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# **The Constitution and Re-Constitution of Citizenship: Political Change in Tunisia since 2011**

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## **Abstract**

This thesis investigates the nature of political change in Tunisia since 2011 by exploring the constitution and re-constitution of citizenship through the prism of the country's constitutions, their making, and implementation. Citizenship offers a framework through which to understand the significant political change that Tunisia experienced following the 2010-11 uprisings. As an expression of the social contract between citizens and the state, it is codified in constitutions, which are elaborated in constitution-making processes – in themselves expressions of the prevalent practices of citizenship.

Using a combination of textual analysis of constitutions, historical analysis of constitutions' genesis and implementation as well as semi-structured interviews with participants and expert observers of the most recent constitution-making process, the thesis investigates the changing relationship between citizenship, constitutionalism, and constitutions beginning at the point when the social contract was first codified in a constitution in the mid-19th Century. The thesis argues that at critical junctures of the country's history, path dependencies and particular choices militated against the establishment of equal citizenship even though the latter enjoyed support from relevant groups in society early on.

The thesis confirms the finding of previous studies that constitutions in themselves do not generate equal citizenship. It adds the finding that a political culture of strong constitutionalism such as existed in Tunisia since 1861 similarly does not generate such equality. However, it demonstrates that the 2014 constitution – emerging from a largely open participatory process – provides a framework within which practices of equal citizenship have emerged and are more likely to be sustained than in previous periods. The thesis contributes to the literature by challenging some of the easy assumptions that Tunisia's history of constitutionalism necessarily lends itself to democratic transition.

# **The Constitution and Re-Constitution of Citizenship: Political Change in Tunisia since 2011**

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2020

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## List of Abbreviations

BTI	Bertelsmann Transformation Index
CMP	Constitution-making process
COLIBE	Commission des Libertés Individuelles et de l'Égalité
CPR	Congrès pour la République
EU	European Union
International IDEA	International Institute for Democracy and Electoral Assistance
IMF	International Monetary Fund
INLUCC	Instance National de Lutte Contre la Corruption
IRI	International Republican Institute
ISIE	Instance Supérieure Indépendant pour les Élections
LPR	Ligues de Protection de la Révolution
LTDH	Ligue Tunisienne des Droits de l'Homme
MDS	Mouvement des Démocrates Socialistes
MENA	Middle East and North Africa
MP	Member of Parliament
MTI	Mouvement de la Tendance Islamique
NCA	National Constituent Assembly
PDP	Parti Démocrate Progressiste
PSCM	Post-sovereign constitution-making
PSD	Parti Socialiste Destourien
RCD	Rassemblement Constitutionnel Démocratique
SJC	Supreme Judicial Council

UGTT	Union Général des Travailleurs Tunisiens
UNAT	Union Nationale des Agriculteurs tunisiens
UNDP	United Nations Development Programme
UTICA	Union Tunisienne de l'Industrie, du Commerce et de l'Artisanat

## **Copyright Declaration**

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Signed:            Fabian Stroetges

Date:             24/12/2020

## **Note on translation and transliteration**

Unless indicated otherwise, translations from French and German are by the author.

Translations from interviews in Arabic are by an interpreter. Transliterations from Arabic follow the International Journal of Middle East Studies' transliteration chart and the editorial guidance for British Journal of Middle Eastern Studies submissions.

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Fabian Stroetges

Berlin, 2021

# 1 Introduction

## *1.1 The problem: the nature of political change in Tunisia post-2011*

Political change is often viewed through the lens of democratic versus non-democratic regimes. Yet a distinct feature of the 2010/11 uprisings sweeping the region of the Middle East and North Africa (MENA) was that protesters' demands did not focus on a specific system of government like liberal democracy. A famous chant of the uprisings – albeit in Egypt – was (in Arabic) “*aish, hurriya, karama insaniyya*” which translates to “bread, freedom and social justice” (Teti and Gervasio 2011). This reflects concerns with the daily lived experience of people rather than institutional questions. Large-scale polling across the region has shown that “the issues most likely to be named were factors pertaining to economic conditions and rights (including employment and inflation) on the one hand, and government corruption on the other” (Abbott and Teti 2017:9). In combination with the fact that the protests were initially spontaneous, driven by individuals rather than organisations, a picture emerges where the protests were more concerned with citizenship – a relational concept – rather than liberal democracy and its institutions. Indeed, Fortier (2015:2) has argued that after the overthrow of the Ben Ali regime, Tunisians “re-appropriated the concept of *muwatana* (مواطنومة) (...) ‘citizenship’, where citizens felt engaged and mobilized as equal partners in the future of the country, with or without the state to accompany them along the way”. Across the region, the uprisings triggered constitutional change. In Egypt and Tunisia, where protesters expressed their constitutionalist ambitions early on, events can also be characterised as constitutional revolutions, where a process of political reconstruction occurred via constitution-making (Arjomand 2012:4–5). These elements of the uprisings need to be reflected in the way political change in the region is studied. Rather than the often teleological assumptions undergirding the democratization paradigm and its unidimensional spectrum between authoritarianism and democracy, conceptual choices should reflect the open-ended nature of the protests themselves (cf. Teti 2012; Valbjørn and Bank 2010a).

## *1.2 Citizenship, constitutions, and constitutionalism: an avenue into political change*

This thesis seeks to understand the nature of political change in Tunisia after the overthrow of the Ben Ali regime in 2011 by exploring changes in citizenship viewed through the lens of the country's constitutions, their content, genealogy, and implementation. It argues that using this multidimensional conceptual approach allows gaining a more granular, detailed picture of

political change than the democratization spectrum. Building on the conceptual work of Carens (2000:162), Faulks (2000:7), and Janoski and Gran (2002:31), it identifies four dimensions of citizenship to operationalise it as an analytical, relational concept. If citizenship describes the relationship between citizens and their polity, constitutions are the place where this relationship is codified in law and thus lend themselves for closer analysis, not least because they both reflect and impact upon political ideas and practices (Arjomand 2007; Dupret 1996; Hirschl 2013; Löwenstein 1959). Specifically, it is argued that episodes of constitution-making represent critical junctures as their (institutional) legacies generate pathway dependencies. The thesis therefore examines four instances of constitution- and pact-making in detail, beginning with Tunisia's first basic law of 1861, which initiated the practice of codifying the social contract in secular law in Tunisia. The approach rests on an interpretivist ontology and epistemology and is based on historical sociology's theoretical stance. Methodologically, this combines the analysis of constitutional text, process tracing of events as well as semi-structured interviews with participants and expert observers of the most recent constitution-making process.

The thesis argues that an analysis on these lines reveals both change and continuities in citizenship. Moreover, while the thesis confirms the finding that constitutionalism is crucial to Tunisia's political culture, it argues that the concept needs some refinement: Usually employed shorthand for liberal, or substantive constitutionalism, in Tunisia, constitutionalism has remained procedural, focussing on the constitution's regulatory functions rather than the liberal purposes associated with its political origins. That citizenship in Tunisia has remained constrained is also a consequence of this fact.

### *1.3 Thesis outline*

These conceptual considerations are developed in chapter 2, which also sets out the thesis' theoretical and methodological approach. It argues that constitutions, constitutionalism, and citizenship provide useful avenues for research on political change as constitution-making occurs at critical junctures that leave important legacies. Constitutions are reflective of the dominant political ideas and agents at the time as well as generating important constraints on agents once adopted. The chapter goes on to construct the planks of the thesis' analytical framework. Citizenship is subdivided into four dimensions, which serve as analytical categories. Four political functions of constitutions are identified, as well as a taxonomy for constitutionalism.

Beginning the analysis in the critical juncture framework, chapter 3 identifies the antecedent conditions to the overall period under investigation as well as examining the first relevant constitution-making episode in the 19th Century. The short-lived 1861 constitution is identified as a fundamental break with previous citizenship practices, which left legacies that contributed to the emergence of a constitutionalist discourse among Tunisians, anchoring the concept in the fabric of Tunisian political ideas.

Chapter 4 examines the genesis, text, and implementation of the 1959 constitution, adopted by a constitutionalist nationalist movement led by Habib Bourguiba. It finds that while it largely fulfils the long-made demand by its proponents for formally equal citizenship rights, it lacked the institutional mechanisms to protect these rights from abuse by the powerful executive it also created and mostly formalised existing power relations that constrained citizenship and enabled the state. Failing to produce consensus between conservative religious and more secular forces within the independence movement, the constitution also entailed competing norms and generated tensions that would continue to influence Tunisian politics.

Turning to the rule of Bourguiba's successor Ben Ali, chapter 5 highlights the continued influence of the constitutionalism developed in the 19th Century and the pathway dependencies produced by the 1959 constitution. Political agents paid close attention to the constitutionality of their actions to lend them legitimacy. Yet the constitution continued to constrain citizenship and constitutional reforms remained cosmetic. Meanwhile, a public discourse of homogeneity – another legacy of Bourguiba's era – concealed considerable levels of exclusion.

Chapter 6 takes the focus to the latest instance of constitution building, analysing the period between Ben Ali's ousting and the actual drafting of a new constitution – the establishing state. It argues that Tunisia's old and new elites found consensus on constitutionalism, designing the transition in a legally sound way. The decisions made during this period – making rules on rule-making – had a significant impact on the subsequent constitution-making process as it influenced the distribution of power within the relevant institutions.

Chapter 7 examines the 2011-14 constitution-making process. Identifying the return of unresolved ideational tensions left by the 1959 constitution, the chapter also identifies procedural constitutionalism in this phase of Tunisian politics. Amid heightened political polarisation, the consensus among agents remained that a political settlement needed to be found within a legal institutional framework to be legitimate.

Chapter 8 analyses the text of the 2014 constitution and its implementation. It finds that the new basic law constructs a model of citizenship that is more equal and better protected than in its predecessors. Yet it retains tensions between competing normativities that militate against full equality. Moreover, despite the more inclusive constitution-making process, constitutionalism continues to be largely procedural as some key provisions remain unimplemented. Citizenship has undergone change – its exercise is more freely possible – but continuities persist as substantive inequalities remain.

#### *1.4 How the thesis contributes to the literature*

The thesis contributes to the literature on three levels: Empirically, it contributes to the understanding of Tunisia's politics. Conceptually, it develops the categories of the constitution, constitutionalism, and citizenship. Methodologically, it contributes to approaches studying the development of political ideas.

On the case of Tunisia, the thesis's findings develop a more nuanced empirical understanding of the role of the constitution, constitutionalism, and citizenship in the country. While the importance of the former two for Tunisia's politics has often been emphasised in the literature, the thesis enhances this finding further. It provides in-depth analysis of Tunisia's three constitutions and emphasises that despite their political centrality, Tunisia's constitutionalism was and remains largely procedural. As a consequence, it does not necessarily lend itself to democratic transition. In using the conceptual lens of citizenship, political change in the country could be described in a more granular way than the institutionalist perspective on the spectrum democracy-authoritarianism would permit, highlighting changes and continuities.

Conceptually, the thesis contributes to discussions on the political role of constitutions, different types of constitutionalism, and analytical uses of citizenship. In all three cases, the thesis seeks to distinguish between the liberal-democratic normative impetus of the concepts and the actual use of these institutions, which can also serve authoritarian ends. Thus, constitutions are found to serve both liberal and authoritarian regimes. In turn, this contributes to an understanding of constitutionalism as part of political culture. Often thought of as an ingredient for democratic transition, the thesis shows that procedural constitutionalism can also lend legitimacy to an authoritarian regime. To employ it as an analytical concept, citizenship is conceived of as a relational concept consisting of four distinct dimensions, which can contribute to the analysis of other case studies, too.

Finally, the thesis contributes to the methodological debate by developing a middle ground approach to studying the development of political ideas, which is situated between the longue-durée history of political ideas approach and the use of polling data on attitudes. The use of a critical juncture framework in this context has highlighted the relevance of this approach for studies concerned with ideational change – where this has hitherto been less popular.

### *1.5 Conclusion*

In sum the thesis finds that historically, constitution-building in Tunisia was long marked by its top-down nature, evident in the power relations present prior to constitution-making, the crises triggering these processes, the negotiations around them, the constitutions' content (both ideationally and in the political systems they established), and, finally, in their implementation. Comparing four instances of formal political settlement (including three constitutions and the 1988 National Pact), the thesis finds that while all of these purport to implement contemporaneous political norms such as individual rights, democracy, and pluralism, the 2014 constitution comes closest to constructing a model of equal citizenship and is the only one that has become an institutional expression of popular sovereignty. As such, it can fulfil the classic functions of constitutions within liberal democracy, which is to constrain the state (individual rights and accountability mechanisms enable a sphere of citizen autonomy) and enable it (the organisation of powers within the state make it more effective and specific structures enable the exercise of popular sovereignty within it). However, the thesis finds that the actual practice of constitutionalism in Tunisia has remained largely procedural across the entire period studied, that is, it is less concerned with the ideational sources of and substantive aims of the constitution (individual rights, popular sovereignty etc.) but mostly views the constitution as a useful regulatory instrument to organise power legitimately. Finally, the thesis highlights that despite the evident political change that occurred since the toppling of the Ben Ali regime in 2011, above all reflected in institutional and ideational shifts and the improved guarantee of individual rights, there remain important continuities in the reality of citizenship as well. Rights and obligations are still not equally guaranteed and enforced and the exclusion of significant parts of the population continues.

## 2 Studying Tunisian citizenship and constitutions: Theory, concepts, methodology, and methods

### 2.1 Introduction

This chapter introduces the research problem, the thesis' research questions, its theoretical and conceptual approach, and outlines its methodology and the research methods used. It provides the rationale for the conceptual and thematic foci on citizenship, constitutions, and constitutionalism, in the case of Tunisia. As political institutions and practices, they embody, reflect, and impact on changes within societies' social contracts and consequently lend themselves for an investigation of political change. Yet both have been less popular analytical angles for studying politics in the MENA region, not least because their liberal-democratic manifestation was in scant evidence there. This chapter argues that even under conditions of authoritarianism, constitutions are often a codification of the social contract between state and citizens as well as among citizens and that citizenship as an analytical concept provides a lens through which to analyse such social contracts. The chapter thus outlines and argues for an analytical framework that studies political change in forms of citizenship, the process and outcome of their constitutional codification and, in turn, how constitutions impact on citizenship.

The argument proceeds as follows: The first section sets out the research problem and research questions. The next two sections provide conceptual disambiguation on citizenship, the constitution, and constitutionalism and examine their use in the literature on the MENA region thus far. Using an approach rooted in historical sociology, the thesis develops a research design that treats constitution-making episodes and their outcomes as critical junctures within the *longue-durée* development of different forms of citizenship, which impact constitutions and are impacted by them in turn. Finally, the different sources of data and methods of analysis are presented and justified with reference to the overall approach.

### 2.2 The research problem and research questions

The aim of this study is to analyse the nature of political change in Tunisia since the uprisings in 2010-11. The influential democratization paradigm has some shortcomings: Underpinned by teleological assumptions, political change is usually captured along a unidimensional democracy-authoritarianism spectrum and attention is focussed on the presence of certain institutions (cf. Schlumberger 2000; Teti 2012; Valbjørn 2012; Valbjørn and Bank 2010b). In

contrast, the 2011 uprisings across the MENA region and protesters' demands related closely to the notion of citizenship: Protests were often driven by individuals, not organisations, and demanded socioeconomic improvements and government accountability rather than a specific form of government such as liberal democracy, the end-point of democratization (Abbott 2016; Abbott and Teti 2017; Meijer 2014). A second feature across the region was that the uprisings also led to constitutional change (Grote and Röder 2016). An analytical approach to understanding political change should take these characteristics into account. Rather than examining events through the lens of democratic transition, this thesis views what followed the toppling of Tunisia's regime as a process of political reconstruction via constitution-making (Arjomand 2012:4–5). Given the above, this thesis seeks to answer the following research questions:

1. What is the nature of political change in Tunisia since the uprisings in 2010-11?
2. What role did constitutions, constitutionalism, and constitution-making play in political change?
3. How have constitutions and constitution-making in Tunisia been shaped by and have themselves contributed to particular forms of citizenship, paying particular attention to the latest episode of constitution-making in 2011-2014?

In answering these questions, this thesis investigates the relationship between constitution-making, constitutions, citizenship, and political change. If constitution-making is understood more broadly than by merely focusing on the drafting of constitutional provisions – which this chapter will argue – this implies a complex relationship in which each influences the other. The remainder of this chapter will review the existing literature on the key concepts of this thesis, followed by its theoretical approach, the methodology and methods applied. That is, data selection, collection, and analysis are problematised. It argues for an interpretivist ontology and epistemology, the use of process tracing and specific methods of data collection and analysis.

## *2.3 Citizenship, the constitution, and constitutionalism*

### *2.3.1 Citizenship as a relational, analytical concept*

Citizenship can be understood in three related but distinct ways. Fundamentally, citizenship is about “membership of the community in which one lives one's life” (Held 1991:20). In a first understanding, citizenship is a synonym for nationality and merely describes which passport an individual holds. The second understanding is of citizenship as a normative political idea

and is about what being a citizen ought to entail. Finally, citizenship can be understood as an analytical category and concept. This section will briefly outline each understanding in turn and suggest how citizenship as an analytical category will be put to use in this thesis.

The most common way of thinking about citizenship is perhaps that of “an international filing system, a mechanism for allocating persons to states” (Brubaker 1992:31). In Arabic, the word *jinsiyya* (passport citizenship) is used to describe this concept (Davis 2000:53). In this approach, citizenship is the signifier for an individual’s membership of a particular political community – contemporarily the most relevant of which is nation state (Fahrmeir 2007). Citizenship is however a multidimensional concept. One’s membership in a community may be formalised to a greater or lesser degree – the extensive legal institutionalisation of “passport citizenship” both within states and internationally reflecting the highest degree of formalisation –, but it always entails an understanding about the rights and duties of the individual toward their community. It problematises who is included and excluded from that community, and how and to what extent citizens participate in it.

Heater (1999, 2004) has made a useful distinction of historical contributions to the normative ideas of citizenship in Western political thought, dividing them into the liberal tradition on one hand and the civic republican tradition on the other. Originating in ancient Greece, the civic republican tradition emphasises political participation in citizenship as well as the individual’s close bond with their political community. In practice, the privileges of this model of citizenship were limited to a small part of society. Liberal theories of citizenship emphasise the individual’s freedom – often vis-à-vis the state – and see their public role as distinct from a private sphere that ought to be protected, e.g. by individual rights. Life in and for the community generally comes second after the commitment to private pursuits. Importantly, the state should be neutral. Even if a majority of citizens were to demand it, no government should pursue moral projects like religion, which is a private matter. The key planks of a liberal-democratic model of citizenship include elements of both the above – though often in a tense relationship – and the lived experiences of such models combine them in different ways. This model as well as the model of liberal democracy itself, it has been argued, may irrefutably be “the political-end product (to-date) of Western civilisation” (Sadiki 2004:12). In contrast, citizenship as a social concept does offer the possibility of a less culturally laden analytical angle.

Rather than a normative model, citizenship as a relational concept can be defined as a universal condition: Individuals in any community anywhere have faced its fundamental

questions. Analysing citizenship from that angle, then, means asking what rights and obligations citizens have vis-à-vis the community in which they live their life, how they participate in its decision-making and who is included and excluded on what basis from that process, and more broadly, the community. In turn, it means looking at how much membership of the community impacts an individual's life. Using citizenship in this way means it can serve as a category of analysis, a lens through which to put the questions of who belongs, how, and why and so on – core elements of a society's social contract. For analytical purposes, the concept of citizenship can be subdivided into four dimensions that may be employed to interrogate both ideational models and existing practices of citizenship:<sup>1</sup>

1) *Inclusion and exclusion* – who is a full member of the community and on what basis? The individual's place of residence, gender, property, faith, and other factors are often used as determinants for this.

2) *Rights and obligations* – what is the substance of citizenship? What privileges do full members of the polity enjoy compared to non-members? What duties do they have to fulfil in return? Civil and political rights may for instance be balanced by the obligation to provide military service. Are there different degrees of membership with different sets of rights and obligations?

3) *Identity and belonging* – what is the psychological dimension? How important is membership in a political community to the individual's identity? National identity may be outweighed by other groups below or above the level of the nation-state, but citizens may seek self-realisation in the private sphere rather than in the political community.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and on what are they based on? Citizenship may simply be a legal status that provides the individual with certain rights and protects their private, individual pursuits. It may however also be oriented toward the common good, with virtuous citizens putting the community's interests before their own. This understanding may be based on an appreciation of republican ideals or an interpretation of a religion. If the three previous dimensions are descriptive of the idea of citizenship in question, the fourth dimension interrogates where this understanding is from and how it relates to other political ideals.

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<sup>1</sup> This builds on the distinctions made by Carens (2000:162), Faulks (2000:7), and Janoski and Gran (2002:31).

What emerges from this last understanding of citizenship as an analytical category can serve as a useful lens through which to interrogate the social contract between citizens and state as well as among citizens that are implicit in these conceptions (cf. Meijer 2014; Meijer and Butenschön 2017a)<sup>2</sup>. A comparison of different moments in time or time periods can in turn provide detailed insights into political change. As an analytical approach, this may not only be more nuanced, but also less contentious than in the case of democracy, which in its liberal manifestation has a connotation of being “Western”. The next chapters will analyse in some detail the interplay between the Western/European notions of citizenship and the discourses and practices in modernising Tunisia. When operationalised in the four dimensions above, the relative lack of culturalist baggage is one of the advantages of studying political change through the lens of citizenship. It also helps escape the narrow focus of much democratization literature on the presence of certain institutions associated with liberal democracy (Grugel 2003:250). Instead, it “lowers the gaze of the researcher from the state to the subject: the citizen as both agent and subject of state policies” (Meijer 2014:10).

### 2.3.2 Constitutions and constitutionalism

Constitutions are an expression of the fundamental rules a society has given itself and therefore also a reflection of its norms and values. They fulfil numerous political functions. Yet as with citizenship, there are different, and competing, interpretations that changed over time about what constitutions are and ought to be – the subject of constitutionalism (Maddox 1989; Schütze 2019). In the modern sense used in this thesis, a constitution can be defined as a law that regulates the exercise of political power (Grimm 2012b:11). The following section outlines constitutions’ origins and political functions. It argues that beyond structuring a polity’s political processes in a way that facilitates the exercise of popular sovereignty, constitutions can serve a number of different purposes that can both contribute to and militate against equal citizenship and popular sovereignty.

Historically and conceptually, this idea is inextricably linked to the emergence of the modern state, 19th Century constitutionalism, and the American and French revolutions. The modern state emerged in Europe against the background of the religious conflicts in the 16<sup>th</sup> and 17<sup>th</sup> century when political and religious authority experienced a split and political rule became both more centralised and territorialised. The emergence of this new “impersonal and

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<sup>2</sup> This approach is similar to the “citizenship approach” proposed by Butenschön (2000), which he tailored more specifically to the context of the modern state and the international state system however.

sovereign political order” (Held 1995:37–38) strengthened the notion of the individual, or citizen as an active and capable participant in the new kind of polity rather than a mere subject of God or monarch. The unprecedented and growing ability of the modern state to control and interfere with the life of its citizens also sowed the seeds for challenges against this concentration of power within the government. Legal instruments aimed at constraining state power began to emerge. These were not constitutions in themselves, but they revived the notion of hierarchical legal norms that had been present in the classical age (Grimm 2012b:15). Amid the split in religious and secular authority, political theorists – above all protestant ones – also revisited the sources of legitimacy for political rule. Now, the consent of the ruled emerged as a key source of legitimacy over the divine. In the thought of liberal social contract thinkers like Thomas Hobbs and John Locke “a political system was deemed legitimate if it could be considered *as if* established by a consensus of the governed” (Grimm 2010:8, emphasis in original). Once revolutions broke fundamentally with traditional rule in the late 18<sup>th</sup> century, these ideas served as a blueprint and were turned into law by the American and French revolutionaries<sup>3</sup>. Popular sovereignty became the paramount legitimating principle of government and positive law the medium through which this was implemented. The idea of a hierarchy of norms was re-introduced to tackle the question of how the political process can be bound by law if the latter is its result: The revolutionaries would distinguish between two bodies of law: Constitutional law, emanating from the people would bind the government, while ordinary law, emanating from the government, would bind the people. Sieyès (1963) distinguished between *pouvoir constituant* (constituting power) and *pouvoir constitué* (constituted power). Briefly summarised, constituting power as the pre-constitutional, legitimate expression of popular sovereignty is legally unrestrained as it establishes and legitimises the state as constituted power by way of constitution-making. As constitutional law is harder to revise, some issues are removed, or indeed protected, from the ordinary political process. A constitution in this sense would become a key political demand in the political struggles of the 19th Century.

Two key functions of constitutions originating in liberal and civic republican political thought are in constraining and enabling government (Castiglione 1996:433–35). Constitutions *constrain* government: They generate principles and procedures by which the exercise of

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<sup>3</sup> Notably, the constitutions that resulted from the American and French revolutions were not the first constitutional documents as such: North American colonies were governed on the basis of various charters, and in 1639, the “Fundamental Orders of Connecticut” were enacted (Maddox 1989:60). For a contemporary argument that constitutions can serve as social contract see Ginsburg (2013).

political power is bound, not least through the implementation of checks and balances between the state's institutions. Another constraint is found in the codified individual rights that most constitutions include, and which delimit a private sphere of citizens the government must not violate – a key tenet of liberalism. Both combined are generally seen as a guarantee against the arbitrary exercise of power and protection against a slide into autocracy (Galligan, Denis and Versteeg 2013:6–8; Lutz 1988:14–15; Sartori 1962). However, constitutions also *enable* government: Not only do they explicitly endow the different parts of the state with powers. The separation of powers also leads to greater efficiency thanks to a division of labour in the state apparatus. Above all however, arguably only the clear procedural rules of a constitution make the effective implementation of civic republicanism's popular sovereignty possible. Holmes (1988:230) thus describes constitutions as instruments of self-government, "a technique by which the citizenry rules itself". This is needed because "a collectivity cannot have coherent purposes apart from all decision-making procedures. The people cannot act as an amorphous blob" (ibid.). In other words, by allocating and constraining political power, as well as making it accountable, an effective constitution makes liberal-democratic citizenship possible.

### 2.3.3 Why constitutions matter politically – even under authoritarianism

Even in authoritarian settings such as pre-2011 Tunisia, constitutions should not be dismissed as mere "liberal facades irrelevant to the actual practice of politics" (Brown 2002:xv). If previous sections have shown that constitutions were originally conceived of used as an instrument to constrain and channel power, their ability to produce and secure liberal democracy should not be overstated. Constitutions clearly matter in various ways, but as Dahl (2006:134–35) and others argue, their mere presence is insufficient as a protection against a rollback of democracy – as indeed Tunisia has showcased. Yet even under conditions of authoritarianism, political documents like constitutions are ultimately the result of negotiations between social forces, and thus provide an insight into the distribution of power within society in the period of drafting, and indeed, amending the text. Both substantive and declaratory elements reflect this. The formal powers bestowed upon the executive are indicative of how powerful and politically deft an authoritarian leader proved to be during the constitution-building process. In its declaratory parts, the constitution can provide insights into the normative dimension of the power struggles present during drafting. Which norms does an authoritarian regime believe it needs to endorse - at least rhetorically - to confer legitimacy on the regime domestically and internationally? Do certain ideological

commitments outweigh rival norms? A close reading of the constitution, along with an analysis of the political context of its drafting can provide insights into these questions as this thesis does with respect to several instances in Tunisia. Often, constitutions of authoritarian states are surprisingly frank about their normative impetus and the limits of popular sovereignty. The fact that constitutional commitments make it possible to identify gaps between regime rhetoric and practice is of scholarly value but is also a mechanism through which oppositionists can exert pressure on a regime. As Arjomand (1992:40) argued:

Constitutions are important social realities in the contemporary world, whether in force or in suspense. They are important as transcendental justifications of political order. When suspended or breached in practice, as is often the case, they delegitimize governments and constitute normative assets for the opposition.

It is worth adding another layer of nuance to Arjomand's argument. While it is certainly true that the breach of constitutional provisions by governments can delegitimise regimes, another possibility is worth considering. Governments may adhere to the constitution's *legal* provisions and yet breach the *political* norms proclaimed by the constitution. In this sense, not only open unconstitutional acts by the government may contribute to its de-legitimation, but also the normative discourses it establishes, and which enhance the constitution's legitimacy.

Even beyond non-compliance with codified norms, constitutions in themselves can serve non-democratic purposes, too. Karl Löwenstein (1959:151–57) has proposed a useful conceptual framework for the taxonomy of what could be called constitutions' embeddedness in societies (cf. Grimm 2012a:107). It aims at analysing the extent to which constitutional norms correspond to the reality of how power is negotiated. Löwenstein's taxonomy distinguishes between normative, nominal, and semantic constitutions, where the first has the highest degree of correspondence and the last has the least. It presumes that a constitution does not by itself enter into function but that in order to be a lively constitution, it requires a benevolent environment.

A *normative* constitution is being followed by all participants, it has grown into the society of the state, and exists in symbiosis with it. Its norms determine the political process and political elites as well as the mass public have internalised the value of constitutionalism.

A constitution is only *nominal* if it is legally valid, but structural constraints meant that the actual political process does not consistently follow its rules. This may be caused by a lack of the necessary prerequisites for normative constitutionalism (Löwenstein mentions political and other education, an independent middle class) that do not permit a complete integration of

the constitution with the dynamic of political life. Given goodwill by those in and those subject to power however, a nominal constitution may become normative in the future and therefore genuinely determine politics. Its adoption may have been premature, according to Löwenstein.

Finally, *semantic* constitutions merely formalise existing power relations. Instead of providing the original function of the constitution – putting limitations on political power and providing a framework for the negotiations of social forces – rulers use a semantic constitution to channel social dynamics in their desired ways. Whether there is a semantic constitution or no formal constitution at all has no real impact on how power is exercised. While the difference between normative and nominal constitutions can be blurry, Löwenstein mentions some unmistakable indications of the presence of a semantic constitution. These include the lack of a presidential term limit, a veto by the president over the legislature without recourse to the electorate, and the limitation of electoral choice to only one political party.

In previous sections, this thesis has argued that the analytical concept of citizenship provides a way of interrogating the social contract of a society. This section argues that a society's constitution is where its social contract is often expressed most explicitly and should therefore be the first place to be analysed.<sup>4</sup> Even under conditions of semantic constitutionalism, a close reading of a constitution often reveals surprising frankness about illiberal normative impetus, on how power is exercised, and on the limitations on accountability and individual rights.

A primary purpose of constitutions is the organisation of power within a political system, but they also provide an opportunity for “locking in certain contested worldviews, policy preferences, and institutional structures, while precluding the consideration of alternative perspectives” (Hirschl 2013:166). Two aspects of this statement will be discussed in more detail in this section in turn: First, constitutions provide a reflection of values and ideological commitments held within a society. Second, they are also the result of power struggles within that society. Inevitably, both of these dimensions are related and subsequent sections on methodology and methods will problematise this. As subsequent sections of this chapter will discuss further, this dimension of constitutionalism is particularly pertinent in societies where

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<sup>4</sup> The term “social contract” is used as the heuristic device it serves as in social contract theory in the tradition of Rousseau, Rawls and others and should not be interpreted as an endorsement of the approach in theories of constitutional law to conceptualise constitutions as a contract through the lens of legal contract theory (Ginsburg 2013).

the constitution is not normative or even nominal, i.e. where the country's constitution lacks embeddedness, such as in most countries of the MENA region (Brown 2002).

Like other political texts and the law more generally, constitutions are communicative, i.e. part of a symbolic system (Corwin 1936; Dupret 1996:599). They are the product of power struggles and in turn structure future political interactions. In other words, constitutions can codify the social contract citizens enter into vis-à-vis the state and their fellow citizens. Consequently, constitutions provide an insight into the values held by their authors as well as the power relations that affected their elaboration. They should also reflect the values that its drafters see as constitutive of their political community as their inclusion provides further legitimacy to the constitution and the state it establishes. King (2013) draws attention to this dimension of constitutions by arguing that they can serve as "mission statements". They do not only establish the legal basis for the institutions of the state and endow them with their responsibilities and power. They also articulate "a set of foundational political principles to which the institutions of the state are meant to give effect, and which typically include a list of human or citizens' rights or related duties" (King 2013:81). According to this understanding, constitutions as a coherent whole can be read as mission statements, but they also contain mission statement provisions. King identifies five specific forms in which mission statement provisions are expressed within constitutions. Not all of these may be intended for judicial enforcement, but general statements may guide legislators and judges in their interpretation of the constitution. 1) *Basic Organising Principles of the State* are often found in the beginning of constitutions. They are often vague and refer to principles such as popular sovereignty or federalism and have become a more common occurrence recently. 2) *Bills of Rights* have long been interpreted as promoting limits on governments, but a more contemporary understanding of rights sees them as empowering and thereby also giving the state certain tasks. 3) *Directive Principles of State Policy* highlight certain social principles for considerations by the state, e.g., gender equality or social justice, but are often kept non-justiciable. They nevertheless may have an impact, not least on public debate. 4) *Ad Hoc Statements of Principle* can express a break with the country's past or express principles to emphasise their importance in the new polity. These may be a specific religious identity or values such as secularism, or regional equality. Finally, 5) *Preambles* are not directly enforceable, but can influence courts and political actors in other ways. (King 2013:82–84). Constitutions thus reflect values both substantively in their justiciable rights (e.g., in the provisions made for the independence of the judiciary that seeks ensure enforcement of liberal individual rights), but also in a

declaratory form (e.g., in the preamble that seeks to guide interpretation but is not in itself legally enforceable).

Following King's argument further, mission statement provisions then serve both substantive and discursive functions: In their *expressive* function they anchor certain constitutive principles that "help to manifest what the state and the political community stands for" (2013:85) in the view of the framers and make them reference points for public debate. They also *channel* or *guide* the state's institutions toward certain normative aims. Their codified nature also means that mission statement provisions have an *enforcement* or *remedial* function. Finally, they contribute to the legitimation of the legal order: "They can make the constitutions more normatively justifiable, and, one hopes, thereby lead to wider public acceptance" (2013:88). To the extent that a new constitution reflects widely-held values, then, its drafters may hope that mission statement provisions do indeed add to its public acceptance (cf. Dupret 1996). This would include both the substantive principles on the organisation of the polity but also the declaratory elements. In turn and as noted above, if the government is in violation of the constitution's provisions and/or does not uphold the values declared in the document, the constitution serves as a discursive reference to question a regime's legitimacy.

Constitutionalism is usefully defined as "the set of ideas that defines what a constitution is or ought to be" (Schütze 2019:40), but is often used shorthand for a particular kind of constitutionalism, liberal constitutionalism, i.e. the "doctrine that a government's authority is determined by a body of laws or constitution" (Bellamy 2017) and more broadly attempts to avert arbitrary government. That constitutionalism is usually thought to include the idea of the constitution as a democracy-enabling institution is not least rooted in its emergence in the 18<sup>th</sup> and 19<sup>th</sup> centuries when popular sovereignty became a key demand alongside the constitution. Above discussions have however shown that constitutions have political function in non-democratic polities, too. Where a country's political culture entails an emphasis on constitutional legalism, which does not make substantive demands on the constitution's content and genesis (e.g., its elaboration in a participatory process and rights protection), one can speak of limited liberal constitutionalism or procedural constitutionalism – analogous to the distinction between procedural and substantive democracy. Relatedly, Brown (2002:xiii–xiv) provides another rationale for studying constitutions, particularly in the MENA region: "Even though constitutionalism has been a secondary goal [of establishing constitutions after augmenting political authority], its prospects are often brighter—and far less related to democracy—than initially appear". While Brown uses constitutionalism synonymously to

liberal democratic constitutionalism, this is particularly true once the concept is used more flexibly, accepting numerous constitutionalism(s) and thus marks a similarity to citizenship.

The political functions of constitutions can thus be summarised such: Constitutions construct and constrain, enable, and endear. Constitutions often stand at the starting point of state-building and the establishment of a regime and are thus a tool for political (re)construction. They often constrain the considerable powers of a state vis-à-vis its citizens and produce a protected private sphere that is delineated from the public sphere. At the same time, they enable the state and enhance its powers by assigning institutional responsibilities and procedures, which is a prerequisite for the implementation of popular sovereignty. Finally, they proclaim norms and values not only to bind the state to them, but also to enhance its legitimacy in the eye of its citizens.

#### 2.3.4 The politics of constitution-making and constitution-building

Constitutional change usually follows and implements political change, making the former a key site to investigate the latter. Most constitution-making processes (CMPs) are triggered by extraordinary changes in socio-political conditions, such as socioeconomic crises and regime collapse (Elster 1995:370–71; Galligan, Denis and Versteeg 2013). Indeed, constitution-making at the point of state foundation, e.g. as an instrument of state-building, or major political change has become so common that it has arguably developed into a strong international norm (Lerner and Lupovici 2019). In other words, consequential political change – and thus, changes in a society’s social contract – often leads constitutional change, particularly in societies with entrenched constitutionalist traditions<sup>5</sup>.

In most cases, constitution-making is “a politicized process in which local elites and interest groups compete for power and try to vindicate their political agenda in constitutional form” (Galligan, Denis and Versteeg 2013:16). In this sense, constitutional design should not be viewed merely as a legal or philosophical affair but results from the power relations within a country at the time of the adoption of the constitution or its amendment (Hirschl 2013:163–76). Viewing constitutions as instruments of power rests on the assumption that constitution-drafters are rational actors that will seek to pursue their political projects in the design of the constitution. Even more than other legal institutions, constitutions have distributional effects,

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<sup>5</sup> It is worth pointing out that this does not refer to Löwenstein’s taxonomy of constitutionalism as even semantic constitutions can reflect political change. The difference to normative constitutionalism in this case is the level of embeddedness, i.e. a new or revised semantic constitution may be imposed top-down and thus reflective of the particular relations of power that permitted this change.

privileging some political and even economic interests of some groups over others. And as noted above, the relative permanence of constitutions allows the framers to give their choices a degree of longevity (Hirschl 2013:166). It would be naïve to assume that constitution-makers will try to design the state in any ways other than those that benefit them.

The study of CMPs is increasingly recognised as an important part of empirical and theoretical investigation, both in the legal and social sciences (Arato 2017; Elster 1995; Elster et al. 2018a; Ginsburg, Elkins, and Blount 2009; Tushnet 2012). Scholars have assessed questions such as optimal process design, the process' impact on the constitutional outcomes, on institutional stability, and quality of democratic governance post-promulgation. A key finding of that literature is that the design of the CMP matters: It impacts the properties of the constitution itself as well as the stability of the institutions set up with it (Aucoin 2004; Brown 2008; Carey 2009; Eisenstadt and Maboudi 2019; Elster 1995, 2012; Ginsburg et al. 2009; Landau 2012; Lerner 2011, 2018). Scholars have variously described the CMP as “higher lawmaking” distinct from “normal politics” (Ackerman 1991), a “period of extraordinary politics” that represents a re-constitutive phase of the political itself (Zemni 2014) or a political process in which rational choice prevails and whose participants are utility maximisers (McGuire 1988). Yet constitution-making is not so much distinguished from normal politics by the nature of the political process, but the object of negotiation and “an unusually generous distribution of veto power among various contending groups” (Brown 2008:676).

Arato (2016, 2017) distinguishes four forms of CMPs: Democratic reform, revolutionary constituent process, revolutionary reform, and post-sovereign constitution-making. While the first is implemented through formal amendment of constitutions, the second reflects the French revolutionary example of 1789, where all legitimate power is vested in the one institution of the constituent assembly, which is thought to legitimately represent the will of the people. Revolutionary reform, based on Bruce Ackerman's concept, refers to the example of the United States, where a convention is tasked specifically and only with the drafting of a new constitution while other institutions govern the country. Finally, Arato's concept of post-sovereign constitution-making relies formally on the inherited amendment of a constitution, but practically functions via the institution of a round table of old regime and oppositional forces, such as in Spain or Central Europe in the late 20<sup>th</sup> century.

Even though virtually “all modern (nonsham) constitutions have been *made* by assemblies” (Elster et al. 2018b), investigations into constitution-making should expand their research

focus to the conditions before and around the work of the *constituante*. Taking seriously the concept of pathway dependency, it is worth highlighting that existing power structures and events occurring prior to the actual drafting of the constitution can put profound limitations on the assembly work (Lerner 2018) – as can unelected, informal bodies and groupings, which often prepare constitutional drafts. Jermanová (2019) has proposed a constitution-*building* framework, which includes the formal constitution-making process as well as periods before and after. As captured in the figure below, the period of constitution-building begins with a point at which the need for and scope of constitutional scope is determined, continues with an establishing stage in which relevant political forces determine the rules on constitution-making – a pivotal period, followed by the formal constitution-making process including its adoption, and concludes or tapers off with a ratification and implementation phase. If a constitution provides the fundamental rules governing relations among state institutions and citizens, the establishing stage produces the rules on rule-making and is thus crucial to the potential pathways of the institutional CMP. In each case of political pact- and constitution-making examined in this thesis, the temporal dimension of the analysis will thus be expanded to include all phases of constitution-*building*. When it comes to the CMP, much of the detailed drafting typically happens in committees and political parties rather than in the plenary of the assembly. These being mostly non-public arenas, a significant part of the process thus happens in black boxes for the researcher, making causal mechanisms harder to establish (Elster et al. 2018b:3). This thesis draws on interviews with committee members and their published material to shed light on these arenas of the CMP.

The above section has provided the conceptual planks for an approach studying political change via citizenship in constitutions, arguing for an approach that uses citizenship as a relational, analytical approach to constitutions, which are highly political documents in liberal democracies as well as authoritarian regimes. It has outlined that as an institution,

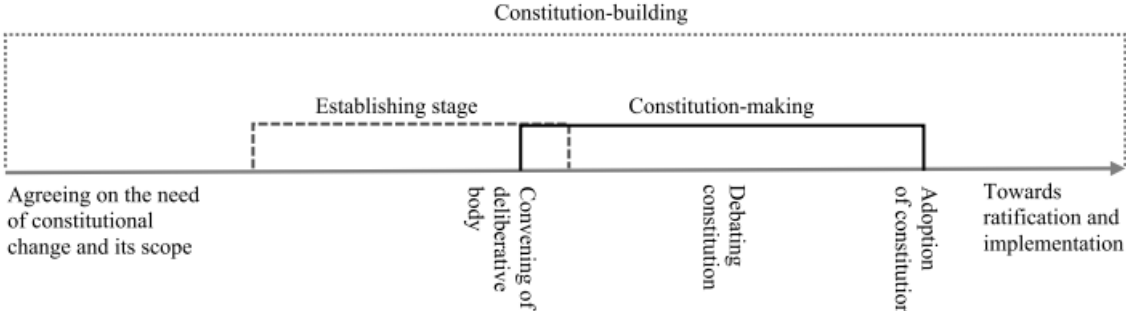


Figure 2.1 - Constitution-Building Stages (from Jermanová 2019)

constitutions historically originate in similar politico-historical processes and discourses as those on liberal democracy and liberal-democratic citizenship and can contribute institutionally to the latter. The section has further argued that even under conditions of authoritarianism constitutions are worthy of study: Like other political texts, they provide an insight into the ideologies and political aims of their authors. Whether in substantive or declaratory elements, constitutions are reflective of norms, values, and the power relations between their multiple authors. The reader of a constitution should be careful not to take each and every element of the text as such an expression. Constitutions – as powerful legal instruments that determine the distribution of political power – are the product of highly politicised processes in which the most powerful political forces will seek to “lock in” their preferences over those of potentially marginalised oppositions. Some elements of constitutional design may be the result of international rather than domestic political pressures or influences. Constitutional analysis should thus include both text and context: Beside global conditions contributing to the endorsement of certain norms and values by the framers, the process can be conceptualised as temporally far exceeding the formal drafting of the document alone, but includes the political processes involved in setting up the deliberative body (“upstream”), its ratification mechanisms (“downstream”) and in an even more expansive notion of constitutionalism (cf. Olson 2007), even its entire period of legal and social implementation.

## *2.4 Citizenship, constitutions, and the MENA region*

By reviewing the existing literature, this section argues for the relevance of studying citizenship, constitutions, and constitutionalism in the context of the Middle East and North Africa, a region largely bereft of liberal-democratic constitutionalist practice and equal citizenship (Meijer and Butenschøn 2017b).

### *2.4.1 Citizenship in the MENA region*

Citizenship was widely discussed by political theorists in the 1990s, particularly in North America and Europe (Kymlicka and Norman 1994) and proved a popular conceptual angle for studies of various regions such as Latin America (cf. Jelin and Hershberg 1996). Given the lack of even basic civil, political, and social rights across countries of the MENA region, a discussion of its politics informed by a citizenship approach was long deemed futile (Butenschøn 2000:7). A sizeable edited volume by Butenschøn, Davis, and Hassassian (2000) changed this by providing a broad spectrum of studies on the region unified by the level of

analysis, which can be described as relational, focussing on the contract (implicit or explicit) between states and the residents within their territories. The heft of the volume is devoted to explaining the absence of liberal-democratic citizenship in the MENA region – even though Butenschøn appears to accept that this ideal model based on legal-rational authority, universal rights, and legal equality is not being fully in practice anywhere, including Europe (2000:13). Eight theoretical chapters unpick numerous factors that explain the lacuna in the MENA region and eight empirical chapters show how these play out in practice: political alliances by states with Islamists, state formation dominated by classes hostile to democracy, demographic, and cultural factors have contributed to political and social systems rife with group privileges and inimical to equal individual rights. Failure to belong to a gender (men), religion (Islam), or ethnic group (e.g. Turkish or Jewish Israeli) can render individuals in the region subject to discrimination, or, effectively an absence of rights altogether. Joseph (1996) highlights the specific consequence limitations on full and equal citizenship have for many women across the region<sup>6</sup>, whose rights as individual are often only accessible through their relationships to males, usually the male head of household. Such limitations on state-based rights are particularly severe given the dominance of patriarchal norms in sub-national social communities like the family. The nation-state, then, is a strategically important site for women and minority groups to gain or lose legal and political protections vis-à-vis other sub-national communities.

Further research on citizenship in the MENA region has continued in the vein of demonstrating and explaining unequal citizenship or its complete absence as well as on questions of identity, particularly in the Palestine-Israel conflict and the societies immediately affected by it. The historical-sociological study of Israeli society by Shafir and Peled (2002) analyses discourses of citizenship to show how social, political, economic, and cultural institutions are manipulated to differentiate individual rights, privileges, and obligations depending on group membership amid a putatively universalist concept of citizenship. Similarly, Nanes' (2008) study of citizenship in Jordan emphasises how the struggle over its definition is deeply tied with the distribution of power and resources within that society as well as the international and regional context within which it finds itself. Going into historical research, Banko (2012) demonstrates how Britain as a mandate power in early 20<sup>th</sup> century Palestine sought to mollify both Arab and Jewish residents by establishing an apolitical type

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<sup>6</sup> Joseph is at the same time careful to emphasise that the MENA region is by no means exceptional in limiting the citizenship of women.

of (legal) citizenship, which conferred no civil or political rights on its bearers – a practice intertwined with colonialism. Jurists like Parolin (2009) have provided comprehensive work on the legal dimension of citizenship (i.e. “passport citizenship”) in the MENA regions’s states and their historical and social origins, including the divergences from a citizenship model rooted in western political thought. In the vein of the above conceptual disentanglement on citizenship, Davis (2000:53) highlights the specific distinction in the Arabic language between *jinsiyya* and *muwatana*. While *jinsiyya* (passport citizenship) represents the right to abode, *muwatana* (democratic citizenship) designates “equal access to the civil, political, social, and economic resources of the state”.

With citizenship mostly conceptualised in the liberal democratic model rather than as an analytical concept as proposed above, research into the development of political ideas in Islam and societies marked by an Islamic influence through the lens of citizenship has often contrasted the social stratification justified by Islamic political theorists, jurists, and religious scholars with the universal aspirations of liberalism – similar to the findings about social practices and institutions – to then turn to contemporary Islamists whose ideas offer some overlap with liberalism. For, as Lewis (1988:65) outlines,

if Islamic usage rejects privilege, it admits – in certain situation it even imposes – inequality. (...) In principle, equality of status, and with it the right to participate at whatever level in the exercise of power, belonged only to those who were free, male, and Muslim, while those who lacked any of these qualifications, the slave, the woman, and the unbeliever, were excluded.

Scott (2007) begins by comparing western contributions toward the idea of universal, liberal democratic citizenship to the practice and justifications of *dhimmi* in classical Islam as well as the stratification of rights and privileges within the Ottoman Empire, which 19th Century reforms gradually eroded. Scott then identifies a change in Islamist discourse on universal concepts such as democracy, human rights, and citizenship. Opposed as imported ideologies until the 1980s, they are now argued to be not only compatible with Islam, but “also an expression of the essence of Islam” (Scott 2007:5). Citing precedents of the “golden era” of Islam under Muhammad’s leadership that support universalism and equality between Muslims and non-Muslims, influential Islamists make a case for the compatibility of liberal democratic citizenship with the essence of Islam under the banner of Islamic citizenship. Lebanese elite jurist and diplomat Nawaf Salam (1997) makes similar arguments. More specifically, Saeed (1999) examines Tunisian Islamist leader Rachid Ghannouchi’s thought on citizenship, arguing that his acceptance of liberal principles such as the freedom of belief, equal rights, and equal taxation for Muslims and non-Muslims go well beyond the hitherto accepted

interpretation of Islamic law. In an academic journal article, Ghannouchi (2013) later set out a comparatively liberal interpretation of Islamic law on the relationship between state and religion.

Interest in citizenship as an analytical category by scholars and practitioners alike was prompted by the Arab uprisings in 2010-11, which appeared to vindicate a perspective that puts more emphasis at the agency of individuals. If developments in the late 1980s in Central and Eastern Europe triggered interest in civil society, the apparent spontaneity and lack of leadership and institutional structure of the Arab Uprisings in 2010-11 seems to vindicate a new focus on the potential agency of the individual. In the view of some scholars (e.g. Meijer 2014), the concept usefully reflects the nature of the uprisings themselves: They were initially a direct citizen revolt, whereas civil society organisations, political parties etc. only joined in later in the process. “In a sense, the absence of ‘citizenship’ led people to the streets in the name of freedom and democracy. Theirs was a response to the realization that the regimes were relating to them as subjects (*ra’aya* in Arabic), while viewing themselves as caretakers of the people” (Golan and Salem 2014:7). Some work prior to the uprisings had already pushed in this direction, albeit focussing particularly on supposedly non-political arenas and practices that ultimately proved to be everything but non-political (Bayat 2010, 2011).

Prior to 2010/11, people in all Arab states were denied multiple elements of liberal-democratic citizenship: political participation, a bundle of rights including political, civil, socio-economic rights, but also a degree of dignity. The call for the latter became a key theme of the uprisings across the region and the Tunisian revolution is now also known as “The Revolution of Dignity” (Aleya-Sghaier 2012; Mabrouk 2011). Citizens sought to re-appropriate their citizenship. Mann (1987) had already observed that ruling elites can and do manipulate the different dimensions of citizenship to sustain power and thus departed from the teleological development of citizenship T.H. Marshall (1950) identified in his seminal work on British citizenship. Similarly, Arab authoritarian regimes like Tunisia’s used citizenship as a political tool and selectively expanded some areas while neglecting others. Thus like in other regions, for some time the provision of social rights by Arab regimes’ welfare state “replaced the ideal of the responsible citizen with the reality of the ‘client’” (Jelin 1996:104) as civil and political rights were withheld.

A two-volume book edited by Meijer and Butenschön (2017b) argued for the approach as a viable alternative to research agendas that had probably overemphasised the ability of authoritarian regimes to persist in spite of the factors that ultimately triggered the protest

wave across the region. The tenor of the analysis in “The Crisis of Citizenship in the Arab World” is that – using the terminology of British sociologist TH Marshall (1950) – “Arab citizens’ social rights had preceded civil and political rights. Once the first could no longer be provided on the same scale, they turned into the regimes’ social favours to selected individuals and groups, generating a sense of injustice that triggered the 2011 uprisings” (Stroetges 2018). Gulf states’ oil wealth may have helped them escape this particular issue, but they face demographic challenges related to the lopsided proportions of native citizens and migrants without citizenship rights who are nonetheless residents on their territory but lack any meaningful prospect of naturalisation. A chapter on Tunisia (Zemni 2018) argues that once freed of the authoritarian regime’s imposed national unity, its citizens were confronted for the first time with the country’s heterogeneity in terms of social class and identity. Renegotiating what it means to be Tunisian, “the people” emerged as general reference point only to be replaced later by “*tunisianité*” – a highly symbolic process playing out in the constitutional process and the latter’s content that will be discussed in more detail below. Santini’s (2018) study of post-revolutionary Tunisia is largely focussed on the nature of the Tunisian state and areas of limited statehood. However, in the second chapter she specifically examines citizenship rights to analyse state-society relations, focussing particularly on the genealogy and contents of the 2014 constitution and its rights provisions. She argues that while many codified rights – and particularly socioeconomic rights – remain violated by the state, the most permanent feature of Tunisian citizenship remains its contested nature.

Citizenship in the MENA region, then, remains varied and contested – as an idea, as an institution, and as a practice, as does its scholarly analysis. To an important extent, there has been a shift from particularity to universality in rights in social practices – much like in Europe (Mann 1987). While religion was long used as a justification for legal inequality, it was later interpreted as demanding equality, including by influential Islamist thinkers. Nonetheless, the most permanent feature of citizenship in the MENA region remains the absence of the rights associated with its liberal-democratic model and the fact that both regimes in control of the state as well as social forces beyond the state tend to militate against equal citizenship.

#### 2.4.2 Constitutions and constitutionalism in the MENA region

A whole generation of political scientists have largely eschewed constitutional analysis in favour of approaches like modernisation, political culture, and others as the analysis of formal

institutions was dismissed as distracting from other factors determining the distribution of power in political systems. Even when the study of formal institutions became more popular again in the 1980s, constitutions were largely bypassed (Brown 2002:4; Lang 2013:345).

Early comparative work on constitutions in the region had been of varying depth, often outlining constitutional provisions with insufficient regard to their political and social context (Lewis, Pellat, and Schacht 1966; Sfeir 1959).<sup>7</sup> Thus, while considerable knowledge was produced on the constitutions of the region, constitutionalist practice was largely analysed under different conceptual headings. Interest in constitutions and constitutionalism picked up across many disciplines in the wake of new constitution-writing following the collapse of authoritarian regimes in the post-soviet space as well as Latin America (Brown 2002:xiv). Arjomand (1992) made a seminal contribution by investigating constitutions as a political tradition transmitted from one particular context (Europe and North America) to another (any other state), focussing on Muslim majority countries and Japan as case studies. He argues that like other political institutions, constitutions acquire “normative and organizational autonomy” when transmitted and thus “can survive their original matrix and subserve other value-ideas and ideologies” (Arjomand 1992:39). If constitutions have emerged out of a legal tradition that sought to limit state power and extent popular sovereignty, their introduction in other contexts of state-building and political cultures sets off different dynamics as his case studies show. Building up from liberal constitutionalism, constitution-makers have over time sought to include an ever-larger repertoire of potentially conflicting principles of order (such as socio-economic rights, socialism, or Islam) to reinforce the state’s legitimacy in specific political contexts at the point of constitution-making, which is always an effort of reconstructing political order. However, the examples of Algeria and Iran show that “the institutional reality of the state can subvert the ideological intent” of the framers (Arjomand 1992:78) as the modern bureaucratic state imposes its own Weberian rational-legal logic on society. Consequently, the state’s effective exercise of authority assumes a greater role in legitimising it compared to the initially constitutionalised ideological commitments – be they socialist, Islamic, or democratic. These may have been incorporated as principles of order for the state, but paradoxically end up legitimising the bureaucratic state. For Arjomand, non-Western constitutions’ ineffectiveness is thus rooted in the tensions produced by the competing principles of order contained in them on the one hand and a lack of counterpower

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<sup>7</sup> A comparative work of surprising depth and breadth for its time – though, again, not for all countries of the region – is Ghosh (1941).

to the bureaucratic state in civil society on the other; the latter having been identified as a weakness of liberal constitutionalism in the European literature as well.

Brown's (2002) study "Constitutions in a Nonconstitutional World" seems to be the first book-length publication on MENA constitutional politics in Political Science for decades. If the discipline had generally eschewed this genre for a long time, Brown specifically argues for the relevance of constitutional analysis under conditions of authoritarianism. As alluded to above, he argues against the cynical view – as he calls it – that constitutions do not matter in that context. Rather than creating false pretences, constitutions of authoritarian regimes often spell out quite frankly the nature of the political system. In any case, even supposedly authentic constitutions can obscure important factors of power distribution within a political system such as the party or electoral system, which tend to be regulated in ordinary legislation and whose dynamics can be considerably removed from constitutional text. Finally, even under Arab authoritarianism, constitutions are "rarely blatantly violated; problems stem from the content of their clauses and more portentously from their silences" (Brown 2002:7). Most of the time, regimes interpret constitutions plausibly, if often authoritarian. In other words, even authoritarian regimes mostly adhere to constitutions. What is the purpose of constitutions, then, if they do not serve the ends of (liberal democratic) constitutionalism? Brown suggests three functions: First, they are an expression of sovereignty as constitutions have become so common as to now be part of the basic infrastructure of statehood itself. This is related to another purpose constitutions can serve under authoritarianism: rather than constraining the state, they help structuring and thus enhancing power. Indeed, elsewhere Brown (2003:50) observed that "[r]ecent constitutional developments are also remarkable in how much they effectively separate constitutionalism from democracy". Finally, and as discussed in the above section, constitutions "may serve the purpose of proclaiming basic ideology" (Brown 2002:11).

Another groundswell of interest in constitutional politics emerged around the Arab Uprisings in 2011, not least as numerous new constitutions and constitutional reforms "took centre stage in the political debate in and about the Middle East and North Africa" (Storm 2014). A significant contribution to the debate, which examines both fundamental conceptual and historical questions in the field is the edited volume "Constitutionalism and in Islamic Countries" (Grote and Tilman Röder 2012), which is dominated by legal scholars and reflects research that began before the uprisings. "Islamic constitutionalism", the authors argue has taken multiple forms. While only a minority declare themselves Islamic states in the constitution, most declare Islam as the state's official religion – a provision with few direct

consequences. Yet a significant number of Muslim majority states have also opted to include Shari'a as "a" or "the" main sources of legislation, among them republics, monarchies, and even socialist states. The authors explain this largely as a "major concession to, or pre-emptive appropriation of, a central tenet of fundamentalist constitutional thought, which reflects the mythical notion of the Islamic state as the primary agent for the execution of the Shari'ah" (Grote and Tilmann Röder 2012:10–11). The actual impact of this clause varies depending on the institutional arrangements in each state. This heterogeneity underlines the multiple interpretations of any kind of Islamic constitutionalism that are possible and practiced. A chapter on constitutionalism in the Maghreb (Le Roy 2012) zooms into that region's experience. It affirms Brown's findings that the purpose of the first post-independence constitutions in the region was largely to legitimize governments,<sup>8</sup> and strengthen young states rather than the individual rights of their citizens. Le Roy points at the frequent constitutional reforms and other efforts by regimes to adhere to ensure that their political decisions remain in the formal legality to argue that the authoritarian governments of the Maghreb believed in the normative or political value of their constitutions, or both and features of (liberal) constitutionalism are present in the form of mechanisms to ensure its tenets, such as constitutional councils. The influence of constitutional law is thus largely limited to relations between political actors, rather than state and citizens. Imprecisions in constitutional provisions allow state institutions broad interpretative flexibility, which is mostly used to favour the executive.

Since the Arab Uprisings have resulted in a new wave of constitution-making processes, scholarly interest has followed events. The earliest publications were often more akin to technical reports and aimed at providing an introduction to the general challenges of constitution-making to practitioners on the ground (e.g. Brown 2011). Beside this, international institutions and NGOs produced numerous publications on constitutional principles for constitution-makers during the process processes as well as technical reports on the events and organisations' contribution to them (e.g. Center for Constitutional Transitions 2014; Proctor and Moussa 2012; The Carter Center 2015). Soon, scholars situated events within existing theoretical approaches, such as Arjomand (2012:204–5) who argued that the revolutions in Tunisia and Egypt were "constitutional revolutions", i.e. "instances of political reconstruction that follows a political revolution or regime change" and situated events in

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<sup>8</sup> The author specifically mentions here the example of the rivalry between Tunisia's monarch and the charismatic independence leader Bourguiba, whose authority would be bolstered by a constitution vis-à-vis the traditional authority of the Bey.

these and other Arab countries within his larger sociology of constitutional politics. Individual case studies of CMPs have assessed issues such as the “optimal modality of constitutional processes” (for Tunisia, see Maboudi 2019) or argued for constitutions’ political, rather than purely legal quality (Lang 2013 uses the case study of Egypt to make this point). Comparative studies have argued that CMPs can at the outset be “designed to keep radical forces and ideas away from the drafting table” (Parolin 2014:31), sought to explain the variety of outcomes from CMPs (Cross and Sorens 2016 highlight political polarisation among key explanatory factors), or investigated the impact Islam has had on constitutional norms and institutions like gender equality, judicial independence, or parliamentary power (Gutmann and Voigt 2015)

The 900-plus pages of an edited volume by Grote and Röder (2016) are certainly an excellent source on the constitutional developments following the uprisings, covering conceptual and empirical matters arising from the events, largely from the perspective of legal scholarship. Some of the key findings of the volume are that the upheavals only produced significant constitutional change in two countries, Egypt, and Tunisia. Overall, the dim continuity of repression outweighs the smaller legal changes heralded by the uprisings as only Tunisia emerged with an institutional setup that can be hoped to implement the individual rights proclaimed in the new constitution. Indeed, while Islamists have overall been unable to translate their ideological visions into successful blueprints for new institutional arrangements, the constitutional processes have – with the exception of Tunisia – even fuelled existing polarisation between Islamists and non-Islamist segments of the societies in the MENA region. Where scholars have studied political actors’ behaviour in constitutional processes, much attention has focussed on Islamist movements. Netterstrøm (2015) highlights the mostly secular nature of the Tunisian 2014 constitution in the face of Tunisian Islamist group Ennahda’s plurality in the constituent assembly. He argues that Ennahda made these concessions knowing that while its rank-and-file wanted to e.g., include a reference to Shari’a in the constitution, such a draft would not gain the necessary two-thirds majority among the members of the assembly. In the comparative volume by Frosini and Biagi (2015), the chapter on Tunisia by Pickard (2015) similarly deals with the moderation and compromise Tunisia’s most prominent Islamist group has engaged in constitution-making. Pickard argues that beyond the religio-ideological aspects of the constitution, Ennahda also compromised on the political system and the transition after constitution-making. In a think tank piece, Marks (2014) makes similar arguments. Focussing on the influence of labour movements, Hartshorn (2017) finds that Tunisia’s powerful UGTT was more able to take influence on the constitution-making process from outside the formal institutions than Egypt’s less powerful

equivalent, which was formally included in the process. Analysing three historic episodes of constitution-making in Egypt, Lang (2013) argues that these processes as well as constitutionalism itself are deeply political rather than technical and bureaucratic, but that this is preferable as it benefits political life generally and constitutional politics in particular.

