Tunisia

Introductory notes

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I. Origins and Historical Development of the Constitution

The 2014 Tunisian Constitution is the result of the political transition which began in 2011 after the popular uprisings which led to the fall of the autocratic regime of Zine El Abidine Ben Ali, who had been in power since 1987. The revolutionary origin of the text becomes clear if one considers the innovative character of the new Constitution, which breaks with a tradition marked by the Constitution that served the purpose of an autocratic regime. The 2014 Constitution, by contrast, lays the foundation for the birth of a true democratic constitutional system, in which the constitution is the supreme source of law and contributes to the entrenchment of a culture of constitutionalism, representing an instrument whose objective is to achieve the safeguarding of fundamental rights and limitation of public powers. It is, moreover, remarkable to note that it represents the first constitution in Tunisian history which originated not only within the governing elite, but also takes into account the opinions of the people. The Constitution was indeed conceived by an elected Constituent Assembly and intensive public discussion accompanied its development.[1] Moreover, although Tunisia enjoys a remarkable constitutional background, especially when compared to other countries in the area, the Fundamental Charter is the first in the country's history that was adopted with a view to establishing an authentic democracy.

The Constitution fits perfectly within the framework of global constitutionalism, being characterized by its compatibility with international standards, in particular those concerning human rights.[2] A number of acts aimed at implementing the Constitution have already been adopted, but the process is still ongoing, and it will be fundamental to observe its operation over time. The analysis of this new Charter and the constitution-making process cannot continue without first presenting a description of its historical background, for reference purposes. The next section will therefore provide some insight into Tunisian constitutional

[*] The present contribution is updated to August 2015.

[1] T. Abbiate, *La partecipazione popolare al processo costituente*, in T. Groppi, I. Spigno (eds.), *Tunisia. La primavera della Costituzione* (Carocci, Roma, 2015), pp. 66-74.

[2] Democracy Reporting International, *Evaluation du caractère démocratique de la constitution tunisienne du 27 Janvier 2014*, March 2015, available at http://democracy-reporting.org/files/dri-tn-democracy_audit-fr.pdf.

roots, dating well back in time, and will subsequently be followed by a brief description of the constitution-making process.

A. Historical background

Tunisia boasts a long constitutional history that can be traced back to the fifth century B.C., when the Carthage Constitution was described by Aristotle as a 'superior one in comparison to others of the same age'. Carthage, an important city-state in the ancient world, was located near present-day Tunis, and its civilization still represents an important heritage for the Tunisian people today. However, it is clear that an example dating so far back in time can only provide a classical antecedent to the modern constitutional history of the country.

Indeed, for current events, the 1861 Constitution adopted by *Bey* (hereditary governor) Mohamed Es Sadok, the local administrator of the Ottoman Empire, which ruled the country from 1574 to 1881, was far more significant. This text represented the first constitution adopted in the Arab world and consisted of the formalization of the *habeas corpus* declaration of 1857, the so-called Fundamental Pact which set out the principles of the inviolability of private property, respect for the human person, and equality, regardless of religion.[3] The 1861 Constitution was a typical Octroyed constitution,[4] issued by the head of state without the participation of representative institutions, let alone the citizens. It set forth the change from absolute monarchy to constitutional monarchy and among the most remarkable provisions was the institution of a Supreme Council, which had the power to remove the *Bey* from office if he himself violated the Constitution. Furthermore, the Supreme Council had some political powers, such as that of endorsing laws. The innovative character of the Constitution also concerned the effects of the laws: they applied to all subjects present on the country's territory, and such general application interfered with the capitulations regime which regulated the Ottoman Empire, which still held nominal authority over Tunisia. The capitulations were bilateral acts signed between the Empire and Christian European nations, through which the latter secured rights and privileges in favor of their subjects who were resident or trading in the Ottoman dominions.

[3] On the 1861 Constitution see V. Silvera, *Le Régime Constitutionnel de La Tunisie: La Constitution du 1er Juin 1959* (1960) 10(2) *Revue Française de Science Politique* 368-370.

[4] This term, coming from the French *octroyer*, meaning 'to grant', refers to constitutions issued by the head of state as a sort of concession to the people. The main feature of these constitutional texts is that they are drafted without the participation of representative institutions.

This Constitution, despite the remarkable limitation of public powers that it provided for, was suspended in 1864 by the *Bey* because of a number of popular uprisings due to fiscal disputes (notably the tax increase because of the growing ambition of the country, which required the public treasury to collect more money for public investment) and pressure from Western countries, whose citizens residing or operating in Tunisia were resentful of being treated equally to other Tunisian citizens, i.e. without the privileges previously granted by the capitulations regime. The combined action of the economic crisis and Western influence led not only to the Constitution's suspension, but also to dramatic political change.

On 12 May 1881 the *Bey* was forced to agree to the terms of the Treaty of Bardo, which effectively made the country a French protectorate.[5] Under French rule, the monarchy was strengthened and reverted to a more autocratic position. The demand for a constitution was picked up by the Tunisian Nationalist Movement, as can be seen by the name of the major Tunisian Nationalist party of the time, *Destour* (meaning constitution in Arabic). The party founded in 1920 initially pleaded for the return to the 1861 Constitution and for the creation of a legislative council representing the Tunisians. Following the emergence of a new group of leaders familiar with liberal and democratic opinions, such as Habib Bourguiba, the party was split. The *Neo-Destour* was formed in 1934, and resorted to a new strategy: it began to formally demand independence from France and the creation of a new constitution corresponding to the new social and political reality. Notably on 10 June 1949 the party issued a 'Charter of General Principles for the Tunisian Constitution' which consisted of a set of political claims submitted to the *Bey* requesting the election of a national constitutional assembly, charged with drafting a new constitution for the country.[6]

The French Protectorate reacted to such claims by suppressing the demonstrations, but with limited success. Once Tunisia achieved independence from France on 20 March 1956, the ground was fertile for the implementation of the *Neo-Destour*'s requests. On 25 March a National Constitutional Assembly (NCA) was elected, made up mainly of members of the *Neo-Destour* party, which led a coalition named the National Front.[7] One of the first decisions

[5] V. Silvera, *Le Régime Constitutionnel de La Tunisie: La Constitution du 1er Juin 1959* (n3), p. 371 ; K.J. Perkins, *A History of Modern Tunisia* (Cambridge University Press, Cambridge, 2004).
[6] A. Boubakri, *Interpreting the Tunisian Revolution*, in *Routledge Handbook of the Arab Spring* (L. Sadiki (ed.) Routledge, London-New York, 2015), p. 68.
[7] C. Debbasch, *L'Assemblée Nationale Constituante Tunisienne* (1959) 13 *Revue juridique et politique d'Outre-Mer* 32-54. On the influence of Habib Bourguiba on the NCA see A. Abdelssemed, *La constitution et son instrumentalisation*

of the NCA was to institute a republic, on 25 July 1957. Following this decision, Habib Bourguiba was appointed by the NCA as the first President of the Republic.[8]

Subsequently, on 1 June 1959, the NCA approved the Constitution. It was a short document, initially composed of only 64 articles, and it shared with other post-independence constitutional texts the aim of establishing the sovereignty of the new political entity, strengthening the state, and reinforcing the presidential figure.[9] This Charter was largely inspired by the 1958 French Constitution and contained the typical principles of a liberal democracy, such as (limited) provision of fundamental rights and the foundations of a civic governing system. As far as the system of government is concerned, the 1959 Constitution originally established a presidential system which was, however, later (in 1976) transformed into a semi-presidential one.

Despite the democratic features present in the 1959 Constitution – the provisions regarding people's sovereignty, the separation of powers, and fundamental human rights – post-colonial political practice did not produce the expected results. All constitutional principles were *de facto* secondary to the political will of the autocratic regime that had come into existence since independence, so that Tunisia, before the 2011 revolution, can be positively described as a typical case of a 'constitution without constitutionalism'; that is to say, a country whose constitution was devoid of any significance in the face of the overwhelming power of the authoritarian regime in charge.[10]

The origins of the Tunisian autocratic regime stem back to the Bourguiba era: the country's first President, in fact, promoted a successful and appreciated modernization policy, but in turn he obstructed true democratic development, as is evident by the establishment of the life Presidency (in favor of Bourguiba himself) through the 1976 constitutional amendment. In 1987 Habib Bourguiba was eventually removed from power through the so-called 'medical

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par le gouvernants des pays arabes «républicains» : cas de la Tunisie, de l'Egypt et de l'Algerie (2013) 9 *Jus Publicum* 18.

[8] Y. Hassen, *La Résolution de l'Assemblée nationale constituante en date du 25 juillet 1957*, in ATDC, *La République*, (Centre de Publication Universitaire, Tunis, 1997), pp. 56-71.

