Constitution-making in Tunisia

- an analysis of contentious constitutional issues in the process of drafting the 2014-constitution

Lisa-Marie Måseidvåg Selvik

Master's thesis

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Abstract

Tunisia opted to write a new constitution, after the fall of the Ben Ali regime in January 2011. The process took over two years, but the adoption of the 2014-constitution has been regarded as pivotal for the country's successful transition toward a more democratic political regime. However, though many consider the process as largely peaceful, and as a great success in relation to other MENA countries' trajectories after the so-called 'Arab spring', the Tunisian experience of constitution-making deserves further scrutiny. The awarding of the Nobel Peace Prize to the Quartet have further strengthen this view. This study of the constitution-making process wants to contribute to a focus on the actual constitution-makers, namely the elected politicians in the National Constituent Assembly.

The aim of this study is, therefore, to develop new knowledge about the constitution-making process, and provide a new possible perspective on the political transition. This study applies constitutional theory in approaching the constitution-making process in Tunisia, and a theoretical framework is constructed within the strategic-realist approach, combining a contractarian and coordination perspective on the situation constitution-makers face. Several expectations derived from the theoretical framework guide the analysis of five articles regarded as particularly contentious in the constitution-making process. By analysing these five contentious issues, several interesting aspect of the political context is uncovered. For one, this study finds that issues concerning values and rights seemingly were treated in the same way as those concerning structural provisions. Further, this study also finds that values and rights were to some extent used in a strategic way, in order to enhance political positions or clout. Further, it is argued that these findings, to a limited extent, can shed light on some aspects of the Tunisian political landscape in the time of constitution-making.

Key words:

Tunisia, constitution-making, the 2014-constitution, strategic-realist approach, coordination theory, modern contract theory

Acknowledgements

Abbreviations and simplified names

CC   Consensus Commission

CPR   Congress for the Republic

LTDH   the Tunisian League for Human Rights

MENA   Middle East and North Africa

NCA   National Constituent Assembly

ND   National dialogue

ONAT   the National Bar Association

OPPP   Provisional Organization of Public Authorities

RCD   Constitutional Democratic Rally

RoP   Rules of Procedure

UTICA   the Tunisian Union for Industry, Trade, and Handicraft

Commissions in the Tunisian National Constituent Assembly, with simplified names:

Commission for rights and freedoms

Commission for the powers	Commission for legislative and executive powers and the relationship between the two powers
Commission for the preamble	Commission for the preamble, fundamental principles, constitutional review
Commission for public authorities	Commission for regional and local public authorities
Commission for constitutional bodies	
Commission for the justice	Commission for judicial, administrative, financial, and constitutional justice
The Drafting committee	the Joint Committee for Coordination and Drafting

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1   Introduction

The process of writing a new constitution that followed the uprisings in Tunisia has been praised by many. The political transition phase was, overall, perceived as relatively peaceful, and without any great influence of the army or foreign powers (Pickard, 2015, p. 4). Many regarded the adoption of the new constitution on 26 January 2014, as a first step towards a more democratic regime. The experience of constitution-making in Tunisia is very distinct from the other experiences with constitution-making in the aftermath of the Arab spring (Beau & Lagarde, 2014). This constitution is the first constitution in the Arab world written with an Islamist party in power (Pickard, 2015, p. 5). It also marks a shift from Arab constitutionalism more generally, where the prevalent belief for a long time has been that constitutions in the region have been adopted without any desire for actual constitutionalism (Brown, 2002). The Tunisian 2014-constitution is different. This is commonly attributed to the fact that Tunisian political leaders envisioned a new constitution that would represent a new democratic order (Pickard, 2015, p. 5). The hope was that a new constitution would signify a willingness to establish a new political order, just as much as signify a rupture with the past (M'rad, 2011).

The Tunisian 2014-constitution has been characterised as both a compromise, a consensus and a contradiction (Marks 2014; Mersch 2014; Thornton 2014). It was elaborated over a period of nearly two years. In the end, the adoption of the constitutional text as a whole, on 26 January 2014, marked the finish line of a long and contentious process. A constitutional moment will be fraught with uncertainties, and tensions and differing conceptions of the political will compete in the formation of a new state identity. This might be the case especially in societies emerging from authoritarian regimes (Gerges, 2014a, p. 2). During the process of drafting the constitutional text, there were many challenges and blockages. Especially the year of 2013 stands out as a crucial period of the drafting process, with two political assassinations and high political tensions both inside and outside of the National Constituent Assembly (NCA). In the end, the political crisis in the country reached a level so high that the NCA suspended its work and the political talks were held outside of the assembly, mediated by representatives from the civil society.

The research question facing this study is:

How were contentious constitutional issues solved during the process of making the Tunisian 2014-constitution?

By posing this question, the study recognises that not all the constitutional issues were contentious. However, the premise is that a study of the political process to solve contentious issues during the constitution-making process can shed light upon interesting aspects of the challenges the political landscape in Tunisia after a political upheaval. When a head of state is removed and the dominating political order toppled, the struggles within the state will intensify. In the new emerging order, there will be some sort of struggle over the distribution of power, and all societies react differently (Gerges, 2014a, p. 8).

However, the political transition that took place in Tunisia, and which arguably is still going on, is about more than the elaboration and adoption of the 2014-constitution. The ambition of this study is nonetheless to view the constitution-making process in Tunisia in the greater context of political transition after an upheaval of the prevalent order. However, this study does not aim to give an account of the whole process, but rather to illustrate how constitution-making does not happen in a vacuum, but should be seen in relation to the context, as being both affected and affecting in turn its surroundings. This is the interesting feature with Tunisia's recent experience with constitution-making. The main purpose of this study is, therefore, to develop new knowledge about the constitution-making process, and provide a new possible perspective on the political transition.

1.1 The relevance of this study

The study of the constitution-making process in Tunisia is relevant for several reasons. For one, the Tunisian 2014-constitution is highlighted as the "success" case of the Arab uprisings. The notion of the "Tunisian model" has appeared, as an example to follow in other Arab countries. That the constitutional process in Tunisia is often compared with the "less successful" trajectories in the other Arab spring countries, causes in many respects an unbalanced analysis. One could argue that it is exactly this comparison that makes the case of the Tunisian constitution-making shine. The apparent success of Tunisia is seen in relation to the so-called failures of the other countries that attempted the same endeavour. However, the reality is far more complex. The labelling of the transition as a "success" can easily be

complicated and dismantled. Some might see the transition in Tunisia as an invariable successful democratic transition (Stepan, 2012), while other see it as a religious counter-revolution (Bradley, 2012; Kraiem, 2014). The transition Tunisia is going through is very complex, and it is therefore important that we gain more in-depth knowledge about it.

Furthermore, the notion of the "uniqueness" or "exceptionality" of the Tunisian constitution-making process should be further scrutinised. It has been renowned for its 'consensus and compromise' between Islamists and secularists, both in the resulting content and by the process of constitution-making. There is a wide misconception that what has become known as the Tunisian "culture of consensus" was created during the drafting process (see for example El-Sayed, 2014). This ignores what those who have studied the country for a while already know: that the tradition of "national dialogue" and the Tunisian culture of consensus and peacefulness is not a new phenomenon born in the transitional situation. It would be more appropriate to claim that this was challenged in the transition, but that Tunisians managed to maintain it. The constitutional process might have been peaceful relative to the other countries in the MENA region, endeavouring the same transition. However, for Tunisia, this has been a contentious and dramatic event in the country's history.

In prolonging of this argument, this study was rendered even more relevant with the awarding of the Nobel Peace Prize of 2015 to the Tunisian Dialogue Quartet, a group of civil society organisations that mediated several rounds of national dialogue in the transition process. Although the mediation of the quartet was a significant contribution in the political transition process, and for getting the constitutional process "back on track", this study of the constitution-making process wants to contribute to the focus on the actors actually making the constitution.[1]

1.2 From uprising to constitution-writing

What led to the drafting of a new constitution in Tunisia after the political upheaval caused by the uprisings? Although this questions could preoccupy a thesis in itself, a historical narrative

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[1] This view is supported by Pickard (2015, p. 4).

of what led to the constitution-making process is necessary before delving into the research interest of this study.[2]

Before the uprisings, Zine El Abidine Ben Ali had ruled Tunisia since he performed a bloodless coup d'état in 1987, when he took power from Habib Bourguiba, also known as the "Father of Independence", who had ruled Tunisia since independence from France in 1956. From independence until the ousting of Ben Ali in 2011, Tunisia was an increasingly more authoritarian state, with power centring around the person of the president (Owen, 2012). Overall, Ben Ali's period in power was marked by recurrent abuses of human rights, restrictions on the media, and widespread corruption (The Carter Center, 2014a, p. 21). Elections were controlled by the party of the president, the Democratic Constitutional Rally (RCD), the Ministry of Interior, and with a legal framework designed to ensure the ruling party's dominance on the political scene. As a result, Tunisian politics lacked competition due to the absence of political space and a viable opposition, and Ben Ali installed himself as a "president for life" (Owen, 2012, p. 61).

What has become known as the 'Jasmine revolution'[3] in Tunisia was a countrywide popular uprising that ended the Ben Ali regime. Ben Ali fled the country on 14 January 2011, after attempting to curb the protests by deploying state forces on the protests, by dismissing his entire government and parliament, and by calling for early parliamentary elections. Immediately after Ben Ali's departure, the existing power structures of the State entered into force. However, when the Constitutional court ruled, judging on the 1959-constitution, that Ben Ali's flight was to be regarded as if he had permanently vacated the presidency, this was a significant decision for the next steps in the transition phase. Nonetheless, even though following the procedures set forth in the 1959-constitution, this did not change that it was still a dominance of Ben Ali's party on the political scene. It was Ben Ali's Prime Minister and the speaker and head of the then-dissolved parliament, both from the RCD, who governed the interim institutions. However, anti-government protests continued, due to links with the former regime and the perception that little had changed "at the top".

