is clear why constitutions are needed. Despite the potential of constitutional drafting to create a supreme law that protects citizens or constrains power,¹⁴ some constitutions have been criticised for lacking any depth or transformative weight, having

¹⁰ Vivien Hart, 'Democratic Constitution Making' (United States Institute for Peace: Special Report 107, July 2003) <<http://www.usip.org/sites/default/files/sr107.pdf>> accessed 5 May 2014.

¹¹ Hillary Barnett, *Constitutional and Administrative Law* (8th edition, Routledge 2011) Chapters 6, 8 and 9. The idea that a constitution is written or unwritten does not contradict what the constitution is aim to fulfil. Constitutions are drafted to give legitimacy to the government and give protection to the people. In this sense the constitution is an act of the people to allow the government to protect their rights and functions internally and externally. There are various opinions regarding the exact definition of a constitution, but the majority of scholars agree that a constitution is a set of rules that defines the powers, rights and duties of the institutions and protects the people it represents.

¹² Political systems could also be affected by the 'veto players' the institutions or the money providers, which in this case the political system will no longer follow what is in the constitution. The political system will change according to the wishes of the veto players. See George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25 *Journal of British Political Science* 289.

¹³ Barnett (n11).

¹⁴ Nathan Brown, *Constitutions in Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2001) 6.

only been drafted for symbolic reasons in order to indicate the sovereignty of the state. This criticism of symbolism has been made against Palestine's constitution, the Basic Law, to the extent that when constitutional law is taught in Palestine, the first line that first year undergraduate students hear is:

'The Basic Law is not worth the paper that [it] is written on'.¹⁵

Hence, law students start their relationship with constitutional law knowing that their own constitutional document is lacking in value. They do not begin by learning the true meaning of a constitution or the reasons why it is regarded as the highest law. Students often only hear and remember this line, which gives the impression that constitutional law does not matter. This apathy towards constitutional law also based on the perceived importance that constitutional developments in Palestine have alongside more pressing matters regarding the political instability that Palestine is facing or the challenges of occupation. With respect to this view, constitutional law matters. In fact it matters more in a place that faces a double transition like Palestine; a transition to democracy and a transition to statehood.¹⁶ Although a constitution may not build a school or educate a child, it does, however, guarantee a right to education, a fundamental that needs to come first. A constitution also paves the way for the application of these rights, for if the constitution only guarantee's right without ensuring its application, then it's worth is much reduced.

To guarantee the application of rights, a constitution has to be drafted with the intention of serving the people (not just defining sovereignty) and limiting the powers of government. For this to work in practice, the constitution also needs to be enabled by a willing government. If a constitution is enabled to fulfil its crucial elements i.e. they 'practice what they preach', they can be described as 'constitutionalist constitutions' - constitutions in which the elements of constitutionalism explicitly exist within the constitution itself. To put another way, constitutionalism can be described as a form of political organisation that 'contain[s] institutionalised mechanisms of power control for the protection of the interests and liberties

¹⁵ From my own observation and discussion with MA and undergraduate students.

¹⁶ Khalil Shikaki, *The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine* (1996) 25 *Journal of Palestine Studies* 5.

of the citizenry, including those that may be in the minority'.¹⁷ Whilst 'constitutionalism' as a political theory has no concrete framework and many different scholars have come to define constitutionalism in different ways,¹⁸ I argue that there are three constitutional principles that central to all 'constitutional constitutions'. This lecture intends to explore these principles and apply them to the context of Palestine. The first principle concerns the drafting process, which can be expressed as being 'done by the people and for the people'. The second principle refers to the clear establishment of the separation of powers (SOP) doctrine in accordance with the political system most suitable for the country. Finally, the third principle relates to the establishing of constitutional protection, which can put the constitutional, articles into practice and protect the constitution from any power abuse. This constitutional protection also considers gender equality, both in its formation and ideally, in its application also.

The lack of these factors while drafting a constitution may lead to creating a document that enables the government at the expense of the people, creating an authoritarian regime. The question is whether these three aspects existed when the constitution was initially drafted or whether other reasons affected the drafting of the document leaving it as 'non-constitutionalist constitution'.

Although, the focus in this lecture is on the Palestinian draft constitution of 2016, it is important to shed light on the transitional constitutional document, the Basic Law, which is the constitutional framework of the Palestinian Authority (PA). The BL was never considered as a proper constitutional document due to the circumstances of its creation and the current fear is that the new draft constitution might suffer from the same issues that the BL has. For example, the BL was never interested in the gender sensitive language or issues, and the three points of constitutionalism were not carefully followed during its creation.

The Basic Law-Current Constitutional Framework

¹⁷Gordan Scott, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Harvard University Press 1999) 4.

¹⁸ The different definitions of constitutionalism will be presented in Chapter 2, which will also justify the definition that this thesis uses for constitutionalism. For more information and discussions regarding constitutionalism, See Paul Dobner and Martin Loughlin (eds), *What is constitutionalism: The Twilight of Constitutionalism* (Oxford University Press 2010).

The BL is a transitional constitutional document, which was drafted due to certain political circumstances. It is the constitutional framework for the Palestinian Authority (PA), which is the body that governs the Palestinian people inside the West Bank and Gaza. The PA was created through an agreement between the Palestinian Liberation Organisation (PLO) and the government of Israel in the 1993 Oslo Accords and later in the Oslo 2 Accords of 1995.¹⁹ The agreement of Oslo 1995 provided the details on the establishment of self-government first inside Gaza and Jericho and later in specific areas in the West Bank. In the Oslo agreement of 1995, the Palestinian Legislative Council (PLC) was granted autonomy to draft a BL to function as a temporary constitution until the establishment of the state at the end of the transitional period in 1999. However, the establishment of the state never came to pass and the BL is still in operation.²⁰ The BL was finally approved in July 2002, due to the delays with presidential ratification. The late approval of the President was taken to mean that the President did not want to impose power limitations upon himself.

This might have been the speculation at the time, but most of the documents that the BL's drafters relied on during the drafting process were prior Arab Spring. For example, the Egyptian constitution of²¹, which was abolished by the revolutions after the recent Arab Spring.²² Such documents gave unchecked power to the executive and particularly to the President.²³ The result was 'paper' constitutional documents with no real limitations over the Executive.²⁴ Indeed, the uprising directed towards these authoritarian regimes was a result of citizens living

¹⁹ The Oslo Accords (II) is also known as the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. Available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>.