[9] T. Le Roy, *Constitutionalism in the Maghreb: Between French Heritage and Islamic Concept*, in R. Grote, T. J. Roder (eds.), *Constitutionalism in the Arab World* (Oxford University Press, Oxford, 2012), pp. 109-119; M. Camau, *Caractère et rôle du constitutionnalisme dans les Etats maghrébins* (1978) 16 *Annuaire de l'Afrique du Nord, Centre national de la recherche scientifique* (CRESM (ed.), Editions du CNRS, Paris) pp. 379-410.

[10] H. Okotoh-Ogendo, *Constitutions without constitutionalism: Reflections on an African Political Paradox*, in I. Shivji (ed.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, New York-Oxford, 1993), pp. 65-82.

coup-d'état': a medical report judged him unfit to carry out his duties as a President, and through recourse to Article 57 of the Constitution, which regulated the permanent vacancy of the President of the Republic, the Prime Minister Ben Ali took power as the new head of state. After a short period of political liberalization, the new President of the Republic established a regime even more arbitrary and authoritarian than the previous one: in particular, his party, the Constitutional Democratic Rally, assumed strict control over every aspect of public and even private life and repressed any form of political opposition, in particular Islamic forces. Moreover, the security apparatus committed severe acts of violation of human rights, while Western powers refrained from openly condemning such an attitude. From a constitutional perspective, the arbitrariness of the regime was reflected in a series of constitutional amendments aimed at reinforcing authoritarian government. One of the most significant was the 2002 amendment, which modified 39 out of 78 constitutional provisions.[11] In parallel, Ben Ali was able to approve some cosmetic changes that gave the illusion of a democratic regime, such as the authorization of some other political parties in addition to his own.

Because of the numerous modifications of the text and the lack of enforcement of the guarantee of fundamental rights set out in the Constitution, the 1959 Constitution remained, as has already been observed, a dead letter. In such a situation, it was predominantly another act that played the role of a 'real Constitution',[12] at least from the people's point of view: the Code of Personal Status, promulgated by Beylical decree on 13 August 1956.[13] The Code, inspired and strongly endorsed by Bourguiba, regulated several aspects of family rights and gave women a unique place in Tunisian society: it forbade polygamy, instituted a judicial procedure for divorce and required marriage to be performed only with the mutual consent of both parties; moreover, it set a minimum age for marriage, fixed first at eighteen years for men and fifteen years for women. Unlike the 1959 Constitution, the Code of Personal Status was effectively implemented and enforced, and thus represented one of the major successes in Bourguiba's modernization policy.

[11] J. Sayah, *La révolution tunisienne: la part du droit* (L'Harmattan, Paris, 2013), pp. 78 ss.
[12] Y. Ben Achour, *Politique, Religion et Droit dans le Monde Arabe* (CERP, Tunis, 1992), p. 225.
[13] Among the many, see M.M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (University of California Press, Berkeley, 2001); O. Giolo, *Donne in Tunisia. La tutela giuridica dei diritti tra universalità dei principi e le specificità culturali* (2002) XVI *Annali dell'Università di Ferrara – Scienze giuridiche* 253-306 ; Y. Ben Achour, *Une révolution par le droit ? Bourguiba et le Code du statut personnel*, in *Politique, Religion et droit* (Cérès Productions et Cerp, Tunis, 1992), pp. 203 ss.

B. Constitution-making process

The 2014 Tunisian Constitution was drafted by a National Constituent Assembly (NCA) of 217 members, elected on 23 October 2011. These were in fact the first true democratic elections ever held in the country. The elections revealed a situation characterized by a high degree of political fragmentation, with 19 different parties and eight independent representatives sitting on the benches of the NCA: no party gained the absolute majority. In the aftermath, the party which obtained a relative majority in the election, the Islamic *Ennahda*, formed a coalition with two secular parties, the Congress of the Republic and the Democratic Forum for Labour and Liberties *(Ettakatol* in Arabic). The coalition, nicknamed the 'troika', gained control of 138 of the 217 members of the Assembly.

The NCA was entrusted not only with the task of creating a new constitution for the country, but also with legislative powers.[14] The constitution-making process was carried out by six specialized constitutional committees composed of not more than 22 members from different parties, proportional to the composition of the NCA. Each committee was responsible for the drafting of those articles pertaining to the committee's field of expertise.[15] In the following stage, the Committee for Coordination and Drafting was responsible for the elaboration of a unified constitutional draft which had to be approved by a qualified majority of two-thirds of the NCA.[16] In case such a majority was not reached in the first reading, a second one would have been set within one month of the first. The same qualified majority would have been required in the second reading also, but if this requirement was again not met, it would have been necessary to hold a referendum. Such a complex procedure was not, however, necessary, since the text was approved by a large majority on the first reading on the night between 26 and 27 January 2014.

However, the constitution-making process had faced severe difficulties, and the approval of the Constitution was welcomed with relief, since the political crisis faced by the country in 2013 brought with it the fear of failure of the whole constitution-making process. The process was in fact strained mainly by opposition between the Islamic movements and the governing majority (the so-called troika) on one side and the secular forces on the other. The troika was accused of trying to impose its point of view and this criticism was mounted particularly in

[14] Article 2 of the *loi-constituante* no. 2011/6 of 16 December 2011.
[15] Rule no. 64 of the NCA Rules of Procedure.
[16] Article 3 of *loi constituante* no. 2011/6, confirmed by Article 107 of the NCA Rules of Procedure.

relation to the discussion over the issues of the Muslim identity of the country and women's constitutional and legal rights.

A debate arose about the proposal, initially advanced by the *Ennahda*, to constitutionalize the *sharia* within the legal sources. This proposal was hotly contested, and a small minority sought the exclusion of all reference to religion and promoted complete secularization. Moreover, the first draft of the Constitution contained a clause which declared the role of men and women in society as complementary; this provision was also highly contested, in particular by women, who feared a step back from the considerable recognition of their rights in the legal system. This proposal raised protests that eventually led to the adoption of Article 21, which states: 'All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees freedom and individual and collective rights to all citizens, and provides all citizens with the conditions for a dignified life.' Women's rights are further developed in other constitutional provisions, as will be shown below.

Apart from the aforementioned major issues of debate, the constitution-making process was also put at risk by some episodes of violence which opened a real political crisis: notably, on 6 February 2013, Chokri Belaid, a lawyer and left-wing opposition politician, was murdered. This assassination was followed, on 25 July 2013, by the killing of Mohamed Brahmi, an NCA member: this led almost 60 deputies to take the decision to leave the NCA and request its dismantlement. In such a situation, the President of the Assembly ordered, on 6 August 2013, the suspension of the NCA's activities. It was only thanks to the mediation of four non-institutional organizations, the Tunisian General Labor Union (*Union Générale Tunisienne du Travail*, UGTT), the Tunisian Union for Industry, Trade and Handicrafts (*Union Tunisienne de l'industrie, du commerce et de l'artisanat*, UTICA), the Tunisian League for Human Rights (*Ligue tunisienne des droits de l'homme*, LTDH), and the National Bar Association (*Ordre national des advocats*, ONAT), that NCA activity recommenced in September 2013. These four organizations, the so-called 'Quartet', managed to implement negotiations with the principal political parties of the country and ultimately permitted the constitution-making process to reach its conclusion.

The decisive action undertaken by the Quartet bears witness to the participatory nature of the Tunisian constitution-making process. In line with a global trend, the Tunisian drafting

process was indeed characterized by public participation at various stages and civil society (of which the Quartet is an expression) played a fundamental role, counterbalancing some controversial proposals coming from the NCA and acting as a proposing entity.[17] Although the NCA made some effort to guarantee the inclusiveness of the process, promoting, for example, consultation between citizens and deputies, such initiatives presented some limits: for one, they took place only during the first phase of the NCA's activity and lacked adequate follow-up.

In general, the NCA's satisfactory functioning was limited by some weaknesses in the institution, such as the lack of adequate funding and limited technical equipment, absenteeism of the deputies, and the general distrust shared by many politicians towards public participation and national experts. Despite these flaws, the NCA released four constitutional drafts, in August 2012, December 2012, April 2013, and June 2013. The publication of the 1 June 2013 draft was accompanied by strong internal criticism: some members of the opposition accused the Committee for Coordination and Drafting of violating the NCA rules of procedure by introducing a title containing the 'transitional provisions', which were not elaborated by any constitutional committee. The claim was lodged before the Administrative Tribunal, which however refused to pronounce itself on such a delicate issue. Various factors contributed to solving this procedural dispute: first, the NCA filed a request for advice to the European Commission through Democracy (also known as the Venice Commission), and this helped in moving the focus onto the content of the text, and away from the elaboration procedure.[18] Second, it was also decided to establish the Consensus Committee, an institution created within the NCA in July 2013 and institutionalized only on the eve of the Constitution's approval, with the purpose of facilitating agreement on the constitutional text.[19] The combined action of these measures, together with the aforementioned restraint by the Administrative Tribunal, allowed consensus to be reached between the political forces.

