

Working Paper N. 2



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The National Constituent Assembly of Tunisia and Civil Society Dynamics

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INTRODUCTION

The Tunisian constitution of 27 January 2014 was deemed essentially compatible with international human rights principles and standards. These were adopted at the outcome of a dual process, which was underway both inside the National Constituent Assembly (NCA) and outside it, between the NCA and civil society stakeholders. Three successive drafts fell considerably short of expectations (6 August 2012, 14 December 2012 and 22 April 2013). The fourth draft (1 June 2013) was still fraught with 20 or so fundamental divergences. These were resolved, thanks to the National Dialogue in cooperation with the ad hoc “consensus commission” (lajnet tawafuqat) within the NCA, which is chaired by Mustapha Ben Jaafar (President of the NCA). The final text was overwhelmingly adopted on 26 January 2014 by 200 votes, with 12 against and four abstentions. It was promulgated on 10 February.

This EU Spring report seeks to address citizens’ rights. However, before examining the dynamics at work (internal and external) and the logic of voting within the NCA (Part II), we would like to make three points. The first point relates to the categories of citizen rights (article 21 to 48). The constitution enshrines all rights - in philosophical terms, rights-freedoms and rights-entitlements, and in generational terms, the rights of the three generations of rights. It even outlines a mini-theory of limitations with a regulatory value (article 49): restrictions to freedoms can only be put in place “to protect the rights of others or for reasons of public security, national defence or public morals”. These restrictions are accompanied by a clause with a double safeguard: they can only be implemented “in case of necessity” and in abidance with the “principle of proportionality”. The second point concerns the oversized role of the state. It can be described in the form of a paradox: as much as the members of the assembly are wary of the state as the censor of freedoms, they are equally ready to place their trust in the state – the Rule of Law, the Welfare State, the Social State and the postcolonial Guardian State. The wording becomes redundant: the state “guarantees”, “endeavours to guarantee”, “strives to achieve” and “strives to assure” the rights. It “undertakes to protect” and “takes” measures in all intents and purposes.

The third point refers to the right itself. Indeed, declarations on major rights begin with the subject of the right (that is, the human being, person or citizen) to whom a substantial right is attributed. The Tunisian constitution does not proceed in this manner. It either states a given right in abstract terms

or it entrusts the state with the care of protecting it. It is as if the human being (not mentioned as such) were not the subject of the initial right. There is an almost sole exception of this one provision, which starts by naming the holders of the right as: “Citizens (male and female) (rather than men and women as the hasty media reported) have equal rights and duties” (Article 21).

PART ONE: DUAL DYNAMICS

Drafting the constitution within the NCA was a slow, complex and confrontational process. Elected on 23 October 2011 for just a year, the NCA first had to adopt a law on the provisional organisation of powers¹. Within the NCA, Ennahdha took the lion's share in the six constitutional commissions, each composed in proportion to each party's electoral score (nine members out of 22). Debates within the commissions started in January 2012. The NCA was driven by two crossing divides - a political divide (between majority and opposition) and a cultural polarity (between conservative and secular forces). The three successive drafts reflected this dual polarity (6 August 2012, 14 December 2012 and 22 April 2013). The fourth draft (1 June 2013), although it introduced major improvements, did not succeed in achieving a consensus. The fact that a third version (April 2013) was required to ensure recognition of the "principles of universal human rights" (but not the rights themselves) is an illustration of the extent of these divergences. Indeed, "in as far as they are in harmony with the cultural specificities of the Tunisian people". In its final report, which was drawn up on the eve of the second draft, the Rights and Freedoms Commission stated the principles that guided their work: Islamic values (1), the aspirations of the revolution (2) and the universal principles of Human Rights including the Universal Declaration of Human Rights (3)². By the fourth draft (1 June 2013), the Rights and Freedoms Commission claimed an almost general consensus on all of the articles, according to the complementary report (Number 3). The Joint Coordination and Drafting Commission handed in its general report (14 June)³. However, more than a dozen fundamental disputes were still unresolved. An ad hoc "consensus commission" (*lajnet tawafuqat*) within the NCA, chaired by Mustapha Ben Jaafar (President of the NCA), made no headway. This was because the Islamists, once again, raised the issue of the Sharia being the source of legislation (which did not figure in the third draft) and the constitutionalisation of the Higher Islamic Council⁴.

¹ The 16 December 2011 law repeals the legislative decree of 23 March 2011, provisionally organizing powers until the holding of elections.

² General report of the Rights and Freedoms Commission, 13/11/2012.765858658

³ See the general report on the draft constitution, Coordination and Drafting Commission, 14 June 2013.

⁴ <http://www.kapitalis.com/tribune/8847-entre-charia-ou-pas-charia-la-tunisie-balance.html>

Civil Society and the NCA

The NCA did not cut itself off from civil society. It organised two open days on 14 and 15 September 2012 with more than 300 associations that expressed reservations on the first draft (August 2012). With the second draft, it launched the watchwords: “towards a participative drafting of the constitution”. It initiated an open debate within the NCA with civil society stakeholders (14/15 December 2012). Some NCA members travelled to the regions (26 meetings) and abroad to listen to the complaints of citizens, which were handed into the commissions in March 2013, to help improve the third draft (April 2013)⁵. Similarly, a window was open on the NCA website to invite proposals to be passed onto the commissions⁶.

On reading the documents, it is apparent that opinions differed more on general principles than on liberties. In the paragraph concerning general principles, civil society was divided on the place of Islam (between those in favour of and hostile to the Sharia), on nationalist ideology (whether or not to mention the criminalisation of the “Zionist entity”) and the reference to international human rights instruments. With regard to freedoms, two major trends confronted each other: one wanting to curtail liberties (through third party rights, respect of what is held sacred and public order) and the majority trend for which liberties were the priority. This calls for two comments: the first is the “observations and proposals of expatriates” which are more progressive. The first points raised were in the following order: criminalise insults to Tunisians of Jewish faith, as well as the accusation of impiety, mention parity and freedom of conscience. The second concerns the role of the mentioned civil society, with reference to the travel that is carried out in the regions, as follows: “the State, in cooperation with civil society, sets up mechanisms able to guarantee the implementation of rights and freedoms recognised in this chapter”.

