

# The 2014 Constitution of the Republic of Tunisia: The Desired Transformation vs the Imposed Reality

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## ABSTRACT

Throughout the various stages of its political history, the Republic of Tunisia has adopted multiple constitutions, but the 2014 Constitution stands out as one of the most important, due to a unique set of characteristics that brought it close to achieving democratic rule and a constitutional system guaranteeing rights and freedoms. However, the successive governments that came to power under it sought to maintain the status quo, leading to the failure of that Tunisian constitutional experience and to the perpetuation of the status quo. This was true both while the 2014 Constitution was in force and after its suspension, as the analysis in this article will show.

Compared with previous and subsequent Tunisian constitutional experiences, the constituent process that led to the adoption of the 2014 Constitution was democratic and aligned with the main international standards adopted in the framework of contemporary constituent processes. It was characterized by a pluralistic and democratic approach in a genuine attempt to establish a legitimate constituent authority. The process was also inclusive and consensus-based and proved capable of resolving the political crises that arose during the constituent period.

In terms of its contents, it can be said that the 2014 Constitution was successful in establishing a rights-based system that drew inspiration from the popular aspirations of the revolution. It also built an institutional framework capable of promoting the rule of law. However, the constitution contained some ambiguous provisions and omissions that resulted from the political disputes that accompanied the constituent process, giving rise to differing interpretations with respect to the constitutional sources that should serve to interpret the rights and freedoms enshrined in it.

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In practice, the 2014 Constitution was also applied selectively in accordance with political interests, especially in terms of the laws that were adopted to implement its provisions. In addition, the constitutional institutions that ensure the supremacy of the constitution and give it precedence over all other laws, the most important of which is the Constitutional Court, were not established. This led to maintaining the status quo, both under the 2014 Constitution and after its suspension and the adoption of the Constitution of 25 July 2022.

Keywords: *Tunisian Revolution, democracy, constituent process, political consensus, guaranteeing rights and freedoms, duality of constitutional sources, selective implementation of constitutional provisions.*

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## INTRODUCTION

Tunisia has had numerous constitutions throughout its political history. The first was the “granted” constitution, also known as the Law of the Tunisian State, promulgated by Muhammad as-Sadiq Bey for his subjects in 1861. It was suspended in 1864 following the revolt led by Ali Ben Ghedhahem. This was followed by the Constitution of 1 June 1959, which laid the foundations of the Tunisian Republic and an independent state after the monarchy was toppled and the republic proclaimed in 1957. The 1959 Constitution was suspended after the revolution of 17 December 2010–14 January 2011, which toppled Ben Ali’s regime and ushered in the second republic following the adoption of the Constitution of 26 January 2014. Some provisions of this constitution were applied for a few years, before it was suspended gradually after the state of exception was declared on 25 July 2021, and Decree No. 117 was issued.<sup>1</sup> The constitution was completely suspended following the referendum of 25 July 2022, and replaced by the “Constitution of the New Republic of Tunisia.”

Every constitution that was adopted in Tunisia was drafted under a different set of circumstances and in a specific context. Along with that, the constitution-making process, the contents of the constitutional text, and the adopted system of government differed every time. Each constituent period represented an endeavour to draft a constitution that would achieve the desired outcomes by breaking with the reality in place. The process of drafting the 2014 Constitution was one of the most important constitutional and political developments in the modern history of Tunisia. This was the “Constitution of the Revolution,” and it represented the culmination of a popular uprising that started in 2010 and turned into a revolution that toppled the existing institutional and constitutional regime and paved the way for a new regime through a more peaceful constitution-making process.

Indeed, the adoption of the 2014 Constitution was a primary outcome of the revolution and its protests, ramifications, and struggles. Despite the contradictions that surrounded the constituent process, all the stakeholders agreed on the objective behind the constitution, which was to achieve the desired transformation.

This transformation can be defined as “the transition from an authoritarian regime, whatever it may be called (one-party regime, military or totalitarian dictatorship, hereditary oligarchy, or autocracy) to a regime that is governed by the rules and procedures of citizenship, i.e. political freedom and participation, after having been previously governed by other principles (mandate, coercive or bureaucratic control, clientelism....”<sup>2</sup> The desired transformation that the new constitution sought to achieve lay in guaranteeing the transition from the authoritarian regime that had been in place for decades to a democratic one capable of achieving the demands of the revolution in terms of citizenship,

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<sup>1</sup> Presidential Decree No. 117 of 22 September 2021, on exceptional measures, Official Gazette of the Republic of Tunisia, Issue No. 86 of 22 September 2021. The decree changed the hierarchy of authorities adopted in the 2014 Constitution. Article 20 stipulated: “The Preamble of the Constitution, Chapters I and II thereof, and all other provisions that are not in conflict with this Presidential Decree shall remain in force.”

<sup>2</sup> Hamadi Redissi, *Political Transformation in Tunisia 2011-2014: Course and Stakes* (Paris: Arab Reform Initiative, 2018).

“work, freedom, and national dignity” – a regime that sustains and reinforces the revolution, in accordance with internationally recognized democratic standards.<sup>3</sup>

The fact that the 2014 Constitution was suspended despite its symbolism and success in culminating the peaceful revolution, leaves us facing fundamental questions concerning its assessment and the extent to which its provisions and their practical implementation achieved the desired transformation in Tunisia. While the 2014 Constitution set the foundations and rules for a democratic system capable of achieving the desired outcomes, the authorities established by virtue of it veered off that path by adopting a policy of maintaining the status quo.

Therefore, the article begins by assessing the extent to which the adoption of the 2014 Constitution resulted from a constituent process based on the principles of legitimacy, participation, and representativeness (I). It then explores whether the 2014 Constitution established a constitutional system that enshrined the goals of the revolution goals in terms of guaranteeing rights and freedoms and the necessary mechanisms to reinforce them (II). Lastly, the article looks into the extent to which the successive governments were committed to the implementation of the provisions of the constitution during their respective terms (III).

## I. THE ADOPTION OF THE 2014 TUNISIAN CONSTITUTION: A CONSTITUENT PROCESS TORN BETWEEN A DESIRED DEMOCRACY AND AN IMPOSED CONSENSUS

The constituent process that led to the adoption of the 2014 Constitution was democratic and in line with the main international standards adopted within the framework of contemporary constituent processes. It was also characterized by a pluralistic and democratic approach, unlike previous and subsequent constitution-making processes. The provisions of the Constitution of 1 June 1959 were neither drafted nor approved according to such a democratic and participatory approach. Despite the fact that it was adopted by an elected constituent assembly, the elections that were held at the time excluded women, and their only purpose was to consolidate the dominance of a single party – the Constitutional Party. This effectively led to a lack of plurality within the National Constituent Assembly, where a single political front was represented, amidst the exclusion of the opposition.<sup>4</sup>

The drafting the Constitution of 25 July 2022 did not meet the democratic standards adopted in the framework of contemporary constituent processes. It was neither participatory nor representative, and it did not abide by the same transparency standards that were followed during the drafting of the Constitution of the Second Republic. Despite resorting to a popular referendum as a means to issue the Constitution of 2022, the mechanism for drafting

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<sup>3</sup> See: Michael Meyer-Resende, *International Consensus: Essential Elements of Democracy* (Berlin: Democracy Reporting International, 2011).

<sup>4</sup> For more on this issue, see: Abdeljalil Bouguerra, *The National Constituent Assembly of Tunisia: The Difficult Birth of the Constitution of June 1959*, 2<sup>nd</sup> edition (Tunis: Dar Afaq – Perspective Publishing, 2012), 21-31.

its different provisions was marred by the lack of proper deliberations and discussions amidst the absence of the elected parliament and the failure of the committee of experts to convene. In fact, the President of the Republic unilaterally drafted and fine-tuned the provisions of the constitution, leading many parties, organizations, and citizens to boycott the process and to abstain from voting in the referendum as a way to express their rejection of the lack of participation and to delegitimize the process.<sup>5</sup>

By contrast, the constituent process of the 2014 Constitution was characterized by a genuine attempt to establish a legitimate constituent authority (A) and a consensus-based and participatory approach to resolve the political crises that imposed themselves (B).

## A. THE COMMITMENT TO LEGITIMACY IN THE ESTABLISHMENT OF THE CONSTITUENT AUTHORITY

From a constitutional law perspective, revolutions are the true basis for the rise of a genuine constituent authority, which should derive its legitimacy from the people through modern democratic means. The Tunisian constituent approach for drafting the 2014 Constitution fits within this framework, as it drew upon revolutionary legitimacy to launch a new constituent process. This reflected a break with the existing constitutional legitimacy (1) and established a constituent authority based on electoral legitimacy, thereby allowing the people to elect the members of the National Constituent Assembly based on a pluralistic and representative approach (2).