While principally a domestic process, Lang also finds that constitution-making in Egypt was marked by the global political context. Among other influences on the process, Maboudi (2019) finds that citizen suggestions on the draft constitutions were mostly taken seriously by NCA members and particularly likely to be reflected in the final constitution in the rights and freedoms section. Overall, 43 per cent of public proposals were considered in the final draft. Analysing online citizen feedback on Egypt's 2012 constitution, Maboudi and Nadi (2016) demonstrate that prior to the boycott of the Constituent Assembly by secular forces, articles were more likely to change when citizens expressed their disapproval online and vice-versa.

The implications of the Arab uprisings for the study of constitution-making more generally are discussed by another set of publications. The importance of the period between the events that triggered constitution-making and the beginning of the drafting process is highlighted by Jermanová (2019), who focusses on the case of Egypt and Parolin (2014) who compares Egypt to Tunisia. If the drafting process and its institutional intricacies have been studied in depth, important decisions are often taken previously that affect the conditions under which constitution-making itself operates, be it the institutional framework of drafting or the pathway dependencies that produce the political context within which the drafting happens. While these are valid points, they largely resemble Elster's (1995:373–75) framework who distinguished between *upstream* and *downstream* constraints on constitution-making.

Another strand of literature uses these events to call for and practice analytical refinements. Zemni (2014) argues that the Tunisian transition after the fall of the Ben Ali regime represents a case of “extraordinary politics”, i.e. a period of comprehensive politico-social overhaul with the aim to radically transform power relations within society. For Arjomand (2013), the “new constitutionalism”, in which domestic and supranational judiciaries are given wide powers to constrain anti-constitutionalist policies, has also affected the contemporary MENA region. Its societies have left the ideological constitutionalism of the 1960s and 70s behind and even Islamist movements in Egypt and Tunisia effectively propose Islam and Shari'a as a limitation on popular sovereignty rather than its alternative.

Some scholars have also begun to combine the themes of citizenship, constitutions, and constitutionalism in their analysis. Bernard-Maugiron's (2018) analysis of the status of the

citizen in the two most recent Egyptian constitutions is an example. She highlights the fact that since 2007, the Egyptian constitution features the word “citizenship”, followed by an analysis of the 2012 and 2014 constitutions. In her view, the binary contrast often made out between the first document, written under the influence of the then-ruling Muslim Brotherhood and the second, produced in a process dominated by secularists, is false. While the list of citizens’ rights has expanded, continuity in the substance of the constitution, its elaboration, and implementation, outweighs change: in an authoritarian regime, the liberal commitments remain largely theoretical.

Besides Santini’s (2018) chapter on citizenship through the lens of the constitutional process and its 2014 outcome, Longo (2016) has studied Tunisia’s constitution-making process and argues that its ratification by a large majority in the National Constituent Assembly reflects a consensual constitution as well as the rise of a new constitutionalism based on citizenship. His argument is largely based on the contestations around Article 1 of the constitution and the inclusion or otherwise of Shari’a as *a* or *the* source of legislation. These resulted in a compromise whereby Article 1 of the 1959 constitution, which declares that Islam is the Tunisian state’s religion, is maintained while no reference to Shari’a is made at all.

In sum, literature on constitutions and constitutionalism in the MENA region was relatively late to emerge, but a review provides important insights into the purposes of constitutions in authoritarian settings while casting aside the notion that constitutions do not matter there. They do. A consequence and, later, amplifier of existing power relations, MENA constitutions have not fulfilled the original liberal constitutionalist purpose of constraining the state but have rather enabled and, indeed, empowered it vis-à-vis citizens as well as providing legitimacy for this arrangement domestically as well as internationally. The Arab Uprisings in 2011 and the constitutional processes that followed it have barely changed this in most Arab countries. Only Tunisia is identified as a country in which the new constitution provides an institutional arrangement, which in conjunction with other factors can be hoped to ensure liberal democratic citizenship.

### *2.5 Theory: Historical sociology’s approach*

In light of the conceptual discussions above, constitutions are conceptualised as partial expressions of social contracts which codify certain political and social values and thereby provide them with certain levels of legitimacy and permanence. The idea and practice of that social contract, then, is best analysed through the lens of the multidimensional concept of citizenship.

This thesis traces changes in political ideas and practices on the assumption that the two are closely related. Analysing longer stretches of time, political theorists have tracked ideational changes by examining texts of political thought (cf. e.g. Pocock 1975; Skinner 1978a, 1978b), political attitude studies have used large-scale polling to track and explain changes in political ideas (e.g. Almond and Verba 1989) whereas critical discourse analysis has been applied to more contingent cases, both thematically and temporally (Fairclough 2001).<sup>9</sup> If Critical Discourse Analysis puts a particular emphasis on the interplay between power and ideas, political theorists have illuminated this aspect in their work, too. Positioned in between the *longue durée* and the contemporary, this study has adopted a theoretical approach that borrows its tools from historical sociology to explain ideational and behavioural change in Tunisia.

To answer the research questions put above, this thesis works within the tradition of historical sociology. While approaches differ, historical sociology's ontology usually does not privilege either structure or agency, in part using the longer period under observation to explain their complex interplay instead to explain social phenomena. Seminal work on the MENA region was conducted by Gerber (1987) and Hinnebusch (2010) amongst others. Thus, Hinnebusch for example summarises his ontology concisely by stating that "Elites and social movements provide agency while institutions and economic infrastructure constitute the structure, with each interacting to explain outcomes" (2014:2). There is large agreement among social scientists that "history matters". The concept of path dependency formalises this assumption theoretically and is used to explain how decisions by agents in the past can trigger self-reinforcing processes resulting in the persistence of an equilibrium in which agents face a set of incentives that provide near-structural limitations on their current decision-making (Pierson 2000, 2004). This way, pathway dependency helps explaining the persistence of certain norms and practices, which have come to be seen as "normal" as well as their sometimes apparently sudden change. On the whole, the literature in these approaches makes causal explanations on the basis of observations on the macro-level. To provide an example, Hinnebusch (2006:391) explains the persistence of authoritarian regimes in the MENA region with the historical legacy of its societies, which include

limited modernization, an unsolved national problem, and particular class configurations  
aborted early limited democracies. Their authoritarian successors found the resources to build

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<sup>9</sup> For a contemporary study employing Critical Discourse Analysis in the Tunisian context, see Preysing (2016) on the Transitional Justice in post-revolutionary Tunisia.

robust modernized forms of authoritarianism congruent with this environment. These regimes constructed institutions incorporating sufficient social forces to enable them to manage their societies, thus raising the threshold of modernization beyond which authoritarian governance becomes unviable.

When economic pressures increased, including those originating from a global shift toward neoliberal economic governance, selective liberalisation was able to moderate its effects. For Hinnebusch, this legacy has left two paths available toward a more balanced state-citizen relationship: reform from the top or regime collapse and a subsequent negotiated democratisation.

## *2.6 Methodology*

By analysing the change of political ideas held by political actors, as well as the level to which they dominate the debate during a period of significant political change, this thesis traces multiple “moving targets” as variables: both ideational and material factors undergo change during the period of assessment and mutually influence each other: Citizenship and its manifestation within constitutions as well as the constitutional documents themselves are subject to and the result of intense political contestation. The behaviour of political agents involved in these contestations is determined to a large degree by the structural conditions within which they act. However, as the outcomes of – among others – constitution building alter the structural plane on which political processes are negotiated, the behavioural determinants of agents also change – as a result of their own behaviour.

This thesis’ research design is thus devised on the assumption that there is no unidirectional causality between these two variables. The ontological and epistemological starting point of this thesis is that there is no objective social reality that is to be discovered, but that knowledge is always socially situated. Thus, building on a broadly interpretivist ontology and epistemology, it is argued that neither material nor ideational factors alone can account for the outcomes of the process under investigation (cf. Hay 2002:205–15). Rather, the complex interplay between these forces will be the part of the analysis.

### *2.6.1 Tunisia as a case study – an interpretivist approach*

This study adopts a interpretivist framework, not least informed by Habermas’ and others’ insights about the deficiencies of positivism (e.g. Habermas 2004 [1963]). The methods adopted in the study follow from that decision as well as the conception of citizenship and constitution as institutions and practices as outlined above: They encompass process-tracing,

document analysis, and semi-structured interviews. In the social sciences, case studies can serve different purposes, not least depending on the researcher's epistemological stance. Bennett and George (2005:5) define the case study approach as "the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events". In adherence to the positivist and critical realist approaches, case studies can therefore be used in comparative and other studies for theory-building as well as the testing of hypotheses. Their usefulness here lies in the possibility to compare the effect of differing independent variables upon the dependent variable in contrasting or similar cases to establish causality and identify regularities (della Porta 2008). The authors of the influential *Designing Social Inquiry* (King, Keohane, and Verba 1994:118) are dismissive of studies with a small number of cases, fearing selection bias and stating that "virtually nothing can be learned about the causal hypothesis" if only a low number of cases is compared as the relationship between dependent and independent variable is not observed in a sufficient number of instances. Yet this critique appears mainly applicable from the perspective of regression analysis. It is less valuable for qualitative case study research designs (Collier, Mahoney, and Seawright 2004:99). A key advantage of case studies over other comparative approaches is that its more detailed description of phenomena allows for the thorough investigation of complex causalities (George and Bennett 2005:10; 12–13). Their apparent deficiency – the lack of representativeness of the empirical data – is not seen as such by case study researchers (ibid: 30-31). Rather, by studying in depth one or a small number of cases (e.g. using process tracing) their contribution lies in the development of theory pertaining to a larger class of phenomena (Vennesson 2008). Or in the words of Yin (2009:15), "case studies, like experiments, are generalizable to theoretical propositions and not to populations or universes". While this is an argument for case studies largely situated in the positivist frame, critical realists and interpretivists tend to be much more open to case study methodology in the first place given their epistemological stance. Unlike positivist research, such investigations do not necessarily seek to produce knowledge about phenomena that is representative and thus fully generalizable. Rather than narrowing down the investigation on causal linkages between variables, using process tracing, the interpretivist researcher may focus on "the reasons actors give for their actions and behaviour" (Vennesson 2008:233). In sum, the case study approach allows the researcher to go into depth in explaining and describing a phenomenon in a way that other approaches do not permit and thereby contribute to theory. The analytical approach developed below as part of this investigation is applicable to similar studies elsewhere. Yet why would Tunisia come into consideration for an

investigation about citizenship, constitutions, and constitutionalism in the Arab world after the 2011 uprisings?

Regionally, Tunisia can be classified as an outlier case. Murphy (2013a:232) has argued that its short-lived 1861 constitution – the first in the non-European world – has “established a preference among Tunisian political elites for institutional constraints on the exercise of power.” Nonetheless, successive regimes and rulers since the 19th Century have governed with little accountability vis-à-vis the population (Perkins 2014). Yet, Tunisia was the first North African country in which large-scale protest erupted in late 2010, which unseated long-time ruler Ben Ali. It also remains the only country of the so-called Arab Uprising in which political change outweighs continuity without falling into civil conflict. In most MENA states, authoritarianism has persisted and in some even intensified since the mass uprisings in 2011 whereas Tunisia has held multiple free and fair elections and introduced a liberal-democratic political system (Hinnebusch 2014; Rivetti and Di Peri 2016; Völkel 2016). As the well-reported events in the country triggered similar protests across the entire MENA region in 2011, Tunisia is considered by some to have a signal role for political actors in other countries in the region. Some even argue that it can serve as a model for other Arab societies (Ghannoushi 2014) while others emphasise that the factors contributing to the outcome of its political transition are evidence of “Tunisia’s uniqueness relative to the rest of the region” (Masri 2017:21). It remains one of few places across the Arab MENA region where political ideas can be openly articulated and fed into the political process. An exploratory analysis of the forces militating for and against the implementation of liberal democratic citizenship and constitutionalism under these circumstances, which may be considered more benevolent than elsewhere, can thus generate findings of relevance for other cases, too.

### 2.6.2 Process Tracing

The methodology and in some parts method employed in this research is based on process-tracing (Bennett and Checkel 2015a; Collier 2011; Vennesson 2008), a qualitative approach particularly suited to unpack the complex causalities involved in constitution building. This chapter has proposed above that citizenship be examined via constitutional text as well as practice. This implies that, first, the process of constitution-making is investigated to examine how the particular configuration of citizenship within the constitution (including the norms, ideas, and power distribution) is arrived at via political contestation – a complex process that includes multiple arenas within which agents negotiate and renegotiate. Second, the investigation encompasses how the constitution is implemented to examine how the idea of

citizenship codified in the constitution evolves over time in political practice and to what extent the latter corresponds to the former. Process tracing is a suitable methodology to approach such processes. Process tracing refers to “the examination of intermediate steps in a process to make inferences about hypotheses on how that process took place and whether and how it generated the outcome of interest” (Bennett and Checkel 2015b:6). The researcher analyses “the decision process by which various initial conditions are translated into outcomes” (George and McKeown 1985:35 cited in King et al. 1994:226). Previously often applied implicitly, this method has recently become more formalised and is proposed as a way to unpack complex causalities (Bennett and Checkel 2015a; Checkel 2006; Collier 2011). It is principally compatible with different social ontologies that assume the possibility of some causal explanation. To explain how events or situations unfold over time, process tracing relies on careful description. “Yet grasping this unfolding is impossible if one cannot adequately describe an event or situation at one point in time. Hence, the descriptive component of process tracing begins not with observing change or sequence, but rather with taking good snapshots at a series of specific moments“ (Collier 2011:824). To analyse the process under investigation, process tracers rely on various data sources that inform the researcher about the decisions taken by the various actors involved in the process and how these are motivated. As in the choice of methods in this study, process tracing in general often includes the extensive use of secondary sources such as press accounts and memoirs in combination with primary data from (elite-level) interviews, surveys, and documents, but also quantitative data. A specific advantage of the thorough analysis of decision-making is that it puts process tracing in a good position to study the specific mechanisms of causality (Checkel 2006) and the influence of ideas on politics. Carstensen and Schmidt (2016) have provided a useful taxonomy for the latter, distinguishing power through, over, and in ideas. Power through ideas is closely reflected by the concept of persuasion invoking ideational resources such as arguments. Power over ideas describes the ability of agents to determine the range of available ideational resources for consideration, such as interpretations of policy problems. Finally, while the previous two concepts focus on the attempts of agents to influence others using ideas, power in ideas is about “the background ideational processes – constituted by systems of knowledge, discursive practices and institutional setups – that in important ways affect which ideas enjoy authority at the expense of others” (Carstensen and Schmidt 2016:329). The institutionalisation of certain ideas through, e.g., constitutions, sets up path dependencies of (ideational) continuity. After delimiting the temporal scope of the inquiry and discussing the analysis as a case study as well as the ontological and epistemological stance of

the thesis, the remainder of this chapter will outline how process tracing will be operationalised in this thesis, specifically outlining the selection, collection, and analysis of data used.

## 2.7 Constitution-making as critical junctures

A *critical juncture* is defined as “a period of significant change ... which is hypothesized to produce distinct legacies” (Collier and Collier 1991:29) and therefore closely related to the idea of path dependency. Crudely put, underlying this concept is the idea that some time periods matter more for the development of a polity than others and consequently are more deserving of analysis. Constitution-making as a particularly consequential political process can also be conceptualised as a critical juncture (cf. Jamal and Kensicki 2016). The key elements of the concept in the framework of Collier and Collier (1991:30–31) are:

1. The *antecedent conditions* that represent a “base line” against which the critical juncture and the legacy are assessed. (...)
2. The *cleavage* (or crisis) that emerges out of the antecedent conditions and in turns triggers the critical juncture
3. Three components of the *legacy*: a. *Mechanisms of production* of the legacy. The legacy often does not crystallize immediately after the critical juncture, but rather is shaped through a series of intervening steps. b. *Mechanisms of reproduction of the legacy*. The stability of the legacy is not an automatic outcome, but rather is perpetuated through ongoing institutional and political processes. c. The *stability of the core attributes of the legacy* – that is, the basic attributes produced as an outcome of the critical juncture (...)
4. *Rival explanations involving “constant causes,”* which (...) represent one of several types of rival explanation that must be considered.
5. The eventual *end of the legacy*, which inevitably must occur at some point.

Building on this framework, this thesis analyses periods of constitution-making, which as the previous chapter has outlined are often triggered by and result in important political changes, as critical junctures. By providing an outline of the practices of citizenship and constitutionalism prior to the intensification of contact with Europe in the 19th Century, the thesis establishes the *antecedent conditions* of the first critical juncture, whose legacies – institutionally and ideationally – in turn contribute to the antecedent conditions of the following critical junctures.

Soifer (2012:1591) has made a useful distinction that critical junctures only occur when both permissive and productive conditions coincide. In Tunisia’s political history, this was the case

with the political convulsions that surrounded its three CMPs, from which the three constitutions analysed in this thesis emerged. In the presence of permissive, but absent productive conditions, Soifer argues that a crisis without change/missed opportunity occurs. This thesis argues that the change of power from President Bourguiba to President Ben Ali, from which the National Pact of 1988 emerged, is such a missed opportunity, which is nonetheless worth examining in the context of this research.

## *2.8 Data selection/sampling: Key documents*

The process tracing suggested here follows the decision-making of a number of key participants in the processes of constitution-making and seeks to explain how this contributed to the outcome of this process (the legacy of the critical juncture), which is the idea of citizenship reflected in and impacted by constitutional texts. In a narrow sense, the constitution-making process consisted of the drafting of the text of the constitution by the members of the respective deliberative bodies (their selection differed across the three constitution-making processes). A broader conceptualisation takes into account the multiple arenas and processes of political contestation that contributed to the drafting, including civil society and other lobbying of the drafting deputies, contestation between the latter, street protests and so on (Redissi and Boukhayatia n.d.; Redissi, Nouira, and Zghal 2012; The Carter Center 2015). Both the nature of the processes and its key participants are problematised in more detail in subsequent chapters of the thesis, but before outlining the data used in the thesis it is worth providing an indicative list of participants<sup>10</sup>:

- Governments (Tunisian administrations and foreign governments)
- Political parties and their representatives
- Individual members of the deliberative bodies
- The Tunisian public
- Civil Society organisations (Tunisian and international)
- Economic actors
- Experts such as local and international legal advisors
- International organisations.

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<sup>10</sup> Note that these are not mutually exclusive or static in the course of the constitution-making process. Individuals have moved between these categories in the course of the constitution-making process, e.g. as social movements have become more institutionalised in CSOs and political parties or as individuals have moved from pressure groups to holding public offices.

The data analysed in this thesis, then, needs to inform the analyst about the behaviour and attitudes of such actors both during and before the transition to establish the antecedent conditions. As indicated above, process tracing as a method relies on a multiplicity of data and in this case, this will mean a combination of selected documents, interviews, but also the consultation of specialised publications, including both academic and more journalistic books and journal publications on Tunisian political and social history as well as media coverage of the transition, specialised publications, and opinion polls.

While both the literature and interviews provided useful data about the overall process of the constitution-making process, the analysis will zoom in on specific situations during the critical juncture periods – “snapshots” – within the process-tracing period of the critical juncture. Actors’ decisions at these points determine the subsequently available paths of action. The approach is summarised in figure 3.1. To some extent, there is an overlap between the four stages of analysis proposed here and the periods of study Jermanová (2019) identifies in constitution-building. It is also worth highlighting that this framework of study is applicable to investigations into citizenship and constitutional (re)-development universally.

In the case of Tunisia in this thesis, it is applied to the following four critical junctures, each of which represents an episode of constitution-making (or similar), following and producing significant change:

The 1861 constitution – the first one outside Europe and North America.

The 1959 constitution, adopted after Tunisia gained independence in 1956 and in a process that was skewed to maximise power in the hands of the country’s first president, Habib Bourguiba (Perkins 2014:136–38).

The 1988 “National Pact”, drawn up by the new government of Tunisia’s second President Ben Ali and the country’s main opposition groups in a political climate that appeared to promise a political opening and more pluralism (Perkins 2014:194). The process contains features of a constitution-making process. The process and its result are being considered in conjunction with the constitutional amendments enacted at this time.

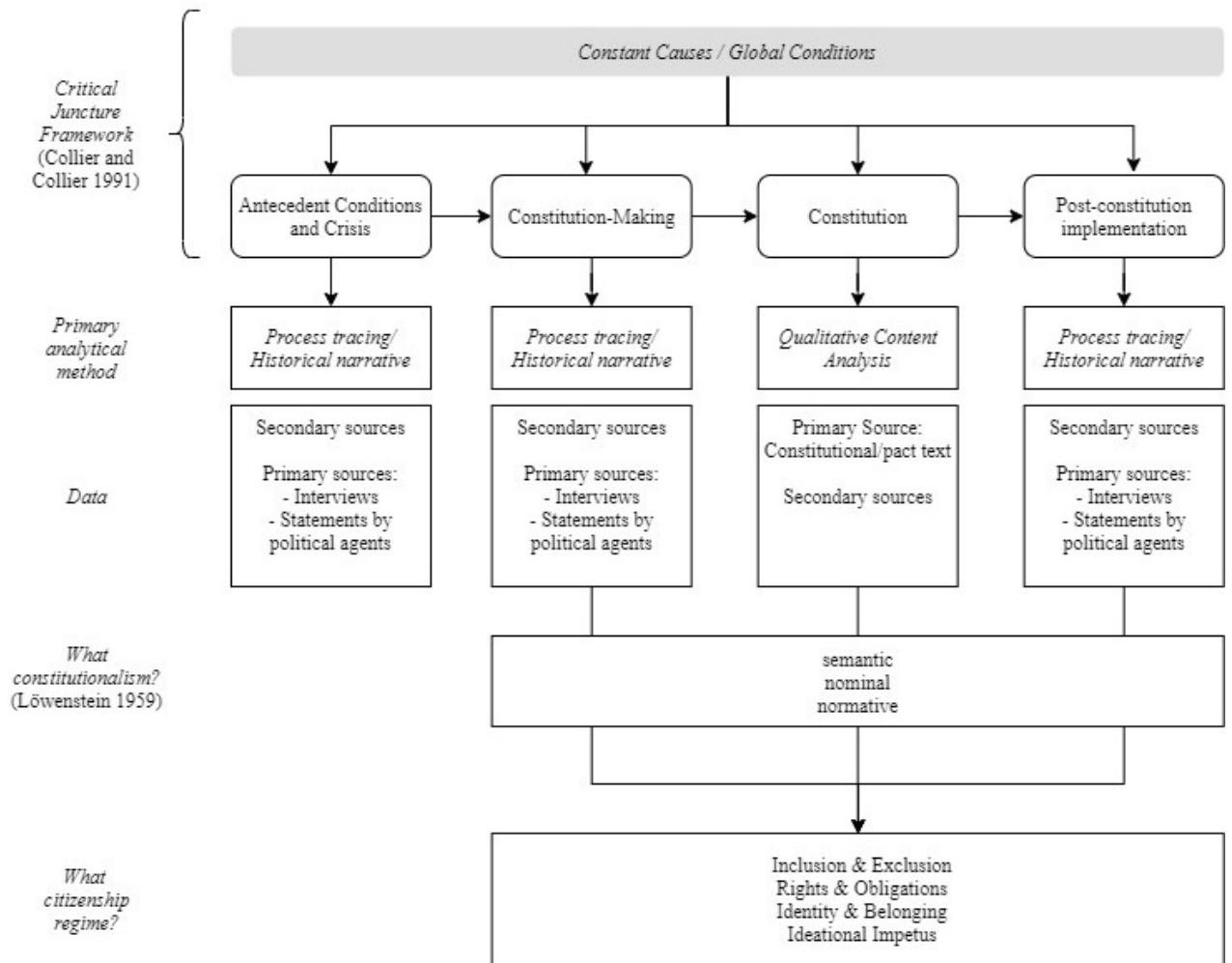


Figure 2.2 – Summary of the thesis' methodological approach

The 2014 Constitution, which resulted from an unprecedentedly open and pluralistic process after the protest-induced fall of the Ben Ali regime.

### 2.9 Data collection

The different sources of data outlined above, key documents, semi-structured interviews, and numerous publicly available secondary sources require different methods of data collection.

The three Tunisian constitutions are available in Arabic, French, and English. In the analysis of the documents, it is necessary to pay attention to how certain terms (e.g., crucially, citizenship, have been used in Arabic and translated into English and French).

Multiple constitutional documents as well as the 1988 National Pact were sourced from Tunisia's National Archives in Tunis. The analysis of these documents, beside representing a set of data in themselves, fed into the construction of the antecedent conditions.

The final set of data is drawn from interviews. At this stage, three key groups of interviewees can be identified, representing important participants and observers of the constitution-making process 2011-2014, and as such, informants for this study.

1) *Members of the National Constituent Assembly (2011-2014)*. The representatives elected in the first poll after the revolution in 2011 were the most central actors in the constitution-making process as they were the ones negotiating the text of the basic law. As many political groups and regional representatives as technically possible were included in the selection of interviewees from this group. While politicians who have been re-elected as members of the Assembly of the Representatives of the People in 2014 were relatively easily contactable for interviews, others were less reachable. However, a particular hesitance to participate in research was noted among politicians of the Tunisian left.

2) *Civil society/social movement actors*. A number of civil society organisations have not only been actively involved in the drafting process by lobbying for particular changes in the constitution, but also continuously observed and assessed the process. Members – both current and former – of these organisations were particularly helpful in supplying information as well as pointing at further individuals to interview.

3) *Informed observers/discourse participants*. This includes officials of international organisations and foreign states. Tunisia has received considerable international “technical” support in the constitution-making process including from legal scholars, both Tunisian and international. Interviewees in this group were an important source of information on the process, often able to contextualise and compare Tunisian events of 2011-14 to precedent and other cases of constitution-making.

After an initial list of interview candidates was drawn up and contacted, snowballing (cf. Atkinson and Flint 2004) helped both in expanding the list of relevant interviewees as well as establishing contact to some individuals already the list. This was particularly the case as personal recommendations and relationships often play an important role in motivating research participation in Tunisia.

All research interviews took the form of semi-structured interviews. A specific script with topics to be covered was prepared for each of the above group, with questions that may be adapted during the interview depending on the situation (e.g., time constraints) and/or interviewees’ specific roles and expertise. This format allows for a more dialogical quality of the conversation, as well as more depth and flexibility for the researcher in discussing the topics than an interview structured along a fixed questionnaire. At the same time, it does permit a degree of comparability of the answers between interviewees, which an entirely unstructured interview would not necessarily allow (Bryman 2008; Kvale and Brinkmann 2009). Where possible and permitted by research participants, the interviews were voice

recorded and subsequently transcribed. Though in all cases, the interviewer took extensive notes to draw upon in analysing the data. Only a minority of interviewees objected to voice recording.

In accordance with Durham University Health and Safety regulation, the interviews were held in organisations' offices or in public places. Durham University's Fieldwork Manual moreover requires that interviewees provide written consent to participating in studies. Other Durham-based researchers and I have made the experience that Tunisian interviewees can be very hesitant to provide such written permission. This may be connected to Tunisia's long and still relatively recent authoritarian history. Under the previous regime, any such paperwork was often part of a relationship of domination, where the person demanding a signature would have some power over the one signing. Following a first round of interviews, in which I noted the hesitancy of research participants to sign a form (particularly among non-elite interviewees), permission was sought from and given by SGIA's Research Ethics Committee to work with participants on the basis of oral permission.

### *2.10 Data analysis: Qualitative content analysis*

To assist the analysis of the competing notions of citizenship in the context of constitution-making, this study has used qualitative document analysis (Bryman 2004). At this point, it is worth noting some particularities of the documents analysed in this project. The latter are often authored by more than one person and specifically political - and in some instances legal - documents emerging out of a process of negotiation. This is clearly the case with several of the texts considered for this project. Thus, as critical discourse analysts have pointed out, texts can become "sites of struggle in that they show traces of differing discourses and ideologies contending and struggling for dominance" as "discursive differences are negotiated within them" (Wodak 2001:11). These struggles were considered in the analysis of these texts.

The documents were approached with a number of questions, pertaining to their relation to the political events they relate to and, specifically, how they conceptualise citizenship in the four dimensions elaborated above<sup>11</sup>:

- How is citizenship conceptualised in the text?
- To what extent does this text reflect the existence of a social contract? How?
- What are the traces of the institutional framework in which this text was authored?

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<sup>11</sup> 1) Inclusion and exclusion, 2) Rights and obligations, 3) Identity and belonging, and 4) Ideational impetus

- What are the traces of the specific political situation in which this text was authored?
- How does this text relate to its broader socio-political and historical context?

Multi-author texts such as the 2014 and previous constitutions will additionally be approached with questions such as:

- Do the different parts of the text combine to a coherent whole?
- Are there contradictions within the text?
- Which elements of the text reveal a particular author's influence?
- Does one author or a particular group of authors dominate the text?
- What is left out? Why? What are the implications of the non-decision?

Texts that originate more clearly from one author, or a coherent group of authors, such as a political party, will be approached with different specific questions, particularly pertaining to their argumentation:

- What argument structures are used?
- What assumptions, beliefs and values are conveyed in the text?
- To what extent can we assume that the beliefs and values conveyed are actually held by the author?

### *2.11 Alternative options rejected*

Two alternatives have been considered but rejected in drawing up this research design: A comparative approach and conducting survey research. However, both theoretical and practical reasons speak against this. Firstly, a single case study allows the researcher to go into much more depth than a comparative study would have. The theoretical and empirical insights gained from that could then feed into future research projects in other countries. As for the use of large-n polling data, this has been rejected for two reasons. Within the scope of this PhD thesis, it would be challenging to achieve a sufficiently high response rate and to gain a sample that is representative of the whole country, not least due to security concerns in some parts of the country. Secondly, there is publicly available high quality polling data on related questions by research organisations such as the Arab Barometer, Afrobarometer and ArabTrans, as well as the European Union and other organisations (e.g. European Union 2013; International Republican Institute 2012). The thesis can thus refer to that data rather than generating its own primary data.

## *2.12 Conclusion*

This chapter has outlined the thesis' theoretical and conceptual approach, research questions, its methodology and the research methods used to investigate the changing relationship between citizenship, constitutions, and constitutionalism in order to understand the nature of political change that occurred following the Ben Ali regime's fall. To operationalise citizenship as an analytical concept, the concept was subdivided into four dimensions. Having outlined the roles and functions of citizenship and constitutions generally and in the context of the MENA region specifically, the chapter argued that these provide a useful lens to study changing the social contract between state and citizens, and thus, political change. This is not least because constitutions also matter under conditions of authoritarianism, as these generally prefer following formal legalism, even if the law is highly repressive. Consequently, in authoritarian regimes constitutions are surprisingly reflective of political practice. Constitutions also matter because they provide insights into the norms and values espoused by its authors who prove less shy about stating their normative commitments in such documents than may be assumed.

Building on a broader understanding of constitutions that includes their genesis and implementation as key elements, the analytical approach of the thesis focusses on four critical junctures, episodes of significant institutional and ideational change to answer its research questions. Entering the juncture with certain antecedent conditions, each episode leaves specific legacies that generate pathway dependencies and represent the antecedent conditions of subsequent junctures. Within an interpretivist approach, the thesis uses process tracing, qualitative document analysis. Data was gathered in multiple rounds of fieldwork in Tunis, which besides semi-structured interviews also included the gathering of documents at local libraries. This approach was developed for its ability to unpack causalities in political change, which are reflected in the complex relationship between citizenship and constitutions.

### **3 Early citizenship and constitutionalism: Islam, state-building, and colonialism**

#### *3.1 Introduction*

The purpose of this chapter is twofold: In summarising some key elements of political ideas, institutions, and practices that were dominant prior to the mid-19th Century, the chapter identifies the *antecedent conditions* that precede all periods studied in this thesis. It also analyses a first critical juncture in the development of conceptions and practices of citizenship and constitutionalism in Tunisia: the country's first constitution in 1861. Reflecting larger structural changes, the document, and the events around it provide insights into important ideational and political contestations in the mid- to late 19th Century, their legacies and the pathway dependencies they generated. The chapter argues that this episode represents a fundamental break with past practices and institutions of citizenship by codifying individual rights vis-à-vis the state and circumscribing state power, which also contributed to an embryonic secularisation of the public sphere. Moreover, despite its brevity, the 19th Century constitutionalist episode anchored constitutionalism in the fabric of Tunisian political ideas and practices while contributing to the emergence of a tradition of Tunisian reformism. Evidencing pathway dependency, later reformers drew on both, arguing that they form a part of Tunisian identity. As European influence over Tunisia increased, so did the influence of liberal political ideas such as equal citizenship. The tensions between these ideas, existing and emerging practices, ideas, and institutions would continue to be a key dynamic within contestations around citizenship, constitutions, and constitution-making.

The chapter employs the analytical approach to critical junctures and constitution-building developed in chapter 2 above, beginning the analysis with an outline of antecedent conditions and crisis. The chapter first examines the influence of Islam on Tunisian society, followed by the social structures and practices present prior to the encounter with an increasingly empowered Europe in the 19th Century – whose growing presence in Tunisia triggered the crisis, opening the critical juncture under examination. Subsequently, the chapter analyses the process of constitution-making and the contents of the 1861 constitution as well as the legacies and pathway dependencies this pivotal episode in Tunisian political history generated. It is with the emergence of this first Tunisian constitution that the relationships between citizenship, constitution, and constitutionalism first manifests itself as the constitution becomes a relevant political institution in the country. The subsequent section on

the period of French colonial control over Tunisia shows that the impact of these pathway dependencies became apparent relatively quickly: Anti-colonial groups' central demand was the institution of a constitution and equality of Tunisian citizens with colonialists.

### 3.2 *Citizenship before the reform era*

#### 3.2.1 Tunisian citizenship prior to the modernisation reforms

Tunisia's homogeneity is part of its national myth (Sadiki 2002c, 2008; Zemni 2016). "As with most national myths," Murphy (2013a:243) notes "there is a degree of truth in this". Today, about 99% of the population are Sunni Muslims and most of them adhere to the Maliki rite, often portrayed as a more open and tolerant tradition than other interpretations of the faith. Islam was brought to Berber-dominated North Africa by Arabs in the 7<sup>th</sup> century and soon became a source of legitimacy for rulers. Subsequently, the Arabo-Muslim and Maghreb identities evolved as Tunisia developed into a political unit within first the caliphate and later the Ottoman Empire (Willis 2012:11–13). Claiming legitimacy from Islam, the region's new leaders also consolidated the religion's dominance, including "as a basis for 'legitimising any supratribal authority'" (Willis 2012:13). In its early phase, Islam had united multiple Arab tribes. Now served as a rallying point for Arabs and Berbers. Eventually, the Ottoman Empire conquered and established control over Tunisia in 1574. Its provincial borders were drawn up in 1588 when the Ottomans subdivided the whole Maghreb. Importantly, they continue to be the boundaries of contemporary Tunisia. After a short-lived attempt at direct Ottoman rule, the province would be headed by monarchic dynasties under Ottoman suzerainty until the French protectorate was established in 1881 (Sylvester 1969:34), when the ruling Husaynid dynasty's position became all but formal.

Like all major religions, its principles have been subject to multiple interpretations and provided justifications for an immense diversity of social practices and institutions (Esposito 2010; Teti and Mura 2009). Neither the Qur'an nor Muhammad himself stipulated a specific form of government or state (Ayubi 1993:4), yet the politico-cultural heritage of Islam continues to have an important influence on Tunisian society since it arrived there in the seventh century BCE. A 2014 poll underlines this: 16% of respondents agreed to the statement that "Islamic texts should form the foundations of all policy and law making" and 51% agreed that Islam's principles should be one consideration amongst others (International Republican Institute 2014).

For citizenship and constitutions, two issues in the Islamic tradition of political thought are worth emphasising: Individual rights and political leadership. For both, the influential position that worldly affairs ought not to be separate from spiritual questions in Islam matters greatly. In the seminal work of Sunni jurist Abu Hassan al-Mawardi (974-1058) and others after him, citizenship is undergirded by an ideational impetus that is religious first but also includes an “egalitarian potential” (Marlow 1997:4 quoted by Black 2011:54). Over time, Islamic scholars have used the religion’s sources to justify both equality and stratification with differentiated rights (Black 2011; Bowering et al. 2013). From the time of its inception, Islam established rules for non-Muslims, which were included “in various degrees of membership” (Hodgson 1978:193), allowing for heterogenous communities. Religious affiliation determined an individual’s relationship to the state including their rights and duties. Several recognised religious minorities received the still-debated status of *dhimmi*, or “protected ones”. Like Muslims, *dhimmis* received protection from external aggression, but they were required to pay a poll tax and could not fully participate in the state (Mitchell 2013). This institution may be held as evidence of an intrinsic tolerance in Islam – in comparison with uncompromising contemporaries such as medieval Christianity – but today serve as an example of discrimination. Given the historical example of leadership by Islam’s prophet Muhammad, who managed both spiritual and worldly affairs, many Islamic scholars argue that legitimate leadership in his succession still combines these responsibilities (Yücesoy 2013:247). That the leader must be Muslim is a logical consequence. If the dominant position on these matters in Islamic political thought remained largely stagnant for some centuries (Black 2011:187), developments in the 19th Century triggered a fresh look at the relationship between religion and politics in majority Muslim societies.

Tunisia existed as a political unit for centuries and comprehensive Arabisation left only localised Berber influences while the Arab language had come to dominate virtually the entire territory. As *dhimmis*, the small communities of Christian and Jewish Non-Muslims could live their faith if not propagate it. Religious courts had jurisdiction on personal status matters whereas criminal cases and those involving Muslims would be adjudicated by Shari’a courts. Political authority was, for the most part, centralised in the person of the bey who had the powers of an absolute monarch circumscribed by Islamic Law (Shari’a) – a constraint that cannot be said to reach constitutionalist quality though. While he had executive and legislative powers, as well as appointing the religious leaders in charge of the judiciary, the main check on the power of his government was its limited reach (Brown 1974:93–145; Moore 1965:9–11). The precolonial North African state was centralised, but “its arena of

control was not extensive nor was its supervision intensive. The common use of the names of the capital cities – Algiers, Tunis, and Tripoli – to designate the whole of the respective Ottoman provinces of North Africa suggests, in fact, the limitations of effective administration” (Anderson 1986:46). Ordinary Tunisians’ relationship to the state was therefore limited. Arguably, the dichotomous and complex relationship between Maghrebi cities and in the plains and coasts and the rural tribal hinterlands – each with their own political logics – is one of the most persistent features of the region. It preceded the Almoravid and Almohad dynasties and continues to be an important feature of the region’s politics (Willis 2012:12). Brown (1974:95) labelled the beylical political system at that time as “despotism”. Their administrations were unaccountable, and their subjects could become victims of arbitrary decisions. Those may have been rare, but the most promising strategy to avoid them was to limit contact with the state to the minimum.

Despite the apparent religious, ethnic, and linguistic homogeneity, Tunisian society was at the same time fragmented along the boundaries of relatively clearly defined groups which mixed only to a limited extent. In the mid-19th Century, a considerable part of the political class was not Tunisian. A case in point is that in line with Ottoman practice, the bey’s court staffed the state administration with Mamluk slave officers. They would typically be imported from around the Ottoman Empire to be trained in Tunisia and serve at the Bardo palace. The presence of this system contributed to the distance between ruler and ruled, though the homogeneity of that group should not be overstated and it did face Tunisification in the mid-19th Century (Oualdi 2016). Moreover, Tunisia’s aristocratic class was not indigenous and depended solely on the bey for their fortune. The majority of the country’s society, too, can be described as compartmentalised in different groups and enjoyed various degrees of autonomy (Moore 1965:13). Among the urban elites, the functional differentiation was between, for instance, the families of religious scholars in the *ulama* and the class of merchants and handicraft guilds of the *balidi* families. Divisions also existed between urban dwellers and those on the countryside. As for latter, the majority of the population were subsistence farmers who only sporadically traded on urban markets. The city-based government would effectively leave them to their own devices, allowing them to maintain “independent political organizations based on local kinship ties” (Anderson 1986:31). Despite good communication and ostensible homogeneity, there was little or no sense of national unity. Individuals thus lived within a number of overlapping communities with associated loyalties. Moreover, there is no easy differentiation of political communities from others. While localised communities are likely to have been key, the Ottoman sultan based in Istanbul also commanded a high

degree of legitimacy as he claimed successorship of Muhammad as the leader of all Muslims. The voluntary enlistment of a significant number of Tunisians in the Ottoman military campaign in Crimea can serve as evidence that this loyalty was genuinely felt (Sylvester 1969:34).

Tunisian citizenship under Ottoman suzerainty was thus marked by contrast between the superficial homogeneity of Tunisians on the one hand and the relative autonomy of groups within society on the other. Theoretically absolutist rule by the bey was coupled with additional layers of governance above and below the court (the Porte in Istanbul, functional organisations, and kinship bonds across Tunisia) as well as the limited reach of the state. The boundaries of Tunisians' citizenship were thus not necessarily the territorial ones of the national polity of Tunisia. Rather, Tunisians were members of multiple relevant political communities with differentiated rights and obligations, loyalties, and ideational bases. The Ottoman Empire, the Maghreb region, Tunisia, and the global Islamic ummah all played a role. To a relevant extent, this sociological reality was shaped by the ideational structures of Islam. However, to a larger extent, religion legitimised this structure, which had its key roots in other historico-social factors.

In the absence of a written constitution, Löwenstein's taxonomy of constitutionalism in the post-18<sup>th</sup> century sense of the word is hard to employ. The existing Tunisian legal and administrative structure may not have been based on a written constitutional document. Nonetheless, it represented a degree of constitutional order: The presence of a legal and judicial system and political conventions provided a certain stability in expectations for all social actors, even if the expectation of potential state arbitrariness was included in this. As the following sections will also show, the more high-profile a case dealt with in these institutions was, the more the arbitrariness of the regime's powers and its political interests in the form of the bey could impact on its outcome. Given the inevitable normativity in Löwenstein's taxonomy, which is clearly predicated on the idea that normative constitutionalism – where the norms of a written, presumably liberal constitution are in symbiosis with the practice of citizens – is preferable over its absence, it would be hard to justify classifying this configuration as normative constitutionalism. Still, it seems more fitting to classify it as nominal rather than seminal constitutionalism as the latter would imply the presence of a written document that is effectively only “fake”, façade, and distorts citizens' expectations. In contrast, under Tunisian constitutionalism pre-1861, citizens were well-aware of the extent of their rights and privileges – as well as their limitations. Within

Löwenstein's taxonomy, it thus appears more appropriate to use the category of nominal constitutionalism to describe this period.

Like constitutionalism, the elements combining to form citizenship in pre-reform Tunisia were distinct and by taking a step back from the normative commitments of liberal-democratic citizenship and treating the concept as a relational one, the following section can summarise citizenship in the four dimensions developed in chapter 2.

1) *Inclusion and exclusion* – who is a full member of the community and on what basis?

National identity was not dominant in Tunisia prior to colonialism and the multiplicity of overlapping communities of relevance all came with their own logics of membership. While not all of these can be covered here, it is possible to highlight that some groups suffered from exclusion in the sense of discrimination on multiple levels. Easily the largest group affected is clearly that of female Tunisians. Not only did Islamic law provide considerably fewer rights and privileges to women than men, conservative social norms discriminating against women and minorities also pervaded society (as they did in European societies at the time, too).

The logics of inclusion and exclusion varied between the types of relevant communities. However, while group affiliation would principally often be based on functional principles in urban settings (e.g., the ulama scholars or mamluk bureaucrats) and tribal affiliation would be of higher relevance in the country's rural interior, inclusion in them would often be a result of descentance. In turn, these groups and their members would have different roles in the national polity and relationships to the state. A lack of (universal political) inclusion in the polity did not least result from the limited capacity of the state at the time.

2) *Rights and obligations* – what is the substance of citizenship?

Rights and obligations were differentiated, depending on the relevant relationship. As far as the relationship between state and citizen is concerned, this was a relatively weak, or thin, link. Particularly subject to regional variation, the state touched on its citizens' life only to a minimal extent while in turn only providing minimal protection (mainly against external threats, the defence against which was also one of the sporadically invoked obligations). Consequently, much social regulation was formulated and implemented by other authorities than the central ones, e.g. institutions of the different accepted religious groups, which regulated personal status issues, or tribal sheikhs in rural communities. In their relationship to the central state, members of different communities were treated differently, with non-

Muslims generally enjoying inferior rights but facing similar or exceeding obligations (e.g. in taxation). Even more drastic is the difference in rights distributed between genders.

3) *Identity and belonging* – what is the psychological dimension of citizenship?

Tunisia's historically enduring boundaries provided a fertile ground for the development of a national identity based largely on geographic residence. Prior to the intensified encounter with European powers, the Tunisian identity was nonetheless relatively weak – not least due to the loose ties individuals had to the national polity as such. Similarly, the existence of the Maghreb as a political unit was recognised even if it had little quotidian relevance.

Overarching these communities were the relatively distant but still relevant categories of Arab and Islamic identity, which had a certain potential for social mobilisation. The analysis of both this and dimension 1) highlights the high relevance of groups above and below the national level.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and what is expected from citizens?

In Weberian terms, the legitimacy of this model of citizenship was largely rooted in traditional authority, that is, based on its historical durability. Discursively though, it would also purport religious legitimation from Islam, not least in the form of Islamic legal arguments. Normatively, the role of the citizen in this – again, limited – national polity is a passive, acquiescing one. As members of other politically relevant communities, the individual in Tunisia did however have larger normative commitments, e.g., living up to the piety expected from Muslims.

### 3.3 *Europe, political reform, and the 'Ahd al-Aman*

In 1861, Tunisia became the first non-European country to adopt a formal constitution (Arjomand 2012:204). Constitutions are usually written in the wake of highly significant political events such as a country's independence or the overthrow of a political regime (Elster 1995:370–71; Galligan, Denis and Versteeg 2013). In 19th Century Tunisia, constitution-building was caused by the marked increase of influence that Europe enjoyed in the country and its region though it took an event to trigger the process. Located in the centre of Africa's Mediterranean coast at one of the continent's closest points to Europe, Tunisia has long served as a conduit for ideas between these regions. As Perkins (1986:1) notes, Tunisia's two shorelines with the Mediterranean point toward the two regions that have left the most significant mark on the country's development: to the north, Europe, and to the east, the

Arabo-Islamic heartland. Historically, these regions often competed for influence over Tunisia. While Islam came to the country in the seventh century, contact with Europe was present at least since 400 BCE. After the fall of Carthage, the Roman Empire established the province of Ifriqiya in present-day Tunisia. For centuries, the Ottoman Empire was powerful enough to keep European intrusions into the Maghreb at bay. By the 19th Century however, the rise of European power – mirrored by Ottoman decline – meant renewed European pressure on the Maghreb that could no longer be resisted. European colonialism was in many way more intrusive and disruptive than Ottoman control and “had a profound effect on the region at all levels, arguably rivalling even the arrival of the Arabs and Islam a millennium earlier” (Willis 2012:18). Evidently, this also left clear marks on conceptions and practices of citizenship and constitutionalism. In this and other aspects of Maghrebi societies – politics, economy, culture – its impact remains clearly tangible at the beginning of the twenty-first century.

During the 19th Century, governments across the Middle East and North Africa sought to counter Europe’s continued encroachment by enacting reforms that were aimed at levelling the power imbalance. Initiated in Turkey, Tunisia, and Egypt, they are often referred to as the *tanzimat*, or “defensive modernisation”. Their main aspects were “[b]ureaucratic centralisation, registration of land ownership, the building of new armies and modern educational systems, and the attempt to reassert the control of government over the economy and to maximise tax revenues” (Ayubi 1995:87). Paradoxically, as these reforms were modelled on Europe, the countries undergoing them became more dependent on European expertise, trade, and finance for their implementation (Owen 1982:57–58). Concomitantly, their societies also introduced European ideas, institutions, and practices that encompassed economic production, political systems, and their justificatory foundations.

As Perkins (2014:17) notes,

European persons, commodities, and ideologies flooded into Tunisia in greater numbers and with greater intensity than ever before. At first, these developments primarily affected the upper echelons of Tunisian society, but in short order their impact was discernible everywhere.

When Ahmad Bey (1837-55) ascended to the throne, he found Tunisia’s position squeezed between the Ottoman Empire and encroaching European powers. Tunisia maintained close political, social, and religious bonds with Istanbul (Brown 1974) but in 1830, France invaded neighbouring Algeria. Only one month after that intervention, Tunisia granted France most favoured nation status and the power of European consuls in Tunisia to judge cases involving

Europeans was strengthened. This opened the Tunisian market to French manufactured goods which would now compete with local artisans and allowed the consuls to interfere in domestic affairs by gathering Europeans, Jews, and Arabic-speaking Christians around them (Abun-Nasr 1987:273). Five years after France's invasion of Algeria, Istanbul occupied and restored direct control over the province of Tripoli, Tunisia's eastern neighbour. Tunisia was now squeezed between two powerful actors. The Ottoman Empire's own *tanzimat* reforms had centralising effects, strengthening Istanbul's grip over the provinces of the Empire. Ahmad Bey and his successors tried to play the competing powers against each other while pursuing modernising reforms at home. This included the build-up of an efficient Western-style military with exclusive allegiance to the Tunisian government rather than the Ottoman Empire (Alexander 2010:16). Crucially, the new form of recruitment introduced alongside this reform also imported the republican-inspired principle that native Tunisians would fight for their country. They thus "might play a role in the governance of the country and, therefore, have a genuine stake in its future" (Perkins 2014:22). Education, too, saw significant changes. From schools focussing on religious instruction and the recitation of the Qur'an, more non-religious, technical subjects arrived in the curricula. Graduates in this mould – exposed to Western concepts in their education through learning foreign languages at a minimum – would soon fill the civil service and became important conduits for the distribution and proponents of the new political concepts in Tunisia (Perkins 2014:39). However, only male Tunisians gained access to this education and like other changes this largely remained an urban affair. If the military reforms, education, and early attempts at industrialisation were largely driven domestically, political reform in Tunisia of the 19th Century was the result of European pressure (Womble 1997). Both were top-down initiatives of which most Tunisians would not be very aware. Nonetheless, they left an important mark on intra-elite power contestation and the ideational heritage of this era. Moreover, the borrowing from European Banks required to finance the reforms had led to an increasing dependence on the northern powers.

The death sentence for a blasphemy case and the subsequent street violence in 1857 gave the Europeans an opportunity to push for the implementation of aims they had long held: political reform and increased legal certainty for their investments and citizens. This would allow more intensive economic penetration of the country. The bey issued the '*Ahd al-Aman* (literally "the Pledge of Security") decree (Abun-Nasr 1987:277). Its key provision in terms of individual liberties were the guarantee of equality before the laws of the state for Muslims and non-Muslims (specifically referred to as *dhimmi*), religious freedom, and the right to own

property for all of Tunisia's residents. The last point relates to the last three articles of the law on the economy: It called for the end of monopolies and allowed foreigners to work in any trade as well as owning property including land. Accommodating European ideas in the language of Islamic thought "with varying degrees of success" (Womble 1997:57), the decree reflected uncertainty among its drafters about how these relatively unfamiliar concepts could be addressed in the Tunisian context. That it was written in a single day suggests it may have been a translation of demands made in letters by European consuls to the bey.

At the same time, an important group within Tunisia's elite were vocal proponents of liberal reforms. They believed – following the pattern of "defensive modernisation" – that only by adopting some aspects of European governance, Islamic societies could become powerful enough to withstand Europe's colonial ambitions. Concomitantly, a discourse, and later, a tradition emerged in Tunisia and other regional peers, which argued for the compatibility of Islamic religion and "modern"<sup>12</sup> institutions. An influential voice in Tunisian society was that of Khayr al-Din al-Tunisi (1822–1890), a Tunisian statesman who espoused the principles of modernism in both theory and practice. Born in the Caucasus, he grew up as an Ottoman slave-soldier and was brought to the Tunisian ruler's court at 17. In Tunisia, he received an education in modern military sciences as well as traditional Arabic and Islamic studies. Having travelled to France, he would later serve as the prime minister of Tunisia (1873-1877) and the Ottoman Empire (1878-1879). In his work *The Surest Path to Knowledge Concerning the Condition of Countries* (1967 [1867]), al-Tunisi argues in favour of adopting some of the institutions that in his view formed the basis of Europe's economic and military successes. The book can be read as a statement of ideas Khayr al-Din espoused for many years before. In the sociological tradition of Ibn Khaldoun, he seeks to recount the experience of European nations as lesson from which Islamic societies can learn and

"choose what is suitable to our own circumstance which at the same time supports and is in accordance with our *shari'a*. Then, we may be able to restore what was taken from our hands and by use of it overcome the present predicament of negligence existing among us."

(Al-Tunisi 1967:73).

Al-Tunisi makes an argument rooted in Islamic tradition, but for its reform. Good practices from foreign countries should be adopted whenever they are not contrary to the Shari'a. The

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<sup>12</sup> Given the frequent normative and teleological use of "modern", it is worth noting that it is used here to denote the social changes associated with the process of modernisation without giving this normative weight (cf. Eisenstadt 2000).

fact that they are from non-Islamic countries is no reason to renounce them as even the Prophet adopted foreign ideas when he deemed them opportune and the Shari'a does not ban the imitation of practices that God does not forbid (1967:74–77). Europe's progress and subsequent dominance, he argues, is not rooted in its Christianity, but in its willingness to reform and adherence to liberal political principles such as the rule of law, accountability of officials, and individual rights and political participation. To catch up with Europe, Islamic societies would thus need significant reform. Fortunately for them, the changes needed for renewal are consistent with the Shari'a, which only requires a more contemporary interpretation. Cautious criticism is levelled at the ulama, which in Khayr al-Din's view is too distant from contemporary politics to be aware of the circumstances that should be part of their reasoning when interpreting the Shari'a (1967:124).

An influential representative of a group of reformist thinkers and policymakers in 19th Century Tunisia, Khayr al-Din's person and convictions would play an important role in Tunisia's reforms, which most notably included the country's first written constitution. A striking example of reformism's policy impact was the abolition of slavery, which Ahmad Bey banned in a series of decrees between 1841 and 1846. Ahmad justified this in a letter to the Tunisian ulama on religious grounds in a way that was principally based on reformist thinking with its openness to fresh interpretations of Islam's tenets. Ahmad "argued from within Islam, citing the Qur'an and Hadith, and emphasising freedom as one of the leading principles of the egalitarian religion" (Masri 2017:129–30). As the ulama conceded, representatives of the reformist tradition had proven that its ideas could produce an ideational repertoire that political actors could draw on to justify political reforms on the lines of the modern, liberal-democratic state. In turn, these reforms produced legacies in the form of pathway dependencies that would impact future political and social developments. A very consequential one of these was Tunisia's 1861 constitution, which the following sections are devoted to.

### *3.4 The 1861 constitution: nominal constitutionalism*

As in other historic precedents, the drafting of the Tunisian 1861 constitution required a specific trigger (cf. Elster 1995:370–71; Galligan, Denis and Versteeg 2013). Structurally, the increasing economic penetration of Tunisia by European countries had already shifted power to their representatives in Tunis. The most powerful representatives of this group were the British and French consuls, who brought increasing pressure on Ahmed Bey's successor Muhammad to introduce a full-fledged constitution (Perkins 2014:27). At this time, Tunisia

had already become economically dependent on Europe with its considerable trade imbalances largely financed by the northern banks. As in other countries of the region, many of Tunisia's religious leaders were deeply concerned about Europe's rapidly increasing influence. The latter's dominance in international trade also meant that Tunisia's merchants – many of whom had familial and social ties to the ulama – fell on hard times. The ulama's concern was that European penetration would be an irreversible process and that once the country had opened itself to the world, Tunisia would have forfeited its control over its international exchanges (Perkins 2014:27). However, the ulama was not a homogenous group. Data from the later 19th Century suggests that while many positions in the religious establishment were reserved for members of distinguished religious families or were passed down from father to son, it also exhibited a certain openness that allowed for some limited upward social mobility. Yet while descendants of established families could hope to hold multiple positions simultaneously, those of humbler origins were usually limited to the bottom of the ulama's hierarchy. Green (1976:226–31) thus argues that while established religious families saw their socioeconomic status threatened by the modernisation reforms, “it was the humbler ulama who supported the reforms in part because the expansion of the civil service opened up to them the possibilities for supplemental appointments and incomes which they were denied in the religious establishment” (Green 1976:230–31). Like their figurehead Khayr al-Din al-Tunis, the most important constituency for modernising reforms was however among the mamluks. They “either underestimated the risk of European hegemony or overestimated their ability to prevent it” (Perkins 2014:24). Familiar with European culture and languages, mamluks were in fact also in an excellent position to serve in the profitable role as middlemen for European entrepreneurs. The religious and bureaucratic elites were thus largely at odds over Tunisia's modernisation, requiring the bey to moderate between these factions as well as his international relations.

#### 3.4.1 The constitution-making process

The summary execution of a Moroccan accused of murdering a Moroccan palace servant provided the pretext under which the French consul pressed the bey to define the *'Ahd al-Aman's* principles further. The bey responded by creating a commission “charged with explaining and defining the *'Ahd al-Aman*” (Womble 1997:62) which ultimately resulted in

the 1861 Constitution, or *Qanun al-Dawla*, as the official Tunisian documents term it.<sup>13</sup> The commission comprised of ten men drawn from the judicial community, ulama of both Maliki and Hanafi schools, and Mamluks who together “reflected to a fair degree the power structure of Tunisia in the nineteenth century” (ibid.). However, Perkins (2014:27) observed that the ulama commissioners “lacked the political skill and connections of the modernizers”, leading to their later withdrawal from negotiations they were set to lose. Simultaneously, two further committees were charged with modernising the military and administration. Khayr al-Din Pasha had put considerable efforts into the inclusion of the ulama in the process. This reflected both his view that such reform was compatible with the tenets of Islam and his political calculation that the religious elite’s approval was vital for the programme’s success. The ulama however justified their withdrawal from the deliberations arguing that “political” issues like this were for the bey and his entourage to decide, not them. This robbed the deliberations of a key link to ordinary Tunisians: The shaykhs were mostly indigenous Tunisians and well-connected with urban notables. As such, they would have been able to lend the reforms legitimacy. While not actively derailing the process, the ulama’s withholding of support for political reform foreshadowed its later failure (Womble 1997:64).

Reportedly, the initial work in the reform committee was auspicious. A member of the Shari’a courts argued in a Friday sermon that the equality of citizens in their rights to security and honour enshrined by the ‘*Ahd al-Aman*’ was a foundation of Islam and opinions by the ulama were subsequently invited and principally offered (Womble 1997:63). Between the beginning of the committees’ deliberation in 1857 and the promulgation of the final constitution in 1861, a series of reforms were enacted that implemented the ‘*Ahd al-Aman*’ in more detail. This included military, tax, and administrative reforms, but also changes to personal status legislation. Amongst other things, the equality of Jews and other minorities was pursued. This included the right to move out from the overcrowded traditional Jewish quarter and to select leaders and judicial functionaries for the Jewish community. As these changes were chipping away at their traditional privileges, Muslim Tunisians reacted with some hostility to them, even if some were merely symbolic in nature. Muhammad Bey died before the drafting committee finished its work and was succeeded by his brother Muhammad al-Sadiq Bey. Al-Sadiq was an enthusiastic supporter of establishing a constitution, hoping that such modernisation would improve Tunisia’s international standing vis-à-vis Europe and could

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<sup>13</sup> The Arabic *Qanun al-Dawla* means “law of the state/regime”, whereas the word *Destour*, now used in modern Arabic for constitution, only came about in the 1870s and originates from Farsi (Womble 1997:fn 44).

bolster his country's efforts at gaining formal sovereignty. Genuine domestic political reform was not his priority however (Perkins 2014:31–32).

Based on the relatively limited sources available on the constitution-making process, some of its key features can be summarised: An elite project from the start, the process was only supported by a part of that elite, which can in part be explained by the different socioeconomic impacts modernisation overall – and the constitutional project stood as a symbol of that process – had on these groups and were expected to have. The ulama's decision to withdraw from the process ultimately reduced the limited link the process had with the Tunisian public even further. With administrative and fiscal rationalisation an apparent aim of the constitution, the process of its drafting appeared to lack well-structured institutional processes, which could have e.g., guaranteed the inclusion of minorities in consultations. Entirely absent was any obvious involvement of the female half of the Tunisian population. As in other societies at the time, the public business of citizenship appeared entirely restricted to men. In a way, the aloofness of the constitution-making process foreshadowed the fact that the constitution itself was merely about creating horizontal accountability, that is, accountability between different elements of the state rather than vertical accountability, i.e., the state's accountability vis-à-vis its citizens.

As with the Fundamental Pact, European influence in the constitution was unmissable. The project was initiated on pressure by European consuls and finished on their terms. As if to perfect the symbolism of the constitution's foreign dimension, Muhammad al-Sadiq Bey specifically travelled to Algeria with the finished draft to meet French Emperor Louis Napoleon III on his trip to the region and gain his approval before its proclamation (Brown 2005:9). Notably, the bey sought European, not Ottoman approval for his plans. "Nothing demonstrated more clearly how interwoven into the origin of Tunisia's constitution European diplomats had become" (Womble 1997:82) and how much the bey perceived Tunisia to be virtually independent rather than a mere province of the Ottoman Empire. For many Tunisians, the constitution would however become symbolic not for independence from Istanbul, but for the growing European influence over their country.

### 3.4.2 The substance and language of the 1861 constitution

The substance of the constitution itself was a relatively tame departure into liberal constitutionalism. Nevertheless, it provides an insight into the changes that political concepts

underwent in 19th Century Tunisia. The text is structured into 13 chapters with an entirety of 114 articles<sup>14</sup>. The first two chapters are concerned with the bey and his family. The third chapter establishes the parliament-like Grand Council, administrative councils, and secular tribunals. Chapter four divides state revenue between the monarch and the administration, followed by the latter's structure and the distribution of its authority and that of the bey in chapter five. Chapters six and seven deal with the Grand Council. Three chapters (nine, ten, and eleven) cover the budget, the structure of state servants and their rights and duties. The longest chapter - with 19 articles in total - is the twelfth, which outlines the rights and duties of Tunisian subjects. Finally, Chapter thirteen provides the rights and duties of foreign residents in Tunisia.

This section will analyse key elements of the constitution, focussing on how the document reflects the conceptions of citizenship present in Tunisia at the time of its elaboration and promulgation.

The eighteen articles of the first two chapters cover the royal family. The eldest member of the Husaynid family is identified as the rightful ruler of the state, the hereditary principle is affirmed (Article 1) and the "rights and duties" (title of Chapter II) of the bey are outlined. Article 9 makes the bey's powers conditional upon an oath to respect the principles of the *'Ahd al-Aman*, the constitution, and the laws that emanate from them. Article 11 establishes a degree of parliamentary scrutiny as it makes the bey responsible to the Grand Council for his acts if he violates the laws. However, the constitution does not include specific procedures or institutions that could deal with a bey's violations of the law (e.g., impeachment). The bey's rights are extensive, but for the first time in Tunisian history they are clearly stipulated in secular legislation along with the ruler's duties. As Womble (1997:84) notes, the term used for the head of state differs between the Arabic original, where "malik" (king) is used, and the French translation, which employs the term "Chef de l'État". In both cases, the person and office referred to is that of the bey, who is in no instance referred to as such. The constitution makes no mention of the laws of the Ottoman Empire or the bey's duty to be invested by the Sultan. The usage of the term *malik* could therefore be understood as an expression of Tunisian sovereignty, just like Article 13, which identifies the bey as the head of the armed forces and empowers him to declare war and conclude international treaties. This is further reinforced by the usage of the term *mamlaka* (kingdom) to describe Tunisia, implying that the

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<sup>14</sup> Both the Arabic original and French translation of the text of the constitution are available in Womble (1997).

country was “a sovereign kingdom, not a mere division of a larger empire” (ibid.). The fact that *malik* is not translated as king (or *roi*) in the French edition of the constitution points at the intention of the constitution’s authors to use the Arabic term that is still below the status of sultan to expand sovereignty claims vis-à-vis the Porte while avoiding a full-out challenge of the Empire’s claim over Tunisia. Similarly, “*Chef de l’État*” in the French translation aims just below the claim of full national sovereignty that the title of *roi* or king would imply in the European understanding of the title.