An Autonomous Civil Society

Civil society also distinguished itself through autonomous action. Although we will limit ourselves here to actions of a general nature, we will later consider them by theme. From interviews with civil society actors, it appears that they are proud of their lobbying activities and, as a whole, are satisfied

⁵See the documents that are available on the NCA website: Rapport Général sur le Projet de la Constitution, op cit; Observations Générales sur la Constitution, 18 Mars 2013, and two tables: Observations et Propositions des Régions et Observations et Propositions des Expatriés.

⁶ The document, Dialogue avec la Société Civile (26 Mars 2013), summarises the 217 participations (exactly the number of deputies).

with the final version of the constitution. They made recommendations, which we will raise in the conclusion.⁷ Civil society was mobilised from the outset, in contrast to the idea that the Tunisian public withdrew from a scholarly discussion on the constitution⁸. Even before the election of the constituent assembly, several constitutions were in circulation⁹. The one that was put forward by the UGTT was presented just after the election of the constituent assembly in the margin of its 22nd congress (December 2011)¹⁰. Once the work began, a *Civil Constituent Assembly* was established in January 2012¹¹. With as many members as the elected NCA, the same commissions and the same working method, it drafted a series of proposals with a sole reference, according to the president, the universal declaration of human rights and international conventions¹².

The Bawsala Association also did some remarkable work in monitoring the constitution. On a daily basis and in real time, they covered all of the NCA's activities¹³. The Tunisian Human Rights League (LTDH) handed the NCA a memorandum requesting for observer status, which it was not granted. However, it achieved greater influence in view of its participation in the Quartet, which sponsored the National Dialogue¹⁴. At the initiative of the Arab Institute of Human Rights (AIHR), many organisations worked to obtain the signature of the *Pact of Tunisia for Rights and Liberties*, proclaimed on 25 July 2012¹⁵. Composed of nine articles, it called for the respect of fundamental rights, a life of dignity, security, equality, citizenship, development, freedom of expression and respect of the environment¹⁶. The AIHR unsuccessfully requested that the Pact be included in the constitution¹⁷. Tension heightened on 25 July 2013 when 30 civil associations signed *The Declaration*

⁷ In the annex, see the interviews that were carried out in January 2014: Sami Tahri, UGTT Spokesperson, Samir Bouaziz (Institut arabe des Droits de l'Homme), Ali Zeddini, Secrétaire Général de la Ligue Arabe des Droits de l'Homme, Wafa Ben Amor, Présidente de l'Assemblée Nationale Constituante Civile, Wafa Frawes, Membre du Bureau Directeur l'Association des Femmes Démocrates (ATFD).

⁸ Mha Yahya, *Beyond Tunisia's Constitution: The Devil is into Details*, April, 14, 2014, Carnegie Middle East Center, <http://www.carnegie-mec.org>.

⁹ See the constitutions on the ATDC website: <http://www.chawki.gaddes.org/6.html>.

¹⁰ Interview with Sami Tahri, UGTT Spokesperson, January 2014.

¹¹ The first session was held on 22 January at the Faculté des Sciences Juridiques. See its proposals <http://www.gnet.tn/temps-fort/tunisie/la-constituante-civile-avance-sur-son-projet-de-constitution/id-menu-325.html>.

¹² Interview with Wafa Ben Amor, President's Assemblée Nationale Constituante Civile, Janvier 2014.

¹³ Bawsala provided biographies of the deputies, monitored the presence of deputies and the vote, and put documents and reports of the session and working documents online: see Bawsala.tn.

¹⁴ Interview of Ali Zeddini, Secretary General of the LTDH, January 2014.

¹⁵ The most important were the 'Union générale des travailleurs tunisiens (UGTT), la Ligue tunisienne pour la défense des droits de l'Homme (LTDH), le Syndicat des journalistes tunisiens (SNJT), l'Ordre national des avocats tunisiens (ONAT) et l'Association tunisienne des femmes démocrates (ATFD). See document: http://aihr-iadh.org/pctfr/pacte_de_tunisie_des_droits_et_libertes.pdf

¹⁶ See "Pour une Tunisie des libertés" by Souhayr Belhassen, Présidente de la FIDH; Abdel Basset Ben Hassen; Président de l'Institut arabe des droits de l'homme, LE MONDE | 26.02.2013 http://www.lemonde.fr/idees/article/2013/02/26/pour-une-tunisie-des-libertes_1839083_3232.html.

¹⁷ Interview de Samir Bouaziz (Institut arabe des Droits de l'Homme), Janvier 2014.

of *Tunis* in which they opposed the fourth version (June 2013), which was supposed to be the final one¹⁸. With respect to freedoms, it refused any kind of delegation granted to the law to fix the system of freedoms. With regard to Islam, the petition referred to the teachings of Islam (*ta'lim al islam*), to its ends (*maqasid*), to the Arab Muslim identity (*al hawiya al arabiya al islamiya*), to the *Umma al islamiya* and the sacred (*muqadasat*)¹⁹. Criticism from the Dastourna (Our Constitution) network and the league of freedoms and human development went along the same lines²⁰.

The Islamists were not to be outdone. In a note addressed to the NCA bureau by the President of the Tunisian Front of Islamic Associations, Mokhtar Jebali, the group referred to the Koranic verse: “So judge between them by that which God hath revealed, and follow not their desires” (5: 49), on which it based its five demands: stipulate “clearly that Islam is the State religion” (1), make the Sharia the “principal and single source of legislation” (2), require that the President of the Republic be “male, Tunisian, Muslim” and his wife a Muslim (3), ensure that the State undertake to “protect Islam and prohibit the dissemination of any non-Sunni propaganda of a heretical obedience” and enact a law making any attack on what Muslims hold sacred a criminal offence (4) and finally, any convention “contrary to the Sharia and to the constants of Islam” should not be conformed to (5)²¹.