### 1. Revolutionary Legitimacy as a Basis for Adopting a New Constitution

The idea of adopting a new constitution was proposed after the President of the Republic fled the country on 14 January 2011, in the wake of protests demanding his departure and the toppling of the existing regime. This idea then began to take form in the first political demands proposed by the opposition. On 20 January 2011, the “January 14<sup>th</sup> Front” stressed in its founding statement the need to: dissolve the Chamber of Deputies, the Chamber of Advisors, and all existing nominal bodies, as well as the Higher Judicial Council; dismantle the political structure of the old regime; and prepare for the election of a constituent assembly within a maximum period of one year in order to draft a new democratic constitution and establish a new legal system to govern public life in a manner that guarantees the political, economic, and cultural rights of the people.” In its statement issued on 28 February 2011, the National Council for the Protection of the Tunisian Revolution endorsed the same demand, calling for the formation of an interim caretaker government whose mandate would end with the election of a National Constituent Assembly charged with drafting a new constitution for the republic. The first and second Kasbah sit-ins were also in favour of this demand, as they were held under the slogans of “the people want a new constitution,” “free elections,” and “National Constituent Assembly.”<sup>6</sup>

<sup>5</sup> For more information on the assessment of the process of drafting the 2022 Constitution, see: Mouna Tabei and Ikbal Ben Moussa, *Tunisia - Referendum on the New Constitution: Drafting and Adoption* (Beirut: Arab Association of Constitutional Law, 2022).

<sup>6</sup> Yadh Ben Achour, “[The People are the Source of the Law and the Interpreters of the Constitution](#),” *author’s blog*, 16 February 2015.

The ruling authorities at the time acceded to this popular demand and decided that the country would adopt a new constitution drafted by an elected National Constituent Assembly, thus abandoning the idea of holding on to the 1959 Constitution. The decision was also made to hold legislative and presidential elections, in addition to introducing amendments to the 1959 Constitution at a later stage. This decision ended the legal and political debate around whether or not it was necessary to break entirely with the previous constitutional system, particularly with respect to the political system in place.

The 2014 Constitution derived its legitimacy from the revolution. This was clearly reflected in the Decree on the provisional organization of public authorities issued at the time,<sup>7</sup> whose preamble state: “Considering that the Tunisian people are sovereign ... and have expressed during the revolution of 14 January 2011, their will to exercise their full sovereignty within the framework of a new constitution; Considering that the current state of the nation following the definitive vacancy of the Presidency of the Republic on 14 January 2011 ... impedes the proper functioning of public authorities, and that the full implementation of the provisions of the constitution has become impossible ...” Article 1 of the decree further stipulated that it was necessary to establish a “National Constituent Assembly elected through a universal, free, direct, and secret vote according to an electoral system developed for this purpose.”

In this context, it should be noted that the pre-constituent stage in Tunisia was characterized by attempts to commit to several legal principles and provisions. The first stage, which paved the way for the election of the National Constituent Assembly, was based on the constitutional legitimacy that existed at the time. The process relied on the provisions of the 1959 Constitution that regulated the vacancy of the Presidency of the Republic, in addition to those that allowed to legislate through decrees,<sup>8</sup> so that the interim president could draft the necessary legal texts to establish a new constituent authority and to manage the transitional period until the National Constituent Assembly could exercise its mandate. A number of necessary decrees were issued to restructure the electoral system and to revoke legal and political texts that could have undermined the election of the constituent body. Other important aspects were further addressed, and the laws regulating political parties, the media, and associations were replaced with new decrees aligned with the democratic transition.

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<sup>7</sup> Decree No. 14 of 23 March 2011, on the provisional organization of public authorities, Official Gazette of the Republic of Tunisia, Issue No. 20 of 25 March 2011. The decree marked a complete break with the previous constitution and the dissolution of all the political institutions and some of the constitutional institutions associated with it. It also suspended the provisions of the 1959 Constitution and announced the promulgation of a new constitution aligned with the demands of the Revolution.

<sup>8</sup> Following the declaration by the Tunisian Constitutional Council of the permanent vacancy of the presidency in accordance with the provisions of the 1959 Constitution, Interim President Fouad Mebazaa went to the Assembly of Representatives and requested that he be given a mandate in accordance with the provisions of Article 28 of the 1959 Constitution to manage the transitional period through decrees, and he referred the draft law granting him such mandate to the Constitutional Council. The latter confirmed the constitutionality of the draft law in Opinion No. 2 of 2011 on the draft law granting the interim president the mandate to issue decrees in accordance with Article 28 of the Constitution.

The Higher Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition<sup>9</sup> played a pioneering role in aligning the contents of those laws with the main international standards to manage the transitional period. The Higher Authority also played a significant legal role through the work of a committee of experts who drafted legal texts that were later issued by the interim president in the form of decrees. It also played an equally significant political role, as it provided an institutional alternative for deliberation and discussion between actors and politicians from all backgrounds and allowed them to explore the available options following the dissolution of parliament.<sup>10</sup>

Despite all the struggles that the Higher Authority faced and the tense political landscape, it managed to establish a legal system based on democratic standards and thus guaranteed the continued legitimacy of the revolution in full respect of the new laws and regulations. The Higher Authority's respect for and compliance with the newly adopted legal system helped restore citizens' trust in the state and led to the election of the National Constituent Assembly.

## 2. Electing a National Constituent Assembly on the Basis of a Pluralistic and Representative Approach

In accordance with the principle of the sovereignty of the people, a new constituent authority was elected directly by the people, through a general and free electoral system entirely different from the previous one.<sup>11</sup>

To ensure the integrity of the elections, the first Independent Higher Authority for Elections<sup>12</sup> was established. It oversaw the organization of the National Constituent Assembly elections in accordance with internationally recognized standards. Indeed, these standards require the involvement of an entity that is independent from the political authorities to organize the electoral process. The establishment of the Higher Authority represented a break from previous practice, where the Tunisian Ministry of Interior held sole responsibility for organizing and supervising elections in Tunisia.

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<sup>9</sup> Established by Decree No. 6 of February 18, 2011, on the establishment of the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition and chaired by Yadh Ben Achour. The updated decree stipulates that it undertakes to examine legislative texts relating to political organization and to propose reforms aimed at realizing the objectives of the revolution and the democratic transition. It is empowered to advise on the government's activities in coordination with the Prime Minister.

<sup>10</sup> For more information on the important role of the Higher Authority, see: Jean-Philippe Bras and Éric Gobe, «[Légitimité et révolution en Tunisie. Les leçons tunisiennes de la Haute Instance pour la réalisation des objectifs de la révolution](#)», «*Revue des mondes musulmans et de la Méditerranée* 142 (2017).

<sup>11</sup> The electoral decree incorporated these principles in its preamble and declared its commitment to “moving away from the previous oppressive regime that disregarded the will of the people through illegitimate means and electoral manipulation. In line with the aspirations of the Tunisian people's revolution, which aimed to establish a legitimate system rooted in democracy, freedom, equality, social justice, dignity, pluralism, human rights, and open dialogue, it was decided that a National Constituent Assembly would be elected. Recognizing the inadequacies of the previous electoral law in ensuring democratic, pluralistic, transparent, and fair elections, the following provisions were agreed upon for the election of the National Constituent Assembly...”

<sup>12</sup> Decree No. 27 of 2011, dated 18 April 2011, establishing an Independent Higher Authority for Elections, Official Gazette of the Republic of Tunisia, Issue No.27 of 19 April 2011, 488-490.

The Independent Higher Authority for Elections worked on guaranteeing the transparency and impartiality of the National Constituent Assembly elections. International and local organizations were able to monitor the entire electoral process, publish their findings, and exercise their right to legal remedy.

Decree No. 35 of 2011, on the election of the National Constituent Assembly,<sup>13</sup> introduced a legal framework aimed at guaranteeing pluralistic representation within the constituent body.<sup>14</sup> The decree enshrined a voting system based on closed lists and proportional representation, employing the largest remainder method. This system has been widely adopted by countries undergoing democratic transitions because it ensures a more balanced representation of diverse political groups in elected bodies. It allows for the inclusion of smaller parties, minorities, and women, enabling them to voice their opinions and perspectives.<sup>15</sup> The implementation of this system resulted in a constituent assembly that effectively represented the various political tendencies that emerged during that time, as evidenced by the election results of 23 October 2011. Despite the significant difference in representation between Ennahda Movement, which secured the majority of seats, and other parties, the adopted electoral system mitigated the potential for absolute political dominance within the assembly. The majority of votes obtained by the Islamist party did not grant it an absolute majority, requiring it to seek a coalition with other parties with different orientations and affiliations. It is important to recognize that the approved voting method facilitated political pluralism within the assembly, fulfilling the requirement at that time to establish a new social contract that would be acceptable to all.

The assembly also witnessed a notable proportion of women's representation due to the incorporation into the electoral decree of the principle of gender parity, which replaced the previously utilized quota mechanism. The assembly imposed vertical parity within the closed lists; candidacies that did not abide by it were disqualified.<sup>16</sup> This approach compelled political parties and independent candidates to acknowledge the role of women in politics. However, the lack of a requirement for horizontal parity at the top of electoral lists hindered the achievement of full gender parity within the assembly. Upon the declaration of results, the representation of women did not exceed 25%. It later reached 30% when certain members of the assembly resigned to assume ministerial positions.