In the light of what has been stated so far, it is no exaggeration to describe the Constitution as a compromise between the main political and social forces of the country, in particular

[17] T. Abbiate, *La partecipazione popolare al processo costituente*, in *Tunisia. La primavera della Costituzione* (n1), pp. 66-74.
[18] European Commission for Democracy through Law, *Opinion on the Final Draft Constitution of the Republic of Tunisia*, 17 October 2013, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL%282013%29034-f.
[19] C. Gaddes, *Il processo costituente (2011-14): fasi e protagonisti*, in *Tunisia. La primavera della Costituzione* (n1), pp. 59-61.

between Islamic stakeholders and their more liberal counterparts.[20] Such a compromise undoubtedly represents a success not only for the constitutional process, but also for the entire political class of Tunisia, who overall displayed great maturity in facing the many difficulties that hampered the path to the Constitution.

II. Fundamental Principles of the Constitution

The Tunisian Constitution is characterized by the interconnection of standard elements of global constitutionalism and elements that reflect more specifically local features. This characteristic is evident right from the Preamble, which, according to Article 145, enjoys the same status as the main constitutional text and contains an account of the revolutionary path which gave rise to the constitution-making process, together with the layout of the new legal system. The interconnection between common principles of global constitutionalism and local features is also apparent in the first chapter, entitled 'General Principles' (Articles 1-20).

As far as the Preamble is concerned, its account of the revolutionary phase praises and recognizes the sacrifice of the Tunisians who fought against the Ben Ali regime and overthrew it. This reference to the revolution was included only in the very last moments before the final draft, since the fourth draft elaborated by the NCA did not contain such explicit reference. The Preamble also lays down that the new constitutional system is

> founded on the law and on the sovereignty of the people, exercised through the peaceful alternation of power through free elections, and is based on the principle of the separation and balance of powers; a political system where the freedom of association, in conformity with the principles of pluralism, impartial administration, and good governance, lays the foundations of political competition; a system in which the State guarantees the primacy if law, the respect for human rights and freedom, independence of the judiciary, equality of rights and duties between all citizens, male and female, and equality between all regions.

Alongside these principles, which are part of a consolidated resource of global constitutionalism, an important role is assigned to the recognition of the Islamic-Arab identity. It appears from the very beginning of the constitutional text, which opens with the

[20] T. Groppi, *La Costituzione tunisina del 2014 nel quadro del "costituzionalismo globale"* (2015) 1 *Diritto Pubblico Comparato ed Europeo* 225; R. Ben Achour, *La Constitution tunisienne du 27 janvier 2014* (2014) 100 *Revue française de droit constitutionnel* 784.

solemn statement '[i]n the Name of God, the Merciful, the Compassionate'. Subsequently, the Preamble contains a formal recognition of the 'people's commitment to the teachings of Islam', which is however combined with the acknowledgment of the 'spirit of openness and tolerance', as well as with the commitment 'to human values and the highest principles of universal human rights'. From a national and regional point of view, Article 5 further defines Tunisia as a part of the Arab Maghreb. In addition to these references, issues regarding the Arab identity and the Islamic religion within the constitutional system are central throughout the text.[21]

Indeed, the first two articles of the Constitution address precisely the matter of the relationship between politics and religion, and reflect the compromise between the two which permeates the whole Constitution. After heated debate, the constitution-makers eventually established an agreement maintaining the wording of Article 1 of the 1959 Constitution, which states 'Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican'. The wording of this article is characterized by a semantic ambiguity which concerns the interpretation of Islam either as the religion of the state or of the majority people. For a long time the legal scholarship has preferred the second interpretation, but such ambiguity leaves some room for an alternative interpretation, which however is very unlikely in the new legal framework.[22] This is because Article 1 of the Constitution has to be interpreted together with Article 2, which states: 'Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law'.

In addition, the concept of a civil state is not self-explanatory and makes reference to the recognition of the Islamic principle of *din wa dawla* (i.e. 'religion and state'), which expresses the inescapable relationship between the public and the religious spheres that characterizes the Islamic view of politics.[23] This is not intended to open the way, however, to the rise of a theocratic state, but aims instead at laying down a democratic and pluralist regime, which is conceived with an eye to the characteristics of Islamic society. Both the provisions are included among those that are declared unamendable (the Constitution contains

[21] P. Longo, *L'islam nella nuova Costituzione: dallo Stato neutrale allo Stato protettore,* in *Tunisia. La primavera della Costituzione* (n1), pp. 102-116.
[22] H. Redissi, *La constitution tunisienne de 2014*, in *Revue Esprit*, 2 juillet 2014, available at http://www.esprit.presse.fr/news/frontpage/news.php?code=331; F. Hached, *La laïcité : un principe à l'ordre du jour de la IIe République Tunisienne?*, in P. Blanc (ed.), *Révoltes Arabes. Premiers Regards*, (L'Harmattan, Paris, 2012), pp. 25-32.
[23] C. Sbailò, *Principi sciaraitici e organizzazione dello spazio pubblico nel mondo islamico. Il caso egiziano* (Cedam, Padova, 2012), pp. 66 ss.

four provisions that enjoy this status[24]), and this confirms their fundamental position within the new constitutional system. Together, the two provisions mark a completely new framework for defining the state.

Article 6 also concerns the new perspective on the relationship between politics and religion. It states as follows:

> The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the ban on any partisan or fanatical use of mosques and places of worship. The state acts in order to disseminate the values of moderation and tolerance, and to ensure the protection of the sacred, as well as the prohibition of all violations thereof. It equally undertakes actions with the aim of prohibiting and fighting against calls for Takfir (an Arabic word meaning to accuse someone of being a nonbeliever), the incitement of violence and hatred.

The definitive wording was modified through the approval of amendments at the very end of the drafting process, particularly to ensure the criminalization of apostasy, attacks on the sacred, and incitement to hatred and violence, and also to prevent the misuse of mosques for political purposes. The expression 'the state is the guardian of religion' raises some questions, notably whether all religions are henceforth protected by the state, or only Islam. Because of the special recognition of the Islamic religion in several constitutional provisions (e.g. in the Preamble and in the requirement that the President of the Republic be of the Muslim faith, contained in Article 74), it might indeed be argued that it enjoys some sort of primacy over other religions. This concern is partially dismissed by the explicit mention in the Constitution of freedom of conscience and belief. A similar compromise between religion and politics is also reflected (albeit in a less evident way) in other articles, such as Article 7, stating that the family is the nucleus of society, and Article 39, stating that the state 'shall also work to consolidate the Arab-Muslim identity and national belonging in the young generations, and to strengthen, promote and generalize the use of the Arabic language and to openness to foreign languages, human civilizations and diffusion of the culture of human rights'.

Besides the recognition of the interaction between religion and politics, the Constitution also gives relevance to other fundamental principles, such as those of social justice (Article 10)

[24] Those are Articles 1, 2, 49 and 75 of the Constitution.

and decentralization (Article 14). These principles represent the formalization of the constitutional text's innovative character. It should be taken into account that the Constitution was elaborated following the so-called 'Tunisian revolution' and is therefore obviously designed to contrast with the rise of an autocratic, corrupt and centralized regime, such as the one it had just replaced. Indeed in clear opposition to the past, the new Constitution expresses its commitment to achieving 'social justice, sustainable development and balance between regions based on development indicators and the principle of positive discrimination' (Article 10), as well as to strengthening decentralization.

This intent also appears in other provisions, such as Article 8, which recognizes the value of youth, and Article 11, which lays down the duty of the President of the Republic, the Head of Government, the members of the Council of Ministers, those of the Assembly of People's Representatives (i.e. the parliament, as to which see below), or the members of any of the independent constitutional bodies or any holders of a senior public position to declare their assets according to the provisions of law. Similar measures are then further developed throughout the Constitution.

The first chapter also contains some provisions which are in keeping with the 1959 Constitution: they notably concern the issue of national unity (Article 9), the mandate of the national army (Article 18), and the mandate of the national security forces (Article 19). Among the general principles, there are also provisions whose counterpart can be found in almost all constitutions, such as that relating to popular sovereignty (Article 3) and to the flag (Article 4).

III. Fundamental Rights Protection

The Tunisian Constitution contains a rich and detailed bill of rights, which is mostly contained in Chapter II, titled 'Rights and Liberties'. It represents a significant innovation in contrast to the 1959 Constitution, which did not contain a specific section dedicated to fundamental rights and included only a limited number of them.[25] In a clear break from the past, the bill of rights of the 2014 Constitution recognizes a vast array of fundamental rights: notably civil rights, political rights, social, cultural and economic rights, and the so-called 'new rights'. Although this type of grouping is somewhat controversial, since some rights

[25] The 1959 Constitution did not contain sections dedicated to fundamental rights. Instead, these rights were delegated to a place in the the 'General Provisions' and they were limited in number (12 out of 17 constitutional provisions).

may belong to more than one category, it can be useful from an analytical point of view, and will therefore be followed.