The third chapter of the constitution provides the structure of the state’s key executive, legislative and judicative institutions other than the bey. Crucially, it makes ministers accountable to the latter as well as the Grand Council (Article 20). It establishes the quasi-parliament Grand Council (Article 21) and a secular judicial system that is to adjudicate on the basis of secular legal codes rather than the Shari’a (Articles 22-28). The equal rights accorded to all Tunisian residents in the *‘Ahd al-Aman* (and affirmed in the 1861 constitution) are given their institutional mirror image: legal codes and judicial institutions for equal enforcement of rights. Brown (2002:17) notes that the councils mix administrative and judicial functions and thereby violate the “emerging European conceptions of the separation of powers”, but that this mixture was quite common for 19th Century Middle Eastern governments. The novelty of the constitution, in his view, is that it steers the state’s organs “to acting on the basis of written law” (ibid.). While all posts in the tribunals were by appointment of the bey, they were given a degree of independence by their permanence. Functionaries could only be removed from their jobs if a tribunal found them guilty of a crime (Article 28) moves – in Weberian terms – from patrimonial to rational-bureaucratic rule.

Similarly, the three articles of the fourth chapter further codify state procedures by designating a specific amount of state revenue for the bey, another to his family and the rest for the bureaucracy, highlighting an emerging separation between the state on one side and the monarchy on the other. Chapter five on the structure of the ministries underlines the attempt to introduce the rule of law into the state. Article 32 emphasises that ministries’ actions are regulated by the laws passed by the bey and the Grand Council. Article 33 clarifies which actions can be taken by officials autonomously, and which require the assent of the bey and the Grand Council. All official government communication is to be in written form, including the orders of the bey (Article 43), presumably to generate more accountability and make the enforcement of rule of law principles possible.

Chapter six, containing sixteen articles, is the second longest section of the constitution and deals with the composition of the Grand Council. Another ten articles are devoted to the Council's competences in chapter seven. It is given powers that are typically associated with a parliament but remains an unelected institution. Its membership is capped at sixty, out of whom a third is drawn from state officials, civil and military, and two thirds selected from the country's notables (Article 44). The bey appoints the Council's members with the approval of his ministers (Article 45) for five years. Article 47 foresees the notable members to select their successors, subject to approval of the bey, who continues to select the replacement officials with his ministers (Article 49). Taken together with the fact that service in the council is not remunerated (Article 59), the recruitment of the council's membership from nobility and state officials makes transparent that this was an elite institution and not a representation of the broader population. Constitutionalist or not, politics in 19th Century Tunisia was – as elsewhere – an affair for those with wealth or status and while this was not explicitly stated, women were entirely excluded. The council members' selection was undemocratic but decisions within the council are taken by majority vote (Article 53). The responsibilities of the council are broad and include new legislation and the amendment of old laws, tax changes, changes to the military's salary and others. Notably, these decisions would still require approval by the bey (Article 63). The instrument that endowed the Council with some power over the ruler was the classic right of parliament: the budget. It could determine the expenditure in for each year (Article 46). Though the bey could make changes during the year, this required consultation with the council (Article 65). Article 60 portrays the Grand Council as the “guardian” of the *'Ahd al-Aman* and the law more generally. It also reaffirms the principles of legality and equality of residents, stating that the council is opposed to laws that would undermine these. The council is also invested as the “defender” of the rights of residents. The most practical implementation of that function is in its position as final court of appeal (Article 61). In line with the legality principle and like the members of the judiciary, council members can only be removed if they committed a crime (Article 50).

Three articles in Chapter nine outline how the budget functions, and chapters ten and eleven detail the rights and duties of state officials. Notably, Article 78 makes the service to the state open to all Tunisians who have not been found guilty of a crime. Depending on their ability, they should “benefit from all the advantages offered by the government to its subjects”. Foreigners can serve too but are bound by Tunisian law for the duration of their service (Article 78).

Three strands with relevance to the idea of citizenship emerge from chapters one to eleven, then. The first is the emphasis on Tunisian identity and sovereignty. By using terms like “king” and omitting any reference to the Ottoman Empire, but also by the very act of adopting a constitution, Tunisia is represented here as a country in its own right whose international alliances are its own affair. The second, highly significant, strand is the introduction of accountability under the banner of constitutionalism. The text makes references to the effect that the bey and the state’s officials are bound by the constitution and the laws emanating from it. Introducing secular rules, institutions, and procedures that make the state more accountable, the constitution also introduces key aspects of the rule of law. Crucially, for the first time in Tunisian history the constitution makes the monarch an instrument of the state and no longer its personalist absolutist ruler, shifting sovereignty from him to the state’s institutions – though still not to the citizenry. The third strand that emerges from the first eleven chapters of the constitution is the emphasis made on individual rights and the (legal) equality between adherents of the different religions though not explicitly between genders. This last strand is continued and reinforced in the last two chapters of the constitution.

Chapters twelve and thirteen make the most explicit statements about the idea of citizenship present at the time of the constitution’s promulgation as they cover what is described as the rights and duties of Tunisian subjects and foreigners residing in the beylik.

Chapter twelve, on the rights and duties of Tunisian subjects, begins with two articles that make specific reference to the *Ahd al-Aman*. Article 86 states that all Tunisian subjects – irrespective of religion – have the right to full personal security and honour in accordance with the fundamental pact. Stating that subjects also have the right that the law be upheld, the subsequent article gives them a right to petition the Grand Council with reports about all infractions of the law. All subjects are given equality before the law (Article 88), their property, honour, and freedom of action is guaranteed with the exception of military service (Article 89 and 91), and judicial decisions are only to be taken by the new, secular tribunals, not religious courts to secure equal treatment irrespective of religion (Article 90). Apart from conscription and taxation (Article 95), the constitution sets few constraints on the individual. A change of religion by non-Muslims does not interfere with their Tunisian nationality (Article 94). In language that also points at the construction of a new Tunisian national identity and community irrespective of religion, the constitution notes that converts “continue to be Tunisian subjects and subject to Tunisian jurisdiction” (ibid.). While it does include certain individual rights, chapter 12 is not a bill of rights in the contemporary understanding. It lacks rights that would typically be associated with such a document today, such as the

freedom of speech and assembly and others. It also regulates issues one would not expect in it, such as the requirement of municipal permission to build factories in a city (Article 97), port fees (Article 101), and a unified system of measures and weights (Article 102). This can be interpreted as another reflection of the economic rationales driving the introduction of a constitution in Tunisia.

The last, thirteenth chapter echoes the *'Ahd al Aman* and reinforces rights to foreign residents in Tunisia. On the whole, they are given similar rights to those of Tunisian subjects but are excluded from military service (Article 108). Religious freedom is granted in the chapter's first Article (105) that declares resident foreigners' "complete liberty ... to exercise their cults" and Article 107 gives them the "same personal security guaranteed to Tunisian subjects" as per *Ahd al Aman*. Like Tunisians, foreigners would be subject to the new local judiciary (Article 114). This "represented part of an effort to curtail the expanding political and economic role of foreigners in Tunisia" (Womble 1997:91). Under the Capitulations, various consular courts would have jurisdiction over foreigners which at times gave them advantages. The constitution's phrasing suggests an end to this legal pluralism – Ottoman and colonial – under which people of different religions or nationalities were tried in different courts and instead adopted the territorial principle emanating from Europe. It also reinforces the nation as the relevant political community as does Article 106, which notes that a change of religion does not imply a change of nationality or jurisdiction. Belonging to a political community – the text suggests – would mainly be tied to residence, not religion. However, in the original Arabic, foreigners are called "ra'iyya al-dawal al-ahbab" – subjects of friendly states. This wording implies that their rights – particularly commercial rights – would be dependent on whether their respective government concluded bilateral commercial treaties with Tunisia. The *'Ahd al-Aman* had stated this before and the constitution did not repeal that requirement.

### 3.4.3 What citizenship in the 1861 constitution?

What does the 1861 constitution reveal about the contestation over political ideas at the time of its genesis? To answer that questions, it is first important to note that its authors were a select group working under specific structural constraints. As previous sections have outlined, Tunisia was under considerable European pressure to reform toward a more liberal model of state. The framer's freedom of action was thus constrained. The constitution-making process was also top-down. Most Tunisian will likely have been unaware of it, meaning that the document can at a maximum represent a limited elite consensus, which crucially excluded the

established religious elite. It was consequently largely reflective of the views of an aspiring administrative caste influenced by European ideas. They believed Tunisia's economic and political security required integration in the international system and were thus aligned with the objectives France and Britain pursued in the Ottoman Empire. For the Tunisian modernisers, protections of ordinary citizens against arbitrary government were an indispensable ingredient for the process of economic modernisation, expansion and international integration (Perkins 2014:23), though likely not an end in itself.

The language and substance of both the *'Ahd al-Aman* and the 1861 constitution should be read against this background. Having outlined the content the *Qanun* and shed light on some of its key elements in the previous section, this section discusses what conclusions can be drawn from the document about the ideas of constitutionalism and citizenship at the time of the constitution. This follows firstly the four dimensions of citizenship developed in the second chapter. After an outline of the political realities under the new constitution, the section will argue that the 1861 constitution reflected nominal constitutionalism and subsequent sections outline the specific legacies of this document and episode for future critical junctures.

1) *Inclusion and exclusion* – who is a full member of the community and on what basis?

A first matter to note when discussing this dimension of citizenship is that the contours of the Tunisian political community as such are being reified by the very act of constitution-making as well as the wording of the constitution. In fact, while the committees drafting the constitution were already at work, Muhammad Bey had dispatched a delegation to Istanbul offering to accept the Sultan's rights over Tunisia if in turn he accepted the Husaynids' rule over the country. As the Tunisian emissaries stressed, this was a formalisation of the status quo, but in the knowledge that this was an offer made from a position of weakness, the sultan insisted on the view that Tunisia was merely a province of the empire (Perkins 2014:27).

Nominally, the constitution underlines a clear territorial principle, whereby all residents in the Tunisian beylik are subject to the same law, which does however grant Tunisian subjects more rights than residents with the citizenship of another country. The key shift here is – like in the *'Ahd al-Aman* – from multiple legal regimes for different religious and national communities to one single regime. In clarifying that a change of religion has no bearing on a subject's legal position vis-à-vis the Tunisian judiciary, article 94 emphasises this particularly. In practical day-to-day life, bonds other than the national Tunisian community would have continued to play a very important role. The elite-centred process of constitution-making in

Tunis that did not even include the ulama is reflective of this as is the exclusive nature of the political system designed in the constitution, which consists only of the existing power elites – the bey, the nobility, and state bureaucracy – albeit rearranged in new institutions like the Grand Council and with some horizontal accountability mechanisms.

### 2) *Rights and obligations* – what is the substance of citizenship?

The 1861 constitution devotes its longest chapter on the rights and duties of Tunisian subjects. From the right to safety and honour to freedom of action and equality before the law, Tunisians are given more freedoms than ever before the *'Ahd al-Aman*. And while absent liberal rights such as the freedom of speech may be subsumed in e.g. the freedom of action, political rights are notable for their almost complete absence. Interaction with the state is dominated by subjects' duties: the payment of taxes and military service. Save for a selected elite with its ability of participating formally and informally, Tunisians' contact with the political system is limited to the right to petition the Grand Council. The key shifts here – as in the first category – are twofold: First, the introduction of relatively equal legal citizenship based on a move from legal pluralism of Ottoman times to the territorial and residency principle is coherent with the idea of legal equality. This is also reflected in the emphasis given to religious freedom. According to the constitution, equality between religions should be upheld. The provisions are not consistent though. While the right of non-Muslims to convert to other religions is explicitly mentioned, this is not the case for Muslims – in Islamic law, leaving the religion (apostasy) is widely considered to incur the death penalty.<sup>15</sup> Thus, while the constitution establishes a clear direction toward equal citizenship, this is not extensive and elements of discrimination based on gender, age, and religion remain though only the latter are explicitly problematised in the constitution. A second key shift toward greater rule of law is that rights and duties of citizens and state institutions are legally codified in the constitution. This fact, along with the establishment of a secular judiciary to interpret these rights, makes equal citizenship legally enforceable and creates at least the possibility of corresponding state practices.

### 3) *Identity and belonging* – what is the psychological dimension of citizenship?

Notionally, the 1861 constitution reifies the Tunisian polity as a national one to which Tunisians belong irrespective of their religious or other group affiliations. The development of

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<sup>15</sup> As Griffel points out in the Princeton Encyclopaedia of Islamic Political Thought, this is “based on the authority of a hadith of the Prophet that states, ‘Whoever changes his religion is to have his head cut off’” (Bowering et al. 2013:40).

secular legal codes as well as a secular judiciary undergirded the (cautious) rhetorical expressions of national sovereignty in the constitution, which appear to largely aim at external actors, further and turned them inwards towards the country's citizens. In establishing a clearly codified political system, the constitution could also have been expected to reduce the importance of informal politics via tribes and other relevant political actors. In practice, the nature of that political system is very distant from ordinary Tunisians, both because universal political participation is not foreseen other than in petitioning the Grand Council, and because the state was not present in other forms in the lives of the bey's subject, such as in the form of social welfare, education and so on. Even though the government resolved that its subjects ought to "benefit from all the advantages offered" by it (Article 78), Tunisia remained a relatively weak state. Moreover, important parts of the Tunisian elite did not endorse the constitution as such. It is therefore highly unlikely the constitution itself contributed to an increased sense of belonging to the Tunisian political community and other social groupings will have continued to dominate people's lives.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and what is expected from citizens?

If the contents of the constitution mark a step toward more rational and accountable government and therefore also more equal effective citizenship – albeit limited –, the background of these political changes in the context of defensive modernisation is informative about their intended purpose. Rather than a deep commitment to the norms reflected in the constitution, their introduction appears to be a mere means to an end. True to the purposes of liberal constitutions, the 1861 *Qanun* both constrained the state (by introducing individual rights, circumscribing the powers of the bey, and producing horizontal accountability) and enabled it (by rationalising its bureaucracy and procedures). For reformers such as Khayr al-Din al Tunisi, these reforms promised to strengthen its capacity to resist European dominance while remaining faithful to the country's Arabo-Islamic heritage and alliances. For the European powers that pushed for the changes, moves toward accountability, the rule of law, and equitable justice could provide more security for their citizens and investments. Both goals were sought by rationalising the state's administration, particularly in the realm of fiscal policy. Yet if protection of the individual and their private pursuits in the constitution was indirectly meant to translate into protection of Tunisia from foreign influence by enabling the state, it was not meant to enable political participation – a key purpose of constitutions this document falls short of.

The language used in the constitution is rooted in Islamic terminology, reflecting the attempt to marry European political concepts with the local reality as well as the limited liberalisation the law brought about politically. Thus, “members of the Grand Council, for instance, are referred to as *ahl al-hall wa-l-‘aqd*, literally, the people who loosen and bind; the population was generally referred to as *ra’ayana*, literally, our flock” (Brown 2002:16). To an important extent, this language reflects the attempt to integrate the new constitutionalism with existing political concepts as well as the limitations of that constitutionalism.

#### 3.4.4 Nominal constitutionalism, in practice

How did Tunisian political life develop, then, during the post-constitution implementation and what were its lasting legacies in the form of pathway dependencies generated that could affect the ideas and practices of constitutionalism and citizenship in subsequent decades? Despite its promise of more accountable government and the protection of individual rights, the 1861 constitution quickly became a lightning rod for discontents among Tunisians that only partly had to do with the legal act itself. The ever-growing economic influence of European countries was often accompanied by political calculations, cronyism and corruption by individuals in the state bureaucracy. Thus, by far not all international investments – and, conversely, Tunisian debt with international banks – served Tunisian development. As the bey drastically raised taxes to pay for European loans, he sowed the seeds for discontent across the country. While this affected large swaths of the populations, different constituencies had their own reservations they saw symbolised in the constitution. To some, it insinuated that Islam no longer provided the right socio-political frame of reference, while being a clear legal symbol of the growing international influence in the country (Perkins 2014:32). Moreover, like the modernising reforms in general, it threatened the socioeconomic and social status of certain groups. For instance, the judicial reforms of the constitution threatened to undermine the role and prestige of tribal shaykhs, who traditionally dispensed justice in some areas of the country (Chater 1988:81). If the idea of legal equality between residents enshrined by the constitution was based in European liberalism, communities from the northern continent in Tunisia still maintained privileges based on the 19th Century capitulations. As a full implementation of the constitution would imply their loss, they lobbied to keep existing tax advantages and their consular courts rather than submitting to Tunisian tribunals while simultaneously asserting the rights the constitution provided. Such a selective interpretation angered many Tunisians at a time where control over their country increasingly slipped abroad (Perkins 2014:33).

A key institution of the new constitutionalist regime was the Grand Council. Selected by Muhammad al-Sadik Bey, its membership was not representative of Tunisia. Instead, it consisted of twenty representatives of the Turkish-Mamluk government elite and forty local notables. The latter group appears to have been entirely dominated by natives of the capital Tunis. In brief, the Assembly only represented a slim section of the Tunisian elite while no participation for all other citizens was foreseen at all. The Assembly “reflected the age old division between the elite and the masses (*al-khassa wa al-‘amma*) in Middle Eastern government and society” (Womble 1997:98) though this was at a time when deliberative bodies in European countries were also far from representative and Tunisia and its Ottoman peers had had no experience with representative government to draw on. A notable lacuna was that few members belonged to the high ulama. Only in 1862 did seven shaykhs join the Assembly to replace other members. Justified by the body on the grounds of public interest, it may well have sought to increase support for its work by incorporating this important category of the Tunisian elite. Mamluks were now not only in the majority in high state offices, but also wielded considerable power in the Assembly. The deliberative body’s skewed membership was however not only a result of the constitution’s design but crucially also the bey’s appointment decisions (ibid.: 100). Ultimately, however the lacking link between the new constitutional government and its citizens reinforced the perception among many Tunisians of the constitution as a European imposition.

The actual work of the assembly reflected its constitutional role – a somewhat awkward position compared to contemporary parliaments since the 20<sup>th</sup> century – and the fact that it operated in the very beginnings of the new constitutionalist state. While the majority of votes were unanimous, the fact that there were contested votes underlines that the Assembly’s members did take their role seriously. Nonetheless, absenteeism hampered its work as members did not even gather in full for close votes. Voting records suggest that some of the Assembly’s output was shaped by personal and family alliances. They also indicate that in its actual operations, the Grand Council assumed two roles: Most often, it “served as a court of final appeal to those seeking redress within the new legal system. It also provided advice to the members of the courts of this new system who were unclear themselves on how to interpret the laws and regulations adopted during the *Ahd al-Aman* reforms” (Womble 1997:111). Its second, less frequent role as an embryonic legislator often derived from the debates on cases in the former role, though some activity was also initiated by its members or the bey. The Grand Council was also charged with reviewing and approving the state’s budget annually. Increases in taxes and salaries required the Assembly’s approval, too. Its members’

eagerness to fulfil this role – reflected in the fact that it did vote against the bey’s wishes – was however scuppered by the fact that it was generally provided incomplete information by Prime Minister Mustafa Khaznadar. Nonetheless, these powers produced unprecedented levels of accountability and openness as the beylik’s finances had never before been a public matter. Not accidentally, this also made Tunisia a more attractive destination for European investors. Similarly, even though the Grand Council’s legislation was subject to approval by the bey, the new constitution dampened his executive power as legislative as well as judicial affairs became public issues (Womble 1997:110–19). This was certainly a stark contrast to the system of executive order by the bey prior to 1861. The practice of government had opened up. If political practice was still limited to a very small, select group, the public now had access to information that allowed for at least some discursive scrutiny.

Just three years after its adoption, domestic and international factors aligned to spell the end of the first experiment of liberal constitutionalism in Tunisia. A revolt in 1864, which demanded the suspension of the constitution along with an end to crushing taxes was met with bribes to local leaders and promises of government employment on the one hand, but also a ruthless military campaign with confiscations that destroyed and depopulated entire swaths of land. As Chater (1988:81) notes, the rebels’ political aspirations were also reflective of the new time and included a critical attitude toward power and demands for participation in local affairs. They did achieve their main aim of revoking the hated constitution, but European pressure contributed significantly to that outcome.

When Tunisia negotiated a convention with Britain, which was predicated on the constitution, this invited French suspicion. With the credible threat of military intervention available for France, but not Britain, the bey gave in to French pressure and the constitution was ultimately revoked, removing the basis for British advances in Tunisia. France had now firmly secured its predominance in Tunisia and the paradoxical outcomes of defensive modernisation became clearly apparent: By 1869, Tunisia had become more, rather than less dependent on European expertise and capital. Foreign influence in the country had increased and foreshadowed the onset of full colonial control: Amid economic crisis, growing debt, and a lack of fresh loans, Bey Muhammad as-Sadiq had no other option than accepting French, British, and Italian financial control over his government in the form of an International Financial Commission that was headed by Khayr al-Din al-Tunisi and was tasked with overseeing the budget (Alexander 2010:17; Perkins 2014:37–40). The three countries had significant investments in the country and geostrategic interests in the region: France in Algeria, Britain in Egypt, and Italy in Cyrenaica (Libya). Bowing to pressure by Italy and France, the bey replaced the

notorious Prime Minister Khaznadar and appointed Khayr al-Din, who used his reformist treatise *The Surest Path* as a blueprint for his prime ministry and with tax, land, military and other reforms managed to redress affairs to some extent. If subsequent colonisation made European control of the country abundantly clear and formalised it, Khayr al-Din's policies reflected his conviction that modernisation and Tunisia's indigenous culture are compatible. Thus, while he pushed for European style reforms, his foreign policy was more concerned with Istanbul than Paris or London. He saw the sultan as "the spiritual and temporal head of the world's most important Muslim state and a figure with whom any leader guided by Islamic principles would feel a natural affinity" (Perkins 2014:39–40) as well as a safeguard against European colonial ambitions.

The experience of the liberal constitution of 1861 reflected, in the taxonomy of Löwenstein (1959:151–57), nominal constitutionalism. In his framework, a normative constitution actually reflects the functioning of the state's authorities and its norms while under nominal constitutionalism the constitution is legally valid while the actual political process follows other rules. A seminal constitution merely formalises existing power relations. In the case of 19th Century Tunisia, then, the 1861 constitution reflected the growing power of European countries and their Tunisian allies whose financial interests the formalisation of legal guarantees served. The new secular state institutions were heavily dominated by the Tunis elite. The lack of any channels for genuine political participation by non-elite citizens reflects the powerlessness of that vast social group and contributed to its short-lived existence. Nonetheless, the Grand Council assumed its role and exercised its powers on legislative proposals, budget control, and in judicial affairs. Factors beyond the Assembly's control hampered a full implementation of the constitution, but despite these limitations and even though it was a top-down imposition reflective of increased European influence in Tunisia, it was more than a façade. It was descriptive and prescriptive enough for political decision-making to go beyond mere seminal constitutionalism.

### *3.5 1881: The French protectorate and the emergence of Tunisian nationalism*

In the late 19th Century, European influence over Tunisia increasingly gave way to outright control. A secret 1878 European agreement at the Congress of Berlin assigned Tunisia to France's sphere of influence. But in 1881, the French government decided it needed full control over its growing assets in the country. Using a border incident as pretext, French troops entered Tunisia and on 12 May the bey gave France substantial power over his country in the Treaty of Bardo (Alexander 2010:18). This left the bey's domestic government intact,

including the army, courts, and school system. Yet France was given exclusive authority over Tunisia's foreign relations and the country's budget, which moved ultimate political authority to the colonial power. The remaining obstacles to full French control were removed when the bey signed the La Marsa Convention two years later and revoked any meaningful sovereignty (Perkins 2014:44–45). Tunisia now was a protectorate, its ministries and agencies supervised and reorganised by French officials. Building on state-building efforts already underway since earlier decades of the 19th Century, the French authorities decided to govern through existing rulers and institutions rather than directly. However, this could hardly obscure the fact that the *Résident Général* appointed by Paris was actually in charge. In many ways, French colonialism had a smaller footprint in Tunisia than elsewhere and thus was “less destructive to the existing political, social and economic structures” (Willis 2012:20). The French settler population never exceeded the relatively low seven percent of the population in Tunisia and French penetration of the country's economy was less intense than in other colonies, particularly neighbouring Algeria, which was considered part of metropolitan France.

Lasting about three quarters of a century, the French presence nonetheless left important legacies in the social and ideational structures of Tunisian society. It strengthened both the state's physical and administrative infrastructure across the country and Tunisia's nationalism. By establishing municipal governments and improving roads and railways, the protectorate administration expanded both the administrative and physical infrastructure of the existing state (Anderson 1986). The Tunisian polity became better connected, but the power shifted further to the capital, Tunis, where decisions about appointments for local authorities could be taken, which in turn depended on the central government for funding. Beside the centralisation of the state, the increasing privatisation of previously jointly owned land over the course of the 19th Century was a key social dynamic that proceeded during French control. It is important to point out the uninterrupted nature of state-building in Tunisia, which has put the country apart from other colonised countries and meant that it had existing political and economic institutions to work with upon independence (Alexander 2010:21; Anderson 1986).

On the level of ideas and ideologies, colonialism accelerated the ongoing diffusion and adoption of European political concepts and norms that began in the 19th Century, including the ideas of nationalism, equality, and self-determination. Murphy (1999:45) observed that “Tunisian city and provincial society absorbed French culture and ideas like a sponge”. Education was a key conveyor belt for these ideas. While the French surveyed and consequently reassigned large swaths of the most productive of agricultural land and many

Tunisians suffered under these reforms, education was a sphere in which the colonial policies also benefited Tunisians. With the aim of creating a cadre of interlocutors familiar with both Tunisian and French language but inculcated with French values, the colonial authorities offered educational opportunities. If prior to the protectorate only the Sadiqi and Bardo Colleges had offered education that went beyond religious studies, France promoted reforms aimed at encouraging the assimilation of French attitudes by Tunisian students. The scale was limited, though: In 1900, only about 3 per cent of the Tunisian population had attended a school with a Western curriculum (Perkins 2014:71). While this exposed Tunisian students to French values, this did not only facilitate colonial control. Indeed, the growing number of graduates of the secular education sector “turned the language and values back on the colonizers” (Alexander 2010:24) and this produced many of the future leaders of Tunisia’s nationalist movement. In fact, “Tunisia was the first Maghribi country to be influenced by modern nationalism” (Tessler, Entelis, and White 1995:424).

Larbi Sadiki (2002c) has argued that colonialism increased the importance of Tunisianness as a source of identity. The French presence made the commonalities within Tunisian society more easily recognisable: They could now be clearly delineated from the French ‘other’ – the Tunisian ‘us’ versus the French ‘them’. National consciousness gained relevance compared to the variety of identities related to tribe, clan, urban or rural dwelling, *baldi* families, ulama and others. Tunisia had already seen an influx of Europeans over the course of the 19<sup>th</sup> century. Yet the French presence “became identical with a historical moment in the imagining of community. ‘Tunisian-ness’ had to be invented as a legal construct and as a national identity” (Sadiki 2002c:500 citing Sraieb 1987). Tunisia’s relative homogeneity facilitated this. And while nationalism is often portrayed as a secular ideology, Tunisia’s strand had a religious dimension from the beginning – not surprising perhaps, given that the largest part of the population shared a common Islamic and Arab identity and playing on this dimension thus promised the highest possible political mobilisation. Indeed, political activism against the French occupants was often triggered by events that were perceived to violate Tunisia’s religious identity. For example, plans in 1911 to build a road across a Muslim cemetery and to hand control over it from the religious authorities to the Tunis municipality mobilised protestors and led to violent clashes.

The discrimination suffered by Tunisians compared to foreign residents of the country was a key driver for Tunisian nationalism. Under the protectorate, French courts were introduced – not too dissimilar to the consular courts operating under the capitulations – which were responsible for all cases involving foreigners. Tunisians were subject to a separate system

made up of religious courts (both Islamic and Jewish) and in some cases the Justice Ministry. Yet when a dispute involved Tunisians, it was in the French courts' jurisdiction (Perkins 2014:50). The Tunisian contribution of around 63,000 men to France's military in World War I created hopes for a renegotiation of the French-Tunisian relationship. When the colonial authorities instead announced the confiscation of habous land and higher pay for French officials than their Tunisian counterparts in the same position, different parts of the Tunisian elite coalesced around the ever-clearer realisation "that the Protectorate served only to 'protect' French interests" (Alexander 2010:25).

Reflecting the pathway dependencies generated by the constitutionalist experiment in the 19th Century, the nationalist movement adopted equal citizenship between French and Tunisian residents of the country as a key position and tied this with the (re-)instatement of a constitution. The first influential movement in this mould were the Young Tunisians, who also positioned themselves "as defenders of the traditional Muslim social and cultural values that continued to form the core of most of [their] countrymen's lives" (Perkins 2014:76) even though some welcomed France as allies in seeking to modernise and reform Tunisia. The Young Tunisians' membership was almost exclusively recruited from the urban *baldiyya* and largely argued for an ideological stance in the vein of Khayr al-Din's reformism. The movement was unable to survive the repression of the colonial authorities, but its bourgeois origin and consequent inability to generate messages that could generate with masses of the population also contributed to its lack of political success. In 1920, some Young Tunisian supporters founded the *Parti Liberal Constitutionnel Tunisien*, or *Destour*, the Arabic word for constitution, which developed into the main opposition group at the time. Its membership would become considerably more heterogenous than the often-Western educated Young Tunisians'. Crucially, it included many men whose positions would traditionally have been sources of social status, prestige, and income, but were now hit by the policies of the protectorate. The members of the party's executive committee were government officials, businessmen and landowners, as well as progressive ulama and artisans. The fact that such a group agreed that the promulgation of a constitution should be their party's central plank and that this demand should even be reflected in its name gives a strong indication of the profound and lasting impact the 19th Century constitutionalist period had: Well beyond its initial advocates among the mamluk state bureaucrats, it had anchored the idea of liberal constitutionalism at the centre of Tunisian politics. The group also demanded an elected parliament with both Tunisian and French members as well as equality in pay, government job opportunities, the freedom of expression and association and elected local councils –

liberal positions that give further indication of the large extent to which key elements of liberalism had permeated in key parts the Tunisian elite and political class. As the only viable outlet for political activism, the Destour also attracted young provincial graduates of modern education, many of them with degrees from French universities (Perkins 2014:82–85). However, they were soon disenchanted with the Destour’s lack of success and its leadership’s sentimentalism toward a glorified precolonial past. A key thinker of this tendency was Tahar Haddad, a young Zaituna professor, who criticised the Destour’s lack of interest in Tunisia’s working class and in 1928 provided an innovative interpretation of the Qur’an’s teachings. In a series of essays, he called for more rights for women as well as advocating a larger role for them in public affairs (Weideman 2016). In the long-term, Haddad’s writings would prove very influential and left an important legacy for future reformers to draw on. Many of the young, disenchanted members of the Destour were secular-leaning, comfortable with Western culture and its norms had left a strong imprint on them. After struggles within the Destour Party, they ultimately broke away and formed the Neo-Destour party in 1934, led by Habib Bourguiba, a French-educated lawyer from Monastir in the Sahel, who “adopted a populist brand of nationalist consciousness” (Tessler et al. 1995:424). Like the Young Tunisians, they believed in the economic and cultural innovations of French liberalism, and like the old Destour, they opposed colonialism. Forging links with the urban working class, trade unions, and rural tribes, the new party became the dominant opposition group to French rule by the late 1930s. Despite their secularism, the Neo-Destour activists had a good understanding of how religious identity could be used in political mobilisation against the French and thus utilised Islam to that effect. A notable campaign focussed on the burial of the small number of Muslim Tunisians who had adopted French citizenship and thus renounced their status as Muslims. Generally treated as pariahs, because their decision was regarded as apostasy, they were denied burials on Islamic cemeteries. Each contravention against this triggered protests and offered an opportunity for the nationalists to portray the French colonial authorities as meddling with Islam (Perkins 2014:96–98; Willis 2012:29).

A change of government in France led to the invitation of Bourguiba by the newly elected leftist Popular Front coalition. Bourguiba articulated the Neo-Destour’s demands short of a call for independence. He focussed on the inequalities between Tunisians and French citizens in the protectorate and the installation of constitutional government. While the leftist coalition in France collapsed after only 15 months, a lasting effect on Tunisian politics was that during its incumbency, restrictions on political work in Tunisia were lifted and the Neo-Destour could work and recruit openly, increasing its membership and links to other groups. When

France failed to fulfil its demands, the political situation heated up as arrests, protests, and acts of civil disobedience dominated the scene, leading to several deaths and injuries such as those on the 9<sup>th</sup> April 1938. The Neo-Destour was banned and hundreds of its members arrested when the Second World War began (Perkins 2014:103, 107–9). While operating underground, an internal conflict over the Neo-Destour’s future course erupted. With Bourguiba abroad in Cairo, the Neo-Destour’s secretary-general Salah ben Yusuf expanded its membership beyond its traditional centres in the Sahel and Tunis as well as developing coalitions with the recently founded trade union association UGTT (*Union Général des Travailleurs Tunisiens*) and activists of the Zaituna mosque-university. Ben Yusuf, from the southern island of Djerba, found the association with this key institution of Tunisia’s Arabo-Islamic heritage useful. Their activists soon constituted their own wing within the party while the majority of its members were secular, westernised nationalists – much like Habib Bourguiba. Ben Yusuf managed to position the Neo-Destour as the only viable political outlet in Tunisia and France’s only valid interlocutor there. Yet the conflict over the orientation of the Neo-Destour between Bourguiba’s vision of secular modernisation Ben Yusuf’s Arabo-Islamic identity would continue well into independence.

To summarise the development of the Tunisian nationalist movement is to first note that it shares with similar movements in other countries under colonialism the approach to turn European ideas and ideologies – nationalism, equality in rights, the rule of law and others – against the colonial power. A specificity of the Tunisian movement was that it put an early emphasis on the demand for a constitution as a tool to codify and guarantee equal rights tying the struggle for independence with that for a constitution. This was so central to the movement’s platform that its key movement, the Destour party, named itself after it and that this demand preceded the demand for independence. Tunisia’s early constitutional experiment, which for reformers evidenced the compatibility of the country’s Arabo-Islamic culture and European norms and institutions, had set an example to emulate. While gender equality had been introduced to the debate by activists like Tahar Haddad, it was not a prominent demand of the movement. Finally, while the leadership of the Neo-Destour consisted mainly of secular individuals determined to move Tunisia toward a Western model of modernisation, with Habib Bourguiba at the forefront, it consciously used Islam to mobilise and unite Tunisians politically, recognising the symbolic importance these values had in the population. The cleavage between these two realities would continue to impact Tunisian politics in the following decades.

### 3.6 *Legacies of the 1861 constitutionalist experiment*

What are the pivotal legacies of Tunisia's 19th Century constitutional experiment? Five distinct legacies of the constitution, its historical context, and implementation phase stand out in terms of generating specific pathway dependencies that would come to have a bearing in future critical junctures as antecedent conditions. In many ways, these legacies lie above all in the setting of precedent, both ideationally and in political practice.

Nationalism dominated the 19th Century in Europe and the Tunisian constitution is an expression that a conception emerged in the country of itself as a nation-state. At the point of the constitution's conception, this was particularly relevant for Tunisia's external relations – vis-à-vis the Ottoman Empire as well as the encroaching European powers. By abandoning the legal pluralism of the past and creating mostly equal, secular laws for all citizens based on their residence in Tunisia, as well as a secular judiciary, the nation-state's logic of the territorial principle was however also developed domestically. While implementation was very uneven, the constitution itself, its institutions, and the *tanzimat* reforms more generally produced a framework within which a national identity and polity could grow and a precedent for future nationalists to point at.

Crucially, the short constitutionalist period in Tunisian history also resulted in a deep enmeshment of nationalism with constitutionalism and the foundation of a Tunisian tradition of constitutionalism. The fact that the 1861 constitution was abolished under foreign pressure made it appear more Tunisian than its genesis would suggest. Hédi Timoumi (2010, cited by Ben Achour 2017:270) argued that in the “twilight” of the Tunisian constitutionalist movement that was the 19th Century constitutionalist period, its concepts, ideas, and language were formed. In spite of being in some ways a product of foreign influence, elitist in form, and limited impact on the population at large, and despite its ultimate failure, “the three years between January 1861 and May 1864 form the ‘three glorious ones’ of Tunisia”, praised by poets and artists (ibid: 270-271). The 1861 constitution as well as the institution of the constitution as such thus became closely associated with the struggle against colonialism, not least reflected in the fact that the nationalist movement was simultaneously a constitutionalist one.

The political language of liberalism – virtually unknown in the Arab world until the end of the 18<sup>th</sup> century (Parolin 2009:23) – well and truly arrived in Tunisia with the 1861 constitution. Even if its implementation was only partial and short-lived, liberalism was also applied: Some degree of accountability was introduced and while political participation was still far off, the

Grand Council introduced a degree of political contestation – one of Dahl’s (1971) two dimensions of democracy –, albeit restricted to some elite groups, while reinforcing the individual rights and freedoms introduced by the *Ahd al-Aman*. There were significant indigenous political forces pushing for the introduction of liberal reforms, but it is worth highlighting the external pressures – both direct political and indirect economically – on Tunisia to modernise. The introduction of the constitution and the push for this move by parts of the bureaucratic elite must be seen in this context. It is unlikely that the country would have taken these steps in the absence of external pressure and the constitution’s association with foreign influence contributed directly to its bad reputation among Tunisians.

A degree of secularisation and bureaucratic rationalisation of the state was reflected in the introduction of procedural rules for the administration and the state’s finances as well as the new court system, which restricted Shari’a courts’ field of action to very basic personal status issues – parallel to the constitution itself, which gave significant further substance to the idea of secular legislation trumping, or casting aside, religious doctrine in multiple relevant spheres of public and private life. It is worth noting the socioeconomic effects of these processes and their political implications: Over time, established elites in the Shari’a court system and elsewhere suffered a decline in income and status relative to the emerging elites in the new state institutions. In turn, the latter group led to the growth of a pro-reform constituency.

Another profound legacy in terms of generating pathway dependencies was a cultural one, namely the *invented tradition* (cf. Hobsbawm and Ranger 1984) of Tunisian reformism. Events around the constitution brought a group of reform-minded statemen, officials, and writers to the fore “who were to play a considerable part” in the political of their country until the French occupation in 1881 (Hourani 1983:65–66). Graduates of both Zaituna and the Bardo School, they entered the elite of the country within the military, government administration and academia. These 19th Century reformers had found an effective discourse to justify the compatibility of modernisation with the country’s Arabo-Islamic cultural heritage (Murphy 1999:43). This historical episode of modernising changes developed into an ideational repertoire that future reformers could draw on to legitimise their projects when these challenged the status quo. Hibou (2009:14) has argued that reformism has become part of Tunisian identity and has an impact on decision-making in the country: “According to the official phraseology, reformism means opening up to the West without denying the Islamic religion and culture; it is the primacy of texts, laws, and the constitution; it is the priority given to order and stability, moderation and the golden mean”. More specifically, Womble

(1997:10) even argues that “flawed as it may have been, the constitution of 1861 became part of the national identity of Tunisia”. The precedent of reform in the 19th Century, Tunisia’s vanguard role in implementing liberal reforms within the Arabo-Islamic world, and its enmeshment with Tunisian identity generated a legacy that would provide discursive resources to would-be reformers in future critical junctures.

### *3.7 Conclusion*

This chapter has argued that the 19th Century constitutionalist experiment in Tunisia has left important legacies, generating pathway dependencies that made their impact felt under the period of colonial control by France and – as subsequent chapters will show – continue to influence Tunisian politics today. By analysing these legacies, the chapter outlined the antecedent conditions impacting later critical junctures as well as those of the overall period of time under investigation in this thesis. This conclusion summarises this chapter’s findings following the critical juncture framework outlined in chapter 2, beginning with antecedent conditions/crisis that triggered the emergence of the juncture, the constitution-making process, the constitution’s content, and the post-constitution implementation phase.

The chapter has identified key social and ideational legacies from the pre-reform era that formed antecedent conditions to the crisis triggered by an increased European influence in and over Tunisia in the 19th Century. Key elements of these antecedent conditions were the ideational heritage of Islam and the socio-political system present in the early 19th Century. The chapter has argued that Islam’s ideational contributions lend themselves to multiple interpretations. These range from legitimising rigid legal inequalities between and among Muslims and non-Muslims to using the religion’s “egalitarian potential” to argue for full equality between all citizens. An analysis of the structures and practices of citizenship in pre-colonial Tunisia have shown to belie the country’s national myth of homogeneity and revealed a multifaceted society where differentiated groups of society developed only a limited shared identity based on Tunisian-ness. The latter only became more prominent in Tunisia’s encounter with the European “other” – an encounter that intensified over the course of the 19th Century though some newly introduced practices such as military conscription already pointed in this direction.

Constitution-making in the mid-19th Century was a reaction to the crisis triggered by Europe’s encroachment on the country and part of the Tunisian “defensive modernisation” strategy. While aiming at increasing Tunisia’s ability to withstand external influence, it paradoxically increased European influence even further. Within this strategy, the 1861

constitution with its liberal contents was a means to the ends of national sovereignty rather than responding to bottom-up demands for more rights and state accountability. The decision to promulgate a constitution was taken at the top and implemented top-down and like its abolition few years later was heavily influenced by European powers. The drafting process itself then was a very exclusive affair, involving only a part of the political elite. Crucially, a link to the general population was lost when the religious elite withdrew from the process, undermining the legitimacy of its outcome both among this influential group and the wider population, for whom the document was less a reflection of Tunisian sovereignty but rather European meddling in the country. The chapter has argued that the reason for the split along pro- and anti-reformist lines were not merely ideological, but that access to political and economic resources as well as social prestige also played a role in determining different groups' positions on the changes.

In substance, the 1861 constitution represented a relatively tame departure into constitutionalism as political participation – much like in Europe at the time – was only extended to a small group of appointed members of the elite. Yet it introduced two key liberal principles: Firstly, for the first time in Tunisian history, the ruler of the country and state institutions more widely were subjected to a degree of accountability. Highly symbolically, the bey's power was bound to an oath to uphold the *'Ahd al-Aman*, the constitution, and the laws that emanate from them. More substantively, his political actions are limited by the budget powers of the quasi-parliamentary Grand Council and to a smaller extent, the judiciary. Secondly, equality before the law was reaffirmed. Citizens' equality in rights and duties (with the exception of the privileges of the ruler's family) and the shift toward a secular legal system operating under the territorial principle rather than based on group affiliation are among the most important elements of the constitution. However, the document is entirely unconcerned with the fate of women, ignoring half the country's population. Geopolitically, the constitution is a measured attempt at expressing sovereignty vis-à-vis the Porte while maintaining Tunisia's association with the Ottoman Empire. This middle ground is also struck on the question of the boundaries of the Tunisian polity. In many ways, the country's heterogenous population is rhetorically tied more closely to its national identity, reducing the relevance of communities on the sub-state (e.g. tribe or functional groups) and supra-state (e.g. Ottoman Empire, Global Islamic Ummah, Maghreb) level. However, in the implementation of the 1861 constitution, the state as such remained too weak and centralised to undergird the discursive reification of the national community with institutions and evenly implement policies across the country's territory that would impact the population at large.

Citizenship, consequently, remained an uneven affair in which some groups and individuals had considerably more privileges than others. That does not mean that all aspirations of the constitution failed: The elites permitted to participate were eager to make use of their new institutionally secured powers. The members of the Grand Council appeared to take their work seriously and used the instruments at their disposal to hold the bey and his ministers to account where this was possible. Nonetheless, internal and external factors conspired to bring the constitutional period to an early end.

Tunisia's first constitution thus left a mixed legacy. A crucial element was the enmeshment of nationalism and constitutionalism. Another legacy was the invented tradition of Tunisian reformism, which provided justification for the compatibility of modernisation and Tunisia's Arabo-Islamic cultural heritage. Moreover, the very identity of the country and its citizens – who were now increasingly supposed to identify with the national community – was tied to this idea. Beyond the discursive level, the implementation of the constitution produced a generation of Tunisians that experienced constitutional government themselves – albeit briefly – and could develop into a reformist constituency later on. Another important legacy is the affirmation and thus anchoring of the language of individual rights and equal citizenship into the Tunisian discourse. Yet if Tunisian nationalists later demanded equal citizenship, they firmly focussed on the equality between Tunisian and European men. It would take until after independence for gender equality to truly become an issue of public policy concern. Despite the influence of the tradition that argued for the compatibility of Tunisia's Arabo-Islamic heritage with European ideas and institutions, the question of the extent to which this principle should translate into the adoption of European practices was contested in the early phase of the nationalist movement. As the following chapter will show, this contestation continued after Tunisia's independence.

## 4 An authoritarian pact: Tunisia's post-independence settlement

### 4.1 *Introduction*

The aim of this chapter is to analyse how the pathway dependencies and legacies created prior to Tunisia's independence affected the country's social contract once colonialism was ended and in turn seeks to identify and explain the pathway dependencies and legacies created in this period, by the 1959 constitution and Habib Bourguiba's presidency. The chapter argues that Tunisia's self-styled democratic post-independence constitution both formalises and reinforces the authoritarian tendencies of Habib Bourguiba's exercise of executive power in the country and therefore reflects semantic constitutionalism. The country's post-independence constitution enabled authoritarian rule and permitted only a very constrained exercise of citizenship, leaving a paradoxical legacy as an element that contributed to national emancipation and liberation from colonialism, but arguably did so at the expense of individual emancipation. The chapter begins by recalling the antecedent conditions and outlining the crisis that opened the critical juncture within which constitution-making took place, which is the struggle for independence. The sometimes-violent conflict within society over this question and that of Tunisia's Arabo-Islamic identity are shown in the subsequent section to affect constitution-making: it provided justification and legitimacy for a strong executive in the new constitution, believed to be better able to maintain stability and national unity. An analysis of the constitution itself shows how frankly these authoritarian tendencies are formalised in a notionally liberal-democratic document and how it cements the existing power distribution, generating a specific legacy and pathway dependencies that militate against the development of pluralism in subsequent decades. The final section evidences this in examining citizenship and constitutionalism under President Bourguiba. It argues that his regime's social contract included trade-offs between different elements of citizenship, based on political-economic conditions; a development that is reflected in amendments to the constitution, too.

### 4.2 *Gaining independence, chasing unity*

Having secured leadership of the Neo-Destour, Habib Bourguiba sought to modernise Tunisia. In building state institutions and forging a strong national identity, this course's appeal was based on "its symbiosis with emancipation and inclusion" (Sadiki 2015: 502). In

theory, the process had the potential to liberate the country from colonialism and the individual citizen from their particularities. The citizen was thus to enjoy their rights within the new national community, liberated from the constraints of primordial associations. However, Tunisian independence from France was preceded by a profound split within the nationalist movement over both tactic and identity as the previous chapter touched on. One camp, led by Habib Bourguiba, favoured a gradualist approach to independence, which could include steps toward and negotiations over internal autonomy – governed within a constitutionalist framework – prior to complete independence. Bourguiba also believed in a project of secular modernisation on largely European lines and had his political constituency among the trade unions and other leftist groups. The camp led by Salah ben Yusuf demanded a radical break from the colonial power, argued that Tunisia’s bid for independence should be pursued in concert with the other countries of the Maghreb as outlined in the charter of the Movement for the Liberation of North Africa, which the Neo-Destour had signed. His stance positioned him closely to the pan-Arabism of Egypt’s Gamal Abd al-Nasser, which Bourguiba had grown sceptical of during his time in Cairo. Ben Yusuf garnered support “from religious leaders, from members of Tunisia’s commercial and landed classes, and from those with strong pan-Maghreb or pan-Arab sentiments” while Bourguiba saw putting Tunisia first as coherent with his nationalism (Alexander 2010:33; Toumi 1989:18–23). France’s unwillingness to change Tunisia’s status changed after World War II, when the conflict between the nationalist movement and the protectorate authorities turned violent at times. When internal autonomy was offered, Bourguiba successfully campaigned within the Neo-Destour for this intermediate aim. It was approved at a party congress in 1955 – at the price of ben Yusuf’s expulsion from the party and embitterment of his supporters. Amid some twenty thousand Yusufists protesting the congress in Tunis, the assembly also endorsed an agenda of social and economic reform that implicitly rejected ben Yusuf’s priority of pan-Arab affairs (Perkins 2014:134). The progressive reform agenda would later become part of the ruling bargain between the state and society (Meijer 2017:81). Another source of mobilisation is worth noting: At another congress that year, three hundred women assembled to demand civil and political equality with men as well as more educational opportunities. The government – now Tunisian – however subordinated these demands to the aim of ending the protectorate (Perkins 2014:143).

Upon independence, Tunisia was formally still an absolutist hereditary monarchy with Bey Amin at its head. The constitution-making process soon confirmed the expectation among many observers that this could not continue after the independence struggle had been fought

and won by the Neo-Destour, with negotiations headed by Habib Bourguiba. While it appeared the country was moving toward constitutional monarchy, hopes that a new political regime would also mean a wider liberalisation of Tunisian politics were soon quashed. The severity of the split within the nationalist movement and the memories of a virtual civil war contributed to a situation where national unity was seen to transcend all other goals and authoritarian government acceptable (Moore 1964:91). Utilising this general atmosphere of uncertainty as well as excelling at the politics of appointments, Bourguiba managed to concentrate power within the party in his hands and, subsequently, also the power of the state. Crucially, this was not temporary: Bourguiba's influence meant that he could and did influence the constitution-making process to consolidate his power even further using the discourse of national unity to legitimise this. At a critical juncture in the political development of Tunisia, when the option of a pluralistic democracy was an available path, the history of internal conflict within the Neo-Destour made a more centralised, authoritarian future more likely and Bourguiba chose it. As the analysis of the constitution and its implementation below shows, the motif of national unity in its text dominated the individual rights provisions the document contained, too.

### 4.3 *The 1959 Constitution*

#### 4.3.1 The constitution-making process

Tunisia's second constitution-making process was closely linked to the country's independence. The bey signed a decree calling for the election of a National Constituent Assembly (NCA) on 29 December 1955, which thus preceded independence by three months. The decree stipulated that the constitution elaborated by the Assembly would be accepted by the bey and promulgated as the Constitution of the Kingdom. The Neo-Destour had long argued that Tunisia ought to have constitutional government even if it only gained internal autonomy. Planning for elections of a *Constituante* became highly symbolic for and foreshadowed independence before it was firmly secured: Unbeknownst to the public, Bourguiba had pressured the bey into passing a voting law in January 1956 eschewing proportional representation in favour of majority representation to the electoral benefit of the well-established nationalists. A National Front was founded, consisting of the Neo-Destour, the UGTT, the farmers' union UNAT (*Union nationale des agriculteurs tunisiens*), and the employers' association UTICA (*Union tunisienne de l'industrie, du commerce et de l'artisanat*), giving the Neo-Destour even greater control over the NCA. The French authorities were aware of the fact that the beylical decree of December 1955 called for a first

assembly meeting on April 1956, where its members would declare Tunisia's independence. The French thus decided to grant it before the NCA could meet (Almany 1972:7–9). After 75 years of protectorate, a Franco-Tunisian convention was signed on 20 March 1956, which abrogated the treaties of Bardo and La Marsa.

When the vote was held a mere five days after the official declaration of independence in March 1956, Yusufists boycotted it under the slogan “the rifle instead of the ballot box” (Alexander 2010:37) and assassinated several party officials who had gone to vote against their demands. Women were excluded from suffrage and could only vote in the municipal elections in the following year (Almany 1972:9). While the Neo-Destour's National Front won the NCA elections in a landslide, low turnout in several regions – particularly on Ben Yusuf's home island Djerba – indicated considerable opposition to Bourguiba in some quarters. The Neo-Destour's success at the ballots was no coincidence. The agreed electoral system not only guaranteed a Neo-Destour majority in the Constituent Assembly, it also secured maximum control over its composition as the choice for voters was limited to candidates hand-picked by the party's political bureau in consultation with relevant political organisations. Bourguiba ran as the Neo-Destour candidate in Monastir and was duly elected. Winning 98.7 per cent of the vote, the Neo-Destour secured all the assembly's 98 seats. The nationalists effectively allocated ten of these to unaffiliated notables “in the interest of national unity”, while twenty went to trade union functionaries including Ahmed Ben Salah, the UGTT's general secretary, who would head the left aisle of the assembly (Alexander 2010:38; Moore 1964:93). Overall, the composition of the assembly was marked by the dominance of Bourguiba's modernist current within the nationalist movement. As Redissi, Chekir, and Nourira (2014:25–29) argue, Tunisia's elites have historically been less divided structurally (e.g. by education levels or income), but rather culturally, reflected in the type of education received: religious at Zaituna mosque-university or secular, e.g. at Sadiki College. However, when it comes to Tunisia's first constituent assembly, the latter mostly represented the coalition around the nationalist movement: urban (petty) bourgeoisie of secular education and modernist leanings. In a country of very low literacy, almost half of the deputies had a higher education degree. Culturally, Redissi et al claim that all members of the assembly shared “republican and secularized ideals, including the 53 constituents in the traditional curriculum (Zaituna and assimilated schools)” (ibid: 26). At a key moment determining the very nature of Tunisian citizenship and constitutionalism for years to come, the key decision-makers again represented only a relatively narrow part of the country's society. Almost a century on from Tunisia's first constitution, the religious elite and its advocates were once

again not involved in the process. If they had decided to abstain themselves in the 19th Century, they were shut out by Bourguiba in the 20<sup>th</sup> century. Also present were some individuals closely associated with the bey and the French. This dismayed some Destourians, but Bourguiba calculated that this might mollify the still influential pro-French circles in the country (Kaaniche 2009).

Despite its high symbolic value, the constitution-making process was at first secondary to the social and political convulsions taking place outside the chamber. The first session of the Constituent Assembly on 8 April 1956 was presided over by the bey. On the same day, the assembly elected Bourguiba as its president, who was also appointed prime minister within the month. Yet for almost two years, deliberations on the constitutions were virtually on hold and the assembly only gathered rarely. Instead, the party leadership headed by Bourguiba sought to implement its modernist programme and establish the hegemony of the state in quick succession. The goal was to carry out a “psychological revolution” that would restructure social relationships in a way that would change Tunisians’ attitudes and make modernity possible. This was no mean feat in a conservative, largely rural, and illiterate society. As defined by Bourguiba himself, the objective was to make each Tunisian “a good citizen, capable of initiative, eager to learn and cooperate, so the battle against underdevelopment will be won” (Tessler et al. 1995:436). Rather than a bearer of political and other rights, Bourguiba’s Tunisian citizen emerges then as an individual who concentrates his or her efforts on the economic sphere. For Bourguiba, this transformation required that individuals be divorced from their primordial attachments, be it their religion or social groups such as tribes. Through a series of reforms, Tunisians should be moulded into a new, national community instead – a national polity (Haugbølle 2016). Just like before independence, the Neo-Destour nonetheless employed religious symbols and language to rally popular support for its projects (Sadiki 2002c).

Bourguiba moved quickly to eliminate alternative power centres and soon concentrated all the state’s power in his hands, including the right to legislate. He enacted a series of radical reforms in the summer of 1956 for which he did not consult the assembly. Bourguiba brought key religious institutions under state control or simply abolished them. First came the Habus councils, traditional institutions comparable to endowments, which manage land for religious institutions. By extension, it brought the beneficiaries of the council’s funds – religious, charitable, and educational institutions – under state control. The state’s judicial system absorbed the Shari’a courts in August 1956 and lay the foundations for the introduction of the Personal Status Code – “the most innovative legal reform in the Muslim world since the

abolition of the sharia in Turkey in the 1920” (Perkins 2014:140). The law introduced a minimum age for marriage, which it defined as a voluntary contract, outlawed polygamy, gave women new rights such as that of divorce, as well as expanding their existing entitlements in inheritance and child custody. Though they were still not put on an equal footing with men, this undoubtedly benefitted Tunisian women. As citizens, they were now more autonomous. While enhancing Bourguiba’s personal reputation, but also that of Tunisia as a progressive society, this reform “also aimed to weaken, if not dismantle historically-based kinship ties, which until then had ‘served as a major anchor for social solidarity, social control, and collective political action’” (Haugbølle 2016 citing Charrad 2001). In other words, like the abolition of the Habus council, the Personal Status Code was a way of removing a base of power for potential political contenders. As Marks (2013:226) has noted, the instrumentalization of women’s rights for political ends “has been a hallmark of modern Tunisian power politics”. These changes had profound impacts upon society. Yet where they increased individual autonomy, this preceded the constitution rather than resulting from it.

Until 1958, the NCA’s only substantial decisions were effectively taken on a single day and had a symbolic nature as well as empowering Bourguiba. In what became a key rupture of the Tunisian political system, a special meeting of the Constituent Assembly on 25 July 1957 proclaimed the republic, abolished the monarchy, and unanimously adopted the first Article for the constitution, which sets out the state’s principles (see discussion below). Following a two-hour speech by Bourguiba, the Assembly adopted a resolution that consisted of only four points. Referring to their democratic mandate, sovereignty, and independence of the state and the aim of establishing a “democratic regime, which was the Assembly’s purpose in drawing up this constitution”, the members declared the abolition of the monarchy, the establishment of Tunisia as a “republican state”, the decision to make then-Prime Minister Habib Bourguiba head of state with the title of President of the Republic, and the conferring of power to the government to take “all measures necessary, for safeguarding the republican regime” (Blaustein and Flanz 1972; Kaaniche 2009). As Bourguiba assumed the monarch’s full legislative and executive powers, the abolition of the latter’s office also removed yet another rival power centre.

In important ways, the constitution subsequently adopted in 1959 merely formalised the existing power relations with a single leader of a single party at the top of the state and – as the detailed analysis below will show – therefore falls into the category of a semantic constitution in Löwenstein’s (1959) analytical framework, that is, a constitution which merely formalises an existing distribution of power in the hands of the polity’s leadership. Tunisian

intellectual Mohammed Talbi would later call it a “constitution of perfectly Stalinist type” (Talbi and Jarczyk 2013:352) and the fact that its promulgation on the 1<sup>st</sup> of June was dated on the anniversary of Bourguiba’s return to Tunisia four years prior was certainly no coincidence. Nevertheless, both the process of constitution-making and its result are important markers for Tunisia’s political history. Between independence and the end of Bourguiba’s regime, the Constituent Assembly was one of only two episodes in which there were substantial parliamentary debates in Tunisia. Toumi (1989:30–36) outlines six key areas of contention in the constitution-making process, which are used in this section to structure the argument.

1) The NCA empowered itself. The tasks of the assembly were originally limited by the beylical decree to the elaboration of a constitution for the Tunisian kingdom – this wording strongly implied that the political system was already set to become a constitutional monarchy. In fact, legal experts have argued that the NCA’s mandate, far from holding the “original constituent power” of representing the people to establish the state on the pattern of the French Revolution, was strictly limited to elaborating a monarchical constitution (Ben Ahmed al-Tûnisi 2002:28). This was immediately challenged in the Assembly’s first session by Ahmed Ben Salah: He declared that the assembly did not only have the power to legislate on matters of government, but also establish rules constraining the monarch who summoned the *Constituante* – if its members so wished. Such a power grab (and some would argue, coup d’état), based on the assembly’s electoral mandate reflects a notable degree of acceptance of the legitimacy of elections over the hereditary and traditional legitimacy enjoyed by the monarch and, arguably, the legitimacy of positive law (Ben Ahmed al-Tûnisi 2002:28).

2) This also links closely with the nature of the political system to result from the constitutional process, which was originally expected to be inspired by the British model of a representative monarch and a powerful governing prime minister. The change of tack had already been foreshadowed by the removal of privileges of princes just weeks after independence, but it represented a break with the Neo-Destour’s previous line to establish a constitutional monarchy, reaffirmed less than two years prior at the Sfax party congress. The bey even had legal protection against the institution of a republican regime thanks to an article of the 1881 Bardo Treaty, which remained expressly in force at the time. While France was theoretically bound by law to guarantee the beylical throne, it was not called upon for protection by the monarch (Silvera 1960:377–80) when the republic was declared. A draft that included a constitutional monarchy had been prepared in January 1957 but was neither debated in the plenary chamber nor published in the Official Journal, suggesting that the

establishment of a republic was already planned early on. Bourguiba of course long desired personal power and his antipathy for the bey reached back to the injustices his family experienced at the hands of the monarchy.

3) The extent to which Bourguiba concentrated power in his hands foreshadowed the constitution's allocation of competences between legislature and executive. The first constitutional draft of January 1958 foresaw a minimum of balance between the two, but the government pushed until it gained significantly more power. For instance, contrary to the original position of the assembly, the executive was given more extensive decree powers and the right to appoint judges. To explain this backtracking by the assembly, some observers pointed at the death of the general rapporteur on the constitutional project Ali Belhaouane in May 1958 as he was a defendant of checks and balances. Others noted the appointment of Ahmed Ben Salah – previously presiding over the committee on the coordination and preparation of the constitution – as health minister, which limited his room for manoeuvre: As a member of the government he could hardly go against the position of the prime minister and his colleagues who defended the executive's dominance. The ongoing issues with France over its military role in North Africa and a tense security situation with a Yusufist plot against Bourguiba in 1959 fed into the latter's discourse of the need for national unity, legitimising a strong executive.

4) Economic questions generated passionate debates in which the UGTT deputies were generally pitted against the farmers of the UNAT. While some demands went as far as a fundamental land reform, others suggested the government's role in the economy ought to be limited to large-scale projects such as hydropower works and the training of farmers. The government justified its planned interventions with reference to the weak capital formation in the private agricultural sector.

5) The debates on the social and “civilizational” dimensions of the constitution have continued and exceeded others throughout the constitution's life. They were centred on the role of socio-economic rights in the constitution and what kind of identity the constitutional text should reflect for the state. Toumi notes that it was the UGTT that secured the right to form trade unions, albeit restricted in the text by the addition of “in accordance with the law”. The most heated debate in this area however was on women's rights. The assembly took two days to debate the enfranchisement of women, which large landowners, traders, industrialists and several Zaitunists opposed. Trade unionists floated the idea of limiting the right to vote to working and educated women. In the end, the assembly decided to include universal suffrage

after Bourguiba had decreed their participation in the 1957 municipal elections and thus created facts. Reflecting the controversial nature of gender equality however, the constitutional proposal only had a majority of one vote. Just months after this decision, Bourguiba introduced the Personal Status Code to further entrench his progressive views on gender legally outside and prior to the constitution, although it took the full political weight and authority of Bourguiba, Ben Salah, Tlili, and leftist intellectuals to avoid street protests against the code (Toumi 1989:35).