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<sup>13</sup> Decree No. 35 of 10 May 2011, on the election of the National Constituent Assembly, amended by Decree No. 2011-72 of 3 August 2011, Official Gazette of the Republic of Tunisia, Issue No. 33 of 10 May 2011, 651-661.

<sup>14</sup> It should be noted that, in response to the demands of the revolution, the decree forbade anyone who previously held responsibility within the former ruling party or contributed to Ben Ali's regime and expressed support for it from running for the elections to the constituent assembly. However, this exclusion did not preclude the participation of members of the former Democratic Constitutional Rally in the National Constituent Assembly (deputies of the National Destourian Initiative and the Al Watan Party).

<sup>15</sup> On the advantages of proportional representation see: Andrew Reynolds et al., *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2008).

<sup>16</sup> Article 16 of the decree specifies the following: "Candidacies are based on the principle of gender parity between women and men. Candidates are arranged within the lists in a rotational order, alternating between women and men. Lists that do not adhere to this principle are allowed only in cases where the number of seats allocated to certain constituencies is odd."

At the beginning, the representation of women within the assembly fell short of the desired level. None of the female deputies assumed leadership of a parliamentary bloc, and only a limited number were able to make a significant impact in the political sphere. Furthermore, it is worth noting that not all female representatives prioritized advocating for gender equality. The majority of women in the assembly were conservative Islamists<sup>17</sup>.

Even so, the election of the National Constituent Assembly garnered acceptance from a broad range of Tunisian society's diverse components. However, after it was established and began functioning, certain concerns arose regarding its approach and its level of commitment to upholding the demands of constitution-making in line with established democratic standards and the agreed-upon timeline.

## B. DRAFTING AND APPROVING THE CONSTITUTION THROUGH AN IMPOSED INCLUSIVE AND CONSENSUS-BASED APPROACH

The National Constituent Assembly held its inaugural session on 22 November 2011, and subsequently enacted Constitutional Act No. 6 on 16 December 2011. The law, often referred to as the “small/temporary constitution,” outlined the provisional organization of authorities. In addition to its primary task of drafting a new constitution, the assembly granted itself various responsibilities, including the election of the President of the Republic, the appointment of government members, and the exercise of legislative and oversight functions over the government.

The constituent work of the assembly did not commence until 13 February 2012, following the approval of its rules of procedure on 20 January 2012. This delay intensified the tensions that had emerged prior to the elections, when the question of the timeframe for the completion of the constitution-making process became a subject of widespread political controversy.<sup>18</sup> An agreement was reached among the heads of the major parties, stating that the constituent period should not exceed one year, which was the deadline that was established in the voter invitation order.<sup>19</sup> However, this commitment was later disregarded by the three parties of the ruling Troika coalition.<sup>20</sup> They asserted that the Constituent Assembly, as an original constituent authority deriving its legitimacy from the elections, possessed sovereignty and supremacy. Consequently, they argued that political agreements and previous legal texts could not restrict its authority. The Constituent Assembly was deemed to be “its own master,” with the sole authority to determine the methods and duration of its work. These statements generated concerns and doubts among the

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<sup>17</sup> Salwa Hamrouni, *For a Meaningful and Effective Political Participation of Women: The Experiences of Jordan, Morocco and Tunisia* (Forum of Federations, 2022), 15.

<sup>18</sup> Yadh Ben Achour, *Tunisia: A Revolution in the Land of Islam* translated from French by Fathi Ben Haj Yahia (Tunis: Institut de traduction de Tunis-Siras Publishing, 2018), 301-303.

<sup>19</sup> Decree No. 1086, of 3 August 2011, on calling upon voters to elect members of the National Constituent Assembly, stipulates in Article 6 that “the National Constituent Assembly shall convene once the central committee of the Independent Higher Authority for Elections has officially announced the final election results. It shall then undertake the task of drafting a constitution for the country within a one-year deadline starting from the date of its election.”

<sup>20</sup> Fadhel Moussa, “The Era of the Constitution,” opening lecture for the academic year 2016/2017, *Tunisian Journal of Legal and Political Sciences* 1 (2017): 21.

public regarding the approach and methodology employed in drafting the forthcoming constitution. There was apprehension that the dominant majority parties might shape the constitution without adequately considering the demands of the revolution.

The provisions outlined in the assembly's rules of procedure established a structural organization that appeared to address the needs of the constitutional drafting process. Thematic committees<sup>21</sup> were established, with each committee responsible for preparing proposals for the specific constitutional topics assigned to it. The Joint Committee for Coordination and Drafting was tasked with preparing the final version of the constitution. The rules of procedure also included provisions that allowed for participatory and transparent engagement. Committees had the option to seek input from individuals or organisations "in order to achieve a deeper understanding of subjects under discussion,"<sup>22</sup> promoting inclusivity in the drafting process. The work of both the committees and the plenary sessions was required to be conducted in a transparent manner, ensuring openness. Furthermore, the rules of procedure mandated the publication of reports, draft laws, and the draft constitution on the assembly's website.

In practice, the committees did engage with Tunisian and foreign experts, as well as representatives of civil society. However, these consultations had little impact on the decisions made by the committees. The consultations were mostly formal and perceived as superficial since the majority's proposals within the assembly predominantly shaped the content of the provisions.

The decision to begin with a "blank slate," as announced by the General Rapporteur of the constitution, hindered the drafting phase of the process. Despite the existence of several pre-existing constitutional projects put forth by political parties, national organizations, and legal experts involved in the revolution, these contributions were largely disregarded. This raised doubts about the participatory nature of the process, particularly since the elected majority within the assembly had the potential to dominate the constituent process, given that the same majority was governing the country at the time,<sup>23</sup> and it was often criticized for not include leaders of the revolution or those who participated in the uprising.

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<sup>21</sup> Article 64 of the rules of procedure stipulates: "The National Constituent Assembly shall establish six constitutional committees, each comprising not more than twenty-two members. Each committee shall review the sections of the draft constitution, within its area of responsibility, as set out below:

1. The Committee on the Preamble, Fundamental Principles and Amendment of the Constitution
2. The Committee on Rights and Freedoms
3. The Committee on the Allocation of Powers to the Legislative and Executive Branches and the relationship between them
4. The Committee on Judicial, Administrative, Financial and Constitutional Jurisdiction,
5. The Committee on Constitutional Bodies,
6. The Committee on Regional and Local Communities.

<sup>22</sup> In accordance with the provisions of Article 59 of the rules of procedure.

<sup>23</sup> After the results of the elections that were held on 23 October 2011 were announced, power was shared between the majority party that won the elections, Ennahda Movement (Presidency of the Government) and its allies in the Troika Coalition, the Congress for the Republic – Al Mutamar (Presidency of the Republic) and the Democratic Forum for Labour and Liberties- Ettakatol (Presidency of the National Constituent Assembly).

Also, the failure to appoint legal experts specialised in drafting constitutional provisions within the thematic committees and the Joint Committee for Coordination and Drafting – despite noting the need to do so – constituted an additional obstacle that demonstrated the adoption of the majority within the National Constituent Assembly of a unilateral approach that did not take into consideration opinions raised outside the assembly.

It can hence be said that the first phase of the drafting process was characterized by the absence of a participatory approach and reliance on a narrow understanding of democracy that is limited to representative democracy as the only means to deliberate on the contents of the constitution. Such understanding disregards the foundations of participatory democracy in contemporary constitution-making processes, which require the constituent body to open up to civil and political organizations and citizens outside parliament, to enable to produce a social contract that enjoys broad public acceptance. However, following the presentation of the first draft of the constitution, the National Constituent Assembly retreated from this approach, henceforward effectively engaging in a participatory process.

The first draft of the constitution<sup>24</sup> was presented without meeting the requirements for presentation at the plenary session. Opinions on the draft were subsequently collected under the framework of a national dialogue organised by the National Constituent Assembly, in which several CSOs participated<sup>25</sup>. The opinions of some legal experts and professional entities were further sought.<sup>26</sup>

In this context, it is worth noting the importance of the transparent approach adopted by the National Constituent Assembly in its work; whether through its openness towards the media and CSOs that accompanied the constituent process and discussed it in the media and in panel discussions, or through the publication of reports on the assembly's website. Such approach allowed citizens and experts concerned with public affairs and the constitution-making process to follow the drafting phase accurately and continuously. This in turn generated a new participatory approach beyond the framework of the National Constituent Assembly, mainly represented in the pressure exerted by the public and civil society organisations for several reforms to be introduced to the various constitutional drafts.<sup>27</sup>

Numerous drafts later, the constitutional bill was issued on 1 June 2013; it was met with reservations from several parties due to its formal flaws and problems in content.<sup>28</sup> This prompted the National Constituent Assembly to adopt a consensual approach that may be described as complicated due to the worsening political situation, which significantly impacted its work.