²⁰ The BL was drafted by the Palestinian Legislative Council (PLC), despite the interference of the PLO, which enacted the early drafts of the BL, and had the late approval of the PA President who was also the Chairman of the PLO Executive Committee.

²¹ The Tunisian constitution was amended in 1999 and in 2002.

²² Arab Spring is the name that is used for the revolutions that occurred in the Middle East. The Arab Spring 'Revolution' in Tunisia, Egypt, Libya etc. demanded a change of governments; a government which was explicitly designed to be representative of the people and governed for the people. See Imad Salamay, 'Post-Arab Spring: changes and challenges' (2015) 36 *Third World Quarterly* 36, 111; Sean L. Yom 'The New Landscape of Jordanian Politics: Social Opposition, Fiscal Crisis, and the Arab Spring' (2015) 42 *British Journal of Middle Eastern Studies* 284.

²³ In these Arab countries writing a constitution was considered similar to printing a postage stamp; the focus was on the shape more than the actual text. This point is clarified by Nathan Brown in *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* (University of California 2003) 10.

²⁴ The paper document is an expression used by Brown (n14).

under 'emergency situations', enabled by these non-constitutionalist constitutions, which suspended the people's rights and prevented their voices from being heard.²⁵

The BL was not in the spotlight regarding its constitutionality for many years after its drafting, often ignored in favour of other contemporary political topics. Indeed, the centralisation of power that the BL gave the President was not a major issue until the international community insisted on splitting the executive branch between a Prime Minister and President Arafat in 2003.²⁶ However, despite this intervention, powers became further concentrated in the president office due to crisis that followed the most recent elections of the Palestinian Legislative Council, which took place in January 2006 and saw Hamas win a majority of PLC seats. This victory of Hamas was not popular internationally, and foreign aid was cut off entirely from the country which caused financial chaos and a problematic political deadlock.

On 14th of June 2007, President Mahmoud Abbas used the BL to declare a thirty-day 'state of emergency' on the West Bank and Gaza which allowed him to rule through presidential decree. The BL Article which allows for thirty days of emergency measures, however, could only be extended beyond its limit by a majority vote of the Palestinian Legislative Council (PLC) - dominated by Hamas. With the PLC suspended President Abbas used Article (43) of the BL – the 'necessity situation' - to continue his rule by presidential decree without any time limitation.

After nine years of presidential rule by decree, Palestinian President Mahmoud Abbas in a surprising move on the 3rd of April 2016 issued a decision to establish the first Palestinian High Constitutional Court. The aim was to provide a legal follow up on the constitutional rules and regulations that define the powers of the three authorities. The reasoning behind this drive to establish a constitutional court is perhaps questionable when one takes into consideration the

²⁵ Sean L. Yom 'The New Landscape of Jordanian Politics: Social Opposition, Fiscal Crisis, and the Arab Spring'(2015) 42 British Journal of Middle Eastern Studies 284; Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014). Throughout history there are many examples of 'emergency situations', which were used, in authoritarian regimes. See Cindy Skatch, *Borrowing Constitutional Designs: Constitutional Law in Weimer Germany and the French Fifth Republic* (Princeton University Press 2005).

²⁶ The policy document designed to instigate this constitutional change was referred to as the 'The Road Map' (May 2003). This document is perhaps more widely known for suggesting a permanent two-state solution to the Israeli-Palestinian conflict.

role Arab constitutional courts in that region had played in the past decade.²⁷ However, all Arab constitutional courts are specific to their locality and it is hasty to assume that Palestine's attempts to create an independent body that can exercise constitutional review, and act as the guarantor of the constitutional order, will ultimately fail. Indeed, moving to create a constitutional court is a major step in any context for a newly created state and reflects a crucial moment in the formation of Palestine's internal politics and its internal constitutional arrangements.

The court became established during this prolonged period of an 'exceptional situation' in which the PA has used and normalized emergency powers to govern Palestine. This situation of governance has caused controversy both within, and outside, Palestine.²⁸ Furthermore, the 'exceptional' status also arrived during a period of political ambiguity regarding the legitimacy of the PA institutions especially the suspended PLC. By 2018 and during the demonstration against social security law that was issued by a presidential decree, the newly embedded Semi-Presidential system was far from functioning smoothly with constitutional questions regarding: the different powers of the prime minister and president; the legal status of the emergency governments ruling the West Bank; the legislative prerogatives of the executive power; the PLC election timetable; and the legitimacy of past and present presidential decrees, which were never adequately answered.

On 22 December 2018, the Palestinian President declared that the constitutional court (established in 2016) officially dissolved the Palestinian Legislative Council (PLC) and called for legislative elections. The following day, the Minister of Justice, explained that what the constitutional court had issued was an explanatory decision that was justified on the grounds that a), the PLC had not been functioning since being elected and b), the PLC's elections had not been held as was due in 2010. This justification was then followed up by published announcement:

²⁷ See Tamir Mousafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt'

²⁸ Nathan Brown, *Palestinian Politics after the Oslo Accords*, p.78; and Naseer H. Aruri and John J. Carroll, —A New Palestinian Charter, *Journal of Palestine Studies*, Vol. 23, No. 4. (Summer 1994), 5-17. Palestine's state of emergency began with the Fatah-Hamas clash in 2007, which eventually became a declaration of state of necessity. Those declarations allowed the president to obtain more powers which have remained in place since. See Alsarghali, 'Palestine and the state of exception: A Perfect Marriage?' forthcoming.

“1-the legitimacy of the PLC lies when practicing its legislative and oversight duties. Considering that it has not convened since 2007, the PLC has lost its status as a legislative authority, and thus as its status as the Legislative Council...5- The President of the State of Palestine shall call for holding legislative elections within six months from the date of publishing this decision in the Official Gazette.”

In this decision by the court, the PLC as a legislative body was completely removed from the political scene. That the Basic law (BL) does not reference the ways in which the PLC would be dissolved, this ruling is perhaps the constitutional courts’ most controversial and significant decision to date. In making its interpretation, the court argued that although the BL provides no mechanism for the dissolving of the PLC, this provisional absence was based on the assumption that the PLC would always be in session (except for scheduled vacations).²⁹ Therefore, when considering the spirit of the drafters meaning when they initially wrote the BL, the court argued the BL had not considered the possibility of a perpetually suspended PLC, and if it had it would have provided the means for the PLC to be dissolved.³⁰

The resulting constitutional vacuum, created by this decision by the court to dissolve the PLC, has now rendered the law-making abilities of the Palestinian government impotent. Previous to the court’s decision, during the suspension of the PLC, laws in Palestine were enacted by presidential decree via Article (43) of the BL, which provides the president with powers of legislation in order to make laws.³¹ However, according to one interpretation at least, this article is valid only whilst the PLC is not in session; with the PLC being dissolved the president can no longer make legally binding laws. Despite this requirement of article (43) for the PLC to be in session, currently the president is still using this article to issue decrees that has the power of laws, and has on many occasion used this capacity to enact laws that improve

²⁹ This oversight by the drafters and Mr Arafat- the president at the time – is perhaps due to the expectation that the president and the PLC would always be in the same political party.