Similarly, experts played an important role as “gate-keepers”²². They all advocated in favour of a constitution that limits the weight of religion, while expanding the area of freedoms. Nothing can better illustrate the influence of the experts than the comments of Yadh Ben Achour, whose point of view was taken as authoritative arguments²³. The same applied to those of Sadok Belaid, the author of a draft constitution and of numerous commentaries on the drafts. We should also mention a document that was made by three professors who were invited by the Joint Commission for Coordination and Drafting of the Constitution to provide an opinion on the third draft²⁴. In the same spirit, the Tunisian Constitutional Law Association contributed periodical comments on the progress

¹⁸See list of signatories and the text <https://delphysyllepse.wordpress.com/2013/08/02/pour-une-republique-civile-et-solidaire-en-tunisie/>

¹⁹The petition cites articles 23 on privacy, inviolability of the home, confidentiality of correspondence, communications and personal information, the choice of place of residence, free movement; article 25, on the right to political asylum; article 30, on freedom of expression, information and publication; article 31, on the right to access information; article 34, on the freedom to establish a political party; and article 36, on the freedom to assemble and demonstrate.

²⁰ Cf. *La Presse de Tunisie*, 13 Mai 2013.

²¹ Lettre dated 9/03/2012, bureau d'ordre de l'ANC, 17/03/2012 réf.96/400/2012.

²² See list of experts called upon by the NCA, Annexe 6, Website ANC.

²³See his contribution Maghreb 26/03/2013 in French (25 Avril 2013): <http://emmabenji.canalblog.com/archives/2013/04/25/27007403.html>

²⁴ Hafedh Ben Salah, Leïla Chikhaoui, and Ahmed Essoussi, *Ta'liq hawla muswwadat al-dustûr, al-sâdira bi-târikh 23 afrîl 2013*[Commentaire autour du projet de constitution du 23 avril 2013]. Document downloadable from the site Marsad : <http://www.marsad.tn/fr/docs/5190b1df7ea2c422e7d0532e>.

of work²⁵. Hence, the association criticised the “serious shortcomings” of the first draft (August 2012). It repeated its criticism of the second draft (December 2012) and commented on the fourth draft (June 2013)²⁶. A group of experts from the ranks of the ATD annotated the last version²⁷.

National Dialogue

The National Dialogue was triggered by the assassination of the Deputy Mohamed Brahmi, on 25 July 2013, following the withdrawal of 60 opposition parliamentarians²⁸. Indeed, the fourth version (June 2013) failed to smooth out all the differences - no more than the negotiations with the Compromise Committee (*lajnet al-tawafuqat*) was able to do. With the aim of avoiding escalating to extreme positions, informal negotiations (direct and indirect) finally led to the establishment of a Quartet²⁹. After being repeatedly postponed, the National Dialogue officially got underway on 25 October 2013³⁰. Before it began, the Compromise Committee had already identified 16 points of divergence, besides the corollary points that were finally ironed out by the National Dialogue³¹.

This was the context in which, on 3 January, the deputies resumed discussion on the ironed out constitution, in plenary session, article by article and at a good pace. More than 1,000 amendments were filed, out of which only 286 were retained. The constitution does not fundamentally innovate. The first two chapters (besides the preamble) refer to the principles of the republic, freedoms and the status of Islam. With regard to freedoms, the constitution abides by the spirit of article 16 of the Universal Declaration of Human Rights and of the citizen (“A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”). With respect to Islam, it relies on an “Islamic secularism”, instituted by the 1959 constitution, reframed in a democratic context.

²⁵ See the ATDC site: <http://www.atdc.org.tn/>

²⁶ See document: recommendations on the second draft: <http://touensa.org/2013/02/13/tunisie-les-recommandations-emises-par-lassociation-tunisienne-de-droit-constitutionnel-sur-le-deuxieme-brouillon-de-la-constitution/>; see commentaries on the fourth draft : http://www.albawsala.com/uploads/documents/Colloque_de_lecture_du_projet_du_1er_Juin_2013.pdf

²⁷ Yadh Ben Achour et al., *Propositions Autour du Projet de la Constitution du 1^{er} juin 2013*, Tunis, Editions Hanns Seidel Stiftung.

²⁸ See Hamadi Redissi, What Role for Tunisia’s National Dialogue Under the Interim Government? *AIR, Policy Alternatives*, May 2014.

²⁹ It is made up of four organisations (l’UGTT, l’UTICA, l’Ordre des Avocats et la LTDH).

³⁰ Dialogue soon suspended on 5 November 2013 due to a lack of consensus on the designation of a candidate for the prime minister: <http://www.businessnews.com.tn/pourparlers-tardifs-et-debut-du-dialogue-national-vendredi-25-octobre-maj,520,41708,3>

³¹ See Hamadi Redissi, Raison Publique et Laïcité, la Constitution Tunisienne de 2014, in *Esprit*, Juillet 2014.

The Focus Groups

The work of the six thematic focus groups remained within the general context of civil society and constituent assembly debates³². They were as follows:

1. Minorities

Is the term minorities a common one and what do we mean by minorities? Although they are many, no list of minorities has been drawn up: religious, colour or ethnic and even sexual (homosexuals were mentioned). However, little is known of their rights. In Tunisia, the general tendency is to emphasise homogeneity, the communal experience, tolerance and the absence of the issue of minorities. What about their status? On a constitutional level, they are inexistent, even after the attacks committed against Sufi and Christian shrines. Are they integrated? Any integration is relative, the situation of people of colour is certainly the most deplorable.

2. Women

How does the situation stand after the revolution? Where does the legislation stand? What rights should women enjoy? First, parity is claimed as a form of positive discrimination. However, amongst women, discordant voices expressed their hostility to parity. Others feared that the progressions women had made would be lost. Finally, on a social level, the gap between the system of rights and the actual conditions that women experienced in the public sphere became apparent.

3. Freedom of Expression

Were the excess of freedom, the limits that need to be imposed and the sanctions to apply debated? It was deplored that penal legislation was still in force, even after the enactment of legislation with a more liberal tone (legislative decrees 115 and 116, 2011). The limits are classical (infringement of the rights of others, public order, etc.) and regulation would be ensured by the highest judicial body (the HAICA) and the judiciary.