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<sup>24</sup> [Draft constitution issued on 14 December 2012.](#)

<sup>25</sup> [Tunisia: Civil society proposals on the draft constitution, National Constituent Assembly.](#)

<sup>26</sup> On this issue, see: Slim Laghmani, "Drafting the Constitution," *Writings on Politics and the Constitution in the Wake of the Revolution*, 2<sup>nd</sup> edition (Tunis: Nirvana Editions, 2020), 73 ff.

<sup>27</sup> Laghmani, 73 ff.

<sup>28</sup> All the constitutional law experts detected deficiencies in the draft constitution. For instance, see: Slim Laghmani, "Eight Changes Necessary for the Draft Constitution to Be Acceptable (Without Being Perfect)," *Writings on Politics and the Constitution in the Wake of the Revolution* (Tunis: Nirvana Editions, 2020), 81 ff.

While consensus between the majority and the opposition was reached with respect to some constitutional provisions,<sup>29</sup> a range of issues remained unresolved and caused sharp disputes within and outside the assembly.

Ultimately, consensus imposed itself as an imperative condition for the ratification of the new constitution for a number of reasons, including political confrontation over the sources of the new constitution's provisions inside and outside the assembly, in addition to the political assassinations that targeted the opposition, the victims of which included a member of the opposition in the assembly, the late Mohamed Brahmi. This tense social situation led to several protests and the "departure sit-in" in front of the National Constituent Assembly, the withdrawal of the members of the opposition from the assembly, and the total suspension of the assembly's work by a decision of its President on 6 August 2013. The overall process was under threat of collapse in the absence of a solution to the political crisis. At the time, there was no choice but to conduct a "national dialogue" at the political level<sup>30</sup> and to create a new structure within the National Constituent Assembly to resolve controversial constitutional issues. To this end, the "Consensus Committee"<sup>31</sup> was established; it managed to resolve a set of contentious issues before the draft constitution was submitted to the plenary for approval.

The consensus reached allowed for the approval of the constitution by the assembly, without the need to resort to a referendum that was projected both theoretically and in practice. When voted upon in the plenary, and from the first reading, the draft constitution was approved by 200 assembly members out of 216 – a majority far exceeding the legally required majority for its ratification. As such, it met the conditions to be adopted as a new constitution for the country, as per Article 3 of Constitutional Act No. 6, on the provisional organization of public authorities.<sup>32</sup>

Despite the conflicts, disagreements, and crises that accompanied it, the process of drafting the 2014 Constitution responded to the principles of both revolutionary legitimacy and legal legitimacy. It was based on a participatory and transparent approach and characterized by a consensual nature that enabled the adoption and promulgation of the new constitution.

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<sup>29</sup> Fadhel Moussa, «Débat majorité-opposition au sein de la constituante,» ed., Sadok Belaid, *Gouvernement de coalition et enjeux politiques* (Tunis: Association Tunisienne d'Études Politiques, 2012), 17-27.

<sup>30</sup> The national dialogue was led by the quartet, which consisted of the Tunisian General Labor Union (UGGT), the Tunisian Confederation of Industry, Trade and Handicrafts (UTICA), the Tunisian Order of Lawyers (ONAT) and the Tunisian Human Rights League (LTDH). This quartet was awarded the 2015 Nobel Peace Prize for its major role in finding peaceful and consensual solutions to the political crisis that Tunisia experienced during the constituent period.

For more on this, see: Hatem Mrad et al., *National Dialogue in Tunisia* (Tunis: Association Tunisienne d'Études Politiques, Nirvana Editions, 2015).

<sup>31</sup> The Consensus Committee was established pursuant to the decision of the National Constitution Assembly dated 14 January 2014.

<sup>32</sup> Article 3 states: "The National Constituent Assembly must approve the draft constitution, article by article, by an absolute majority of its members. It must then approve it in its entirety by a majority of two-thirds of the assembly members, and, if that is not possible, by the same majority in a second reading within a deadline not exceeding one month from the first reading. If that is not possible, the draft constitution in its entirety must be submitted to a referendum."

## II. RIGHTS AND FREEDOMS IN THE 2014 CONSTITUTION: BETWEEN ENSHRINING THE DESIRED AND CONSTITUTIONALIZING THE IMPOSED

The Tunisian revolution was not expected; in fact, it took everyone by surprise. When the revolution erupted, it was not led by organised entities, but was rather the product of spontaneous youth movements that lacked the leadership of civil and partisan organizations. As a result, it failed to present a clear and specific programme setting a future vision and a comprehensive strategy for the required transition; it was simply limited to expressing the rejection of the previous authoritarian regime and its remnants. Intermediary organisations, including national parties and organisations that joined the protests in the first phase, failed to present future practical visions, merely issuing supportive statements.<sup>33</sup> In doing so, they adopted the same popular slogans that were raised, subsequently presenting their visions and projects within the National Constituent Assembly as successive draft constitutions were produced.

In this context, Professor Yadh Ben Achour acknowledges that “the revolution is not necessarily the result of a carefully thought project at the level of partisan organisation or at the level of ideological development. Rather, it can abruptly arise out of protest movements, and then turn into a revolution. A failed uprising is considered a rebellion, while a victorious one can become a revolution. A revolution is the opposite of suffering, and the Tunisian Revolution should be understood within the framework of this model.”<sup>34</sup> Indeed, the Tunisian Revolution expressed the economic and political hardship of different social groups and was summarized in shorthand slogans that called for “work, freedom and national dignity” – slogans that “turned words into action,” according to some.<sup>35</sup> This placed human rights at the centre of the revolution and of the new constitutional text, for they required to be enshrined in order to be guaranteed and preserved.

In this respect, it can be stated that the 2014 Constitution succeeded in enshrining a human rights system derived from popular aspirations (A). At the same time, the provisions of the constitutional text featured ambiguity and omissions resulting from political conflict over certain areas, which opened the door to interpretation with regard to the constitutional sources that must serve as their reference (B).

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<sup>33</sup> Azmi Bishara, *The Glorious Tunisian Revolution: The Structure and Process of a Revolution through its Daily Chronicles* (Doha, The Arab Center for Political Studies and Research), 388 and ff. The appendix to this book contains all the statements issued by the political parties of the opposition between 17 December 2010 and 14 January 2011. These were statements that merely condemned the violence against demonstrators and expressed support for the protesters. The same applies to the statements issued by the the main organizations participating in the uprising, especially the statements of the Tunisian Order of Lawyers and the Tunisian General Labor Union that were issued by some of their regional structures in the same period. The majority were statements of support and calls for a strike. See, for instance, the [statement](#) of the national administrative body of the Tunisian General Labor Union issued on 11 January 2011.

<sup>34</sup> Yadh Ben Achour, “The Scenography of the Tunisian Revolution,” *Tunisia: A Revolution in the Land of Islam*, 83.

<sup>35</sup> Mohsen Bouazizi, “Slogans of the Tunisian Revolution: The Language of Freedom and of Words Turned into Deeds,” *Bedayat* 1 (2021).

## A. RIGHTS AND FREEDOMS, FROM REVOLUTIONARY SLOGANS TO CONSTITUTIONAL ENSHRINEMENT: CONSTITUTIONALIZING THE DESIRED

In order to examine the extent to which the 2014 Constitution responded to the targets and objectives of the revolution, it is necessary to look at the nature of the demands that were raised. The popular demands expressed in the slogans of the revolution were numerous and varied, and both increased in number and evolved as events unfolded. Although they were largely socioeconomic at the outset, they soon turned into political demands aimed at overthrowing and ousting Ben Ali's regime.

It comes as no surprise to those familiar with the slogans that were raised at the start of the revolution that they expressed a desire for a democratic regime. ("Work, freedom, national dignity," "Employment is a right, you band of thieves," "Release your grip over the country, you gang of the corrupt," "Bread and water, not Ben Ali," "Freedoms, freedoms, no presidency for life," and later, "No fear, no terror, power belongs to the people," "*Dégage*,"<sup>36</sup> and "The people want to topple the regime.")

While the constitutional enshrinement of rights and freedoms represents the first of the guarantees needed for the establishment of a democratic regime that responds to people's aspirations, the incorporation of rights into the constitution cannot of itself ensure the effective guarantee of their exercise if it is not accompanied by effective constitutional mechanisms. From this perspective, it can be stated that the 2014 Constitution was characterized by the establishment of a protective human rights system that responded to popular aspirations in terms of consecrating rights and freedoms and the general principles guaranteeing them (1). It further established advanced mechanisms for their protection, compared to those of both the 1959 Constitution and the 2022 Constitution (2).

### 1. Enshrining Rights and Freedoms and the General Principles Guaranteeing Them

The text that was adopted by the Tunisian Constituent Assembly in 2014 enshrined the entire range of rights and freedoms around which the revolution centred, including social, economic, and political rights, as well as collective and individual freedoms. Rights and freedoms were incorporated into a specific chapter – Chapter Two. The constitution incorporated additional rights elsewhere, such as in the preamble (freedom of association and equality), the chapter on general principles (freedom of conscience and belief), and the chapter on the judicial power (judicial rights).