Despite the dominance of the modernist current in the assembly, the question of identity produced intense debates from the beginning of the constitution-making process. They were held between the proponents of Arabo-Islamicism and the modernists (or “Kemalists” after Turkey’s secularist reformer), led by Habib Bourguiba and Ahmed Ben Salah. While Bourguiba did display a critical attitude toward Islam’s impact on Tunisian society and was deeply sceptical about the religious establishment, he did not present his modernist positions in radical contradistinction to religion. Rather, in the tradition of the 19th Century reformers around Khayr al-Din a-Tunisi, he argued that the modern era required a fresh interpretation of Islam under the banner of the Islamic concept of *ijtihad* (“reinterpretation”). This would utilise the core teachings of the religion and make them relevant to the contemporary context rather than holding on to established teaching. Not all of Tunisia’s religious establishment agreed, but Bourguiba had skilfully reshuffled top ulama positions to produce a leadership compatible with this vision. Lower rank critics were conscious they were not powerful enough to challenge him (Perkins 2014:410–142). Thus, when it came to the constitution-making process,

at the session of 14 April 1956, two deputies of Zaituna education, Chadly Naifar and Nasr Al-Marzouki, proposed the first article stipulate “Tunisia is an Arab state, Muslim, free and independent” while the trade unionist deputies Mahmoud El-Ghoul and Salah Al-Galaoui proposed: “Tunisia is a democratic, independent and completely sovereign state”

(Toumi 1989:33)

Toumi finds that the ultimate wording by Bourguiba, his secretary of the presidency Bahi Ladgham and Minister Ben Salah reflected the Zaitunists’ proposal more, but it may also be seen as a compromise:

Tunisia is a free, independent and sovereign state, Islamic in religion, Arabic in language and its regime republican.

(Blaustein and Flanz 1972:3)

The enormous ambiguity of this unanimously adopted formulation is worth highlighting as this produced grounds for competing interpretations on the relationship the constitution foresaw between religion and the state (Redissi and Nourira 2009:58). Moreover, the descriptor “democratic” in the symbolically important first article disappeared in the compromise article.

6) The international environment of Tunisia’s post-independence constitution-making process was nothing if not turbulent. In the Arab world, the Suez crisis in 1956 was perhaps the most significant event, but there were also the creation of the United Arab Republic between Egypt and Syria in 1958, the coup d’état by French military forces in Algeria, the end of the Iraqi monarchy, and the establishment of the provisional Algerian republic in Tunis. Meanwhile, France ceased its financial assistance to Tunisia. Globally, the Cold War dominated calculations as the Soviet Union intervened in Budapest, but the late 1950s also saw a wave of African countries gain independence and the first satellite in space. In light of the internal instabilities, these uncertainties “bolstered [Bourguiba’s] case that the times demanded national unity under strong leadership” (Alexander 2010:41) rather than pluralist democracy.

Going beyond Toumi’s account of the CMP, the question of the process’ democratic legitimacy arises. Arguably, the process changed its nature fundamentally with the declaration of the republic in July 1957. Of Arato’s (2016, 2017) four forms of constitution-making, the process initially resembled revolutionary reform the closest, as the Assembly was specifically tasked with the drafting of a new constitution while other institutions continued governing the country. The NCA’s self-empowerment on what is now Tunisia’s annual “Republic Day” changed this and turned the process into one more closely resembling a revolutionary constituent process, where all legitimate power is concentrated in the Assembly, believed to represent popular sovereignty (Bourguiba’s government issued decree-laws nonetheless). In contrast to the mid-19th Century process, this time the constituents were elected and there was public debate about the process and its result as the radio transmitted debates and newspapers critically assessed the new constitution (Bendana 2015:172–73). However, there was little to no concern about public participation as is the case in contemporary CMPs. Despite the democratic legitimacy that elections and a certain level of public scrutiny may confer over the process, it was ultimately still mostly highly elite-centred and distant from Tunisian citizens.

#### 4.3.2 The substance and language of the 1959 constitution

The product of the constitution-making process was promulgated by President Bourguiba on the 1 June 1959 at the Bardo. Even a naïve or extremely benevolent reader of the 1959

constitution cannot miss the large extent to which the document is tailored around a concentration of power in the presidency with virtually no safeguards against executive overreach. The constitutional text is structured in ten chapters containing 64 articles, preceded by a preamble. The chapters deal, respectively, with general provisions, the legislative, executive, and judicial power, as well as the high court, council of state, economic and social council, local councils, revisions to the constitution, and transitory provisions.

The preamble opens with a religious phrase (“in the name of God...”), and purports to convey the “will of the people, set free from foreign domination”<sup>16</sup> in some key principles and ambitions. The text begins with references to the state’s independence to then state as the first goal “to consolidate national unity”, while respecting social values such as human dignity, justice, and liberty. The second substantial paragraph deals with Tunisia’s identity and states the country should “remain faithful to the teachings of Islam”, and relates it to the Maghreb, the Arab family, and African peoples. Finally, the preamble notes the will “to establish a democracy founded on the sovereignty of the people”, while emphasising stability, the separation of powers, and the superiority of a republican regime in safeguarding human rights and equality between citizens as well as economic prosperity.

The nine substantive chapters that follow stipulate the institutions typically associated with liberal democracy: citizens’ rights and duties as well as a legislative chamber, presidency, and judiciary. Due to the relations established between them and the detail of the articles (as well as the lack thereof), all but the presidency are relatively weak.

Both the political principles of the state and citizens’ rights and duties are subsumed under the first chapter on general provisions. In contrast to many other constitutions, rights and duties do not have their own chapter, which can enhance their symbolic status within the constitutional text. As noted above, the highly symbolic Article 1 describes Tunisia as free, independent and sovereign state, with Islamic religion, Arabic language and republican regime. Subsequent articles place Tunisia in the Greater Maghreb, the unity of which is included as a goal of the republic (Article 2). Popular sovereignty is recognised in accordance with the constitution in Article 3. The limitation, albeit small, of popular sovereignty here is remarkable and notes that it is put into a juridico-constitutional straightjacket. A description of flag and state motto (Art. 4) precedes a series of typical individual rights (Articles 5-17). In the latter, the sequence in which rights are listed is notable. Article 5 stipulates that the

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<sup>16</sup> All citations of the constitution in this chapter are from the English translation in Blaustein and Flanz (1972).

“Tunisian Republic guarantees the dignity of the individual and freedom of religious belief and safeguard public worship, provided such worship does not disturb public order”. Religious concerns appear to have been of high importance for the members of the assembly. At the same time, the limitation of the rights provided in this is repeated in the articles concerning other rights, such as the freedom of thought and expression, assembly, and association, the inviolability of the home, and right to property. All these are principally given but can be constrained by ordinary law. Citizens’ duties are explicitly listed as defence of the country and the payment of taxes (Arts. 15 and 16). Article 6 (“All citizens have equal rights and duties and are equal before the law”) is particularly significant: In the draft text, the term “tunusi”, i.e. *Tunisian* in Arabic was used, which – as the Arabic language can assign genders to nouns – raised the question of whether women were included in the term. The male and female forms of the word could have been included, but this was found by some to be an unnecessary recognition of a *fait accompli* given that women could already participate equally in the elections to the constituent assembly. After other members argued whether Tunisian society was ready for such a liberation of women and whether women should be given ten years to give “proof of their maturity and capacity to bear the responsibilities of their freedom”, the matter was referred to a committee. Ultimately, the term “muwatin” (citizen) was adopted. Narrowly understood as just referring to male citizens, there was a tacit understanding it referred to both genders (Sfeir 1959:444). Thus, gender equality, contested at first, had found its way into the constitution, albeit in a toned-down manner. Moreover, the term “citizen” had made its first appearance in a Tunisian constitution. The first chapter finally also prohibits the extradition of political prisoners and the banishment from the country (Arts. 11 and 17).

The legislative power, covered in Articles 18 to 38, is the subject of the second chapter. “The people exercise the legislative power through a representative body – the National Assembly” (Art. 18). The Arabic original for that institution is “majlis al-ummah” – the latter being a way of translating “nation” using Islamic-inspired vocabulary<sup>17</sup>. The franchise for elections to that assembly includes all Tunisians of at least twenty years of age, holding citizenship for at least five years, while candidates for office have to be thirty and have a Tunisian father – reflecting a patriarchal understanding of how citizenship should be inherited (Arts. 20 and 21). Once elected, each “deputy is representative of the entire nation” (Art. 25) – this can be interpreted

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<sup>17</sup> Ummah, like jama’a, can be translated as community, but unlike the latter is found in the Qur’an and is also closely associated with the idea of the community of all Muslims globally, though this is a phenomenon of the 20<sup>th</sup> century (Arsenault 2013).

as an emphasis of national unity over alternative identities, such as regional, religious, class or ethnic affiliation. Members of the assembly enjoy some legal immunities while in office (Arts. 26 and 27). Both assembly and president are elected for five years, simultaneously (Art. 22), but during war or “imminent danger”, their term may be extended by law until elections can be held again (Art. 22). While the assembly is principally the sole legislative authority and in charge of the national finances, the constitution makes three substantive exceptions under which the president can issue decrees with only limited oversight. The power to enact decrees can be delegated by the assembly for a limited period of time (Art. 28), it can arise during the assembly’s recess (Art. 31), or when “the independence and security of the country are so endangered as to obstruct the normal processes of government” (Art. 32). In practice then, there is ample space for a legislating presidency.

Chapter Three is on the Executive Power, mainly the presidency. The President of the Republic is the head of state and the office is only open to Muslims of at least forty years of age, born of a Tunisian father and grandfather (Arts. 37 and 39) – as with assembly candidates, it is interesting how male lineage is given priority over the origin of mothers and grandmothers. The limitation to Muslims likely reflects the principle in Islamic political thought that the leader of the polity needed to be Muslim and as such contrasts with the liberal aspects of the constitution. It is however coherent with Article 1. If Islam is the state’s religion, the leader can reasonably be expected to be representative of this characteristic. The incumbent is bound by the constitution and its guardian (Art. 38). He moreover “insures that the laws are enforced” and “makes civil and military appointments” (Art. 45). Elected in the same way as the assembly, the 1959 constitution limits the number of consecutive terms in this office to three (Art. 40), this temporal limit being one of the few restrictions of the power of the presidency in the absence of a powerful legislature or a constitutional court. While the president takes his oath “in the presence of the National Assembly” (Art 41) and informs the latter on progress on implementing general government policy, which he determines, parliament has no role in the appointment of cabinet members (Art. 43). Beyond decree power, the president’s role in legislation includes his obligation to sign and publish laws in the Official Journal as well as a veto power vis-à-vis the assembly. As in the US system, the latter can overrule a presidential veto by passing a law with a two-thirds majority (Art. 44).

The fourth chapter of the constitution deals with the judiciary, but the president already makes an appearance in its first article: “Judgement is given in the name of the people and is carried out in the name of the President of the Republic” (Art. 52). Nominally, the judiciary “is independent” (Art. 53), yet the President can appoint judges “upon recommendation of the

Supreme Council of Justice” (Art. 54), which is also responsible for judges’ promotion, changing of posts and disciplinary measures. As details are regulated by ordinary legislation, there is considerable room to organise the judiciary in a way contrary to the constitutional principle of its independence.

Chapters five to eight contain one article each and establish a set of institutions: A “High Court” may meet to adjudicate cases of high treason by members of the government (Ch. V, Art. 56). The Council of State has a dual function, serving as a source of administrative jurisdiction in cases of disputes between individuals and the state, and where the latter overreaches its competences. It also serves as an audit office to verify the state accounts, submitting reports to the President and the Assembly, its composition, procedure, and powers are determined by ordinary legislation (Ch. VI, Art. 57). An Economic and Social Council is established as an advisory body on the respective areas (Ch. VII, Art. 58). While the constitution does outline details about the council’s purpose and relations with other institutions, discussions in the Constituent Assembly stated “that the purpose of the Council is to provide a means for the participation of the people in economic and social projects through advice and guidance ... [supplementing] the work of the National Development Board in existence before the Constitution” (Sfeir 1959:445). Article 58 in the eighth chapter on local government establishes “Municipal and Regional Councils [which] deal with questions of local interest, as prescribed by law”. In fact, fourteen governorates had been established by decree in 1956, named by their capitals, whose “governor was more than a high official, he was the depository of national sovereignty and might be called the ambassador of the head of state” (Rossi 1967:48). That only a single, very general article is devoted to local government fits with the centralising tendency and top-down organisation of the Tunisian state that began under colonisation and which Bourguiba continued.

The ninth and last substantive chapter of the 1959 constitution deals with amendments to the same. As in many other states, a two-thirds majority in the National Assembly is required to produce a change of the basic law (Art. 61). The President or a minimum of a third of the assembly’s members have the right to make proposals for changes (Art. 60). Two things stand out from the technical details: the republican nature of the state cannot be changed (Art. 60) and there is a cooling-off period for constitutional change. At least three months must pass between the first and second reading of proposed amendment in the National Assembly (Art. 61).

The transitory provisions of Chapter Ten once again give a symbolic reflection of the President's power as he is charged with the constitution's promulgation (Art. 63) and remains in charge of public powers as per the NCA's resolution of July 1957 until fresh elections have taken place.

Before turning to an analysis of the 1959 constitution through the lens of citizenship, five points can be highlighted about its text, two substantive and three declaratory: First and most obviously, the political system established in the constitution concentrates power in the presidency. Prior to the abolition of the monarchy, members of the National Constituent Assembly had debated the introduction of a strong parliament, which would have served as a check on presidential power. The promulgated version gives parliament the legislative competence but provides ample space for the presidency to circumvent the assembly and legislate under various pretexts. The government, chosen and presided over by the President, is not even responsible to the National Assembly, but "simply kept informed about the development of general policy decided by the government" (Silvera 1960:388). This volte-face from the Destour movement's long commitment to parliamentary government is undoubtedly explained by the great sway President Bourguiba had gained over his party and its members, which dominated the Constituent Assembly and the government. In September 1957, Bourguiba revealed that "we are moving toward a system that would provide a minimum of stability at the top of the state" and that an adapted version of the American constitution would therefore be an option for the Tunisian constitution (Silvera 1960:392–93). However, the provisions ultimately adopted foresee considerably more powers for the Tunisian president than the US office provides and virtually none of the accountability mechanisms. One analysis of the 1959 constitution raises the spectre of arbitrary rule but points at a safety net against this consisting of individual rights, elections, and the guarantee of an independent judiciary (Sfeir 1959:447). In practice however, these have mostly declaratory value as the constitution provides loopholes for the presidency to undermine all three. Article 7 gives an entirety of five different justifications that allow limitations on individual rights: to safeguard others' rights, protect public order, national defence, economic prosperity, and social progress. The last two reasons particularly provide much space for a restrictive interpretation of individual rights. In the absence of a constitutional court and a powerful parliament, the "only effective limitation on the president's authority was temporal: he was allowed to serve three five-year terms" (Brown 2002:77). The system included no horizontal accountability (cf. O'Donnell 1998) and was thus "unquestionably more authoritarian than that of the United States" (Silvera 1960:393). Arguably, rather than

establishing a set of impersonal permanent state institutions to facilitate popular sovereignty, the 1959 constitution was tailor-made for the personality of President Bourguiba.

Second, as alluded to, individual rights are listed in the text, but the political system lacks effective institutions to uphold them given the presidency's overarching power over the entirety of the state. As Ben Achour (1990b:536) noted, this is in fact a regression of the 1861 constitution, which at least foresaw the Grand Council as responsible for checking the constitutionality of legislation. In the 1959 version, upholding the constitution is the president's own prerogative.

Third, the constitution provides a clear break with monarchy and an inscription of republican values that have persisted in the country since. Notwithstanding the outsized personal role of Habib Bourguiba and the continued relevance of personal networks, this was also yet another marker in the move from the highly personalised system of government under the bey that included more or less formal roles for local sheikhs to one based on a rational-legal system based on the logic of anonymous state institutions. It is also worth noting that the republican character of the state was protected with a so-called eternity clause – constitutional amendments could not touch this aspect.

Fourth, and beyond the move to a modernist model of government, the constitution puts strong emphasis on national unity. This must be read against the background of internal and global instabilities during the text's genesis. Only a strong executive was thought able to manage with these instabilities. In turn, the provisions have both a domestic and international dimension. Domestically, both the formal structure of the state and declaratory elements in the text reflect this: The state is highly centralised. As local government structures are weak and controlled by the centre, they would be unable to present a challenge to a homogenous sense of national identity. In terms of declaratory elements, the first of three resolutions in the preamble emphasises the consolidation of national unity, prior to such projects as dignity, justice, Islam, and democracy. This is further reflected in the notion that each deputy in the National Assembly "is representative of the entire nation" (Art. 25) rather than of their constituency. In practice, the idea of "national unity" also meant that dissent was not tolerated (Perkins 2014:209). Like the very act of promulgating a constitution, the call for national unity is however also an expression of the sovereignty of a recently independent country.

Fifth, reflecting the compromises made within the Neo-Destour, the constitution establishes a principally secular state, but contains religious references, upholds some tenets of Islamic political thought, and reflects efforts at Arabisation. The Tunisian state established by the

1959 constitution formally treats its citizens independently of their religion (cf. Art. 6) and is based on secular law adjudicated by a secular judiciary (cf. Abdessamad 2015). Unlike many other Arab constitutions, Tunisia's does not include a reference to Shari'a as *the* or *a* source of legislation. Nevertheless, the relationship between state and religion that the constitution establishes is both more complex and ambiguous than a strict separation following the French model of *laïcité*. Even in the absence of constitutional rank, Shari'a was often cited by the courts of the Tunisian republic, particularly in family law disputes, in conjunction with references to the constitution's preamble and Article 1.<sup>18</sup> As the preamble resolves to "remain faithful to the teachings of Islam" and Article 1 describes Islam as the state's religion, Redissi and Nouria (2009:59) thus pointedly ask "is this an Islamisation of the state or stateification<sup>19</sup> of Islam?". They provide three interpretations: The sociological thesis, present among a minority of framers, defers religion to the majority of the population of Muslim faith and denies it political or legal implications. The Islamic thesis insists that Islam is the religion of the state in the sense that it is to be taken into account in its legislation, raising the question of Shari'a, its application, and place in the legal order. The statist thesis puts Islam under the tutelage of the state and is the Bourguiban reading of the Article. Besides the preamble and Article 1, a key break with the idea of equality between citizens is in the limitation on the presidency to Muslims. The stance that the head of state must be of Islamic religion is deeply rooted in Sunni Islamic political thought, where political and spiritual leadership are thought of as one unit, following the pattern set by the prophet Muhammad. Indeed, Bourguiba would on occasion assume this role of religious leader and therefore, interpreter of religion in order to legitimise his policies (Ben Achour 1995:101). Finally, Article 1 also determines Arabic as the national language – like the emphasis on national unity, this was a reflection that the colonial heritage was to be overcome as well as a nod to the pan-Arab constituency among the Neo-Destour activists.

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<sup>18</sup> In the landmark "Houria" case, the court of cassation set a relevant precedent by admitting Shari'a as a material source of law, albeit secondary to positive law (Borrmans 1969; Klibi 2016:85–90).

<sup>19</sup> In the original French, the authors write "étatisation", which would ordinarily be translated as "nationalisation". Given that the latter is usually connotated with state intervention in the economy, a literal translation of the conceptual term was chosen.

### 4.3.3 What citizenship in the 1959 constitution?

What conclusions can be drawn on the idea of citizenship reflected in this constitution? The following sections again uses the four dimensions elaborated in the first chapter (inclusion and exclusion, rights and obligations, identity and belonging, and ideational impetus):

1) *Inclusion and exclusion* – who is a full member of the community and on what basis?

Inclusion and exclusion are almost exclusively based on a territorial understanding of citizenship. The most important criterion is long-term residence within the territory of the Tunisian state. The nationality code passed in 1956 had allowed individuals who had settled in the country for multiple generations to retain their nationality of birth. A 1963 reform of the code fully implemented the territorial, *jus soli* principle, according to which children born in Tunisia to Tunisian or stateless parents are also given Tunisian citizenship if they reside in the country. The same code also strongly discouraged Tunisian citizens from actively seeking out a second citizenship while resident in Tunisia by forcing such individuals to leave the country (Rossi 1967:48–49). Amid some references to Islam in the constitution, it does not question that people of other religions can be Tunisian citizens. Indeed, in political practice, members of Tunisia’s Jewish minority served in the country’s first post-independence administration (Perkins 2014:149). Nonetheless, the religious restriction on the presidency and other references to Islam give that religion a superior. Moreover, the post-independent secular state’s demand for allegiance appears to require that its citizens drop virtually all their other particularities and sources of identity. National unity and emancipation is prioritised over individual emancipation.

2) *Rights and obligations* – what is the substance of citizenship?

Legally, all Tunisians are equal in rights and obligations vis-à-vis the state and their fellow citizens, irrespective of their religious affiliation, gender, ethnicity or other individual markers – with the symbolically important exception of the office of the Tunisian presidency. Like many other constitutions, the Tunisian 1959 basic law also outlines the payment of taxes and national defence as duties of citizens. In practice, the innocuous sounding provision that ordinary law can regulate much of the actual extent of the constitutional rights militated against their actual exercise and the possibility of real political opposition: One party dominated the legislature and that party was in turn dominated by Habib Bourguiba, who also controlled the powerful presidency. “The result is a system that deprives citizens of the very rights and liberties the constitution claims to provide” (Alexander 2010:41). A notable exception to this was gender equality. Women’s suffrage was only narrowly endorsed by the

Constituent Assembly. However, the most sustained change for Tunisian women came in the form of the Personal Status Code rather than the constitution. This was decreed by Bourguiba's government prior to the promulgation of the constitution. In the absence of institutions that could enforce the implementations of constitutional norms – such as a constitutional court – this code produced substantive changes for Tunisian women and reflected the importance Bourguiba seemed to attach to this issue.

3) *Identity and belonging* – what is the psychological dimension of citizenship?

National identity is a dominant motif in the 1959 constitution. With the Neo-Destour's typical mixture of national themes undergirded by some Islamic references (much of it certainly chosen in contradistinction to the non-Islamic colonial power France), the constitution is an effort at constructing and strengthening a Tunisian national identity based on the largely secular concept of the modern nation-state. The emphasis on this national identity is also clearly an effort at dominating other sources of identity such as tribes, regions, and to some extent, religion. Membership in this modern Tunisian political community was supposed to supersede these other forms of belonging. The persistence of Yusufist mobilisation however also reflected widely shared attitudes that merge national and religious identity to such an extent that this could not be ignored by the framers. The references to Islam in the constitution's preamble and the quick adoption of its first Article with its religious reference reflect this.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and what is expected from citizens?

Interrogating the normative impetus of the idea of citizenship in the 1959 constitution, it is first worth recalling that Tunisia's independence movement did not have profound ideological foundations other than commitments to social justice and political reform (Murphy 1999:50). Unlike the constitutions of many communist states, Tunisia's post-independence basic law is thus relatively thin on ideological references. The inclusion of "faithfulness to the teachings of Islam" in the preamble, the description of Islam being the religion of the state in Article 1, and the limitation of the presidency to Muslim candidates appear to be efforts at co-opting conservative forces before the state was able to exert full control over religious institutions and their political constituencies.

The very act of promulgating a constitution fulfilled a key promise of the constitutionalist independence movement while references to the establishment of democracy, popular sovereignty, and the separation of powers are largely rhetorical window-dressing as far as

Bourguiba was concerned. Under the banner of “guided democracy”, Tunisia’s first president thought that control of the state must be in the hands of a progressive-minded, competent elite until a “psychological revolution” produced the politically sufficiently mature citizenry required for a democracy (Essebsi 2009:400; Tessler et al. 1995:436). When it comes to assessing the normative impetus of the constitution, it is Article 7 that is the most revealing (cf. Toumi 1989:46). It outlines the reasons for which citizens’ rights can be limited. In an interesting way, the reasons stated are both wide and specific. On the one hand, it invokes the well-established liberal principle that rights of individuals end where their exercise impinges on the rights of others. Another common reason stated is national security. Remarkably, the constitution adds the promotion of economic prosperity and social progress as further reasons available for the state to limit individual rights. This extensive list is not counterbalanced by a requirement that rights restrictions be proportionate. This certainly goes to the heart of the understanding of citizenship in this document, which fundamentally speaks to “modern” norms such as electoral democracy, individual rights etc., but ultimately subordinates them to other aims. Thus, several parts of the 1959 constitution speak to the motif of liberation. Yet, only to a limited extent does this refer to individual liberation. Rather, where the text invokes related concepts, they are used to express national sovereignty and independence. This should not surprise in the case of a recently independent state. Where the individual’s emancipation is concerned, Bourguiba’s ambition was limited to the liberation of the individual from its primordial attachments to tribe and – to some extent – religion in order to insert it into the modern community of citizens of the Tunisian nation. As the next chapter will show, this was a fraught process beset by tensions that led to paradoxical outcomes.

#### *4.4 Semantic constitutionalism?*

Despite the novelty of universal suffrage, open parliamentary debate, recognition of popular sovereignty and a host of individual rights in the constitutional text, the 1959 constitution reflects semantic constitutionalism in Löwenstein’s taxonomy. At all important points during this critical juncture that was the constitution-making process of Tunisia’s first republic, Habib Bourguiba’s influence outweighed considerations and possibilities for pluralist, liberal democracy. From the mode of election to the National Constituent Assembly to the drawing up of the list of candidates, from the abolishment of the monarchy to the extra-constitutional reforms with their profound impact upon the Tunisian social fabric, pivotal processes were directed by Bourguiba. The enormous concentration of power in a presidency tailored for him, which faced no institutional checks is evidence that the 1959 constitution merely formalised,

legitimised, and consolidated his grip on the country. In turn, this closed potential pathways for pluralist democracy that were open at the beginning of the juncture.

One qualification to the categorisation is required, though: For Löwenstein, there is no difference under semantic constitutionalism between the presence of a constitution or its absence for the way power is exercised. Two reasons explain why Tunisia adopted a constitution, nonetheless. The first relates to the pathway dependencies that began in the 19th Century around the demand for constitutionalism in the nationalist movement. This had been so central for the Destour movement that an independent state without a constitution is extremely hard to imagine. The second reason relates to a larger point around semantic constitutionalism and the question why authoritarian countries adopt constitutions at all. Brown (2002:93) has argued that Arab constitutions were issued “to organize power and render it more efficient, and secondarily to establish sovereignty and a clear sense of ideological direction”. Going back to the four political functions of constitutions, these constitutions therefore served to enable, endear, and construct the (post-independence) state, but not to constrain it. This meant giving up on the political function that was most present in the conceptual history of liberal constitutionalism. The 1959 constitution entrenched an existing regime, lending it virtually unconstrained powers to facilitate Bourguiba’s state-building projects while signalling national sovereignty to the outside world and providing the state with legitimacy.

#### *4.5 Citizens or clients under Bourguiba?*

The previous sections have provided an analysis of the 1959 constitution, which continued to serve as Tunisia’s primary legal framework until the end of the Ben Ali regime in early 2011 but was amended multiple times. The sections have shown how the constitution presented itself superficially – and was in part perceived as – a relatively liberal and democratic document promoting equal citizenship within a republican political system. At the same time, its liberal-republican commitments were shown to conflict with an effectively unchecked presidency tailored around Bourguiba as well as the inclusion of Islamic provisions and references. National unity and sovereignty were prioritised in discourse and institutional design over individual rights and popular sovereignty. This section deals with the post-constitution implementation phase.

Meijer (2014:3) has argued that since the second half of the 20<sup>th</sup> century across many Arab states, the development of citizenship occurred along broadly similar lines: Politically empowered post-independence states restricted civil and political rights while providing

generous social rights. Despite relative inclusiveness, the post-independence social contract provided no cultural or minority rights (national unity was prioritised), few economic rights, and included little mobilisation. In contrast, social issues were depoliticised amid a belief in technocracy. Widely described in the literature, the post-independence Arab state

demands political allegiance, while in exchange the population receives from the state jobs, education, housing, pensions, and food and petrol subsidies, and can expect the state to ensure social justice, foster economic development, maintain the national identity, and protect national interests.

(Meijer 2017:79–80)

The state-centred economic development model soon showed signs of strain as import-substitution industrialisation and nationalisations did not succeed in generating sufficient employment and led to imbalances in trade and the national budget. A wave of liberalisations swept across the region, leading to a modified social contract, in which more civil and economic rights as well as cultural/minority rights were granted while social rights receded. This reflected the requirements of the market-led development model, as businesses and investors as well as international financial institutions demanded legal certainties and labour flexibility. As inclusiveness declined, these reconfigurations were contested and triggered mobilisation. In the final phase of Meijer's framework (2014:3) prior to the 2010/11 uprisings, civil and social rights contracted further while political and economic rights expanded. Inclusiveness increased as mobilisation diminished. This phase was shaped by increased corruption, social inequality, and repression, as well as the introduction of façade democratic institutions (cf. Milton-Edwards 1993; Sadiki 2002b). In summary, while multiple elements of citizenship underwent significant changes triggered by economic and other factors, the one constant is the lack of political rights for Arab citizens.

In Tunisia, citizenship largely followed this pattern, too. For analytical purposes, Bourguiba's era of rule can be roughly divided into two time periods: The first decade after independence saw the evolution of the Neo-Destour to the *Parti Socialiste Destourien* (Socialist-Constitutionalist Party) from a mass movement to ruling authoritarian party. In the second period, beginning in the late 1960s and ending with Bourguiba's fall from power in 1987, the PSD's and Bourguiba's dominance of Tunisia became increasingly challenged by leftists and Islamists (Alexander 2010:36–37). These developments coincide with the formulation and implementation, and the subsequent failure of a social bargain between state and citizens, which was fundamentally based on the provision of social benefits for citizens in return for

their political acquiescence. To an important extent, it was the state's inability in the latter time period to keep up its part of the bargain that motivated the challenges of the existing order (Meijer 2017).

#### 4.5.1 From independence to socialist experiment: deepening authoritarianism

If the constitution failed to guarantee legal and political equality, the social reforms did not manage to generate genuinely equal access to resources either. Indeed, the top-down modernisation project confined political participation to a small elite and was soon paradoxically “complemented by a successive *re-traditionalization, re-tribalization, and re-Islamization* of politics” (Erdle 2010:93). The secular nation-building project based principally on equality within the national polity surreptitiously strengthened the primordial kinship bonds it sought to weaken as it produced an exclusive state apparatus focused on its own interests rather than an accountable state and thus marginalised significant parts of the population.

In the years immediately following independence, Bourguiba had followed a pragmatic foreign and relatively liberal economic policy. He “did not have fixed ideas” on the economy (Hopwood 1992:85) other than the desire to produce a strong, self-reliant Tunisia, able to reduce poverty, and an environment in which his reforms could prosper. His hope was that good relations with the former coloniser France and other Western powers would also pay off economically in the form of foreign direct investment and that tax incentives would trigger domestic investment, too. When this approach failed, it led to the realisation that industrialisation required state leadership, leading to the socialist experiment implemented as of 1962 under the leadership of the former UGTT Secretary General Ahmed Ben Salah (Murphy 1999:81). The change of tack also pleased Tunisia's political left, one of Bourguiba's most potent political challengers at the time. Development plans that spanned many years and relied on foreign financing would now determine the direction of economic policy. As Bourguiba had captured control of both state and party, both extended their control into ever larger parts of the Tunisian social fabric. Corporatist national mass organisation and the party offered some mechanisms for popular involvement in policy-making, interest articulation and political competition (Murphy 1999:54; Murphy and Ehteshami 1996), but actual decision-making was top-down and the state's legitimacy was mostly based on the improved provision of welfare services and a developmentalist ideology. Bourguiba maintained the presidency of the party and used it to reach out to the masses beyond the capital. “It provided both Bourguiba and his government with legitimacy and mass support,

with the consequence being that the relationship between party and government became increasingly ambiguous” (Murphy 1999:51–52). Despite its elaborate structure across the country, “the party was more centralized than democratic and its high-ranking personnel so interwoven with that of government that influence was in reality confined to a relatively small regime elite” (ibid). As he had done with the state through the constitution’s political system, Bourguiba reorganised the party to make it malleable to centralised top-down governance. The election of its politburo was replaced with appointment and geographically, more control was shifted to Tunis. Political control “flowed top-down and center-outward” (Erdle 2010:69–71). Thus, Tunisia’s authoritarianism deepened after the promulgation of the 1959 constitution as Bourguiba continued to co-opt or eliminate potential rivals for power, justified by the tense security situation. A Yusufist coup plot uncovered by security officials in December 1962, which was supported by army officials and pan-Arab countries both motivated and legitimised Bourguiba’s increasing authoritarianism. If he wanted to defend Tunisia’s sovereignty and his secular modernisation project against challenges from – amongst others – the very popular idea of pan-Arabism, Bourguiba concluded, he had to tighten his political control (Alexander 2010:42). Soon, this also found reflection in constitutional amendments.

The social reforms brought Bourguiba’s government both more control over Tunisian society as well as legitimacy, both domestic and international. Modern education had played a significant role in the lives of many Neo-Destour cadres, notably Bourguiba himself, and they also recognised it as a prerequisite for industrial development. The government invested about 20 per cent of its post-independence budget in the training of teachers and building of schools (Perkins 2014:143–44). There was also a gender dimension to this as party officials expected educated women to impart modernist values to their families once they founded one. After the state had clamped down on citizens’ civil and political rights, increasing state control of the economy through nationalisation and collectivisation impinged on another sphere of individual autonomy. International observers were often impressed by what they saw as bold reformism and innovative, progressive social engineering in Tunisia (Tessler et al. 1995:436), securing Western support during the Cold War era. Yet the reforms were carried out under a clientelist ruling culture, where a small elite effectively controlled the state (Sadiki 2002c:502). Infrastructure was also developed extremely unevenly, favouring the urban coastal areas from where the Neo-Destour garnered much of its support, while remaining indifferent and/or unable to serve basic needs in the Northwest, interior, and Southern Tunisia, paired with state repression and centralised control. In these regions – strongholds of

opposition challengers going back to Ben Yusuf – traditional kinship ties remained more relevant and continued to challenge the state’s legitimacy (Haugbølle 2016).

#### 4.5.2 Crisis, change, and corrosion of the system

Toward the end of the 1960s, economic and political crisis coincided, triggering constitutional change. As the economy faltered under the burden of foreign debt required to finance the government’s investments, Bourguiba suffered a serious heart attack in 1967. It starkly reminded elites that the President had neither a deputy nor an institutionalised way of choosing a successor. Amid high inflation and unemployment hovering above 20 percent, Bourguiba blamed the entire economic malaise on Ben Salah and claimed to have been duped. It was not credible, but Bourguiba held on to the presidency and changed tack to economic liberalisation (Alexander 2010:42–43; Murphy 1999:55–57).

A brief window of political liberalisation opened in the early 1970s but a return to authoritarianism followed and soon left its marks in the constitution. Bourguiba permitted some open debate about the state of the country, which gave the public an opportunity to vent their disenchantment with the government. In this atmosphere, a liberal wing within the PSD sought to renew and democratise the party. Its 1971 Monastir congress saw the first open elections in 16 years, which the reformers came close to winning (Erdle 2010:76). Instead, Bourguiba clamped down again, moving toward even more centralised control of party and state. Opposition was pushed out of the party and the party was pushed out of government. As PSD cadres in the cabinet were replaced by technocrats, the conclusion became that “Destourian movement gave birth to a state of which, in fact, it became its first victim” (Toumi 1989:85). Though state and party were still closely entangled, “one can identify the immediate post-Ben Salah era, and the regime's attempts to cope with the fallout from his socialist experiment, as the turning point after which Tunisian corporatism began its decline into political atrophy, centralization, authoritarianism and corruption” (Murphy 1999:59).

After relatively minor changes of Article 29 of the constitution in 1965 and 1967 to extend parliamentary sessions, the 1970s political and economic crisis led to substantive revisions – symbolically, legally, and politically. In a speech in June 1970, Bourguiba had promised constitutional change bringing the country closer to a parliamentary system, but as the political climate turned, the opposite direction was taken (Kaaniche 2009). Having been formally declared President of the Party for Life at the PSD’s 1974 congress, the National Assembly declared him President of the Republic for Life in the subsequent year. The March

1975 law changed Articles 40 and 51 of the constitution<sup>20</sup>. In the former, Bourguiba's new role is introduced and justified by the Assembly on

an exceptional basis and in consideration of the eminent services rendered by the Supreme Combatant ... to the Tunisian people whom he freed from the yoke of colonialism and of whom he made a United Nation and an independent, modern, and fully sovereign state ...

The remarkably ideological language of the article, which in constitutions is usually reserved for preambles, mirrors the deeply illiberal change implemented here. Bourguiba's total domination of Tunisian politics had previously been at least partially masked behind institutional and procedural provisions in the constitution as well as political practices such as the 1974 elections, which confirmed him in office. Yet this reform made the lack of open and inclusive political contestation utterly transparent and thus removed any pretence of liberal democracy.

The change of Article 51 constitutionalises the office of prime minister, which Bourguiba had introduced by way of a simple presidential decree in November of 1975. Above all, that change ensured that the president could appoint a person of his trust as his representative and successor as the incumbent would "immediately be invested with the functions of President of the Republic for the remaining period of the current legislature" in the event of vacancy "due to death, resignation, or absolute impediment". Due to Bourguiba's control over the PSD-dominated assembly, the two-third majority threshold for constitutional change presented no hurdle to his plans.

A last substantial change of the constitution under Bourguiba in April 1976 reformed the political system without touching the absolute dominance of the presidency, limitations on individual rights, or ideological commitments. Quite pointedly, it was named the "Constitutional Law No. 76-37 Modifying and Completing the Constitution of the 1<sup>st</sup> of June 1959". The relationship between the prime minister, president, and parliament were amended. In different ways, both are relegated further to mere props of the presidency. The head of government was now expected to "support" the head of state in the latter's exercise of executive power. The parliament's new role in exercising accountability is even more peculiar: It was now supposed to scrutinise the government's implementation of the president's policies. This could ultimately lead to an expression of no-confidence in the prime

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<sup>20</sup> Following citations of the constitution in its respective amended forms are taken from the legal database at Perpignan University (Maury n.d.) and translated from French by the author.

minister and even the president. Since Bourguiba had already been declared President for Life, this latter parliamentary power in particular was of little relevance during his lifetime. The institutional change did however make transparent that having already implemented a succession and vacancy rule for the presidency, the aging Bourguiba wanted or needed to delegate competencies for the daily operative work of the executive to another person (Baumann and Ebert 1995:708).

Economic liberalisation was largely a reaction to Ben Salah's previous approach rather than a well-engineered strategic re-adjustment (Murphy 1999:57). Tunisia opened its doors to export-oriented foreign investors. This liberalisation was very selective, allowing the Tunisian state to maintain its significant intervention in the domestic market. Thus, many Tunisian industries remained protected behind significant trade barriers. There were also implications for the regional distribution of the policy's gains. Companies producing for the world market settled in the coastal areas for obvious logistical reasons. In the absence of robust regional redistribution policies, the fruits of the new openness to trade flowed disproportionately to the traditional strongholds of the Neo-Destour and its socialist successor party. At the same time, elite recruitment changed as well. If male gender, higher education and party membership had sufficed initially, regional origin, education, and occupation mattered more now. Bourguiba's top public servants were now recruited more heavily from the Sahel and less from Greater Tunis and the interior. Science and engineering graduates from the new *Grandes Écoles* and technical institutes won over those with arts and law degrees and public administration experience was valued over political activism. Economic liberalisation also gave the country's old bourgeois elite another lease of life as it merged with the Destourian newcomers (Erdle 2010:83). A "bourgeois-bureaucratic state apparatus" (Murphy 1999:21) emerged, bound by three elements: "horizontal elements clustered around common social interests; vertical elements based on common primordial affiliations; and crisscrossing networks following a patron-client logic" (Erdle 2010:83–84). As clientelism and corruption intensified across public and private life, the vast majority of Tunisians were left excluded from this system. A project of modernisation, which principally included the ambition to produce more equality between Tunisian citizens and tie them to the state and its institutions had paradoxically led to the rise of an apparatus that excluded the majority, produced resentment against the state, and pushed them back to primordial sources of identity and social support. This is also true because under conditions of authoritarianism, the social "rights" whose provision is the state's part of the social contract, can be used and altered arbitrarily and are therefore unreliable for the individual. In practice, many state benefits were channelled through clientelist networks,

further undermining the egalitarian claims of the system. Moreover, the economic and political crisis in which the state became increasingly unable to provide socio-economic rights came at a point where unprecedented numbers of Tunisians had received university education – a politicising experience for many – and were more willing to challenge the state in protests and other forms of political activity.

Amid the political and socioeconomic exclusion and in the absence of state-sanctioned institutional avenues for political participation, Tunisians resorted to civil society organisations and protests to express their dissatisfaction. Intellectuals formed alternative leftist parties (which lacked the resources to compete nationally) and civil society organisations such as the Tunisian League for Human Rights (*Ligue tunisienne des droits de l'homme*, LTDH). The regime concluded that some well-constrained political pluralism should be permitted as safety valves, though only three of the least threatening political parties were legalised (Willis 2012:128). Students and workers expressed their dissatisfaction through strikes. The latter now extended their demands to political reform. The situation came to a head in January 1978 when the UGTT organised the country's first general strike since independence and Tunisian security forces fired on protestors who had turned out in their thousands, attacking ministries and businesses in central Tunis (Alexander 2010:47). "Black Thursday" saw around 200 dead and 1000 wounded.

To Bourguiba's frustration, his rule was not only challenged by the political left. It was also accompanied by a re-emergence of Islam as a social and political force in Tunisia. Wolf (2017:27–28) identifies three key factors that contributed to the politicisation of Islam in Tunisia. From the late 1960s, literature of the Muslim Brotherhood – the leading Islamist organisation of the Middle East and North Africa that emerged in Egypt – became increasingly available and was circulated amongst Tunisian youth. The 1978 Iranian Revolution gave religious Tunisians the confidence to move from socio-cultural activities into the political sphere. Finally, increasingly politicised university campuses developed into the forum in which a growing number of religious activists first took their activities. Ayubi (1993:85) adds a Tunisia-specific "occidental saturation" as an explanatory factor. In other words, he argues that Tunisian citizens protested that their country underwent the arguably most far-reaching adoption of European cultural and political norms in the MENA region. This preference for European ideas among significant parts of the elite had marginalised a large segment of the population culturally and economically. Indeed, the extent of Westernisation that students from rural backgrounds experienced in the capital Tunis specifically would have made many deeply uncomfortable (Wolf 2017:42). Given the existing

challenge to its rule from the political left, the regime condoned and even supported the development of a potential rival opposition group on campuses, but evidently underestimated the strength of that current (Alexander 2010:50).

Bourguiba's concern with Islamists was considerably raised by an attack on the south-western mining town of Gafsa by a self-styled Tunisian Liberation Army on the two-year anniversary of Black Thursday. Supported by Qaddafi-led Libya, it had aimed to overthrow the "PSD dictatorship and neo-colonial domination" but was quickly dealt with by security forces. Despite public statements to the contrary, Bourguiba suspected the Islamists to be complicit in the attack and stepped up their surveillance and repression. However, it was only after the arrest and torture of two members of the Islamic Tendency Movement (*Mouvement de la Tendence Islamique*, MTI) in December 1980 that the state became aware of how tightly organised the organisation was and that it was active across all provinces of the country (Wolf 2017:54).

In the early 1980s, Bourguiba sought to reduce some of the pressures on the regime resulting from the political and economic turbulence in the 1970s. He appointed a new prime minister, Mohamed Mzali, released some political prisoners, brought back some of the liberal voices within the PSD, and legalised competing political parties for parliamentary elections in 1981. While this allowed the regime to co-opt some opposition leaders and produce the semblance of reform and democratic political process, the MTI's application to operate as a political party was rejected. Instead, a first large-scale crackdown on their movement resulted in the arrest of over a hundred activists (Wolf 2017:57). In the event, both electoral rules and the regime's rigging of the vote meant that other parties stood no chance. In the official results, the PSD received almost 95 per cent of the votes cast, catapulting secular opposition into irrelevance. When the regime's relations with the UGTT – until then the main mediator between regime and citizens – soured over the implementation of IMF austerity measures that triggered large scale bread riots in 1984, Mzali changed tack. Recognising the political strength of the Islamists, he sought to cultivate them, released prisoners and gave the MTI unprecedented freedoms to publish their material. The peak of this rapprochement between regime and Islamists was reached when Mzali formally received two of the MTI's key leaders, Abdelfattah Mourou and Rachid Ghannouchi in November 1985, followed by an announcement that "the government would like to normalise its relationship with the Islamists" (Wolf 2017:62). Over the course of the decade, MTI activists began to populate both the state administration and key organisations like the UGTT, where they represented 20 per cent of the membership as of 1989 (Wolf 2017:59) though former detainees were blocked

from public employment. The rapidly increasing power the MTI appeared to accumulate when they had the freedom to act shocked Mzali and led him to reconsider his strategy. After all, he was set to succeed Bourguiba and did not welcome any challengers to his power. His renewed crackdown came too late, however. Bourguiba replaced him with a new prime minister in July 1986. The more important appointment was that of the interior minister three months prior. Beginning a meteoric rise in the security administration, former General Zine al-Abedine Ben Ali was recalled from an ambassadorial post in Poland – where the communist regime had resorted to martial law to deal with opposition challenges to its rule – to crack down on the Islamists, breaking with Bourguiba’s tradition to keep the military politically neutral (Alexander 2010:51). As minister of the interior, and from October 1987 as prime minister, Ben Ali unleashed new levels of surveillance and repression upon the MTI. Daily protests against the detention of Rachid Ghannouchi and explosions at coastal hotels generated a highly tense atmosphere in the country. Bourguiba hoped the trials of MTI leaders alleged of orchestrating the hotel attacks would lead to their execution. When an insufficient number of death sentences were handed down, he demanded retrials. His behaviour became increasingly erratic, hiring and firing senior officials within days and weeks, convincing many around him that he was no longer fit to govern. When the police discovered an assassination plot for Bourguiba and Ben Ali by a secret MTI wing in early November in case the retrials went ahead, Ben Ali triggered what is now known as the “medical coup” or “constitutional coup” (Ware 1988): In line with Article 57 of the constitution, seven doctors attested Bourguiba’ inability to fulfil his function as head of state and the presidency was transferred to the prime minister.

#### 4.5.3 Taking stock of citizenship under Bourguiba

It almost seems paradoxical on first notice: For the lawyer Habib Bourguiba, leader of a constitutionalist movement for decades, Tunisia’s constitution of 1959 appeared to be merely a tool to cement and legitimise his personal exercise of political power. Rather than fulfilling both constraining and enabling functions, Tunisia’s constitution only enabled the state and its ruler while citizens were effectively shut out of political decision-making altogether. As the previous chapter has shown, the constitution already contained inherent tensions between its commitments to democratic procedures, individual rights, Arabo-Islamic identity, and a very powerful executive. The political practices under Bourguiba evidence only semantic constitutionalism (Löwenstein 1959) and a very constrained idea of citizenship.

From the perspective of non-elite Tunisians, citizenship under Bourguiba – consisting of the relationship between the four dimension of citizenship developed earlier in the thesis – did not develop in the sequential order that Marshall (1950) had identified in Britain.

1) *Inclusion and exclusion* – who is a full member of the community and on what basis?

The Tunisian body politic superficially became more homogenous. Early on, Bourguiba emphasised national and social cohesion in his discourse and ensured that the state use its resources to reinforce such an identity. Tunisia continued developing the European model of a Westphalian nation-state where nationality was a – if not *the* – key marker of identity and residence within the state’s territory was the determinant of citizenship. In practice, these developments were uneven, both socially and geographically. Some groups in society benefitted more from Tunisia’s rapid socio-economic improvements under Bourguiba’s aegis than others and the state failed to channel enough investment into areas that had already been long-neglected, such as the country’s interior. The political economy behind these discrepancies is evident: investments went primarily to those coastal areas where Bourguiba and his faction within the Neo-Destour enjoyed strong support, whereas the regions that had a strong following of Ben Youssef saw comparably little development. Similarly, on an ideational level, Bourguiba did not integrate the typical constituents of Ben Youssef. Rather than emphasising Tunisia’s Islamic heritage, he emphasised republican ideas and side-lined religious institutions that were traditional bearers of social power and prestige. Along multiple axes, considerable parts of the population thus faced exclusion, be it on the basis of gender, regional origin, ideology, or (lack of) membership in clientelist networks.

2) *Rights and obligations* – what is the substance of citizenship?

Bourguiba’s regime initially traded one set of rights off against another, offering Tunisians social rights that included access to social benefits such as housing, education, and health services in exchange for political acquiescence and severe limitations on civil and political rights. When this became economically unsustainable, it provided a degree of liberalisation. Some political and civil rights were granted while the provision of social rights was dialled down. On the part of obligations, the 1959 constitution makes national defence and the equitable payment of taxes an explicit duty (Articles 15 and 16). In practice, the regime demanded these unevenly – depending on the political stance of the person in question. Citizens’ rights and obligations were thus uneven, fluid, and subject to political calculations. Crucially, any rights theoretically granted were never reliably enforceable judicially.

### 3) *Identity and belonging* – what is the psychological dimension of citizenship?

Under Bourguiba, Tunisia developed from a society in which a differentiated model of citizenship dominated to a more homogenous one. Mostly rooted in various kinship bonds prior to independence, identities were increasingly supplanted by those the state generated for the national community. “This task was achieved fairly easily, with the state using a combination of repression (...) and equalisation through welfarist redistribution of goods (...). In particular, state welfarism partly made the clan redundant” (Sadiki 2002c:503). Beyond these tangible factors, Bourguiba’s Tunisia also needed a narrative about belonging to the new, “imagined community” (Anderson 2006) of the new nation state. While Bourguiba has often been characterised as an Atatürk-like secularist whose state-building was accompanied by a determination to reduce the relevance of religion to Tunisian citizens, the picture is actually more differentiated (McCarthy 2014). Yes, many of the reforms introduced by Bourguiba directly challenged the established religious institutions. Yet, in part this was only a product of his efforts to consolidate power. Moreover, the reforms were not as radically confrontational to Islamic traditions as sometimes made out. The Personal Status Code – often referred to as a key secularist achievement – improved the legal status of women compared to men enormously, but at the same time incorporates aspects of Islamic law, such as in the area of inheritance (Khedher 2017). Finally, following the reformist tradition established in the 19th Century, Bourguiba specifically justified some of his reforms with reference to Islam, albeit an innovative interpretation thereof. “He argued his position from within the Islamic context. Islam, he said, instilled in mankind a profound sense of right and wrong, but this sense of justice must adapt with time” (McCarthy 2014:737). By and large then, one purpose of Bourguiba’s ostensibly secularist reforms was (state) control of religion rather than a condemnation of Islam as irrelevant as the latter would have undermined the legitimacy of the Tunisian state and robbed it of a factor for mobilisation. Just as he had done as an opposition leader under colonialism, President Bourguiba knew he could not break too radically with tradition and needed to utilise Islam as a source of national identity. A complete break with the Neo-Destour’s pre-independence discourse, which associated Islam with Tunisian identity and marked Christianity out as the foreign, coloniser’s religion, would be too evidently a departure from the party’s long-standing position and risked offending remaining Yusufist elements within the party too much. Nonetheless, the exclusion many Tunisians experienced both ideationally and substantively from the “bourgeois-bureaucratic state apparatus” that benefited a select elite led to discontent and a re-emergence of the relevance of primordial, sub-national bonds. It explains, in part, that the most potent challenge of his rule was rooted in

the heritage of Arabo-Islamic identity Bourguiba sought to supplant with a modern nationalism.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and what is expected from citizens?

Tunisia has been described to be positioned at the “Crossroads of the Islamic and European Worlds” (Perkins 1986). Setting aside the contested nature of such concepts as “The Islamic World” (cf. Aydin 2017) as well as the political nature of claims to civilisational affiliation within Tunisia (Helal 2019; Zemni 2016), it is true that due to its geographic location the country has experienced diverse external cultural influences. Given the centrality of Habib Bourguiba for Tunisia’s development after independence it is worth reflecting on the convictions of the political leader. He himself was the product of both Tunisio-Arab and French culture, both of which he mastered. Essebsi (2009:397–98) has argued that Bourguiba’s belief in liberty, dignity, and responsibility were not only deeply anchored in his personality, but also the result of intellectual reflection. Like other post-independence leaders, Bourguiba subordinated political and civil liberties notionally entailed in the 1959 constitution to the demands of economic development: “Without denying the theoretical merits of democracy, he believed more firmly in individual power and the single party. In his view, political pluralism and the multiple parties are harmful to the liberation struggle as much as to the major struggle for economic and social development.” (Essebsi 2009:400). However, he may have been more earnest in his conviction that there is a trade-off than others. “Bourguiba talked often about ‘democracy’, but he always did it in ways that emphasized the importance of national unity. The interests of the corporate whole took clear precedence over any individual or particular interests” (Alexander 2010:53). Above all, Bourguiba thought he knew best about these interests, casting himself “in the roles of patriarch, teacher, and disciplinarian, making clear that he, the founding father of modern Tunisia, knew better than anyone else what its people, his children, required” (Perkins 2014:135–36). Three factors can perhaps thus explain the path Tunisian citizenship took under Bourguiba. On the one hand, the president appears to have been a genuine proponent of French republican ideals, including the ideas of individual rights and popular sovereignty. At the same time, he viewed his country’s population as unprepared for the introduction of these norms (and in this would not have been alone among his contemporaries). In contrast, seeing himself as enlightened enough to lead the country’s development toward a state in which it would be “ready” for full republicanism, he accumulated the powers for that project to an extent that undermined the initial project. Part of this project could be summarised in the idea of “national sovereignty

before popular sovereignty” as the newly-independent Tunisia was scrambling to build a state strong enough to hamstring foreign interference in its internal affairs – a concern since the 19th Century. Bourguiba built on the legacy of an existing state bureaucracy and developed Tunisia’s state institutions, leaving behind a comparatively well-functioning state apparatus though it is noteworthy that he avoided institutionalisation in his immediate vicinity lest this undermine his powers by introducing accountability.

Another key legacy of Bourguiba is the hegemonic idea of national identity, Tunisian-ness, or *Tunisianité*. In a biography of Bourguiba, Béji Caid Essebsi, who later served as interim prime minister and was elected president in 2014, wrote that Tunisia did not see itself

in any political, ideological or religious extremism, just like it rejects class struggle or proletarian dictatorship and rejects tribal or social fragmentation. The *tunisianité* is a culture of moderation, of realism and consensus. We draw from Islam the idea of ‘nation of the middle’ which seeks to bring together and unify and favours persuasion rather to coercion. *Tunisianité* rests on the principle of national unity, natural solidarity and voluntary cohesion of all the nation’s social layers. It rejects all dogmatisms and cultivates the spirit of tolerance and the sense of relativity.

(Essebsi 2009:401–2)

Like Bourguiba’s early emphasis on national unity, this hegemonic construction of national identity can serve to delegitimise and marginalise even relatively small expressions of difference, or disagreement. As Hibou (2011:204) argues, consensus in Tunisia purports to be “an art of governing harmoniously” while actually concealing the sometimes violent exercise of power. This consensus is anti-pluralist, as it equates the open negotiation of social conflicts with chaos. The effect of this legacy will be highlighted in subsequent chapters.

#### 4.6 Conclusion

This chapter has argued that the 1959 constitution and the process surrounding its genesis have produced specific legacies on two levels, the discursive-ideational level and the institutional level. While the 1959 constitution as well as some of the reforms preceding and surrounding it suggest that key liberal tenets such as the equality of individuals as well as the territorial principle for the most relevant political community have taken hold, both the institutional and ideational legacy of this period has also put specific constraints on the practice of citizenship after the constitution’s promulgation. Reading the 1959 constitution as a “mission statement” (King 2013), a statement of political ideology, the chapter has identified it as an ostensibly unideological, technical document establishing a modern state

operating under the logic of impersonal rational bureaucracy. Yet a closer look reveals contradictions between its liberal-republican language, commitments to Islam, and the political system. Unlike the 1861 constitution, the 1959 document resembles more closely a contemporary understanding of how a constitution should be both structured and what it should include. Both its form and content appear more like contemporary constitutions. It clearly is the primary legal document of a modern nation state, in which citizenship reflects membership of a territorially defined political community. It also clearly endorses the principle of equal citizenship. Yet by maintaining some of the ideational repertoire of Islamic political thought, it also establishes a tension between these and the liberal-republican principles that are left to be negotiated by Tunisian society after its promulgation. The constitution makes these references with the general endorsement of Islam in the preamble and Article 1, which positions Tunisian-ness as related to the Islamic religion and thus excludes the non-Muslim parts of society – even if only by a matter of degree. The limitation of presidential candidates to Muslims is a blunt expression of this. An important area in which the compromise between liberal-republican principles and Islamic thought militates against fully equal citizenship is in gender equality. The dominant interpretations of Islam at the time of the constitution's promulgation conflicted with an equal role for women. The reference to Islam in the constitution opens ordinary, secular legislation to court interpretations in which e.g. gender equality can be subordinated to religious aims – even when the court system is secular. Even though Bourguiba's modernist current within the nationalist movement won the upper hand against Yusufist traditionalists, and despite the largely secular nature of the constitution, it did not provide a final answer on the question of national identity. Finally, as in the constitutions of many newly independent countries, sovereignty is mainly represented as national, not popular sovereignty. This is discursively evident in the calls for national unity, but also reflected in the politico-juridical detail of the text, both emerging from the conflicts and instabilities present prior to and during constitution-making, which Bourguiba used to justify the concentration of power in his hands. An analysis of the institutional legacy produced by the constitution and the independence process shows that a considerable part of its discursive elements merely served as a façade behind which personal rule by Bourguiba was facilitated and outweighed institutionalisation. The political system the 1959 constitution establishes is both a reflection of Bourguiba's tight grip on power during the constitution-making process, his homogenising and centralising tendencies and that he saw the constitution as an instrument to maintain that power after its promulgation rather than one that establishes accountability on power. This semantic constitution establishes an overwhelmingly powerful

presidency, which is virtually unchecked by other state institutions. Even individual rights are subject to ordinary legislation and thus hollowed out. As no constitutional court is available to enforce the implementation of constitutional norms, citizens rely for this on the incumbent of the presidency whose task is to serve as guardian of the constitution. Given Bourguiba's superiority complex, the political system, and with it the nature of the presidency, was tailored around him rather than established as a durable model. Bourguiba must have believed his dominance was necessary to implement his national building project and the related "psychological revolution" of Tunisian citizens toward a homogenous national community. The tense national security climate and his grip over Neo-Destour – and the Constituent Assembly by extension – gave him the ability to influence the process in his own interest. The further analysis of citizenship and constitutionalism under Bourguiba showed that both remained limited, subordinating individual rights and emancipation to national development and stability. Notably, constitutional amendments reflected the increasing authoritarianism under Bourguiba. The façade of the rational-bureaucratic and impersonal state eventually collapsed entirely when Bourguiba is declared President of the Republic for Life in a constitutional amendment in 1975, which rendered existing (though practically meaningless) accountability mechanisms in the constitution entirely useless. Throughout, the regime had traded different elements of citizenship off against each other. Initially granting socio-economic benefits while repressing political participation and other freedoms, it granted a small extent of the latter when state and economy became unable to provide the former. When both elements were clamped down on and the state provided no avenues for participation, Tunisian citizens responded with street protests and the founding of civil society organisations. These provided fora to express dissent and some political activism if not participation. By incorporating religious references, the constitution mobilises existing elements of Tunisian identity though the purpose of social reforms was to remould Tunisians into a national community, where other individual affiliations only take a subordinated role, if any.

In sum, the 1959 constitution and its implementation leave a complex, and often paradoxical legacy. Superficially, it purports to establish a modern democratic state. In that context, constitutions are expected to enable and constrain the state in order to make liberal democratic citizenship possible. In the case of newly independent Tunisia, the constitution has become a tool that enables the state, particularly its executive, and constrains citizenship. In fact, rather than contributing to the establishment of a rational-bureaucratic institutional order, the constitution is tailored around the person of Habib Bourguiba, which his designation of

President for Life later formalised. Finally, the constitution establishes an ambiguous relationship between the state and religion, where the former can dominate the latter but continues to rely on it for its legitimacy. Beside facilitating authoritarianism, the endorsement of both traditional Islamic and liberal-democratic norms generates a tension and militates against the equal citizenship central to liberal democracy. Nonetheless, as the subsequent chapter shows, the mere endorsement of liberal-democratic norms in the constitution – even when these are counterweighed by other provisions as well as political practices – has to some extent anchored them in the repertoire of political ideas that political actors in Tunisia rely on to legitimise their rule.

## 5 Ben Ali's betrayal: From authoritarianism to liberalism and back

### 5.1 Introduction

This chapter analyses ideas and practices of citizenship in their relationship with constitutionalism and the constitution under Habib Bourguiba's successor Zine El-Abidine Ben Ali. Ben Ali's time in office can broadly be divided into three periods: The "Tunisian Spring" (1987-1989) of liberalising reforms, the "Authoritarian Turnaround" (1990-1995) in which the regime reasserted its control over public life, and the "Authoritarian Reconfiguration" (1996-2010) of crony capitalism (cf. Erdle 2010:97–135). Ben Ali only modified authoritarianism. While his term in office did not produce an entirely new iteration of the constitution, Tunisian citizenship did undergo some change. Ben Ali's time in office is thus not part of a critical juncture. Yet both reforms of the legal, institutional, ideational, and civic environment as well as their absence in some areas effectively and in sum created the preconditions for both the 2010/11 uprising and the subsequent constitution-making process. In the critical juncture framework, this episode is thus a "crisis without change or missed opportunity" (Soifer 2012:1580).

In his first years in office, Ben Ali introduced a series of institutional reforms that appeared to be a local reflection of the ongoing global "wave" of democratisation at the time (Huntington 1991) and seemed to move Tunisia closer to liberal democracy. "He not only talked about multiple parties, competitive elections, and equal rights for women. He also talked about the rule of law and individual rights and liberties" as well as the right to dissent from the government and the majority (Alexander 2010:53). However, the reforms that brought more actors into the official political scene were also designed to cushion the political blow from economic liberalisation. They allowed the executive to share the blame for increasing inequality and higher taxes amid decreasing social welfare provision. Paradoxically, in their details the ostensibly democratising reforms also often maintained or even strengthened incumbent power while simultaneously placating international creditors and investors who demanded safeguards for "good governance" (Murphy 1999:30–39).

### 5.2 *Painting the democratic façade: Ben Ali's liberal democratic signalling*

That Ben Ali assumed power in a "constitutional coup", triggering Article 57 of the constitution on the president's inability to fulfil his office, arguably "demonstrated the respect

for legal institutions that marks the Tunisian political culture” (Ware 1988:592). Beside his publicly declared intention to save Tunisia from the increasingly erratic long-term leader, Ben Ali had at least two further motivations for pursuing the take-over. Given his opposition to Bourguiba’s plan to have Islamist leaders executed, he must have feared his own dismissal as well as civil war in the country in the aftermath of the executions. Moreover, the security services believed that Islamists were planning their own coup for 8 November, which Ben Ali’s move pre-empted (Alexander 2010:52; Willis 2012:175–76).