4. Education and Health

What type of health system: public or private? Free or pay-for? The inequality of citizens within a two-tiered health system was deplored, whereby the rich have access to private health care while the majority of the population have to resort to uncompetitive and under-funded hospitals. It is the duty

³² The EU Spring team and Tunisian partners carried out the focuses for the duration of the project.

of the state to provide the means of ensuring a public health system for all. The same question is applied to education: public, private or a combination of both? Pay-for or free? Opinions differed. What is the role of civil society in the area of health and education? It is a lobbying role, a pressure group, which monitors and acts with the interested parties. It also has a role as a partner.

5. Unemployment

In favour or not of unemployment benefits and how to finance them? Those who opposed to the principle refer to their personal experience of being unemployed and having successfully found a job. Those who were in favour believe it is one of the demands of the revolution. According to some, a temporary measure is necessary but others argue that is insufficient. Who would be entitled to it? Job seekers, other jobless categories or the injured? Is social security coverage adequate? A review of the employment system on a new base was suggested.

6. Political Participation

Since participation is a right, what are the ways and means of implementing it? The answer is: political parties, associations, unions and the media. Political parties take decisions, associations monitor, citizens participate and the media inform. What forms of participation are there? There are many, starting with the ballot, a “classical” mode that does not exclude civil protest, especially during a revolutionary period.

PART TWO: RIGHTS AND THE VOTING LOGIC

Islam and the State

The relationship between Islam and the civil state provoked considerable tension between the conservatives and modernists, and between the NCA and civil society. The challenge was to reconcile the reference to Islam and the civil character of the state. The final text retains the first article of the 1959 constitution in the four drafts: “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. Introduced into the third draft, article two picks up immediately with a clause that could seem somewhat like a coincidental opposition: Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law”. In stipulating that these two articles might not be amended, the final text adopted, in plenary, the firm establishment of them as strict markers of Tunisian identity, a historical identity (article one), “expanded” in a democratic context (article two).

Article one has always been interpreted by legal doctrine as referring to Islam as the religion of Tunisia and not Islam as the religion of the state. As a compromise, article one was adopted almost unanimously (less one vote and two abstentions)³³. The conservatives within the NCA attempted to push the advantage in two directions: the first was to close the doctrinal debate on the interpretation of article one by making Islam the religion of the state and not of Tunisia. This position was upheld in the Preamble Commission³⁴ and was reverted to in the fourth draft (article 148). Under pressure from civil society, as well as from the National Dialogue, the mention was deleted. Second direction: make the Sharia a source of legislation according to the Egyptian model (article two of the 2012 and 2013 constitutions)³⁵. Two amendments along those lines were rejected in plenary (amendments five and 42). Nonetheless, reference to the Sharia was almost retained in the “constants of Islam” (*thawabet*) (in the three drafts). The wording was opposed and the Compromise Commission’s first decision was to replace it with: “Expressing our people’s commitment to the teachings of Islam”³⁶.

³³ After verification, the only deputy to have voted against article one proved to belong to the Mahaba movement (formerly El-Aridha led by Hechmi al-Hamdi). Of the two abstentions, one belonged to Mahaba and the other was independent: see Bawsala.tn.

³⁴ The initial report and the final report of the preamble, general principles and review of the constitution, 20 October 2012.

³⁵ See plenary session, debate on the constitution, 3/07/2013.

³⁶ Decision n° 1 of the Compromise Commission of 27/09/2013.

The Sharia was also indirectly mentioned with regard to the status of conventions in national law. In the minds of Islamists, conventions cannot contradict religious values. Other members of the assembly regarded such a provision unnecessary³⁷. An end was finally put to the debate by the provision that granted duly ratified treaties “a supra legislative and infra-constitutional authority” (article 20 of the final version). The plan to constitutionalise the Higher Islamic Council, which figures in Ennahdha’s version of the constitution (article 28), was not debated in plenary. Article two confirms this orientation. During commission debates, some Islamists put forward the following argument: if the Sharia is not the source of legislation, then any explicit mention of the civil state should be removed or it should be specified “Civil State that refers to Islam”. Otherwise, the reference might infer that the State is separated from religion³⁸.

Religious Freedom and Protection of the Sacred.

Article six refers to religious freedom and its limits and innovates by *specifically* recognizing the freedom of conscience. The article also stirred great controversy and underwent several evolutions. The second (December 2012) and third drafts (April 2013) stipulate: The state is the guarantor of religion. It guarantees freedom of belief and conscience, the free exercise of religious practice; it protects the sacred and is responsible for the neutrality of places of worship from all partisan purposes”. The fourth draft (June 2013) introduced a “freedom of conscience” between the freedom of belief and free religious practice. Within the Rights and Freedoms Commission, some sought to criminalise attacks against the sacred, whilst others regarded this as a restriction on the freedom of expression³⁹. This initial wording was approved on 4 January 2014⁴⁰. At that point, it did not mention Takfir or the values of moderation. An amendment (number 23) sought to delete the “freedom of conscience and free exercise of religious practice”. It was rejected⁴¹. The only group to have unanimously voted against this amendment (10 out of 10 votes) was the left wing group, known as “Kotla” (democratic bloc). On the other hand, the 35 votes in favour of deleting the provision were to be found in all of the groups, the greatest number being amongst Ennahdha’s secular allies⁴². A

³⁷ Minutes 1, Commission Etude des principaux axes du préambule, 26 mars 2012, marsad.tn

³⁸ Minutes 3, Etude des principaux axes: Préambule, principes fondamentaux et amendement de la constitution, 25 Avril 2012. It is necessary to put the link in all of the materials that you quote in order to let readers consult them.

³⁹Final report of the Rights and Freedoms Commission. 13/09/2012. NB: it is surprising that the issue was tackled in this commission when article six was part of the chapter on general principles.

⁴⁰(149 for, 23 against and 13 abstentions). Votes against and abstentions were found to be amongst all of the groups.

⁴¹(104 against, 35 for and 23 abstentions).