Indeed, the 2014 Constitution responded to the demand for freedom and dignity by enshrining the relevant rights and principles as follows:

- A general principle requiring the state to guarantee freedoms as well as individual and collective rights to all citizens, and provide all citizens the conditions for a dignified life (Article 21);

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<sup>36</sup> This slogan was raised in French and means "leave."

- The right to dignity, which includes the protection of human dignity and physical integrity, the prohibition of torture and of subjecting crimes of torture to any statute of limitations (Article 23) and the guarantee of prisoners' right to humane treatment that preserves their dignity (Article 30); and
- A set of individual and collective freedoms, including the right to privacy and personal information (Article 24), freedom of opinion, thought, expression, information and publication, and the prohibition of prior censorship (Article 31), the right of access to information (Article 32), the freedom to establish political parties, unions, and associations (Article 35), the right to assembly and peaceful demonstration (Article 37), academic freedoms (Article 33), and the freedom of creative expression (Article 42).

The constitution further enhanced the provisions related to political rights by guaranteeing the right to run for office and the right to universal, free, direct, secret, fair and transparent elections. It also stipulated pluralism and the peaceful alternation of power through periodic elections to Parliament and the Presidency of the Republic, whose term duration it rendered unamendable. It also recognised the rights of the opposition represented in Parliament, which represented a qualitative step in the adoption of the basis of a democratic regime, compared to the 1959 Constitution and even to comparative constitutions.<sup>37</sup>

The 2014 Constitution likewise responded to economic, social and cultural aspirations by enshrining a set of socioeconomic rights as required by international treaties. It recognised the right to work and acknowledged that it is a right for every citizen, male and female, requiring the state to take the necessary measures to guarantee work on the basis of competence and fairness, in addition to the right to decent working conditions and to a fair wage (Article 40). It also enshrined trade union rights, extending it to groups that had been denied such rights, as well as the right to strike (Article 36), the right to health care (Article 38), education (Article 39), and culture (Article 42).

The enshrinement of these socioeconomic rights represented a major development in the Tunisian constitutional system, bypassing the debate around the non-justiciability of these rights, which precluded their enshrinement in the 1959 Constitution (with the exception of trade union rights), which merely referred to them succinctly in its preamble.

In this context, it is also important to discuss the constitutionalisation of women's rights in Article 46 of the 2014 Constitution. The enshrinement of women's rights was one of the demands of the revolution. Women's organisations, CSOs and progressive parties sought to achieve it to counter the regressive approach that religious and conservative parties within and outside the National Constituent Assembly tried to impose on the constitution of the revolution by refusing to recognise the principle of equality between men and women.

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<sup>37</sup> The 2014 Constitution is one of the rare constitutions in the world, especially in the Arab world, that enshrines constitutional rights for the opposition. Article 60 stipulates the following: "The opposition is an essential component of the Assembly of Representatives of the People. It shall enjoy the rights that enable it to undertake its parliamentary duties and is guaranteed an adequate and effective representation in all bodies of the assembly, as well as in its internal and external activities. The opposition is assigned the chair of the Finance Committee, and rapporteur of the External Relations Committee. It has the right to establish and head a committee of enquiry annually. The opposition's duties include active and constructive participation in parliamentary work."

The demonstration that was held on 13 August 2012, in which thousands of Tunisians expressed their commitment to women's gains in rights and the need to consolidate them, was a major turning point in the enshrinement of women's rights as a constitutional principle.

The provisions enshrining rights and freedoms in the 2014 Constitution represented a major constitutional gain that the Constitution of 25 July 2022 generally preserved.<sup>38</sup>

The 2014 Constitution was also characterised by the incorporation of a set of general principles relating to the functioning and organisation of state institutions aimed at preventing the abuse of power. These principles were the legal translation of popular aspirations related to ending the system of corruption and tyranny and ensuring justice between the regions. The incorporation of provisions related to the issues that were overlooked throughout the period of oppressive rule and which had not been enshrined in the 1959 Constitution was a step towards the strengthening of the rule of law. The following provisions can be highlighted in this respect:

- The provisions of the preamble on the necessity of “breaking with injustice, inequity, and corruption” and building a “republican, democratic and participatory system, in the framework of a civil state founded on the sovereignty of the people and the peaceful alternation of power through free elections and the separation of powers, which guarantees the freedom of association in conformity with the principles of pluralism, an impartial administration, and good governance ... the supremacy of the law and the respect for freedoms and human rights, the independence of the judiciary, and the equality of rights and duties between all citizen”.
- The provisions of Chapter I on the general principles related to citizenship, the will of the people and their sovereignty in a civil state, and the adoption of principles of good governance and combating corruption (impartiality of public administration in conformity with the rules of transparency, integrity, efficiency and accountability (Article 15), the proper use of public funds and the prevention of corruption (Article 10) and achieving social justice, sustainable development, balance between regions, and the adoption of the principle of positive discrimination (Article 12).
- The transitional provisions through the adoption of the “transitional justice system”<sup>39</sup> (Article 148, paragraph 9) in order to ensure accountability and prevent impunity, the repetition of past crimes and the return of tyranny.

It should be noted in this regard that these general principles were not enshrined in the 2022 Constitution.

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<sup>38</sup> Regarding the enshrinement of rights and freedoms in the 2022 constitution, see: Mouna Tabei and Ikbal Ben Moussa, “[A Preliminary Reading of the New Draft Constitution](#),” *Dustour Talk*, 14 July 2022.

<sup>39</sup> The National Constituent Assembly adopted Organic Law No. 53 of 2013 on 24 December 2013, on establishing and regulating transitional justice, Official Gazette of the Republic of Tunisia No. 105 of 31 December 2013, 4343-4335. Article 1 of the law defines transitional justice as “an integrated process of mechanisms and methods used to understand and deal with past human rights violations by revealing their truths, and holding those responsible accountable, providing reparations for the victims and restoring their dignity in a way that achieves national reconciliation, preserves and documents collective memory, guarantees non-recurrence of such violations and transitions from an authoritarian state to a democratic system that contributes to the consolidation of human rights.”

In accordance with the provisions of the law, the Truth and Dignity Commission was established and tasked with implementing the transitional justice process in Tunisia. However, the work of the commission was stalled and rather difficult.

## 2. Enshrining Mechanisms for the Protection of Rights and Freedoms

The 2014 Constitution represented a major development at the level of the incorporation of mechanisms to protect rights and freedoms as demanded by CSOs. These mechanisms were largely enshrined in Article 49, related to the limitations and restrictions that can be imposed on the exercise of rights and freedoms, as well as in the establishment of new constitutional institutions. Various human rights organizations and experts worked to enshrine these mechanisms in order to ensure the effective respect of rights and freedoms and to include them at the highest normative level to make them binding on the authorities.

With regard to defining the limitations and conditions for the restriction of rights and freedoms, Article 49 constituted a key mechanism to prevent the abuse of power when restricting rights and freedoms. The adoption of a comprehensive restrictive article was a demand that CSOs, especially the Tunisian Association of Constitutional Law, worked on enshrining in the 2014 Constitution.<sup>40</sup>

Establishing conditions and limitations restricting the authority of the legislator when regulating constitutional rights is crucial to ensure their effective guarantee. Article 49 of the Constitution defined a set of conditions that the authorities had to follow when restricting constitutional rights and freedoms. It required that said restrictions be established by law, necessary to a “civil and democratic state”, put in place to achieve a specific constitutional objective, and based on proportionality. Additional guarantees included the incorporation of the principle of non-retroactivity of the gains in the field of rights and freedoms and entrusting the task of looking into violations to the judicial authorities.<sup>41</sup>

Thus, Article 49 was a major improvement in comparison with Article 7 of the 1959 Constitution, which enabled the legislative authority and the general regulatory authority to adopt legal provisions that restricting public rights and freedoms in a way that prevented their effective exercise. One can refer, for instance, to Law No. 4 of 1969 relating to public meetings, processions, parades and demonstrations, as well as the list of circulars that deprived people of their freedom, such as the circulars on the prohibition of wearing the hijab, closing cafes during Ramadan, and choosing the names of children ...

It must be noted that the enshrinement of Article 49 in the 2014 Constitution and the adoption of the proportionality principle to determine the legality of the restriction enabled the Tunisian judiciary to establish a jurisprudence championing rights and freedoms. While Article 55 of the 2022 Constitution preserved the comprehensive limitations and conditions for the restriction of rights and

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<sup>40</sup> See the [proposal](#) submitted by the Tunisian Association of Constitutional Law.

<sup>41</sup> Regarding Article 49 of the constitution, see the series of practical guides issued by the International IDEA, including: Mouna Tabei, [Civil Society's Guide to Implementing Article 49 of the Constitution](#) (Stockholm: International IDEA, 2021).

freedoms,<sup>42</sup> most of the other institutional guarantees that were enshrined in the 2014 Constitution were dropped.