Early on, Ben Ali conveyed an intention to reform, not overturn, a sclerotic dysfunctional system. His televised address upon taking power referred to republicanism, democracy, constitutionalism, and regional and religious identity as ideational sources for his leadership (Toumi 1989:207).<sup>21</sup> Addressing his viewers as “citizens” in both genders, he justified his power grab on the basis of the president’s senility and the constitution – reflecting its important symbolic value in generating legitimacy despite its limited effectiveness to keep Bourguiba’s government accountable. “Our people”, Ben Ali said,

have reached such a level of responsibility and maturity that all its elements and components are able to participate in the management of its affairs in keeping with the republican idea which confers fullness on the institutions and guarantees the conditions of democracy as well as respect for popular sovereignty as enshrined in the constitution.”

He continued by saying the constitution required change: A presidency for life and automatic succession of an unelected person did not fit in the current times anymore. To increase participation, Ben Ali proposed a law on political parties and the press – not without mentioning that the work of consolidating Tunisia’s independence should be implemented “in the framework of order and discipline”. Ben Ali also promised cleaner governance, good international cooperation, he emphasised Tunisia’s identity as Islamic, Arab, African, and Mediterranean (in this order), and promised to work on the aim of Maghreb unity.

The new president quickly concentrated enormous power in his own hands, combining the offices of head of state, head of government and presidency of the ruling party, PSD. But over the course of his first year in office, there were nods to political opponents and signalling that genuine democratic change was in the cards. Ben Ali reached out to regime opponents with amnesties for thousands of political prisoners including the MTI’s Rachid Ghannouchi. The

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<sup>21</sup> The whole address is available in French in Toumi (1989:207–9) from where all following quotes are taken.

space for free speech and association were broadened and numerous exiled intellectuals considered returning to their country (Alexander 2010:52ff; Perkins 2014:188ff).

Within Ben Ali's first year in office, he initiated constitutional amendments that built on the promises of his TV address (Ben Achour 1990a). However, the process was entirely top-down and only ostensibly democratising. Beginning mere week after Ben Ali's takeover, an expert committee was assembled, tasked with drafting the legislative changes the new president had announced in his 7 November address. A sub-committee on constitutional change in close consultation with the new powers-that-be<sup>22</sup> developed the legislative proposal. This was ultimately amended and adopted unanimously by parliament following further consultations of the president with the head of the Constitutional Council and other advisors. The succession of the head of state was changed to a process whereby the president of the parliament takes over for an interim period. In its limited scope, this part of the constitutional amendment is indeed a change toward a more accountable system. The change that was supposed to increase the parliament's prerogatives was symbolic in scope. The chamber's oversight role was changed to one where it can censure the government for not enforcing the president's policies. Even if the domination of the parliament by the government party is ignored, this is still a very limited scope – one which Ben Achour calls “a fake” (1990a:130). Where the constitutional amendment did introduce improved accountability was in the limitation of presidential terms to two re-elections (as was the case in the original 1959 constitution) and some seemingly technical changes that concern the process of elections. However, that temporary limit on presidential power was later revoked under Ben Ali. The constitutional changes following the 1987 ‘medical coup’ thus were mostly cosmetic. Neither was presidential power checked by other institutions via horizontal accountability during the term in office (O'Donnell 1998), nor were the constitutional rules an impediment to the actual exercise of power beyond the constitutional boundaries. The continuity of presidential power outweighed any change toward democratic norms, the latter being mostly for cosmetic purposes.

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<sup>22</sup> The report by constitutional lawyer and later minister under Ben Ali, Rafaâ Ben Achour (1990a:124) on consultations with the new President gives an idea of the ductus under which the amendment process was implemented: Following the presentation of the sub-committee's proposals, “The President suggested the following elements:

- Do not mention the Constitutional Council (...)
- Entitle the newly elected president, following the presidential vacancy, the right to dissolve parliament.
- Do not mention political parties.”

The change in leadership and its ideological underpinning was also reflected in the symbolic change of the party's name from PSD to *Rassemblement Constitutionnel Démocratique* (RCD, Democratic Constitutional Rally). The reference to the constitution "tied the party to its predecessors, but the remainder of the title anticipated a broader and more egalitarian institution than the Destour, Neo-Destour, or Socialist Destour had ever managed to become" (Perkins 2014:188). The reference to the constitution remained. Ben Ali also sought to reduce tension with the Islamists (Halliday 1990). He had no interest in all-out conflict with an organisation whose strength he could not be certain of, though it was clear that the MTI had developed a clandestine armed group. A well-publicised pilgrimage to Mecca was certainly a climbdown from Bourguiba's top-down attempts to enforce secularism and a nod to their constituency, as was the permission to broadcast the call to prayer on the radio and television. A key reason for this was Tunisians' increasingly public expressions of piety, a trend that had emerged across the region of the Middle East and North Africa in the late 1970s and early 1980s (Cleveland and Bunton 2009:440–44). By taking these initiatives, Ben Ali sought to both respond to this trend and take control over it though some religious symbols were considered too retrograde. Despite his public demonstrations of piety, he maintained that religion was to be a private matter to limit its public, political role.

### 5.2.1 The National Pact

Ben Ali invited a broad range of political forces including the MTI to formulate a National Pact – a statement of political philosophy and objectives – to be unveiled on the first anniversary of his ascension to the presidency (Perkins 2014:194). The process and result of this National Pact are worth closer inspection.

Three months ahead of the first anniversary of his assumption of power, Ben Ali published an open invitation in Tunisian newspapers. While his previous reforms had mostly involved a small circle of presidential advisors, he now called on national forces to debate on a new national consensus, to be codified in a "National Pact" (Anderson 1991). Initial confusion over the pact's purpose and enthusiasm by intellectuals foreseeing national soul-searching in town meetings gave way to the realisation that this was to be an elite level process led by representatives of the various organisations. While Murphy (1999:174) reports the a first draft of the National Pact was written by a committee chosen by Ben Ali's party and subsequently amendable by the representatives of other groups, Anderson (1991:252) writes that the "participants met repeatedly during the autumn, hammering out the text". Either way, the discussions were held in a closed format, though the Tunisian press frequently reported on the

progress of debates and published editorial standpoints advocating certain provisions, which created a public debate of sorts. Participants described the discussions in the diverse group as sometimes heated (ibid.). Ultimately, the six recognised political parties, including the ruling RCD, the Movement of Socialist Democrats (MDS, *Mouvement des démocrates socialistes*) and the Tunisian Communist Party, became signatories to the Pact. Several professional associations and national organisations also signed, as did the League for the Defence of Human Rights (LTDH) and an individual representative associated with the MTI. On the surface, then, this appears like an expression of consensus among equals. In fact, the government mainly used the Pact to project an (false) image of pluralism – to Tunisians as well as internationally.

The national pact is structured in four substantive sections on identity, the political regime, development, and external relations, preceded by a preamble. Together, these form a document, which in the French edition published by the Tunisian Ministry of Information consists of about 31 small pages (Tunisian Ministry of Information 1988).

The preamble highlights aspects of Tunisia's national identity: Its cultural heritage, anti-colonial struggle, reformism, the republican regime, and the creation of the rule of law and institutions as guarantors of liberty and progress. Its authors express consciousness of their historic responsibility at a decisive turn of the country. Interestingly, the pact is also declared to be “a concretisation of the principles announced in the declaration of 7 November [1987 by Ben Ali], and which express the aspirations of the people and guarantee a dignified and developed life, based on democracy, pluralism, popular sovereignty, and the primacy of the law” (ibid: 5). Ben Ali's TV address is expressly mentioned as the basis for the thinking in the pact and it uses the language of liberal democracy in contrast to Bourguiba's emphasis on cohesiveness.

The identity section is the first substantive part of the pact and describes the country's identity unambiguously as Arabo-Islamic. This fact is probably part of the regime's attempt to avoid letting Islamists monopolise this issue after many Tunisians had become disenchanted with what they saw as Bourguiba's infatuation with the West. The text<sup>23</sup> describes how Tunisia can reconcile its Arabo-Islamic identity with the demands of contemporary life through reform. This is achieved through the combined invocations of the 19th Century reformer Khayr al-

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<sup>23</sup> All quotations from the National Pact are author translations from the French Text published by the Ministry of Information (Tunisian Ministry of Information 1988).

Din, the concept of “ijtihād” (a source of Islamic law based on independent reasoning), the role of educational institutions both Islamic and modern, and the Personal Status Code.

In the section on the political system, the National Pact invokes liberal-democratic values – constitutionalism, human rights, equality between citizens, independent institutions, and the contribution of civil society. The section’s first paragraphs pick up the theme of (Islamic) reform, noting that its movements have opposed absolute power and called for it to be governed by law (1988:15). The text then points at Tunisia’s early constitution as further evidence of the country’s avant-garde role. The people’s struggle, the text says, had the double-purpose of freeing the country from foreign rule and building a modern state built on the rule of law and popular sovereignty. Describing the promulgation of the 1959 constitution and the republican regime as the guarantee for human rights and individual liberties, the text argues that the current problems were not attributable to “the absence of a legal tradition nor the lack of democratic spirit among the people” (Anderson 1991:255). Rather, the Pact explicitly argues that

... the single party system, the marginalisation of institutions, the personalisation of power, the monopolisation of authority were all practices contrary to the constitution of the country and the cause of many crises.

(1988:16)

Emphasising that the country’s problems were caused by abuses of power under Bourguiba, whereas the institutions per se were adequate, this paragraph reiterates “the theme that Ben Ali was leading the country back to its proper roots” (Murphy 1999:175). Indeed, the Pact specifically refers back to Ben Ali’s 7 November declaration as the solution, as it “ended such deviations and (...) restores the organic link with the objectives of the movements of renewal and recovery” (1988:16) and responded to activists’ and people’s desire for liberty, justice, and sovereignty in a framework of democracy and human rights. The Pact notes that it is the state’s task to ensure individual rights and liberties and that this requires the values of tolerance and the banishment of extremism and violence – a justification that excludes supposedly intolerant Islamists from legitimate politics. Among them, it lists the freedom of religion, but also the pressing duty to keep Mosques politically neutral. Equality between citizens is held as no less important than liberties, irrespective of their gender, religion, colour, opinion or political beliefs. Political parties should engage in political education but must not substitute for or get the status of state institutions – a clear reference to the deep

entanglement of Bourguiba's PSD with the state, but also Ben Ali's RCD, and a concession to smaller parties.

The subsequent section on development is notable for its emphasis on collective efforts, which contrasts with the individual rights invoked before. Beside its geographic location and the qualities of its people, the Pact lists the country's homogeneity as one of Tunisia's sources of potential. Rather than outlining a concrete development strategy, it describes it as the citizens' duty to work conscientiously and with discipline. Solving the problems of the people and ensuring citizens an "honourable existence" (1988:22) are portrayed as the guarantee for democracy. Later, the development section picks up the themes of national identity and of *ijtihad* and combines them with the idea of adopting the latest discoveries and technologies. The Pact identifies the broad participation of the people in identifying the objectives and means of development as well as the "equitable distribution of the fruits of production" as fundamental conditions for successful development and the establishment of "perfect social relations" (1988: 23). In turn, citizens are urged to pay their taxes, knowing that any transgression of this "sacred duty ... constitutes a violation of the entire community and a weakening of the spirit of citizenship" (1988:23). Three elements resemble policy pronouncements most closely: The commitment to food security, the assertion that a balance between public and private sector engagement are required for development, and the commitment to concentrate efforts on the long disadvantaged regions. Finally, the Pact invokes the severity of the historical moment in which it is written again and calls for national solidarity and the necessary sacrifices by all – employers and employees – as well as committing the Tunisian state to implement a long-term development strategy to end dependency. Like under Bourguiba, the tension between the commitment to individual rights in principle and the apparent need to constrain them in the interest of the nation as a whole remains unresolved.

The chapter on foreign relations once again takes its cues from national identity and consequently emphasises inter-Arab, intra-Islamic, and intra-Maghreb solidarity and cooperation. This was also a symbolic shift away from Bourguiba's francophile orientation. This short section also emphasises the importance of norms such as the struggle toward law, justice and human rights.

### 5.2.2 Discussion

Anderson (1991) generally offers an optimistic reading of the pact. She notes that in some areas it responds to political pressures rather than dictating them, notably on national identity.

In this context, one should not label as naïve those who believed in Ben Ali's sincerity to democratise the country while returning it to "the values of the early post-independent state" (Murphy 1999:176). Many parties and national organisations took part in the process and signed the pact. In fact, some "leading opposition figures and intellectuals joined the RCD and accepted positions in the new government because it was implementing the very reforms that they had always demanded" (Alexander 2010:54).

Ultimately, the contents of the National Pact are a discursive reflection of the deft way in which Ben Ali managed the political transition. By talking the talk of liberal democracy and reforming the system in a way that appeared to democratise it, he surreptitiously cemented his own personal power. Many believed that as a technocrat, Ben Ali lacked political acumen. Opposition groups believed he needed them, because unlike Bourguiba, he lacked his own constituency. In fact, the concessions Ben Ali made in political reforms were a way to recruit political forces into a national consensus that in effect stymied any competitive democracy. In any case, they never went far enough to generate genuine political competition. It is true that virtually all parties that participated in the drafting of the pact had made concessions and this included the regime. Three examples identified by Anderson (1991) stand out: The Pact explicitly notes the abuses of power in the past and condemns the entanglement of party and state, which is a considerable concession on the part of the RCD. Meanwhile, the communists agreed to protecting private property and the Islamists committed to the Personal Status Code. This went beyond finding political consensus: "The very principles upon which alternative political agendas were based were repudiated by their own advocates" (Murphy 1999:176–77).

In hindsight, it is revealing to read how Ben Ali described his conception of democracy in November 1989. Tunisians, he argued, had achieved a degree of maturity that allowed them to constructively participate in their affairs in a republican regime, which guarantees the conditions of "*responsible* democracy" (Ben Ali 1990:10, emphasis added). Concretely,

the state fixes the framework, creates the climate and provides the fundamental necessities for competition and dialogue. It is up to civil society, with all its components and sensitivities, to consecrate the laws of competition and the rules of dialogue. It is also their responsibility to oppose all actions that go against the mainstream of the national consensus, to combat aberrations, quietude, progress and well-being.

(Ben Ali 1990:13)

The leader thus recruited civil society into the government's efforts at policing a particular type of political culture, which strongly emphasised "consensus" while the actual political environment was such that the government could not be openly challenged.

In sum then, the National Pact was a tactical and rhetorical step to co-opt opposition forces into a political project, which appeared to lead to democratisation on the surface, but which actually created the base for Ben Ali's own domination over Tunisian politics, society, and – soon thereafter – its economy. It "recreated the image of an organic corporatist state, reinvigorating the role of national organizations as partners with the state, rather than potential and sometimes actual combatants" (Murphy 1999:174–77), and "sapped the opposition's ability to do anything but applaud [Ben Ali]" (Alexander 2010:54). Later, Lisa Anderson revised her assessment of the National Pact, contrasting it to the Spanish experience, which was a compromise between groups with independent power bases in society. In Tunisia, in contrast, "far from a compromise or bargain among equals, the pact was an effort to create the appearance of political pluralism in the absence of political actors with autonomous social and economic power" (cited in Sadiki 2002a:62).

### 5.3 *Hollow reforms*

Despite the liberal democratic rhetoric, the political system that emerged under Ben Ali was a façade democracy (Sadiki 2002b, 2002a) and citizens' rights were not given improved protection: Superficially, the system exhibited the institutions associated with liberal democracy, which ultimately had little influence while substantial decisions were taken by Ben Ali himself. Indeed, the presidential palace in Carthage became even more powerful than it had been under Bourguiba. "The palace has grown so much in size and power that it has become, by all accounts, the country's command center and steering body. Before, it merely supported the government; now, it has effectively become the government" (Erdle 2010:140). The reforms were also "for the Yankees to see", as Ayubi (1995:411) put it; that is, cosmetic changes to the political system for foreign – mainly Western – creditors, allies and investors for whom these changes made Tunisia more palatable. The symbolic gestures continued. Ben Ali invited prominent opposition figures into his government, including representatives of the Tunisian Human Rights League. As Murphy (1999:32) argued, democratization in this guise can also be a strategy to secure power by a new regime as part of an intra-elite struggle:

... political liberalization and/or democratization is initiated by a president and his coterie of aides in order to disempower the existing single party relative to themselves. Only thus can they reduce structural resistance to policies which transfer economic management (and powers

of patronage) from the state (and the political party which has dominated it for so long) to the private sector and their own interests within it.

The political reforms implemented after the National Pact that included constitutional amendments were hollow. They were presented to have a democratising effect but, in some cases, actually hollowed out existing institutions.

The introduction of a constitutional council illustrates this pattern. Constitutional review, the power by a court (be it a Supreme Court, Constitutional Court, or Constitutional Council) to review legislation regarding its compatibility with the constitutions, has become a regular feature of liberal democratic regimes and so have the relevant courts (Ginsburg 2008). In liberal democracies they can be powerful institutions defending constitutional norms such as individual rights as well as the checks and balances between the state's authorities (Rath 2013; Schmitter 2004). Given France's traditional reluctance toward constitutional review and its late introduction there, it should not come as a big surprise that Tunisia, whose legal system has been influenced by its former colonial power, had not included such mechanisms in its first post-independence constitution.<sup>24</sup> Ben Ali's creation by decree of a constitutional council in Tunisia shortly after gaining power and its constitutionalisation in 1995 thus putatively suggested Tunisia's joining this emerging norm. While lower courts lack the competence to assess a law's constitutionality, this appeared to create an institution, which for the first time in Tunisian history could enforce citizens' rights codified in the constitution. However, the Council's mandate was far too restrictive to take on this task. While its recommendations were binding, only new legislation could be submitted for review, saving existing repressive laws from scrutiny. Moreover, "in cases where the conformity of a normative act with the constitution is not obvious, is allowed to use the more flexible concept of 'compatibility' in order to uphold a law whose constitutionality in the strict sense seems rather doubtful" (Le Roy 2012:114). Paired with the fact that only the executive could make submissions in the first place, it is not surprising that "the Tunisian Constitutional Council has scarcely had any effect on the executive power" (ibid). No wonder then, perhaps, that key texts on Tunisia barely give the Council a mention (Alexander 2010; Murphy 1999). For international financial institutions, the mere presence of such institutions spoke of increased

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<sup>24</sup> As Le Roy (2012:118) notes, France has only begun extending the parameters of constitutional review from 1971 and its highest courts were only given the possibility to submit legislative provisions to the constitutional council for constitutional review in 2008. See also Gallala-Arndt (2012) with a comparative perspective on constitutional councils in the Maghreb region

accountability, while domestically, their presence – even if limited in power – may have contributed to the further embedding of liberal constitutional norms.

#### *5.4 Regional instability propping up authoritarianism*

Two conflicts outside Tunisia changed the dynamic between the Ben Ali government and its Islamist opponents and provided the justification for a return to authoritarianism: The 1990 Iraqi invasion of Kuwait and the escalating civil war in Algeria. Ennahda split over their stance on the Gulf war and the radical wing gained control. It scaled up its campaigning against the regime to a level not yet seen under Ben Ali. The police arrested several militants on the grounds that they planned terrorist attacks including the assassination of Ben Ali himself. A deadly act of arson at an RCD office in February 1991 triggered public revulsion. In neighbouring Algeria meanwhile, Tunisians could observe the aftermath of a successful electoral bid by Islamists that spiralled into civil war as the army took control of government and cancelled the elections in 1992. On the one hand, Ben Ali was concerned that the situation in Tunisia might escalate out of control. On the other hand, this provided him the perfect justification to scale back any political liberalisation. He thus ordered a crackdown on Ennahda activists and sympathisers. Given the ongoing horrors in Algeria, he could be assured that harsh measures would be condoned and even widely supported by many Tunisians willing to sacrifice political and personal freedoms in the interest of security (Perkins 2014:198–99). The fear of violent Islamism was not entirely unfounded, even if Ennahda maintained that it was committed to non-violent resistance to the regime.<sup>25</sup>

Extremist groups were evidently present and the fall in tourist figures following attack on a Synagogue on Djerba by the precursor group to Al-Qaeda in the Maghreb (AQIM) showed the severe economic impact these groups can have (Alexander 2010:61). Yet the regime consciously conflated (moderate) practices of expressing religious identity with the threat some extremist posed to national security. This way, it marginalised those unwilling to conform with what was presented as a national consensus. A diplomat reported in 2005 of government harassment against veiled women and men with beards, “including stories that police have torn off women's veils, manhandled veiled women in the markets and arrested and interrogated bearded men or veiled women” (US Embassy Tunis 2005). Yet only “respect and

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<sup>25</sup> An internal evaluation by Ennahda leaders in exile emphasised this insistence on non-violence, but “acknowledged there had been some ‘excesses’ (al-tajāwuzat), including the throwing of Molotov petrol bombs and the attack on the RCD office at Bab Souika in 1991, which it admitted marked a turning point in al-Nahda’s fortunes” (McCarthy 2018:80).

inclusion of difference can produce the kind of multilevel community capable of deliberation, aggregation of public preferences, their representation and (...) a shared political space” (Sadiki 2002a:63) essential to liberal democracy and absent in Tunisia under Ben Ali (Sadiki 2008).

Over time, Ben Ali’s regime became ever more entrenched. Regular elections were held, but were virtually meaningless for the actual allocation of political power (Sadiki 2002a). To root out any viable alternative to his own leadership, Ben Ali used the Islamist threat to legitimise his regime both domestically and to its international allies. The RCD’s and Ben Ali’s own dominance over Tunisian politics were poorly concealed by the existence of a legal but small loyal opposition. As Sadiki (2002c:506) pointed out, the “*dyads l’Etat-patron and l’Etat-parti* are today a massive support system that hegemonises and homogenises political life to the point of stultifying political life below the state”. Political parties other than the RCD remained largely ineffective whereas the regime’s ability to galvanise public opinion against the Islamists, generate economic growth, and tackle some of the social inequalities made vote rigging – some of which undoubtedly occurred – counterproductive in the 1994 elections. “The RCD enjoyed a measure of genuine popularity that the PSD had forfeited (...) long before the ‘Historic Change’” of 1987 (Perkins 2014:201). When opposition groups were given a guaranteed share of parliamentary seats as well as subsidies, these measures were both a way of creating presidential patronage over the smaller parties and a means of ensuring they would mainly compete against each other rather than the regime. In subsequent elections, Ben Ali and the RCD continued to dominate. Even when alternative presidential candidates were on offer, the incumbent secured over 99 per cent of the vote.

In 2002, sweeping amendments in the constitution marked a shift from any liberal pretence in the constitution and formalised Ben Ali’s grip on Tunisian politics. The most consequential constitutional reform affected 39 of the constitution’s 78 provisions and touched “almost every aspect of the country’s political life” (Abdessemed 2014:717). What stands out are the abolition of presidential term limits – a key concern after Bourguiba’s extended rule – and the increase of the age limit for candidates to 75, meaning that Ben Ali was now given the opportunity to rule effectively for life – in line with the letter of the constitution (Alexander 2010:63). An amendment to Article 41 gave the president lifelong legal immunity for acts conducted in the exercise of his office. While regular elections continued and other candidates were permitted, the regime ensured through the electoral system and other means that only Ben Ali could win. Elections, like the other institutions of liberal democracy present in Tunisia, were hollowed out of their meaning. As under Bourguiba, citizens had no way to

hold political power accountable through the official institutions of the state, be they political (elections) or judicial (the courts) as both were ultimately controlled by Ben Ali. Ben Ali's attitude to the constitution was ultimately as flexible as Bourguiba's. As above discussions have shown, constitutionalism under Bourguiba was semantic. In Löwenstein's (1959:151–57) taxonomy, this means that the constitution merely codified and reflected existing power practices. Despite rhetorical commitments to the opposite, Ben Ali dealt with the constitution in a similarly pragmatic fashion. He used its provisions to oust Bourguiba and raised his own profile by removing the presidency for life from the constitution. Yet when its articles stood in the way of his own exercise of power or its prolongation, the constitution was changed to suit Ben Ali's demands. Constitutionalism thus remained semantic, with the constitution remaining largely a reflection of existing power relations rather than making it accountable. It served “the primary purpose of organizing power without limiting it” (Brown 2002:12).

### *5.5 An economic success story for many, but not all Tunisians*

If most observers of Tunisia freely admitted that after the brief period of liberalisation, civil and political rights were widely disrespected by Ben Ali's regime, many would point at the evident socioeconomic progress made as a reason for some cautious optimism. It appeared that the difficult transition from state-led development to liberal market-led economics was a success. But beyond the intrinsic benefits of an improved socioeconomic situation, the economic change could also be a harbinger of political liberalisation, many analysts hoped. They largely based their expectation on the findings of Lipset (1963:9) that “the more well-to-do a nation, the greater the chances that it will sustain democracy” (cf. Lipset 1959). In the long run, economic liberalisation would produce a segment in society that was economically independent of the state and would therefore extract traditional liberal concepts such as the rule of law and democratic participation from it.

The country's economic growth record and improvements in human development outcomes were indeed impressive during Ben Ali's rule. Between 1987 and 2010, GDP per capita tripled while inflation and net government debt roughly halved from around 10% and 65% to 32.9% of GDP respectively. Though unemployment remained relatively high, it too dropped from over 16% in 1987 to 13% in 2010 (International Monetary Fund 2018). Tunisia's score in the Human Development index rose from 0.569 in 1990 to 0.716 in 2010, reflecting improved outcomes in health, education, and income. Economic liberalization included the privatization of state-owned companies as well as the reduction in trade barriers, especially with the European Union, Tunisia's most important trade partner (cf. Cassarino 1999).

Several forces militated against political liberalism following economic liberalism in Tunisia under Ben Ali. First, the celebrated aggregated national figures for income, unemployment, and indeed poverty cast over significant differences between regions and groups within society. For example, unemployment in some interior regions was – and continues to be – double the national rate, as is that of university graduates. The labour market participation of women is considerably lower than that of men. In some instances, the regime used what is effectively manipulation of the data to make the economy appear in a better light (Murphy 2013b:50–51). Second, the authoritarian regime controlled the process of economic liberalisation and used its benefits as patronage. Rather than creating a class of entrepreneurs challenging the state therefore, “state would not disengage from the economy but rather it would redefine the methods of intervention and the directions in which it would exert influence, such that other actors behaved in desired ways” (Murphy 1999:224). Thus, the winners of liberalisation remain dependent on the regime as the latter can selectively use regulation to exercise power (Hibou 2011; Hibou and Hulseley 2006). Third, the regime used privatisations to enrich itself. State-owned companies, concessions, licenses, and land were allocated to members of the Ben Ali clan at knock-down prices – often financed by Tunisian banks via unsecured loans. The ostensibly private sector emerging out of this was not independent of the state like in the liberal playbook. Instead, this “third sector” was closely tied to political power and thus “able to circumvent the regulations of the state, to privilege itself at the expense of the genuine private sector and to ultimately transfer wealth out of the country rather than generating the investment capital that would fuel the kind of economic growth and job creation that the economy needed” (Murphy 2013b:45–46). An analysis by World Bank staff showed that during a particular timespan, an ensemble of 220 companies owned by Ben Ali appropriated an extraordinary 21 per cent off all net profits made in the country’s entire private sector (Rijkers, Freund, and Nucifora 2014).

To preserve social stability and his regime, Ben Ali also sought to reduce the negative impact of liberalisation on the most vulnerable. Yet again, this was not implemented through an accountable and transparent system. Resources for the disadvantaged were mobilised in various funds that companies contributed to on a supposedly voluntary basis, though the implications were relatively clear. Cooperating companies received favourable treatment by the authorities, whereas those who failed to contribute (sufficiently) risked regulatory problems (Tsourapas 2013; Willis 2012:241). Collective wage bargaining was another channel through which the regime retained some control over the economy. In the regular interval of three years, the government, the trade union federation UGTT and the employer’s

association UTICA would negotiate wage policies for the private and public sectors (M'rad 2015:18). This gave Ben Ali another means to compensate for the imbalanced political system and to achieve relative social peace. In some ways, it also increased the discretion the president enjoyed in using social welfare for political ends compared to the post-independence social contract. Nonetheless, the Tunisian economic success story was an exclusive one. While there were some genuine improvements for all Tunisians across many of the standard development indicators, a selected elite of Tunisia's society enjoyed outsized relative gains from liberalisation. Among non-elite citizens, the perception of a detached and corrupt regime that had developed under Bourguiba did not change. The ostentatious lifestyle of Ben Ali's clan merely confirmed this suspicion (Beau and Graciet 2009).

### *5.6 The forces militating against Ben Ali*

The power Ben Ali's regime had gained over Tunisia's political system was far-reaching. With the state under his control, including its extensive and growing security apparatus, most intermediary organisations and even opposition parties were to some extent co-opted by the regime. This shut virtually all avenues of political interest articulation for citizens vis-à-vis the regime. Consequently, if state policies were challenged at all, this often took the form of street protests, strikes, and even riots (Hostrup Haugbølle and Cavatorta 2011:329; Murphy 1999:38).

In hindsight, a series of protests in the Gafsa mining basin of Tunisia's interior region in 2008 appears like a prelude to the country-wide revolt that toppled the Ben Ali regime in 2011. Pervasive frustration over exclusion across multiple dimensions such as the lack of public investment, a lack of jobs, and public service provision among Tunisians in the interior regions had been brewing for many years. To boil over, these frustrations required only the trigger that the recruitment announcements of the state-owned Gafsa Phosphate Company provided. Many workers accused the company of hiring the well-connected over the well-qualified for prized jobs. "Some of those hired were protégés of the local union boss himself, who enjoyed a close relationship with the regional government at the RCD, of which he was a senior member" (Perkins 2014:220). Others, including relatives of those who had died working in the mines, went empty-handed, violating a 1986 agreement. After a popular committee reached an impasse, miners used strikes, street protests, roadblocks and other means to gain attention to their grievances. The protests spread and after an attack on a police station, the state used fierce repression. One protestor died and many were injured when the security forces opened fire on them. In grossly unfair trials of over two hundred individuals,

miners and activists, long sentences were handed down (Beinin 2015:chapter 3). The Gafsa events were the most severe challenge to the regime since its conflict with Ennahda and provided an opportunity for local activists to connect with national organisations based in Tunis, such as the trade union of unemployed graduates. It also provided an example for other Tunisians that the state can be challenged and thus laid the groundwork for the 2010/11 revolt that brought down the Ben Ali regime.

The work of the organised opposition was unable to challenge the regime effectively within the state institutions as the unfair electoral framework, repression, intimidation, and other repressive methods combined to a grossly uneven playing field. While Ben Ali and the RCD continued winning the regular elections, the coordination between groups produced a valuable legacy. Most opposition parties under Ben Ali had originally sprung off Habib Bourguiba's Socialist Destourian Party and shared a vaguely socialist ideology (the details of which separated them). Their separation from the PSD was often the product of personal rivalries rather than representing certain constituencies or social groups. Consequently, they lacked both institutionalisation and effective leadership. That the Islamist Ennahda party was the most serious challenger to the regime also resulted from other groups' lack of credibility. At the same time, the leftist parties' fear of the religiously inspired policies Ennahda would implement once in government provided Ben Ali with a powerful tool to co-opt the secular opposition (Alexander 2010:66). A key element in this regard was the regime's staunch defence of women's rights as codified in the Personal Status Code, which in its portrayal was threatened by the Islamists. Yet in contrast to other Arab countries, Tunisian secular and Islamist forces were engaged in discussions and did not let the contact break down (M'rad 2015:18). In 2003, representatives of the main opposition parties, which were later represented in the National Constituent Assembly to elaborate the post-Ben Ali constitution, met in France and formulated a "Call from Tunis" (Stepan 2012:96). The document notes the deterioration of the human rights situation in Tunisia, makes references to the country's history of reformism and constitutionalism, and calls for the country to establish a democratic alternative for which it is described to be mature enough. Twelve concrete demands include the release of political prisoners, the promulgation of a new constitution based on human rights and establishing a democratic political system and independent judiciary, judicial review, as well as gender equality. It also calls for respect for Tunisia's Arabo-Muslim identity and values, pluralism, tolerance and active civil society as well as a fight against corruption, and the protection of socio-economic rights (Anon n.d.). Two years later, a coordination effort that included secular groups as well as Ennahda leaders echoed these

principles. In fact, the activists of the 18 October *Collectif* explicitly referred to equal citizenship as a goal, which included gender equality (Collectif du 18 Octobre n.d.; Hostrup Haugbølle and Cavatorta 2011:336; Néjib-Chebbi 2016).

With no change to the structural conditions motivating protestors in Gafsa after Ben Ali's re-election in 2009, the now well-known self-immolation of a young street vendor in Sidi Bouzid was the trigger for an even larger revolt that spread across Tunisian regions and classes and ultimately resulted in the departure of Ben Ali from the country. The movement began with daily protests in Sidi Bouzid from late December 2010, which spread to nearby towns. There is a political dimension to the slogans that protestors chanted, which were also partly the same as 2008: "Work is a right, you pack of thieves!" (referring to the corruption under Ben Ali and his clique) and "Work, Freedom, Social Justice". While the highest level of national organisations like the UGTT remained largely inactive – not least thanks to the co-optation by the regime – grassroots activists began supporting the uprising. It was not least the brutality of the police response that soon drew the attention of human rights activists from the LTDH and lawyers to the protests after some media had covered them. Solidarity protests sprang up across the country and the UGTT ultimately endorsed the demonstrations. Its political and logistical support brought about the movement's ultimate success – even though its leadership remained loyal to the regime for a long time, bowing to the pressure from the street only in the last days before Ben Ali's departure on 14 January 2011. His speeches with promises to create thousands of jobs, lift censorship, and – ultimately – even step down later that year were too little, too late for the now-mobilised masses. Amid the calls for a general strike by the Tunisian Bar Association and several trade unions, the military was brought onto the streets and the state of emergency imposed. But as thousands coalesced around the centre of Tunis demanding that Ben Ali resign, the military leadership refused to issue orders to fire on protestors, underlining the central role militaries have for regime stability (cf. Albrecht 2015). Tunisia's professional army had seemingly concluded that the president and his coterie had become the detriment to Tunisia's much-vaunted stability and by withdrawing from the street effectively smoothed him out of office. He departed by government airplane to Saudi Arabia (Ayeub 2011; Jebnoun 2014; Murphy 2011:301–2; Perkins 2014:222–28).

### 5.7 *Citizenship during the Ben Ali years*

Ben Ali's time in office was marked by a return to authoritarian government amid a discourse and façade reforms that signalled commitments to the norms of liberal democracy. For non-elite Tunisians however, citizenship under Ben Ali was marked by a lack of effective

individual rights, multiple exclusions, and an intolerance against difference. The following section summarises these findings along the four dimensions of citizenship.

1) *Inclusion and exclusion* – who is a full member of the community and on what basis?

At a minimum, the regime's discursive commitments to liberal democracy would suggest political participation, equal citizenship, and an acceptance of difference based on a consensus on the institutions and procedures of democracy (Dahl 1971; Habermas 1996). Yet while promising pluralism, the transition was only one from "from single party rule to ruling party hegemony" (Sadiki 2002c:505). Behind the façade of these discourses and ostensibly liberal-democratic institutions (parliament, a constitutional council, regular elections) the politics of inclusion remained authoritarian and demanded political uniformity (Sadiki 2008). On the level of legal institutional politics, potential challengers for power were either shut out by repression (like Islamists and human rights activists) or co-opted into the regime (like the national organisations such as the UGTT and UTICA). Elections were effectively meaningless, making political participation available only to those willing to work within the narrow confines of the state and party, which demanded obedience to and endorsement of its discourses and policies. Tunisia may be superficially homogenous. Yet despite the lack of openly sectarian cleavages, there continued to be multiple dimensions of exclusion. Residents of the disadvantaged interior regions remained neglected while coastal areas benefitted from both private and state investment. Religious expressions that the regime judged too conservative – or simply, politically inexpedient – were repressed. The poor and the floating middle class were disproportionately affected by the inequalities that economic liberalisation produced. Women faced exclusion in many areas, including the labour market and family law (Fassatoui 2016; Marks 2013). There are further axes of exclusion, marginalisation, and discrimination. In some cases, discrimination was part of the body of the law, such as for LGBT+ Tunisians. Under the 1913 penal code, introduced by the French colonial authorities, "sodomy" is criminalised (Khouili and Levine-Spound 2017). The regime saw no need to rid itself of a law that allowed it to use citizens' private life as an opportunity for repression. While homosexuality lacked social acceptance, it also saw no gain in decriminalising it. In other cases, existing social discrimination such as that against black Tunisians remained unpunished in the absence of laws against hate speech and discrimination. One group whose inclusion was pursued by the regime under Ben Ali was the Tunisian diaspora in other countries, whose continued membership in the Tunisian policy was emphasised and institutionalised.

## 2) *Rights and obligations* – what is the substance of citizenship?

Citizens' rights under the Ben Ali regime were extremely limited and not guaranteed. The National Pact may have ceremoniously invoked tenets of liberal democracy, but practically rights remained constrained. They remained codified constitutionally and invoked in discourse along with other liberal values. In practice however, power trumped over the law as the state used ambiguity to control citizens. The same is true for citizens' obligations: Be it taxation or conscription, the state did not consistently demand that these be fulfilled. This ambivalence left the regime space for arbitrary decisions and thus the exercise of power (Hibou 2011). The ability to enjoy rights and escape obligations was a function of proximity to the regime. Meanwhile, the social contract changed as the state was no longer able to substitute political participation with socioeconomic entitlements and improvements for citizens under economic liberalisation. In search of alternative sources of legitimacy short of genuine electoral competition, the (construction of) an Islamist threat to stability came to prominence. The Ben Ali regime presented itself as the guarantor of stability, both in terms of hard security and in macroeconomic terms. The notion of social progress was thus applied to questions like women's rights, rather than the socioeconomic rights that the government could not and the political rights it would not guarantee.

## 3) *Identity and belonging* – what is the psychological dimension of citizenship?

The debate on Tunisian identity under Ben Ali remained closely linked to the role of religion in public life. Like Bourguiba before him, his regime pursued an openly secular path of modernisation though rhetorical commitments to Tunisia's Arabo-Islamic identity increased. In the perception of some of his opponents however, the dominance of secular francophony was unmissable and the regime's construction of Tunisian identity binary. "For [Nahda-leader] al-Ghannushi, 'defining who is Tunisian under Bin Ali is based on simple reasoning: if you are not with him, you are against him'" (Sadiki 2002c:506). In fact, Ben Ali's relationship to Islam was more complex. Despite its theoretically secular impetus, the state remained involved in the management of religion and thus maintained control over it. Permitting and promoting religious symbols in the public sphere, the regime also followed the increased public displays of piety by many Tunisians. The increased emphasis on Arabo-Islamic identity – notably in the National Pact – went along with the aim to portray Tunisia as a country that can reconcile traditional beliefs with "modernity" thanks to a reformism that is itself ingrained in the national character.

Unlike Bourguiba's regime, Ben Ali's did not seek political mobilisation of citizens, but rather the opposite. Consequently, while elite cadres were trained in dedicated institutions (e.g. the ENA and an RCD school), ordinary citizens were discouraged from engaging in the political sphere. Consequently, many Tunisians sought self-realisation in private endeavours rather than public ones.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and what is expected from citizens?

The ideational impetus of citizenship under Ben Ali could be labelled with a shift toward “selective liberalism”. This is because it entailed a shift toward some classic liberal values as endorsed in the National Pact but stopped short of its core tenets. The hierarchy between the public and the private shifted in the latter's favour. If post-independence citizenship in Tunisia had a strong anti-colonial, nation-building ideational impetus – the sense that political rights could be forgone for socio-economic progress was apparently condoned by a large number of people – this was no longer as strong under Ben Ali. Opposition with liberal leanings had organised and made their voice heard. Even under authoritarian government, Tunisian children were taught core principles of democratic political systems at school – “without reservations” as a study of Arab countries' civics textbooks showed (Faour 2013). Nonetheless, while service for the nation-building project was an important part of the idea of citizenship under Bourguiba, this became much less prominent under Ben Ali. Indeed, the contrast between the very types of leadership reflect a trend that was also evident in society at large: Bourguiba was reportedly much more interested in power itself than its trappings. Ben Ali on the other hand, particularly in the latter half of his rule, sought to maximise the economic benefits of his presidency to the maximum. This has led to apathy, particularly among the middle classes. With the choice for citizens limited to joining the RCD (and thus endorsing a deeply objectionable system) or a politically impotent opposition group, most Tunisians withdrew from public life altogether, making Tunisia “a very apolitical place” under Ben Ali (Alexander 2010:120). The republican ideal of citizen service for the polity gave way pursuits in the private sphere.

The regime also promoted the liberal virtue of tolerance, albeit within strict confines. Openness was an essential ingredient to promoting Tunisia as a destination for foreign direct investment as well as tourism. At the same time, political dissent and Islamic conservatism were not tolerated. Ultimately, the values supposedly promoted by the regime were emptied of their real content in political practice. There is, then, little genuine ideational impetus left in

the practices of citizenship that the regime condoned. What is noticeable about the period of Ben Ali's rule is that opposition groups rallied around norms that undergird both liberal and substantive notions of democracy. Be it on the demands they articulated for the political regime – democratic, based on the rule of law and human rights – or the way they organised their work – in coordination with others based on civility and inclusive dialogue.

### 5.8 *Conclusion*

This chapter has argued that despite the difference in their discourse on citizenship, the similarities in the political practices of Presidents Bourguiba and Ben Ali outweighed these. For both, their authoritarian political practices contrasted sharply with the political norms the 1959 constitution notionally endorses. Both sought to manipulate the different dimensions of citizenship under their rule in order to maintain power and implement their key projects. While invoking its symbolic value, both used the constitution as a tool to enable the state and organise power without constraining it. For individual citizens, this meant their rights were not effectively enforceable through any state institutions while neither vertical nor horizontal accountability mechanisms functioned.

In post-independence Tunisia, Bourguiba's key project was secular state-building and modernisation. In this, there existed tension between the principally emancipatory potential of his reforms. Early on, Bourguiba had identified Tunisians' attachment to primordial bonds of kin and religion as an obstacle to modernisation and his exercise of power. However, the uneven implementation of his reforms ultimately led to exclusion and disenchantment and paradoxically to a reinvigoration of subnational and kinship bonds.

Similarly, Ben Ali's calculation was that Tunisia would have to be generally seen as a liberal country for his economic liberalisation project to work. The re-emergence of political Islam was therefore not only an important challenge to his rule politically, but also economically. Like Bourguiba, Ben Ali's regime consequently shut representatives of political Islam out of public life. Despite the discourse of liberal democracy and political reforms that produced its façade, Ben Ali ultimately also valued unity over diversity and democracy.

While both presidents' reforms notionally moved the state closer to a rational-bureaucratic logic – or, later, models of “good governance” –, the role of clientelist networks and mechanisms of patronage continued to be important and undermined citizens' confidence in the state's institutions. Whether under corporatism or economic liberalisation, the state – and thus the regime – controlled important aspects of social life. Citizenship under these

conditions was very constrained: Low levels of pluralism were paired with considerable exclusion of groups while the state demanded uniformity and repressed particularistic agendas. Individual rights insecure and political participation was virtually impossible as any political change was implemented top-down. Citizenship as a practice was thus virtually only possible either in small everyday acts (Bayat 2010) or street politics: strikes, protests, and riots. In these forms, citizenship as a practice had a resistance quality as it had to be exercised against the pressure of the regime. A particularly powerful strand of resistance was based on the Arabo-Islamic cultural identity many Tunisians saw threatened by the regime's attempts to reform Tunisia toward a more secular and culturally liberal society.

This legacy of citizenship had an important effect on the political transition that followed Ben Ali's rule in 2011 and is analysed from the next chapter.

## 6 From revolution to constitution: 2011 and the rules on rule-making

### 6.1 Introduction

The purpose of this chapter is to examine the period between the departure of Ben Ali and the beginning of the constitution-making process (CMP) to identify continuous and new path dependencies that impact the CMP and, consequently, the changes to constitutionalism and citizenship. This chapter thus examines the period between authoritarian President Ben Ali's departure from the country and the convention of the deliberative body tasked with the elaboration of a new constitution, the National Constituent Assembly (NCA). If a constitution provides the fundamental rules governing relations among state institutions and citizens, this establishing stage produces the rules on rule-making. It is thus crucial to the potential pathways of the institutional CMP, which is merely one part (albeit the central one) of the larger constitution-*building* process (Jermanová 2019). In the critical juncture framework, the large-scale protests in the 2010-11 winter triggered the crisis that peaked in the removal from office of Ben Ali, opening the critical juncture by producing the necessary permissive conditions for it (Soifer 2012). The chapter argues that the pre-CMP period provides evidence of a political culture of constitutionalism and generated important constraints on the remainder of the process. The widely shared consensus among agents on handling the transition within the framework of the 1959 constitution and the decision to produce both a transitional and permanent new constitutional framework reflect pathways dependencies generated by conditions antecedent to the opening of this critical juncture.

Ben Achour and Ben Achour (2012:717) make a useful distinction of three phases that Tunisia underwent during its political transition before the establishment of a new constitution. The first period was a "constitutional" transition and lasted from 14 January to 15 March 2011 under the framework of the 1959 constitution. The second period, which they label "consensual", lasted until the election of the National Constituent Assembly (NCA) on 23 October 2011. The final, "democratic" phase began with these elections and was still ongoing at their time of writing, but can be assumed finished with the constitution's promulgation, or the holding of elections in the framework of the new constitution. This chapter will employ this temporal separation of the transition, beginning with an assessment of the first period. This chapter argues that the decision to elaborate a new constitution was a logical consequence of the evolving elite consensus on democratisation, to which the 1959

constitution provided significant obstacles. It was also an important symbol signifying the profound nature of political change. When it comes to the nature of the process leading up to the CMP, the chapter argues that it was both elite-coordinated and driven by popular protests, pluralist and marked by horizontally inclusive consensus-seeking. Many of these features reflect the impact of antecedent conditions that have been in evidence prior to the opening of the critical juncture.

## 6.2 *Constitutionalism and constitutional change*

### 6.2.1 The durability of 1959 constitutionalism

Established Tunisian politicians quickly accepted that the sudden vacancy at the top of the state should be dealt with within the framework of the existing constitution, evidencing the impact of pathway dependencies generated by conditions antecedent to the critical juncture. A situation that could have produced considerable instability, a military coup or revolutionary chaos was instead handled following the letter of constitutional law – as had previous critical moments in Tunisian political history (Murphy 2013a:232). Constitutionalism may have been semantic while Ben Ali and Bourguiba were in office, but following the upending of Ben Ali's regime, political elites made genuine efforts not to contravene the provisions of the 1959 constitution. Upon Ben Ali's departure from the country, Prime Minister Mohammed Ghannouchi announced he assumed the presidency in accordance with Article 56 of the constitution. Ghannouchi was immediately challenged because the respective Article provides that the president, in case of his temporary inability to perform his duties, can delegate his authorities to the prime minister by decree. However, it was neither foreseeable whether Ben Ali's absence was only temporary, nor did he formally decree the transfer of his powers to the prime minister. More controversial politically, given that the president had just been chased out of the country by a popular revolt, was that Article 56 gave the president the opportunity to resume office. Prime Minister Ghannouchi thus triggered Article 57, which stipulates a vote by the Constitutional Council to determine the vacancy of the presidency. Ghannouchi accepted the Council's ruling that the vacancy of the presidency was permanent and that constitutionally, therefore, the Speaker of the Lower House, Fouad Mebazaa, ought to take the presidential reins immediately for an interim period of sixty days. In that period, presidential elections were to be organised while the powers of the interim president's powers were

circumscribed in various ways (Ben Achour and Ben Achour 2012:719)<sup>26</sup>. With a long record of public service, the seventy-eight-year-old Mebazaa was widely believed not to hold political ambitions (Perkins 2014:229). Nonetheless, key agents' decision to follow constitutional norms in this uncertain situation evidences the strength of Tunisia's constitutionalist political culture. However, while holding on to the provisions of the 1959 constitution gave the transition structure and stability, it also seemed to suggest the ruling élites' determination to retain its lopsided legal framework with its extensive executive privileges. As the previous chapters have shown, this made democratic reforms extremely challenging and dependent on the incumbent of the presidency. The RCD authorities signalled a limited willingness to entertain the thought of political reform, but this would take the form of amendments to the existing constitution. Unbeknown to and unexpected by the public, as one of his first acts in office Ghannouchi had already approached a reputable jurist, Yadh Ben Achour, to assemble a Political Reform Committee (Perkins 2014:229).

Once back in the office of the prime minister on 17 January, Mohammed Ghannouchi announced a government of national unity to organise elections. Almost half of the cabinet were co-opted from opposition leaders. As the army patrolled the streets under a state of emergency, he also promised the abolishment of censorship and the release of political prisoners. But opposition figures remained unsatisfied. Human rights activist and one-time presidential candidate against Ben Ali, Moncef Marzouki, called the cabinet a "masquerade", given that most posts including the pivotal ministry of interior were still held by RCD figures. Moreover, after decades of authoritarianism, only the ruling party had the country-wide infrastructure needed to stage an electoral campaign in the short timeframe the constitution left. The Tunisian Communist party, led by Hama Hammami, criticised that quick elections would inevitably return an RCD president and called for a constituent assembly to introduce a parliamentary regime (Le Monde 2011). Under pressure from their own grassroots, three UGTT members in the cabinet and veteran opposition leader Mustafa Ben Jaafar resigned from their newly acquired government posts.

Non-RCD elites – technocrats, civil society and opposition politicians – realised the necessity for constitutional change and there was continued street protest with the demand that the

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<sup>26</sup> This chapter includes multiple references from sources published by the Ben Achours. Born into an old noble family, siblings Yadh, Rafâa, and Sana Ben Achour are all lawyers by training and held prestigious public positions beside their academic jobs. Yadh Ben Achour was a member of the Constitutional Council during Ben Ali's early years in power until his own resignation following an illiberal reform by the President. Rafâa Ben Achour was a minister of state in the education ministry 2001-2002. Sana Ben Achour was President of the Tunisian Association of Women Democrats (ATFT, *Association Tunisienne des Femmes Démocrates*).

revolution produce systemic political change rather than merely a change of political personnel. In the following period, the “twin dynamics of constitutional change and revolutionary protest moved together in a dialectical *pas de deux* which saw the impetus for progress alternate between institutional office and the street” (Murphy 2013a:233; italics in original). The political configuration at this point showed some peculiarities: On the elite institutional level, there was scant legitimacy: Both the individuals in government and many opposition parties were tainted by their involvement in or collusion with Ben Ali’s regime. Civil society figures were unelected. As for the monopoly on violence, Ghannouchi’s government was either unwilling or unable to draw on the security services, which in any case were retreating while the military was determined to restrict its role to the maintenance of public security. In this situation, protesters in Tunis and other cities continued to occupy the streets demanding radical reform.

#### 6.2.2 Between old and new constitution

On 3 March 2011, the interim president gave a speech in which he declared that “the present constitution no longer meets the ambitions of the people after the revolution”, not least due to the numerous amendments that “prevent genuine democratic life and constitute an obstacle to organising transparent elections and establishing a political climate in which each individual and group can enjoy freedom and equality.” Political reform now required a new constitutional foundation, which “reflects the will of the people and benefits from popular legitimacy” (Ben Achour 2017:282). The president announced that elections for a Constituent Assembly would be held in late July 2011 and three weeks later ratified decree-law no. 2011-14 on the provisional organisation of public authorities. This “mini-constitution” would remain effective until the Assembly promulgated a new constitution. It maintained some existing political institutions and founded several new ones, reconciling the needs to guarantee a degree of stability with the revolutionary demands for political change (Zemni 2014:6).

This change in tack had been preceded by intense mobilisation on the streets that pitted protesters against the interim government. As protests continued, the remaining RCD members of the government resigned from the party. Opposition activists grouped in the “Front of 14<sup>th</sup> January” a week after Ben Ali’s departure. It “saw itself as the only legitimate authority to speak in the name of the people and opposed the transition from above” proposed by the legal government (Zemni 2014:4). Remaining in the process under Article 57 of the 1957 constitution would only leave 60 days to organise presidential elections – too short for a

fair ballot as all political elites soon agreed. Under the lopsided presidential system, the risk of renewed personalisation of power remained, while the two chambers of parliament were still stuffed with Ben Ali figures, opposition figures cautioned and demanded elections for a constituent assembly to draft a new constitution along with the dissolution of regime-linked institutions (Ben Achour 2017:272).

The so-called “Kasbah I” sit-in beginning on 23 January was named after the square adjacent to the prime minister’s office, where the Tunisians from across the country staged a long protest. Many there had come with the “liberation caravan” from the country’s long-neglected interior and now stayed in tents on the square, defying the winter cold. Speaking to a surprised reporter, an unemployed man from Gabès contended that ridding the country of President Ben Ali was “nothing (...) we need a constitutional congress, first of all. Then we will establish a new constitutional order” (Coll 2011). The sit-in had not only been a way of pressuring the interim government to more radical reform, but also provided a forum for protestors to debate and hone the demands they formulated. Their focus had become the removal of all regime figures from the government and the introduction of a new constitution.

With the 60-day deadline for elections under Article 57 of the constitution looming and under pressure from the street, the Constitutional Council held a “farewell meeting” on 3 February 2011 to consider the constitutionality of a bill that would authorise the interim president to adopt decree-laws. Given that it was the overwhelming power of the presidency under Tunisia’s two previous heads of states, it was paradoxical that democratic transition was now sought by empowering the (interim) president even further. Despite the enormous breadth of the mandate the bill would give the president, the Council determined its constitutionality under Article 28 of the constitution, which allows for the temporary delegation of decreeing powers by the parliament, and against the background of the objectives of the delegation and the specificities of the transitional phase (cited in Ben Achour 2016). The discredited houses of parliament adopted the same bill and thus authorised the interim president with much of their own legislative scope. Tunisian opposition and civil society groups founded the National Council for the Protection of the Revolution (Conseil national de protection de la revolution or CNPR) in mid-February, grouping all those who opposed or mistrust the Ghannouchi government, including Ennahda, the Bar Association, the UGTT, the Human Rights League and members of the political left (Lagarde 2011) to maintain pressure and keep the government accountable.

### 6.2.3 Setting the institutional path

The decrees the president issued under his new powers had “an immediate, revolutionary and liberation character and deal[t] with sensitive issues” (Ben Achour 2016): On 18<sup>th</sup> and 19<sup>th</sup> February alone, they covered a general amnesty, accession to optional protocols of international political rights and anti-torture treaties<sup>27</sup>, as well as the International Criminal Court<sup>28</sup> and the establishment of National Fact Finding Committees on Corruption and abuses during the uprising that began on 17 December 2010. Prime Minister Ghannouchi’s appointment of known RCD figures to the offices of provincial governors triggered a new wave of protests across the country. From 20 February “caravans” once again brought large numbers of youth from the marginalised regions of the country to the capital, where the protests coalesced around the Kasbah square (Zemni 2014:5–6), reflecting the potential for rapid and high levels of political mobilisation. This may well have been the decisive turning point at which the government accepted the need for constitutional change. High Authority Chair Ben Achour (2016) recounted that in late February, he and a small number of top civil servants discussed four potential scenarios with the Prime Minister at the presidential palace in suburban Carthage, to where the government had withdrawn amid the ongoing protests in the centre of Tunis. The first scenario of holding presidential elections as per Article 57 was ruled out. There was simply not enough time to organise a free and fair poll in the remaining time, though the president would have been willing to hold elections in late July, using an extension to the deadline. The second scenario would have seen presidential elections at the same time, followed after Ramadan by the suspension of the constitution, a provisional organisation of public authorities and elections for a constituent assembly initiated by the president-elect. Third, the constitution would be suspended when its deadline for presidential elections expires, a provisional law organising public authorities decreed and a constituent assembly elected. The final scenario would have seen the High Authority draft a constitution, which the interim president would then submit to a referendum. It is significant that the two more participative scenarios (two and three) could both not be realised without suspending the 1959 constitution, indicating how little it lent itself to establishing and undergirding a democratic regime. Amid the ongoing popular pressure, the third scenario was agreed on 21 February, followed by an acceleration of events and ushering in the second, “consensual”

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<sup>27</sup> Decree No. 2011-3 of 19 February 2011 approving Tunisia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights and Decree No. 2011-5 of 19 February 2011 on approval of the accession of Tunisia to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>28</sup> Decree No. 2011-4 of 19 February 2011 approving the accession of Tunisia to the Rome Statute of the International Criminal Court and the prerogatives and jurisdiction of the ICC

transition period, which for Zemni (2014) represented a “turn to extraordinary politics”. On Friday the 25 February, over 100.000 protesters coalesced around demands for change: The resignation of Ghannouchi, the dissolution of Ben Ali’s RCD party, and constituent assembly elections. This Kasbah II protest also marked the increased presence of Islamists in the protests, who had previously not been visible in the protests (Beau and Lagarde 2014:37). Bowing to the pressure, Ghannouchi and the remaining *ancien regime* ministers resigned from the cabinet two days later and interim President Mebazaa appointed the octogenarian and fellow Bourguiba contemporary Beji Caid Essebsi to lead the government on 27 February. Days after Mebazaa’s solemn speech on 3 March, in which he announced the need for a new constitution and the election to a National Constituent Assembly in late July, the RCD was dissolved as were the branches of the secret political police. Days later, the moderate Islamist Ennahda party was legalised.

In a key development, the president also legislated the establishment of a High Authority for the Achievement of the Goals of the Revolution, Political Reform and Democratic Transition on 18<sup>th</sup> February 2011 (Ben Achour 2017:288–308; Beau and Lagarde 2014:48–50). It resulted from the negotiated merger of Yadh Ben Achour’s early political reform commission and the opposition CNPR. From a juridico-technical institution, the High Authority thus turned into a central political one. While formally only consultative, the High Authority played a significant political role in deliberating and formulating proposals for political reform. After some negotiations, this role was bolstered by increasing its representativeness as it ultimately included 36 political party representatives, 33 representatives of civil society and national organisations, 72 national figures, 12 representatives of regions and 2 representatives of the families of the martyrs of the revolutions. As Yadh Ben Achour (2016) – who chaired the council – argued, the authority was “in practical terms, the first free and democratic public community institution in the history of the country” – and turned into a proto-parliament, whose mandate also included “the issuing of opinions on the activity of the government, in consultation with the Prime Minister” (Ben Achour and Ben Achour 2012:721). The assembled political élites established dialogue formats with the street protesters as well as numerous organisations. This resulted in the explicit formulation of a democratic transition as the objective and the High Authority began work on preparing the necessary reforms. As Murphy (2013a:234) noted:

This cohering of the admittedly ad hoc political reform institutions of government and self-proclaimed ‘revolutionary’ opposition is, in retrospect, quite extraordinary, indicating a degree

of consensus which extended beyond established political elites and more deeply into the broader professional classes (...).

Similarly, Beau and Lagarde (2014:50) highlight the existence of a “real political field” despite decades of authoritarian rule that quickly entered the terrain and which sets Tunisia apart from other countries in the region and is in their view a key explanatory factor for the further development of its transition.

Given the impossibility of implementing the provisions of the 1959 constitution in their entirety, the remainder of the transition up to the election of a constituent assembly required a new legal framework. were governed by a “mini-constitution”. Decree-law no. 14-2011 of 23 March, issued by the interim president, consisted of only 19 articles, but formalised the transition from one constitution to another. For the Ben Achours (2012:722), it is “paradoxically a constitutive act, generating a new legality, founder of a new constitutional order”. Valid until a National Constituent Assembly is elected in universal, free, direct and secret elections, the decree endows the Head of the State with legislative power, exercised after deliberation with the council of ministers and abolished several institutions of the old regime and constitution: both chambers of parliament, the Constitutional Council, and the Economic and Social Council were dissolved. Many of the state’s structures are explicitly kept, among them the judiciary and municipal authorities. The nonetheless radical break with the old constitution and concentration of power in the presidency is justified in the preamble, which invokes the revolutionary legitimacy of the decree-law<sup>29</sup> based on democratic norms<sup>30</sup> as well as its technical necessity due to the constitution’s inability to accommodate this situation of dramatic political change<sup>31</sup>.

From a leaderless revolution triggered by youth protests in the interior, the process transformed into a political transition managed by Tunisian elites, who had now produced the institutions within which this would largely be negotiated. Was it elite-captured? Developing a legally sound framework for the process required legal expertise. Nonetheless, it was still driven by the pressure of street protests to an important extent. The legitimacy of the

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<sup>29</sup> “Considering that the people expressed during the revolution of 14 January 2011 their wish to exercise their full sovereignty in the framework of a new Constitution...”

<sup>30</sup> “Considering that the Tunisian people are sovereign and exercise their sovereignty through their representatives elected by direct, free and fair suffrage...”

<sup>31</sup> “Considering that the current situation of the State, after the definitive vacancy of the Presidency of the Republic (...), no longer permits the regular operation of the public authorities, and that full implementation of the provisions of the Constitution has become impossible ...”

unelected High Authority was nonetheless challenged and its internal discussions were not immediately fruitful. Debates about the representativeness, legitimacy, and acceptable legislative scope of the of the Assembly ensued, but members also mistrusted the technical experts appointed by the government. Ennahda repeatedly threatened to withdraw, arguing that the High Authority's legislative action could limit the sovereignty of the coming Constituent Assembly – an argument that its chair refutes. For Ben Achour, the High Authority's decrees did “draw the future of the country, in the name of a liberating revolution” (Ben Achour 2017:297; Beau and Lagarde 2014:50). The paradoxes of constitutional democracy – building the institutions necessary to organise the expression of popular sovereignty have to precede the latter and thus lack democratic legitimacy themselves (Habermas 2001; Olson 2007) – played out before the formal CMP began. By ensuring that the presidential decrees were the result not of technocratic top-down decisions, but deliberations by a cross-section of representatives who in turn sought dialogue with social groups, the Tunisian post-revolutionary process enjoyed a degree of representative legitimacy.

### *6.3 From the streets to institutions: the establishing stage*

The second, “consensual” transitional period in the Ben Achours' framework dealt with creating the legal and institutional framework that could make credible elections possible, which in turn would make the CMP credible. Despite the challenges to its legitimacy, the High Authority – soon known as “Ben Achour Commission” after its chairman Yadh Ben Achour – turned out to be an effective mechanism to negotiate the transition. Indeed, Stepan (2012:92) described it as “one of the most effective consensus-building bodies in the history of ‘crafted’ democratic transitions”. An early decision was based on the realisation that holding the elections in July had become unrealistic and should therefore take place in October. Amid the atmosphere of suspicion and even aggressiveness, the early vote on an electoral code on 11 April 2011 constituted “certainly the most notable success of the Authority” for its chairman, which in his judgement made the entire rest possible (Ben Achour 2017:296). The final code<sup>32</sup> foresaw that the elections for the constituent assembly would be held across 33 constituencies in a system of “largest remainder” proportional representation, which slightly disadvantages the most successful parties, to avoid the kind of dominance over the institutions Ben Ali's RCD had. 18 of the 217 members of the assembly would represent constituencies outside of Tunisia's territory, enabling “Tunisians forced into

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<sup>32</sup> Decree-law no. 2011-35 of 10 May 2011

exile or labour migration to play a part in their national reconstruction” (Murphy 2013a:235). A minimum of 50% of nominations on party lists had to go to women and at least one space reserved for an individual under the age of 30. Senior RCD officials, judges, regional governors, local officials, and military personnel were excluded from running. All these features reflected the aspiration that the constituent assembly ought to be an inclusive institution reflective of multiple interests and forced to compromise (unless one party did manage to unexpectedly dominate). The decree regulated campaign finance and handed the entire organisation of the election to the independent electoral commission ISIE (*Instance supérieure indépendante pour les élections*) established by an earlier decree<sup>33</sup> (Ben Achour and Ben Achour 2012:723–26). This set out in detail the composition of ISIE’s board<sup>34</sup> and endowed it with fiscal and administrative independence. Two further decree laws are worth highlighting with respect to their impact on the ongoing transition: No. 87 regulating political parties and no. 88 on associations. Both replace their authoritarian predecessors and protect the autonomy of organisations from state intervention. Notably in contrast with previous regulation, decree-law no. 88 now also grants binational citizens the right to direct a political party (Ben Achour and Ben Achour 2012), despite the ongoing suspicion against this group.<sup>35</sup> Despite the effectiveness of the work in the High Authority – in part owed to the high number of lawyers involved there – ISIE soon postponed the elections from late July to 23 October 2011. Larger parties like Ennahda objected while smaller parties saw an opportunity to gain time to establish themselves more properly. Prime Minister Essebsi hesitated, fearing to be accused of ancien regime stalling technique, but in June gave in and postponed the poll (Murphy 2013a:236).