The new interim government decided to lift all bans on political parties, which allowed for the return of many political refugees. One such was Rached Ghannouchi, the leader of the

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[2] This historical account of events is contructed from Keesing's online, unless otherwise stated (Keesing's online, 2011a, 2011b, 2011c, 2011d).

[3] Although this event might not have been a 'revolution' as defined by most revolution theories, the symbolic effects of the uprisings becomes evident in this denotation.

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moderate Islamist party Ennahdha[4], who could return to Tunisia after 20 years of exile in the UK. Despite this, and non-regarding the attempts by politicians to sever all ties with the former regime, the unrest and anti-government protests continued in various parts of the country, focusing on their links with the RCD and calling for an interim government free of any affiliation with the old regime. An interesting feature of the Tunisian transition, is that there was no attempt in Tunisia to replace the head of state with another "grand homme". There was no "dictatorial horizon", no one natural political figure around which rally around. This has by many been attributed to the culture of pluralism in Tunisia, which was both a major resource in the uprisings and for the process that followed (Salmon, 2016, p. 305). Indeed, in the transition phase, from Ben Ali's departure to the installation of a National Constituent Assembly (NCA) charged with writing a new constitution, we saw the emergence of two different political groups involved in the political transition; the government appointed High Commission of Political Reform (HPRC), with the "revolutionary" Council for the Protection of the Revolution (CSR) in opposition. These two groups later formed one joint body.

Within hours of Ben Ali's departure, then-Prime minister appointed Yadh Ben Achour, a former member of the country's constitutional court, to lead a political reform commission, charged with overseeing a reform of the 1959-constitution, dismantling repressive laws, and supervise an election of a new president (Hachemaoui, 2013; Tavana, 2014, p. 9). The HPRC became better known as the Ben Achour Commission (The Carter Center, 2014a, p. 22). However, despite Achour's credentials, this commission was not received well by the society at large. Many protesters feared that the old regime, through the RCD, would survive and prosper even without Ben Ali (Tavana, 2014, p. 2). They wanted more change on the political scene.

In opposition to the transitional government, which saw its main task as ensuring political and constitutional continuity in this time of upheaval, was the "revolutionary" opposition. This group, led by the left-oriented January 14 Front, created the Council for the Protection of the Revolution (CSR) on 11 February, as a response and to counter-weight the strong RCD affiliation of the government, and what they perceived as the poor legitimacy of the Ben Achour Commissiom (The Carter Center, 2014a, p. 22). This RCD gathered 28 political parties, civil society organizations, and unions, including the Tunisian League for Human

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[4] Ennahdha means 'revival' in Arabic.

Rights (LTDH), the Tunisian General Labor Union (UGTT), the Ennahdha movement, and several judges and lawyers (Tavana, 2014, p. 2). In this way, this "all-party" council assembled a large spectrum of Tunisian politics.

Due to continued popular discontent, and in a period of intense political polarisation, it was held two major demonstrations that are recognised as significant in challenging the interim government. At the first sit-in at the Kasbah square in Tunis,[5] protesters called that institutions inherited from the old regime should be dissolved, and that the "revolutionary" CSR should get decision-making authority and share responsibility for the transition with the government (Tavana, 2014, p. 2). Kasbah I led to the merging of the two groups, and a new body was formed, the High Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition. This body, commonly referred to as the High Commission, had much of the same responsibility as the Ben Achour Commission (The Carter Center, 2014a, p. 23).

At the second sit-in at Kasbah, on 27 February 2011, close to 100,000 gathered protesters in a call for the resignation of Mohamed Ghannouchi, (The Carter Center, 2014a, p. 22). As a result, he was replaced by Beji Caid Essebsi, a former adviser and minister under Bourguiba. Essebsi stressed his government's desire to "break with the past", and said that the main task of his government was to "restore respect for the state" and to establish trust between the people and those in power. However, his popularity did not last for long. In May 2011, the public's perception of a lack of promised democratic reform prompted a call for the ejection of Essebsi's government as well. Still, Essebsi kept his post until the elections of the NCA and the assignation of a new interim-President of the Republic.

The High Commission had presented three different alternatives for the course of action: 1) to hold presidential elections, the elected president dissolves the parliament, and then calls for legislative elections, 2) to hold presidential and legislative elections at the same time, or 3) to elect an assembly to rewrite the constitution (The Carter Center, 2014a, p. 23). The third alternative was opted for, and elections to the NCA was held on 23 October. The elections were postponed from the initially proposed date of 24 July, set by Mebazaâ in March[6]. This

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[5] Named Kasbah I and II, from the square where they were organized, the location of numerous ministries, including the Prime Ministry building.
[6] The suggestion of postponing the elections caused a conflict between the electoral commission (ISIE) and the government, and stimulated street protests, but the ISIE's message of practical challenges and quality of the election manage to convince both politicians and the public (Tavana, 2014, p. 4-5).

three-month delay had, in retrospect, many positive benefits. For one, it allowed a sorting out of the over 100 political parties and groups that had initially announced their participation in the election (Owen, 2014, p. 260). Second, it was important for the party leaders to reach an as large agreement as possible on the electoral system itself.

When the choice of constitutional change was made, there still existed some different courses of action to take. One option was to re-write the old 1959-constitution, done either by experts or by an elected National Constituent Assembly (NCA), or elect a NCA to write a new one. On 21 February, Yadh Ben Achour came with the warning that Tunisia "risked falling into anarchy" during a "dangerous transition", noting the unstable situation and the need for some continuity. Further, he opted for a constitutional change by "the people", and stated that Tunisians, as soon as possible, must decide on whether to amend the old constitution or to write a new one. On 3 March, the interim-President Mebazaâ suspended the 1959-constitution, and announced that a constituent assembly charged with re-writing the constitution would be elected (Tavana, 2014, p. 3). A surge in the street protests in March prompted the government to reach the agreement that a national constituent assembly of 260 members would be elected to draw up a new constitution (The Carter Center, 2014a, p. 23).

The final decision to write a new constitution, and not use the old as a text of reference, was in the end made in the newly elected NCA. However, the idea that Tunisia needed a new constitution had emerged on an early stage, and had developed throughout the process. Some say it was during the Kasbah I and II that this idea came to be.[7] Others claim it was a "conspiracy" on Ennahdha's part, in order to re-instate "their own project" and impose Islamic law on the Tunisian society (Kraiem, 2014). According to Salmon (2016), it was a union dedicated teacher close to Amnesty International, Samir Rabhi, who was the first to call for the need for a new constitution. By doing this, he "outlined the horizon of a second Republic", on the 10 January 2011 through Al Jazeera, from a Kasserine in full uprising (Salmon, 2016, p. 311).[8]

1.3 Outline of the thesis

In order to address the research question, and conduct the study of how contentious constitutional issues were solved during the constitution-making process in Tunisia, this thesis

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[7] Interview with ONAT.
[8] Authors translation.

follows a set of steps. The next chapter, chapter 2, provides a theoretical perspective and construct a framework of understanding, to guide the study of the constitution-making process in Tunisia. Chapter 3 discusses the methodological challenges in approaching the case of constitution-making after a political upheaval, and develop an analytical tool to steer the analysis. Chapter 4 presents the context and identify the contextual factors relevant to this thesis' approach to the constitution-making process in Tunisia. Chapter 5 analyses five selected constitutional issues regarded as particularly contentious, and chapter 6 discusses what this analysis can illuminate and presents some interesting features in the Tunisian constitution-making experience appearing in the analysis.

2   Theoretical framework

In this chapter, the choice of theoretical perspective to the making of the Tunisian 2014-constitution is presented, and a theoretical framework to guide the study constructed. As the research question facing this study concerns the process of solving the contentious issues in the constitution-making process, the theoretical approach to constitutions will focus on aspects of the process of drafting, but also how the nature of content can influence this process. First, the choice of applying constitutional theory in this case study will be defended. Second, the approach to constitutions and the process of constitution-making will be presented. Third, a theoretical framework to guide the analysis will be constructed, for the purpose of this study. This framework will in turn provide the analysis with a set of expectations, in order to guide the empirical inquiry.

2.1 The choice of constitutional theory

Before delving into the theoretical framework, a note must be made about the choice of constitutional theory as the theoretical perspective guiding this study. The theoretical perspective we choose as scientists will affect how we understand a phenomenon, which aspects we will study and what conclusions we can draw. There are several theoretical perspectives available to understand what has happened in Tunisia after the fall of the Ben Ali regime. Many studies have focused on the phenomenon of 'political transition', 'democratisation', or 'conflict resolution'. This is an observation shared by others. (Hachemaoui (2013, p. 7) notes that transitology[9] "quickly imposed itself as *the* paradigm for the interpretation of the Arab Spring". However, while accepting that recent developments in Tunisia can be understood as a transition towards a new political order, this study is not dependent on this. Further, by not applying democratisation theory, this theory aspire to avoid the pitfall many other studies of political developments in the region have falling into. Too many studies have been preoccupied with the extent to which countries in the MENA region have come in their process of democratisation, not to pause and ask whether what we see is in fact a democratisation of the political order (Albrecht & Schlumberger, 2004).

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[9] Theories of political regimes in transition from one political regime to another, see for example O'Donnell & Schmitter, 1986.