As regards institutional guarantees, the 2014 Constitution entrusted the judiciary with protecting rights and freedoms and guaranteeing the supremacy of the constitution and the rule of law. The constitution enshrined several guarantees to establish a judiciary that is functionally and structurally independent from the legislative and executive authorities, thus addressing the loopholes and shortcomings of the 1959 Constitution. The provisions of the constitution generally responded to the demands of CSOs that submitted proposals in this regard to the National Constituent Assembly and lobbied for their inclusion in the constitution.<sup>43</sup> They also entrusted the task of seconding, transferring and disciplining judges to a specialised entity – the Supreme Judicial Council.

The 2014 Constitution also established constitutional institutions that were not enshrined in the 1959 Constitution. These institutions were supposed to have a major and effective role in preserving the gains made by the revolution and the democratic transition process; however, they were never established. The constitution established a Constitutional Court, further introducing the possibility for citizens to challenge the unconstitutionality of the laws in force. It also established five independent constitutional bodies intended to support democracy<sup>44</sup> and regulated matters that the previous regime had to sought to control and manage through the executive authority. Thus, the constitution entrusted the organisation of elections to the Independent Higher Authority for Elections, which is the only constitutional body that was effectively established out of the constitutional bodies stipulated in the constitution (the Human Rights Commission, the Audio-Visual Communication Commission, the Good Governance and Anti-Corruption Commission, and the Commission for Sustainable Development and the Rights of Future Generations). Failure to establish those bodies led to failure in guaranteeing the constitutional system that was embedded in the 2014 Constitution, as discussed under Part III of this paper.

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<sup>42</sup> Article 55 of the 2022 Constitution stipulates: “No limitations shall be imposed on the rights and freedoms guaranteed in this constitution except by law, and only for reasons necessary to a democratic system and with the aim of protecting the rights of others or based on the requirements of public security, national defense or public health. Such limitations must not compromise the essence of the rights and freedoms guaranteed in this constitution and must be justified in their objectives and proportionate to the objective sought. No amendment may undermine the human rights and freedoms guaranteed in this constitution. Judicial authorities shall protect these rights and freedoms from all violations.”

<sup>43</sup> For instance: the statement of the Tunisian Magistrates Association issued on January 14, 2014 on Article 103: <https://nawaat.org/2014/01/15/%D8%AC%D9%85%D8%B9%D9%8A%D8%A9-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A9-%D8%A7%D9%84%D8%AA%D9%88%D9%86%D8%B3%D9%8A%D9%8A%D9%86-%D8%A8-%D9%84%D8%A7%D8%BA-%D8%A7%D8%B6%D8%B1%D8%A7%D8%A8-%D9%84%D9%85%D8%AF/>

<sup>44</sup> Article 125 stipulates: “The independent constitutional bodies act in support of democracy; and all institutions of the state must facilitate their work.”

## B. THE DUALITY OF CONSTITUTIONAL SOURCES IN DETERMINING SOME CONSTITUTIONAL PROVISIONS: CONSTITUTIONALIZING THE IMPOSED

One of the main criticisms that were directed against the 2014 Constitution<sup>45</sup> was that it was based on consensus and a duality of sources, and that its provisions contained a series of contradictions. This constitutional issue cannot be understood without taking into consideration the impact of the political conflicts that surrounded the drafting process, or the balance of power within the National Constituent Assembly. Although the slogan “The people want to topple the regime” expressed the prevailing desire to break with the regime, there was no consensus on the elements of the desired state under the new constitutional system.<sup>46</sup> This led the political parties involved in the constituent process to present mostly differing visions and perceptions.

The identity of the state and the question of constitutional sources became a real problem during the drafting process, even though they had not been raised during the revolution. The country experienced great ideological and political polarization of these matters, resulting in several sharp conflicts between conservative Islamists and their vision of the new state, and progressive modernists. The conflict erupted before the National Constituent Assembly elections, continued during the drafting period,<sup>47</sup> and deepened with the results of the elections to the assembly, which produced an Islamist majority that had not participated in the revolution on the ground. The conflict worsened due to the Islamist-leftist alliance during the Troika rule and their attempt to deviate from the basic demands of the revolution for freedom and impose the hegemony of Islamism within the constitution.

The demands and slogans raised during that period shifted from social justice, freedom, and equality to the question of identity. On the one hand, there were demands that focused on the need to establish a secular state, which was considered a guarantee for all rights and freedoms and for the achievement of the revolution’s goals in accordance with the expressed aspirations. On the other hand, there were demands for the establishment of an Islamic state, which the previous regime had prevented, while persecuting its supporters. The conflict turned from a political confrontation between the parties within the National Constituent Assembly into a deep societal conflict that was amplified with the emergence of new organisations that Tunisia had not witnessed before the revolution, such as Salafist movements and religious parties that reject democracy, such as Hizb ut-Tahrir.<sup>48</sup> The conflict subsided once

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<sup>45</sup> See: Slim Laghmani, “Critical Thoughts Regarding the Constitution of 27 January 2014,” *Writings on Politics and the Constitution in the Wake of the Revolution*, 51-70.

<sup>46</sup> Following the downfall of Ben Ali’s regime on the night of 14 January 2011, the political scene was dominated by conflicting visions and differences over the mechanisms for achieving the desired transition (amending the 1959 Constitution or adopting a new constitution/establishing a national unity government or a technocratic government to run the transitional period).

<sup>47</sup> Moussa, “The Era of the Constitution,” 22-24.

<sup>48</sup> The conflict between the supporters of the establishment of a secular state those of an Islamic state led to several demonstrations, sit-ins, and confrontations, where the slogans raised differed from those raised during the first phase and contradicted each other. For instance, slogans like “yes to secularism, no to a Muslim Brotherhood constitution,” were raised against others like “people want the Caliphate back” and “There is no god but God, and secularists are the enemies of God”.

agreement was reached to keep Article 1 of the 1959 Constitution (“Tunisia is a ... state. Its religion is Islam”<sup>49</sup>) and to adopt Article 2 that enshrined the “civil dimension of the state.”<sup>50</sup> But the constitutional problem persisted, and the consensus that was reached was considered “a consensus that upheld the contradictions” and postponed their resolution. While the agreement was praiseworthy from a political perspective, from a legal point of view, it raised problems concerning the constitutional text.

Indeed, the 2014 Constitution did not resolve the issue of constitutional sources with respect to the determination of the content of rights and freedoms, even if it enshrined the principle of the civil dimension of the State and guaranteed the supremacy of international treaties supremacy over ordinary laws, which were placed below the constitution.<sup>51</sup> As such, the matter remained open to interpretation. In contrast, the constitutional sources of the 1959 Constitution were clear, as Article 5 explicitly stipulated: “The Republic of Tunisia shall guarantee fundamental freedoms and human rights in their universality, comprehensiveness, complementarity and interdependence. The Republic of Tunisia shall be founded upon the principles of the rule of law and pluralism ...” As for the 2014 Constitution, despite the advanced and diverse of rights and freedoms it enshrined, lacked such clarity, enshrining substantively conflicting provisions. For example, the preamble, which was an integral part of the constitution, stated the following: “Expressing our people’s commitment to the teachings of Islam and its aims characterized by openness and moderation, and to the human values and the highest principles of universal human rights ...” Article 1 (under General Principles) stated: “Tunisia is a free, independent and sovereign state; its religion is Islam.”<sup>52</sup> In turn, Article 2 stipulated that “Tunisia is a civil state based on ... the supremacy of the law”.<sup>53</sup> Both articles were unamendable. Chapter 6 explicitly enshrined this contradiction by stating: “The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices ... The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof ....” Article 39, which deals with education, although based on the normative content of the right as enshrined in international law (compulsory, free, of high quality), adds the following: “It [the state] shall also work to consolidate the Arab-Muslim identity and national belonging in the young generations ....”

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<sup>49</sup> On 20 March 2012, the head of the Committee on the Preamble suggested to adopt the Sharia as a source of legislation; demonstrations supporting and opposing the idea took place shortly after. The constituent assembly of the Ennahda Movement resolved the issue by considering that Article 1 of the 1959 Constitution was sufficient and should be considered a non-amendable provision.

<sup>50</sup> Added to the draft of 22 April 2013.

<sup>51</sup> Article 20 of the of the 2014 Constitution stipulates that “ International agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution.” However, it does not make establish them as a reference for the assessment of the legitimacy of laws.

<sup>52</sup> Article 1 of the 2014 Constitution stipulates: “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended.”

<sup>53</sup> Article 2 of the 2014 Constitution stipulates: “Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law. This article might not be amended.”

Such wording is subject to many interpretations, tying human rights to the balance of power at the political level and to the judge's will in determining their constitutional content. It grants great discretion to the decision-maker to pick the most appropriate reference based on their personal beliefs. It should be noted that the protection of rights and freedoms must be primarily based on the concept of rights and freedoms held by international law in a way that guarantees their application to everyone, regardless of and individual's ideological and religious affiliation. This must be properly addressed at the level of the constitutional text, so as not to leave ample room for the interpretation of the content of a right from a purely religious perspective.