During the discussions on the electoral system in the High Authority, the idea for a “Republican Pact” emerged in late March. Adopted in late July, it was a way of morally binding the political parties in the coming poll and, by extension, the members of the NCA, as it served as a basis for the coming constitution (Dubruelth 2011). While principally in favour of the document, Ennahda strictly insisted it should not become legally binding. In the High Authority, the party was in a minority but was widely expected to do well in the elections. For

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<sup>33</sup> Decree-law no. 2011-27 of 18 April 2011

<sup>34</sup> Three judges, three lawyers, two professors, two civil society representatives, one expatriate, one notary, one bailiff, one accountant, one IT expert and one journalist

<sup>35</sup> Sélim Ben Abdeselem (2018b:19–22), a Franco-Tunisian based in Paris until 2011 and later member of the National Constituent Assembly describes that the Tunisian left is often more nationalist than internationalist and suspects binationals of a lack of patriotism.

this strategic reason, but also as a matter of principle, the unelected Authority should not bind the hands of the electorally legitimated Constituant. Over the months of debating the pact, Authority President Ben Achour observed how the revolutionary unity against dictatorship gave way to the political confrontations over ideology that would also mark the remainder of the transition (Ben Achour 2017:303). After Ennahda's withdrawal from the authority over numerous issues, a majority passed the pact with language reminiscent of the political principles codified in the 1959 constitution and Ben Ali's 1988 National Pact. Its originality lies in the fact that it describes Tunisia as a "civil state" before largely repeating the descriptors of Article 1 of the 1959 constitution.<sup>36</sup> The pact subsequently notes some fundamental principles such as the separation of politics and religion, legislative, executive, and judicial branches of government, citizens' personal autonomy in benefitting from fundamental rights, particularly of conviction and religion, their equality before the law, the achievements of the Tunisian woman as set in the Personal Status Code, an equitable development model and others. Notably, the tenth and final principle is national self-determination. Following the insistence of Ennahda and some other groups, it included the support for the Palestinian cause and a controversial expression of opposition to "any form of normalisation with the Zionist entity" (Ben Achour 2017:301–8; Dubruel 2011).

The High Authority's role as quasi-legislator "demonstrated an evolving elite consensus, in tune with popular demands, that revolutionary change could and should be enacted through a constitutional political pathway" (Murphy 2013a:237). At the same time, an economic downturn following the uncertainty of the revolution and political transition and instances of political violence and open expressions of extremist positions foreshadowed the challenging nature of the remainder of Tunisia's transition (Elhaddad 2016). Four episodes involving Salafists influenced public perception of this issue particularly ahead of the elections. In late June and again in October, groups protested violently against the screening of films they considered blasphemous. The first attack aimed at the cinema Afric'art in central Tunis, while the second hit the private TV channel Nessma TV, which screened the animated film *Persepolis*, in which God is pictured – a taboo in Islam. Also in October, two universities encountered violent protests by conservative Islamic groups. Faculty at El Manar University in Tunis and Sousse University had refused to allow a young woman to wear the niqab, an extensive cover of the face common in some Arab countries but not Tunisia. The protesters'

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<sup>36</sup> The pact also adds "democratic" to the remainder of Article 1: "Tunisia is a free, independent, and sovereign state; its religion is Islam, its language is Arabic, and its regime is republican."

behaviour gave rise “to fears that at least some citizens were prepared to resort to violence to have their way” (Perkins 2014:246).

#### 6.4 *Electing the NCA*

By electing the NCA, Tunisia’s transition would gain the democratic legitimacy that the High Authority’s critics saw missing in the short elite-led phase. They were a prerequisite for the core of the CMP. The Tunisian process included two of the four forms of constitution-making identified by Arato (2016, 2017). Its process represents a slightly unusual mixture between revolutionary constituent process and post-sovereign constitution-making, where the National Constituent Assembly was indeed given virtually all powers, but the transition in effect also relied on the extra-institutional process of National Dialogue, where a broader array of political forces negotiated the country’s transition (M’rad 2015). Both political power and legitimacy were in effect shared between these two key institutions at various points of the transition (Murphy 2016).<sup>37</sup> Indeed, for Sayah (2015:66) the choice of resorting to a constituent assembly for the drafting of a new constitution gives the whole process a “mystical” dimension it would not have had if the task was given to an expert commission.

Registration for the elections was slow, with only 4.4 million voters registered of an estimated 7.5 million eligible voters by 12 October despite two extensions of the registration deadline. Unregistered voters could nonetheless participate, but the process was cumbersome and thus confusing to some. This “reflected both the desire of the ISIE to be as inclusive as possible and its lack of operational expertise” (Murphy 2013a:236). The strict regulatory framework designed to produce a level playing field paradoxically dampened the liveliness of the campaign and put a premium on name recognition, which only some larger parties like Ennahda enjoyed. After a short nomination period of one week to submit lists of candidates for the various constituencies, over 100 new political parties competed with the established eight opposition parties that were legal under the Ben Ali regime.<sup>38</sup> Campaign messages could only be publicised on standardised A3 posters on dedicated walls or specifically scheduled TV programmes with 3-min slots as the Tunisian media was banned from covering campaigns and foreign journalists prohibited from interviewing candidates (Murphy 2013a:237). Similar to the media regulation, campaign finance rules were strict but cumbersome and produced

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<sup>37</sup> This was also confirmed in an interview with the Assembly’s general secretary. For reasons of legibility, research interviews are referenced from here on in footnotes in the following format: Author interview with Adel Bsili, Secretary General of the National Constituent Assembly, 6 October 2017, Tunis.

<sup>38</sup> The vast majority of candidate lists were accepted by ISIE, yet 145 political parties were denied legal status.

mixed outcomes. Its key planks consisted public funding dispersed in two tranches ahead of the vote based on the number of voters in the constituencies the parties tackled, a ban on foreign funding, and a limit on private donations. Even though all campaign finances had to go through one dedicated account, accusations of irregularities in this as well as vote buying were both widespread and hard to police. For Murphy (2013a:237), “[i]n sum, the legal structures for the elections represented a triumph of democratic intention over operational purpose and clarity”.

Two weeks prior to the beginning of the campaign period, 11 of the 12 parties present in the High Authority signed a “Declaration on the Transitional Process”<sup>39</sup>. Following six weeks after the “republican pact”, this further non-binding document was nonetheless more technical in nature. It “aimed to establish a road map to define the operating rules of the NCA and to limit its mandate to no more than one year”. This appeared to further bolster the one-year mandate included in a decree of August,<sup>40</sup> adopted even though “comparative examples suggest that participatory constitution-making processes are typically lengthy processes, varying between 18 and 24 months” (The Carter Center 2015:51). The multiple restrictions and short duration on political campaigning meant that many parties and lists failed to develop a substantive offering to voters. In any case, few were organisationally able to compete nation-wide. Consequently, much of the election discourse focussed on the implications of a possible Ennahda win at the polls with some secularists stirring fears that the party might turn Tunisia into a theocracy, full with compulsory headscarves. Ennahda officials’ insistence that the group was committed to the values of pluralist democracy in statements and its electoral manifesto were dismissed.

If the slow registration for elections had made many observers expect a low turnout, the queues at polling stations across the country belied the pessimism. While the overall turnout was 52%, a very high 86% of those registered turned up to vote. Moreover, over 10,000 Tunisians volunteered as electoral observers in old and new civil society organisations after undergoing training. International observers from the African Union, Council of Europe, European Union, and the Carter Center described the elections as free and fair, and as a

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<sup>39</sup> The only party to state that the CMP would require more than a year was Moncef Marzouki’s CPR.

<sup>40</sup> Decree No. 2011-1086, dated Aug. 3, 2011 on convening voters to participate in the elections of the National Constituent Assembly states in Article 6: “... and is responsible for drafting a constitution within a maximum of one year from the date of his election”. In an interview with the Author in Tunis on 6 October 2017, the Secretary General of the NCA, Adel Bsili suggested the one-year mandate was included upon the suggestion of High Authority Chair Yadh Ben Achour.

success despite some administrative problems and infractions of the electoral law, which domestic observers were more eager to stress. After decades in which the simulated democratic procedures under Ben Ali had chipped away at citizens' confidence in institutions like elections and constitutions, the turnout suggested that Tunisians were eager to use their newly won right of political participation (Murphy 2013a:239–40).

The vertical parity requirement for candidates' list was successful in boosting the number of successful female candidates: At 65 deputies, their share reached 19.9 per cent of all members and a large part of them were sent by Ennahda. As the electoral code also promoted young candidates, about 10 per cent of the Assembly's members were 30 years or younger (Inter-Parliamentary Union 2014; The Carter Center 2015:24).

While some election results matched expectations, others came as a surprise. As was widely expected, Ennahda was the main winner of the elections. The moderate Islamists netted 89 of the 2017 seats in the Assembly based on a vote share of 41.4% of the vote and the electoral system designed to prevent the dominance of the winning party. Established secular opposition parties like Mustafa Ben Jaafar's social democrat Ettakatol and Ahmed Néjib Chebbi's PDP did worse than expected. Overall, the fragmentation of the secular spectrum into small parties lacking unified lists meant that in many constituencies won by Ennahda, "the second greatest number of votes, sometimes collectively amounting to more than any one party had received, was dispersed among parties that failed to win seats. Close to a third of the total vote nationally was frittered away in this manner" (Perkins 2014:251). The strong showing of the Popular Petition (*Al-Aridha*) came as a surprise. It netted 8% of the vote and 26 seats, exceeding the established PDP and Ettakatol. Headed by the London-based businessman and TV station owner and ex-Ennahda member Hachmi Hamdi, it had its

Table 6.1 - Parties' seats gained in the NCA elections on 23 October 2011

Source: ISIE (cited in The Carter Center 2015:24)

Ennahda	89
Congress for the Republic (CPR)	29
Al-Aridha Al-Chaabia (Popular Petition)	26
Ettakatol	20
Democratic Progressive Party (PDP)	16
Al-Moubadra (The Initiative)	5
Democratic Modernist Pole	5
Afek Tounes	4
Al-Badil Athawri (The Revolutionary Alternative)	3
Democratic Socialist Movement (MDS)	2
Harakat Achaab (The Movement of the People)	2
Independent lists	16
Total	217

strongest results in its leader's hometown Sidi Bouzid (Beau and Lagarde 2014:53–55; Murphy 2013a:240–42; Perkins 2014:248–52). Ennahda's electoral success delivered it a plurality in the NC, but was partly based on the weakness and lack of coordination among its competitors, many of whom lacked both the financial resources and political experience to fight an electoral campaign on this scale.

The ideological positions of the different groups were often difficult to ascertain. Apart from the comparatively cohesive moderate Islamist force of Ennahda, many parties coalesced around a well-known leadership personality but were ideologically heterogeneous groups. As a “catch-all” party, Moncef Marzouki's CPR had sought to integrate all those wishing a radical break with the old regime including leftists, nationalists, and Islamists. *Al-Aridha* was largely an unknown force, but its leader Hamdi had publicly offered to work on an “Islamic constitution”. Given that Ennahda could – as it transpired later – also count on the support of several independent members, there was technically a majority in the NCA for an Islamist constitution or the adoption of conservative legislation in different coalitions (Ben Abdesselem 2018b:83, 91).

#### 6.4.1 Transitional government 2.0

While the clock of the one-year deadline for the completion of the constitution was ticking, political parties bargained for a full month after the elections before an agreement on the distribution of offices between a governing coalition was found. The opening ceremony of the National Constituent Assembly confirmed a coalition between Ennahda, CPR and Ettakatol, soon referred to as the “troika”. The coalition of an Islamist and two largely secular parties, which would last for the entire duration of the CMP, to some extent reflected a certain level of trust that had developed thanks to inter-opposition coordination in the 2000s (Hassan, Lorch, and Ranko 2019). Agreements emerging from meetings in exile as well as during the October 2005 hunger strike confirmed the secular opposition movements' acceptance of Ennahda's legitimacy as a political actor while the former could hold the Islamists' to account on their commitment to a non-religious state.<sup>41</sup>

In what was effectively a parliamentary interim political system, the CPR's Moncef Marzouki was elected to serve as president of the republic. Mustapha Ben Jaafar of Ettakatol became President of the Assembly while the prime minister's office would go to Ennahda's Hamadi

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<sup>41</sup> Multiple author interviews, including with Moncef Marzouki, Mustapha Ben Jaafar, Meherzia Labidi, and Ahmed Néjib Chebbi.

Jebali. Two doctors and an engineer: Tunisians knew more about the former two than the latter. Both physicians had attempted, unsuccessfully, to run as presidential candidates against Ben Ali and had their candidacies dismissed on formal grounds. Moncef Marzouki was mostly known for his human rights activism as President of the Tunisian Human Rights League (LTDH). Hamadi Jebali, an engineer with a degree from France, had spent years in prison – many in solitary confinement – for his Islamist activism.

The broad consensus on appointments, albeit not universally accepted, also included an understanding on the powers of the respective offices, which contrasted starkly with Tunisia's hitherto skewed presidential system. On 10 December 2011, the NCA adopted a provisional Public Powers Act, a "mini-constitution" setting out the role and responsibilities of the state institutions prior to the adoption of a proper constitution. If using an empowered constituent assembly was a continuation of the institutional choice made for the elaboration of Tunisia's first constitution, the political system the "mini constitution" established represented a profound break with Tunisia's previous constitutional history: Significant powers were assigned to the Prime Minister's office while the presidency was downgraded. This meant a shift to a quasi-parliamentary regime, in which the Prime Minister relied on a majority in the NCA for his government and legislation. The Public Powers Act also mandated the drafting of a new constitution and stipulated that for its adoption, each article would require an absolute majority of votes in the NCA while the constitution as a whole needed a two-thirds majority (Allani 2013:fns 9-11; The Carter Center 2015:30). The choices on the political system had important implications on the CMP. As the sole elected institution, the NCA would also be responsible for ordinary legislation such as the state budget, which it would draft, debate, and vote on, consuming its members' time and attention. The *Pouvoir Constituant* gave itself rules on rule-making, which evoked criticism from some quarters. Given the concentration of significant powers in the NCA, Law Doyen Yadh Ben Achour cautioned that in the absence of institutional counter powers, the Assembly might assume a dictatorship of the majority and called for a speedy completion of the constitution to introduce accountability mechanisms.

## 6.5 Conclusion

This chapter has analysed the early part of Tunisia's constitution-building process: the period preceding the establishment of the deliberative body tasked with elaborating the new constitution, the National Constituent Assembly. It has argued that this pre-CMP period, which included agents' decision to first deal with the transition within the framework of the 1959 constitution and subsequently establish new constitutions evidences a political culture of

strong constitutionalism, where both political elites as well as the population generally accepted that a constitution should provide the legitimate framework to regulate political power – including the handover of the latter. Despite its shortcomings, agents adhered to the 1959 constitution before the decision was taken to establish a new temporary constitutional framework to govern the transitional period with the aim of producing a new constitutional settlement. At the end of this period, Tunisia had a governing coalition for the subsequent CMP as well as a set of transitional institutions, which the NCA could confirm or adapt given its electoral legitimacy.

Amid continuities such as the largely unreformed political economy of the country and the preference for constitutionalism, the pre-CMP period was also one of considerable disruptions, signifying both the fact that a critical juncture had opened as well as this period's importance in the same in establishing key path dependencies. For example, the choices in this period included a turn away from the previously strong presidentialism and an inclusion of multiple elites in coordinating the process, particularly the new emerging political class which was recruited from opposition leaders.

The relevant agents and institutions were in flux. During the early, pre-CMP transition, Tunisia set up institutions that would govern this period itself as well as the CMP. Some of the transitional institutions would even stay in existence well after the promulgation of the 2014 constitutions. Once the decision on wholesale constitutional change was taken and pursued, this opened the previously closed pathway of installing a more balanced and liberal constitution than was possible under the legal and political configuration prior to 2011. The primary institutional legacy of the pre-CMP period is the quasi-parliamentary political system with the National Constituent Assembly at its core. The latter's specific features owed to the electoral code passed by the High Authority and the postponement of the elections are worth underlining again. By disadvantaging electorally very successful parties, an overwhelming dominance in the NCA of any one political force was prevented and its members were forced into seeking compromise. This reflected the wish to prevent the kind of institutional dominance that Ben Ali's RCD and Bourguiba's PSD had enjoyed as well as the oft-emphasised consensus-orientation in Tunisian political culture. To some extent, the values of inclusiveness and pluralism were institutionalised. Evidence for this is in the practice of including multiple political forces in the High Authority and the inclusion of provisions requiring and/or incentivising the inclusion of women and young citizens as well as allowing sufficient time for electoral organisation and campaigning for smaller parties.

The most influential agents during this time were two large groups: political elites and street protestors. Among political elites, the decisions taken by former regime figures, above all Prime Minister Mohamed Ghannouchi, were crucial in opening the pathway for political change via constitutional reform. In this, they were prodded on by continued protests. The scale of demonstrations in late February 2011 appears to have convinced these existing elites that nothing short of an overhaul of the constitutional and political system would suffice. In the subsequent months, the elaboration of the institutional and legal framework for the CMP in the High Authority evidenced the ability of elites to cooperate constructively, albeit not without tension, toward the evolving consensus of full democratisation of the political system. In contrast to the intra-elite conflicts the pre-CMP period had uncovered in other Arab countries undergoing political transitions at the time (Jermanová 2019), the Tunisian consensus emerged relatively quickly (Murphy 2013a). This both drew on existing practices of opposition coordination and consensus-finding and reified these for the subsequent CMP. The latter also relates to the ideational legacies of this period. An important discursive legacy impacting the political pathways of the CMP was the one-year deadline for the completion of the constitution, which most political parties had endorsed and which was included in a decree-law. Even though the legal effect of the latter is doubtful – after all the point of the NCA was its sovereignty and it therefore was able to legislate to overturn this deadline – the popular mandate given to that institution now appeared to be time-limited, creating a popular expectation of a swift CMP, which for both practical and political reasons was unrealistic.

## 7 The constitution-making process 2011-2014

### 7.1 Introduction

This chapter examines the constitution-making process (CMP) that began with the institution of the National Constituent Assembly and ended with the promulgation of the new constitution in January 2014. The chapter argues that this critical juncture evidences the strong influence of Tunisia's constitutionalism on relevant political agents who eschew political violence and prefer negotiated, legal settlements. However, the chapter also shows that like prior to the revolution, political agents' consensus was largely limited to procedural constitutionalism, i.e. the idea that state and politics should be constrained to the provisions of a constitution but with relatively few conditions on the characteristics of that constitution and its genesis.

For analytical purposes, this part of the constitution-building process can be divided into at least two distinct periods of time. The first period from late 2011 to late July 2013 was marked by relatively slow progress on and debates over multiple drafts of a new constitution and largely reflected a revolutionary constituent process in the typology of Arato (2016, 2017) and thus the adoption of a method that Tunisia had previously employed to draft the 1959 constitution. However, the political framework within which the process occurred was decidedly different as power within the different institutions of the state as well as within the NCA was dispersed more broadly than in the 1950s. The first period of the CMP saw the elaboration of four consecutive constitutional drafts, which all emphasised Tunisia's Arabo-Islamic identity more than the 1959 constitution but became increasingly specific and adhering to a liberal-democratic idea of citizenship. The time was also marked by increasing political tension and mistrust between political actors – above all, a polarisation between the Ennahda-led government and the largely secular opposition – as well as street mobilisation and acts of political violence, which influenced the drafting. The assassination of NCA Member Mohamed Brahmi and the political crisis that emerged from this led to the temporary suspension of drafting and marked the end of the first period. The second period resembles to some extent what Arato (2016, 2017) calls post-sovereign constitution-making as political bargaining between relevant actors increasingly happened outside the NCA as well as within. Numerous interviewees in Tunis confirmed that the political assassinations that triggered the crisis were a turning point in the CMP.

## 7.2 *Revolutionary legitimacy: The Constituante begins drafting*

### 7.2.1 Slow beginnings

The month-long interparty bargaining that followed the elections of the National Constituent Assembly (NCA) on 23 October 2011 was met with impatience by the Tunisian public. A widely shared perception that the constitution drafting process was slow to start with did not disappear with the firm establishment of the institutions and progress was constantly measured against the political commitment to finalise the constitution within a single year. However, the NCA's constitutional committees only began work on the constitution in February 2012 as multiple factors weighed against quick progress.

Principally, CMPs can typically take many years as they include complex processes such as “civic education and public consultation, the preparation of drafts, and discussions held by a constituent assembly” (Brandt et al. 2011:47). If democratic constitutions are supposed to reflect the values that are constitutive of their political community, Tunisia in 2011 had had the first opportunity in decades to reflect as a society on what these values are. A national debate on that scale takes time. The choice of a one-year deadline was in this sense not only ambitious. Constitution-making experts generally caution against rushing the process, as tight deadlines can undermine its success (ibid.).

The process' legitimacy was also challenged by the fact that some relevant political actors did not fully buy in to the idea that a completely new constitution was needed. Influential constitutional law professor and President of the High Authority Yadh Ben Achour for instance argued in favour of the 1959 constitution and presented a new draft constitution that almost precisely mirrored the predecessor with two additional provisions (on term limits and decentralisation) ahead of the NCA elections. He and others doubted the necessity of an entirely new constitution.<sup>42</sup>

At the outset, the members and administration of the NCA were also inexperienced with parliamentary procedures. “It was totally alien to me”, Noômane Fehri, a member for the centre-right Afek Tounes and former business executive recalled his first days in the assembly, speaking for many members who had been recruited from all walks of life but many of whom had little if any knowledge of parliamentary procedures or constitutional

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<sup>42</sup> Author interview with Zaid Al-Ali, International Institute for Democracy and Electoral Assistance, 24 October 2017, Tunis.

law.<sup>43</sup> On the side of the parliamentary bureaucracy, there were shortcomings as well. Since some officials who had worked in the Ben Ali-era parliament had also been RCD members, they could not work with the new Assembly. Both administratively and intellectually, this left the Assembly bureaucracy “diminished” in the words of its secretary general, while they had to adjust to working with multiple political groups and extensive new parliamentary rules of procedure.<sup>44</sup> Despite considerable international funding, the Assembly provided only minimal administrative and clerical support to its members (Perez 2016:235). Only committee chairpersons were provided an office and not even all political groups had one. There were insufficient number of photocopiers and members had no budget for staff. Where members had assistants, these were usually either volunteers or paid for by the political group or party, where multiple members often shared assistants and researchers. While all committees were assigned legal advisors, they varied in the extent to which they used them for legal or merely clerical support. At the same time, the Assembly and its members had to fulfil both ordinary legislative functions and constitution-making.

Finally, at least one international legal advisor closely associated with the Tunisian CMP observed a “pretty bad” work ethic, “which was really not impressive. I can’t overemphasise that”.<sup>45</sup> Moreover, work on the constitution started without a specified timetable and deadlines to structure the drafting. “We didn’t have that”, said the Assembly’s secretary general, “So we just worked so. On the one hand we did the constitution. ... Among other commissions was the work on ordinary legislation. There was a lot of interruption on the work.”<sup>46</sup>

### 7.2.2 The institutional framework within the NCA

Two texts represented the most important planks of the legal and institutional framework governing the CMP: The Provisional Public Powers Act provided a quasi-constitutional context, while the NCA gave itself rules of procedures to govern its internal operations on 20 January 2012. Over the course of the process, the relative importance of the institutions set up

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<sup>43</sup> Author interview with Noômane Fehri, former NCA member, 19 October 2017, Tunis. Mabrouka M’Barek said “In the end, this constitution was written by 217 citizens, for the most part - for the most part picked randomly (laughing sigh). So, it was actually good ...”, arguing that this happened due to the confluence of electoral rules, party list nominations, and the lack of firm political platforms by political parties. In this sense, the NCA represented a somewhat Fishkinesque deliberative institution (Fishkin 1991).

<sup>44</sup> Author interview with Adel Bsili, Secretary General of the NCA, 6 October 2017, Tunis

<sup>45</sup> Author interview with Zaid Al-Ali, International Institute for Democracy and Electoral Assistance, 24 October 2017, Tunis

<sup>46</sup> Author interview with Adel Bsili, Secretary General of the NCA, 6 October 2017, Tunis

by these texts and their responsibilities shifted – partly to institutions and processes set up more or less ad-hoc during the ongoing negotiations.

Within the NCA, the rules of procedure regulated the voting processes and responsibilities of members, committees, and the presidency (Proctor and Moussa 2012; The Carter Center 2015:30–33). The rules were criticised for including ambiguities early on and eventually underwent multiple rounds of changes. Adapted from the by-laws of the Ben Ali-era Chamber of Deputies, they nonetheless managed to blend Tunisian parliamentary traditions with innovations from elsewhere that Tunisian Assembly members found useful to adopt.<sup>47</sup> While some institutions within the NCA were narrowly tasked with constitution drafting, others contributed to this while maintaining other responsibilities. The NCA’s executive organ, its bureau, was headed by the Assembly’s President Mustafa Ben Jaâfar (Ettakatol), First Vice President Meherzia Labidi (Ennahda), Second Vice President Arbi Abid (initially CPR, then Ettakatol) and included seven further assistants co-opted from the members, taking into account the political make-up of the Assembly. While the deputy presidents represented the president in his absence, the assistants had dedicated areas of work in which they supported the work of the President (e.g. in legislative affairs, relations with the government, and civil society.).

The Conference of Presidents was principally an advisory body but was responsible for the planning of the NCA’s constituent and legislative work, drafting the plenary’s agendas, and organising its proceedings. Reflecting its centrality to the work of the NCA, it did not only include the president and the heads of political blocs. The two deputy presidents as well as his assistants and the constitution’s general rapporteur were also included, producing a forum in which conflicts across multiple fault lines could be addressed and resolved, particularly since the rules of procedure stipulated decisions by consensus.

A minimum of ten Assembly members could form a political bloc. Political parties could not form more than one bloc and members could only belong to a single one of them, but multiple parties could bolster their visibility by creating a joint bloc. That the rules of procedure allowed members to join any bloc of their choice prompted controversy. The argument was put forward that members owed their electoral success to their political party affiliation and that consequently, leaving the party bloc would undermine the electorate’s choices. Yet the idea of representation endorsed in the “mini-constitution” and the rules of procedure

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<sup>47</sup> A key example is the adoption of the President’s Colloquy or Conference of Presidents, an institution likely borrowed from francophone assemblies, which is advisory but has broad areas of action.

themselves appear incompatible with a very rigid conception of parliamentary blocs. Evoking Article 25 of the 1959 constitution, the NCA's rules of procedure proclaimed that each Assembly member represents "all the people" (rule 119) rather than a specific political party or part of the country. In reality, like parliamentarians elsewhere, the NCA operated within the tension generated by the dual ambitions of universal representation and respect for party affiliation, which "has proved necessary for the proper functioning of constituent and legislative assemblies" (Proctor and Moussa 2012:37).

The NCA drafted a constitution in parallel to conducting legislative activities, both of which required institutional buttressing. While the above bodies were responsible for the entirety of the Assembly's work and thus touched on and influenced constitution-making, there were also dedicated constitutional bodies in the Assembly. While a number of ordinary and extraordinary committees dealt with legislation and current events, six constitutional committees<sup>48</sup> were entrusted with the drafting the respective chapters of the new constitution (Proctor and Moussa 2012:26). Their work was coordinated by the Joint Committee for Coordination and Drafting (or Drafting Committee), tasked with coordinating the work of the committees, preparing a general report on the constitution before submission to the plenary and elaborating the final draft in accordance with the plenary's decisions. Chaired by the NCA president, its members included the constitution general rapporteur (Ennahda's Habib Khedhr), his two assistants, and the chairpersons and rapporteurs of the other constitutional committees. As the composition of the constitutional committees was decided to be proportionate to the representation of the different political parties in the Assembly, the troika dominated not only the committees themselves, but also its key posts (presidency and rapporteur). In turn, these were in a majority in the Drafting Committee. Only in the Committee on Independent Constitutional Bodies was Ennahda not represented in one of the two positions, while only the presidency of the constitutional Justice Committee went to a member of the opposition.

The troika's dominance in the initial institutions was then also a reason for the late addition to the NCA's internal bodies of the consensus committee, an ad-hoc institution created to address a standstill in the drafting stage in July 2013. It prioritised inclusiveness over representativeness and thus did not follow the proportionate representation principle applied

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<sup>48</sup> The six committees were concerned, respectively with rights and liberties; legislative and executive powers and the relations between them; preamble, fundamental principles, and constitutional revision; public, regional and local authorities; constitutional authorities; judicial, administrative, financial and constitutional jurisdictions.

in other internal bodies. It was given ex-post official status in the rules of procedure in January 2014 (The Carter Center 2015:33).

### 7.2.3 Shari'a debates in the NCA, violence in the streets

With the rules of procedure only finally approved on 20 January 2012, around three months after the NCA election, constituent committees took up their work on 13 February 2012. In the absence of a central timetable, deadlines or other clear guidance by the drafting committee, the six constitutional constituent committees began their work independently and without a common work plan (The Carter Center 2015:34). Reflecting the wish for a fundamental break with the past that constitution-making often entails, the NCA agreed to drafting the new constitution from an “blank sheet” (*“page blanche”*). Some civil society organisations, worried that this may put progressive gains such as the rights of women at risk, criticised this approach. According to Ettakatol member Salma Mabrouk (2018:132) its purpose was “not to start with a particular document that would have limited the possibilities for change (...) This choice should allow us to adopt a neutral position with regard to old texts so as not to taint the drafting process with a suspicion of bias”. The Assembly members nonetheless studied multiple constitutional drafts civil society organisations had proposed, including the UGTT and the Tunisian Constitutional Law Association (*ATDC, Association Tunisienne de droit Constitutionnel*) as well as existing international constitutions, particularly from countries that underwent a political transition themselves. Members also invited numerous constitutional law experts to give evidence to their committees and some went on study trips abroad.

The question of national identity and the relationship between state, society, and religion emerged early on, reflecting an unresolved tension built into the 1959 constitution and the state it created. The issue became an increasingly pressing concern during the CMP as the process evolved. Even before the CMP had properly started, a consensus emerged on maintaining Article 1 of the 1959 constitution – an exception to the “blank sheet” policy (Chaabane 2018:234). The compromise found in Tunisia’s post-independence Constituent Assembly stated that “Tunisia is a free and sovereign state, its language is Arabic, its religion is Islam, and its regime is the Republic”. The article’s political appeal at the time of its adoption remained the same after the revolution: It was open to multiple interpretations at a time when the country debated fiercely about its own identity. During the campaign for the NCA elections, parties taking a concrete stance against maintaining Article 1 were rare. While it is interpreted varyingly from sociological statement about the make-up of the Tunisian

population and its identity to justifying the application of Shari'a, its ambiguity contributed to its longevity because "its absence would produce heated disagreements whereas its presence could satisfy all types of interpretations" (Zeghal 2013:260). Staunch secularists could accept it as a minimum consensus and red line beyond which they would not go while Islamists could see in it a justification for the continued invocation of (some) Shari'a law by the courts or even its expansion in the future. Crucially, leftist NCA member Nadia Chaabane argued that maintaining the status quo also meant "leaving it to the legislator to specify and complete, depending on the balance of power in society" (Chaabane 2018:235) – a mechanism that would be a prominent feature of drafting later on.

Triggering the first substantial public *éclat*, Ennahda for some time went further and publicly discussed the inclusion of Shari'a as a source of legislation in the new constitution – as is the case in many constitutions across the region (Beau and Lagarde 2014:135; Chekir 2016:230–31; Dupret 2016; Marks 2014:20–22). The Islamist party had already been noted to be considerably better organised than the other, largely secular groups: While other groups and members were still orienting themselves, Ennahda was seen as "extremely structured; ... [knowing] exactly what they want"<sup>49</sup>. This raised the suspicion that Ennahda would use its now-powerful position to implement its project of Islamising Tunisian society. "In fact, confidence was close to zero, paranoia had set in. We began to interpret everything in terms of the fear of traps in every statement", recalls former NCA member Chaabane (2018:231). Against this backdrop, a draft constitution attributed to Ennahda circulated, which included Shari'a as "fundamental source of legislation" as well as a High Fatwa Council tasked with controlling the conformity of laws with Shari'a (Chaabane 2018:237).<sup>50</sup> Many now accused Ennahda of a "double discourse" whereby the party would publicly endorse liberal positions while holding more conservative views internally. The party leadership had ruled out constitutionalising Shari'a ahead of the elections and generally promised that the liberties Tunisians and tourists in the country had gotten accustomed to, such as the free sale of alcohol and the gains in women's rights, would be maintained if the party gained power. The 2012 debate on Shari'a, in which youth activists and senior dogmatic members like Sadok Chourou and Habib Ellouze publicly adopted a more reactionary position fed into the concerns of secular Tunisians that Ennahda would seek to introduce its conservatism "through the back

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<sup>49</sup> Author interview with Noûmane Fehri, former NCA member for Afek Tounes, 19 October 2017, Tunis.

<sup>50</sup> In an interview with the author, centre-left NCA Member Sélim Ben Abdesslem (02.05.2018, Tunis) said a constitutional draft by Ennahda had been identified by NCA Member Samia Abdou as the text of the Iranian constitution. It could not be verified whether this was the draft Chaabane mentions in her book.

door”. The intense discussions in the NCA on the issue were not per se detached from the Tunisian population’s views: In a 2011 poll by Pew (Pew Research Center’s Forum on Religion & Public Life 2012), 56 per cent of Tunisians were in favour of making Shari’a official law – a more than significant proportion of the population albeit a regionally low figure (compared to e.g. Egypt at 74 per cent support for Shari’a). NCA Vice President and Ennahda member Meherzia Labidi recalled that society became polarised on the issue. Groups demanding the inclusion of Shari’a in the constitution approached her in the Assembly while other groups came to demand secularism.<sup>51</sup> Both sides organised street protests, which drew considerable attention.

For Ennahda – usually seen as a cohesive political force – the debate brought fissures within the movement to the fore, but it also showed significant parts of the Tunisian public had an understanding of Shari’a that made the concept’s constitutionalisation politically infeasible. It took Ennahda’s executive committee days of discussion to conclude on the question.

Conservative voices within the party, such as Sadok Chourou and Habib Ellouze, both of whom were also NCA members, argued for Sharia’s inclusion in the constitution. While they were in a minority they started persuading others (Marks 2014:20–21). Ennahda’s powerful leader and Islamic intellectual Rachid Ghannouchi had long argued for a liberal interpretation of Shari’a focussing on Islamic ethics, such as social justice and citizen equality rather than the rigid application of legal codes (Saeed 1999). Ennahda members like him have particularly argued against the fixation in parts of the public to equate Shari’a with the *hudud* – the often-archaic seeming catalogue of punishments. A more flexible approach would not necessitate the codification of Shari’a in positive law but focuses on Shari’a as a “way of life”. Looking back, conservative Habib Ellouze also feels misunderstood in his interpretation of Shari’a and speaks about “confusion” that many people suffered about Islamic teaching:

Ennahda made sure to clarify its position on Shari'a and that we see Shari'a as this group, of the purposes of Islam. The 'maqasid' - the principles and values of Islamic teaching - [not the individual rules] that's what we believe Shari'a is. For example, we believe that the freedom of women is part of Shari'a. We believe that the values of - freedom of women, freedom of conscience, modernity, democracy - all other liberties ... they are all part of Shari'a.<sup>52</sup>

Invoking Ghannouchi’s years of intellectual reflection on the relationship of Islam and society, NCA Vice President Labidi recalls approaching the Ennahda leader with the issue:

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<sup>51</sup> Author interview with Meherzia Labidi, former NCA Vice President for Ennahda, 7 May 2018, Tunis.

<sup>52</sup> Author interview with Habib Ellouze, former NCA Member for Ennahda, 19 October 2017, Tunis.

And I really thank him. He was so audacious to speak about the problem in the media *before* referring to the Choura Council of Nahda (emphasis added). He was asked by a journalist whether Ennahda is going to mention Shari'a in the Constitution. And he replied 'No, we are not going to mention Shariah. The word Shari'a is so equivocal and so full of negative connotations.'<sup>53</sup>

Indeed, Pew polls show a diverse range of views on Shari'a among Tunisians at the time. On one hand, 44 per cent of those favouring of Shari'a as official law in a late-2011 poll also advocated the introduction of punishments such as cutting off thieves' hands (Pew Research Center's Forum on Religion & Public Life 2012). Another poll conducted in late 2011 showed that 72 per cent of Tunisians see Shari'a as open to multiple interpretations – more than in any other country polled in the study (Pew Research Center's Forum on Religion & Public Life 2013).

The Ennahda-internal controversy ended with the position that Shari'a should not be included in the constitution and with a Choura Council vote of 52-12 the day after Ghannouchi's statement to maintain the consensus of Article 1 of the 1959 constitution to preserve the Arabo-Islamic identity of Tunisia as well as guaranteeing the principles of a civil and democratic state. In a statement after the vote, Ghannouchi again emphasised the non-threatening nature of Shari'a and asserted that most of Tunisia's laws already complied with it (Yahoo Actualités 2012). Ennahda's choice was ultimately pragmatic. Shari'a proved too controversial a concept to demand in the constitution – particularly during the general sense of fragility the transition had created. The party nonetheless seeks to Islamise society, albeit in a “long-term, gradualist approach, adaption itself to the current socio-political context” which in Tunisia is less socially conservative and more impacted by the strength of civil society organisations (Marks 2014:22). For Ennahda itself, the pragmatic position had a profound effect: Thousands protested in the streets against the choice and Ennahda's youth branch lost about ten per cent of its members who accused the party leadership “of betraying the very Islamic principles it claimed to follow” (Wolf 2017:140). Some of them joined ultra-conservative Salafi groups (Merone and Cavatorta 2013). While secular movements welcomed the decision, suspicions about Ennahda's motives remained. Its often ineffective and domineering way of governing strained its coalition with CPR and Ettakatol and furthered mistrust.

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<sup>53</sup> Author interview with Meherzia Labidi.

The period leading up to the first constitutional draft also saw the beginnings of political violence that would continue to accompany the CMP (Elhaddad 2016).<sup>54</sup> Soon after the departure of Ben Ali, Salafist groups had attacked cultural institutions, the media, and universities. In March 2012, the security threat posed by Salafi jihadist groups was first publicly recognised by Interior Minister Ali Lâarayedh (Ennahda). Soon thereafter, his ministry and Ennahda leader Rached Ghannouchi denied reports about jihadist training camps near the Algerian border and largely played down the threat posed by terrorism. The government's hesitation led to accusations of complicity or at least tolerance of acts of violence (Ben Achour 2017:193). At protests on Martyr's Day<sup>55</sup> on 9 April 2012, violence escalated. Witnesses reported disproportionate attacks by police officers who enforced a protest ban on Tunis' central Habib Bourguiba Avenue, but also that law enforcement did not intervene when individuals in plainclothes attacked protesters. This brought the self-titled Leagues for the Protection of the Revolution (*Ligues de Protection de la Révolution*, or LPRs) into the spotlight. Spontaneously founded to address the security vacuum after the revolution at the neighbourhood level, the LPRs were later often portrayed as Islamist thugs and accused of being Ennahda militias who intimidate political rivals. In their complexity, the leagues also represented a form of citizenship from below. Formed to maintain pressure against any rollback from revolutionary aims and achievements, they became more formalised, opened local offices and achieved legal status in 2012. Some of these operated "as a kind of citizen's advice bureau" helping local people navigate the state bureaucracy to e.g. access welfare services (Belghith and Patel 2013). Amid the ambiguity, some NCA members sought to establish an investigatory committee into larger security failures, which an Ennahda initiative pared back to merely focus on the events of 9 April. In his relationship with the committee, Interior Minister Lâarayedh, himself a victim of torture at the hands of the Ben Ali regime's security apparatus, was less than forthcoming. In the absence of a legal obligation to cooperate with the novel body, he declared his intention to forbid security officers to give their testimony but promised a detailed report on the events, which never appeared. In light of these events, Ennahda's usual insistence on the legitimacy of the NCA as the only elected institution appeared to be a more flexible stance (Ben Abdesslem 2018b:252–57).

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<sup>54</sup> Serious political violence had of course begun much earlier with the Ben Ali regime's repression of protests in late 2010 and early 2011. This and following sections are focussed on the emergence of political violence as part of the CMP.

<sup>55</sup> Martyr's Day commemorates those who fought for independence from France in the mid-20th century.

Changes in the political party system had important effects on the dynamics of the CMP as new groups emerged and existing ones both consolidated and unravelled. A consequence of the mistrust against Ennahda as well as their poor returns at the NCA elections, political parties on the secular spectrum went through a period of consolidation. Néjib Chebbi's and Maya Jribi's PDP and a good handful of other centre-left liberal parties merged to found the Republican Party (Al-Joumhouri). Further on the left, Al-Massar united the Ettajdid and the Tunisian Labour Party, while the radical left merged in the Popular Front under the leadership of Chokri Belaïd and Hama Hammami (Beau and Lagarde 2014:90–91). The most decisive change on the political landscape that also significantly affected the CMP was the creation of a new secular party by former transitional Prime Minister Essebsi that quickly garnered significant support.<sup>56</sup> The founding of Nidaa Tounes (Call of Tunisia) to defend the country's secular Bourguiban heritage followed a highly symbolic announcement by Essebsi in Monastir, the first President's home town, in the presence of many Destourian figures – including some former RCD members. Essebsi's aim, said one person close to him, was to create a counterbalance to the Islamisation of Tunisian politics (Beau and Lagarde 2014:92–93). With its anti-Islamist approach, Nidaa Tounes quickly turned into the primary opposition party and attracted a diverse membership. Former UGTT head Taïeb Baccouche's choice as secretary general of the party reflected its trade unionist affiliations, yet the party also recruited prominent political and civil society figures. Tunisians from working- and middle-class backgrounds disenchanted with the socioeconomic stagnation were drawn to it while it secured funding from Tunis' bourgeoisie and the Sahelian businesspeople milieu.<sup>57</sup> Most controversially its membership included multiple individuals associated with Ben Ali's RCD. Winning over multiple Assembly members who defected to Nidaa Tounes gave it representation in the NCA without having participated in the elections.

To respond to the increasing political polarisation, the UGTT took the initiative in June 2012 to launch a national dialogue council, which was supposed to bring together the different relevant political actors, institutional and extra-institutional. Acting in concert with other CSOs, the aim of the dialogue was to find consensus on the many controversial issues the political transition brought up, including, but not limited to the drafting of the constitution.

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<sup>56</sup> Two interviewees identified Nidaa Tounes' founding as a "turning point" in the CMP, Achraf Aouadi and Sélim Ben Abdesslem.

<sup>57</sup> Both Bourguiba and Ben Ali originated from the Sahel, Tunisia's coastal plains. Favoured in the country's political economy, the affluent regions have resisted a more equal distribution of economic gains that would include the country's disadvantaged interior regions.

This would be based on six principles such as the civil character of the state and the neutrality of its institutions, a democratic and republican regime, human rights, and socioeconomic improvements (UGTT 2012). Though 50 parties and 22 organisations participated in the subsequent conference in October, two government parties, Ennahda and CPR, refused. Their refusal was based on the view that other participating parties did not respect the legitimacy of the elected institutions (M'rad 2015:25–27).

That relevant political actors – among them the former Prime Minister Beji Caid Essebsi – openly challenged the legitimacy of the elected institution (albeit mostly for the period after the one-year drafting deadline) indicated that the strong constitutionalism in Tunisian political culture remained mostly procedural or semantic: There was consensus that the constitution should provide the legitimate framework within which politics should operate. However, this consensus did not necessarily require that this constitution be the result of a participatory, inclusive process. Rather in the absence of a permanent constitution, the acceptance of institutions' legitimacy depended to an important extent on the respective political parties' influence over them.

#### 7.2.4 The first constitutional draft document<sup>58</sup>

While public criticism of the NCA mounted, in June 2012 Assembly President Ben Jaafar announced 15 July 2012 as a deadline for draft submissions of the parts of the constitutions for the respective committees. Now prioritising speed over consensus, the Drafting Committee allowed constituent committees to submit multiple versions of articles where no agreement had been reached to meet the deadline. Still, several committees took longer to complete their work and it took until 10 August for all reports to be submitted to the Drafting Committee, which released the first draft after compiling the submissions into one document on 14 August 2012. The limited progress six months after drafting had begun drew harsh criticism. “It was pathetic, it was terrible”, international legal expert Zaid Al-Ali assessed the draft containing tables with various options, adding: “I mean, you don't need six months to do that, you know what I'm saying (laughs). You can do that in a couple of weeks”<sup>59</sup>.

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<sup>58</sup> The discussions on the drafts and citations from them in this chapter are based on the translations to French and English provided by the International Institute for Democracy and Electoral Assistance, available at <http://constitutionnet.org/country/tunisia> (last accessed 16 July 2020).

<sup>59</sup> Author interview with Zaid Al-Ali, International Institute for Democracy and Electoral Assistance, 24 October 2017, Tunis.

General Rapporteur Habib Khedhr made sure to convey in a preface to the text that it “is not the new draft constitution of Tunisia; rather it is a phase prior to that”, containing the outcomes of committee work in their “raw form” before the respective constituent committees submit improved versions in September. This was a euphemistic way of speaking about the serious lack of consensus within several committees that the document revealed. Each committee was made up of 22 members in proportionate representation of their overall electoral result, meaning that Ennahda needed to win only two votes from other parties in the committee to gain a majority. Equally in reflection of its electoral success, Ennahda was accorded most of the committee presidencies.

The result of the process at that point was a 73-page, comprehensive document covering all aspects generally considered part of a constitution, but some sections contained multiple options for the constitutional provisions. In some parts of the constitutional texts, the contents reflected a long assembly of rights, duties, and provisions that were neither structured nor standing in any clear relation to each other. Most strikingly, this is the case with chapters 1 and 2, where e.g. individual rights provisions are listed in both chapters with many redundancies. Beside editorial incoherencies, there are also apparent contradictions, such as the equality between genders embraced in Article 22 whereas Article 28 talks about “complementarity” between men and women. Yet despite these elements, many chapters convey a degree of coherence, reflecting the shared will to constitutionalise a whole range of first, second, and third generation rights and fundamental principles (republicanism and democracy) while incorporating some duties for citizens as well as references to Tunisia’s Arabo-Islamic cultural heritage in a way that emphasises these latter elements more often and emphatically than the 1959 constitution. While the lack of structure and editorial clarity in these sections does reflect a lack of consensus in the respective committees, the tables containing numerous options for articles in other chapters or the plain listing of various draft articles in other chapters reflected the even larger gulf of disagreement between NCA members in other committees. This was particularly the case in the committee on legislative and executive powers and the relations between them, where electoral calculus played an outsized role compared to the other committees (Ben Abdesslem 2018b:223–31; M’Barek n.d.:38). It was widely expected that Ennahda would continue to fare well in parliamentary elections but less likely to win the presidency, which was probably going to be won by secular candidates. The moderate Islamists thus favoured a parliamentary system with few prerogatives for the presidency. Other parties, which had returned a comparatively small parliamentary representation, expected their leaders to have relatively good chances of

securing the presidency and consequently sought to establish powers in that institution. Only the emergence of Nidaa Tounes in 2012 indicated a potential parliamentary rival to Ennahda. Another contentious element were the candidacy requirements for presidential candidates. Positions here were similarly informed by political calculus as well as ideology. There were proposals to exclude individuals with a second passport and those over the age of 75, which would have excluded some potential candidates. This included Al-Aridha Leader Hachmi Hamdi, who is also a UK subject, and Nidaa Tounes Leader Beji Caid Essebsi who in 2012 was 86 years old.

Similarly, though less forcefully fought, the conflict in the justice committee was rooted in political expectations. Sélim Ben Abdesslem, a committee member for Ettakatol, recalls that Ennahda was initially reluctant to adopt a really independent judiciary, expecting to dominate the government for years to come. Even when polling data suggested that opposition parties had a realistic chance in the elections, Ennahda did not change its stance. The draft text reflects consensus on most points, such as the principle of an independent judiciary, the right to a fair trial, and the establishment of a constitutional court with broad review powers. Disagreement was both over symbolic questions (e.g. should sentencing be issued in the name of the people or in the name of the President of the Republic?) and the composition of the judiciary's highest body, the Supreme Judicial Council, which governs the judiciary, and the appointment and candidacy requirements for the constitutional court. On the latter, the proposed inclusion of non-lawyers – though not unusual in international practice<sup>60</sup> – sparked concerns by secular politicians that Ennahda would seek to appoint theologians whose role would be to interpret the law in accordance with the Shari'a (Ben Abdesslem 2018b:237). As it became clearer that neither side of the political spectrum would be able to dominate the country in the foreseeable future, the issue of the constitutional court as the arbiter between state institutions and the highest institution for the interpretation of the law became very contentious.<sup>61</sup>

A piece of collaboration between the justice committee and that on constitutional authorities was the proposal by Ennahda to include a High Islamic Council with consultative powers to determine the compatibility of legislation with Shari'a law. Secularists saw in this institution a potential institutional competitor for the legitimacy of the constitutional court and they

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<sup>60</sup> Author interview with Zaid Al-Ali, International Institute for Democracy and Electoral Assistance, 24.10.2017, Tunis.

<sup>61</sup> Author interview with Zaid Al-Ali.

consequently rejected the proposal.<sup>62</sup> It is not contained in the August 2012 draft. Instead, chapter 7 includes independent national bodies for elections, media, sustained development and future generations, human rights, and governance and anti-corruption. Some of these would replace existing, transitional bodies. With the exception of the development authority, the constitutional draft already gives provisions about the appointment of their members by the legislature. The articles also give the authorities financial and administrative independence. A common factor among them is that the details “shall be governed by an organic law” as per the relevant articles. In French law, organic laws are situated in the hierarchy of norms between the constitution and ordinary laws. A similar approach is taken in Tunisia. Article 40 of the present draft constitution (in Chapter 3) prescribes that while ordinary legislation requires approval by the majority of members present in the legislature (though the majority must represent at least a third of all members), organic law projects require a majority of all members of the house. The Article then specifies a long list of areas that are to be regulated by organic law, including mostly issues pertaining to the political system, security services including the military, the media, and human rights. Other areas of the law are specifically relegated to ordinary legislation, such as the application of the constitution, public institutions and enterprises, court procedures, fiscal, and monetary policy. Local government and decentralisation, the subject of chapter 6, was the area in which NCA members found consensus easiest to reach throughout the CMP and this is already reflected in the August 2012 draft. In its first article, it prescribes that “local administrative organization shall be based on the principle of decentralization within the framework of the unity of the state” – a formulation that is a far cry from the discourse of national unity in the 1959 constitution as decentralisation takes a central position, but apparently seeks to reassure those who worry about that unity in the context of a redistribution of powers. The chapter gives local authorities financial and administrative independence, tasks them with attending to the local interest, and binds their leadership positions to free and fair elections. Beyond public participation, in light of the historic and considerable regional imbalances in Tunisia, which contributed to the revolution, the most important aspect of the chapter is perhaps that the constitutional draft foresees a balance between the burdens a local authority deals with and the resources it is to be provided, and links this to the “principle of solidarity”. However, they are also to be furnished with self-generated resources.

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<sup>62</sup> Author interview with Sélim Ben Abdesslem, former NCA Member (Ettakatol), 02.05.2018, Tunis.

Chapter 8 on constitutional amendments foresees that the president or a third of national lawmakers can suggest changes to the constitution, which would have to be approved by an absolute majority of the population in a referendum. The constitutional court is given the role to check that changes are not sought for unamendable articles. These are listed in the final article of the constitutional draft in chapter 9. These comprise of the nature of the state as described in Article 1 (Islam as the state’s religion, the Arabic language, the republican regime), but also the state’s “civil capacity”, which otherwise only features in the preamble (“With a view to building a participatory, democratic, republican regime for a civil state...”). Otherwise unchangeable are human rights and freedoms and the number and duration of presidential terms, which cannot be increased. Notable for its absence in this “eternity clause” is any reference to democracy and popular sovereignty as such is not covered by this last article of the draft constitution.

Viewed through the lens of the four dimensions of citizenship, the document reveals multiple tensions. On *inclusion and exclusion*, there remains principally the territorial principle of determining Tunisian citizenship on the basis of birth and/or long-term residence within its territory. That the electorate of the NCA and its membership itself was extended to Tunisians abroad speaks to an expanded territorial notion that takes into account the increasingly global patterns of migration and the acceptance of the increasingly common phenomenon of dual and multiple citizenships (Brøndsted Sejersen 2008; cf. Seeberg and Eyadat 2013). Citizenship as the “right to have rights” (Arendt 1967) is protected by the fact that Tunisian nationality cannot be denied or revoked (Arts. 1.7 and 2.5) to its citizens. However, a narrower, more sovereigntist understanding of citizenship – and possibly even suspicion of bi-nationals and foreigners – is reflected in some of the proposals for parliamentary and presidential candidacy requirements, which in one case include even Tunisian grandparents<sup>63</sup>. Among the requirements proposed for presidential candidates, three out of five demand that they be Muslim or “embrace Islam”.

In combination with multiple other references to Tunisia’s Arabo-Islamic heritage in the dimension of *rights and obligations*, this suggests to some extent the preference among the constitution’s drafters for a graded model of citizenship in which virtually all rights are equal,

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<sup>63</sup> The requirements in the 1959 constitution were similar, albeit undergoing change. In the initial version of 1959, only paternal lineage mattered (“Any Tunisian whose father and grandfather have remained Tunisians without interruption...”), whereas the constitution in force in 2011 considered both sides of the family tree, making the requirements more gender-balanced, but also extensive (“... father, mother, paternal and maternal Tunisian grandfathers, all remaining of Tunisian nationality without discontinuity”).

but some – occasionally subtle – differences are permitted on the basis of religious affiliation. Innocuous-sounding formulations could in some cases be interpreted in ways that undermine the substance of the rights declared in other parts of the constitution.

All this appears to be tied to the dimension of *identity and belonging*. Tunisia’s Arabo-Islamic identity is emphasised in this draft well beyond the inclusion of the 1959 Article 1 and the references to the country’s Maghrebi and Arab identities and regional affiliation. For one thing, the actual phrase “Arabo-Islamic identity” is included in the preamble, but the latter also presents the constitution as “building on the fundamentals of Islam” and also proclaims the country’s “affiliation to the *ummah*”, i.e. the global community of Muslims. That integration is not only sought within the Arab-Muslim world, but the African continent, too, is worth highlighting. Arab nationalism is not least reflected in the reference to the Palestinian Liberation Movement and the criminalisation of “normalisation with Zionism” in Art. 2.27. The use of religious language in some articles (e.g. the right to life, which is described as “sacred” in Art. 2.1) reinforces the impression that the entirety of the constitution is sought to express a turn to Arabo-Islamic identity.

This links with the *ideational impetus* of the constitutional draft document. Two tendencies emerge here as dominant. On the one hand, the constitution is clearly aimed at securing the gains made from emerging from an authoritarian regime. The text devotes considerably more space to individual rights and liberties than the 1959 constitution and indicates a general agreement that the power in the political system should no longer be concentrated in the presidency but subject to horizontal accountability. The addition of the word dignity to the national motto reflects a multidimensional understanding of the human rights violated by the previous regime and sought to protect by the state henceforth. On the other hand, the constitutional draft document appears to include a desire to “correct” for several decades of secularism that was often imposed top-down and thus reflects an effort to swing the pendulum back to a supposedly more authentic expression of Tunisian identity which includes a more open expression of religious values.

#### 7.2.5 Reactions to the draft: mobilisation of secular civil society

The release of the constitutional draft document engendered a strong reaction by various political forces: Tunisian CSOs, opposition constituents, domestic and international constitutional scholars, and foreign actors intensely debated how the draft dealt with women’s status, criminalisation of blasphemy, and the political system. Tunisian constitutionalists criticised the incoherence and contradictions in the draft and questioned whether its

provisions were compatible with the civil character of the state (Anon 2012). International NGOs like the Carter Center generally welcomed the release of the draft but pointed at similar and further issues, such as the omission of the right to vote in the text, urging the NCA to address this as well as vague wording and incoherencies – not least so that Tunisia would hold up its treaty obligations under international law. Beside the content of the draft, they also highlighted how the drafting process with its changing deadlines and lack of coordination had undermined public trust in the work of the NCA and urged greater public participation, outreach, and transparency (The Carter Center 2012).

The status of women in the draft produced particularly intense mobilisation, days before the release of the whole constitutional draft, as the contents of its Article 28 on women's rights became publicly known and debated (Charrad and Zarrugh 2014). In its first sentence, the Article reads “The state shall guarantee the protection of the rights of women and shall support the gains thereof as true partners to men in the building of the nation and as having a roll complementary thereto within the family”. This description of women as “complementary” to men provoked robust criticism from Tunisian and international NGOs and across the media. While other articles (6, 21, and 22) set out the equality in rights of citizens and emphasise an “environment of equality between spouses”, Article 28 failed to clearly affirm equality between genders. Just days before the anniversary of the progressive Personal Status Code of 1956 on the 13 August – women's day in Tunisia – critics found that the draft article's formulation called the principle of equality into question fundamentally (Dufourmont 2012). A petition against the Article garnered thousands of signatures and street protests erupted. A sit-in at the NCA seat on 9 August was followed by a large protest demanding explicit references to equality between women and men on 13 August. Ahlem Belhadj, President of the Tunisian Association of Democratic Women (*Association tunisienne des femmes démocrates*, or ATFD) at the time recalls this episode as a major turning point in the CMP as it represented a broad coalition that included feminist organisations, but also “parties, trade unions, people, citizens to say that [the] model of society we want is a model of equality between men and women”.<sup>64</sup> Similarly, Amna Guellali of Human Rights Watch Tunisia found that Article 28 reflected a “dangerous step, because it meant that equality

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<sup>64</sup> Author interview with Ahlem Belhadj, ATFD, 07.05.2018, Tunis.

between men and women as we see it will not be the focus of the constitution and that the concept of complementarity was overshadowing (...) equality”<sup>65</sup>.

For Ennahda’s NCA Vice President Labidi, the polarisation on this article was largely the result of a misreading and of shrewd PR by the opposition: “We have never; never, never voted in Nahda Choura Assembly or asked our MPs to mention complementarity instead of equality.”<sup>66</sup> Marks (2014:23), too, argues that far from a deliberate assault on women’s rights, Article 28 was largely badly communicated and misperceived as its language simply reflected its authors’ sincerely held view on gender role distribution “namely that men and women are indeed equal under God, but that they have different biological roles and familial obligations, and therefore ‘complement’ or ‘fulfill’ (sic) one another within the family” as the Arabic original can also be translated in different ways than “complementary”. Marks quotes an Ennahda committee member who points at Article 22, which affirms the equality between all citizens. The different views on the Article itself also affect the assessment of its withdrawal in the next draft. While Belhadj views this as evidence that Ennahda realised the limits of its own power, Marks (2014:24) largely portrays it as a communications misstep and a “lost opportunity to allay opponents’ fears”.

While the parties’ differing positions on the political system originated in their distinct electoral calculus, the question of blasphemy raised in Article 3 of chapter 2 reflected more deeply held beliefs on identity by Ennahda members of the Rights and Liberties Committee. The text protects freedom of belief and religious practice, but also entails criminalisation: “The state shall guarantee the freedom of belief and the exercise of religious rites. The state shall also incriminate all acts of violation against any religious sanctuaries.” For constitutional law professor Slim Laghmani, the first part of this provision was not only unnecessarily narrow compared to the Universal Declaration of Human Rights, but the constitution was the wrong place for criminalising blasphemy as this is in the scope of the penal code (Anon 2012). The most widely shared concern was about the risk that Article 3 could restrict the freedom of expression and serve as a means to implement political repression. Ennahda members justified the inclusion of this article with the need to protect Tunisia’s Muslim identity from “provocations” and “insults”. Both the testing of the scope of postrevolutionary

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<sup>65</sup> Author interview with Amna Guellali, Human Rights Watch Tunisia, 19.10.2017, Tunis

<sup>66</sup> Author interview with Meherzia Labidi, former NCA Vice President (Ennahda), 7 May 2018, Tunis.

freedom of speech on the part of artists and media<sup>67</sup> and the Ben Ali regime's abuse of religious activists had pushed Islamists toward "over-correcting" the legacy, one committee member said. Ultimately, Ennahda changed tack and adopted the position that constitutions ought to "reflect positive, rights-affirming ideals rather than restrictive, prohibitory language" (Marks 2014:24–26).

#### 7.2.6 A second draft

After the firestorm of criticism the first draft constitutional document had generated, work began on a revised, second draft in a way that was supposed to take in substantive problems, but also those in the process itself. The entire text was quickly reviewed by the coordination committee, which identified vague language, inconsistencies, omissions, and redundancies to the relevant constituent committees for review. Over 300 CSOs participated in a two-day dialogue session on the draft, organised by the NCA in September and an online consultative mechanism was launched on its website to allow the Tunisian public to submit their suggestions on the constitution. In the months leading up to the release of a second draft on 14 December 2012, the respective committees each released revised drafts of their chapters. Several of these incorporated the concerns CSOs and protesters had voiced before (The Carter Center 2015:35–36).

Further efforts to tackle the political impasse outside the NCA were attempted. On 23 October 2012, the Assembly's plenary debated the preamble and general principles of the constitution, but the day marked the end of the one-year timeframe for constitution-making that most political parties had subscribed to. While probably not legally probably not binding, opposition politicians from former Prime Minister Beji Caid Essebsi to Ahmed Néjib Chebbi claimed that "electoral legitimacy was ending" (M'rad 2015:27; Sayah 2015:87). Interpreted by some as an attack on the transition's legitimacy, its most pronounced effect was to justify attempts to solve the political conflict outside the elected institutions.

"I personally took the initiative to ask, first of all, all the parties, and then the then Head of State Mr Marzouki, to convene the parties to a conclave at [the presidential building] Dar Dhiafa",<sup>68</sup> historical opposition figure Ahmed Néjib Chebbi, then NCA member and leader of the Joumhouri party, recalls his proposal of September 2012. "It started out well at first;

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<sup>67</sup> For example, the broadcasting of the film *Persepolis*, which includes a depiction of God, was mentioned by Ennahda constituents.