³⁰ Ibid (n9).

³¹ Article 43 of the Basic Law: ‘The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law’.

women's rights.³² Technically, however, and following the above logic, the government in its entirety has now lost this ability to make laws legally binding due to the absence of a legislative body and the ineligibility of Article (43).

For these recent pro-women decrees to have a lasting impact, they need to also be presented to the PLC in its first session (once it has been reconvened). Indeed, if they are not presented at the first session they will cease to have the power of law; furthermore, if they are not approved by the PLC they will also cease to have the power of law. Therefore, in order to save the efforts of the NGO's that have been working eagerly to improve women's rights, women focused organizations are keen to ensure the recent advances in women's rights will be codified in the new constitution. That way they are guaranteed irrespective of the outcome of the first PLC session.

It is important to point out that when we discuss the new constitutional draft from women's perspective that women are considered here to be as equal citizens, where their input is not only in the articles regarding their rights or duties, but also explicitly throughout the drafting process. In other words, there should be gender sensitivity clearly apparent in regards to: the language used; the Separation of Powers doctrine; the design of the chosen political system (a female input); and female involvement in the shaping of the constitutions protective mechanisms that protect the document itself and citizens' rights - regardless of their gender.

The Drafting of the Constitution

In September 2016, the writing of the new Palestinian draft constitution was completed, but has not yet been put into practice. Many observers have been concerned that this newly drafted constitution will repeat many of the existing issues and problems found in the current Basic Law. Indeed, questions have been asked if the constitution will pertain to democratic

³² Women's rights organization have for example taken advantage of the president's willingness to pass laws in this regard, if only for symbolic reasons.

ideals. If it will separate powers effectively? And if it will authentically be the property of the people?

From a women's perspective the key question also arises if it will be gender sensitive constitution. For a constitution to be gender sensitive, for example, it must use appropriate language, be aligned with the constitutional provisions established by international conventions and ensure an integrated participation in the formulation of constitutional provisions. In order for a constitution to achieve its desired goals, we must also think about the post-constitution period (implementation mechanism) – and especially the role of the constitutional courts and their interpretive approach – because this too will contribute in affirming the importance of gender considerations in the constitutional process. However, before discussing any gender-related considerations, it is important to talk about how constitutions are formulated.

How are constitutions written?

The constitution is a document that helps build society. Through the constitution, we can envision the type of society that we aspire to become. In the countries that seek to break away from a certain phase (such as civil war, secession, post-conflict period, or the building of a new state), the constitution is considered an essential factor in the transitional process from one political stage to another.

Among the main functions of a constitution is to formulate the general framework of government institutions and to specify the parties that possess the powers and authorities of the state and the ways of enhancing their role. Therefore, it is important to exert substantial efforts to pave the way for dialogue between different parties in order to successfully draft an integrated and democratic constitution.

This is because a well-informed public will become aware of constitutional violations and will demand accountability and the enhancement of civil values, as well as helping to rectify possible exclusions by voting for persons who were previously suppressed.³³ Therefore, a constitution-making process, which takes gender perspectives into consideration, can become a great model to be emulated in the public sphere at large.

The Popular Conference sought to achieve participatory deliberations during the Tunisian constitution-drafting process. This in turn strengthened the level of communication between the delegates, civil society, female leadership associations and women's organizations. Moreover, this helped in building the capacities of women and enhancing women's roles in the democratization process and the writing of the new Tunisian constitution.

Anware Mnsari, "The Constitution-Making Process in Tunisia: Women's Participation – Lessons Learned and Good Practices", in *Women's Participation 2013*, p. 13, <https://www.wilsoncenter.org/blogpost/womensparticipation-the-making-the-tunisian>

By involving gender perspectives in the constitutional-making process, women's empowerment is automatically increased as they are actively encouraged to take part in public life, are allowed the opportunity to struggle for their interests, and can make their voices heard when their rights are violated. Female participation in constitutional process can thus begin to subvert the different discriminatory practices throughout history that have excluded women. Indeed, this female participation can alleviate the problem of women refraining from joining the constitution-drafting process because they feel unimportant, unconsidered or that they are sometimes added to constitutional commissions for only superficial reasons. From this perspective, the enhancement of inclusive participation and ensuring it is a pre-condition for the constitution-making process could be considered as important as the constitution itself.

The constitution-making process starts by selecting the persons who will sit on the negotiation table, along with specifying the goals that the constitution aims to achieve and the way of

³³ Jason Gluck and Michele Brandt, *Participatory and Inclusive Constitution Making*, United States Institute for Peace, 2015, p. 12, <http://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-ConstitutionMaking.Pdf>

ratifying the new constitution. These things should be done in an early stage prior to discussing the new constitution, and one must not ignore the impact of early negotiations on the constitution. Moreover, a great focus should be placed on the political values of the constitution.³⁴ Furthermore, the constitution's aims must explicitly lay down the goal of female

The exclusion of women from constitution-making processes usually takes place in three cases:-

1. Temporary constitutions
2. Transitional constitutions (also called "Provisional Constitutions")
3. Post-conflict constitutions.

Each of these three cases exclude women through the pretext that they are constitutions which will not serve the country for a long time. However, in practice, many of these constitutions last for long periods of time and sometimes become permanent constitutions which exclude the participation of women from the constitution-making process.

participation, the involvement of women and women's rights organizations alongside the experts in decision-making structures and key positions.