⁴²Nahdha (48 against, four for, 22 abstentions), CPR (six against, three for, two abstentions), Wafa (nil against, six for, two abstentions), Intikal (two against, eight for, no abstention), Tahaluf (Alliance) (four against, one for, no abstention), Kotla (10 against out of 10), the independents (28 against, 10 for, no abstention).

second amendment (number 95) set out to add a paragraph stipulating: “Any form of call to Takfir (accusation of impiety) and incitement of hatred and violence are strictly prohibited”. It was adopted with a comfortable majority⁴³. The vote revealed a clear polarisation between Ennahdha opposing the amendment and the democratic left wing bloc voting unanimously in favour⁴⁴. A third amendment (62) further fuelled the issue by proposing to do away with the mention of the freedom of conscience. It was rejected⁴⁵. The two extremes were polarised with the democratic bloc (12 against) opposing Wafa, an Ennahdha ally (seven in favour, none against and one abstention). Ennahdha’s vote was slightly more nuanced⁴⁶. The more laboured Amendment 127 finally “liberalised” and “secularised” the article. It sought to extend the protection of the state to all religions and to shield places of worship from political struggles. It was rejected by a strong majority - not one Nahdhaoui deputy voted in favour, while the democratic bloc voted unanimously in favour of the new wording⁴⁷.

The next day, 5 January, discussion resumed on article six. Again, a vote was taken. The wording, which was supposed to be the final version, raised opposition from the Salafists and part of Ennahdha. The debate on article six continued on 23 January 2014, three days ahead of the final vote on the constitution, with a “consensus” amendment to paragraph two of the article: “The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred”. The amendment was adopted with a majority⁴⁸. Article six was then voted in its final version, as it figures in the constitution⁴⁹.

Minorities

No more than the former, the new constitution grants no rights to minorities as such (religious, ethnic and linguistic). These fall into three broad categories: the Arab-Muslim identity, the freedom of religious practice of non-Islamic religions and the ethnic-linguistic minorities. We will restrict ourselves to the last two categories.

⁴³ 96 for, 60 against and 31 abstentions.

⁴⁴ Ennahdha (Ag 53, F: 10, A: 18) as opposed to Kotla (12 F) and, to a lesser extent, the independents (F: 38, Ag: 3, A: 8).

⁴⁵ 96 against, 49 for and 39 abstentions.

⁴⁶ Ennahdha: Ag: 35, F: 17, A: 27) (against 35, for 17, abstention, 27).

⁴⁷ General vote: 104 against, 71 for and 12 abstentions. Ennahdha (Ag: 77, F: none, A: 5), compared to Bloc (F: 12). All of the other groups were divided.

⁴⁸ 150 for, 14 against and 15 abstentions.

⁴⁹ 152 for, 15 against and 16 abstentions. NB: It may be noted that the votes against were evenly distributed between all of the groups, including the democratic bloc from which one out of 12 voted against.

There is no mention of religious or ethnic-linguistic minorities. It may be considered that religious minorities are protected by the freedom of religion (article six). At independence, the 1958 law, which pertains to the organisation of Judaism, dissolved the Council of the Jewish community of Tunis⁵⁰. It replaced it on a national level by a provisional Commission. Subsequently, this was permanently established (articles 17 and 18). In the case of Catholicism (institutional expression of the Christian majority), it was governed by quite a different regime, based on a *Modus vivendi* and an additional protocol. The ratifications of this have remained the same since 9 July 1964⁵¹. It recognises “the free practice of the Catholic religion in Tunisia”, (article one of the *Modus vivendi*).

What of the ethnic-linguistic minorities? From interviews with NCA members, it appears that Islamists and Arab nationalists were hostile to any mention of minority rights, while the “progressives” were in favour of them⁵².

The former regard the rights of non-Arab minorities as a “danger” liable to foment “dissent” and “divide” Tunisians along ethnic lines, or even to serve “foreign agenda”⁵³. On the other hand, the modernists defended Tunisia’s pluralist identity with rights that were founded on universality. Associations for the defence of minorities and Berber identity took to lobbying in the unsuccessful attempt to write the rights of minorities into the constitution.⁵⁴ The Vice President of the Tunisian Association for Amazigh Culture addressed a letter to each of the 217 members of the NCA, which remained unanswered. In this letter, he called for the creation of a Berber cultural centre⁵⁵. It is noteworthy that the establishment of a body for minorities was never mentioned amongst the 30 or so bodies that proposed to the Commission of constitutional Bodies⁵⁶.

⁵⁰Articles 17 and 18 of law n°58-78 of 11 July 1958 relative to the Jewish religion, JORT, 11/07/1958.

⁵¹Décret n° 64-245 du 23 Juillet 1964, J.O.R.T 36, 24/07/1964.

⁵²See the list of people who were interviewed by Sabrina Fathallah, *Transition démocratique et minorités berbères après le 1 Janvier*, Mémoire de Mastère en science politique, Faculté de droit et des sciences politiques de Tunis, 2014.

⁵³See the accusations of Salim Hakimi in the magazine *El-Fejr* spokesperson for Ennahdha, “Qui foment la discorde Amazigh en Tunisie?” *El-Fejr*, 25/11/2012.

⁵⁴The six legal associations are: l’Association Tunisienne de la Culture Amazigh (présidée par Khadija Ben Saïdane), l’Association Amazigh de Djerba (Président Slaheddine Ben Mimoun), l’Association Tamazigh pour la Culture et les Arts (Président Ahmed Oulghazi) et l’Association de Développement du Patrimoine Musical et Poétique Amazigh (Président Lotfi Riahi), l’Association de Sauvegarde du Village Amazigh Taoujout (Président Mohamed Gouirah), l’Association AZRO pour la Culture Amazigh (Président Arafat Mahroug).

⁵⁵See letter reference n°212 in the NCA registry in annex to Sabrina Fathallah, op cit.

⁵⁶See report of the Commission of Constitutional bodies, 26/09/2012doc, available on Marsad.tn, Rapports de la Commission des Instances Constitutionnelles.