The rights' catalogue opens with the principle of equality before the law, with explicit mention of the application of the principle to male and female alike (Article 21). This article has been praised as one of the Arab world's most liberal provisions concerning women and it represents the result of the popular mobilization against the initial proposal of labelling women as 'complementary' to men within the family, mentioned above, which thanks to the strong opposition of women's associations, was rejected. The final wording of Article 21 is therefore particularly progressive, even though it has to be noted that it refers explicitly only to male and female citizens. This aspect represents a limitation of the otherwise advanced bill of rights, since it might potentially exclude individuals who do not possess Tunisian citizenship. However, the Constitutional Court might overcome such a limitation through an evolutive interpretation of the constitutional text.[26]

The protection of the status of women is reinforced by Article 46, which expresses the state's commitment to protecting and strengthening their rights. This provision also contains an imposition on the state to guarantee equal opportunities between women and men in accessing all levels of responsibility in all domains. To this end, the state works to attain parity between women and men in elected Assemblies. Finally, Article 46 requires the state to play an active role in eradicating violence against women.

Apart from the provisions regulating the equality of sexes, human dignity as a whole represents a pillar of the new constitutional system. This principle is explicitly recognized in Article 23, which also contains a prohibition of mental and physical torture.

As far as civil rights are concerned, the Constitution recognizes the right to life (Article 22), the right to privacy (Article 24), and the right to property (Article 41). A civil right which enjoys a high symbolic value, given its absence during the 55 years of autocratic regime, is the freedom of opinion, thought, expression, information, and publication, over which there shall not be prior censorship (Article 31). Moreover, the right to elections is recognized in Article 34, which contains again a reference to gender equality, addressing women's representation in elected bodies. As a complement to this right, the right to establish political

[26] I. Spigno, *Diritti e doveri, tra universalismo e particolarismo,* in *Tunisia. La primavera della Costituzione* (n1), p. 99.

parties and associations is recognized (Article 35), together with the right to form unions (Article 36). These rights are not subject to any restrictions except respect for the constitutional provisions, the law, the principle of financial transparency, and the rejection of violence.

The Constitution also includes several social rights, notably the right to social justice (Article 12), the right to healthcare (Article 38), the right to education (Article 39), and the right to work, which also includes the right to strike, which was not included in the 1959 Constitution, and makes reference to adequate working conditions and to a fair wage (Article 40). With reference to these provisions it should be noted that their wording does not contain any reference to the fact that their realization must be subordinated to the availability of financial resources, as is the case with other constitutions, such as that of South Africa. The lack of a similar specification might give rise to future conflict between the application of such rights and the actual resources available to the state.

As far as 'new rights' are concerned, the Constitution explicitly recognizes the value of sport and expresses the commitment of the state to provide the facilities necessary for the exercise of physical and leisure activities (Article 43), the right to water (Article 44), and the right to a clean environment (Article 45). The constitutionalization of the latter two rights finds an explanation in the Tunisian local context, characterized on one side by environmental pollution and on the other by the presence of areas of the country within the Sahara Desert which have to cope with water scarcity and drought.

It should also be noted that fundamental rights are not only laid out in Chapter II of the Constitution, but are continually present all through the constitutional text. An example is Article 108, which sets out the right to a fair trial and the right to defense. With reference to rights, it has to be underlined that some constitutional provisions refer only to citizens, while others refer to every human person. This difference, however, is not uncommon, and it does not prevent the bill of rights, which covers the complete spectrum of rights, from receiving a positive evaluation.

i. Limitation clause

The Tunisian Constitution therefore guarantees a fairly adequate protection of human rights, a feature which is further expanded by Article 49, which provides standards for the lawful

limitation of human rights.[27] The wording of this provision is particularly advanced, deriving its language from international treaties, notably the International Covenant on Civil and Political Rights and the European Convention of Human Rights, and recalling the wording of other constitutions.

Article 49 states:

> The limitations which can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defense, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.

A number of observations need to be made as to the scope and breadth of this provision. First, its wording highlights a set of principles that justify the limitation of rights, notably: (1) its lawfulness, which means that the limitation has to be established by law; (2) its legitimacy, meaning that it has to be justified by legitimate aims, such as protecting the rights of others or for reasons of public order, national defense, public health, or public morals, and in any case cannot threaten the essential core of rights; (3) its necessity, which has to be framed according to the perspective of a civil and democratic state; and (4) its proportionality between the rights' restrictions and the objective sought. These elements designate a strictly limited area in which rights can be restricted and clear parameters by which this area can be assessed. The limitation of rights' discipline refers to a plethora of subjects: notably the legislator, which is called upon to specify the scope and the means of its actions; the judiciary, which according to Article 102 ensures the protection of rights and freedoms; the President of the Republic, who according to Article 82 can decide to submit draft laws related to freedoms and human rights to referendum; and the Human Rights Commission, which according to Article 128 'oversees respect for, and promotion of, human freedoms and rights, and makes proposals to develop the human rights system. It must be consulted on draft laws that fall within the domain of its mandate […]'.

[27] Democracy Reporting International, *Vers une nouvelle ère dans la protection des droits fondamentaux en Tunisie : La mise en œuvre de l'article 49 de la nouvelle Constitution tunisienne*, May 2015, available at http://democracy-reporting.org/files/rapport_article_49_1.pdf .

Second, it can be argued that establishing that the ban on limitations of rights 'compromising their essence' outlines an essential core of rights that is unamendable. This feature is quite common in comparative perspective and its origins can be traced back to German constitutional law, which has spread through several other constitutional systems. In fact, this clause offers a firm reinforcement of the rights established in the Constitution.

It is worth pointing out that a systematic interpretation of the Constitution, which is prescribed by Article 146 of the Constitution itself, seems to suggest that some rights have a 'core content' that cannot be limited: a paramount example is Article 23, which states the principle of human dignity, saying: 'The state protects human dignity and physical integrity, and prohibits mental and physical torture. Crimes of torture are not subject to any statute of limitations'. Since torture finds no justification at all, it can be noted that there is a core content of this right.

The general limitation clause was included only late in the drafting of the Constitution: indeed it only appears in the fourth draft of June 2013, which however did not contain a reference to the principles of proportionality and necessity. In the previous drafts, the limitation of rights was set article by article. The recognition of a general clause became a goal of civil society, and in particular of the Tunisian Association of Constitutional Law, which undertook lobbying activity to achieve such recognition. It applies not only to rights included in the bill of rights but also to other rights. This explicit limitation clause represents a remarkable innovation compared with the 1959 Constitution, whose Article 7 simply stated that the limitation had to be established by law.[28] As has been underlined, Article 49 of the 2014 Constitution imposes severe restrictions upon the limitation of rights. Many laws adopted in the past seem to contain provisions that contrast with Article 49, and therefore significant reform of the legislation will be necessary.

ii. Rights enforcement

In light of the fact that the recognition of rights is null if there is no system of enforcement, this issue plays a fundamental role in the constitutional system. The enforcement of rights involves all constitutional branches of the state, notably parliament but also the executive and, as expected, the judiciary.

[28]Article 7 of the 1959 Constitution stated: 'Citizens exercise all their rights in the forms and according to the terms provided for by law. The exercise of these rights can be limited only by laws enacted to protect the rights of others, the respect of public order, national defense, the development of the economy and social progress'.

As far as the parliament is concerned, it plays a fundamental role both in the recognition and in the protection of human rights. It will be charged with the task of reforming the existing legislation in order to ensure its compliance with the new constitutional system, and at the same time, it will have to adopt legislation to enable full application of the rights. The executive is also responsible for the protection of rights through the guarantee of compatibility of legislation and practice with the principles embedded in the Constitution and through its contribution in the execution of the courts' decisions. The fundamental task of guaranteeing an effective remedy for the violation of rights is vested in the judiciary, as is highlighted in a number of constitutional provisions, such as Article 102, which states that '[t]he judiciary is independent. It ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the *protection of rights and freedoms* […]', and Article 49, which states that '[j]udicial authorities ensure that rights and freedom are protected from all violation'. It guarantees a normative basis for the enforcement of rights.

In addition to this, it should be noted that all the rights included in the Constitution are justiciable, although it will be fundamental to consider the Constitutional Court's jurisprudence with regard to this aspect. Since there was no true Constitutional Court in the Ben Ali era (see below), this is a new institution for Tunisia, and it will therefore take some time before it can be effectively established. However, there is no doubt that once this institution begins to operate, it will play a fundamental role in ensuring the guarantee of rights. To cover the transition period for the creation of the Constitutional Court, Article 148(7) of the 2014 Constitution has provided for the establishment, within three months, of a '[p]rovisional authority in charge of determining the constitutionality of draft laws': the functioning of this authority will be examined below in the section dedicated to constitutional adjudication.