Not contesting that these theoretical perspectives can be useful in some respects, the choice of constitutional theory is an attempt at liberating us from any anticipation of what the constitution-making process in Tunisia signifies. However, constitutional theory is not altogether free of associations, as constitution-making has also been linked with both democratisation and peace-building.[10] Still, as the research question posed in this study is *"How was the main contentious constitutional issues in the Tunisian 2014-constitution solved during the drafting process?",* there is no need to regard this process as anything other than 'constitution-making' in order to answer this question. The focus is rather on understanding the process of solving the contentious constitutional issues, and furthermore explore what this can tell us about the political landscape in Tunisia at the time of constitution-making. This renders this study relevant by its theoretical perspective, as well as its empirical relevance.[11]

In addition, the recent events in the MENA region have challenged conventional ways and dominant thinking about the region (Gerges, 2014, p. 1). It gave way to an overall new era of studying politics, that required a reconsideration of our ideas, how we think and the ways we study the region. The durability and resilience of authoritarianism was one such enduring convention.[12] In addition, the "fixation" with top-down politics and the elite is swapped with a reinvigorated academic interest in bottom-up perspective to politics, with focus on workers, ordinary people, social movements, the notion of public space and resistance, the crisis of authority and the role of agency in general.[13] Not only have the Arab uprisings shattered the myth concerning the durability of authoritarian regimes, they have also shattered the myth about the powerlessness of agency (Gerges, 2014, p. 9-15). Therefore, the framework constructed in this chapter will seek to accommodate this new understanding into the theoretical framework, by combining the perspective of an active population with a usually "elite-fixated" approach to constitution-making and political transition processes.

Further, the endeavour of making a constitution in the midst of social and political upheaval, political transition, and even conflict, will be burdened by the challenges such environments pose (Miller, 2010, p. 651). In pace with recent waves of constitution-making, a new generation of the tradition of studying constitutions in their social and political context has appeared in constitutional scholarship. By understanding the social and political foundations

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[10] See Ghai & Galli, 2006; Hart, 2003; Widner, 2008.
[11] Kuhn (2015) is one study applying constitutional theory to the constitution-making process in Tunisia. This study shed light on the why certain procedural options were opted for in designing the process.
[12] See Lawson, 2007; Schlumberger, 2007; Selvik, 2007; Selvik & Stenslie, 2011.
[13] See Chalcraft, 2012; Gerges, 2014b; Marzouki, 2011; Tripp, 2013.

of constitutions, constitutions are viewed as social institutions that both will be affected and in turn will affect their political context (Galligan & Versteeg, 2013, p. 4, 7). Accordingly, there is growing recognition in constitutional theory that constitution-making processes and their context merit just as much attention as the outcomes of these processes do (Aucoin, 2010; Miller, 2010, p. 602).[14]

2.2 Approaching constitution-making in Tunisia

In the case of the Tunisian constitution-making process, a theoretical framework is needed to guide the study of how constitutions are made and constitutional issues treated and solved in a period of political upheaval, insecurity and transition from one political order to another. The first step is to clarify the theoretical approach to constitutions, which will affect how constitutions are viewed, and thereby how the process of constitution-making is understood.

As any encounter with a constitutional text will show, constitutions are steeped in values. A constitutional text will often contain a nation's values, proclaim rights and freedoms for the population, and reflect a nation's history. This may especially be the case in constitution-making after a crisis or upheaval, as a nation's history can be both a source of inspiration, or something to overcome and avoid in the future (Galligan & Versteeg, 2013, p. 8–18). One way to understand constitutions is therefore as an expression of values, which is known as the idealist approach to constitutions. Traditionally, there are two main strands of constitutional theories applied to the study of constitutions: the idealist and the functionalist approach. The strategic-realist approach has emerged in the last decade or so, in response to the other two (Hirschl, 2013, p. 157). This third possible approach also see constitutions as forward-looking in that they, by creating a system of government and dictating its powers and responsibilities, also therefore inherently rely on ideals, principles, and values meant to guide and contain governments in the future (Galligan & Versteeg, 2013, p. 9). According to the idealist approach, the meaning and quality of ideas are key factors in explaining constitutional ideas prevalence or demise (Hirschl, 2013, p. 157-158). This approach can therefore give an account of what constitutions are, and can provide analysts with claims about why certain values have been chosen and with contextual knowledge shed light upon why a particular

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[14] There is a gap in understanding the links between process and outcomes (Ginsburg, Elkins, & Blount, 2009). This study will thus be a contribution in trying to unravel what connections can be found in its holistic approach to the constitution-making process, in discussing both the nature of the content and the greater context.

nation have chosen a certain content. However, it fails to account for how constitutions are elaborated and drafted, and explain the scope, nature and timing of constitutional reform.

As the purpose of this study is to analyse the process of elaborating and adopting the 2014-constitution, the strategic-realist approach to constitutions can provide an understanding of the drafting process that the idealist approach cannot. This approach view constitutions as manifestation of power, which entails that the constitution-making process will be dominated by power struggles, pursuit of interests, and in general political conflict (Hirschl, 2013, p. 163). As strategic-rational actors, constitution-makers will seek to make the constitutional text and its provisions most favourable for themselves. This might especially be the case when the constitution-making happens in a period of political upheaval, when "everything" is up for debate and the future for the political actors is insecure. In this sense, a constitution-making process will be a form "of politics by other means", where the behaviour of stakeholders in the process, that is politicians, elites and courts, play a key role in explaining the outcome of a constitution-making process (Hirschl, 2013, p. 157, 159). In other words, no matter what other qualities constitutions have, they are by nature the product of domestic power struggles, and they will reflect bargains and the interests of different political elites and interest groups (Galligan & Versteeg, 2013, p. 18–19). Through the strategic-realist lens, domestic politics that lead to constitution-making in the first place can be explained, as well as the different interests and challenges of political elites in the constitution-making process (Galligan & Versteeg, 2013, p. 21).

It is especially the elite's power to influence content during the constitution-making process which is of particular value. The strategic-realist approach cannot tell much about the actual content of constitutions, beyond that it provide broad and vague predictions about whose interests they will entrench, and the values and practices in which these interests will be clothed (Galligan & Versteeg, 2013, p. 21). This approach therefore admits that values and ideas can be a potential source of content, and does not exclude the idealist (or functionalist) understanding of how different content is opted for. In this way, the idealist and strategic-realist approach are therefore in practice complementary, as the strategic-realist approach provides an alternative source of content to that of the idealist, which entails that certain rights and values could be included by strategic reasons. In both these approaches, constitution-making can be a struggle over values and ideas, for instance by disagreement over which ideas or worldviews should be "locked in" in the constitution. In essence, ideational and

structural factors might delimit or frame the range of available options for stakeholders in a constitution-making process, but the actual form of constitutional change, that is the resulting content, can best be explained by concrete political factors (Hirschl, 2013, p. 163).

However, a power play amongst strategic, self-interested political elite is always an underlying factor in the strategic-realist approach to constitution-making, and is always present even though they can be pushed into the background. Politics are not always just about manifestation of power, and with its pragmatic approach to constitution-making, the strategic-realist approach allows for the strategic behaviour to be put in the background, and be overcome by the power of ideas and values, or by a desire for coordination (see further down) (Galligan & Versteeg, 2013, p. 21). As strategic-rational actors, therefore, constitution-makers sometimes have to take account for other things than their own self-interest. Sometimes, a preservation of their own self-interest can be contingent upon ensuring certain ideas and values in the constitution. It can be difficult, not say impossible, to discern the different motivations in the political process of constitution-making, as the political landscape will impact how the political actors involved in the process act. In this sense, the strategic-realist perspective opted for in this study, can provide both a useful perspective on how content is opted for in a constitution, and allows the constitution-makers to be a part of a greater political context in the constitution-making process. This is the virtue of the strategic-realist approach to constitutions opted for in this study, that it encompass the aforementioned significance of political and social context and the population in the process, admitting that the process of drafting a constitution does not happen in a vacuum.

2.3 Structural provisions or rights and values

The strategic-realist approach can offer a useful starting point for the analysis of the contentious constitutional issues, as it provide an analytical distinction concerning the nature of the content, namely between structural provisions and rights and values in a more general sense. With 'structural provisions' is meant the provisions that define the power of and relationship between different government actors (Galligan & Versteeg, 2013, p. 21). 'Rights and values' are usually to be found in preambles and chapters concerning freedoms and rights, but can also transcend into other parts of a constitution. While the structural provisions are defining for the power structures within the state and will consequentially affect the future

of political elites, rights and values will not (Galligan & Versteeg, 2013, p. 21). As mentioned above, constitutions can be an important instrument of "locking in" contested worldviews.

Attached to this distinction are expectations concerning how the different constitutional issues in the constitution-making process will be treated and discussed. Galligan and Versteeg (2013, p. 21) suggests that domestic politics will to a certain extent impact on substantive constitutional choices. As the structural provisions have a direct impact on the future of the political parties involved in the constitution-making, it is reasonable to expect that actors in domestic politics will be more concerned with the structural part of the constitution than parts such as preambles and articles stating values and rights. This leads to the first expectation from the theoretical framework guiding this study:

1) *Domestic politics is more likely to take interest in structural provisions than those of values and rights.* [15]

2.4 Open or closed for the public

Further, whether the nature of the content will have any implications on the process, or vice-versa, should also be questioned. Recent developments in private contract theory can prove useful in understanding how constitutions come about, and can explain many aspects of a constitution-making process and the constitutional design resulting from such a process. In Ginsburg's (2013, p. 201) modern contribution to contract theory, the conviction is that the thought of constitutions as contracts still can provide a useful framework for understanding the process of making constitutions.[16] By applying knowledge from private contract theory, therefore, contract theory can still prove useful in understanding the contentious process of drafting a constitutional text. With the potential problems and solutions that the different parties face in constitution-making, this theory can shed light on the significance of specific interests of the parties in constitutional negotiation, and the situation they are working in (Galligan & Versteeg, 2013, p. 41).

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[15] Unless otherwise stated, the expectation proposed are based on conclusions drawn from case studies conducted in *Social and Political foundations of Constitutions* (2013) by Denis J. Galligan and Mila Versteeg (eds).

[16] No matter the deficiencies contract theories have as normative theories, the focus here is on the process of drafting a constitution. For criticism of contract theory, see Galligan and Versteeg 2013, p. 39; Ginsburg 2013, p. 182.