Understanding the drafting process:

In order to understand how women will be able to play a major part in the drafting and be also included in the document, a proper understanding of the way constitutions is drafted should be presented. According to the definition adopted in this lecture: The first element that should be taken into consideration according to constitutionalist-constitutions is the drafting process. The drafting process operates under the assumption that laws can be made in a vacuum, independent of context, and as such are written as rigid documents. In this abstract space the theory of constituent power comes into being as the notion of constituent power that resides in a country's citizens' gives legitimacy to the constitutional document.³⁵ This document then has superiority above other laws and is called the constitution.³⁶ The fact that written constitutions

³⁴ 2 Ní Aoláin et al. 2011, p. 205

³⁵ Asem Khalil, *The Enactment of Constituent Power in the Arab World: The Palestinian case* (Helbing and Lichtenhahn Bâle, Genève 2006) 9.

³⁶ Ibid.

are responsible for constituent power theory does not mean that the unwritten constitutions did not develop and take their place in the constitutional world,³⁷ but for the purpose of this lecture which focuses on the Palestinian case, the theory of constitutionalism is centered on the written constitutions. The drafting process determines to whom the constitution belongs, and how it is going to be used. Therefore, the process should be created by the people and designed for the people. In this case, the constitutional document is a reflection of the people's will, not a type of law or authority imposed on them. This sense of inclusion in the drafting process followed by an assumption that the constitution would actively take care of their wellbeing.³⁸

This notion that the constitutional drafting has to be 'done' by the people dates back to the French Revolution where the notion that authority originates from God was turned upside down and replaced with a form of popular sovereignty.³⁹ Constitution drafting since then has had to try and resolve the paradox that somehow the people need to be the owners of the constitution, but at the same time, recognizing the impossibility of 'the people' being active agents involved in governing the constitution. Indeed, the various political experiments in different forms of government that occurred in France after the Revolution can be viewed as different attempts to resolve this paradox. Writing at the time of the French Revolution, Sieyès made attempts to resolve this paradox by distinguishing between the constituent (i.e. popular sovereignty) and the constituted powers.⁴⁰ The constituent power, enacted by the constituent subject (i.e. 'the people') 'is always capable of renovating established juridical orders'.⁴¹ For Sieyès, the nation, as the bearer of constituent power, 'never needs anything but its own existence to be legal. It is the source of all legality'.⁴² In this formulation of constituent power, the constituted powers are mere political institutions created by the constituent subject. By definition of the constituent power – the source of all legality – the constituted powers (the

³⁷ The United Kingdom does not have written constitution, for example.

³⁸ See Mark Tushnet, 'New institutional Mechanism for making constitutional Law' available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589178 last accessed 20 August 2015.

³⁹ Joel I. Colon-Rios, 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia' 2011, 18 *Constellations* 365.

⁴⁰ Emmanuel Joseph Sieyès, *What is the Third Estate?* (1789 re-printed in Praeger, 1963) 10.

⁴¹ Joel I. Colón-Ríos (n39) 378.

⁴² Sieyès (n40) 11.

executive, legislative and judicial powers in the modern republican form of government) are always limited by the constitutional forms that grant their existence. In order for ordinary legislature to exercise its legislative power then, it must adopt statutes in the manner prescribed in the constitution. This measure ensures the constitution has been 'done by the people' as it prevents the constituted powers from violating the established constitutional norms that have been established by the constituted power.⁴³

According to this distinction constituent power comes prior to the constituted powers. Thus, the constituent power creates a self-legitimizing constitution. In this formation constituent power is hierarchically superior to constituted powers and the only sovereign is constituent power, not constituted powers.⁴⁴ In the same view Paine writes, in his seminal piece *The Rights of Man*, 'a constitution is not an act of its government, but it is an act of the people constituting a government'.⁴⁵ Paine is drawing the same distinction that Sieyès made between the constituent power and the constituted powers. With this formulation of constituted power, Paine defines constitutionalism as:

'The body of elements ...which contains the principles on which the government shall be established, the manner in which it shall be organised, the powers it shall have, the mode of elections, the duration of the parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and in fine, everything that relates to complete organisation of a civil government, and the principle on which it shall act, and by which it shall be bound'.⁴⁶

For Paine, the government cannot alter the constitution that binds it because such law can only be altered by the people (the constituent power). Paine's point that government is continually bound by the constituent power is not applicable if constituent power is divided into two; the framing power and the amending power as understood by Kelsen and Schmitt⁴⁷ who divide constituent power like this in order to maintain the idea that the constituent power grants the

⁴³ Colon-Ríos (n39) 366.

⁴⁴ Ibid.

⁴⁵ Thomas Paine, *Rights of Man* (1791, reprinted at Oxford University Press 1995) 122.

⁴⁶ Thomas Paine in Bruce Kukliced (ed), *Political Writings* (Cambridge University Press 2000) 89.

⁴⁷ Khalil (n 35) 33-35.

constitution its legitimacy whilst at the same time allowing the state the authority to amend the constitution lawfully.⁴⁸ From this perspective the ‘people’ are still – as Paine believed – the constituent ‘framing’ power because it is the people that give the constitution its legitimacy and the justification for the state and its institutions. However, the concept of an amending power allows scope for the state to interfere with the constitution legitimately. In other words, framing the constituent power as two separate entities – the framing power and the amending power – dilutes Paine’s somewhat radical understanding of constituent power. Central to both perspectives is the recognition that the people are the source of legitimacy for a constitution. This form of legitimacy is thus a necessary facet required for a constitution to be considered a ‘constitutionalist-constitution’;⁴⁹ it has to be a reflection of the people’s will.⁵⁰

The initial preamble of the U.S. constitution makes direct reference to this notion of ‘the people’s will’;

‘We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.’⁵¹

This emphasis on ‘the people’ highlights how they are the explicit owners of the constitution. Modern constitutions (in the post-colonial and post-communist era) often begin in this vein, claiming legitimacy from the constituted power by making reference to ‘the people’ and their ownership of the document.⁵² This direct reference to ‘the people’ is one way to make the citizens feel like an integrated part of the constitution, and to confirm the fact that the social

⁴⁸ Ibid 61.

⁴⁹ This term refers to the constitutions that focus on implementing the idea of constitutionalism. See Brown (n44).

⁵⁰ Ulrich Klaus Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Humanities Press 1995).

⁵¹ The American Constitution. See also Germany’s Constitution (art. 20.2): ‘All governmental authority emanates from the People. It shall be exercised by the People by means of elections and voting, and by specific legislative, executive, and judicial organs’; France’s (art. 3): ‘Sovereignty resides in the Nation. No body, no individual, may exercise authority which has not been expressly granted’. Italy’s (art. 1): ‘Sovereignty belongs to the People, who exercise it in the manner and within the limits laid down by the Constitution’. Spain’s (art. 1.2): ‘National sovereignty belongs to the Spanish People, from whom all powers of state emanate’.