Apart from the role of the judicial authorities in ensuring the protection of rights, other institutions in the Tunisian constitutional system will also be concerned with this issue: in particular, the 'Human Rights Commission' (Article 128) and the 'Commission for Sustainable Development and the Rights of Future Generations' (Article 129). These are two of the five independent constitutional bodies that were envisaged by the constitution-makers

to support democracy.[29] While the first has a consultative, monitoring, and investigating power, the second one has only consultative powers. According to Article 125, these institutions will be elected by the Parliament by a qualified majority. They will be responsible to it and will have to submit an annual report. Apart from the general provisions relating to them, their discipline is assigned to the law, but since the process of implementation is still ongoing at the time of writing, it is not possible to examine the matter in further detail.

Overall, the creation of these independent commissions confirms a common trend of contemporary constitutionalism: indeed similar commissions can be found in other new democracies, such as Afghanistan, Kenya, and South Africa.

Finally, with reference to the enforcement of rights, it should be noted that lawyers also play a fundamental role and with reference to them, the 2014 Constitution presents an original feature: Article 105 explicitly recognizes the legal profession, stating that it 'contributes to the establishment of justice and the defense of rights and liberties'.

In conclusion, it can be argued that the bill of rights covers a full range of human rights that are recognized and protected. However, the recognition of rights is one thing, and their enforcement is another. Regarding this crucial issue, it should be stressed that the Tunisian constitution-makers have set up a strong framework for the protection of rights, but only time will allow its effectiveness to be evaluated.

IV. Separation of Powers

The establishment of effective separation of powers was one of the major goals expressed during the constitution-making process, because of the erosion of this principle under the former Constitution. The 2014 Constitution establishes a complex system of checks and balances that aims to prevent an abuse of power by one institution over others. The separation of powers is solemnly proclaimed in the Preamble and several other constitutional provisions give substance to it. Topographically, the Constitution dedicates separate chapters to the legislature (Chapter III), the executive (Chapter IV), and the judiciary (Chapter V).

A. The Executive

[29] The other three independent constitutional bodies are the 'Elections Commission', the 'Audio-Visual Communication Commission', and the 'Good Governance and Anti-Corruption Commission'.

The 2014 Constitution provides for a convoluted semi-presidential system which is outlined in Chapter IV and is articulated in two parts. Part I deals with the President of the Republic, and Part II deals with the Government.

The question of the system of government affected much of the constitution-making process. The Islamic Party, which had the relative majority inside the NCA, supported a parliamentary system, which represented a clear break from the past, while the opposition, represented by a plethora of political parties, supported a presidential system, based on the idea that the directly elected President of the Republic would counterbalance the Parliament. In the aftermath, a solution of compromise was found: the Tunisian constitution-makers designed a semi-presidential system, with a President of the Republic directly elected by the people, and a Cabinet led by an indirectly elected Head of Government.[30]

This compromise assigns significant powers to both the President and the Head of Government, as will be pointed out later. It can be argued, however, that despite the entrenchment of the principle of separation of powers and the system put in place, there is still a possibility of a concentration of power. Indeed, it may be that the Head of Government and the President of the Republic are expressions of the same political party, a situation that could trigger an undemocratic development. This risk is not too serious, however, since in many other democratic systems with a semi-presidential system of government, having the Head of the State and the Head of Government of the same political party has not undermined democracy at all. In order to avoid such a risk, the Tunisian constitutional system sets out a series of guarantee mechanisms, such as the introduction of an effective system of constitutional adjudication, the constitutionalization of the role of political opposition, and the creation of independent constitutional commissions.

Semi-presidentialism also poses problems in the opposite case: indeed, it could be that the President of the Republic and the Head of Government are the expression of two different opposing parties (the so-called issue of 'cohabitation'). This might give birth to an unstable system, in the event that neither the President nor the Head of Government emerges from the elections with a clear majority. Such a situation would be likely to undermine the stability of

[30] D. Pickard, *Al-Nahda*: *Moderation and Compromise in Tunisia's Constitutional Bargain*, in F. Biagi, J.O. Frosini (eds.), *Political and Constitutional Transition in North Africa: Actors and Factors* (Routledge, London-New York, 2015), pp. 23 ss.; M. Olivetti, *La forma di governo nella Costituzione tunisina del 2014*, in *Tunisia. La primavera della Costituzione* (n1), pp. 129-151.

the government, and might even trigger a shift back to authoritarianism. With such serious issues at stake, only observation of the actual functioning of the system of government will allow an evaluation to be advanced.

i. The President of the Republic

According to Article 77, the President of the Republic is the Head of State, but also exercises a power typically performed by the Head of Government: he/she is indeed responsible for determining the general orientation of the state with regard to defense, foreign relations, and national security, after consultation with the Head of Government. The diarchy is also stated in Article 91, which reads '[t]he Head of Government determines the state's general policy, taking into account the provisions of Article 77, and shall ensure its execution'. It appears that the Constitution does not point out clearly who the chief of the executive actually is: this is confirmed by Article 93, which first states that 'the Head of Government chairs the Council of Ministers', but then adds that 'it is mandatory for the President of the Republic to preside over the Council of Ministers in issues relating to defense, foreign policy and national security […]. The President of the Republic may also attend the Council of Ministers other meetings, and if so, he/she presides over the meeting'. These provisions point out the risk of conflicts between the two figures and analysis of the Constitution reveals the constitution-makers' awareness of this issue. Indeed, Article 101 assigns to the Constitutional Court the function of resolving disputes between the President of the Republic and the Head of Government over their respective powers, as will be seen further below.

Apart from this blurred definition of the role of the President of the Republic, he/she enjoys the typical powers exercised by a Head of State, such as representing the state, chairing the National Security Council, declaring war and establishing peace, ratifying treaties and ordering their publication, awarding decoration, issuing special pardons, etc. (Article 77). Moreover, according to Article 78, he/she has significant powers of appointment, notably of the General Mufti of the Tunisian Republic, of individuals in senior positions in the Presidency of the Republic and dependent institutions, of individuals in senior military and diplomatic positions, and positions related to national security, after consultation with the Head of Government, and of the Governor of the Central Bank upon a proposal by the Head of Government. Under Article 118 he/she is also responsible for the appointment of four judges of the Constitutional Court.

Furthermore, according to Article 79 the President of the Republic may address the Assembly of the People's Representatives, and according to Article 80 he/she can declare a state of emergency in the event of imminent danger threatening the nation's institutions or the security or independence of the country, upon consultation with the Head of Government and the Speaker of the Assembly of the People's Representatives and after having informed the President of the Constitutional Court.

Finally, another important aspect of his/her role is the authority to submit to referendum draft laws related to the ratification of treaties, to freedoms and human rights, or personal status, which were adopted by the Assembly of the People's Representatives (Article 82).

The qualifications for election as President are spelt out in Article 74, which states:

> Every male and female voter who holds Tunisian nationality since birth, whose religion is Islam shall have the right to stand for election to the position of President of the Republic.
> On the day of filing the application for candidacy, the candidate must be at least 35 years old.
> If the candidate has a nationality other than the Tunisian nationality, he or she must submit an application committing to abandon the other nationality if elected president.
> The candidate must have the support of a number of members of the Assembly of the People's Representatives or heads of elected local authority councils, or of registered voters, as specified by the election law.

In light of the potential for abuse of power of the country's President of the Republic, Article 75 establishes that no one can be elected as President for more than two full terms and this limit applies regardless of whether the two terms are consecutive or separate: this is a remarkable provision, particularly because it is unalterable.

ii. The Government

Under Article 89 of the Constitution, the government is a collegial body composed of the Head of Government, Ministries, and Secretaries of State. The constitutional provisions show, however, a system unbalanced towards the Head of Government to the detriment of other governmental authorities.

The procedure for the formation of the government is contained in Article 89, which states:

> Within one week of the declaration of the definitive election results, the President of the Republic shall ask the candidate of the party or the electoral coalition which won the largest number of seats in the Assembly of the People's Representatives to form a Government, within a one month period, extendable once. If two or more parties or coalitions have the same number of seats, then the party or coalition having received the largest number of votes shall be asked to form a government. If the specified period elapses without the formation of the government, or if the confidence of the Assembly of the People's Representatives is not obtained, the President of the Republic shall consult with political parties, coalitions, and parliamentary groups, with the objective of asking the person judged most capable to form a government within a period of no more than one month to do so. If, in the four month period following the first designation of a person to form a government, the members of the Assembly of Representatives of the people fail to grant confidence in a government, the President of the Republic may dissolve the Assembly of the People's Representatives and call for new legislative elections to be held within a minimum of 45 days and a maximum of 90 days.