One such aspect of the process that will affect how different constitutional issues are treated, is whether the process is open or closed to the public. Jon Elster (1995) suggests that whether a debate is public or behind closed doors is likely to have two consequences for the discussion. For one, there will be a shift from impartial discussion to more interest-based bargaining, because there is less need to present a proposal while at the same time aiming it at "promoting the public good". Second, secrecy will improve the quality of debate, as it allows politicians to change their mind when persuaded by an opponent's view (Elster, 1995, p. 388). Therefore, the more transparent a process is, the more likely is it to lead to arguing instead of bargaining, as the negotiating parties will spend more time and energy on "posturing before their respective principles" (Ginsburg, 2013, p. 192). This entails that public debate will be void of any appearance of bargaining, and encourages "stubbornness, overbidding, and grandstanding in ways that are incompatible with genuine discussion" (Elster, 1995, p. 388). This also gives that actual bargaining will be hard to uncover, as this will happen behind closed doors. Further, agreements reached in secrecy does not necessarily contain actual bargaining, but allows for a more strategic behaviour than merely an ideational one, and can lead to a more pragmatic and solution-based discussion.

This gives the two expectations to guide the analysis:

> 2) *Contentious issues will be easier to resolve in a closed forum, than in public.*
>
> 3) *In public forums, politicians are likely to posture their principles and emphasise these rather than pragmatic solution-oriented discussion.*

This contribution from contract theory will not, however, obtain the holistic perspective on constitution-making aspired in this study. Tom Ginsburg (2013) encourages contributions from contract theory to be used in combination with a coordination perspective on constitution-making.[17] Even though a constitution is the result of political negotiations and bargaining, the notion of constitutions as coordination devices can still be useful in understanding a constitution-making process (Ginsburg, 2013, p. 183). However, despite providing a valuable holistic perspective to the constitution-making process, coordination theory cannot alone account for the formation of a constitution, as this theory tells us little about the actual processes and outcomes of constitution-making (Ginsburg, 2013, p. 183).

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[17] As contract and coordination theories are usually thought of as contradictory theories, this study's combination of these two theories is also of theoretical relevance. See Ginsburg (2013) for his account of this combination.

There is nothing that contradicts a combination of the two theoretical perspectives – it rather makes for a fruitful approach to a constitution-making process. As noted above, the strategic-realist approach places constitution-making in a greater context. In this lies the virtue of the combined theoretical perspective constructed in this section, in that it can encompass both aspects of the process that will affect the discussion, and the overall political context the constitution-makers find themselves in.

2.5 Pressure on the process

Although this study does not aim to say anything about the effects of the Tunisian 2014-constitution or the constitution-making process on society, coordination theory can provide a perspective that captures the overall perspective on constitution-making. As the first theoretical expectation states above, domestic politics will be concerned with certain aspects of the constitution. Coordination theory describes constitution-makers as acting in response to the population in particular, as their overall goal is assumed to be successful coordination of politics and society (Hardin, 2013, p. 61). This holistic perspective therefore serve as a reminder of the practical point of a constitutional order; whether it manages to establish an effective system of government or not (Galligan & Versteeg, 2013, p. 28). In this sense, it assumes that social coordination is necessary and wanted in any society. Coordination theory also advances claims about the necessary conditions for a nation to have an effective system of government within a constitutional framework (Galligan & Versteeg, 2013, p. 27). It is thereby concerned with the overall effects of a constitution and the process of constitution-making on society.

The usefulness of the coordination perspective is that it can describe the position of the people in a constitutional order, by invoking the notion of acquiescence. In this perspective, popular acquiescence is a significant feature in the context of the constitution-making process (Galligan & Versteeg, 2013, p. 26). The 'people' is given an active agency in coordination theory, and therefore enables us to encompass an active civil society and the role of agency of the people in understanding the process of constitution-making. This becomes a part of the external environment to the constituting-making process, but a part in which constitution-makers find themselves dependent on accommodating. Through a strategic-realist (and rational) lens, constitution-makers are regarded as actors acting in response the "political

reality", and with a coordination perspective on the process, the degree of acquiesce given by the people – or the lack thereof.

For the sake of this study, this notion of popular pressure on the process can mean two things. For one, and as argued, this popular pressure can affect the way constitution-makers act and the choices they take. Second, the population's perception of the constitution-making process can induce popular pressure. This view is supported by Miller (2010, p. 602), where the case studies conducted demonstrates that those involved in a constitution-making process will behave in a manner indicating that they believe the nature of the process matter for the public's perception of the whole project of constitution-making, both the resulting constitutional text and the process that produced it.

Following the expectations retrieved from theory concerning the nature of the content and the forum for discussions, it is reasonable to believe that both the nature of constitutional issues and the way they are treated will affect the level of popular pressure. This because people's perception of the process and the people's expectations to content will matter for the popular acquiesce (Galligan & Versteeg, 2013, p. 30). Therefore, this theory would expect that issues concerning values and rights are likely to induce more popular pressure than those concerning structural provision. Further, it would expect that issues discussed in openness are likely to induce more popular pressure than those treated in secrecy. However, these will not be useful expectations to guide this study, as the purpose is not to say anything about the actual level of popular pressure on the constitution-making process. The point of interest is rather how the politicians perceived and reacted to a popular pressure. And in that sense, these expectations are useful. In total, the theoretical framework constructed here gives that a process of constitution-making will be vulnerable to pressure from the greater context of the process in two ways, both by pressure from domestic actors and by popular pressure. Therefore, some expectations derived from theory concerning the pressure on the process are:

4) *Issues concerning structural provisions are likely to be subject of pressure from domestic politics, and is likely to be treated in a closed forum.*

5) *Issues concerning values and rights are likely to be subject of popular pressure, and is likely to be treated in a public forum.*

In this study of the constitution-making process in Tunisia, the focus is on how it was possible to find a solution on the main contentious issues. When discussing a theory's worth, the

crucial point is whether it can help to uncover aspects of constitutions and constitution-making that are not included in other theories (Galligan & Versteeg, 2013, p. 40). This is the underlying ambition in this chapter. By constructing a theoretical framework, with all the choices and delimitations that entails, this theoretical framework endeavours to link the nature of the content discussed to the nature of the process, and the context of constitution-making, including pressure on the process from outside of the NCA. Further, an analytical tool to guide the analysis will be developed in the next chapter.

3 Research method and analytical tool

Studying the constitution-making in Tunisia after the uprisings posed several challenges of a methodological nature. As anyone who have tried to study a constitution-making process knows, such processes are often chaotic and contentious even after they are "concluded" – especially when they are conducted in times of political upheaval and uncertainty. The constitutional process in Tunisia is no different. It is a polarised topic to discuss, and dominating discourses, sometimes contradictory, are still fighting over the power to define the Tunisian experience of constitution-making. As a result, the constitution-making process in Tunisia as a field of study, is filled with contesting views both concerning what really happened, why it happened, and the significance thereof. A thorough review of this study's methodological approach, research methods and analytical tool is necessary in order to evaluate the study as a whole. First, the case in question and the case study approach will be accounted for. Second, the sources of evidence for this study is recognised. Third, the fieldwork in Tunis is presented, and interviewing as a method of data collection discussed. Lastly, an analytical tool is developed to guide the empirical inquiry.[18]

3.1 Case study approach

The first thing to ask oneself in conducting a case study, is what the case of study is a case *of* (Levy, 2008, p. 2). By identifying this, it will be possible to delimit the scope of the research, and identify the most logical sequence that can connect the empirical knowledge to the questions at hand, and thereby draw conclusions (Yin, 2009, p. 26). This case study is most consistent with Yin's (2009, p. 18) definition of a case study, as it is an empirical in-depth study of the constitution-making in Tunisia, viewed as a contemporary phenomenon and within its real-life context. This definition is rendered still more relevant, as the boundaries between the phenomenon of constitution-making and the context of political transition are not evident.

However, despite the impossibility of divorcing a phenomenon from its context, defining 'the case' enables us to discern knowledge about the subject of the case study (the phenomenon of constitution-making) from knowledge external to the case, concerning the context (Yin, 2009,

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[18] Reliability and validity are not discussed on its own, but will appear where appropriate in the methodological discussion.

p. 32). This is in compliance with the definition given by Gerring (2007, p. 19) of the case as a "spatial delimited phenomenon", that is to say a phenomenon with a clear demarcation in time and space. This inclusion of the wider context is one of the virtues of a case study (Andersen, 2013, p. 24). However, it is not always easy to define either its beginning nor its end points. An advantage of the case study method is thus that it allows retaining the holistic and meaningful characteristics of real-life events (Yin, 2009, p. 4, 29-30). Further, the phenomenon of scientific interest in this study is constitution-making process after political upheaval. By identifying the case of the Tunisian constitution-making process as a case within a 'class of cases', this indicates what this study can shed light upon (George & Bennett, 2005, p. 17).

I needed a research approach to the constitution-making process in Tunisia that fit my research interest, namely to shed light and develop new understanding about how we see the process of constitution-making in Tunisia.[19] Although embedded with an empirical research interest, this study is not allover atheoretical. While I do not aim at testing theoretical predictions, a theoretical framework have informed my study, provided me with some expectations about the case of study, steered my data collection and structured the analysis (Yin, 2009, p. 17). I thereby use theory as a reasoned and precise speculation concerning the answer to my research question. As such, this case study can be categorised as a 'theory-guided case study', which develops a conceptual framework that can cover a few particular theoretical aspects of reality (Levy, 2008, p. 4). This, of course, entails to exclude other aspects of the real-life phenomenon of interest, but this is unavoidable in any research endeavour. All of a researcher's decisions, from the very study propositions she or he makes and the class of events to study, to which theories to use in this study, determines what information is relevant for the case study (George & Bennett, 2005, p. 18).

As a phenomenon and the context are hard to distinguish, as noted above, we need other "technical characteristics", including a method for data collection and a strategy for the analysis of this data. Typically of qualitative research is the unease to depict the research strategy in terms of a set of stages, as there are many different methods and sources that comprise this research (Bryman, 2004a, p. 268). The case study as a research method is, like other research methods, a way of doing an empirical inquiry by following a set of pre-specified procedures (Yin, 2009, p. 21). By using the analytical tool developed on the basis of

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[19] As the method chapter concerns my choices, as the researcher, I allow for the subjective form of "I" to appear.

the theoretical framework, therefore, I hope to accommodate criticism of the case study method, like its lack of rigor, and to increase the methodological "soundness" of the case study. First, however, the way in which information has been collected for this empirical inquiry is presented.