Women's Rights: Partial Equality

Tunisia has made major progress in the area of women's rights, particularly with the Personal Status Code (1958)⁵⁷. With regard to the constitution, three articles are devoted to women's rights (21, 33 and 46).

Article 21 of the constitution stipulates that "All citizens, male and female, have equal rights and duties, and are equal before the law without discrimination". This article was voted on 6 January without amendment by an overwhelming majority of members present⁵⁸. Article 28 of the first draft (August 2012) stipulated "a complementarity between man and woman". The second draft (December 2012) established equality between male and female citizens without any discrimination (article 5). The third draft (April 2013) also stipulated "men and women are associated in the building of society and the State" (article 11). The fourth draft (June 2013) restores things to order. This was achieved thanks to the action of women. On annual Woman's Day, several organisations at the NCA presented the "citizen and equality draft constitution". Here, they advocated total equality, parity in conformity with international standards (4/08/2012)⁵⁹. In October 2012, the international NGOs presented a "position paper"⁶⁰. Despite improvements, three shortcomings need to be pointed out: equality is between male and female citizens and not between a man and woman; it is "before" the law and not *by* the law; "discrimination" is not specified.

The second article that refers to women's rights (article 33) is divided into two paragraphs. The first paragraph provides for political participation in general (the right to elect and to stand for election) and raised no issues.⁶¹ The second is more problematical and concerns women's rights: "The State will ensure the representation of women in the elected assemblies". This paragraph, presented in the

⁵⁷Prohibition of polygamy, equal right to marriage and to legal divorce, minimum age at marriage, prohibition of forced marriage and duty of obedience.

⁵⁸159 for, 7 against and one abstention. The few negative votes do not belong to the large blocs: Ennahdha had no votes missing and the only discordant vote of the democratic Bloc (Abdessalam) is even more relevant in as far as it demanded equality between men and women.

⁵⁹ ATFD, AFTURD, LTDH, Commission femmes de l'UGTT, section femmes Amnesty et conseil des libertés [journee-internationale-de-la-femme-tunisie/](http://www.fidh.org/IMG/pdf/noteposition.pdf)

⁶⁰ See text: <https://www.fidh.org/IMG/pdf/noteposition.pdf>

⁶¹ It figures in the second draft of the constitution (December 2012) (article 43) and the third (April 2013) (article 47) and the fourth (article 33).

form of amendment 139, was voted separately beforehand⁶². When voted on as a whole (including both paragraphs), the outcome was widely in favour⁶³.

Finally, article 46 (44 before reordering). It can be broken down into four elements. “The State undertakes to protect the acquired rights of women and endeavours to reinforce and to develop them” (1); “The State guarantees equal opportunity of women and men to accede to any responsibilities in all areas” (2); “The State endeavours to achieve parity between women and men in elected assemblies” (3); “The State takes the necessary measures to eliminate violence against women” (4). Disagreement arose within the Commission on whether the Personal Status Code, parity and complete equality between men and women should be enshrined in the constitution⁶⁴. The article was adopted with a comfortable majority⁶⁵. It was the result of a consensual amendment⁶⁶. Elements one, two and four were taken textually from the preceding drafts⁶⁷. The third point regarding parity ties back to article 16 of the legislative decree pertaining to the election of the constituent assembly. This provides for the classification of candidates on the lists by alternating between a man and a woman⁶⁸. On the strength of this achievement, civil society continued to lobby for “horizontal” parity (parity between heads of lists) as a means of counteracting the almost systematic choice of a man to head the list according to “vertical” parity (through alternation on each electoral list)⁶⁹. The same applies to the elimination of violence against women. Before the revolution, domestic violence was a punishable offence⁷⁰. Women’s associations demanded the modification of other provisions of the penal code⁷¹ and a special law against violence⁷².

⁶² 125 for, 32 against, 22 abstentions.

⁶³ 166 for, nine against, six abstentions. Of the nine against, four were from Ennahdha, one from CPR and four independents.

⁶⁴ Rapport général op cit.

⁶⁵ 127 for, 43 against of which almost half from Ennahdha (20) and 24 abstentions.

⁶⁶ 116 for, 40 against (of which 20 Ennahdha) and 32 abstentions.

⁶⁷ Articles seven and 37 (draft two) and articles 42 (draft three) and 45 (draft four).

⁶⁸ Décret-loi n°35 du 10 Mai 2011, JORT n° 33 du 10 Mai 2011, p. 648.

⁶⁹ See list of associations concerned with parity: <http://www.tuniscope.com/article/43567/vie/associations/parite-egalite-572712>

⁷⁰ Article 218 of the Tunisian penal code provides that violence between spouses is punishable with a two-year prison sentence and a 2,000 dinar fine.

⁷¹ Articles 226 and 227 of the penal code suspend prosecution in case of violation of a minor through marriage of the perpetrator with the victim.

⁷² Interview with Yosra Frawes, membre de l’ATFD, Janvier 2015.

Civil Rights

Provisions concerning civil rights (22 to 30 in the final version) did not stir much debate. This is understandable in an NCA made up mostly of opponents who had suffered bodily and in their private lives from repressive methods. Only one article (21, future article 22 after reordering) regarding the right to life created some problems. Within the Freedoms Commission, it was agreed that “the right to life is sacred”. However, this was accompanied by four qualifications: as long as it is not in contradiction with the Koran (1), it is up to the legislator to determine the conditions under which it is to be implemented (2), it should not be violated except in the cases provided for by law (3), the death penalty is maintained (4). Article 22 stipulates: “the right to life is sacred, this right cannot be violated except in extreme cases provided for by the law”⁷³. It was adopted by a majority vote⁷⁴. Ennahdha’s vote was unanimous (81 in favour with no vote against or abstention), while the opposing votes from various quarters were against the death penalty. The camp in favour of the abolition of the death penalty has been active in Tunisia since the inception of the *Tunisian National Coalition Against the Death Penalty*⁷⁵ in 2009. The latter has undertaken several actions, the latest being in October 2013 on the World Day against the death penalty, calling parties to write abolition into the constitution⁷⁶. Yet the rejection of both amendments confirmed the NCA’s anti-abolitionist stance. The first (85) stipulates that “the right to life is sacred. It is protected by law and this right may not be violated”⁷⁷. The second (136) sought to delete the mention “this right may not be violated except in extreme cases provided for by the law”⁷⁸. Once again, the democratic bloc voted unanimously for

⁷³ The right to life was the “first right” (article 16, second draft), then it as “sacred” (article 22, third draft and 21, fourth draft).