⁵² See the Ukrainian, Belarusian constitutions etc.

contract between them and the political rulers is one made between equals. For Preuss this element that the people drive political authority is crucial.⁵³ He argues that constitutions are not only a set of rules that establish the structure of a political regime or draw limitations on the government, but more importantly define the collective credo of the citizens of the state. The language used in constitutions thus plays a major role in providing citizens with the social security that they seek, often after their struggle to have constitutions (re)written. This process by which a constitution is drafted is therefore, in itself, highly significant in ensuring that new constitutional content reflects the values and aspirations of the people. From this perspective constitutions are essential, as they serve as an expression of the people's self-determination. In this sense, as heightened by Preuss, constitutions can be considered a useful technique for a civilized polity.⁵⁴

If the drafting of constitutions is to be 'done by the people' in order to express self-determination, how are constitutions to be governed? There is an agreement across the political spectrum from both conservatives and liberals alike, that once the constitution is adopted, modern republics must be governed by the people and for the people, but never by the people.⁵⁵ Although the constitution needs to be an expression of the people's will, the government has to have the ability to manage the people, and perhaps also to protect the constitution from the people.⁵⁶ Indeed many constitutional theorists concur with this view that the people are the real owners of the constitution, and yet they cannot also be active agents in its execution.⁵⁷ The disagreement occurs when theorists debate how this paradox, between the need for constitutional governance and the need to ensure constituent power is respected, can be resolved.⁵⁸

⁵³ Ulrich Klaus Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Humanities Press 1995) 2.

⁵⁴ Ibid.

⁵⁵ James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Penguin 1987) 87.

⁵⁶ Preuss (n53).

⁵⁷ See Carl Schmitt 'Legal Theory' in David Dyzenhaus (ed) *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press 1999).

⁵⁸ The most famous of these constitutional debates occurred between Carl Schmitt and Hans Kelsen which became somewhat immortalised with Kelsen's 1931 essay: 'Who Should Be the Guardian of the Constitution?' in Lars Vinx (ed and tr), *The Guardian of the Constitution Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 174.

The underlying question then, and indeed the practical issue, is how can constituent power be practiced, and what could be considered as practising constituent power? How these questions are answered is largely dependent on the assumptions made concerning constituent power when the constitution is drafted. There are two opposing schools of thought here; does one draft a constitution based on the Kelsian doctrine that assumes constitutions rests on abstract norms: 'The constitution is valid by virtue of the existing political will of that which establishes it'.⁵⁹ In this formulation constituent power is usually regulated by a Constitutional Court that acts as mechanism of judicial review. This means of judicial review ensures the governance of the constitution remains representative of the people.⁶⁰

The Schmitt doctrine, by contrast, argues that 'constituent power cannot be limited by law or regulated by any legal procedures; the will of the constituent subject is an 'unmediated will'.⁶¹ In this guise the constituent power is realised through a National Constituent Assembly that organises the constituent power into an entity that can draft a constitution.⁶² In this formulation such an assembly acts as a sovereign dictator, but it is not itself the sovereign. This assembly then undertakes the fundamental political decisions adopted by the constituent subject, namely, in Schmitt's terminology, 'the people's mode of political existence'.⁶³ This refers 'to the state's basic structure: whether it takes the form of a republic or a monarchy, of a unitary or a federal system, of a liberal democracy or a socialist order'.⁶⁴

In the assembly, priority is given to ensuring that the people's views are adequately represented during the process, whilst at the same time, encouraging professionalism and efficiency throughout. Only in this way can the end result reflect the collective views and

⁵⁹ Hans Kelsen, 'The Function of a Constitution' in Richard Turet *al.* (eds) *Essays on Kelsen* (Clarendon Press 1986); Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949).

⁶⁰ Kelsen(n59) 11.

⁶¹ Colon-Rios (n35) 367.

⁶² Carl Schmitt, *The Concept of the Political* (University of Chicago Press 1996). For an illuminating discussion, see also David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press 1999) 97.

⁶³ Carl Schmitt, *Constitutional Theory* (1928, reprinted by Duke University Press 2008).

⁶⁴ Colon-Rios (n35) 367.

concerns of the people while enjoying some form of normative legitimacy. Constitutional assemblies are needed in this view to make sure that none of the constituted powers, which the constitution creates, could be part of the constitutional drafting, and thus the people are owners of the constitution and can practise their right by creating their own constitution. The question is whether the constitutional assembly should disappear after the drafting and, if it does, who would be able to amend the constitution when it is needed. Schmitt's own view is that it is a mistake to think that constituent power 'is thereby expended and eliminated, because it is exercised once'.⁶⁵ 'The political decision, which essentially means the constitution,' he wrote, 'cannot have a reciprocal effect on its subject and eliminate its political existence. This political existence remains alongside and above the constitution.'⁶⁶

In summary, to compensate for the absence of an active constituent power, constitutional assemblies are created to act in its place; however, these assemblies do not necessarily guarantee popular sovereignty. When no constituent assembly is available, the drafting process could take place by referendum or by an elected parliament as a first step before it goes through the referendum. The problem with the parliament, however, is that the initial idea behind constituent power was to limit the legislature, and therefore for extremist scholars the parliament is not supposed to draft the constitution under any circumstance. It is a constituted power, which should appear only after the constitution exists. Thus, the people in all these cases will not be the actual drafters but the drafters will be the people's representatives, as proposed by Schmitt. In this case the representatives of the people are the actual drafters of the document. The problem lies with the designated body that acts on behalf of the people.

This fear becomes clear if the parliament is the agent that drafts the constitution. Indeed, if we accept that the parliament is entitled to draft a constitution then we are adopting the idea that constituent power and constituted powers are the same, which is something that this thesis does not agree with. If so then why would the parliament be part of the drafting process? This thesis argues that the parliament could be part of the drafting process if the document after

⁶⁵ Ulrich Preuss, 'Constitutional Power making for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution,' (1993) 14 *Cardozo Law Review* 635.

⁶⁶ *Ibid* 368.

drafting goes into referendum; in this case there will be some sort of check over the drafting. An elected constitutional assembly that drafts the constitution and disappears after the drafting is still the preferred model according to this thesis.