3.2 Sources of evidence

As a field of research, qualitative research is very complex, with a variety of sources and methods for data collection (Bryman, 2004a, p. 268). The case study, as a distinctive form of empirical inquiry, involves a lot of information. A major strength of this research method, is the opportunity to use multiple sources in data collection (Yin, 2009, p. 14, 114). For this study, it was necessary to collect information about the process of constitution-making and the organisation of the NCA, but also about the pressure from domestic actors and civil society on the constitutional process, in order to get a holistic perspective on the greater context the NCA worked in.

A significant body of evidence for this study consist of written documents, such as reports elaborated by of the constitution-making process, as well as chronicles and articles written by observers, journalists and scholars during the process. Having been closely followed from its very beginning, by both national and international observers, there exists a great deal of information about the process of making the Tunisian 2014-constitution. All of the reports, statements, and other written sources issued from these actors, constitutes an important part of the empirical basis for this study. Combined, these written sources focus on the organisational aspects in the NCA, gives an account of the process and timeline, express which events were of significance, and discusses the different constitutional issues in the process. Both during and in aftermath, a number of researchers have written about the process. They have largely based their research on documented information about the process, adding interviews and information of their own to gather more knowledge about the aspect of interest (see for example (Haugbølle & Cavatorta, 2011; Marks, 2014; Murphy, 2013; Pickard, 2014; Thornton, 2014; Zemni, 2015).

Documents of especial importance in this study are the different drafts of the constitutional text itself. In tracing agreements concerning constitutional issues, and articles in particular, it was necessary to consult the different constitutional drafts. By comparing drafts at different

stages of the drafting process, the written development of the articles could be traced, and linked to the discussion. Where possible, both English and French versions of the drafts have been consulted. The consultation with the French version was necessary, as Al Bawsala documented the proposed amendments in French, and it was thus a necessary measure to trace the sometimes very small adjustments in the text. I have relied on unofficial translations done largely by the UNDP[20], the International IDEA, and Al Bawsala. (See attachment 5.)

Two collections of data have been of great use, albeit of a different nature. The Carter Center's report "The Constitution-Making Process in Tunisia", issued when the process was completed in 2014, is a comprehensive account of the organisation of the NCA, the process of drafting, and the contentious issues in the process, both concerning the constitutional issues and more others. In addition, the Tunisian youth organisation Al Bawsala developed an online database, *Marsad Majles*, where they published information about the elected deputes, stating their electoral list, constituency, which political party and parliamentary bloc they belonged to, and which commissions in the NCA they participated in. These archival records also includes reports from commission meetings and plenary sessions, and a registry of the voting process, with information concerning who voted for which amendments.[21]

In relying on observers or other researchers' collection of information, we are also dependent on their method for collecting data, for processing, for interpreting and for presenting it. By the method of data triangulation, however, the facts extracted for the purpose of this thesis, will be verified and cross-checked. By applying multiple sources of "evidence" in order to collect data about the case of study, this will contribute to a validation of the information (Mikkelsen, 2005, p. 96). The rationale behind the concept of triangulation, relies on the notion of a "fixed point", or a superior explanation against which other interpretations can be measured (Barbour, 2001, p. 1117). This study, however, in accordance with the relativist perspective in qualitative science, acknowledge the existence of several possible versions, all of equal validity. The main principle, however, is that the broader the empirical foundation of the case study, the better, as a great advantage of such a method will address potential problems of construct validity, as the multiple sources of evidence essentially provide multiple measures of the same phenomenon (Yin, 2009, p. 116–117).

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[20] United Nations Development Program in Tunisia.
[21] The Marsad Majles online platform can be visited at http://majles.marsad.tn/anc.

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As aforementioned, the process of constitution-writing after a political upheaval is chaotic, contentious and often characterised by a somewhat *ad hoc* fashion and informal procedures. Consequentially, the collection, handling and processing of information can be a challenge, both for those contemporary studying, or merely following, the process, and for those aspiring to conduct a study after the "dust have settled". Further, history is being written in Tunisia and the struggle over the dominating version is very much ongoing. Several sources of data have therefore been used in order to corroborate evidence, or to identify prevalent beliefs and perceptions on certain contentious issues.

Despite the relatively well-documented nature of the constitution-making process, there are still some aspects of the process left to unravel and analyse. In order to have a fruitful analysis following the research question posed in this study, it was therefore necessary to collect data of my own. All methods of data collection are of equal value, as there are no one source of evidence that is more advantageous or dis-advantageous than others (Yin, 2009, p. 101). However, interviewing can provide the case with essential information, specified for that case study (Yin, 2009, p. 106). The interviews conducted for this study, were also a necessary complement to the other sources of evidence, and features in the triangulation of data.

3.3 Doing fieldwork in Tunis

My fieldwork in Tunisia was confined to the capital, Tunis, in the period of 16 November – 16 December, 2015, and resulted in 26 interviews. A whole month was dedicated to the fieldwork. The period was determined in part by the Nobel Peace Prize ceremony the second week in December of Oslo, as I did not know how this would affect the schedule of my desired interviewees. Further, the length of the fieldwork allowed time to get in contact with the desired interviewees. One problem endemic to all elite interviewing, is the extraordinarily busy lives of the interviewees (Rivera, Kozyreva, & Sarovskii, 2002, p. 684). A whole month in the field also gave flexibility in case of unforeseen events.

The fieldwork was prepared in several ways. For one, I talked with researchers who had done fieldwork among the political elite in Tunis, and others with first-hand knowledge, in order to get a sense of the field of study. Second, and as a result of this, I was able to hire a translator. As efficient in French, I hoped to manage most interviews in French, but wanted to prepare

for a situation where the interviewee was more comfortable to speak in Arabic.[22] The translator also had a broad political network, as she both worked professionally with, and was personally involved in, political parties, and therefore could also act as a local "fixer". Third, I contacted possible interviewees, or starting points for a snowballing method (see further down), but, as the previous preparations had prepared me, this yielded little response. The most successful step in preparing the fieldwork, however, turned out to be attending a discussion at the Swedish Institute of International Affairs in Stockholm in September, 2015.[23] In addition to the Tunisian panelists, a great part of the audience was Tunisians with different relations to the constitution-making process. The contacts made in Stockholm, proved valuable as starting points in the snowballing method.

Tunis was a very grateful place to conduct fieldwork. For one, because of practical concerns, as the infrastructure provided a high level of mobility. Second, when arrived in Tunis, it was fairly easy to get in contact with and gain access to my desired interviewees. Third, due to the overwhelmingly positive response from the interviewees, who nearly all wanted to participate in this study. Two main reasons were given for this. Most of my interviewees expressed a want to "tell their story", as there is a common understanding that this has been an important event in Tunisian history. Many also saw it as their duty, to share their experiences. Another reason given, was the want to encourage research, as many of the interviewees themselves had engaged with research in one way or another in their education.

3.4 Interviewing as method for data collection

Contrary to belief of the ignorant, interviewing is a challenging method of data collection, and maybe in particular when interviewing political elites. Nevertheless, interviewing is probably the most widely employed method in qualitative research, made attractive by its flexibility in how you want to acquire knowledge on a certain subject (Bryman, 2004b, p. 319). It also depends on what kind of information you want to acquire. My main argument for conducting interviews, is that the view and rationale of the actors in the process can be captured and discussed.

The interviews conducted for this study were of a semi-structural nature, with a loose structure, and were conducted in a conversational manner. Most of them lasted for

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[22] However, none of my interviews needed translation from Arabic.
[23] The discussion was titled «Democracy in Tunisia: Where Are We Now?», convened on 11 September, 2015.

approximately one hour, and all of them were recorded. An interview guide with questions prepared for the interviews, gave a certain order on the topic areas (Bryman, 2004b, p. 324).[24] The interviews can be classified as a mixture of in-depth interviews and focused interviews, as it was a mixture of key respondents asked about the facts of a matter, and their opinion, as well as the purpose of many of the questions asked were to corroborate certain facts, or to ascertain the "truthfulness", of other sources (Desmond, 2004, p. 107). Further, the semi-structured nature of the interview allowed for an alteration of the sequence of questions, as well as more latitude to probe the interviewees, and ask more specified questions in response to significant replies (Bryman, 2004b, p. 321). In many of the interviews, when allowed time for preparation, personal probes were developed for respective interviewees.

In general, the questions in the interview guide were formulated with the aspiration not to be leading. There were 7 general questions, that would cover the point of interests of the research question. The first theme was concerned with information on how the NCA worked, while the second, and largest theme, was concerned with "finding an agreement". However, sometimes I did not pose question explicitly myself, but nonetheless received an answer. As one concrete attempt at corroborate fact, but also to mitigate the problem of flawful memory, a timeline was presented to the interviewees. (See attachement 2.) This was particularly useful when asking about the process, and probing about developments in the process of solving a particular constitutional question. It was also valuable as to noting when the interviewee pointed to an event or the like, not included in the timeline I had prepared.

3.4.1 Interviewees and snowballing

As this is a study of the constitution-making process in Tunisia, interviews with the aim of gaining knowledge about the process should be with those involved in the constitution-making. This study will favour the NCA as a unit of analysis over others, and thereby view actors outside of the NCA as part of the greater context. The group of desired interviewees is thus the NCA members involved in the constituent commissions, and notably those working with the constitutional issues chosen for the analysis. As all of the contentious issues remained unsolved until the last phase of the process, especially those involved in the last stages of the process are desired interviewees, namely those who participated in the

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[24] Different groups of interviewees made for different interview guides, as the NCA members, the spokespersons of the quartet, and the observers of the process, respectively required slightly different sets of questions.