⁷⁴ 135 for, 28 against, 11 abstentions.

⁷⁵ The coalition brings together seven associations: La Ligue Tunisienne des Droits de l’homme (LTDH), la Section Tunisienne d’Amnesty International (AIST), l’Institut Arabe des Droits de l’Homme (IADH), l’Association Tunisienne des Femmes Démocrates (ATFD), l’Association des Femmes Tunisiennes pour la Recherche et le Développement (AFTURD), Le Syndicat national des journalistes tunisiens (SNJT) - la Fédération Tunisienne des Ciné-clubs (FTCC). Elles sont 13 associations en 2014 avec l’adhésion de la Confédération Générale du Travail (CGT), l’Organisation Tunisienne Contre la Torture (OCTT), me Conseil National des Libertés (CNLT) et le réseau Doustourna.

⁷⁶ The call was signed by the IFHRL (International federation of Human Rights Leagues) e l’Homme), Amnesty, Section Tunisie et la Coalition Nationale Tunisienne contre la peine de mort : <https://www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/maghreb-moyen-orient/tunisie/pour-l-abolition-de-la-peine-de-mort-en-tunisie-appel-aux-partis-14072>. See the regional conference, which was organised in September 2013 by the 13 associations “En marche pour l’abolition de la peine de mort”:

http://www.citoyensdesdeuxrives.eu/index.php?option=com_content&view=article&id=3861:conference-regionale-l-en-marche-vers-labolition-de-la-peine-de-mort-r-tunis-26--27-septembre-2014&catid=200:societe-civile&Itemid=172

⁷⁷ 102 against, 50 for and 15 abstentions. NB: It should be mentioned that two nahdhouis voted in favour of this amendment and a member of the democratic bloc voted against.

⁷⁸ 99 against, 49 for and 22 abstentions.

the removal of the paragraph. The following articles referring to civil rights (22-30) raised no objections.

Civil Liberties

Covered by articles 31-35, civil liberties had already been provided for by a post-14 January liberal legislation. Concerning freedom of expression and information, decrees 115 and 116 are even more forward-looking than the present constitution, in as far as they are in conformity with the international covenant on civil and political rights. Meanwhile, article 20 of the Constitution confers on treaties a supra-legislative and infra-constitutional rank⁷⁹. Under these circumstances, the adoption of article 30 (31 final version) on freedom of opinion, thought, expression, information and publication was unanimous. Such progress was made possible by the action of the NGO article 19 (Tunisia section) in favour of the amendment of the first versions of the articles (30, 31 and 127) in cooperation with a group of associations⁸⁰. This step forward was commended by a joint statement (1/02/2014) from three organisations, recalling the need to reform legislation in force and institutions in order to provide for the protection of human rights⁸¹.

Article 32 recognises academic freedom⁸². Just as for freedom of opinion and of expression (affirmed by decrees 115 and 116), freedom of associations and parties is recognised by two post-14 January legislative decrees⁸³. The right to organise in a union is guaranteed by article 35 of the fourth version, including the right to strike. This constitutes progress, compared to the preceding versions, where the right to strike could not “endanger the life of people or their health or their security” (article 27, second draft), as well as “the law determines the conditions under which public service continuity is maintained” (article 33, third draft). In the Freedoms Commission, opinions differed on the right to

⁷⁹ Legislative decree n° 2011-115 of 2 November 2011 relative to freedom of the press, printing and publication and decree 116 relative to the establishment of a Higher independent body for audiovisual media.

⁸⁰ The Civic Coalition for the Protection of Freedom of Expression, The National Syndicate of Tunisian Journalists – SNJT, The Tunisian Human Rights League (LTDH), The General Syndicate of Culture and Information under UGTT, The Tunisian Syndicate for free radios – STRL, The Tunisian Centre for Freedom of the Press – CTLP, The Federation of Newspaper Editors, The Tunisian Magistrates' Association, The High Authority of Audiovisual Communication – HAICA, The African Centre for Training of Journalists and Communicators – CAPJC, The United Nations High Commissioner for Human Rights – OHCHR, Amnesty International, BBC Media Action, The Euro-Mediterranean Network for Human Rights – EMHRN, The Euro-Mediterranean Foundation of Support to Human Rights Defenders – EMHRF, The International Academy of Constitutional Law, The Council of Europe, UNESCO
<http://www.article19.org/resources.php/resource/37327/en/Tunisia>.

⁸¹ Bawsala, Amnesty International and Human Rights Watch; see communiqué in bawsla.tn.

⁸² Academic freedom figures in drafts two (article 30), three (article 36) and four (article 32).

⁸³ Legislative decree n° 2011-87 of 24 September 2011 organizing political parties and legislative decree n° 2011-88 su 24 Septembre 2011, portant organisation des associations.

strike - whether it should be absolute or restricted. During a first vote, this right did not apply to the National Army. Amendment (35) was adopted with a short majority (77 in favour, 73 against). It seeks to achieve a balance between freedom to work and restrictions for some non-mentioned bodies. It was removed during the final vote. Subsequently, other bodies were excluded from the right to strike (internal security forces and customs). Article 36 guarantees the right to peaceful demonstration⁸⁴. Amendment 233, which entrusts the law with fixing the ways and means without violating the essence of the right, was rejected⁸⁵.