The wording of Article 89 is therefore particularly detailed as far as the government's formation is concerned, but this Article also contains the provision concerning the relationship of confidence between the government and the Parliament. Indeed, the government must present a summary of its program to Parliament in order to obtain the confidence of an absolute majority of its members. Only by obtaining the vote of confidence is the President of the Republic allowed to appoint the Head of Government and the other members. Following this, according to Article 97, Parliament can vote on a motion against the government based on a reasoned request presented by at least one-third of the members to the Speaker of the Assembly of Representatives. The constitutional provision sets a timeframe for proceeding with the motion of censure of fifteen days after the date the motion was presented to the Speaker of the Assembly. This time seems to be sufficiently long for a reasonable evaluation of the situation. Moreover, the Tunisian constitution-makers adopted the legal mechanism of the constructive vote of no confidence**, w**hich allows Parliament to withdraw confidence from the Head of Government only if there is a positive majority for a prospective successor. Another limitation to the motion of no confidence is the requested absolute majority of deputies' votes. In the event that the motion obtains such a majority, the replacement will then be instructed by the President of the Republic, according to the provisions of Article 89. The constructive vote of no confidence is a regulatory scheme provided by several other constitutional systems, notably the German one, and this choice highlights the intention to ensure political stability for the country.

As far as governmental competence is concerned, the 2014 Constitution assigns several powers to the Head of Government. According to Article 91, '[t]he Head of Government determines the state's general policy, taking into account the provisions of Article 77, and shall ensure its execution'. Moreover, Article 92 states:

> The Head of Government is responsible for:
> - Creating, modifying and dissolving ministries and secretariats of state, as well as determining their mandates and prerogatives, after discussing the matter with the Council of Ministers
> - Dismissing and accepting the resignation(s) of one or more members of the government, after consultation with the President of the Republic in the case of the Ministers of Foreign Affairs and Defense.
> - Creating, amending, and dissolving public institutions, public enterprises and administrative departments as well as establishing their mandates and authorities, after deliberation in the Council of Ministers, except in the case of institutions, enterprises and departments under the competence of the Presidency of the Republic, which are created, changed or dissolved upon a proposition by the President.
> - Nominating and dismissing individuals in senior civil positions. These positions are regulated by law. The Head of Government informs the President of the Republic of the decisions taken within the latter's aforementioned specific areas of competence.
>
> The Head of Government leads the public administration and concludes international agreements of a technical nature.
>
> The government ensures the enforcement of laws. The Head of Government may delegate some of his/her authorities to the Ministers. If the Head of Government is temporarily unable to carry out his/her tasks, he/she shall delegate his/her powers to one of the Ministers.

According to Article 94, 'the Head of Government exercises also regulatory powers. He/she is individually responsible for issuing decrees that he/she signs after discussion with the Council of Ministers. […]'. Apart from these responsibilities and powers, the Head of Government ordinarily chairs the Council of Ministers, although on issues relating to defense, foreign policy and national security, it is presided over by the President of the Republic, as has already been noted.

B. The Legislature

The Constitution marks the establishment of full parliamentary sovereignty, founded on a unicameral parliament named the Assembly of People's Representative (ARP), which is

charged with the legislative function as well as the function of control of the executive. The whole of Chapter III of the Constitution deals with this constitutional institution.

The Fundamental Charter does not mention the number of deputies who make up the Legislative Assembly; however, the electoral law adopted in May 2014 for the first legislative election set the same number of members as for the NCA (217). The Constitution establishes that its seat is in Tunis, although in exceptional circumstances the Assembly may be held in any other place within the Republic (Article 51). According to Article 54, every Tunisian citizen aged eighteen years shall be deemed a voter in accordance with the conditions established by the electoral law, which is not constitutionalized – a feature shared by other constitutional systems, such as the Italian and the German. Article 55 states, however, that the ARP's members are elected by universal, free, direct, secret, fair and transparent voting, in accordance with the electoral law.

As far as the right to be elected is concerned, Article 53 states that

> [e]very Tunisian voter who has acquired Tunisian nationality at least ten years prior and is no younger than twenty three years of age on the day of candidacy is eligible to be elected to the Assembly of the People's Representatives, provided that they are not prohibited from holding such a position as specified by the law.

According to Article 56, the ARP enjoys a term of five years and in the event of inability to hold elections as a result of imminent danger, the term of the Assembly shall be extended according to the provisions of law.

The Constitution pays special attention to the principle of independence of the legislature and relating to this, Article 52 of the Constitution states:

> The Assembly of the People's Representatives enjoys financial and administrative independence within the framework of the state budget.
>
> The Assembly of the People's Representatives shall determine its rules of procedure and ratify them by an absolute majority of the members of the Assembly.
>
> The state shall put at the disposition of the Assembly of the People's Representatives the necessary human and material resources to allow for members of the Assembly to fulfil their obligations.

The fact that the legislative body adopts its own rules of procedure and enjoys administrative and financial autonomy indicates its autonomy and independence from other powers. As far as the legislature's competences are concerned, the ARP can:

- override the presidential veto;
- remove the President;
- exercise significant fiscal oversight through the adoption of a budget bill; and
- compel testimony from the President and Ministers.

Moreover, the Constitution sets a strict system of constitutional oversight of the dual executive. In particular, Article 95 states the principle of governmental accountability towards the legislature, and Article 96 states that every Minister of Parliament can pose written or oral questions to the government. Furthermore, according to Article 96 the legislature can vote on a motion of censure against the government or one of its members, but, according to Article 88, it can also start a process of impeachment concerning the President of the Republic.

A fundamental issue with reference to the principle of separation of powers is the repartition of competences between the executive and the legislature. The Constitution lists the areas that are of legislative competence and those that are of executive competence (Article 65). More specifically, the constitutional provision sets out a long list of areas that have to be regulated by organic law,[31] notably those relating to the creation of public institutions and facilities, those concerning taxation, finance and the state budget, and those that must be regulated by ordinary law, such as approval of treaties, organization of justice, personal status law, etc. The areas that belong to the exclusive competence of Parliament are broad and concern the most relevant issues of the state, and this confirms the intention of the constitution-makers to prevent the central role played by the executive which had characterized the past constitutional system: that situation arose through constitutional practice and not because of the lack of a formal separation of powers, and this is the reason why the constituents decided to attribute relevant powers to a democratic elected body. The last paragraph of the article states that all the matters which are not listed among those for which Parliament enjoys exclusive competence are of the executive's competence.

Finally, a remarkable feature of the Tunisian Constitution concerning the legislature is the constitutionalization of the role of political opposition. Indeed, Article 60 recognizes its role

[31] Organic law enjoys a supra-legislative and infra-constitutional status. See Y. Ben Achour, *Droit administratif*, (C.P.U., Tunis, 2000).

and assigns it the power to chair the Finance Committee,[32] the function of rapporteur of the External Relations Committee, as well as the right to establish and head a committee of enquiry annually. Besides these rights, the Constitution also establishes the opposition's duty to actively and constructively participate in parliamentary work. Such a special recognition of the role of political opposition is not widespread in comparative perspective, although it is quite common in the new democracies, where it represents a mechanism to avoid a shift towards authoritarianism.[33]

C. Independent Judiciary

The whole of Chapter V of the Constitution deals with the judiciary, and it is divided into two parts and several articles. This seeming abundance is explained by the fear of an erosion of the principle of independence of the judiciary. Such a fear is justified by the fact that prior to the constitutional transition, the Tunisian judicial system was very weak and subject to strict control by the executive.

Articles 102-105 set forth the general principles on which the judiciary is based, notably the principle of independence (Article 102), the principle of competence, neutrality and integrity (Article 103), the principle of immunity of the judges (Article 104), and finally the recognition of the legal profession (Article 105). An observation should be made here about the scope and breadth of the latter provision: the generous recognition of the legal profession, which is far from widespread in comparative perspective, is mainly due to the active role played by the Bar in the revolution. The lawyers wholeheartedly supported the protests and were deeply involved in the constitution-making process. Moreover, this considerable recognition of the legal profession represents a sort of reparation for the repression suffered by lawyers during the former regime.

The principle of independence of the judiciary is reinforced by the mechanism of selection used for judges: according to Article 106 of the Constitution

> [j]udges shall be nominated by presidential decree based on a concurrent proposal by the Supreme Judicial Council (SJC). Senior judges shall be nominated by presidential decree and in

[32] The Presidency of the Finance Committee allows the opposition to influence and monitor the determination of financial resources chosen by the parliamentary majority.

[33] Democracy Reporting International, *Les droits constitutionnels de l'opposition,* in *Note d'information n. 34*, 2013, available at http://democracy-reporting.org/files/dri-tn_bp_34_fr.pdf ; Venice Commission, *Draft Report on the Role of the Opposition in a Democratic Parliament, Study no. 497/2008*, 2010, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL%282010%29100-e.

consultation with the Head of Government, based on an exclusive recommendation by the Supreme Judicial Council. Senior judicial posts shall be regulated by law.