Consensus commission. Due to the chaotic nature of the last phase of the process, it was also desirable to talk to observers of the process. It was also necessary to interview representatives from the quartet, who remained involved in mediating the political crisis until the adoption of the constitution, to unravel how much this affected the process of constitution-making, and in particular the constitutional agreements themselves. In other words, I needed to get access to the political elite class in Tunisia operating in the period of the NCA.

The snowball technic of gaining access to desired interviewees is a form of purposive sampling, where interviewees were included in my sampling frame due to their direct relevance to the research (Barbour, 2001, pp. 1115–1116). This technic, also known as the referral method, rely heavily on personal contacts and introductions (Rivera et al., 2002, p. 683). After every interview, I presented a list with names of interviewees I would like to get in contact with. I found this a good way to steer the snowball to a certain extent. One tendency with this technic was that interviewees tended to give me contacts to their party colleagues. This did not represent a great drawback however, as I made contact with different political fractions, and managed to cover a large portion of interviewees within my sampling frame. In addition, it was difficult to get in contact with those who had retired from their political commitments. In some cases, however, I needed a more direct approach than that of the snowball technic, sometimes by contacting interviewees on e-mail, phone or Facebook, sometimes by presenting myself (or through my "fixer") at the head quarter or office of the political party or organisation requesting an interview.

As a result, 14 of the interviewees were member of the Consensus commission. Out of the 22 members in the commission, I met with 5/6 from Ennahdha, 2/2 from CPR, 2/3 from Ettakatol, 3/3 from the Democratic bloc, 1/1 from Wafa, 1/4 independents, but none of the 3 members from the Democratic transition or the Democratic alliance. From the Drafting committee, I met with 10 out of 16 members, where only 3 of these did not participate in the CC. Other than the interviewees from these groups, I met with three NCA politicians that did not participate in either the CC or the Drafting committee. However, one of these help to organize the Dar Dhiafa conference. Further, I met with one observer, and with representatives from all of the quartet organisations. [25]

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[25] Unfortunately, I only met with one observer, as neither Al Bawsala or the Carter Center were available. They were, however, very accomodating on e-mail.

3.4.2 Challenges in interviewing political elite

There were also several challenges in the interview setting as well. For one, and as aforementioned, many of the interviewees had such a strong "need" to tell their story. This had a tendency of dominating the interview, occasionally rendering the questions in the interview guide secondary. This could underline the argument that 'rambling' or going off at tangents is often fruitful, and is in encouraged in qualitative interviewing (Bryman, 2004b, p. 320). Reflected in my interviewing style, I decided early on that I would not interrupt, and allow 'rambling' as long as it did not stray too far away from the topic, as this also could give indications of a topic's relevance. However, this setting was not uncommon, and sometimes became very challenging for the interview setting, especially when operating with a set time frame. The challenge of "steering" the interview back on track, for me as a researcher fairly new to conducting fieldwork, this made the power dynamics of the interview situation practically tangible. Particular in elite interviews, the power relation between the researcher and the researched is inevitable asymmetrical regardless of the research strategies deployed (Desmond, 2004, p. 265). While literature on qualitative research usually assumes a power hierarchy where the researcher is "on top", elite interviews are different because the researcher becomes dependent on the cooperation of a small number of people with specialized knowledge.

Overall, however, it was my perception that both I as a researcher and my questions were taken seriously. The interviewees dedication for the topic and positive attitude towards research, made it very easy to establish a good rapport with most of the interviewees. However, another aspect of interviewing political elites, is that some of the interviewees will be rivaling elites. As mentioned introductory, the topic of the constitution-making process is still, in certain areas, a contentious topic. Sometimes, I felt "trapped" in an argument, where – instead of actually answering the question – the interviewees would refute the arguments they thought the other side had given.[26] Further, in most cases, the positive attitude towards research on Tunisia and their achievements, made it a grateful setting to arrive as curious and with in-depth knowledge about the process. It was, however, sometimes a challenge to show this knowledge. At other times, my aspiration to appear knowledgeable, sometimes came at the expense of open questions (Bryman, 2004b, p. 325).

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[26] As a result, a great deal of the data collected concerns the different side's viewpoints on the contentious issues.

A last point of interest, on the challenges of the interview setting, also concerns Tunis and the political sphere as a field of study. My experience was that the interviewees either had a strong expectation about what I was going to ask, or a strong opinion of what I should be asking instead. I attribute this to two things; for one, as a highly educated group of people, many of the interviewees had either done or were planning to do, their own work on the process, either memoirs or articles, or the like. Second, many of them informed me that they met with researchers all the time, and that students from all over the world came to study the process. In other words, they were used to the interview setting, and had "heard the questions before". This sometimes made it difficult to pose the whole question. In these instances, I made use of the probing technic of asking the same question twice.

3.5 Analytical approach to the research question

The theoretical distinctions derived from theory will help to organise and structure the information gathered for the empirical inquiry. In doing so, an analytical tool will be developed to guide this study of the main contentious articles in the constitution-making process in Tunisia. The analysis consists of three steps; first, the contentious issues chosen will be presented, identified as either a structural provision or a value and right; second, the process of solving this issue will be presented, especial focus on whether the forum of discussion was open or closed to the public, and further what pressure, if any, this issue induces; third, the findings will be discussed in relation to the theoretical expectations stipulated in the theoretical framework.

Before this is possible, however, what the different theoretical distinctions entail, and how we can identify them, must be elaborated on.

First of all, the contentious issues in the constitutional process will be characterised as either 'strategic provisions' or 'rights and values'. With 'structural provisions' is meant the provisions that define the power of and relationship between different political actors, and are mostly constitutional constraints on power (Galligan & Versteeg, 2013, p. 22). Examples of this could be the electoral system, judicial review, and all provisions regulating the balance of power between the legislative, executive and judiciary. The main point of this conceptual distinction is that structural provisions will affect the future of political elites. The articles

treated as structural provisions in the analysis concerns the type of government and transitional provisions.

By 'rights and values' is meant expressed values, ideals, aspirations and worldviews, as well as provisions allocating rights. The opposite of rights, forbidding something, is also an expressed value, as it thus protect something else. According to the idealist approach, values are many and various, and can reflect a nation's political commitments and identity, or international norms and standards, or notions such as liberty and democracy (Galligan & Versteeg, 2013, p. 8). Rights and values do not appear exclusively as provisions. They are also normally found in preambles, as mere statements. In contrast to structural provisions, they are not expected to have any direct effect on the future of political elites. The articles treated as rights and values concerns freedom of conscience, women's rights, and the candidacy of the president.

Second, the empirical information on the contentious issues in the constitutional process will be discussed with regard to how open or closed the process was to the public. Whether a forum is 'open' or 'closed' is characterised by the degree of openness in the process, that is transparency to the public (Elster, 1995, p. 388). As long as the process is transparent to the public, it is a gradual question of *how* open. If the process is closed, it will be possible for the constitution-makers to talk without a public audience, and without any transparency in the process – that is, full secrecy, without transcripts or registry of any sort being published. However, the degree of openness will not be measured or evaluated in this study, and this distinction is treated as a dichotomy. Either the public had access to and could follow the on-goings, or they could not.

Third, the constitution-makers' perception of the different kinds of pressure will be discussed in relation to the theory. The different types of pressure on the process can be hard to distinguish, and it might be impossible to allocate the source of the pressure to one issue in particular. However, as an attempt, the different types of pressure derived from theory include both pressure from domestic politics and the notion of popular pressure.

By 'domestic politics' is understood the actors in the political landscape, who have interests in the political developments and the possibility to influence other political actors. These interests will, according strategic-realist approach, entail to gain more political power, or electoral support, or merely be recognised as a political actor by other political actors.

Especially in a period after a political upheaval, will the political landscape be in flux, with both established actors and new actors emerging or re-emerging, expanding their role or taking on new ones. This is expected not to be a public debate, but a power struggle between political actors. In the case of Tunisia, this includes political parties both inside and outside of the NCA. Further, it includes actors such as the judiciary and the military, and others alike. In addition, the quartet, even though consisting of civil society organisations, is regarded as a part of the pressure from domestic politics.

By the concept 'popular pressure' is understood as popular protest, in the form of demonstrations, strikes, petitions, and the likes. It is thereby, following of coordination theory, an expressed withdraw of the population's acquiesce or acceptance to such an extent that the population take action to express their discontent, in order to address the issue and address decision-makers. This type of pressure is therefore present in the public debate, in a way pressure from domestic politics is not. The actors are outside of political parties, either as civil society representatives, protestors from the population overall, or the media, or they can come from outside of the country, as international or foreign actors.

This is the most challenging theoretical distinction. This appearance of a mediation of civil society organisations on the political scene, illustrates the difficulty of discerning between different types of pressure in the constitution-making process after such a "revolutionary" transition. In approaching a 'real-life' phenomenon, the different actors encountered will have different perspectives, and these will not always comply with the study's definitions and delimitations (Yin, 2009, p. 30). It is therefore necessary to have an as clear as possible perception of the case in question is, with the theoretical perspective chosen. As a concrete example, some of my interviewees referred to the mediation of the quartet as 'popular pressure'. One virtue with the case study as a research method, is that it allows for the researcher to identify and measure the indicators that best represent the theoretical concepts intended to observe, and thereby achieve high levels of conceptual validity (George & Bennett, 2005, p. 19). After deliberation, I chose to treat this involvement of the quartet as part of 'domestic politics'.[27]

Further, the point of interest is to examine how constitution-makers perceived and reacted in response to this pressure. The purpose of this study is not to analyse the actual effects a

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[27] This is debateable, as several of these organisations are known as grassroots organisations locally. However, as a unified actor, the quartet mediated between political actors on the national level.

measurable concept of 'pressure' had on the process and the content of the constitution. Rather, the ambition is to unravel how much emphasis the politicians themselves put on 'pressure' as an external factor that affected the process and the content, and in particular, where this pressure came from.