Economic and Social Rights

Economic and social rights, as are laid down (articles 38-48) and adopted, reflect a radical social democrat vision that overburdens the state with obligations towards individuals, underprivileged groups and disadvantaged regions. The divergence is not fundamentally ideological. It lies between those who demand minimal state intervention and those who uphold the fullest commitment of the state⁸⁶. The rights emanate from a theory of justice, based on the principles of freedom (or equivalence) and equality (or corrective difference of inequalities). The question was indirectly raised in commission⁸⁷. Article 12 sets the stage. It provides that “the State shall seek to achieve social justice, sustainable development, a balance between regions, by referring to development indicators and relying on the principle of positive discrimination. It will also seek to exploit natural resources in the most efficient way”. All is covered.

The right to health (article 37 before reordering) acquired its final wording after the introduction of a “consensual” amendment on the role of the state⁸⁸. Two amendments were rejected because they overburdened the state: amendment (4): “The state ensures that preventive health care and treatment for all citizens and the national community will cover the costs of this fundamental amongst all human rights”. Amendment (89) extends free health care to all and the right to social security. The right to health was debated within civil society. Already in April 2012, the Tunisian association for the

⁸⁴ 170 for, four abstentions.

⁸⁵ This restriction figures in drafts two (article 25) three (article 31) and four (article 36).

⁸⁶ This is why we do not refer to the vote by groups.

⁸⁷ Procès verbal 2, Etude des principaux axes: Préambule, principes fondamentaux et amendement de la constitution, 23 Avril 2012, marsad.tn.

⁸⁸ This right is already guaranteed to “low income” categories by drafts one (article 31), two (article 37) and four (article 37).

defence of the right to health (ATDDS) called for the right to health to be written into the constitution and the possibility for civil society to have recourse, were this right to be violated⁸⁹.

Article 38 (39, after reordering), which concerns education, was the subject of debate. The right as such was affirmed without difficulty (compulsory free public education and the obligations of the state in this respect). A second paragraph, however, polarised the conflicts because it established a cultural particularism, partially resulting from an amendment (87): “Also, the State shall endeavour to root young generations in their Arab Muslim identity, to strengthen, consolidate and generalise the Arabic language”. Only nine deputies from the assorted left voted against this article on 7 January 2014. Rooting in identity was not mentioned at all in the second draft (article 29). The third and fourth drafts restrict themselves to requiring the state to strengthen and consolidate the Arabic language (respectively article 35 and 38). Once alerted, over 50 associations addressed an open letter to the President of the NCA, requesting that the article be revised⁹⁰. The NCA bowed to the pressure. Article 39 requires that the state both consolidate pupils in their identity and ensure “openness to foreign languages, human civilisations and the diffusion of a culture of Human Rights”.

Directly connected to the right to join and form a union (article 36), the right to work (article 39) (40 final) was voted in its final version, with the introduction of a consensual amendment⁹¹. The first amendment on assistance to the unemployed was rejected. Amendment 142 was rejected with a short majority: “Every citizen has a right to work under decent and fair conditions; and the State takes the necessary measures to guarantee equal opportunities”⁹². Drafted in another wording, the final version establishes the right to work “guaranteed on the basis of competence and fairness” and with “decent working conditions and a fair wage”. Articles 41 (42 final) (the right to culture and freedom of creation) 42 (promotion of sport), 43 (the right to water) and 44 (right to a healthy environment) were voted without modifications. Article 45 refers to women’s rights (already examined). The article on children’s rights (46) was adopted after a consensual amendment. Article 47 on the rights of people with disabilities was voted following a consensual amendment⁹³.

⁸⁹<http://www.tixup.com/international-politique/15532-tunisie-inscrire-le-droit-a-la-sante-dans-la-nouvelle-constitution.html>.

⁹⁰See the text of the bilingual petition and the list of signatories : <http://www.sidibouidnews.org/petition-a-signer-constitution-tunisienne-la-societe-civile-demande-la-revision-de-larticle-38/>; also <http://touensa.org/2014/01/20/constitution-tunisienne-la-societe-civile-demande-la-revision-de-larticle-38/> See information also in : <http://www.africanmanager.com/160904.html>

⁹¹It is guaranteed by article 26 (second draft) and 32 (third draft) and 38 (fourth draft).

⁹²64 against, 62 for.

⁹³Recognised by article 39 (draft one), 44 (draft three) and 47 (draft four).

The discussion of the chapter on freedoms was closed on 8 January 2014. However, on 9 January, an article on the right to housing (that does not figure in the final version) was added: “Every citizen has the right to decent housing and the State will endeavour to guarantee this right”. On the 10 January, a second article was voted: “The State guarantees the freedom to work and the freedom of economic initiative”. On 20 January, members went back on some articles and reworded article 12 (social and regional justice), article 10 (equality in taxation and taxes) and 31 (information). On 22 January, article 31 on the right to information acquired its final wording. Paragraph four of the preamble was revised. The words “the revolution of 17 December-14 January” were added to the first paragraph of the preamble. Another vote was taken on paragraph two of the preamble. A paragraph was added to article 35 on the right to strike, depriving internal security forces and the customs of this right. On 23 January, a vote was taken on article 35 as a whole. Article six was then, once again, examined. Article 38 was fine-tuned in order to balance the educational particularism. A further vote was taken on the whole article and was adopted almost unanimously (one vote against). An article was added on “the freedom of work guaranteed by the State”.

Conclusion

The purpose of this report was to describe the dynamics of a citizens’ movement that contributed to the establishment of rights and freedoms and the constitution. Now that it has entered into force, civil society actors have set themselves a new agenda: implement the rights into reality and consolidate them. Yet, two questions remain outstanding. The first concerns practice: will political actors respect the rights affirmed in the constitution? The second is of a normative nature: how to harmonise the new provisions of the constitution with legislation? An answer may be given to the first question without having to place our trust in the actors themselves. It is up to the representatives of the state, the political parties, the legislator and the judicial authorities to accept the new rules of the game and obey the constitution. With respect to the second question, present legislation is subdivided into three categories: laws that are “aligned with” the letter and/or the spirit of the new constitution, measures that are “in advance” of the constitution and a legislation that clearly falls short of the constitution. With regard to international human rights legislation, the constitution places international treaties above legislation but below the constitution. It is the role of the judge to interpret this provision in a manner compatible with the Vienna Convention on the law of treaties, ratified by Tunisia.