<sup>68</sup> Author interview with Ahmed Nejjib Chebbi, NCA member for Joumhouri 08.05.2018, Tunis.

everyone came, even [Nidaa Tounes founder] Mr Caid Essebsi”. Yet three months after its own initiative, the UGTT’s exclusion led to a breakdown as Essebsi and the Al-Massar party withdrew. The Joumhouri initiative was focussed on the political plane: Finalising the constitution and organising fresh elections. The trade unionists had had a much larger scope for the National Dialogue that included socioeconomic issues. Nonetheless, it interpreted the Joumhouri initiative as an attempt to divert from its own programme. Subsequently, when the UGTT’s National Dialogue Council met in October 2012, government coalition parties Ennahda and CPR boycotted the meeting and the political blockages remained unaddressed (M’rad 2015:27–28).

An important stumbling stone for the transition was the choice of the political system and the second constitutional draft reflected the persisting disagreement between the parties. With the latter exception, the draft was much more coherent and closer to a final constitution as the committees had found consensus on numerous articles for which the first draft included multiple proposals. Yet the chapters on legislative and executive powers still included at least two formulations for many articles and often comments by the Drafting Committee with a recommended wording. Its tendency to suggest the allocation of powers to the prime minister over the presidency where the constitutional committee included multiple options reveals a slight preference for a parliamentary or mixed system of its members – after all, the majority of the Drafting Committee were members of the troika coalition parties. A key feature of the second draft was a slight shift away from ambiguous and religiously connotated language toward more specificity and clearer adherence to norms of liberal democracy and human rights. For instance, in the article on the right to life, the latter is no longer described as “sacred”, while the right to vote is now explicitly included and Article 3 includes the concept of popular sovereignty. The chapter on the judiciary now no longer included multiple opinions and specified many more aspects. One example is the specification of the Constitutional Court’s competences, which now included constitutional review of draft legislation and existing law as well as the parliament’s rules of procedure – a notable proposal as only months later, an ordinary court denied jurisdiction over the NCA’s rules of procedure. Where citizens are mentioned in articles, the language now also included both the male and female forms of the word.

In sum, the new constitutional draft became more *inclusive* and less reliant on religion to justify a graded model of citizenship. Nonetheless, the candidacy requirements for the presidency still rule out non-Muslims for the highest office in the state. They also restrict the candidature to a certain age band (over 40, under 75) and rule out holders of multiple

passports. For parliamentary candidates, the draft proposes they need at least one Tunisian parent, while the Drafting Committee suggests to require candidates to have been citizens for at least five years.

The higher level of specificity of the draft's language leads to an increased protection of the *rights* it contains as the scope for different interpretations is reduced. This is particularly true for women's rights, reflecting greater equality between citizens.

While the second draft marks a shift away from religious language in its substantive part, *identity and belonging* are still closely tied with Tunisia's Arabo-Islamic identity in the preamble, Article 1 of the 1959 constitution is retained and the first drafts designation of the state as "the patron of religion" and "protector of religious sanctuaries" remains.

The *ideational impetus* of citizenship as constructed in the second draft is similar to the first draft. That includes the tensions between an apparently authentic expression of Tunisian identity through religious values and the construction of a post-authoritarian democratic state that protects rights. In what appear to be concessions on the part of the religious conservative drafters, the emphasis in this tense relationship has shifted from religious expression to explicit protection of liberal democracy and human rights.

#### 7.2.7 After the second draft

The second constitutional draft was released to a Tunisian public that had become increasingly disenchanted with its country's politics, including the CMP. Economic stagnation contributed to the public's disenchantment. After a revolution triggered in no small part by socioeconomic grievances, little had changed in the economic situation of many Tunisians. Unemployment had increased while purchasing power declined and the state's budgetary position became more precarious (Institut National de la Statistique 2020b). As a consequence, the government introduced austerity policies in some sectors, including cutting the budget of the NCA. It also entered negotiations with the IMF for financial support arrangements. In this situation, a populist discourse around the NCA members' compensation emerged. The allowance of around €1000 per month was far above the average Tunisian income creating a narrative of a self-serving political class and undermining the credibility of the NCA (Ben Abdesslem 2018b:199–206). Its failure to meet the self-imposed one-year deadline, absenteeism of members, and the shifting political affiliations of its members contributed further to this. As the CMP continued beyond October 2012, polling showed a

marked increase in respondents who believed the NCA should complete its mandate within a year or less.<sup>69</sup>

To what extent the one-year deadline was legally binding on the Assembly was contested even though it was overwhelmingly argued that the NCA's mandate could not be legally restricted by legislation that predated it. After all, the NCA was the only democratically elected institution in the country and in the tradition of the French Constituent Assembly following the 1789 revolution, all power was concentrated in it as the sole embodiment of the popular will. In this revolutionary constituent process of constitution-making (Arato 2017:448), "constituent dictatorship" by the majority in the Assembly is seen as legitimate and the Assembly's sovereignty – derived from its electoral legitimacy – trumps other sources of legitimacy. Moreover, as original power, it can repeal any previous legislation. On the other hand, in addition to the moral pledge of the parties to limit constitution-making to one year, several decree-laws prior to the election of the Assembly, including the electoral law itself, pointed to a mandate focussed on if not limited to constitution-making. Indeed, the two decree-laws on the 2011 elections "specifically indicated that the Assembly is charged with establishing a constitution 'within a maximum delay of one year'" (Ben Achour 2017:314). The anti-Ennahda forces that gathered in the new Nidaa Tounes party focussed their campaign against the government precisely on this point, arguing that the Assembly's mandate had lost legitimacy one year after its election – if not legally, then at least morally (Ben Achour 2017:319–20).

The often-low attendance in the plenary witnessed by the Tunisian public on live television not only affected the Assembly's reputation, but committees' work was often delayed by the lack of quorum and routinely had to work while some of their members were absent, even when they debated and voted on critical issues.<sup>70</sup> "Absent members often subsequently protested that important decisions had been made without them and requested a re-examination of the issues" (The Carter Center 2015:53). The problem of chronic absenteeism affected members of all parties, and neither internal policy changes by the NCA nor pressure from civil society were able to stem it.<sup>71</sup> Over the course of the *Constituante*, numerous

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<sup>69</sup> From around 45 per cent from January to August 2012 to 65 per cent in January 2013, of which 43 per cent favoured completion within less than a year (International Republican Institute 2013:15).

<sup>70</sup> Without suggesting a continuity or causal relationship, it is interesting to note that Tunisia's first parliamentary assembly in the 19<sup>th</sup> century was also plagued by absenteeism.

<sup>71</sup> Though it appears some members felt they were as accountable to civil society as to their voters and the NCA administration; in at least one case a constituent produced a doctor's notice justifying his previous absence to

members switched party allegiance, reflecting low institutionalisation of the political party system. In an Assembly of 217 members, there was an entirety of 83 changes of affiliation between October 2011 and December 2013.<sup>72</sup> For many members of Ennahda's coalition partners CPR and Ettakatol, their parties' dealing with the Islamist group was part of the motivation to join other groups or become an independent member. In other cases, members joined new parties such as Nidaa Tounes, which was only founded after the elections. The third largest group at the beginning, Al-Aridha lost 19 of its initially 26 seats. True to its reputation as well-organised and cohesive, Ennahda suffered only three defections – the smallest number relative to group size (The Carter Center 2015:46–50). This “political tourism” had consequences on the representativeness of intra-NCA institutions, where positions (e.g. chairpersonships of committees) had been appointed at the beginning of the session on the basis of group sizes, which had now shifted. The growing number of independent members also produced practical problems on issues like the allocation of speaking time.

The public's disenchantment with politics appears clearly in changing polling figures (International Republican Institute 2013). In October 2011, the month of the NCA elections, respondents were effectively evenly split between those saying things are going in the right direction in Tunisia and those saying the opposite. In January 2012, the optimists in this question considerably outweighed the pessimists (by 62 per cent to 30 per cent), whereas this all but reversed a year later and after the second draft. Now, 77 per cent found things were going in the wrong direction while less than a fifth was optimistic – a response strongly correlated with economic expectations for one's own household. At that point, around two thirds of respondents were also unsatisfied with the government's performance and thought politicians in Tunis do not care about local problems in the rest of the country. The publication of constitutional draft documents appears to have led to a shift in positions on the new political system sought. At the very beginning of the CMP in January 2012, the most popular choice (42 per cent) was a mixed government, followed by a presidential system (25 per cent) and a parliamentary system (19 per cent). The most significant changes an April 2012 poll showed is the increased appeal of a mixed system (53 per cent) and a drop by half of don't know/refusals to answer (from 14 to 7 per cent). Around the publication of the first

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parliamentary observation group Al Bawsala. Author interview with Ons Ben Abdelkarim, Al-Bawsala, 04.10.2017, Tunis.

<sup>72</sup> Author calculation based on data in Carter Center (2015:48).

draft in August 2012, a presidential system shot up in popularity as 52 per cent favoured this over the other options. With support for a parliamentary system practically constant, the drop of support for the (then relatively vague) model of a mixed system to 21 per cent explains the large shift. These figures hardly change in the subsequent January 2013 poll. In another noteworthy shift of public opinion, respondents were asked whether they would prefer a “stable and prosperous” but undemocratic Tunisia or a democratic country with instability and insecurity. In January 2012, 70 per cent would prefer democracy and 26 per cent authoritarianism, but this narrowed quickly to 55 over 38 per cent in April and 52 over 42 per cent in January 2013. Looked at together, these last two results appear to indicate a widespread yearning for stability, even at the price of democratic gains. Finally, while a plurality of respondents found that employment should be the government’s top priority, only 3 per cent even mentioned the constitution (and only 1 per cent as first mention).

Public participation in constitution-building has emerged as an international norm (Hart 2003; cf. Lerner and Lupovici 2019) and the Tunisian CMP was no exception. If Elster (1995) had suggested “hour-glass shaped” participation – at the beginning and at the end – to first provide input and then lend legitimacy to the result, many processes now include public consultations at multiple points rather than just with the election of an assembly and a referendum on the result of its work. The release of the second draft in December 2012 was followed with public consultations across the country as well as Tunisians abroad. Assessments of these consultations were mixed though. On the one hand, they gave Assembly members the opportunity to reach out to their local voters and collect feedback and proposals (M’Barek n.d.:28). On the other hand, many saw the UNDP-organised process as an expensive but poorly organised exercise that was insufficient in scale.<sup>73</sup> NCA Member M’Barek found that it resembled a box-ticking exercise: “It was just to say ‘hey, we did participatory’, but it was not true. It was not fully participatory”.<sup>74</sup> In focus groups, Tunisians uttered scepticism about this initiative, too (Rowell and Yahia 2013:19). This particular format may not have produced many substantive changes to the constitution<sup>75</sup>, but much work was put into collecting and organising suggestions and ideas, which the constituent committees would then consider. Practically in parallel, the second draft was also scrutinised within the NCA, where

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<sup>73</sup> Author interviews with Mabrouka M’Barek and Ons Ben Abdelkarim.

<sup>74</sup> Author interview with Mabrouka M’Barek.

<sup>75</sup> “... one half sentence that was incorporated into the draft as a result of that tour ... That’s the only thing I was able to identify”, recalls Legal Expert Zaid Al-Ali in an author interview.

plenary sessions debated the various sections, allowing members to contribute on parts of the constitution that were not within the scope of their committees.

If the period after the release of the first constitutional draft was marked by increased political tension and violence, the situation deteriorated even further in the time after the release of the second draft (Gobe and Chouikha 2014). Ennahda – in charge of the interior ministry via its Minister Ali Lâarayedh – faced accusations of being too tolerant toward Salafist groups and the security failures reinforced mistrust among opposition groups. Socioeconomic protests regularly flared up and like in the case of Siliana were met with harsh repression by security forces (Ben Abdesslem 2018b:292–304). The assassination of leftist party leader Chokri Belaïd in February 2013 triggered a government crisis. In the existing climate of mistrust toward Ennahda, its Prime Minister Hamadi Jebali proposed to form a government of technocrats, which calmed the political situation. Yet Jebali resigned after Ennahda refused to go along with his proposal. The resignation coincided with a rare general strike by the UGTT in protest of the Belaïd murder reflecting the significance of the violent episodes in a country used to relative stability.

The deepening crisis also led to attempts at national pact-making by various political leaders, building on the initiatives of the previous year, while work on the constitution continued. One week before stepping down, Prime Minister Jebali assembled a “Council of the Wise” at the presidential Dar Dhiafa building. Including well-known national personalities, the meeting was aimed at discussing a new government and finalising the constitution but lacking support by the government coalition and suspected by the opposition to be a mere distraction, the initiative failed to produce any results (M’rad 2015:30). Instead, the troika partners agreed in March to continue their coalition until elections, to be held in late 2013. Ennahda’s former Interior Minister Ali Lâarayedh was elected prime minister.

Meanwhile, within the NCA, work was accelerated to respond to the political crisis. The rules of procedure were revised in March to streamline plenary debates by limiting the number of amendments that could be proposed. The prerogatives of the Drafting Committee were also clarified. The constituent committees worked on revised constitutional drafts and submitted their results to the Drafting Committee on 10 April. In its entirety, the assembled parts would be draft *2bis* – an amended version of draft 2, which was never released by the NCA since a consolidated third draft was to be elaborated by the Drafting Committee. The latter committee’s decision to make substantial changes to the committee submissions proved highly controversial. Among other things, the Drafting Committee made a choice on the

political system, which the Committee on Legislative and Executive Powers had left open for debate in the plenary. Contention arose over the question whether the committee had overstepped its authority. The new Article 104 of the rules of procedure stated that it would “meet to prepare the final version of the draft constitution based on the work of the commissions and with the help of experts” (The Carter Center 2015:37). That formulation allowed for various interpretations on the scope of changes the coordination committee could apply to the drafts.<sup>76</sup>

#### 7.2.8 A third draft

While political polarisation increased in Tunisia, the third draft diverged less from the second draft than the latter had from the first draft document. Some editorial revisions aside, the changes with relevance to the idea and practice citizenship were largely focussed on aspects of ideology and identity on the one hand and the political system on the other hand. The revisions also brought in some added layers of safeguards for rights and state institutions’ independence, bringing them closer to international legal standards if not consistently fulfilling them.

The preamble maintained the thrust of the substance that proclaimed Tunisia to be an Arabo-Islamic country that has its own reformist tradition, accepts universal human rights and is open to the world. Changes included the removal of a reference to colonialism, the inclusion of social justice beside the value of solidarity and a slight toning down of an anti-Zionist reference. If the second draft had proclaimed solidarity with rightful liberation movements, “*first and foremost* the Palestinian liberation movement”, the third draft changed this to “*including* the Palestinian liberation movement” (emphases added), but goes on to resolve “fighting all forms of anti-human racism including Zionism”. The reference to environmental concerns appears more prominently and the “sublime human value” of work is supplemented by references to knowledge and creativity.

The concern with identity continues most significantly in chapters 2 and 3, where multiple articles are added, which occasionally appear as a secular counterweight to more religiously connotated language in existing draft articles. A key innovation is the new Article 2. Following directly from the historic Article 1, which makes reference to Islam as the Tunisian state’s religion, Article 2 reads:

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<sup>76</sup> If this part of the rules of procedure was controversial later on, that does not appear to be the case at the point of its adoption: A large majority of 121 voted in its favour, 13 against, and 3 abstained (Al-Bawsala n.d.).

Tunisia is a civil state that is based on citizenship, the will of the people, and the supremacy of law.

Both the first and second drafts had included references to Islamic normativity in different places, described Tunisia as a civil state in the preamble, and included the civil character of the state as well as the determination of Islam as the religion of the state as one of the unamendable elements of the constitution in an Article at the end of the text. The latter had already conveyed the intention of the drafters to make both elements cornerstones of the constitutional order. Yet both opposition NCA members and many commentators were concerned that Article 1 in combination with the inviolability clause could yield constitutional interpretations that require making the legal order compatible with Islamic normativity. The inclusion of Article 2 – a proposal by the Tunisian Constitutional Law Association according to its Secretary General Chawki Gaddes<sup>77</sup> – was one step in dealing with this concern. It provides both a guide to the interpretation of Article 1, which is also on the character of the state, and clarification on the concept of the civil state (Abdelkefi 2016).

It is interesting to note that the constitutionalisation of both concepts, the civil state and citizenship, has precedents in Egypt, highlighting the regional dimension of constitution-making following the uprisings across Arab countries. There “was a debate that was taking place across the region at the same time”, recalls international legal expert and constitutional consultant Zaid Al-Ali. Influences flowed “from other countries to Tunisia and from Tunisia outwards as well”.<sup>78</sup> The word “citizenship” appears to first make a showing in an Arab constitution after the Egypt’s constitution was amended in 2007 and introduced a new Article 1 describing the Egyptian Arab Republic as “a state with a democratic system that is based on citizenship”, though the amendments were largely a façade restoration keeping executive dominance intact and enabling one-party authoritarianism (Bernard-Maugiron 2018). At the same time, the changes reflected a turn away from ideological constitutionalism (cf. Arjomand 2007:7) as they removed much socialist language from the document, introducing instead “a new discourse of ‘citizenship’, which has been championed by President Mubarak’s son Gamal”, widely assumed to be the his father’s heir-apparent (Brown and Dunne 2007). The notion of the civil state first emerged in a constitutional proposal by the influential Islamic University Al-Azhar in Cairo in the context of the Egyptian CMP in June

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<sup>77</sup> Author interview with Chawki Gaddes, Secretary General of the Association Tunisienne Droit Constitutionnel, 02.05.2018, Tunis.

<sup>78</sup> Author interview with Zaid Al-Ali, International Institute for Democracy and Electoral Assistance, 24 October 2017, Tunis.

2011. “It resonated with the Muslim philosophers’ notion of the virtuous city (*al-madina al-fadila*) and sounded like it was more cognizant of the historic pattern of the separation of religion from the state while avoiding the term ‘secularism’”, an anathema to many Islamists (Arjomand 2013:304).

In Tunisia, Article 2 was formally proposed by opposition members of the Assembly. Similar to the Egyptian context, the “civil” state proved popular in the public debate. While its definition was still vague, it offered an alternative to the politically problematic concept of secularism. In any case, the latter does not describe the social reality in Tunisia well, where the relationship between state and religion is more complex. As Tunisian constitutional law professor Slim Laghmani outlines, a reasonable interpretation of Article 2, then, would be that it signifies that the state is neither “laïc”, i.e. completely separate from religion, nor a theocracy, i.e. dominated by religion. Instead, the state is closely associated with and regulates religion through multiple institutions and channels such as the Ministry of Religion and public funding for religious positions.<sup>79</sup> The three descriptors of the “civil state” in Article 2 (citizenship, will of the people, and supremacy of the law) point toward an interpretation that includes the equal treatment of individuals based solely on their status as citizen and a legal order that is based exclusively on positive law. In turn, this would reject any model of differentiated citizenship (which could possibly be justified on the basis of Article 1) as well as legal interpretations based on sources other than positive law such as religion.<sup>80</sup>

The other changes to chapter 1 reflect an added emphasis on equality, inclusion, equality, transparency, and the neutrality of state institutions. The new Article 8 sets that the state “shall seek to achieve social justice” and work toward balance between regions. Other amended and new articles bolster gender equality, highlight the contribution of youth to the nation, and emphasise the impartiality of educational institutions as well as the political neutrality of the security apparatus including the military. Finally, the new Article 20 makes the disclosure of all assets mandatory for public officials at the beginning and end of their terms.

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<sup>79</sup> Author interview with Prof Slim Laghmani, Faculté des sciences juridiques, politiques et sociales de Tunis, 14.05.2018, Tunis.

<sup>80</sup> If this narrative appears as an overly optimistic presentation of compromise, Law Professor Kais Saied (who was since elected President of Tunisia), is more critical, interpreting the Article as the result of political horse-trading with the final result of the constitution merely serving to “legitimise power” rather than providing a tool for liberty.

Chapter 2 underwent two key changes: The article on women's rights now includes a clause obligating the state to protect women and their acquired rights. A new article first introduces the right to asylum to the constitution.

Chapters 3 and 4 reflect the Coordination Committee's choice for a mixed political system by allocating shared responsibility for foreign policy to the president and the prime minister. The role of the latter office holder is elevated by the decree-powers he is given in Article 66 while the parliament's role is bolstered with the institution of investigatory committees, which all authorities are required to assist. Within the Assembly, the opposition is given a specific mention. With a nod to parliamentary plurality and the establishment of mechanisms that make government scrutiny possible, it is allocated "an appropriate quota" of parliamentary activities in Article 57. If the second draft had required parliamentary candidates to have at least one Tunisian parent, the new draft requires ten years of Tunisian nationality of the candidate.<sup>81</sup> The presidency's prerogatives are reduced. The officeholder can no longer declare the state of emergency and is now only commander-in-chief of the military, not the internal security forces. Symbolic functions and important appointments are still in the remit of the office though. Candidacy requirements have been somewhat relaxed. Only the candidate themselves need to be Tunisian by birth and the candidate needs to "embrace Islam". The second draft had required candidates to be Muslim.

Some additional safeguards for judiciary independence were included in chapter 5, where the number of proposed candidates for the constitutional court by the president, parliament speaker, and prime minister respectively, have been altered. Like in the second draft, the court rules on the constitutionality of legislation, effective and proposed, but its function to adjudicate between state institutions (e.g. by declaring a vacancy of the presidency) is described in the chapter on executive powers.

The latter parts of the constitution underwent only relatively small changes. In chapter 7 on local government, public participation and inclusiveness are strengthened, among other things by making some representation of youth on local councils mandatory. Chapters 6 and 8 were mostly unchanged. In chapter 9, the new Article 139 states that the constitution's provisions should be interpreted as a homogenous whole – a provision that seems especially pertinent with respect to Articles 1 and 2.

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<sup>81</sup> In comments to the second draft, the coordinating committee had suggested 5 years of nationality, so this seems like a suggested compromise.

When it comes to *inclusion and exclusion*, the third constitutional draft is clearer than its predecessors that the territorial principle applies to determine full membership in the polity. The grounds on which citizens can be excluded from full citizenship are reduced and the base on which equal treatment is prescribed expanded, especially with the addition of Article 2. Further evidence of this is in the choice by the coordination committee for parliamentary candidacy requirements, which do not include Tunisian lineage, but ten years of nationality. References to specific social groups in chapters 1 and 2, such as women and youth, also point at the will to use positive discrimination to be more inclusive toward these groups. Finally, the inclusion of the right to asylum reflects a degree of inclusivity toward non-citizens.

As the above alludes to, *rights and obligations* are now close to equal among the citizenry, with many provisions in the previous draft that could have lent themselves to a discriminatory interpretation on the basis of religious normativity now balanced by provisions that give grounds for an interpretation in line with equal citizenship for all. Again, Article 2 is a meaningful addition in this respect as it bolsters equality along with some other changed provisions. A change in the sequence of articles that moves the obligation of citizens to pay taxes and serve in the military from the latter parts of the constitution to the general principles in chapter one into a symbolically more direct and thus perhaps more meaningful relationship with citizens' rights. Some uncertainty about which norms would take precedence in constitutional interpretation is produced by the requirement in Article 139 that the constitution's provisions should be interpreted as a homogenous unit, suggesting considerable leeway on the part of the interpreting party (e.g. the constitutional court) about which norms should take precedence.

Notably, the shift to a more open substantive commitment to equal citizenship changes little about the symbolic proclamation of Tunisia's *identity and belonging* in the constitution as parts of the Arab-Islamic world. References to the country's cultural heritage remain in the preamble and substantive articles, but are now often balanced, or checked by provisions guarding these commitments against a discriminatory interpretation – though, again the uncertainty by Article 139 comes into play. Another ambiguity is created by a formulation in the preamble (an integral part of the constitution as per Article 138): Here, the constitution is “building on ... universal human rights that are in harmony with the Tunisian people's cultural specificity”. This could be interpreted in two ways: Either affirming that human rights are indeed in harmony with the country's cultural specificities or that they are not in their entirety and that the constitution only builds on those human rights which are in harmony with Tunisia's culture.

The *ideational impetus* of the third draft reduces the emphasis on Tunisia's Arabo-Islamic cultural heritage and identity to some extent and to the benefit of a secular, territorially-based idea of equal citizenship. Amid the concern during the transition that after the state capture by the ruling party under Bourguiba and Ben Ali, Ennahda and its allies could now aim at dominating the state's institutions, the constitution also reflects a heightened concern with their neutrality. For instance, this is in evidence in the new Article 14, which prohibits the politicisation of education. Some changes in the preamble tame the previous draft's international ambitions and move the focus somewhat more toward the domestic sphere. This includes the removal of a reference to the history of colonialism and slight reduction of emphasis with respect to the cause of the Palestinian liberation movement (though the draft does now mention Zionism as a form of "anti-human racism").

#### 7.2.9 Between drafts: new legitimacy questions

While civil society organisations lamented inadequate safeguards for human rights in the third draft constitution (cf. Article 19 2013), events after its presentation once again brought the question of legitimacy in constitution-making into sharp focus as the elected members of the NCA, legal experts, and civil society all made claims to or were portrayed as legitimate (co-) authors of the constitution.

An important episode in this regard was the Assembly's plan to have the third draft reviewed by a group of legal experts. The individuals were selected by the NCA leadership on the basis of proposals by the constituent committees' presidents. Yet several of them declined the invitation, worried that their work's scope remained ambiguous and that other well-known experts were not included. Kais Saied, the first to decline, later said that "they sought to legitimise their choices. (...) I refused to play that game. (...) There is a legal technique, certainly. But the big choices are political choices. (...) Because it is a sovereign act, it is the expression of the popular will."<sup>82</sup> Nine experts nonetheless reviewed the text in cooperation with the Drafting Committee.

Meanwhile, dialogue sessions by President Marzouki and the UGTT continued to deliberate on the broader issues of the political transition. After the failure of the presidential track to produce consensus among the invited political parties, the UGTT initiative continued over multiple rounds at the Tunis Conference Centre. The meetings now included the three

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<sup>82</sup> Author interview with Prof Kais Saied, Faculté des sciences juridiques, politiques et sociales de Tunis, 14.05.2018, Tunis.

presidents (head of state, government, and NCA), fifty political parties, now including all troika coalition partners as well as numerous civil society organisations. The scope of discussions entailed the completion of the constitution with the controversial choice of the political system, the electoral calendar after that, as well as socioeconomic choices and the security situation. The purported aim of the discussions was the adoption of a roadmap with concrete dates for agreements on the specific issues (M'rad 2015:34–35).

While the National Dialogue was still discussing constitutional issues, the drafting committee resumed its work, incorporating some of the agreements found at the Dialogue. As speculation about the time of the release of the fourth draft ran high toward the end of May, some observers attributed the rush to conclude drafting to a hope on the part of NCA President Ben Jaafar and others to finalise work on the historic date of 1 June. On that day in 1955, Habib Bourguiba had returned triumphantly to Tunis, having secured internal autonomy. Four years later, the 1959 Constitution was adopted on that day (Ben Abdesslem 2018b:353–60). In 2013, the coordination committee added a 10<sup>th</sup> chapter on transitional provisions to the draft without the constituent committees' input and at a late stage of the drafting process, which left little time to review and debate the additions' implications.

#### 7.2.10 A fourth draft

Most differences between the third and the fourth draft of the constitution were editorial and only a very small part concerned the idea of citizenship. In the preamble, the reference to Zionism was toned down, now referring to “all forms of occupation and racism” rather than “discrimination and anti-human racism including Zionism”. In a new continuity with the 1959 constitution, the aim of Maghreb Unity was taken up in the substantial part of the constitution, representing a new Article in chapter 1, which also saw a change of structure and – in places – new framing of issues. For instance, the obligation of military service is now subsumed to a general “sacred duty for all citizens” to protect “the unity of the homeland” and its dignity (Art. 9). Similarly, Chapter 2 on Rights and Freedoms now begins with Article 20 on Equality (previously in Chapter 1). Among other small changes, citizens are now given a constitutional right to leave the country on top of the right to enter it. A considerable change was the introduction of a “limitations clause”, which prescribed that restrictions on the rights guaranteed by the constitution can only be introduced under certain conditions. They required proper justification (e.g. the protection of the rights of others or national security) and could not touch the rights' essence. On the political system, the changes delineated the responsibilities between president and prime minister more clearly though it still resembled a

complex power-sharing arrangement. However, the president's role on foreign and security policy is bolstered in the fourth draft. A major addition is the tenth chapter on transitional provisions, which regulates the approval and staggered entering into force of the constitution as well as assigning functions for the time of its gradual coming into force.

Both because of the changes the Drafting Committee undertook and because of the process preceding, the release of the fourth draft precipitated the preliminary collapse of parliamentary work on the constitution.<sup>83</sup> At the heart of the contestation was the question what body legitimately represented the *pouvoir constituant* (Sieyes 1963), the unconstrained expression of popular sovereignty in constitution-making and on whom what decisions would be binding. If previously the legitimacy of the NCA had been questioned as such, within the Assembly the prerogatives of the different constituent committees were contested. The unannounced official presentation by NCA President Mustafa Ben Jaafar on the 1 June 2013 triggered immediate protest by opposition constituents as well as some coalition members. Their contention was that the draft did not correspond to the work of the constitutional committees and that the Drafting Committee had exceeded the scope of its mandate by amending articles that constituent committees had agreed on in draft 2bis and adding a chapter on transitional provisions. The staggered entry into force of the constitution in the latter without clear deadlines appeared to the opposition as if the government kept itself the option of continuing the transitional phase – and thus its incumbency – indefinitely (Gobe and Chouikha 2014). A legal challenge by 70 members in the courts remained unsuccessful as the administrative tribunal argued it had no jurisdiction on the issue. As the NCA Bureau at first mostly overlooked the protestations, the draft was submitted to the constitutional committees as per rules of procedure. Within two days, the committees could submit a report with a summary of their views on the sections the respective committees had first authored. Protesting what he viewed as a lack of adherence to the agreements in the National Dialogue and the self-empowerment of the Drafting Committee, the President of the Committee on Legislative and Executive Powers, Amor Chetuoi (CPR) refused to call a meeting. This effectively blocked the entire process. After an intervention by NCA President Ben Jaafar, all committees ended up submitting their reports, in which the committee on the judiciary enclosed a protest note against the drafting committee's decisions to amend the substance of

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<sup>83</sup> Secular members of the NCA nonetheless found numerous points of contention in the draft. For instance, the use of language in describing the right to life as “sacred”, but allowing for the death penalty, a lack of emphasis on socioeconomic rights, and the possibility of legalising the carrying of arms by groups other than the security forces drew criticism (Ben Abdesslem 2018b:355).

articles. A final report by the drafting committee with the final constitution draft was soon officially signed by Ben Jaafar and the General Rapporteur Khedhr and submitted to President Marzouki for review. Opposition members used the plenary debate on 1 July – scheduled as the last step prior to article-by-article voting on the constitution – to loudly protest, forcing Ben Jaafar to suspend proceedings. The detractors of the process insisted that draft 2bis – never published as a consolidated draft – was the legitimate final constitutional draft (The Carter Center 2015:37–39). This was based on the accusation of overreach on the part of the Drafting Committee within the framework of the rules of procedure. Crucially, that committee’s composition was not really representative of the political forces within the NCA as only two of them were part of the opposition and due to the shifting political affiliations of many members. As the number of entirely unaffiliated members grew to become the second largest after Ennahda’s political group (almost a quarter of all members), merely two members of the Drafting Committee were unaffiliated (equivalent to 12.5 per cent of the committee votes), representing a very diverse set of members. An initiative by Ben Jaafar on the same day eased tensions and allowed for the resumption of the two-week plenary discussions on the draft: He announced the creation of an ad-hoc Consensus Committee to discuss the key contentions around the text.

As the Tunisian transition process began to stutter, regional politics impacted it with full force. The delicate negotiations around the composition of the Consensus Committee coincided with momentous events in Egypt. The country had adopted a new constitution the previous year and like Tunisia had elected an Islamist party to government. On 3 July, following mass protests, Egypt’s powerful military removed the Muslim Brotherhood-affiliated President Mohamed Mursi and suspended the constitution. The coup d’état in the fellow Arab nation happening in a similar political constellation (Islamists in government and secular street opposition) had a profound impact on political actors in Tunisia, not least because Ennahda realised that its grip on power had become ever more tenuous.<sup>84</sup> Polling data at the time suggested that Beji Caid Essebsi and his Nidaa Tounes party could count on electoral success in future elections and possibly form a governing coalition with the leftist forces represented by the assassinated Chokri Belaïd, which had gained in popularity. Meanwhile, according to Ennahda’s former Foreign Minister Rafik Abdessalem, the party realised it could meet the same fate as Egypt’s Islamists (M’rad 2015:49–50). Amid this new

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<sup>84</sup> Author interviews in Tunis. Multiple interviewees (MPs, CSO activists and others) mentioned events in Egypt unprompted.

political context, the inclusiveness of the different political currents within the Consensus Committee was prioritised over proportional representativeness. This particularly benefited the heterogeneous groups of the democratic bloc and the equally diverse group of unaffiliated members (Al-Bawsala n.d.). Holding 11 out of 23 seats in the Consensus Committee, the troika coalition did not command a majority in that body. To some extent this reflected the widespread view that the government had exceeded the legitimacy of its mandate after missing the one-year deadline and failing to reign-in the deteriorating security situation. The format proved successful in finding compromises on multiple contentious issues in the draft and key agreements were reached on 24 July 2013. Key civil society organisations now specifically lobbied the Consensus Committee, seeking to strengthen human rights provisions in the constitution and align them with international standards.<sup>85</sup>

Just as political actors had found a mechanism to overcome the polarisation and mistrust between parties, the process was all but derailed by the assassination of NCA member Mohamed Brahmi on the 25 July 2013.<sup>86</sup> An outspoken critic of Ennahda, his killing on Tunisian Republic Day had massive reverberations within the NCA and outside as it mobilised politically and deepened political polarisation and mistrust. Protests erupted on the day of the assassination, calling for the dissolution of government and NCA, numerous opposition constituents withdrew from the Assembly's work, and the UGTT announced a general strike for the following day. Quickly, competing interpretations about the assassinations emerged. Among opposition members, many accused the government of failing to protect Brahmi following the assassination of Chokri Belaïd in February while others accused the Ennahda-dominated administration of complicity. Amid similarities between the murders, the fact that Belaïd's killers had not been brought to justice prompted profound public anger. Government supporters tended to interpret the murder as an attempt by forces that sought to discredit the government and tilt Tunisia into conflict. About three weeks after the Egyptian military had unseated an Islamist-led government after massive street protests against it, there was substantial street mobilisation in multiple areas of Tunisia, including Sidi Bouzid, Brahmi's constituency and starting point of the protest wave that unseated Ben Ali in 2011 (Le Monde 2013; Nawaat 2013). In Tunis, 42 NCA members suspended their work in the Assembly and began a sit-in opposite its building under the slogan "Errahil" (departure),

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<sup>85</sup> E.g. via the joint statement by Tunisian NGO Al Bawsala and the International NGOs Amnesty International, Human Rights Watch, and the Carter Center (2013), which interviewees in Tunis also referred to.

<sup>86</sup> When asked about turning points within the CMP, the assassinations of Belaïd and Brahmi were the most mentioned events.

attracting numerous protesters. They demanded the dissolution of the constituent body as well as the government. By late August, the group had grown to 58 and over 100,000 people joined the protests (Al-Bawsala n.d.; Chayes 2014). For constituents like Noômane Fehri and others, the Brahmi assassination reinforced concerns that Ennahda was not only exceeding the one-year mandate but used its position within the government to “capture the apparatus of the state”<sup>87</sup> – an accusation that even been uttered by interim President Marzouki. Indeed, records emerged, which showed that between December 2012 and February 2013, 87 per cent of all public sectors recruitment decisions were partisan and that 93 per cent of those were Ennahda-related. After the deep disentanglement under Bourguiba and Ben Ali between ruling party and state bureaucracy, there were growing concerns that the neutrality of the civil service was still, or again, at risk (Hachemaoui 2013:11). The high level of mobilisation also “allowed Nidaa Tounes to use public opinion to reverse the balance of power” between Ennahda and the secular opposition, drawing on key narratives of the Bourguiba and Ben Ali regimes: national unity and *Tunisianité*, to which it contrasted Ennahda’s political Islam as foreign (Boubekeur 2015:117).

### 7.3 *Post-sovereign constitution-making: mid-2013 to 2014*

Among the four models of constitution-making distinguished by Arato (2016, 2017), Tunisia effectively underwent two. Initially, Tunisia’s CMP was best reflected in the model of a revolutionary constituent process, where all (formal) political power is concentrated in the institution of the elected constituent assembly, the supposed legitimate embodiment of the people’s will. In post-Ben Ali Tunisia, the “mini-constitution” stipulated that the NCA fulfil that role. By mid-2013, this model had become untenable as an increasing number of relevant political actors questioned and challenged the legitimacy of the NCA-led process after it had exceeded a year and the security situation deteriorated (Murphy 2016) – both input and output legitimacy were thus challenged. As a consequence, the remainder of the Tunisian CMP resembled more closely a modified version of what Arato (2017:448) has called post-sovereign constitution-making (PSCM). Usually a model “where old regime actors formally negotiate with oppositional forces concerning interim constitutional rules under which a new constitution can be made”, the remainder of the Tunisian CMP mainly resembles PSCM due to the reduced role for formal institutions and the increased influence of élite bargaining. The legitimacy problem this generates can be seen as a strength as the protagonists of PSCM often

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<sup>87</sup> Author interview with Noômane Fehri, former NCA member, 19 October 2017, Tunis.

“mobilize inclusion, consensual decision-making, public openness, strict legality and a new democratic election” (2017:448). Indeed, if in Tunisia the dynamics of the political party system had been changed dramatically with the rise of Beji Caid Essebsi’s Nidaa Tounes, the assassination of Mohamed Brahmi and the events following it significantly shifted the locus of political contestation from the formal institution of the NCA to informal venues and institutions such as street protests and informal negotiations between the leaders of political parties and CSOs. Formally and de jure, Ennahda and its coalition partners were still in full control of the government. Yet the massive street protests in Tunisia coupled with the events in Egypt, where the government had been ousted by a coalition of the military and “the street” nourished a perception on all sides that their de-facto power was in fact more tenuous. Thus, in spite of being formally in charge of the country’s institutions, the distribution of power between the government and opposition began to balance as the political process turned increasingly informal.

### 7.3.1 From formal to informal processes

NCA President Ben Jaafar’s decision on 6 August to suspend the work of the Assembly altogether reflected the gridlock within the formal institutions and their failure in negotiating the transition. Besides the constitution itself, the NCA had failed to agree on a legal framework for an electoral commission or the date of the elections it was supposed to supervise under the new constitution (though the troika coalition had committed to the end of 2013). “Ennahda was not at all happy” about the suspension, Ben Jaafar said later, comparing the situation to a potential tipping point that required quick intervention. Amid high levels of mobilisation on the street and recalling that in August many saw the country as on the brink of civil war, he worried that a single event could trigger “fire all over the country”, particularly since there “were people who were prepared to fight anything to set fire to [the country] and to make a concerted effort [to implement an Egyptian scenario].”<sup>88</sup> Ben Jaafar sought to pre-empt such an escalation with the NCA’s suspension. In spite of another severe security failure – in an unprecedented attack by suspected terrorists on Tunisian security forces in the border mountains to Algeria, eight soldiers were beheaded – the massive countrywide protests on 6 August remained peaceful. M’rad (2016:123) has argued that in the latter phase of the political transitions in Egypt and Tunisia following the ousting of the Ben Ali and Mubarak regimes, “the street” emerged as the central political actor. In Tunisia,

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<sup>88</sup> Author interview with Mustafa Ben Jaafar, President of the National Constituent Assembly, 18.10.2017, Tunis.

Assembly member Ben Abdesslem (2018a:66–72) has observed that in contrast to the anti-Mursi protests in Egypt, street mobilisation continuously decreased after a massive demonstration on 13 August in spite of Ennahda’s intransigence in the transition negotiations. This raised the relative importance of élite bargaining, which occurred in different fora.

The two most salient bargaining processes were the widely reported initiative by civil society to restart a structured National Dialogue under the leadership of the UGTT and negotiations between the leaders of Ennahda and Nidaa Tounes. Shortly after the Brahmi assassination, established Tunisian civil society had reacted to the political gridlock with an initiative that sought to force a settlement. Reviving the National Dialogue process that began in the previous year, the UGTT on 30 July called for the appointment of a technocratic government of independent personalities as well as a committee of experts to revise the latest constitutional draft, ensuring “that it is stripped of everything that could affect the civil character of the state, its republican regime, and the foundations of democratic choice” (Leaders 2013). The expert constitution, the UGTT proposed, should be binding on the NCA. The trade union was joined by the Bar Association, the employers’ group UTICA, and the Tunisian League for Human Rights (LTDH), soon coined the “quartet” as a group. Ennahda hesitated for weeks to participate, setting various preconditions and viewing a technocratic government as a potentially unofficial ally of the opposition under the guise of technocracy (Gobe and Chouikha 2014).

While political polarisation in Egypt had deteriorated into mass violence, two Tunisian businessmen facilitated a meeting between Ennahda President Rached Ghannouchi and Nidaa Tounes leader Beji Caid Essebsi in Paris. The two political heavyweights and leaders of their respective camps had their first proper conversation in two years. It is widely assumed that a pivotal oral agreement between the “two sheikhs” was struck: Ennahda would let Essebsi seek the presidency while the Nidaa Tounes leader would shield the Islamists from the most repressive ardour within his anti-Islamist camp, particularly those affiliated to the United Arab Emirates (Bobin 2019). Another set of meetings involved the Algerian government, which was concerned about its own and regional security amid the deteriorating situation in Tunisia and preferred a negotiated settlement (cf. Ghilès 2013:2).<sup>89</sup> Notably, neither Ghannouchi nor Essebsi held elected office at this time but were formally only party leaders. Their negotiations were nonetheless ascribed massive political influence – including their

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<sup>89</sup> Author interview with Joachim Paul, Heinrich Böll Foundation, 18.04.2018, Berlin.

characterisation as the “two sheikhs”. The restarting of the CMP in the meeting’s immediate aftermath is highly suggestive of their powerful role, too while at the same time indicating the importance of informal channels in resolving political conflict at the time.

Two weeks after the Paris meeting, a round of negotiations between the Quartet and the troika government began and a week after the Algiers meetings, the Quartet unveiled a Road Map aimed at organising the remainder of the political transition within predefined stages. The plan included the relaunch of the National Dialogue with representatives of all parties present in the NCA where four cornerstones of the Road Map would be announced: Basic agreement on the formation of a technocratic government headed by an independent, resumption of NCA sessions, beginning of negotiations on the new independent head of government, approval of the Road Map and an electoral timetable. The milestones were joined with tight deadlines, aiming to approve a new cabinet within two weeks, and the adoption of a new constitution within four weeks as of the resumption of NCA activity. While street mobilisation in the middle of Ramadan remained high, intense negotiations with the political parties on their approval of the roadmap followed, from which UGTT leader Houcine Abbasi emerged as a national hero, praised for his tenacity in the long meetings. With the political parties’ signature on the Road Map on 5 October, the National Dialogue could launch another twenty days later after Ennahda Premier Ali Lâarayedh committed principally to resign in favour of a technocratic government (Chayes 2014; Gobe and Chouikha 2014). In parallel, the ANC’s consensus committee found agreements on several contentious points during meetings in late October. These include elements in the judiciary and the removal of the state’s religion from the “eternity clause” in Article 140, but crucially also the changes to the candidacy requirements for the presidency. The removal of an age cap opened the way for a candidacy for octogenarian Beji Caid Essebsi of Nidaa Tounes while opening the candidacy to bi-nationals was seen as favourable to Ennahda, which counts numerous members with several passports among its ranks after years in exile as well as London-based binational Ex-Ennahda figure Hachmi Hamdi (Ben Abdesslem 2018a:163–69; B’Chir 2013).<sup>90</sup>

The economic situation deteriorated, triggering downgrades by rating agencies and the suspension of IMF and EU financial support programmes. After little more than a week of National Dialogue sessions, the clock was already stopped as parties could not agree on an independent prime minister. As the process stalled, 17 EU ambassadors visited the UGTT’s

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<sup>90</sup> Author interview with Yousef Cherif, Political Analyst, 10.05.2018, Tunis.

headquarters on 28 November, signalling EU support for the National Dialogue and the Quartet. On 4 December, Abbasi gave the National Dialogue ten more days before declaring it failed. When the parties could agree on the Industry Minister Mehdi Jomaa as independent candidate on 14 December, the process could continue, and the National Dialogue resumed on 25 December.

### 7.3.2 As the sit-in ends, the NCA restarts

Within the framework of the National Dialogue, the withdrawn Assembly members had agreed to return to drafting and subsequently, the pace of constitution-making increased as National Dialogue and NCA worked in parallel. In the final week of the year, the consensus committee held around 20 meetings to speed up proceedings. At the same time, the actual locus of decision-making became harder to identify. Legally, the NCA was still in charge of constitution-making and was the only legitimate institution to adopt the final result. However, “that did not mean that the National Dialogue did not influence the process of finalizing the Constitution” (M’rad 2015:75). As the secretary general of the NCA recalled, the Assembly at the time no longer reflected the political landscape and therefore, “from November/October, political consensus was no longer the consensus of the Assembly and the consensus committee. It was the political consensus at the level of the National Dialogue. That is, coming from outside the Assembly.” He added, “We couldn’t do anything else”.<sup>91</sup> The NCA and the National Dialogue were in regular exchange. Nonetheless, there were some redundancies in the two institutions’ work, leading to some laments that it lengthened the whole process. Both held hearings with constitutional experts, because they preferred working with different personalities. “So, basically, the National Dialogue was repeating the work we had done. This wasted a lot of time”, argued Mabrouk Hrizi, 2<sup>nd</sup> Deputy Rapporteur of the Joint Coordination and Drafting Committee.<sup>92</sup>

The agreements of the National Dialogue and those of the Consensus Committee opened the way for an intense “marathon” of constitution-making in the plenary of the NCA, where each article of the draft as well as amendments to it was debated and voted upon. The debates began on 3 January and the initial plan was to complete the process within eleven days to promulgate the constitution on the anniversary of the revolution, the 14 January. That proved

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<sup>91</sup> Author interview with Adel Bsili, Secretary General of the National Constituent Assembly, 6 October 2017, Tunis.

<sup>92</sup> Author interview with Mabrouk Hrizi, former NCA Member and 2<sup>nd</sup> Deputy Rapporteur of the Joint Coordination and Drafting Committee, 24.10.2017, Tunis.

too ambitious. Broadcast on live television, the event character of the process contributed to an appropriation of the constitution by ordinary Tunisians, many of whom were unusually politicised at the time. “I remember my mom was watching”, said parliamentary transparency activist Ons Ben Abdelkarim. Suddenly, “you find (...) regular people commenting on the right of conscience - you know, what's happening in the country? And you have, like, ten million constitutional experts in the country debating about the Constitution.”<sup>93</sup> Unburdened of the remainder of the transitional political questions outside the constitution itself and cognisant of the Consensus Committee that could tackle disagreements, questions of ideology and principle re-emerged in the plenary debates. The first controversy was sparked by a proposed amendment that would see a commitment in the preamble to Tunisia’s “Mediterranean identity”.<sup>94</sup> For some constituents, this resembled an implicit recognition of Israel and therefore unacceptable. The proposal failed, as did the suggestion to include “the fight against all forms of colonialism and racism, and at their head Zionism”. In another instance, current events had a direct impact as the already-approved contentious Article 6 was debated and amended yet again. Ennahda member Habib Ellouze had called leftist member Mongi Rahoui an “enemy of Islam”, triggering death threats against the latter and a plenary debate. After intense and ultimately fruitless debates in the Consensus Committee, followed by plenary debate, the amended Article 6 now not only guaranteed the freedom of religion and conscience while making the state “the guardian of religion” and “protector of the sacred”, but also outlawed takfir – the practice of calling a Muslim an unbeliever (Ben Abdesslem 2018a:211ff; cf. Ryan 2014).

Out of roughly 200 amendments to the constitutional draft, 15 were consensual amendments originating in the Consensus Committee, all of which passed. However, the consensual amendment to Article 45 on women’s rights passed with only a relatively small margin. Out of the remainder of the amendments, only a relatively small fraction was adopted. Where agreement on articles could not be found, the vote was postponed allowing discussions in the Consensus Committee prior to another round of voting and progress was made on articles that could be adopted. As a result of this backlog, a number of amendments came up for votes in the latter stage of the process and their success rate was higher than the earlier proposed amendments. Among the last-minute disagreements were details on the judicial sector and the

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<sup>93</sup> Author interview with Ons Ben Abdelkarim, Al-Bawsala, 04.10.2017, Tunis.

<sup>94</sup> Unless other references are indicated, this section used the vote data and chronology by Marsad.tn (Al-Bawsala n.d.)

candidacy requirements for the presidency. Having found consensus on the remaining questions on 23 January, the final draft was read aloud by the General Rapporteur Habib Khedhr and his two deputies on 26 January followed by a vote on the project. It passed by a wide margin with 200 voting for, 12 against, and 4 abstaining, allowing the constitution's promulgation the following day.

#### *7.4 Discussion*

The above sections have traced and analysed the changes of constitutional text during the recent Tunisian CMP within its political context. Textually, this showed that the constitutional project became increasingly adherent to a liberal-democratic notion of equal citizenship as sources of discrimination and ambiguities in the text that could be interpreted in a discriminatory way were erased and references to inclusivity added.

Contextually, the shift from religious normativity in the constitution to provisions in which religion plays a (still ambiguous) secondary role is also a product of a power shift that occurred during the CMP as secular forces reasserted their sway vis-à-vis the Islamist forces that dominated the NCA. The analysis shows that at the peak of political polarisation, the influence of a political culture of constitutionalism on relevant agents who eschew political violence and emphasise legal and negotiated solutions. Despite some consensus that fundamental rights, popular sovereignty, and the rule of law should be contained in the constitution, most political agents only agreed on a procedural notion of constitutionalism, under which the constitution does provide the framework for legitimate action for the state and political actors. Yet not all actors put conditions on the process by which the constitution is drafted. In this, the process represented a continuity with Bourguibist and Ben Ali era political culture. The above outline of the CMP also shows the confluence of multiple factors that contributed to both polarisation between political forces and its subsequent resolution in negotiations. It should be noted, however, that while both the Consensus Committee and the National Dialogue were institutions reflecting inclusivity over majoritarianism, the inclusivity implemented here was horizontal, that is on the level of elites, and not vertical in the sense of popular participation (cf. Bisarya et al. 2017:259–62). Notwithstanding the election of the NCA and pressures exerted by street protests and civil society, the process was generally elite dominated with relatively few mechanisms that implemented popular participation effectively. However, in contrast to previous critical junctures, the post-2011 CMP was both considerably more participatory and inclusive of multiple political forces.

The above analysis relied on a chronological examination of the process informed by the thesis' theoretical and conceptual framework. In the following, some features of the CMP shall be discussed that affected the entire duration and therefore fit less into an individual timeframe of the above section.

#### 7.4.1 Formal and informal institutions and venues

Evidencing the influence of Tunisia's constitutionalist political culture, there can little doubt that despite the numerous pressures from outside its walls the NCA, and thus the legally responsible institution, remained the author of Tunisia's new constitution. Nonetheless, the above analysis of the CMP has also shown that there were not only structural constraints on the drafters such as institutional and economic structures that limited their freedom of action. Other relevant agents and events such as civil society, protests, and regional political developments had significant influence on the process within the Assembly. The confluence of street mobilisation with elite level bargaining outside the formal institutions is particularly noteworthy in this regard.

However, the question of formality and informality is not only one that concerns the relationship between the work within the formal institutions and without it. In the Assembly itself as well as within the remit of other formal elected offices, informal venues and practices have played an important role in the Tunisian CMP.

Within the NCA, the plenary and the committees were not necessarily the location of actual bargaining. It is not uncommon that the parliamentary plenary is used mainly for members' communication with the public rather than as a venue for negotiation as much of the detailed work is done in committees. However, for the NCA multiple members have pointed out that important bargaining between political groups and individual members happened outside even those formats. For instance, constituent M'Barek recalled that "The Bardo Palace had a cafeteria in the basement with a garden that was perhaps the place where most negotiations took place" (M'Barek n.d.:23). Perez (2016:244) has described that these dynamics, which undermined the formal decision-making structures of the NCA, also suited many party leaders – predominantly of the historical secular opposition – who preferred such less accountable decision-making over organised meetings of their members in Assembly.

On the broad bargaining between political currents, President Marzouki has referred to his Dar Dhiafa dialogue initiative as "just for the public, you know, to see 'look we had

discussion' and so forth", adding that "the real discussion were behind the scenes"<sup>95</sup>, a phrasing he used twice. Instead, Marzouki emphasised the importance of a weekly informal dinner he hosted at Carthage Palace, where important political questions would be discussed.

#### 7.4.2 Contested Expertise

A noteworthy feature of the Tunisian CMP was the contested nature of expert advice. Tunisia's academic community had numerous constitutional law experts well-versed in the international debates and scholarship on constitutional law and in that sense had the technical expertise for constitutional reform.<sup>96</sup> However, the revolution had also brought a contestation to the foreground that originated in the technocracy often promoted by the Ben Ali regime. Then, the supposedly neutral and narrowly technical expertise was used to confer legitimacy on what were in effect structures of economic, and by extension, political and social domination and control (Hibou 2011:xxii). Unsurprisingly, many now elected politicians as well as civil society activists and ordinary citizens were now suspicious of such technical experts, especially where individuals had even worked for the regime (M'Barek n.d.:12). Early on, NCA President Mustafa Ben Jaafar had tried to establish a permanent committee of constitutional experts within the Assembly, but outside his own political group Ettakatol his proposal was met with fierce resistance. "It was significant to see to what extent this text produced unanimity against him" as members of all stripes threatened their resignation in case such a body were created (Ben Abdesslem 2018b:248). Their concern was that the proposed committee "would have more power than the MPs themselves. And it was the same committee that was the Ben Achour committee. So, we refused that", said independent NCA Member Mabrouk Hrizi,<sup>97</sup> reflecting the widely shared attitude of a perceived competition between the electoral legitimacy enjoyed by the members and the scholars' authority rooted in their expertise. "Me and my colleagues we claimed, and I think it was our right, we've been elected to draft this constitution; a constitution isn't technical text, is a political text", NCA Vice President Meherzia Labidi said.<sup>98</sup> At the same time, constitutional scholars like Chawki

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<sup>95</sup> Author interview with Moncef Marzouki, former President of the Republic of Tunisia, 16.05.2018, Tunis.

<sup>96</sup> Author interview with Prof Slim Laghmani, Faculté des sciences juridiques, politiques et sociales de Tunis, 14.05.2018, Tunis.

<sup>97</sup> Author interview with Mabrouk Hrizi, former NCA Member and 2<sup>nd</sup> Deputy Rapporteur of the Joint Coordination and Drafting Committee, 24.10.2017, Tunis.

<sup>98</sup> Author interview with Meherzia Labidi, former NCA Vice President (Ennahda), 7 May 2018, Tunis.

Gaddes, Secretary General of the Tunisian Constitutional Law Association were aghast at the lack of legal expertise among the Assembly's members:

So, we explained to them, but they didn't understand anything. Nothing, nothing at all. (...) the difference between a parliamentary regime and a presidential regime. (...) What does the legislative process mean anyway, how does it work? What are the different categories of laws? Justice. What does the independence of the judiciary mean? Is it justice or judges? (...) [T]hey did not have the necessary background to be able to understand that. After all, you have to spend four years going to law school to be able to understand all that. Theoretically, they had one year to understand all this and then they had to reflect on the Tunisian situation and find a solution to find rules or adopt these rules for the Tunisian situation. To make a constitution that would be good for the next 50, 100, 100 or 200 years, it was a wizard's trick. (...) It was impossible.<sup>99</sup>

Members were conscious of some experts' condescension, complaining that "they were making fun how the MPs were not able to write well. They were making fun of the preamble" despite the presence of jurists among the members. "There was an attempt to dominate over the MPs".<sup>100</sup> Via informal channels, the debarred constitutionalists nonetheless took influence, organising colloquiums, giving interviews to the media or providing their expertise to individual members.<sup>101</sup>

The mistrust – particularly among Ennahda members – against Tunisian scholars was also rooted in the fact that the latter's political sympathies lay squarely with the anti-Islamist camp. Moreover, Ennahda counted few constitutional lawyers among its members and not even big names in public law. As Islamists had been effectively barred from public administration under authoritarianism, those pursuing a legal career would usually go into private practice (Ben Abdesslem 2018b:246). For Chawki Gaddes, the constituents' mistrust vis-à-vis Tunisian expertise was thus "perfectly normal". In the midst of transition, in provisional institutions, trust in others was generally low and as an association founded prior to 2011, the Tunisian Constitutional Law Association was met with suspicion despite its distance to the former regime.<sup>102</sup> A consequence of this mistrust was a preference in the

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<sup>99</sup> Author interview with Chawki Gaddes, Secretary General of the Association Tunisienne Droit Constitutionnel, 02.05.2018, Tunis.

<sup>100</sup> Author interview with Mabrouk Hrizi.

<sup>101</sup> Author interviews with Chawki Gaddes, Mabrouk Hrizi, and Prof. Slim Laghmani.

<sup>102</sup> Author interview with Chawki Gaddes, Secretary General of the Association Tunisienne Droit Constitutionnel, 02.05.2018, Tunis.

Assembly for the input of international legal experts whose comments were often touted by Ennahda members when it suited their ends. In turn, such expertise was often accused as not suitable for the specificities of the Tunisian context. In this state of affairs it is worth noting that Tunisian legal professionals are seen by some as “deeply conservative” (Al-Ali 2016:387–88) as the attachment by many to the 1959 constitution reflected.

### 7.5 *Conclusion*

This chapter has argued that Tunisia’s latest CMP is notable for the extent to which it highlights the country’s political culture of constitutionalism and thus a factor that long precedes this specific critical juncture. Similar to previous such episodes of political change, its relevant political agents largely eschewed political violence and sought a negotiated, legal settlement. While many actors long insisted on their electoral legitimacy, they were willing to forego some of their influence in favour of maintaining long-term political stability and arriving at an agreement on procedural rules. In the interest of achieving this, they also gave up on some substantive demands regarding the constitution. Notably, not all political actors accepted electoral legitimacy as a prerequisite for legitimate constitutional authorship throughout. The consensus on constitutionalism was thus limited to procedural constitutionalism, i.e. the idea that the constitution provides the legitimate framework for political and state action. The 2011 commitment to finalise the constitution within a year provided a potent political tool for those agents to challenge the legitimacy of the process past 2012.

Beyond long-term legacies of political culture, pathway dependencies generated in 2011 and at the beginning of the assembly-based process contributed strongly to the dynamics of the CMP. The choice of the electoral system resulted in a heterogenous assembly, which was strengthened as an institution by the provisional public powers act as the latter effectively introduced a parliamentary political system and thus a radical shift away from Tunisia’s tradition of presidentialism under which the executive had dominated politics. Thus, in stark contrast with previous Tunisian CMPs, a variety of forces both within and outside the NCA influenced constitution-making. For instance, in the pre-1959 CMP, the neo-Destour dominated the NCA and was in turn dominated by Habib Bourguiba whose concessions in the constitution to other political players were limited. After 2011, power was more dispersed and the government of the day was therefore not able to constitutionalise its preferences alone. While still a mostly elite-driven process, popular participation via free and fair elections to the NCA, civil society engagement with the Assembly, and street politics was influential. The

example of gender equality in the constitution is a good example for the impact of extra-institutional politics. The protection of rights and liberties in the decree-laws in 2011 meant that citizens could make effective use of their citizenship by participating both institutionally and through other channels.

## 8 The 2014 constitution: A (con)textual analysis

### 8.1 *Introduction*

The purpose of this chapter is to provide an analysis of the 2014 constitutional text and subsequent implementation. It argues that the 2014 constitution provides a legal framework within which citizenship is discursively constituted mostly as an equal institution though some ambiguities and exceptions to this remain. There are also better legal protections for equal citizenship than previously. However, an analysis of political practices since the constitution's promulgation shows that the constitution has not yet become fully normative in Löwenstein taxonomy as gaps remain between the mostly equal citizenship model in the text and political practices since its promulgation.

The chapter begins with a summary of the constitutional provisions, followed by an analysis of the model of citizenship in the text views through the lens of its four dimensions, highlighting some tensions between the two aims of the constitution, which are both to secure equal citizenship and to represent a more authentic expression of Tunisian identity than its predecessors. Competing interpretations of the constitution are discussed, paying particular attention to how it compares to previous constitutions and CMPs. The subsequent section discusses whether the implementation of the constitution so far – over the last six years or so – reflects normative constitutionalism and concludes that the remaining gaps indicate that it is not yet fully normative. The final section analyses citizenship in political practice, arguing that despite evident and pivotal change, in political practice there also are considerable continuities.

### 8.2 *The substance of the constitution*

The 2014 constitution begins with a preamble that invokes in its first paragraph not only the struggles and sacrifices of Tunisians made in the revolution that led to the latest constitution building process, but also pays tribute to the struggle for independence and of state-building. The text continues by emphasising the Tunisian people's commitment to both "the teachings of Islam" – a formulation borrowed from the 1959 constitution – and universal human rights. It invokes the country's Arab-Muslim identity as well as its reformist movement before describing the political system to be established as "participatory, democratic, and republican" in the framework of "a civil state" as well as invoking other norms of liberal democracy (e.g. liberal rights and the separation of powers). The text also specifically states the ambition to

establish a system that guarantees respect for “the equality of rights and duties between all citizens, male and female, and equality between all regions”. After its declaration of universal values and Tunisia’s national and Arabo-Islamic identity and invoking “national unity that is based on citizenship”, the penultimate paragraph commits to the strengthening of Maghreb unity as a step to Arab unity as well as complementarity with African and Muslim peoples. Solidarity is expressed with “just liberation movements”, particularly that of Palestine. Finally, a paragraph is devoted to the preservation of the environment and sustainability.

The first twenty articles of the constitution are devoted to “general principles”. What is most immediately noticeable and worth highlighting is that the first two articles are protected from amendment by what is equivalent to an “eternity clause”. Article 1 is taken over verbatim from the 1959 constitution’s ambiguous compromise phrasing on the character of the state and its relationship to religion:

Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended.

Article 2 extends the list of principles and states

Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law. This article might not be amended.

By using yet more compromise language in the form of the little-described concept of the “civil state”, Article 2 serves as a guide to the interpretation of Article 1, which otherwise may be read as making Tunisia a religious state. Instead, Article 2 provides that the state is based on positive, not religious, law. Article 6 elaborates on the latter by prescribing both that the state is the guardian of religion, protecting the sacred, and by guaranteeing the freedom of conscience and belief. These provisions set up complex state-religion relations distant from the archetypical models of *laïcité* on the one hand and theocracy on the other. Popular sovereignty is enshrined in Article 3, which describes elections and referenda as institutions for its exercise. As per Article 20, the expression of constituent power also weighs higher legally than does international law.<sup>103</sup> Among the duties of citizens, chapter one cites military service to protect “the unity and integrity of the homeland” in Article 9 and the payment of taxes (Art. 10). Reflecting the revolution’s characteristics, the national motto is amended to “freedom, *dignity*, justice, and order” (Art. 4, emphasis added), youth is specifically

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<sup>103</sup> This is actually in contravention of international public law itself. The Vienna Convention on the Law of the Treaties foresees in Article 27 that states cannot invoke domestic law for non-implementation of a treaty.

mentioned (Art. 8), and an article on social justice includes the ambition to establish balance between regions (Art. 12) while another makes decentralisation of the state a general principle (Art. 14). Finally, public services and education are supposed to be impartial and non-partisan (Arts. 15 and 16) as is true for the security forces, which hold the monopoly of violence (Arts. 17-19).