3.6 What can this study say something about?

By analysing these five contentious issues, several interesting aspect of the political context is uncovered. As a main point of this study is to capture how the constitution-makers reacted in response to the context of the constitution-making process, their expressed views and opinions about the process of solving these issues will in the next chapter be discussed, to further shed light on some aspects of the political landscape in Tunisia in the period of constitution-making. The theoretical expectations will therefore be discussed both on an article-level, but also on the process as a whole. On the process as a whole, the distinction between structural provisions and rights and values will be maintained, to discuss whether the nature of the article has anything to say on how much, and potentially the kind of pressure, it induces.

However, it is important to note that this is not a comprehensive study of all the contentious issues in the constitution-making process. With the selection of five articles, the conclusion we can draw of the process as a whole is modest. However, as the selection of these five articles are not random, but rather quite careful, this study would argue that they represent the main tendencies of the contentious issues in the constitution-making process. The role of religion in general, and of Islamic sharia in particular, in the constitution was a recurrent topic for debate, and this debate transcends many of the values and rights entrenched in the constitutional provisions. The articles has been chosen by them being highlighted by both the written sources and by the interviewees as both important in the process, and highly contentious.

In addition, and to re-cap a note made in the introduction, this is a study of only the contentious constitutional issues. Therefore, the study has excluded the possibility to say anything about the constitutional issues were it was in fact a great deal of agreement. However, a study of the less contentious issues in the process would be less interesting, and would tell us little about the interesting struggles going on in the political landscape. A final

note on what this analysis can provide of knowledge, is that it is a very simplistic analytical tool for a highly complex process. Some aspects are bound to be lost in this approach.

4 Context of the drafting

As this study allows for the greater political context of drafting to matter, this chapter will outline the situation of constitution-making. In order to set the context of the drafting process to the case of study, several aspects must be presented. It was a long and contentious process, and at a point of accumulation, many feared that the constitution would not be completed at all. The central contextual features to the drafting, both within the NCA and outside, will be presented briefly.

4.1 Election results and political landscape

After the elections on 23 October 2011, the National Constituent Assembly consisted of 217 elected deputes, where 89 were from the Islamist party Ennahda. This gave Ennahdha majority, with 41% of the seats in the assembly (The Carter Center 2014, p. 49). Together with the centre-left secular party CPR and the social democratic party Ettakatol, which held respectively 29 and 20 seats. Together this government coalition, called the Troika, held 138 seats and 63,6 % in the assembly. Further, this meant that the Troika only lacked six votes to guarantee a 2/3 majority, that is the 144 votes that was required to adopt the constitution.

The political composition of the NCA in 2011 had significance for the organisation of the work and dividing of roles. Due to the Troika coalition, the post of the Prime minister was given to Ennahda, the President of the Republic to the CPR, and the President of the NCA to Ettakatol. In the NCA, it was Mustapha Ben Jaafar who presided as President of the NCA, with a 1st vice-president from Ennahda and a 2nd from CPR. The distribution of power also showed itself in the allocation of posts of presidents in the NCA's commissions, and in the constituent commissions, Ennahda got three out of six presidents, while Ettakatol, CPR and the Democratic bloc got the presidency of one commission each. This composition had an impact on who participated in other bodies in the NCA concerned with the making of the constitution, such as the Drafting. In other words, the whole organisation of the work with the constitution was proportionally organised according to the results from the election in 2011.

However, during the drafting process, the political composition in the NCA changed due to re-alignments in the political scene, due to party dissolutions, defections and formations of new parties. As the composition of the NCA bureau and the commissions relied on a the

principle of proportional representation at the time of their formation, these shifts in the political composition caused the structures of power to get progressively out of sync with the real balance of power (The Carter Center, 2014a, p. 46). This again caused tensions, as some political parties or parliamentary blocs became over-represented while others became under-represented in relation to their membership within the NCA (The Carter Center, 2014a, p. 49).

The numerous changes in the political scene can be attributed to the very high number of registered parties in the elections. As the interviewee Meherzia Labidi, vice-president of the NCA notes, the "assembly was like a patchwork".[28] An overall recount of the political shifts in political affiliation during the period of the NCA done by the Carter Center (2014) shows an estimation of 50 deputies changing party after joining the NCA, approximately ¼ of the 217 members. Further, while deputes from 11 political parties were elected to the NCA in 2011, the number of parties had risen to 27 at the time of the adoption in January, 2014, and there was a much higher number of independent deputies than initially (The Carter Center, 2014a, p. 47).

The point being here, that these shifting political affiliations gave another composition in the NCA that was meant initially, as constructed from the election results from 2011. By time, therefore, it was not just the NCA who was accused of lacking "electoral legitimacy".

4.2 Organisation of the NCA

Although many difficulties of the drafting are linked to the context in which the constitution-making process took place, the way the NCA organised their work has also been noted as significant in denoting difficulties (Al-Ali & Ben Romdhane, 2014; Kuhn, 2015). First of all, the complexity and challenges of the drafting process before them did not seem clear to the actors involved in the constitution-making process. Before the elections to the NCA in October 2011, state officials expressed a belief that the drafting of the new constitution only was a matter of months (Al-Ali and Romdhane). The fact that the NCA initially envisaged the constitution-making to take one year, and the consequential prolonging of the process in order to finish the constitution, caused a discourse about the deteriorating "electoral legitimacy" of the institution. This criticism came especially from the opposition, who for a while had felt that they could not get their politics through as long as Ennahdha remained in majority.

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[28] Interview with Meherzia Labidi (Ennahdha).

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Second, lack of organization and coordination of the drafting process in the NCA contributed to the prolonged process. The way the drafting process itself was organised within the NCA fostered much criticism. From the outset there were no clear plan, no coordination between the constituent commissions, and no set dead-lines. This caused the process to take even longer, and the overall effect that the NCA did not manage to meet its own one-year deadline, and that the process seemed chaotic to observers and the public.

In setting the framework for the NCA, two texts governed the constitution-making process; the Provisional Organization of Public Authorities (OPPP) and the Rules of Procedure (RoP). As the 1959-constitution had been partially suspended in Mars 2011, it was further fully repealed under a constituent law on the OPPP that was adopted by the NCA on 23 December (The Carter Center, 2014a, p. 23). This text would act as a provisional constitution, until a final constitution was agreed upon, and outlined the conditions and procedures to be followed by the county's executive, legislature and judiciary (Owen, 2014, p. 262). This document is commonly referred to as the "mini- or little-constitution". According to Al Jazeera, the task of drafting this document caused a "tumultuous debate" lasting for five days, which attracted thousands of protestors outside the Assembly building at Bardo in Tunis (Al Jazeera in Owen, 2014, p. 262). One of the central issues people were concerned with was the role of Islam in the OPPP, and the gathered masses expressed rival views on this matter (Marks, 2014). The OPPP only dedicated one article to the "constituent power" of the assembly, which required a two-thirds majority in order to adopt the constitution in its entirety (The Carter Center, 2014a, p. 30). Further, the article stipulated that in the case of two failure attempts at reaching the two-thirds majority, the constitution in its entirety would be voted upon by a referendum, only requiring an absolute majority to be adopted[29] (The Carter Center, 2014a, p. 30). In this way, the OPPP set a relatively high threshold of support for the adoption of the constitution.

Another important text for the work of the NCA was the Rules of Procedures (RoP), which was not a law but a legal framework, including the rights and duties of deputies, provisions concerning the voting process, and rules concerning the drafting and adoption of the constitution (The Carter Center, 2014, p. 30-31). The RoP were adopted by the NCA in a plenary session 20 January, 2012, and underwent four amendments as a consequence of

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[29] The OPPP did not say anything about what to do if the constitution was rejected in the referendum (The Carter Center, 2014a, p. 30).

procedural challenges that occurred at various moments of the drafting process (The Carter Center, 2014a, p. 30).

There were several bodies in the NCA that contributed to the drafting process, some exclusively, others with a mandate that extended beyond the constitution-making (The Carter Center, 2014a, p. 31). The bodies involved non-exclusively are the bureau of the NCA, the plenary of the assembly, and the Conference of the Heads of Blocs, who all played an important role in the process as they became important at times when decisions needed to be taken, conflicts resolved, and voting convened. However, it was the bodies exclusively concerned with the drafting of the constitution, which worked with the drafting on a day-to-day basis. These were from the outset six constituent commissions and the Drafting committee. The six constituent commissions were responsible for discussing and preparing articles within different chapters of the constitution:

1) Commission for the preamble

2) Commission for rights and freedoms

3) Commission for powers

4) Commission for the justice

5) Commission for constitutional bodies

6) Commission for authorities

List 1: The six constituent commissions in the NCA, collected from The Carter Center, 2014, p. 32. (For full name, see List of abbreviations and simplified names.)

Once a member in one constituent commission, the MPs could not take part in any other constituent commission. They could however be a member of other non-constituent commissions, such as the legislative or special commissions (The Carter Center, 2014b, p. 32). In total, around 60 percent of the deputies in the NCA was a member in a constituent commission[30] (The Carter Center, 2014b, p. 33). The constituent commissions consisted of the bureau of the commission (a president, a vice-president, a rapporteur and two assistant rapporteurs) and 17 members of the commission. Each commissions were composed of in total 22 deputies, where the seats were proportionally allocated on the basis of the political

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[30] The remaining part of the deputies consequently participated through discussions and votings in the plenary, in the parliamentary blocs/group.

composition in the NCA at the time when the commissions were formed (The Carter Center, 2014b, p. 32). This gave the following composition in all of the different commissions:

Amount of members	Parliamentary Bloc
9	Ennahdha
3	Democratic bloc
3	CPR
2	Ettakatol
2	Liberty and Democracy bloc
1	Liberty and Dignity bloc
1	Al-Aridha
1	Independent / non-affiliated

List 2: Division of members in the constituent commissions. Source: (The Carter Center, 2014b, p. 32)

The work with drafting the constitution began on 13 February, 2012, when members of the NCA began discussions in the constituent commissions (The Carter Center, 2014b, p. 34). However, the NCA did not set a deadline for submission of a first draft for many months. As the Carter Center (2014) notes, it is likely that such a deadline would have helped the commissions to organise themselves better, both in the way they worked and in the consistency of their output (The Carter Center, 2014b, p. 34).