The acknowledgment of a fundamental role for the Supreme Judicial Council (although the body is still to be established) represents a guarantee of the independence of the judiciary and diminishes the power of the executive. The Supreme Judicial Council is, like in other civil law systems, the judiciary's self-governing body and according to Article 112, two-thirds of it is composed of judges, the majority of whom are elected, in addition to judges appointed on merit, and one-third is composed of independent specialized persons who are not judges, the majority of whom are elected. If this is the general legal framework of the composition of the SJC, the mechanism of members' selection is reserved to the law. In fact the Constitution only states that the SJC is composed of three bodies specialized in judicial issues, administrative issues, and financial issues. Moreover, a General Assembly of the three judicial councils is also foreseen, which is endowed with the task of proposing reforms and proffering its opinions on draft laws related to the judicial system, as well as reviewing such laws. According to Article 114 'each of the three councils is responsible for making decisions on the professional careers of judges and on disciplinary measures taken against them'.

The SJC enjoys financial and administrative independence and it establishes all the issues relating to appointment, transfer, dismissal and removal of judges, as well as the functioning of the judicial system. Article 107 declares for example: 'Judges may not be transferred without their consent. They cannot be dismissed or suspended from their functions, nor be subject to disciplinary sanction, except in the cases and the guarantees regulated by the law and in accordance with a reasoned decision by the Supreme Judicial Council'.

Despite the establishment of several guarantees of the judiciary's independence, the Constitution does not regulate all aspects concerning the same, such as the issues of salary and educational requirements. These shall be provided by the law.

Another fundamental achievement of the 2014 Constitution concerning the judiciary is the establishment of a Constitutional Court, whose composition and functioning will be discussed below.

V. Federalism/Decentralization

Decentralization represents a fundamental element of the contemporary constitutional state, since it is believed that the exercise of government closer to the people can better respond to their expectations. One of the main innovations of the 2014 Constitution is the establishment of a decentralized organization of powers, which is also explicitly stated among the general principles of the Charter.[34]

Under the former constitutional system the issue of local government was regulated only by one constitutional provision (Article 71), revealing a centralized conception of the organization of power. The sub-national governmental structure of the past essentially provided strong central control coupled with limited resources and inefficiency at the local and regional levels, and thus took more of the pattern of a concentrated model than a deconcentrated one. This was mainly due to the idea that decentralization at the time of independence might put national unity at risk, and kindle local tension and particularism. The 2014 Constitution has instead seen a move towards a decentralized system, which entails a valorization of decentralized levels of decision-making and participatory democracy. The explicit recognition of this shift is evident in Article 14, which imposes an obligation on the state to support decentralization.

The whole of Chapter VII (Articles 131-142) of the Constitution, entitled 'Local Power', deals with the principles of devolved government. In Article 131, the Constitution states that '[l]ocal government is based on decentralization. Decentralization is achieved through local authorities comprised of municipalities, districts, and regions covering the entire territory of the Republic in accordance with boundaries established by law'. A number of observations should be made regarding this provision. First, the legal framework prescribes the creation of three levels of government: the municipalities, the regions, and the districts. Moreover, the last paragraph states that 'the law may provide for the creation of specific types of local authorities', providing the possibility for the establishment of other local authorities lacking a constitutional basis. Second, the reference to the 'entire territory of the Republic' underlines the state's commitment to tackling a Tunisian anomaly: in fact, almost 50 per cent of the territory, corresponding to one-third of the population, is not municipalized.[35]

[34] L. Tarchouna, *Il decentramento territoriale: novità e sfide*, in *Tunisia. La primavera della Costituzione* (n1), pp. 152-167; G. Milani, *Decentramento e democrazia nell'evoluzione costituzionale della Tunisia* (2014) 2 *Focus Africa di Federalismi* 1-28.
[35] Tarchouna (n34), p. 166.

The local government's expansion also entails the creation of the High Council of Local Authorities, which is endowed with the task of considering issues related to development and regional balance, and giving advice with respect to any draft law related to local planning, budget, and financial issues (Article 141).

According to Article 133, local authorities are headed by elected councils: as far as the first two levels of government are concerned, municipal and regional councils are directly elected through general, free, direct, secret, fair, and transparent elections, while district councils are indirectly elected by the members of municipal and regional councils. The Constitution does not mention the electoral system but contains a recommendation to guarantee the representation of young people in local authority councils (Article 133). Moreover, it should be taken into account that Article 34 sets out the state's commitment to guaranteeing women's representation in elected bodies, while Article 46 expresses the state's commitment to attaining parity between men and women in elected Assemblies.

Local authorities enjoy legal personality as well as financial and administrative independence (Article 132). This provision is complemented by several other articles referring to the facts that the financial system of local authorities shall be established by law (Article 135), that the central government shall provide additional resources for local authorities in order to apply the principle of solidarity, in a balanced and organized manner (Article 136), and that local authorities shall have the freedom to manage their resources (Article 137).

To summarize, the 2014 Constitution vests local authorities with substantial autonomy, which is also apparent in the fact that, according to Article 138, the actions of local authorities are subject only to *a posteriori* control of legitimacy. As far as their competences are concerned, Article 134 states that '[l]ocal authorities possess their own powers, powers shared with the central authority powers delegated to them from the central government'. Such a provision describes therefore three types of power: exclusive powers, shared power between local authorities and the central authority, and power delegated to them by the central government. The allocation of shared and delegated powers takes into account the principle of subsidiarity, according to Article 134. The Constitution does not list the matters of competence of local authorities and this may appear problematic because the evaluation of past Tunisian experience regarding the legislative control of local affairs reveals that a strong limitation of municipal power (to say the least) occurred. It would therefore be preferable to have the

competencies of the local level stated in detail rather than just outlined in mere principles. According to Article 140, local authorities may cooperate and enter into partnership and they may also establish foreign relations of partnership and decentralized cooperation.

Chapter VII of the Constitution provides for a substantial decentralization of powers, which is nowadays considered a fundamental feature for strengthening democracy. It has to be noted, however, that the effectiveness of these constitutional provisions requires the adoption of a series of legislative reforms, concerning for example the municipalization of the territory, the electoral system for local elections, and so on. Moreover the effectiveness will depend on the enjoyment of the envisaged administrative and financial autonomy.

The development of a decentralized administration, with the tasks of considering local differences and promoting even and equal economic development in the various regions of the country, is therefore a pivotal aspect of the new Constitution: however, Tunisia is at present facing the challenge of implementing this decentralized organization of powers, which is rather new for the country, as has been noted. It will only be possible to evaluate the effective implementation of these principles in the future.

VI. Constitutional Adjudication

One of the main innovations of the new Tunisian Constitution is the provision of a system of constitutional review.[36] The previous constitutional system did not include such a provision and although in 1987 an advisory Constitutional Council was created, it had limited powers and did not establish a proper system of constitutional review. The Constitutional Council was indeed a tool in the hand of the executive: only the President could bring a case before it, and he alone effectively controlled the appointment of its members; moreover, it had only consultative powers and its decisions were not binding.

Breaking with the past, in Chapter V, section 2, the Tunisian Constitution establishes a Constitutional Court endowed with several powers, including that of constitutional judicial review, which is nowadays a fundamental feature of constitutionalism. However, the Constitutional Court has not yet been set up, since a series of constitutional requirements has

[36] N. Vizioli, *Le garanzie giurisdizionali: il ruolo della Corte costituzionale*, in *Tunisia. La primavera della Costituzione* (n1), pp. 168-179; D. Pickard, *Tunisia's New Constitutional Court* (April 2015) Atlantic Council, available at http://www.constitutionnet.org/files/tunisias_new_constitutional_court.pdf.

to be met first (see below). The new organ will be created from scratch. According to Article 118

> the Constitutional Court consists of 12 judges, three-quarters of whom are legal experts with at least 20 years of experience. The President of the Republic, the Assembly of the People's Representatives, and the Supreme Judicial Council shall each appoint four members, three quarters of whom must be legal specialists. The nomination is for a single nine-year term. One-third of the members of the Constitutional Court shall be renewed every three years. Any vacancies in the Court shall be filled according to the same procedure followed upon the establishment of the court, taking into account the appointing party and the relevant areas of specialization. Members of the Court elect a President and a Vice President of the Court from amongst its members who are specialists in law.

As far as renewal is concerned, the transitional provision, and in particular Article 148(6), states that the two first partial renewals will be carried out by a draw of lots between the initially nominated members. However, the following procedure is not described and shall be provided by the law, together with other issues, such as the nature of non-legal experts.

It may be argued that the constitutional model designed by the Tunisian constitution-makers is that of a specialized court which has the final power to adjudicate on the constitutionality of laws and interpret the constitutional text. According to Article 120, such control does not, however, entail administrative decisions, including executive orders. As far as the Constitutional Court's competence is concerned, the Court has the exclusive authority to rule on questions of constitutional law: in particular it is the only body competent to oversee the constitutionality of laws, draft laws, treaties, constitutional draft laws, and the rules of Parliamentary procedure.