A familiar list of fundamental rights is contained in Chapter 2, which in Articles 21 to 48 contains rights of the first to third generation, i.e. from civil and political rights (e.g. freedom of opinion and expression in Article 31, the right to vote in Article 34, or the right to assembly in Article 37) to socioeconomic and cultural rights (e.g. right to health in Article 38 and right to work in Article 40) to more recent innovations (e.g. right to a healthy environment in Article 45). It is significant that this chapter begins with the assertion that “[a]ll citizens, male and female, have equal rights and duties” in Article 21 – this affirms the hotly contested issue of gender equality while emphasising equal citizenship more generally in this symbolically prominent place. The article further affirms that the “state guarantees freedoms and individual and collective rights to all citizens and provides all citizens the conditions for a dignified life”. However, it is worth pointing out that this phrasing could justify discrimination against non-citizens. Given the ambiguities on the relationship between state and religion in the first chapter, Article 31 has a key function as it guarantees the freedom of opinion, thought, expression, information, and publication. This bolsters the liberal provisions made in Article 6. The right to vote in Article 34 is conjoined with gender equality in that the state “seeks to guarantee women’s representation” in elected bodies, constitutionalising ambitions such as the 2011 electoral code, which sought to bolster women’s representation in the NCA by requiring female candidacies. In Article 46 on women’s rights, parity in elected assemblies is set out as an aim. The provision also commits to not only maintain accrued rights, but to “strengthen and develop” them and seeks the eradication of violence against women. The theme of identity – both national Tunisian and Arabo-Muslim – is picked up in Article 39 on the right to education. It specifically provides that education should “consolidate the Arabo-Muslim identity and national belonging in the young generations”, while also furthering openness to the world and human rights. The chapter concludes with a limitations clause in Article 49, which provides that any restriction on the rights and freedoms the constitution grants can only be established by law, must not compromise its essence, and must be necessary as well as proportionate to its aim. Another “eternity clause” also protects the rights and freedoms from amendment, effectively giving them a supraconstitutional character.

The political system is mainly set out in chapters three and four though the constitutional court in chapter five does also play a political role in parts. Overall, the new institutional arrangement does not derogate entirely from the Tunisian tradition of presidentialism. However, in a complex arrangement, the president shares executive authority with a relatively powerful Prime Minister whose authority is based on support in the parliament, which also emerges as a powerful institution.

Legislative power is vested in the unicameral parliament named Assembly of Representatives of the People (Ch. 3), though referenda are possible. Beyond the fairly common provisions such as immunity for elected members (Art. 68), four points are worth highlighting in the chapter on legislative power. The first relates to the institution of the parliament, whose independence from other institutions is emphasised and bolstered institutionally in Article 52. Second, the constitution sets up some concrete rules for the procedures within the parliament, such as the proportional representation in committee composition (Art. 59) and the role of the opposition, which is assigned chairpersonship of the finance committee and the position of rapporteur of the external relations committee as well as the right to form investigatory committees (Art. 60). Third, candidacy requirements are relatively open, allowing anyone above 23 years and with at least ten years of Tunisian citizenship to run for parliamentary office. However, the oath upon assuming it does include a religious reference to “almighty God”. Finally, decree-powers in the event of parliament’s dissolution are given to the president with agreement of the prime minister, setting up a potentially tense relationship between the two office holders in an already delicate political situation.

The executive power is shared between the prime minister and the president. The former – who is appointed by the president but needs a parliamentary majority (Art. 89) – has most prerogatives such as appointing government ministers and chairing cabinet meetings (Art. 92-93). The president’s symbolic position remains high though – the incumbent is head of state and “symbol of its unity”, guaranteeing its independence and continuity while ensuring respect for the constitution (Art. 72). As commander in chief, the president’s prerogatives are largely focussed on foreign and security policy and include the appointment of defence and foreign ministers (Arts. 77-78). However, the incumbent can play an important role in the establishment of the government, can influence legislation via their power to call a referendum and has appointment powers (Arts. 77, 82, 89). The president also has the power to dissolve parliament under certain circumstances and in imminent danger may “take any measures necessitated by the exceptional circumstances”, though these are supposed to have the aim of returning to a normal state of affairs and are scrutinised by other state institutions.

Any one individual can only ever occupy the office of the presidency two full five-year terms, consecutive or separate, and the constitution cannot be amended to change the number or the length of presidential terms (Art. 75). A noteworthy aspect of the presidency is its relationship with religion. Islamic political thought has long merged political and religious leadership and thus made the former conditional upon being Muslim. In contrast with the equality requirements between citizens in other parts of the constitution, the same requirement exists for candidates for the Tunisian presidency. They must also be at least 35 years of age and Tunisian since birth, and second passport holders must apply to relinquish their other citizenship(s) if elected (Art. 74). Like for other public offices (member of parliament, prime minister), the president's oath includes a religious reference (Art. 76). The incumbent also appoints the highest cleric of the country, the Mufti (Art 78). This again underlines the complex state-religion relations in the new Tunisian system.

The judiciary – subject of chapter five – is declared independent, as are judges, in the first relevant Article 102. The 2014 constitution reinforces this independence institutionally. Its mandate is not only the administration of justice, but also ensuring “the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms” (Art. 102). It is subdivided into four branches with different jurisdictions, out of which one is the Constitutional Court. A supreme judicial council (SJC) is the main body responsible to manage the affairs of the courts. It is administratively and financially independent (Art. 113), composed mostly of judges (Art. 112), and its subunits can lift the immunity from prosecution that judges normally enjoy (Art. 104) or transfer judges against their will (Art. 107). The president appoints judges but does so based on a concurrent proposal by the SJC (Art 106).

The most politically potent judicial institution is the constitutional court, which has broad constitutional review powers and at times becomes an arbiter between state institutions. The court may determine the constitutionality of existing legislation as well as drafts, international treaties, and parliament's internal rules of procedure (Art. 120). Its most political roles are the declaration of a vacancy of the presidency (Arts. 84), the impeachment of the president after a parliamentary motion (Art. 88), and the settling of disputes about the respective powers of president and prime minister (Art. 101). Its members are appointed by the president, the parliament, and the supreme judicial council, who each name four individuals for a single nine-year term (Art. 118). Three quarters of them must be legal specialists, but the remainder can be filled by other candidates.

Chapter six establishes five independent constitutional bodies, which deal with elections, media regulation, human rights, sustainable development/generational equality, and good governance/anti-corruption respectively. All of them “act in support of democracy”, are financially and administratively independent, and their members are appointed by the parliament. Some accountability and connection to other institutions is established via annual reporting to the Assembly (Art. 125). With the exception of the electoral body ISIE, all bodies are to be consulted on legislative proposals that touch upon their mandate area. The Human Rights and the Good Governance and Anti-Corruption Commission also have investigatory powers and transfer cases to the relevant authorities (Arts. 128 and 130).

Local government and decentralisation are the themes of chapter seven, which gives local authorities legal personality, and financial and administrative independence (Art. 132). Two aspects stand out: First, given regional inequalities, which contributed to the revolution, the decentralisation of public administration is what local government is based on (Art. 131). This is to “apply the principle of solidarity” when it comes to the distribution of resources (Art. 136). Second, local authorities are made more representative and their procedures more participatory as its councils’ members must be elected (Art. 133) and participation is ensured in planning issues (Art. 139). While the norm to achieve gender parity in elected assemblies (Art. 46) applies here, too, another provision toward inclusiveness on the local level is the requirement that youth be represented in local authority councils (Art. 133).

The barriers to constitutional amendments are high and outlined in chapter eight. The president or a third of the parliament’s members can initiate amendments, though the head of state’s initiative has priority (Art. 143). Proposed changes first require verification by the constitutional court whether they violate any of the eternity clauses.<sup>104</sup> A two-thirds majority in parliament can effect constitutional change, but the president can still submit the amendment to a referendum. The latter would require an absolute majority of votes cast (Art. 144).

The final provisions in chapter nine stipulate that the preamble is an integral part of the constitution (Art. 145) and that the constitution’s provisions should be interpreted as an indissoluble whole (Art. 146). Transitional concerns are dealt with in the tenth chapter. It regulates the staggered entry into force of the constitution, taking into account the necessity to hold presidential and parliamentary elections. It sets various deadlines for the holding of these

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<sup>104</sup> These concern the identity and regime of the state (Art. 1), the civil character of the state (Art. 2), the human rights (chapter 2), and the number and length of presidential mandates (Art. 75).

elections as well as the creation of the Supreme Judicial Council and the Constitutional Court. It also establishes a provisional authority for the control of constitutionality of laws, whose mandate does not extend to existing laws.

### 8.3 *Four dimensions of citizenship in the 2014 constitution*

Having summarised the contents of the new constitution above, this section analyses model of citizenship is reflected in the constitutional text of 2014, following the four dimensions of citizenship developed in chapter 2.

#### 1) *Inclusion and exclusion* – who is a full member of the community and on what basis?

In the 2014 constitution, citizenship is based on territorial residency. People can generally become Tunisian if they reside in the territory of the Tunisian state. However, they can also remain Tunisian citizens when abroad for longer as the electoral participation of Tunisians in the 2011 elections has shown. A mix of *jus soli* and *jus sanguinis* is thus present. It is notable that the constitution makes various efforts toward inclusiveness beyond the mere absence of discrimination. This is the case in the provisions that aim at parity in representation in elected bodies or the inclusion of youth in municipal councils. More substantially, and simultaneously also symbolically, the constitution represents an attempt to be more inclusive in the way the territorial administration is run. Regional and local administrations had long been institutions the central government used to control its citizens, creating mistrust and resentment. The constitutionalisation of decentralisation, subsidiarity, and local elections for the entire territory holds the potential of generating an inclusive institutional set-up that would particularly respond to the demands from the long-neglected interior regions of the country. A factor that works as excluding on some citizens is the emphasis in parts of the constitution on the Arab-Islamic identity and the at times substantive traces this has left in the constitution's provisions. The requirement for presidential candidates to be Muslim is the most visible discrimination in this regard. Given that the vast majority of Tunisians identify as Muslims, this is unlikely to have real consequences, but its symbolic and practical effect remains. While Article 6 protects the freedom of conscience, the oaths for members of parliament and the prime minister also contain a religious reference, which atheists may find inappropriate. In spite of the dominance of the Arab-Islamic identity that features throughout the document, the constitution shows tolerance of heterogeneity.

## 2) *Rights and obligations* – what is the substance of citizenship?

The equality of citizens in rights and duties is emphasised in the preamble and the first article on rights within the constitution. Each time, the formulation specifically makes reference to both male and female citizens, underlining the importance gender equality is given in the document. The new constitution contains many of the civil and political rights that were already present in the 1959 constitution. However, not only the number of rights and the symbolic space they are granted within the document expanded. If the previous regimes were able to use ordinary legislation to empty the constitutional provisions of content, the rights and freedoms in the new constitution are given multiple safeguards. On the legal level, rights and freedoms, as well as the character of the state and its regime are given a supra-constitutional status in the form of eternity clauses, which prohibit the amendment of the relevant parts of the constitution. Moreover, the limitations clause in Article 49 stipulates that even temporary limitations on rights and freedoms must conform to strict criteria of necessity and proportionality. On the institutional level, multiple checks and balances are introduced with the aim of preventing rights violations. The general dispersion of power in the political system is supposed to prevent an all-powerful presidency as under the 1959 constitution. A small but relevant detail to note in contrast to the previous basic law is that the task to ensure respect for the constitution is no longer given to the presidency alone, but that this is shared with the judiciary, which is also specifically tasked with protecting rights and freedoms. Further institutional protections are the constitutional court's review powers and the stipulated neutrality of the security sector. The constitution also makes provisions for the achievement of substantial equality between citizens. Beyond the socioeconomic rights, it entails elements of positive discrimination for women and youth as well as institutional frameworks to tackle regional inequalities. In turn, the constitution imposes specific obligations on citizens. These are the payment of taxes and other public charges and the fulfilment of national service. The latter term, even though mentioned in the context of defence, leaves open whether that service is military in nature.

## 3) *Identity and belonging* – what is the psychological dimension of citizenship?

In constructing an idea of national identity, the present constitutional text attempts to reconcile commitments to potentially competing normativities as reflected in the preamble. Three sets of ideas emerge as foundational: First, and most generally, universal values such as human rights and the gains of human civilisation; second, the Arabo-Islamic identity reflected in the teachings of Islam; and third, a Tunisian national identity reflected in references to the

revolution for freedom and dignity, the independence struggle and state-building, as well as the reformist movement. The preamble presents these as principally complementary, or even mutually reinforcing.<sup>105</sup> Yet the fact that many religiously-inspired provisions of the constitution are immediately followed by provisions that reflect liberal norms (Articles 1 and 2 are examples as are the competing norms within and between Articles 6 and 31) speaks of a concern by secularist co-drafters that Islamic norms could be interpreted in restrictive ways and thus need textual counterbalancing. In its sum, the constitution does suggest that there is a hierarchy of relevant political communities, whereby the belonging is strongest in the nation-state, very pronounced in the Maghreb and Arabo-Islamic world, and still relevant for the global community. It is noteworthy that this constitution – unlike its predecessor – specifically tasks the state with consolidating the youth’s Arabo-Islamic identity though this is again “balanced” by references to openness to human civilizations and diffusion of the culture of human rights. Above all though, Tunisians are expected to feel belonging with their national polity, the protection of whose unity is described as a “sacred duty” for them.

4) *Ideational impetus* – what are the normative aims of this conception of citizenship and what is expected from citizens?

Like other constitutions following revolutions, the text of Tunisia’s new basic law is in many ways an expression of the revolutionary rupture that the political change from Ben Ali’s authoritarian regime to the new political system represents. This rupture has a substantive and an ideational dimension.

Substantively, the constitution represents a shift from a political system in which power was concentrated at the top in the office and person of the president and political decision-making was top-down to one where power is dispersed between multiple institutions and emanates principally from the people. The main reasoning behind this is clear: Its purpose is to prevent single-person rule from re-emerging. But beside this institutional decentralisation, the state’s structure and with it political dynamics are also changed by the implementation of regional decentralisation. The effect of this change is likely most clearly felt in the disadvantaged regions, where the state was long seen as an imposition of a central power that was, in effect, external to the life realities of local people.

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<sup>105</sup> And indeed, author interviews with Ennahda politicians as well as literature by their party leader Rached Ghannouchi (cf. Ghannouchi 2013; Saeed 1999) confirm that many adherents of the party generally view little or no conflict between Islam and the concept of universal human rights.

The ideational shift is reflected in the apparent ambition for this constitution to embody a more authentic version of Tunisian identity that the one the 1959 text had contained as well as securing its exercise by citizens. Under Bourguiba and Ben Ali the state had a both hegemonic and homogenising force in that it sought to crowd out the influence of tribes and religion to exert its own authority based on a modern rational-bureaucratic logic. The powerful presidency removed institutional barriers to that end. For many Tunisians, the state made significant cultural impositions on them – such as the 1981 ban on the headscarf in schools and public offices. The new constitution not only makes explicit references to the Arab-Islamic identity of the state and its citizens, but its rights and liberties provisions, which have multiple safeguards, also aim at enabling an open expression of identity on the part of citizens and protect them from discrimination.

In sum, there is not a single ideational impetus for the model of citizenship present in this constitution but many. This very fact is noteworthy and as far as the competing normativities of Islam and liberal democracy are concerned, their carefully crafted parallel inclusion in the document counts as evidence of mutual recognition, or “twin tolerations” (Stepan 2000).

#### *8.4 Competing interpretations*

When applying the four dimensions of citizenship to compare the drafts it becomes clear that the direction of change was not linear. However, a few directions of change can be identified. Generally, the constitutional texts become more inclusive, removing barriers for the candidacy to elected office (age, nationality) and making more provisions to specific groups within society (women and youth stand out). The equality of rights and duties between citizens was continuously reinforced. This included the addition of safeguards to rights (in the eternity clauses and limitations clause) as well as specific references to citizens of both genders in the Arabic original. Moreover, the number of rights increased as third generation rights were included (e.g. the right to a clean environment). There is also a successive strengthening of the separation of positive law from religious normativity, which has the potential to protect the constitution’s provisions from interpretations based on Islamic law. This relates directly to identity and belonging, where the emphasis on Tunisia’s Arabo-Islamic cultural heritage remained from the first draft to the final constitution, but was rendered successively less consequential for the constitution’s actual implementation as its relative weight dropped compared to commitments to universal human rights and popular sovereignty. The ideational impetus of the document appears to shift from an initial correction for and counterpoint to what some parts of the Tunisian population saw as decades of top-

down secularisation. All constitutional drafts reflect the wish to express a political rupture and a more authentic version of Tunisian citizenship than its predecessors. If initially, this seemed to focus on a relatively narrowly defined Arabo-Islamic model, the drafts over time reflected more diversity and tolerance thereof.

The new Tunisian constitution was adopted with an overwhelming majority in the NCA, and after intensive mediation efforts on the part of established civil society, reflecting a broadly shared consensus at the level of the country's political elite. Nonetheless, it evoked different interpretations. This section reviews some of these interpretations.

Three prominent Tunisian constitutional experts have argued that despite the new provisions of the 2014 constitution, there remains much continuity, albeit in different ways. Chawki Gaddes (2014:21) has argued that the 2014 constitution is one of continuity rather than rupture. He points at the maintenance of Article 1 from the 1959 constitution, albeit with an added unamendability clause, and sets the new text into the tradition of the national liberation movement and the builders of the modern Tunisian state. Law doyen Yadh Ben Achour (2017:346–49) identifies continuities with the revolution itself, pointing at the centrality of rights and liberties and the design of the political system, which is designed to prevent a return to dictatorship.<sup>106</sup> In an author interview, Law Professor and current Tunisian President Kais Saied has said that “this constitution has been written to legitimate power. To legitimate it.”<sup>107</sup> This must be seen in the context of Saied's view that while a “cultural revolution” was occurring over the course of the uprisings that led to the ousting of the Ben Ali regime, the 14<sup>th</sup> January 2011 – the date of Ben Ali's departure – was not its apex, but the point at which the revolution was aborted: “The 14<sup>th</sup> January is to save the regime in some way from this movement”. The real constitution, Saied said “is the one that was written on the walls by Tunisian youth in December 2010 and in January 2011”.

Another set of authors emphasises the ambiguities, contradictions, and ambivalences within the constitution though they come to different conclusions as to their meaning. For public law professor Sayah (2015:109–10), these are features of an “in-between” constitution, which makes universal commitments as well as embracing cultural relativism. The text reflects a transactional spirit, “a constitution of Islamist expectation but modernist content”, rooted in

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<sup>106</sup> In a subsequent book section, Ben Achour identified fractures as well, but these are largely focussed on state-religion relations in the CMP. As for actual constitutional provisions, only the cultural references in Article 39 on education is being discussed in this context.

<sup>107</sup> Author interview with Prof Kais Saied, Faculté des sciences juridiques, politiques et sociales de Tunis, 14.05.2018, Tunis.

compromises between Islamists in government and secularists in opposition. Similarly, but more positively framed, for UNDP constitution specialist Abdelkefi (2016), the inconsistencies of the constitution reflect the “constant search for balance” and the “compromises gradually built inside and outside the assembly”. Constitutional scholar Slim Laghmani has called this a “constructive ambiguity”, which allows the state to “secularise without de-Islamizing” (Redissi 2014). For Laghmani, Article 2 of the constitution points at a middle way between laicism and religious normativity but is closer to a secular state. A practical and perfect example of this is in Article 6, which shows that the state “dominates religion”, for it is the state that both “protects religion” and guarantees the liberty of conscience.<sup>108</sup> An important observation in practical terms, many ambiguities in the constitution merely led to postponing controversial questions until ordinary legislation or the courts construe its provisions authoritatively (Mezghani 2014). For many observers, the constitution’s ambiguities and grey areas are its main weakness (Ben Achour 2014). It is precisely the postponed deadlines in conjunction with the remaining religious references that make some commentators concerned that the text could make repressive interpretations by the courts possible. Focussing on Article 6, Human Rights Watch Tunisia director Amna Guellali (2014) laments the vagueness of its formulation, warning that “lawyers, judges and politicians could interpret Article 6 however they see fit. This ambivalence could hold grave consequences for the country.” In an opinion on the 1 June 2013 draft constitution, the Council of Europe’s Venice Commission of legal experts specified that “A state which proclaims itself to be civil (Article 2) should not be competent to determine what is sacred and ‘protect’ that which is held to be so”, noting that “such wording could legitimise the criminalisation of sacrilege or blasphemy. It would be preferable to delete it” (Venice Commission 2013). The provisions remained (though there have been additions).

International democracy and constitutional consultants Zaid Al-Ali and Donia Ben Romdhane (2014) contextualise the ambiguities internationally, pointing out that strategically vague phrasing in constitutions is common and argue that it is unlikely that the constituents of different persuasions would have been able to reach a better outcome. They note that “[c]onstitutional drafters the world over often seek to resolve irreconcilable differences of this type by making use of ‘constructive ambiguity’”, deferring some issues to a later date to allow the constitutional debate as a whole to continue. Despite the apparent risks of some of the

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<sup>108</sup> Author interview with Prof Slim Laghmani, Faculté des sciences juridiques, politiques et sociales de Tunis, 14.05.2018, Tunis.

vague provisions, Al-Ali and Ben Romdhane highlight that Tunisia introduced numerous provisions that appear progressive compared to the country's Arab peers. Specifically, they point at gender equality and gender sensitive language, the limitations clause in Article 49, which they describe as "probably the Arab region's most detailed" provision of this type. At the same time, they note that the constitution is comparatively short on rights, and that in conjunction with the limitations clause, this puts a burden on Tunisia's courts as the only mechanism to stop rights incursions by elected institutions. They are particularly critical on the low level of detail on security sector governance in the constitution in combination with the fact that the president can only be ejected from office by an unlikely two-thirds majority in parliament. For them, this leaves too few safeguards against abuse of the security services by incumbents. Similarly, they argue that the decentralisation provisions lack detail.

In sum, then, the new Tunisian constitution's content was met with a mixed response. Ambivalent elements were construed as both necessary compromise and risk for the future. If some vagueness on cultural issues is widely seen as a necessary evil for the sake of achieving consensus, and thus a constitution rather conflict, the lack of clarity in substantive areas such as the security sector does not seem justified politically to the same extent.

#### *8.5 Normative constitutionalism at last?*

Constitutionalism has long been an established part of Tunisian political culture as the above chapters have shown but this section argues that even since the revolution, this constitutionalism has remained procedural to an important extent. Despite the overwhelming support for the 2014 constitution as reflected in its adoption, evidence from practices and attitudes of politicians and population suggest a normative constitutionalism with qualifications. Previous chapters have shown that in Tunisia, constitutions were mostly seminal, or at most nominal in Löwenstein's (1959:151–57) taxonomy, that is they largely formalised existing power relations. A normative constitution is one whose norms determine the political process, based on an environment in which both voters and elected officials have internalised the value of constitutionalism. Political practices since the constitution's promulgation suggest that Tunisia largely fulfilled these criteria, though there are some areas of uncertainty. The below sections discuss these areas in turn, showing that both in the political process as well as in the internalisation of norms, the letter of the constitution is largely adhered to while there are at times conflicts between political practices and the spirit of the constitution.

### 8.5.1 The political process: re-emerging presidentialism?

With the political system established by the new constitution in place for over six years, some observers have argued that presidential dominance is re-emerging in Tunisia. The constitution's promulgation in January 2014 was followed by parliamentary and presidential elections in the same year that saw a peaceful alteration of power – notably one of the ambitions in the constitution's preamble and oft-used indicator for democracy's "consolidation"<sup>109</sup> – and municipal elections in 2018 (Bertelsmann Stiftung 2020). This was in turn followed by presidential and parliamentary elections in 2019. Only the run-off stage of the latest presidential elections broke with a trend of secular decline in voter turnout (ElectionGuide 2019). The successive holding of elections does however indicate that the political and administrative elites respect the legitimacy of elections, which are a crucial element of the constitution's overall framework.

The 2014 constitution has established a mixed political system where both the parliament and president are elected by universal suffrage and the head of state shares some executive prerogatives with the prime minister, who relies on support in parliament (Article 89). This dispersion of power – designed to prevent executive dominance – has proven a difficult framework for Tunisian political actors, leading to an adherence to the letter of the constitution, but often a bending of its spirit (Bertelsmann Stiftung 2020; Brumberg 2020; Yerkes and Ben Yahmed 2019). The short lifespan of governments since the revolution has not changed as the average cabinet barely survives one year without either reshuffles or a whole new government led by a new prime minister. The political party system remains fractured with groupings disassembling and new formations frequently emerging, often around a familiar political personality rather than socially rooted (Brésillon and Meddeb 2020:9–10). This contributes to instability within the Assembly, which has consequently found it hard to unite around appointment decisions, be it for the independent constitutional authorities or the prime ministership. The president – drawing on their own electoral legitimacy – has thus come to dominate the process of government formation (Boussen 2020:9). Before elected president, then-law professor Kais Saied insisted that "everything happens at the [Presidential] Palace of Carthage. Normally, if we respect the constitution, everything would take place in the Bardo palace [the seat of parliament] and not in Carthage.

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<sup>109</sup> For Diamond (Diamond 1999), six conditions that revolve around widely shared beliefs in the legitimacy of elections by elites, organisations and the mass public as well as pro-democracy behaviours on their part indicate democratic consolidation. See O'Donnell (1996) for a critique of the concept of consolidation.

The centre of power has not changed [since the revolution]”<sup>110</sup>. Indeed, an established political culture of presidentialism in combination with a fractured political landscape have produced a dynamic in which the prime minister significantly depends on the president, allowing the latter to dominate government. The complex power-sharing arrangements of the constitution, designed to establish horizontal accountability between state institutions, have surreptitiously led to a re-emergence of a degree of presidentialism in practice and calls for a reform of the political system, criticised as “fundamentally flawed” (M’rad 2019).

A key innovation of the constitution is to devote an article to the role of parliamentary opposition, recognised as an “essential component” in Article 60. This is particularly significant as in Arab countries political disputes are often avoided by establishing national unity governments, undermining ministerial and party accountability (Al-Ali and Ben Romdhane 2014). However, for several years after 2014, Tunisia was governed exactly by such cabinets of national unity, which enjoyed the support of multiple parties, including Islamist Ennahda and secular Nidaa Tounes, previously bitter campaign opponents. Rory McCarthy (2019) has argued that the emphasis on consensus that has increasingly dominated Tunisian politics for that period not only reactivated a mechanism that was prominent under Tunisia’s previous authoritarian rulers. It also had a similar effect in limiting the policy agenda away from socioeconomic reform to broadly conservative concerns (cf. Zemni 2016). Indeed, at a time when public trust in the political class declined sharply, elite-level pact-making – principally an exercise in horizontal inclusivity, that is inclusive of the majority of politically relevant elites – risked undermining an important element of democracy: political contestation (Mullin and Rouabah 2014). Amid the intense polarisation during the CMP, economic stagnation, and numerous security failures, the preference for stability offered by unity governments is understandable. Yet while unity governments do not violate the constitution’s provisions, they do not fulfil the hope some observers had put into Article 60’s potential to unlock a political culture in which opposition is allowed to play its own significant role in governing and holding the government accountable.

If the period between the promulgation of the constitution and the death of President Essebsi was dominated by consensus politics, the 2019 presidential and parliamentary elections have reintroduced significant contestation but also uncertainty into the political process. The presidency was seized by political outsider Kais Saied who gained over two thirds of the vote

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<sup>110</sup> Author interview with Prof Kais Saied, Faculté des sciences juridiques, politiques et sociales de Tunis, 14.05.2018, Tunis.

in the run-off against media tycoon and populist candidate Nabil Karoui, who was in jail on suspicion of money laundering and tax evasion for a time during the campaign. As regional politics and the conflict in neighbouring Libya make their impact felt on Tunisian politics, the consequences for Tunisian constitutionalism are difficult to judge. There are, however, some indications that the previously widely shared consensus on accepting the existing constitution and its norms become challenged by some politicians. The Free Destourian Party (PDL, *Parti destourien libre*) is openly hostile to the revolution and challenges the Ennahda party's legitimacy, associating it with terrorism in its public discourse (Brésillon and Meddeb 2020; Brumberg 2020). At the time of writing, the party's support base did not reach half of the electorate but remains stable in the double-digit percentages.

#### 8.5.2 Institutional lacunas

A key discrepancy between the constitution's provisions and actual political life is the failure by politicians to establish several institutions the 2014 text prescribes. As part of the transitional provisions in the constitution's tenth chapter, Article 148 sets a number of deadlines for the establishment of inter alia, the constitutional court and the independent constitutional bodies established by chapter six of the constitution. At the time of writing however, neither the constitutional court nor most of the independent bodies have been put in place. The most notable exception is the electoral commission ISIE, which was established properly in 2014 ahead of the elections. In the case of the good governance and anti-corruption body, the transitional institution known by its acronym INLUCC continues to operate. The most significant lacuna is however the continued absence of the constitutional court, whose role as institutional arbiter and check on legislative overreach cannot be entirely fulfilled by the provisional authority for the control of constitutionality of laws (Grewal 2018). An even more momentous task for the court will be to adjudicate on the ambiguities left in the constitution, where the framers deferred controversial questions by including competing normativities. An important example is between the religious element of Article 1 and the equality provisions in Article 2.<sup>111</sup> Moreover, given that this provisional institution's staff is effectively borrowed from other parts of the judiciary, there are practical limitations on its ability to operate in a timely manner.

Tunisia's political elites have however shown that inter-institutional coordination can function even in the absence of some key bodies such as the constitutional court – and again

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<sup>111</sup> Author interview with Dr. Meriem Guetat, Centre d'Études Maghrébines à Tunis, 30.06.2020, via Skype.

highlighted their preference for constitutionalism. In 2019, President Beji Caid Essebsi died in office. According to Article 84 of the constitution, the constitutional court “shall promptly meet and acknowledge the permanent vacancy” with the consequence that the speaker of parliament is entrusted with the functions of the presidency. In the absence of the court, it was roundly accepted that the provisional authority’s decision to the same effect would be accepted as constitutional and the provisions were otherwise followed (TAP 2019).

### 8.5.3 Has the new constitution “grown into society”?

Löwenstein’s taxonomy stipulates that a constitution can only be normative if both voters and elected officials have internalised the value of constitutionalism. This thesis has shown above that Tunisia’s political elites before and after the revolution have embraced procedural constitutionalism. Whether Tunisian citizens at large support the constitution is more difficult to assess because this is not part of regular polling. Such data does however show that a vast majority of Tunisians share the norms of inclusive procedural democracy that the new constitution has established: 90 per cent of respondents of a 2019 poll found it very or somewhat important that all members of the country’s adult population are included in political decision-making (International Republican Institute 2019). However, in 2018, only 46 per cent of respondents in representative polls prefer democracy to any other kind of government (Afrobarometer 2018). This has steeply declined from 71 per cent in 2013 while support for autocratic alternatives has increased. In the same poll, just under one third of respondents rejected one-man rule, down from 80 per cent in previous polls and similar increases can be observed for one-party and military rule. Such figures mesh with the results of other polls that reflect a deep disconnect between Tunisian citizens and their political institutions. Three quarters of respondents in a December 2019 poll said that parliamentarians did “nothing” for people like them (“a lot”: 2 per cent, “enough”: 3 per cent, “little”: 12 per cent). When it comes to ministries, 62 per cent responded “nothing” (“a lot”: 2 per cent, “enough”: 6 per cent, “little”: 19 per cent) and 69 per cent said that political parties did nothing to address the needs of people like them (International Republican Institute 2019).

### 8.6 *Contested citizenship in Tunisia today*

How can citizenship in Tunisia since the promulgation of the 2014 constitution be characterised in the four dimensions developed above? The above discussion on the implementation of the constitution has already pointed at a disconnect between citizens and their state. Santini (2018:31) has argued that the articulation of rights in the constitution on

the one hand and the failure of the state to deliver on these on the other hand create a “gap between expectations and social reality, fueling (sic) a rage which (...) can be easily translated into mobilization both to obstruct and ask for change”. By analysing citizenship through its four dimensions, this section argues that while citizenship has become more equal and its rights better protected in many regards, in many other areas, continuities to the pre-2011 era prevail.

Previous sections have shown that the new constitution clearly proclaims **inclusion** over **exclusion**, for example by making specific references to social groups (e.g. women and youth) whose inclusion in the state’s institutions is to be supported. However, in practice, exclusion continues to operate along multiple axes in Tunisian society. With broad inclusion in the political system now entrenched, the continued socioeconomic exclusion of large parts of Tunisian society become even more obvious than before. The uptick in socioeconomic protest since the constitution’s promulgation has equally indicated the continued relevance of this dimension of exclusion. Indeed, multiple factors can still compound the degree of exclusion of individual citizens.

The constitution’s commitment to increased regional balance has not born fruit yet. Under the national unity governments, state expenditure has increased, but largely benefited insiders, e.g. thanks to the mass recruitment of civil servants and wage hikes for them. In contrast, less was spent on the long-neglected interior of the country (Brésillon and Meddeb 2020:7). This continuity with past policies meant that public investment remains generally too low and specifically lacking in disadvantages regions, which would require considerable catching-up to the affluent coastal areas, which also attract the bulk of private sector investment (Abdelkarim 2017; Bertelsmann Stiftung 2020). Consequently, regional inequalities persist and national averages in e.g. unemployment cast over profound differences between social groups. Thus, while the overall unemployment rate stood at 14.9 per cent in the final quarter of 2019, it differed by almost 10 percentage points between genders: The rate was 12.3 per cent for men and 22 per cent for women. Among university graduates, the rates were generally higher, but so was the gender discrepancy. In the same time period, the unemployment rate in the overall group was 28.6 per cent. Yet it affected men at 16.8 per cent and women at 38.7 per cent (Institut National de la Statistique 2020a). Despite the constitution’s commitment to regional balance, women and youth, it is precisely these groups that remain significantly excluded in socioeconomic terms. Unsurprisingly, in what has been termed “acts of citizenship” (Isin and Nielsen 2008), regular demonstrations demanding economic and other improvements have regularly occurred since the constitution’s

promulgation, but protest movements have usually been dealt with “only in short-term clientelist arrangements” (Brésillon and Meddeb 2020:7).

A key contrast with Ben Ali era citizenship is that state and society have become more tolerant of difference – to a degree. Bans on headscarves and other religiously symbolic dress have been retracted and the groups of females with and without hijabs are a common sight in Tunisia. The appointment of a Jewish cabinet minister in 2018 was a further signal of religious inclusivity. However, racist and socially conservative norms still generate considerable discrimination to the extent that it is highly exclusive of citizenship rights, for black Tunisians and people identifying as LGBTQ+. Beyond the criminalisation of homosexual acts in the penal code – in contravention of constitutional norms according to the COLIBE report – both groups also face social discrimination across numerous areas such as health, education, legal protection, and work (Bertelsmann Stiftung 2018:12, 2020:8).

The 2014 constitution stipulates equal **rights and obligations** for all citizens, specifically phrased as to mention both female and male citizens (Article 21). However, human rights organisations lament that the regularly extended state of emergency conflicts with the country’s ambitions and obligations under international law. There are also considerable shortcomings when it comes to harmonise the body of ordinary law with the ambitions of the constitution as well as the country’s obligations under international law. The presidential Individual Freedom and Equality Commission (COLIBE, *Commission des libertés individuelles et de l’égalité*) headed by feminist activist and MP Bochra Belhaj Hmida had been tasked with identifying these discrepancies. In its 2018 report, the commission recommended the abolishment of the death penalty, decriminalisation of homosexuality, introducing equal inheritance between male and female successors, and dismantlement of patrilineal citizenship. While in itself evidence of a commitment to these rights, little has happened since the publication of the report as the proposed changes remain controversial in Tunisia’s conservative society. A notable improvement was the legalisation of marriages between Muslim Tunisian women and non-Muslim foreign men (BBC News 2017).

Previously, foreign men would have to convert to Islam to be able to marry a Tunisian woman, though unlike inheritance this only affects a small number of couples. Overall, the state appears unwilling to devote significant resources to guarantee citizens’ rights. This is true for the lack of political will to establish independent constitutional bodies and the constitutional court. The latter could have an important role in developing the Tunisian legal framework by assessing the constitutionality of existing laws, which are often interpreted and invoked by the authorities in restrictive ways. It is however also true for the already existing

bodies such as the anti-corruption commission INLUCC or the Access to Information Authority (*Instance d'accès à l'information*) who complain they do not have sufficient resources to adequately fulfil their statutory functions (Bertelsmann Stiftung 2020). Even the electoral commission ISIE was only able to carry out the 2014 elections thanks to a grant provided by the European Union, according to its former director (Yerkes and Ben Yahmed 2019:17).

**Identity and belonging** were key battlegrounds in the CMP 2011-2014 as drafters and the mobilised public contested, first, the extent to which the country's Arabo-Islamic heritage should be reflected in the text and, second, how legally consequential these references should be. The result were "in-between" (Sayah 2015) compromises, which circumscribe the religious references' legal potential. In spite of the new pluralism, egalitarian reforms did not feature highly on the political agenda since the constitution's promulgation as the above discussion on rights and duties has outlined. It is however interesting to note that both when identity-based contestation was intense as well as when consensus dominated politics, they each had the effect of relegating socioeconomic issues to a secondary concern. Thus, Leyla Dakhli (2013) has argued that contestation along the secular-religious binary as well as Tunisian patriotism and national unity in the course of Tunisia's transition has cast over "the essential", namely the socioeconomic problems facing large parts of Tunisian citizens. In turn, the horizontal inclusivity of consensus government following the eventually "pacted transition", which has toned down the rhetoric along the secular-religious binary, has undermined vertical inclusivity in Tunisia's political process in the period since the constitution's promulgation and was equally seen to hamper socioeconomic reform (cf. McCarthy 2019).

Contemporary citizenship in Tunisia has multiple **ideational impetuses**. The struggle for equal rights sought by women's civil society organisations is inspired by a liberal understanding of equal citizenship, but also expresses a contemporary interpretation of Islam based on the thought of authors like Tahar Haddad. Just as references identity in the constitution make claims based on both the country's Arabo-Islamic heritage as well as its reformist traditions and universal values, these normativities are constantly being negotiated and re-negotiated. It is however notable that despite the establishment of democratic institutions, which citizens have generally also taken up well as voter turnout demonstrates, protest politics has not lost momentum in Tunisia. If anything, the phenomenon of claim-making outside the institutions, through street protests and social movements, has seen a resurgence – like in other countries of the region, which have not institutionalised pluralist

politics like Tunisia (Chomiak 2019). This simultaneity, where political participation is fully possible within the institutions of the state and “acts of citizenship” (Isin and Nielsen 2008) is to some extent a symptom of the disconnect between citizens and the political system.

### 8.7 *Conclusion*

This chapter has reviewed the text and implementation of the 2014 constitution, arguing that there remain gaps between the mostly equal citizenship model in the text and political practices since its promulgation. That is to say the 2014 constitution is not entirely normative. When it comes to citizenship, the 2014 constitution has made that institution more equal, both discursively by emphasising its value in the text and in the institutions it creates to bolster equality legally as well as to some extent substantively. At times, this ambition of the text is in tension with its aim to be a more authentic expression of Tunisian identity than its predecessors, namely by making more concrete references to the country’s Islamic cultural heritage. However, across the text, these references are usually balanced by affirmations to liberal principles, leaving ambiguities in many areas. An important role in settling open questions will therefore be played both by political actors in ordinary legislation as well as the judiciary’s interpretation of the constitution in case law. It is worth emphasising that in the provisions and institutional framework established by the 2014 constitution, political agents have a foundation available that is considerably more congenial to achieving equal citizenship than its predecessors. At the same time, the centrality of the constitutional court makes it doubly problematic that the political gridlock within Tunisian institutions has meant that this body has not yet been established. That the country’s political elite handled the temporary vacancy at the presidency pragmatically by letting the provisional court rule on it underlines their support for constitutionalism. However, the institutional lacuna itself suggests – like the shortcomings in equal citizenship – that this constitutionalism remains largely procedural and that the constitution is not fully normative. After all, the constitutional deadlines to establish various institutional bodies have been missed by several years.

The 2014 constitution – textually and in its (partial lack of) implementation shows that Tunisian society continues to negotiate what influence religion should have on citizenship and the degree of its equality. Postponed within the CMP, numerous questions that touch on this relationship remain unanswered – along with others that touch on privileges of some parts of society. In the absence of a firm consensus in this question, it is detectable that there is neither acceptance for a relationship between state and citizens that is fully mediated by religion nor one that is entirely untouched by it. That secular forces were unwilling to fight as a point of

principle against restricting the presidency to Muslims shows that in their political constituencies, too, citizens take treat the requirement that political leadership must emanate from a fellow coreligionist as common sense.

## 9 Conclusions

### *9.1 Introduction*

This thesis has investigated the nature of political change in Tunisia since 2011. It did this by exploring the *longue-durée* constitution and re-constitution of citizenship through the prism of the country's constitutions, their making, and implementation. It has argued that at critical junctures of Tunisia's political history path dependencies and particular choices militated against the establishment of equal citizenship even though the latter enjoyed the support of relevant groups in society early on. Beyond political practices, the thesis has shown that constitutional text reflects such outcomes more than might be expected. It has confirmed the finding of previous work that the mere presence of a constitution does not produce equal citizenship – even if that norm or some of its key aspects are included in it. It has added to the literature the finding that even a strong political culture of constitutionalism does not necessarily contribute to democratic transition if the norm is limited to procedural aspects of the constitution. The findings of the thesis will be summarised in the following sections. This is followed by a discussion of the key implications of the conclusions, a short discussion of some of the limitations of the research and some suggestions for further study based on this thesis' findings.

### *9.2 Methodological, theoretical, and conceptual findings*

Overall, the findings of the thesis have vindicated the theoretical, conceptual, and methodological approach taken. Using the critical juncture framework embedded in the overall approach of historical sociology, the thesis has analysed the interplay between key agents, ideas, structural constraints, and pathway dependencies on political change in Tunisia, starting from the mid-19th Century to the current period. A particular emphasis in this was the role of ideational pathway dependencies. The thesis focused on instances of constitution- and pact-making for more detailed investigation as these were expected to leave more influential legacies than other periods of time as per the critical juncture paradigm. The thesis' findings have vindicated this approach as each episode studied could indeed be shown to have left important legacies that re-occurred as antecedent conditions in subsequent critical junctures. In this context it is worth highlighting that the thesis' focus on ideational changes demonstrates the usefulness of the critical juncture framework for this area of research as the literature using this approach has so far largely overlooked this dimension of political change.

Similarly, the choice of the concepts of citizenship and the institution of the constitution have proved valuable as they allowed to gain a more finely grained picture of state-society relations that the often binary representation made between democracy and authoritarianism does not capture. The thesis highlighted, for example, continuities from the Ben Ali era in rights violations and exclusion dynamics, which a purely institutional analysis would not reflect to the same extent. The methodology of using process tracing while focusing on the case study of Tunisia, drawing on a range of primary and secondary sources as data, proved suitable for the remit of the study.

Key findings of the thesis are on the political functions and consequences of the constitution and constitutionalism. The study confirmed the previously held assumption in the literature that a constitution in and of itself does not generate equal citizenship and that to secure the latter, a combination of institutional, structural, and ideational factors is required. Going beyond the liberal democratic purposes of the constitution originating in its genealogy, the thesis identified four political functions of the constitution, many of which also hold true under conditions of authoritarianism. These are to construct a polity both by giving it an institutional framework to work with as well as a (new) source of identity, to constrain the state by introducing various limits on its powers (e.g. civic rights), to enable the state and democracy by delineating clear competences to the various state institutions and channel popular sovereignty through them, and finally to endear the state to the population by incorporating existing normativities into its legal fabric. Highlighting the relevance of constitutional analysis in non-democratic regimes, the thesis has confirmed that constitutions can be surprisingly frank about the nature of the political regime they construct – the declaration of Habib Bourguiba as President for Life in the Tunisian constitution is a case in point. In this way, constitutions are a closer reflection of the really existing power relations than may be expected in authoritarian regimes, justifying their close analysis as has been undertaken in this study. Moreover, the thesis contributed to the literature by further developing a nuanced understanding of constitutionalism in political culture. The thesis found that in contrary to previous assumptions mentioned in the literature, even in the presence of a political culture dominated by constitutionalism, the latter may not contribute to democratic transition, but only to the other political functions of the constitution, such as rallying support for the state, and improving co-ordination between its institutions.

### 9.3 *Empirical findings*

Empirically, the aim of the thesis was to investigate the nature of political change that occurred in Tunisia since the end of the Ben Ali regime in 2011 through the prism of citizenship and constitutions. A key finding here was that in spite of the institutional changes Tunisia undoubtedly underwent after 2010-11, which allowed for considerably more formal political participation of the citizenry and suggest a transition to some form of liberal democracy, there are also important continuities between the time before and after the uprising. In particular, this entails the economic, social, and political exclusion of parts of the population due to inaction on the tackling of regional and other inequalities despite their constitutional prescription. Discourses on national unity in adversity continue to be employed, undermining the legitimacy of political projects outside a carefully balanced national consensus between key social forces.

Further important findings concern the status of the constitution and constitutionalism. The study has confirmed previous authors' finding about the centrality of the constitution for Tunisia's politics. For instance, Murphy (2012:251) had observed that since Tunisia's short-lived constitution in the 1860s, the country's political struggles have "revolved around the construction and manipulation, or challenges to, the constitution as a means of defining the identity and structure of the nation". The thesis has also confirmed previous studies' finding that constitutionalism is a key part of Tunisian political culture but added findings on the nature of that constitutionalism. It had largely been taken for granted that Tunisia's constitutionalism would also lend itself naturally to support democratic transition. Like other factors that are often identified as "prerequisites" for democracy, constitutionalism has been taken as *a* though not *the* positive ingredient for liberal democracy and the establishment of equal citizenship in Tunisia. In analysing the dynamics of the four political functions of the constitution through the prism of citizenship, this thesis has contributed to the literature by showing both that authoritarian states can make selective use of these functions and that even a political culture of constitutionalism can be limited to such aspects of the norm that do not contribute to democratic transition. The analysis of citizenship before, during, and after the latest critical juncture has revealed both change and continuities, such as the persistent socioeconomic exclusion of parts of the population and the competing liberal and religious normativities. The following paragraphs summarise how the six substantive chapters have contributed to the empirical argument.

If each critical juncture is investigated in the sequence beginning with antecedent conditions, crisis, constitution-making, and post-constitution implementation, chapter 3 has examined the antecedent conditions to the overall period under investigation as well as the first of the critical junctures. Portraying Tunisian society in the 19th Century as a heterogenous one in which numerous inequalities were justified on the basis of religious normativities and tradition and where European influence was growing, the chapter argued that the brief constitutional episode represented a fundamental break with previous citizenship practices. The 1861 Constitution first codified (relatively equal) rights for citizens while circumscribing state power. This first critical juncture anchored constitutionalism in the fabric of Tunisian political ideas and contributed to the emergence of Tunisian reformism as a tradition. Later Tunisian reformers drew on both in their discourses, evidencing the pathway dependency generated by this critical juncture. In particular, Tunisian nationalists drew on the liberal ideas propagated by French colonialists and supported by relevant local elites and surreptitiously turned them against the colonisers to argue for independence and equality between Tunisians and colons within the framework of a constitution. Significantly, constitutionalism took on such importance within this discourse that it was given a prominent place in the name of the nationalist party.

Chapter 4 argued that in contrast to the 1861 Constitution, its 1959 successor and document of Tunisian state-building after independence paradoxically only formalised existing power relation despite an ostensibly more participatory constitution-making process. Within the nationalist movement as well as in Tunisian politics more broadly, Habib Bourguiba had secured dominance. The new constitution provided a framework within which he could also formally dominate state and society. It and the political culture of constitutionalism remained semantic, however. Contributing in important ways to constructing the Tunisian polity as an independent and sovereign state, the basic law constrained the exercise of citizenship rather than the state while enabling the executive with vast powers. Ideationally, it continues the effective secularisation of public life started in the mid-19th Century, though some nods to Islamic normativity in text and substance remain – presumably to endear the state to its mostly conservative citizens. By including such provisions while setting up an effectively secular state that operates under the logic of rational-bureaucratic, impersonal administration, legitimised by popular sovereignty and rhetorically establishing equal citizenship, the constitution endorsed competing norms and generated tensions that would continue to influence Tunisian politics. For example, partly as a result of the top-down nature of constitution-making and secularising reform more broadly, in later national pact- and

constitution-making processes, some agents would push for the inclusion of more supposedly authentic elements of Tunisian identity – mostly in the form of religious normativity. Meanwhile, along with other institutions, the constitution was an instrument with which citizenship was manipulated. The new Tunisian polity was constructed as the most relevant political community for citizens within the territory of the country, consciously diminishing the role of other social groups.

Chapter 5 examined the development of citizenship and its relationship with constitutionalism and the constitution during the rule of Habib Bourguiba's successor Ben Ali and found that the pathway dependencies generated by the 1959 constitution's powerful presidency loomed large over this part of the country's political history. The chapter has argued that during this period, the constitution was manipulated first to signal greater openness and participation in part to legitimise the new leadership. When this was achieved, provisions that enabled authoritarian rule were re-inserted. The constitution and the constitutionalism in Tunisian political culture remained semantic. The purpose of the basic law remained to organise power rather than to constrain it or make it accountable. Thus, despite numerous reforms, citizenship remained constrained and underwent mostly gradual changes. The superficial homogeneity of Tunisian society – an objective of Bourguiba's reforms – concealed exclusion of parts of the population along multiple axes, such as geography, class, and gender. While the regime's tolerance for religion in public life increased somewhat and it engaged in some religious signalling itself, this was only permitted within a discourse that portrayed Tunisia as a society that reconciled traditional beliefs with "modernity". In reality, the bridge between secular and religious political actors was built outside of institutional politics by opposition activists coordinating their activities against the regime and their plans for Tunisia's post-authoritarian political future.

Beginning the analysis of the post-2010 constitution-building process, chapter 6 investigated the establishing stage of this period, focussing on continuous and new pathway dependencies, which as antecedent conditions, would impact the subsequent constitution-making process (CMP). It highlighted the strong constitutionalist political culture evident in the behaviour by old and new political elites, who agreed on handling the post-Ben Ali political transition within the legal framework of the 1959 constitution and, subsequently, a transitional constitutional framework whose purpose was to allow creating a new constitution. This also suggests a long existing latent support for democratic norms among elites that had previously been prevented from being implemented by a combination of structural and institutional constraints. The chapter argued that the decisions taken in this relatively short period

generated considerable pathway dependencies. Key among them are the establishment of the institutions that would govern the CMP and elaborate the constitution as well as their design. For instance, the electoral system used to select members for the National Constituent Assembly disadvantaged larger parties and thus prevented a full unilateral partisan dominance in the CMP. An important discursive contribution of this period was the commitment by most political parties to limit the CMP to one year, which critically undermined the legitimacy of the process when the deadline was not met.

Chapter 7 contributed an analysis of the post-2011 CMP, finding that this episode once again confirmed Tunisian élites' preference for constitutionalism as the political stalemate was settled in negotiations and did not escalate into violent conflict (as in other countries of the region). That some relevant political actors were willing to abort the process mid-way suggests however, that this constitutionalism remained semantic, where a consensus has been reached on the importance and legitimacy of the constitution, but the latter was not required by all participants to have been the result of popular participation. The chapter also found that with the re-emergence of questions of identity and the relationship between the state and religion, the unresolved and tense legacy of the 1959 constitution imposed itself again. Over the course of the process, the constitutional drafts became less religious in language and its provisions protected equal citizenship more explicitly – both rhetorically and institutionally. Often however, the constitution simply leaves ambiguity rather than making a clear commitment to either the liberal or religious normativity in the text.

The final and eighth chapter analyses the text of the 2014 constitution along with its implementation thus far. It argues that while the document provides for a mostly equal model of citizenship that is also bolstered institutionally in numerous provisions, there is a tension within the text between this and the competing aim for the constitution to be a more authentic expression of Tunisia's identity. Moreover, a gap remains between the equal model of citizenship established by the constitution and the behaviour of the state and other relevant political actors. These two conflicts are interlinked as the example of the constitutional court shows, whose constitutionally prescribed creation is blocked by concern that it could come down for one side or another in key questions of identity that the framers left strategically ambiguous. The lack of implementation of constitutional norms suggests that Tunisia's political culture of constitutionalism has largely remained semantic and that the constitution can only partially count as normative.

#### 9.4 *Limitations and further research areas*

Some limitations to the above conclusions need to be noted. The first concerns the methodology and the data used in this study. Focussing largely on textual codification of political ideas in constitution as well as behavioural data from the narrative on political development in Tunisia to examine citizenship and constitutionalism in practice, the study sheds light only on that dimension of political change. The limitations of a single case study such as this one are close to self-evident, but what needs highlighting is the fact that in contrast to many other countries, Tunisia has a long constitutional history. This made the country a particularly useful case study but may limit the extent which findings can also apply in other contexts. Some conceptual and theoretical findings may nonetheless be transferrable. As previous literature has shown, this includes the political use of constitutions to ends that are unrelated to liberal constitutionalism (cf. Brown 2002). To what extent this applies to the other findings remains unclear, however.

Further research may seek to address some of the limitations identified above as well as empirical and normative questions raised by this thesis. The most obvious is to explore the relationship between citizenship, constitutionalism, and constitutions in other contexts, beginning with polities in the Arabo-Islamic space to see which similarities and differences can be observed and which factors explain these. Another avenue for research is to explore in more depth and across multiple cases the phenomenon of semantic or procedural constitutionalism. If since 2014, Tunisian political actors could not agree on a full implementation of the constitution due to ideological differences, what causes a lack of substantive constitutionalism and a limitation of the political functions of constitutions in contrasting contexts? The hypothesis that political polarisation can contribute to a lack of consensus on substantive constitutionalism suggests itself (cf. Carothers and O'Donohue 2019).

#### 9.5 *Quo vadis Tunisia?*

Whichever the conceptual angle of choice, it appears that amid all the challenges to its stability, Tunisia's politics have found a new stable equilibrium within the framework of the 2014 constitution. In turn, the new legal basis of the state has significantly expanded the space for citizens to make use of their citizenship. The remainder of this conclusion seeks to discuss Tunisian citizenship in relation to the constitution more broadly and with a view to the future.

Since the overthrow of the Ben Ali regime, Tunisian politics have gone through phases of polarisation and consensus. In defining her model of “agonistic pluralism”, Chantal Mouffe (1999:755–56) has warned that “every consensus exists as a temporary result of a provisional hegemony, as a stabilization of power and that always entails some form of exclusion”. She argues that to make democratic politics – and thus, equal citizenship – possible, contestation between differing identities is necessary as the us/them distinction is an essential part of politics. However, in agonistic pluralism, “the ‘other’ is no longer seen as an enemy to be destroyed, but as an ‘adversary’, i.e. somebody whose ideas we are going to struggle but whose right to defend those ideas we will not put into question”. The different forces within an agonistic democracy do need to share a consensus on “ethico-political principles of democracy”, but this is bound to be a “conflictual consensus”. A pluralist democracy needs room for dissent and a choice of real alternatives. In their absence, “there is a risk that this will multiply confrontations over essentialist identities and non-negotiable moral values” (ibid). Tunisian society continues to negotiate the constructive ambiguities left in the constitution by its authors, which mainly concern the relationship between state and religion. Part of stopping short of fully implementing the constitution appears to be a further deferral of these questions, on which consensus was already elusive during constitution-making. The 2014 constitution tasks the judiciary – and, in practice, the constitutional court – with guaranteeing the supremacy of the constitution and the guarantee of citizens’ rights. A full implementation of the constitution that includes the establishment of the constitutional court would thus contribute to implementing substantive constitutionalism doubly. Firstly, by creating the constitutionally required institutions, the basic law’s provisions would finally be put into action. Secondly, the very establishing of these bodies would bolster the constitutional norms protecting individual rights and therefore equal citizenship. Meanwhile, it appears that the very limited political choices Tunisian face electorally when it comes to areas of socioeconomic policy have contributed to precisely the phenomenon Mouffe anticipates, namely a disproportionate focus on ideological and moral questions over which little consensus can be found politically.

This thesis has highlighted the considerable continuities in the realities of citizenship in Tunisia that persist since the promulgation of the 2014 constitution. These include but are not limited to the political economy of the country. Despite the ambition of the new basic law to reduce regional inequalities, the Tunisian economy continues to function largely on the same lines as prior to the revolution, benefitting some coastal dwellers and disadvantaging citizens in the country’s peripheral regions. There can be some legitimate expectation that using the

current constitution as an imperfect foundation, Tunisian civil society will be better able to struggle for the full implementation of equal citizenship thanks to its legally enforceable provisions. Marshall's (1950) seminal contribution on citizenship in Britain, where civil citizenship builds the foundation for political citizenship, which in turn serves as the lever with which civil society can enforce social citizenship may serve as a reminder of the interlinked nature of the concept's different dimensions and how they can productively influence each other. Through acts of citizenship, including in everyday life, Tunisians have brought their country to a tipping point at which the authoritarian regime made way for a more democratic alternative. Under current conditions, such acts are more practically doable and may be able to effectively challenge the powers that maintain inequality in citizenship. Having secured important aspects of civil and political citizenship, Tunisia face the challenge to establish a political sphere within which the public can decide about the nature of social citizenship they wish to implement. Yet in spite of the important institutional changes prescribed by the constitution, there is also continuity in the state's structures. This makes those normative shifts the 2014 constitution represents even more important. One of the less-emphasised elements in this regard is the addition of the word dignity to the state motto, so that it now reads "Liberty, Dignity, Justice, Order". Yet the state's coat of arms – omnipresent on identity cards, official certificates etc. – still uses the old tripartite motto without citing dignity. Not too much should be read into this omission, but it is a symbolic representation of the failures to implement the constitution's many ambitions. In this case as in some other areas, it appears political disagreement and bureaucracy stand in the way of full implementation (Lakhal 2017): Six years after its constitutionalisation, this normative ambition of the constitution has yet to become tangible.

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## List of Interviewees

Interviews were conducted in English, French, Arabic, and German. For interviews in Arabic, the author was accompanied by an interpreter. Translations in the thesis text are the author's (for German and French) or the interpreter's (Arabic).

<b>Name</b>	<b>First Name</b>	<b>Affiliation</b>	<b>Interview Date</b>	<b>Place</b>
Abbes	Najla	Ligue des Electricies Tunisiennes (LET)	30.04.2018	Tunis, Tunisia
Afaya	Kacem	Union Générale Tunisienne du Travail (UGTT)	09.05.2018	Tunis, Tunisia
Al Ali	Zaid	International IDEA	24.10.2017	Tunis, Tunisia
Al Saghir	Oussama	Member of National Constituent Assembly for Italy	20.10.2017	Tunis, Tunisia
Amami	Nizar	Member of Parliament (2014-2019)	23.10.2017	Tunis, Tunisia
Aouadi	Achraf	I-Watch	16.05.2018	Tunis, Tunisia
Belhaj	Ahlem	Association Tunisienne des Femmes Démocrates (ATFD)	07.05.2018	Tunis, Tunisia
Ben Abdelkarim	Ons	Al Bawsala	04.10.2017	Tunis, Tunisia
Ben Abdessalem	Slim	Member of National Constituent Assembly for France 1	02.05.2018	Tunis, Tunisia
Ben Jaafar	Mustafa	President of National Constituent Assembly	18.10.2017	Tunis, Tunisia
Ben Moussa	Abdessatar	Ligue tunisienne des droits de l'homme (LTDH)	12.10.2017	Tunis, Tunisia
Bousselmi	Ali	Mawjoudin	03.05.2018	Tunis, Tunisia
Boussiga	Natascha	Chambre Tuniso-Allemande de l'Industrie et du Commerce	20.10.2017	Tunis, Tunisia

Bsili	Adel	Secretary General of National Constituent Assembly	06.10.2017	Tunis, Tunisia
Chebbi	Ahmed Néjib	Member of National Constituent Assembly for Tunis 2	08.05.2018	Tunis, Tunisia
Cherif	Youssef	Columbia University Center Tunis	10.05.2018	Tunis, Tunisia
Chourou	Sadok	Member of National Constituent Assembly for Ben Arous	12.10.2018	Mornag, Tunisia
Ellouz	Habib	Member of National Constituent Assembly Sfax 2	16 October, 19 October 2017	Tunis, Tunisia
Fehri	Noômane	Member of National Constituent Assembly for Nabeul 1	19.10.2017	Tunis, Tunisia
Gaddes	Chawki	Association Tunisien Droit Constitutionnel (ATDC)	02.05.2018	Tunis, Tunisia
Guellali	Amna	Human Rights Watch	19.10.2017	Tunis, Tunisia
Guetat	Meriem	Centre d'Études Maghrébines à Tunis (CEMAT)	30.06.2020	Skype
Hamdi	Maher	Union des Diplômés Chômeurs (UDC)	20.10.2017	Tunis, Tunisia
Hrizi	Mabrouk	Member of National Constituent Assembly for Kasserine	24.10.2017	Tunis, Tunisia
Jeribi	Lobna	Member of National Constituent Assembly for Tunis 2	15.05.2018	Telephone
Kahlaoui	Tarek	Former Advisor to President Moncef Marzouki	03.10.2017	Tunis, Tunisia
Labidi	Meherzia	Vice-President of National Constituent Assembly	07.05.2018	Tunis, Tunisia
Laghmani	Slim	Faculté des sciences juridiques de Tunis	14.05.2018	Tunis, Tunisia

Lakhzouri	Mohamed Hedi	Union Générale Tunisienne du Travail (UGTT)	11.05.2018	Tunis, Tunisia
Louhichi	Ghada	British Council Tunisia	07.05.2018	Tunis, Tunisia
Marzouki	Moncef	President of Tunisia (2011-2014)	16.05.2018	Tunis, Tunisia
Mbarek	Mabrouka	Member of National Constituent Assembly for America and rest of Europe	06.10.2017	Tunis, Tunisia
Mrad	Nejib	Member of National Constituent Assembly for Monastir	10.05.2018	Tunis, Tunisia
Murphy	Jonathan	United Nations Development Programme (UNDP)	12.10.2018	Skype
Naoufeul	Jammali	Minister of Vocational Training and Employment (2013-2014)	09.05.2018	Tunis, Tunisia
Neji	Jmal	Member of National Constituent Assembly for France 2	08.05.2018	Tunis, Tunisia
Paul	Joachim	Heinrich-Böll-Stiftung Tunis	18.04.2018	Berlin, Germany
Romdhani	Messaoud	Forum Tunisien pour les Droits Economique et Sociaux (FTDES)	02.05.2018	Tunis, Tunisia
Said	Kais	Tunis Faculty of Law and Political Science	14.05.2018	Tunis, Tunisia