This duality of constitutional sources turned the religious issue into a priority and main focus of political competition between the candidates for elections under the political system in place, expelling the economic and social problems that triggered the revolution from the societal debate.

In this context, it is worth mentioning the report of the Individual Freedoms and Equality Committee<sup>54</sup> and the controversy it generated on how to interpret the constitution's provisions on rights and freedoms on the one hand, and how electoral victories were prioritised over legal reform on the other hand. The report included several legislative proposals and amendments in line with the constitution and international human rights law (abolition of capital punishment, decriminalization of homosexuality, turning equality in inheritance into a legal principle<sup>55</sup>...). However, the publication of the report politically and socially polarized people on the extent to which the proposals were aligned with the teachings of Islam, leading to the organisation of defamation campaigns against the committee and its members, who were accused of being non-believers (*keuffar*). This prevented the Presidency of the Republic to submit a bill in this respect, to preserve interests and prepare for the 2019 legislative and presidential elections.

Relatedly, it should be noted that the constitutional sources of the 2022 Constitution reference are not clear either; if anything, they seem more complicated, for the constitution, did not include a reference to the principle of the universality of human rights. It further let go of the concept of a civil state and of the wording of Article 1 that was included in previous constitutions. Instead, Article 5 referred to achieving "the goals of true Islam in preserving life, honour, money, religion and freedom."

It can be generally acknowledged that the 2014 Constitution responded to the revolution's goals by strengthening constitutional rights and freedoms and stipulating mechanisms for their protection. However, it also enshrined extraneous issues that were not raised in the revolution but imposed by the dominant Islamist party at the political level and within the constituent assembly. As a result, it contained a dual reference, which opened the door to multiple interpretations and pushed the parties to politically compete on that matter, instead of proposing reformist electoral

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<sup>54</sup> The late former President of the Republic, Beji Caid Essebsi, created a committee that worked on introducing the legislative reforms necessary to comply with the new constitution's requirements with regard to equality and individual freedoms.

<sup>55</sup> The report is published on the website of the Presidency of the Republic: <https://www.carthage.tn/>.

programmes. Even so, the real problem lay in a lack of commitment to the full implementation of its provisions.

### III. THE IMPLEMENTATION OF THE 2014 CONSTITUTION: SELECTIVE IMPLEMENTATION AND IMPOSED REALITY

The constitutional system enshrined in the 2014 Constitution differed from the provisions of the 1959 Constitution in terms of the nature of the political system, the institutional framework, and rights and freedoms. It was meant to break with the authoritarian practices that Tunisia had known before the revolution, but no matter how developed a constitution's provisions are, they cannot achieve the desired goals if the leaders are not committed to respecting their requirements and putting in place the necessary legislation and institutions to ensure their proper implementation. The implementation of the 2014 Constitution was characterised by its selective nature and the authorities' failure to properly implement its requirements.

Between the entry into force of the 2014 Constitution and its replacement following the referendum on the Constitution of 25 July 2022, the country went through two electoral cycles<sup>56</sup> before the state of constitutional exception was imposed on 25 July 2021 and the Assembly of the Representatives of the People was suspended. Each cycle witnessed several political crises and successive government changes, which resulted in a selective implementation of the 2014 Constitution. As regards the legislative enforcement of constitutional provisions, despite the adoption of new legislation, the process was partial (A). As for the exercise of power, a fait accompli policy was imposed through selective interpretation and amidst the lack of establishment of the Constitutional Court (B).

#### A. PARTIAL IMPLEMENTATION OF THE 2014 CONSTITUTION PROVISIONS

In implementation of the 2014 Constitution, it was expected that the entire legislative framework would be reviewed to guarantee the new constitutional rights and freedoms, amend laws that contradicted them, and put in place new laws to guarantee the revolution's goals. However, the legislative authority did not keep up with the required pace, despite the successful drafting of important new laws.

Indeed, the Assembly of Representatives, elected in October 2014, adopted a number of protective laws in implementation of the constitution's provisions related to rights and freedoms. The following are the most important ones:

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<sup>56</sup> First- The 2014 legislative and presidential elections resulted in the election of a majority from the Nidaa Tounes party, followed by the Ennahda Movement in the legislative assembly and of Beji Caid Essebsi, head of the Nidaa Tounes party, as President. Early presidential and legislative elections were held in 2019 after the death of Beji Caid Essebsi; they gave rise to a majority by the Ennahda Movement and the Heart of Tunisia Party in the legislative assembly, and Kais Saied, the independent candidate, was elected as President.

- Law No. 58 of 2017 related to the elimination of violence against women: It criminalised all forms of violence against women, established comprehensive preventive and procedural mechanisms, and created a national observatory to combat violence against women.
- Law No 61 .of 2016 on the prevention of trafficking in persons :It was created by the National Commission for Combating Trafficking in Persons ,which worked to monitor violations and develop a national strategy to combat trafficking in persons.
- Law No 22 .of 2016 on the right to access information :It affirmed the right of everyone to access information before all official entities and established the Information Access Authority ,granting it quasi-judicial powers to guarantee that right.
- Law No 54 .of 2017 on the establishment of the National Council for Social Dialogue :It provided a framework for dialogue between the government ,trade unions and custom unions ,and deliberation on development and economic rights issues.
- Law No 49 .of 2015 on partnership contracts between the public sector and the private sector ,a new Investment Code updated by Law No 71 .of ,2016 and Law No 47 .of 2019 on improving the investment climate ;these instruments support an economic liberal approach and encourage private initiative.
- Law No 10 .of 2019 on the creation of a social security programme aimed at advancing poor and limited-income groups and achieving social justice.

In general, most of the institutions necessary to enforce these laws, especially those related to the economic and social fields, were not created, and even those that were established remained incomplete.<sup>57</sup>

In the second parliamentary term, unenforceable laws were approved. These were aimed at quelling the anger of the marginalised classes, especially the unemployed, amidst deepening poverty, unemployment<sup>58</sup> and ongoing sit-ins and protests under the slogan “The revolution continues.” This was for instance the case of Law No. 2020-38 of 13 August 2020 on exceptional recruitment measures in the public sector. The law allows holders of higher degrees to join public office without having to participate in a recruitment competition if they have been unemployed for 10 years or have reached the age of 35 without having started a job. It also guarantees the employment of one member of every family of unemployed persons and imposes the allocation of no less than 5% of annual assignments to public office to persons with disabilities. Regardless of the issue of the constitutionality of the law, its provisions were inapplicable, due on the one hand to the inability to approve more assignments to public office after those who benefited from the general amnesty were assigned, and, on the other hand, to the inability to issue the regulations required for its enforcement.

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<sup>57</sup> For more details, see: Wahid Ferchichi and Muhammad Anwar Al-Zayani, “Five Years of the Work of the Assembly of Representatives of the People in Tunisia, 2014-2019: What Legislative Outcome in the Field of Rights and Freedoms?” *The Legal Agenda*, 27 March 2019.

<sup>58</sup> On the decline in development indicators and statistics, see: Sara Yerkes and Zeineb Ben Yahmed, “[Tunisia’s Revolutionary Goals Remain Unfulfilled](#),” *Carnegie Endowment for International Peace*, 6 December 2018.

Many constitutional provisions remained without new legislation in line with their contents, as competent authorities failed to enact basic laws related to political parties and associations, freedom of the press and audio-visual communication, which are still regulated in accordance with the decrees of the transitional period, although the provisions of the 2014 Constitution stipulated the adoption of new basic laws to guarantee those freedoms. In this context, it should also be noted that a number of rights and freedoms remained unregulated, including the right to strike, and many laws that contradicted the 2014 Constitution remained in force being amended, such as the law regulating the right to peaceful assembly and demonstration, some provisions of the Penal Code and some provisions of the Personal Status Code.

The exercise of power following the constitution's entry into force did demonstrate a desire to adapt the new legal provisions, especially those relating to the electoral law.<sup>59</sup> The law preserved the same voting system enshrined in the electoral decree, as well as the gains related to the conduct and organisation of elections and those related to vertical parity between women and men in electoral lists. However, when the bill was discussed within the National Constituent Assembly, the majority refused to include horizontal parity between women and men for the heads of electoral lists,<sup>60</sup> as most parties still consider that politics are primarily the affair of men.

Following its entry into force, the law was subject to successive and repeated amendments aimed at serving the electoral interests of those in power. A case in point was the proposed amendment of the 2019 electoral law, which was aimed at changing essential electoral provisions two months before the legislative elections, in violation of international standards guaranteeing the integrity of elections, which impose a one-year limit for the adoption of such changes.<sup>61</sup> Nonetheless, the Assembly of Representatives at the time approved the amendment, and the constitutionality of the provisions was confirmed by the temporary body charged with controlling the constitutionality of draft laws. However, it did not enter into force because the President did not sign it.