The Court may proceed to an abstract review, as well as to a concrete review of legislation. In the first case the Court, the President of the Republic, the Head of Government, or at least thirty members of the Assembly of People's Representatives may refer a draft law to the attention of the Court. In the second case the review takes place when a lawsuit or some other kind of litigation is brought before the Court, after a constitutional question has been raised in the course of proceedings (Article 120). Requests to the Court are filed within seven days of Parliament's adoption of the bill, but before it is signed by the President of the Republic. In addition to this, as has been noted above, the Court also has the power to resolve conflicts between the authorities of the state, notably the President of the Republic and the Head of

State. Article 101 indeed gives the Court the power to settle disputes which arise regarding the respective powers of the President and Head of Government.

The Court must approve constitutional amendments after they are approved by Parliament or referendum, to ensure that the process follows the procedure outlined in Chapter VIII and that they do not temper unamendable provisions (Articles 1, 2, 49, and 75).

Article 80 grants the Constitutional Court a role in verifying whether circumstances justify a state of emergency being maintained: thirty days after these measures enter into force, the Court can be required by the Speaker of Parliament or by thirty members of Parliament to rule on whether the standard of 'imminent danger' is still being met.

The Court has the power to issue a decision on the impeachment and removal of the President of the Republic for a 'grave violation of the Constitution'. Such a decision must be approved by a majority of two-thirds of the members of the ARP and may be issued after a parliamentary motion has been approved by two-thirds of the members (Article 88).

The Constitutional Court is therefore endowed with a vast array of powers. It has the duty of guaranteeing fundamental rights, separation of powers, and supremacy of the Constitution, and thus represents a key institution in preventing any risk of backsliding into dictatorship. However, it must be noted that the Constitution leaves the definition of many aspects concerning the Court to legislation and therefore subsequent laws concerning its organization and procedure will have to define fundamental aspects, notably the issue of non-legal specialist members, that of protection against the partisan removal of judges, and that of the effects of decisions. With regard to this last point, it is remarkable that according to Article 123, after a declaration of unconstitutionality, the law's effects are 'suspended'. This expression is rather vague and leaves room for a possible debate over what should actually happen when a law is 'suspended'. Moreover, the Constitution does not state that the competencies listed are exhaustive, leaving open the possibility that the law will define further roles for the Court. Pending legislative definition of these aspects, it can be argued that the role of constitutional interpretation will represent a difficult task in the light of the vague character of some constitutional provisions.

As noted above, the Constitutional Court has still to be created and several steps must be taken before it can be implemented: in particular, the establishment of the Supreme Judicial Council which is endowed with the power to appoint four members of the Court. This judicial body will be formed through the adoption by Parliament of a specific law. Subsequently the law establishing the Constitutional Court will be adopted by the ARP and appointments to the Court will have to be made. The Tunisian constitution-makers set a series of binding deadlines for such steps: in particular, Article 148(5) states that the Supreme Judicial Council must be approved within six months of the legislative elections and that the Assembly of People's Representative must approve the law establishing the Constitutional Court within one year of the legislative elections. In any case, at the time of writing, the term for creating the Supreme Judicial Council has expired without such a body being set up. With the term for the establishment of the Constitutional Court approaching, it is not certain whether the complex schedule will be respected.

In the light of this lengthy constitutional implementation process, the National Constituent Assembly adopted a law creating a 'Provisional Authority for the Constitutional Review of Draft Laws' (*Instance Provisoire de Contrôle de Constitutionnalité des Projets de Lois*). According to Article 148(7) of the Constitution and Article 4 of Organic Law No. 2014/14 of 18 April 2014, which created the Provisional Authority, it is composed of six members: the first President of the Court of Cassation (also the President of the Provisional Authority); the first Presidents of the Administrative Court and the Financial Court; and three experts named respectively by the former President of the Republic, the former Head of Government, and the former Speaker of Parliament. According to Article 18 of Organic Law No. 2014/14, it has a limited mandate to review draft laws referred to the Authority by the President of the Republic, the Head of Government, or at least thirty deputies. The request shall be delivered within a maximum deadline of seven days from the date of adoption by Parliament of the draft law that is the subject of the appeal, or in which one of these provisions is the subject of the appeal.

The Provisional Authority has not been vested with the power to review Parliament's rules of procedure, and its first judgment, issued on 21 May 2014, has been highly contested. Five issues, in particular, were brought before the Provisional Authority, namely: (1) the request to include the alternation between male and female candidates as list leaders; (2) a recourse against the exclusion of army members from the right to vote; (3) an issue regarding electoral

boundaries; (4) a dispute over the deposit required from the candidates in order to run for the post of President of the Republic; and (5) various objections pertaining to the electoral lists. All these claims were rejected by the Provisional Authority except for the one regarding the right to vote for the military; even this, however, was *de facto* rejected, since its timeframe expired before the Provisional Authority could pronounce its decision.

Moreover, the decisions made by the Provisional Authority so far have been considered by scholars to have been weakly motivated, even though the law requires it to provide adequate motivation for its rulings (Article 20). Despite the criticism of this body, it must be acknowledged that it ensures a constitutional judicial review of draft laws. An example is shown by its decision issued on 9 July 2015, which declared nine articles of the draft law concerning the Supreme Judicial Council to conflict with the Constitution. In conclusion, it can be argued that as far as the constitutional adjudication of the Constitutional Court is concerned, only time will allow a more precise assessment.

VII. International Law and Regional Integration

The Tunisian Constitution contains some provisions concerning the status and the role of international law in the national legal order, but the issue is not specified in detail.[37] In particular, the 2014 Constitution does not contain any specific reference to customary international law or to any general or conventional rules of international law. However, this feature does not constitute a gap, since general international law provisions apply to states that are members of the international community without a specific obligation of expressed constitutional provision. Moreover, as far as human rights are concerned, the Preamble expresses the state's commitment to 'human values and the highest principles of universal human rights'.

Like many other constitutional systems, the process of approval and ratification of international law concerns both the executive and the legislature. As far as the executive is concerned, both the Head of Government and the President of the Republic have a role. According to Article 62, the Head of the Government is the only authority entitled to present draft laws related to the ratification of treaties. However, according to Article 77, the ratification of treaties is a competence of the President of the Republic. Nonetheless, he/she is

[37] C. Zanghì, *Diritto internazionale e diritti umani nella recente Costituzione della Tunisia*, in (maggio 2014) *Ordine internazionale e diritti umani* 304-318.

obliged to submit treaties concerning commercial issues, those related to international organizations, to borders of the state, to financial obligations of the state, to the status of the individual, or to provisions of a legislative character (Article 67) to the Assembly of the People's Representatives for ratification. According to Article 20, these treaties have a status superior to legislation, but inferior to the Constitution. Because of this provision, it seems that international treaties concerning matters that exceed the list contained in Article 67 enjoy the same status as ordinary laws.

Besides these matters on which the Constitution sets an obligation of submission to the legislature for ratification, Article 82 allows the President of the Republic to extraordinarily call for a referendum over draft laws relating to the ratification of treaties. Moreover, according to Article 120, the President of the Republic can present treaties to the Constitutional Court before the draft law approving them is signed.

The Constitution provides for two different types of legal sources concerning international law. According to Article 65, the approval of treaties takes the form of organic laws, which require an absolute majority of all members of the ARP, while the procedure for ratification of treaties shall be regulated by ordinary law, which requires a majority of members who are present, provided that such a majority represents no less than one-third of the members of the Assembly. However, awaiting approval of the ordinary law concerning the procedure for ratification, the procedure for ratification of treaties cannot be assessed. It seems however unlikely that the Assembly of the People's Representative will also be involved in this, as it already votes for approval.

All the above-mentioned issues concern treaties that will be approved and ratified in the future, but the Constitution does not clarify the fate of treaties previously approved by the Tunisian Republic. It may be assumed that these international agreements, too, enjoy the same status as those regulated by the Constitution. This is however a mere supposition which must eventually be confirmed by the case law.

VIII. Concluding remarks

The 2014 Tunisian Constitution has laid down the foundations for the development of a substantive constitutional democracy, containing the main elements of constitutionalism (e.g. the principle of separation of powers, the recognition of fundamental rights, and the

establishment of a system of constitutional review). The text represents the result of a remarkable process of constitution-making that started in 2011 following the so-called 'Tunisian revolution', but it also owes a great deal to the constitutional roots of the country dating back in time, which were not completely destroyed in the more than 50 years of autocratic regime.

The positive evaluation of the constitutional provisions has to be balanced by the acknowledgment that most are still to be implemented. Indeed, the short timeframe since the adoption of the Constitution has not yet allowed full constitutional application. There is still, therefore, the risk that the constitutional provisions may remain a dead letter or that, despite the remarkable efforts made by the constitution-makers in order to avoid an undemocratic turn, the public authorities will upset the constitutional framework. So far, such an undesirable scenario is far from foreseeable, but only time will allow for an assessment of the real working of the constitutional framework. The only considerations that are possible to develop at this moment are that, whatever the future developments, the 2014 Tunisian Constitution represents a cornerstone in the transition process from an autocratic to a democratic regime, and that its full execution will depend largely on the political authorities' ability to face the severe economic situation, as well as the challenges to security.

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