In Palestine, the constituent power or the 'people' is especially problematic because there is currently ambiguity surrounding the identity of the Palestinian people due to its geopolitical context. This ambiguity perhaps renders the Kelsenian doctrine which is less appropriate for the Palestinian case as the domain of jurisdiction for the laws which govern the state and its associated society, a tenant necessary for the practice of Kelsenian constituent power, are dependent on the principles of explicitly defined sovereignty. That the Palestinian state is in a constant state of flux and contention might prevent this form of 'judicial' constituent power from being exercised efficiently.

The second part of drafting a constitution concerns the aspect 'for the people', which relies on the rationale behind the drafting. If the drafters intend to serve the people by creating a government that is limited by the constitution, then the reasons behind this document are connected with serving the people and not only obtaining power.⁶⁷ If the reasons behind the drafting are not to achieve the aforementioned points, then the whole idea of having a constitution is questionable. Why would the constitution be drafted if it was not intended to help in serving the people by organising power? This type of constitution is usually written to enable authority without limiting it; people's interests or rights are not a main aim of this type of constitution. Rulers who want to obscure the unrestrained nature of their authority issue this type of constitution; in this way the authority will be masked but never limited by the constitution. Usually, it is the executive that ends up controlling the drafting of this document to give legitimacy to its rule and with a weak parliament, the drafting process, regardless of how it is done or by whom, would never place the 'people' as sovereign. Constitutions designed in this context often centralise powers.

⁶⁷ Oliver Richmond, 'The problem of peace: Understanding the liberal peace' (2006) *Conflict, Security and Development* 219; Joanne Wallis, *Constitution making during State Building* (Cambridge University Press 2014).

The drafting process element of constitutionalism indicates that the body that takes control of the process and the driving rationale of this body are very important in ensuring that the executive concentration of powers is limited.

The current Palestinian situation

The current Palestinian draft constitution has not adopted an approach to constitutional making that explicitly promotes inclusivity and democratic principles. It has instead been heavily dependent on the Iraqi constitution of 1925 and the Tunisian constitution of 1959 - both of which were cancelled after the Arab revolts due in part to constitutional failure of their documents. A far more suited and sustainable approach would have been to model the new constitution on the recent Tunisian example of 2014, now famed for its inclusive and democratic approach. Unfortunately, these progressive constitutions were only mentioned in passing during the initial formation of the Palestinian draft constitution-making committee.

It is also worth noting that the constitution-drafting committee thoroughly discussed the importance of holding a constitutional referendum and the reasons for applying it. However, the committee considered that this democratic method cannot be applied in Palestine because of the uniqueness of the Palestinian predicament, whereby stating the following:

“With regard to constitution-making and constitution-ratification methods, the committee took into consideration the specificity of the Palestinian predicament as a result of the occupation and dispersion of the Palestinian people. Therefore, the drafting committee suggests considering the general constitution-making committee as a constituent committee following its expansion, provided that the agreed draft constitution would be presented to a popular referendum in order to reflect the will of the Palestinian people. However, if a referendum could not be held as a result of compelling reasons through a decision from the constitutional court, the draft constitution shall be presented to the Palestinian National Council (PNC) for ratification, and if the PNC cannot be convened, the draft constitution will be ratified by the Palestinian Central Council (PCC).”

Such an action by the drafting committee is considered a clear violation of popular sovereignty. This is because the drafting committee stipulated that the constitution will be ratified by the President without discussing in detail the cases that would prevent a popular referendum from taking place. Indeed, the above paragraph reads as a justification of their unwillingness to hold a popular referendum. To put another way, an unwillingness to have direct democracy, thus undermining the rights of Palestinian citizens, both male and female, in practicing their sovereignty as the constitution cannot be considered to be “owned by the people” in such a case.

The drafting committee was also problematic in of itself. Comprised of eight persons the drafting committee argued that it had adopted “the idea and philosophy of total partnership between women and men since they are equal partners in the struggle, development and decision-making processes, as well as avoiding gender-based discrimination”. However, after examining the established committee, it is clear that this principle was clearly absent.

Fore mostly, there were no women in the drafting committee; hence the committee violated its declared work principles by including eight male members without the presence of any women in the drafting process. This absence of women in the drafting committee is a great obstacle to achieving a constitution-making process. Moreover, there was also an absence of youth in the drafting committee despite the recognized principle of youth representation being a core pillar of democracy. As for the presence of religious minorities and the opposition parties, they were also mostly absence from the committee, another core requirement for ensuring that a constitution stems from all groups of the populace.

The applied method for forming the Palestinian constitution-drafting committee shows us that it is highly unlikely that they care about the equal participation of women and the vital issues that concern them (such as some rights that are easily granted to men but not to women). Moreover, even though some parties involve women in discussions, no women were included in the constitution drafting and ratification processes. If the “general constitution-making committee” really learned from the Tunisian experience of 2014 as stated by them in the

introduction of the Palestinian draft constitution, would it not have been a priority for them to include women and youth as done in Tunisia?

In sum, the drafting committee can be criticized for failing to recognize:

1. Equal participation of women.
2. Alignment with international conventions (CEDAW, Beijing Agreement, Convention on the Rights of the Child, and others).
3. The constitution's language and gender-compatibility.

These things are essential for having a non-discriminatory constitution which is fair to women, and they must be taken into consideration by the drafting committee to achieve the philosophy and principles that were declared in the introduction of the Palestinian draft constitution.

The Concept of Gender Integration in Constitutions (Participation and Alignment)

The concept of "Gender Integration" is not only related to the inclusion of women in the constitution-drafting process. Rather, it involves a much wider horizon, such as the treatment of women in different social classes/levels in order to achieve full popular sovereignty. This idea of 'gender integration' began to gain traction as a constitutional idea after the Arab Spring.

The Arab Spring came after decades of neo-liberalism in which the Arab regimes granted their citizens some social rights but restricted many of their political rights following the end of colonialism. In other words, the Arab neo-liberal regimes did not achieve social justice and failed to grant their citizens their due political rights. In the beginning, the Arab revolts (as in the case of Egypt and Tunisia) led to strengthening democracy and enhancing political rights and openness towards social issues. However, there were conflicting views about the exact purpose of *popular sovereignty* and they did not link gender-integration to this concept despite the inclusion of some articles related to women, family and society and the sufficient number of women in the constitution-writing process. For example, in the Tunisian Constitution of 2014, there was a clear contradiction between what needs to be achieved on one side and satisfying the different parties involved in the constitution-drafting process on another side.

Therefore, priority was given to consensus without seriously considering social justice and its mechanism of achievement on the ground. In spite of that, and as seen in the section discussing

Article 21 of the Tunisian Constitution of 2014

All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees freedoms and individual and collective rights to all citizens, and provides all citizens the conditions for a dignified life.