In similar fashion, the President of the Republic changed the provisions of the electoral law after dissolving the Assembly of Representatives and declaring a state of exception, despite an explicit provision in the 2014 Constitution that electoral matters cannot be regulated by decree. Still, the President adopted a number of decrees that amended the provisions of the electoral law during a period in which he was not entitled to do so, and this was in order to hold the referendum on 25 July 2022.<sup>62</sup>

As mentioned above, the 2014 Constitution established a number of constitutional bodies in Chapter VI that the

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<sup>59</sup> The National Constituent Assembly approved a new electoral law following the entry into force of the 2014 Constitution (Organic Law No. 16 of 2014, of 26 May 2014, on elections and referendum).

<sup>60</sup> Moussa, "The Era of the Constitution".

<sup>61</sup> This amendment suggested changing a number of fundamental issues related to the inclusion of the threshold and adding new restrictions on candidacy requirements. For more, see: Salwa Hamrouni, Mouna Tabei et Meriem Aguerbi, « Chronique de la Tunisie », *A.I.J.C.* 35 (2019) : 1002-1008.

<sup>62</sup> Moussa and Tabei, *Tunisia- Referendum on the New Constitution*.

old constitutional system had not known. Although the transitional provisions of the constitution stipulated that the provisions related to independent constitutional bodies would come into force following the election of the Assembly of the Representatives, these were not created, except for the Independent Higher Authority for Elections, whose establishment was necessary to ensure the alternation of power. The other constitutional bodies remained unestablished because politicians did not believe in their necessary role in consolidating democracy. They also undid the progress that was made with the Independent Higher Authority for Elections by imposing a *fait accompli* policy that altered its composition in violation of the 2014 Constitution.

## B. SELECTIVE IMPLEMENTATION AND IMPOSED INTERPRETATION: THE ABSENCE OF THE CONSTITUTIONAL COURT AS EXAMPLE

In our view, the failure to establish the Constitutional Court was the biggest challenge that the implementation of the 2014 Constitution faced, and the main reason that led to its termination. The disruption of the court's establishment is the biggest proof that those who reach power were not committed to upholding the constitution.

The 2014 Constitution granted the Constitutional Court<sup>63</sup> broad powers, giving it the exclusive competence to oversee the constitutionality of draft laws, constitutional amendments both procedurally and substantively, international treaties, the rules of procedure of the Assembly of Representatives, and laws referred to it by the courts (Article 120). It also granted it other powers that allow it to supervise the executive authority through resolving conflicts of jurisdiction between the President of the Republic and the Head of Government (Article 101), to bring to an end the President of the Republic's term for a grave violation of the Constitution (Article 88), and in the event of the position of President of the Republic becoming temporarily vacant to meet and declare the temporary vacancy of the office (Article 84), and verify whether the circumstances having been considered exceptional remain so (Article 80). In this way, the 2014 Constitution broke with the political conception of oversight that the Constitutional Council had previously exercised under the 1959 Constitution, and introduced a model that was more akin to the model established in democratic countries.

According to the 2014 Constitution, the Constitutional Court is placed at the top the institutional and legal structure. As stipulated in Article 1 of the Organic Law on the Tunisian Constitutional Court,<sup>64</sup> it is the "guarantee of the constitution's supremacy and protector of the democratic republican system, rights and freedoms," and all public authorities must abide by its decisions. It was meant to constitute the basis of the rule of law-based state and act as the sole and official interpreter of the 2014 Constitution. In its absence, the interpretation and implementation of the 2015 Constitution<sup>65</sup> become a purely political matter devoid of rule of law guarantees.

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<sup>63</sup> The 2014 Constitution, in its fifth chapter on the judicial authority, devoted a second section to the Constitutional Court.

<sup>64</sup> Organic law No. 2015-50 of 3 December 2015 on the Constitutional Court.

<sup>65</sup> On the Constitutional Court, see: Salsabil Klibi, "The Constitutional Court in the Tunisian Constitution of 27 January 2014," *In A Collection of Works Dedicated to Dean Mohammad Saleh Bin Issa* (Tunis: University Publishing Center), 107-134.

The constituent authority granted the Constitutional Court a vital role. Despite the tension and conflicts that characterised the discussions regarding its composition within the National Constituent Assembly, constitutional guarantees for its independence were approved, including a distribution of the power to appoint its twelve members, whereas 4 members were to be appointed by the President of the Republic and 4 by the Supreme Judicial Council, and 4 were to be elected by the Assembly of Representatives. The organic law regulating the Constitutional Court completed the constitutional provisions related to the election of the court members and stipulated that they be appointed successively, beginning with the members elected by the Assembly of the Representatives first on the basis of a two-thirds majority.<sup>66</sup>

The transitional provisions of the constitution required the authorities to establish the Constitutional Court within a year, at the latest, from the date of the legislative elections. The National Constituent Assembly created a temporary body to monitor the constitutionality of draft laws<sup>67</sup> and oversee draft laws until the establishment of the Constitutional Court.

However, the assembly elected in October 2014 started to interpret the constitution's provisions politically, paving the way for the postponement of the establishment of the Constitutional Court. The ruling majority at the time considered that the deadlines enshrined in the constitution were nothing but "indicative deadlines" and were not binding on the assembly. This interpretation, which struck at the foundations of the mandatory nature of the constitution, led to the justification of its violation.

During the first and second parliamentary terms, the assembly was unable to elect the members of the Constitutional Court due to a disagreement on the candidates. The parliamentary blocs wanted to control the Constitutional Court by appointing members who would be loyal to them and they did not select competent candidates. The first parliamentary term ended with the election of but one of the four members after multiple sessions.

Due to the lack of consensus among the members of the assembly on the nomination of the court members in the first parliamentary term, the organic law of the Constitutional Court was amended in the second parliamentary term, and the required majority for the appointment of members was reduced from 145 votes to 131 votes. The amendment was approved on 25 March 2021. Its adoption reveals parliament's political use of the legal system its interest in the establishment of the Constitutional Court in circumstances marked by tense relations

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<sup>66</sup> Article 11 of the Constitutional Court Law states: "The Assembly of Representatives of the People appoints four members as follows: Each parliamentary group in the Assembly of Representatives, or each group of deputies who do not belong to any parliamentary group whose number is equal to or exceeds the minimum required to form a parliamentary group, has the right to nominate four candidates for the plenary session, provided that three of them are law specialists. The Assembly of Representatives elects the four members by secret ballot and by a two-thirds majority of its members. If the candidates do not get the required majority of votes after three consecutive sessions, the nomination period will be opened again to present a new number of candidates according to the remaining available number of seats, taking into account whether they are law specialists or not. In the event of equality in the number of votes obtained, the eldest is declared the winner".

<sup>67</sup> Organic law No. 14 of 18 April 2014, on the Provisional Instance to Review the Constitutionality of Draft Laws.

with the Presidency of the Republic. However, the President did not sign the amendment to the law but returned it to parliament. In doing so, President Kais Saied offered his own interpretation of the transitional provisions, considering that the failure to establish the Constitutional Court within a year from the date of the election of the Assembly of Representatives prevented its subsequent establishment. He thus flouted the constitution and deemed himself solely responsible for its interpretation. The President insisted on not signing the amendment to the law after the temporary body charged with overseeing the constitutionality of draft laws refrained from ruling on the matter not due to the absence of a majority of its members,<sup>68</sup> which, in turn, impeded the establishment of the Constitutional Court.

The lack of establishment of the Constitutional Court led to the absence of effective oversight over the constitutionality of the laws that were adopted, the exacerbation of political crises between the Prime Minister and the President of the Republic in the absence of an arbitrator between them, and constitutional crises for lack of an interpreter of the provisions of the constitution. It made it possible to govern under the *fait accompli* policy and in accordance with the balance of power rather than on the basis of the constitution. The problem stemmed from parliament's desire to administer power through the Prime Minister it appointed and determine the meaning of the constitution according to the numerical majority in parliament. The elected parliaments tilted the system of government toward a parliamentary system that lacked balance between the powers and ended with the President of the Republic declaring a state of exception with no oversight, which allowed him to dissolve the elected parliament and existing political institutions and monopolize power, ultimately imposing the abolition of the 2014 Constitution.

## CONCLUSION

We have offered a brief overview of the stages of constitution-making and subsequent enforcement of the constitutional rules that resulted from the revolution, which expressed a yearning for freedom and social justice, and a will to shift to an effective democratic system that guarantees a decent life for all. We are led to conclude that the post-revolutionary rulers turned the revolution into a struggle to gain power and hold on to it, both by contravening the provisions of the constitution and failing to establish the institutions guaranteeing its supremacy.

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<sup>68</sup> Decision of the Provisional Instance to Review the Constitutionality of Draft Laws No. 1 of 2 June 2021, on the amendment of Organic Law No. 50 of 3 December 2015, on the Constitutional Court, Official Gazette of the Republic of Tunisia No. 49 of 9 June 2021.

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