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.

rights and freedoms, the Tunisian constitution is considered among the best written constitutions following the Arab revolts (at least on paper).

The Tunisian example shows the importance of emphasizing gender-inclusive language, equality between women and men, and alignment to international conventions in order to ensure women's rights and freedoms are guaranteed in the constitution. However, the following question still remains: To what extent can gender integration achieve equity for women in light of a political democracy that fails to emphasize economic democracy also?

Perhaps this question will be answered by assessing the Tunisian constitution in the coming years. Outside of the constitution Tunisia has made commitments to United Nations conventions related to women. This commitment shows that gender integration goes beyond

The following was stipulated by the United Nations Charter:

"Ensure that women, civil society organizations focused on women's issues, and civil society representatives are included equally in all peace negotiations and post-conflict rebuilding and reconstruction efforts."

the concept of women's participation and includes a country's compliance with international

conventions related to women. For example, the following was stipulated in Article (2) of Part I of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women):

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of equality between men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure, through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.”⁶⁸

⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), United Nations, 1979.

The Arab Charter on Human Rights declared its commitment to gender-integration in Arab constitutions, as stipulated in Article (44) of the Charter which stated that:

“The state parties undertake to adopt, in conformity with their constitutional procedures and the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein.”

What are the implications of the absence of female participation in the Palestinian draft constitution in terms of freedom, equality and dignity?

Even though Palestine has signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), without any reservations, and has the desire to be globally recognized as a country that upholds rights and freedoms (including women’s rights and freedoms), it is generally recognized that Palestine has not actively applied this international commitment to practical everyday practice. A good example of this is the above-mentioned case of constitution-drafting in Palestine, where the main aim of the said process was not the achievement of equality and justice between male and female Palestinians, but it was more of a “beautifying”, superficial reform similar to those found in most Arab constitutions. So whilst, Article (22) of the State of Palestine’s draft constitution of 2016 stipulates that *“women shall have the right to participate on an equal basis with men in economic, social, political, cultural and educational/scientific aspects of life. The law shall safeguard women’s access to decision-making positions and their suitable representation in all public positions and elected bodies with a minimum of 30%. The State will aim to empower women and enhance women’s equity, as well as eliminating all forms of discrimination against women in all fields”*, there are still practical problems.

For example, whilst the beginning of Article (22) mentioned the right of women’s participation in all aspects of life “on an equal basis with men”, it infers that men are the standard to denote equality. A far more gender sensitive article would have stipulated that “women and men have the right to participate ...” Therefore, the phrase “on an equal basis” must be removed from this provision because not mentioning it in this case would consolidate a new self-evident state

of imposed gender equality. As for the currently-used wording/formulation, it wrongfully affirms that women are second-class citizens who seek to reach a status equal to that of men.

A second issue arises with the legislator's confirmation that the percentage of representation for women in public positions and elected bodies must not be less than 30%. However, this percentage is unsatisfactory because the provision would consider that a sufficient representation of women would be achieved if the percentage representation reached 30%. An approach that recognizes society as being fully integrated, as opposed to having gender distinctions, would have stated that women's representation should be at least 50%. Article (22) should also include a clause which states that the failure to reach such representation [i.e. 50% of women's representation] should call for reviewing the specified jobs/positions. It is clear then that the Palestinian draft of its new constitution has a core problems related to women's representation and participation.

Furthermore, another issue of contention is if this draft constitution is in line with the international conventions pertaining to women's rights? Despite the above-mentioned criticisms of Article (22), the Palestinian draft constitution was committed to and took into consideration a number of sections related to human rights in general. For example, Article (51) of the draft constitution stipulates that basic human rights and freedoms are compulsory and must be respected, and that the State shall guarantee the religious, civil, political, economic, social and cultural rights and freedoms of all citizens on the basis of equality and equal opportunities, and that no persons shall be deprived of their basic rights and freedoms or their legal capacity because of political reasons.

What was stated above [in Article (51)] is in line with Article (2) of the Universal Declaration of Human Rights which declared that:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory

to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”⁶⁹

The Palestinian draft constitution also dedicated a number of articles related to women’s affairs, and it confirmed several women’s rights and criminalized all parties that violate or undermine them.

The draft constitution also reaffirmed many women’s rights that oriental societies have grown accustomed to undermine. A good example of this is Article (88) which stated that *“the woman’s constitutional and legal rights are inviolable. The law punishes any violation of these rights and protects the woman’s right to legal inheritance”*. Also, Article (89) stated that *“a woman has her legal status and independent financial rights, and she has the same basic rights, freedoms and duties as the man”*. The article added that *“the law shall remove all restrictions that prevent women from taking part in building the family, society and the State”*.

Moreover, Article (90) stipulates that *“the State commits to protect women from all forms of violence and discrimination and guarantees their empowerment to succeed in combining between their family-related duties and work requirements. The State will aim to provide care and protection to female heads of households, elderly women, and impoverished women.”*

Amidst our focus to highlight the problems of unfairness-to, and non-empowerment of women in drafted constitutions, it has been argued that the draft constitution’s articles related to women did intend to restrict them within a narrow framework. For example, the economic and social rights of women – including their right to work and education – should not have been neglected when drafting Article (90). This is because the deprivation of women and curtailing their access to education are among the serious problems suffered in third world countries in general and the Arab world in particular. Furthermore, the guaranteeing of education as a basic right for women enhances women’s awareness and rejection of all forms of violence, thus

⁶⁹ <https://www.un.org/en/universal-declaration-human-rights/index.html>

Reformulation of Article (90):

The State commits to protect women from all forms of violence and discrimination and guarantees the empowerment of women and men in combining between their family-related duties and work requirements.

The State will aim to provide care, education, protection and job opportunities for young women who are able to work, as well as female heads of households, elderly women, and impoverished women.”

contributing to the achievement of Article (90) with its new wording [see below]. Article (90) should have been formulated as follows: -

“The State is committed to protecting women against violence and discrimination. The State shall ensure that women and men are able to reconcile family duties with work requirements. The State seeks to provide care, education, protection and employment opportunities for young women, able to work, breadwinners, the elderly and the poorest women”

Language of the Constitution:

The language of the constitution must always be inclusive and not neutral with regard to gender. This is because being merely neutral would most likely lead to women’s exclusion. Therefore, the constitution must explicitly reflect the society’s commitment towards women. A constitution, with inclusive and gender sensitive language sends a strong message to current and future legislators to think deeply about gender-related aspects in legislation; especially as constitutions are not easily amendable.

That constitutions are often gender neutral, constitutional provisions are often biased towards men. For example, when Arab constitutions talk about their State Presidency, they usually refer to the President in a masculine form (“Ra’ees” in Arabic). This makes it hard for the society to accept a female person in this position [an alternative could be to use “Ra’ees/at” (رئيسة) ,

which includes both the male and female versions of the word “President” in Arabic]. Therefore, the used language should be a means of equal representation between women and men.

Unfortunately, the vast majority of constitution drafters around the world use neutral plural nouns (e.g. the word “citizens”) instead of words that alternate between the feminine and masculine form (such as saying: “citizens, both male and female”). The neutral plural nouns (e.g. “citizens”) enhance unequal representation between women and men [note that the neutral word for “citizens” in Arabic is in the plural masculine form - i.e. “*muwatineen*” (male citizens, which is also used to refer to both male and female citizens) - whereas the word “*muwatinat*” (female citizens) should be used as well]. Rather, the alternating feminine and masculine form should be used in such contexts because it enhances equal representation. It is especially important to use the latter form for positions that were historically considered to be confined to men, such as the Prime Minister’s position or judicial roles. Sadly enough, the feminine form was only mentioned in the context of organizations that were historically assumed by women. For example, we saw the use of feminine nouns and pronouns (such as “women” and “she”) when a provision was related to marriage or the family; and this enhances the historic restriction of women and men to certain roles.

The future Palestinian constitution should use phrases like “**he or she**” as done in Article (89) of Nepal’s constitution which stipulated that:

The seat of a Member of Parliament shall be vacant in the following circumstances:

- a. if he or she resigns in writing to the Speaker or Chairperson,*
- b. if he or she does not meet the requirements under Article 91*
- c. if his or her term of office expires [...].*

This shows the importance of using such pronouns because they help in confirming that these vacancies can either be filled by men or women.

Hence, it is important to use both female and male pronouns in the needed contexts. Moreover, a good constitution must be clear and unambiguous and its provisions should never lead to confusion. A clear language can also prevent the restriction of constitutional protections by avoiding judicial misinterpretations supported by an ambiguous language. Therefore, *coherence* and *unambiguity* are among the most important elements in the drafting process because their absence would lead to judicial misinterpretations and false judgments by constitutional courts which are many times unfair to women (or at least have been so throughout history). Also, the constitution should harmonize between the different legal references/texts and must not prefer some over others. For example, religious teachings are sometimes misinterpreted and used as a false pretext to violate the universal rights of women. This kind of inconsistency will cause great harm to the constitution and citizens because it would lead to violating their rights and freedoms in light of a prevailing spirit of ambiguity.

How was the language used by the Palestinian Draft Constitution in terms of gender?

The preamble of the Palestinian Draft Constitution had a clear inconsistency in terms of gender language. For example, we see Palestinians being mentioned as female and male at some point, but then we find that other phrases totally focused on men [i.e. excluding women] without following a unified, consistent pattern in the preamble. Note that the preamble is an expression of what the constitution will contain.

The preamble included the following phrase: *“the State of Palestine is for Palestinians wherever they are”* [note that the Arabic word for “Palestinians” (*“filisteeniyjeen”*) is in the plural masculine form and not the feminine one]. This is considered a setback and we recommend using words similar to those of the Tunisian constitution as follows: *“[...] the equality of rights and duties between all citizens, male and female”*. This is because using the latter formulation (and especially in the preamble) would confirm that the constitution belongs to the people regardless of gender, as well as preventing future misinterpretations that might cause gender bias.

The provision that mentioned both women and men in the preamble was a brief one and it stated that there should not be discrimination between men and women. Nevertheless, women were not referred to as citizens in this context and the plural masculine word for “citizens” [“*muwatineen*”] was used. This is considered a grave problem that will negatively affect the

Reformulation of Article (79):

Every Palestinian, both male and female, whose age is eighteen years old and above, has the right of election, and whoever is nominated for the State Presidency or House of Representatives [both male and female] should not hold another citizenship, whereas the law shall regulate the age and necessary requirements for election and nomination.

Reformulation of Article (81):

Palestinians, both male and female, have the right to participate in the political life, both individually and collectively.

interpretation of the Palestinian draft constitution at a later stage.

Moreover, Articles (89), (90) and (91) of the Palestinian Draft Constitution confined women to the historical roles assigned to them, and the word “women” was mainly used in relation to the family. For example, Article (90) mentioned guaranteeing the empowerment of women “to succeed in combining between their family-related duties and work requirements”, thereby considering family duties to be the exclusive duty of women without ascribing them to men as well.

We can hereby conclude that the only role that the Palestinian Draft Constitution ascribed to women is family duties. Also, the word “women” was not mentioned in Article (79) which talks about the right of election, and only a neutral word was used. This provision used the following words: “for every Palestinian”. A more fitting alternative would be: “for every Palestinian, male and female” in order to enhance the right of election to all citizens regardless of gender. The problem of this Article is that it excludes women from political participation and decision-making positions that ought to be shared equally between women and men. Therefore, the psychological barriers created from reading such articles will limit the key decision-making positions and roles to men at the expense of women.

Conclusion:

In conclusion, it must be asserted that constitutional awareness is a very important starting point. This is because any discussion about constitution-building or gender-integration can only lead to fruitful results if the people are aware of this document's significance. Moreover, the constitution drafters should work to produce a more inclusive constitution to overcome a number of political hurdles and take into account the various needs that the Palestinian people aspire to achieve. This discussion is particularly important because the Palestinian draft constitution is still modifiable and amendable at this stage. It should also be noted that whichever method is used to formulate the constitution must be accompanied with a strong level of popular participation in a democratic manner. Hence, there should not be any demands for the gender-inclusion of women in the constitution without first presenting the draft constitution for public discussions and referendums (despite some reservations regarding the latter). Additionally, the nature of the proposed constitution must be clearly specified. We highly recommend that (in spite of some risks) there would be a temporary constitution prior to the permanent one because of the importance of specifying the relation between the Palestine Liberation Organization (PLO) and the State of Palestine as this relationship is still unclear. Therefore, our talk about gender issues concerns all people and not only women, and the highlighted notion of equal citizenship should be enforced in any constitutional effort (in this constitution or any other future draft).