List 3: **The different versions of the constitution:**

First draft: 14 August 2012

Second draft: 14 December 2012

Third draft: 22 April 2013

Fourth draft: 1 June 2013

Final draft: 26 January 2014

In addition, as Ennahdha held majority of the seats in the NCA, they also dominated the Drafting committee, as stipulated in the RoP. The remining members of the Drafting committee, notatbly those from the opposition, complained that their views were being ignored, that the General rapporteur from Ennahdha did not have respect for agreements reached in the constituent commissions, and that the committee passed it's mandate in what it could actually decide with regards to the constitutional drafts. In sum, there were many aspects of the organization of the NCA that caused tensions. When the tensions in the NCA

reaching a culmination point in 2013, Ennahdha was accused for one of no longer having a proportionate representation of their electorate, which the opposition claimed had diminished, and second, not following the electoral platform that they presented in the elections in 2011 (Marks, 2014).

4.3 Public participation and civil society

As this whole constitutional process was spurred by a popular uprising against the former regime, and as the NCA had been elected by the people to write a constitution, the Tunisian civil society had some expectations to be a part of the constitution-making process. Concerning how open the NCA was to the public, the NCA and its members became increasingly open to public participation and the dialogues with civil society throughout the process (Kuhn, 2015, p. 36). The Carter Centre, for one, advocated strongly for increased transparency and documented the inaccessibility of the process to civil society organisations, especially during the first year of the drafting process (The Carter Center, 2012). Al Bawsala was also a vocal actor in promoting transparency and accountability, amongst other with their Marsad Majles site[31] (Palmer, 2013). In addition to promoting interaction between politicians and 'regular people', it has also been argued that the mere fact that they were noting and publishing the absence in the NCA, contributed to a higher sense of accountability with the deputies. Despite the NCA's challenges in involving the civil society, the constitution-making process in the NCA has overall been praised for its active civil society. Though it was, as an interviewee noted, it was "a learning experience on both sides".[32]

In general, social unrest continued to a varying degree during the whole process of making the constitution, due to the continued deteriorating economy and security issues in the country.[33] Tunisia finds itself in a situation where both the people and the politicians are insecure, suspicious, with fear of each other. There is not only a "new" vs "old" regime divide, but the new composition of power in the Tunisian political order (in transition) is evolving and insecure. Many has presented the crisis of 2013 as having to result in either violence or compromise (International Crisis Group, 2014).

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[31] Others initiatives like this was the website of Mouwatana wa Tawassol, http://www.mouwatana.org, which collected information related to the NCA and activities by CSOs all around the country, and the website http://www.tunisie-constitution.org which allowed citizens to comment on the 1959-constitution and post their opinion (The Carter Center, 2012).
[32] Zied Boussen (DRI).
[33] Information gathered from Keesing's online, 2012.

Most of the civil society in Tunisia has a history under the previous regime of Ben Ali, and some even from independence. The Tunisian General Labour Union (UGTT) has played a major role on the political landscape in contemporary Tunisian (Yousfi, 2012). UGGT has been one of the key actors on the Tunisian scene, since independence (Beau & Lagarde, 2014, p. 89). The trade union has always acted not only as a social force may also claim as a force of proposal or against a real-power politics. While some may characterise the quartet as civil society, they are in this study regarde as domestic politics. They have been political actors in the political landscape for many years, as they did also operate under the old regime. But they are mentioned in this section, as they locally function as grasroot organisations. The important thing in this respect, is that they operated as the link between the protestors and the political scene.

4.4 Rounds of national dialogue

Hatem M'rad (2015) has identifies four phases of national dialogue in the Tunisian transition period. The first phase of dialogue he identifies, after the revolution of 14 January 2011, is the High Commission, which was created in February with the merging of the Ben Achour commission with the "revolutionary" opponents (M'rad, 2015, p. 24). Responding to that the mandate of the NCA would come into question after having surpassed its one-year limit of completing the constitution (23 October 2012, one year after its election), the UGTT intended to bring together actors from the political class and from the civil society (Hachemaoui, 2013, p. 12).The UGTT was able to bring together the principal actors of the political class and civil society. However, Ennahdha and CPR refused to join, because of Nidaa Tounes. This argument was, however, not very convincing, as they six months later attended another national dialogue initiative, organised by the President of the Republic Marzouki (CPR), where Nidaa Tounes participated.

The second phase of dialogue, after the elections in October 2011, consists of two initiatives; "Conseil de dialogue national" by the UGTT, LTDH and ONAT in October 2012, and an initiative of a round table talk initiated by Joumhouri in September 2012.

The third phase of national dialogue is after the assassination of Chokri Belaid on 6 Fenruary, 2013. This phase had several initiatives:

- "Conseil des sages" at Dar Dhiafa, 12 February 2013. Initiated by Prime minister Hamadi Jebali (Ennahdha).

- National dialogue at Carthage, 15 April – 15 May 2013, initiated by President of the Republic, Moncef Marzouki (CPR).

- Second round of national dialogue led by the UGTT, 16 May 2013, initiated by the UGTT.

- National conference against violence and terror at the Palais des Congrès, June 2013. Initiated by UGTT, UTICA, LTDH and ONAT.

Lastly, the fourth phase he identifies, is the national dialogue after the assassination of Mohamed Brahmi, 25 July 2013. This is what has become known at the "National Dialogue" (ND), and lasted from 25 October to 25 November, 2013. It was mediated by the UGTT, UTICA, LTDH and ONAT, and symbolised the official birth of their partnership refered to as the Quartet (M'rad, 2015, pp'. 24–25). This was the last and most important round of ND, and will be elaborated on during the analysis in the next chapter.

5 Analysis of constitutional issues

In this chapter, the research question will be addressed:

How was the main contentious constitutional issues in the Tunisian 2014-constitution solved during the drafting process?

By analysing how a set of chosen articles regarded as particularly contentious in the constitutional process, the analytical tool will guide a discussion on how these constitutional issues were solved. The five constitutional issues treated are the provisions concerning the type of government, article 146 on transitional provisions, article 46 on women's rights, article 6 on freedom of conscience and article 74 on the candidacy for President of the Republic. The two former are identified as structural provisions, while the three latter as values and/or rights. The process of solving the respective issues will be presented, and discussed in relation to the theoretical perspective chosen for this analysis.

As mentioned in the method chapter, all data concerning the voting is collected from Al Bawsala's online Marsad Majles platform. The versions of the different draft of the constitution consulted can be found in the appendix 5. The 1959-constitution is included, because even though the decision was made to write a new constitution, the system created and provision stipulated by the 1959-constitution, will be a part of Tunisia's constitutional history. Information concerning each of the articles is collected from the chronicles/reports by Al Bawsala and the Carter Center's (2014) report, unless otherwise stated.

5.1 Chapter 4: Type of government

The question concerning the type government, namely the choice between a parliamentary system and a presidential system. As accounted for, the old constitutional order centered power around the person of the President. The choice was whether to retain the presidential system, or opt for a parliamentary or semi-presidential system. Ennahdha opted for a parliamentary form of government, while the other parties wanted a presidential system. In the end, a semi-presidential system was chosen, which is a mixture between a strong parliament, and a president elected by the people, with certain executive prerogatives. Tunisia's political system thus has two "heads" of the executive powers, where both the

Prime minister, as head of government, and the President of the Republic, are regarded as executive powers, as stipulated by article 71 in the 2014-constituion.

The provisions concerning the type of government are situated in chapter four, on the executive authority, of the 2014-constitution. This comprise article 71, and all of the articles in part I concerning the President of the Republic, articles 72-88. Consequentially, part II on the government is affected by the choice of type of government, articles 89-101. In addition, other articles are also affected, for example concerning nomination of judges, and the like. Especially the first article in the chapter, article 71 on the two executive heads, will be mentioned in the discussion. The Commission for the powers was charged with the drafting of these provisions, and as this initial choice of the type of government affected so many articles, the difficulties to find an agreement created challenges for the drafting process.

The principle of the separation of powers was established already in the first draft. The subsequent debate therefore was concerned with the balance of powers between the executive and the legislative, and, when the mixed system was chosen, the balance of power between the two executive heads. Several aspects of this issue remained unsolved in the first and second drafts. The provisions opted for in the second draft, granted considerable power to the parliament and the government, while the president should be elected directly by the people. It was therefore not a pure parliamentary model. Nonetheless, the president's prerogatives remained very limited in the third draft. The issue remained contentious throughout the constitutional process.

The issue of the type of government is an inherent structural provision for the political system, and as such, theory gives that it is likely to for one, be treated and solved in a closed forum, and second, be subject to interest by domestic politics, and therefore experience pressure from outside the NCA as well. For one, this issue was treated in several forums within the NCA, first in the constituent commission and the Drafting committee, then later in the CC. In the beginning of the drafting process, and as a result of unwavering positions in the Commission for the powers, the commission handed two parallel drafts to the Drafting committee at the time of the first submission. The Drafting committee then chose the alternative that granted considerable power to the parliament and the government, as this was the most coherent with the rest of the constitution. This was not received well by the

constituent commission, who had meant for the two parallel versions to be presented to the plenary.[34]

Second, as a structural provision, theory suggests that this issue will be subject to interest by domestic politics, and therefore experience pressure from outside the NCA as well. Further in the drafting process, even though the prerogatives of the two heads of the executive were not changed substantially from the third to the fourth draft, it was elaborated details to clarify their respective roles and to create a balance between them. This was to some extent the result of further dialogue outside of the NCA, as this issue was discussed in the first dialogue by UGTT, at Dar Dhiafa, at Carthage, and at the second dialogue by UGTT. Hammami (Ennahdha) contends that the conference at Carthage was the most successful in advancing on this issue.[35] Further, at Dar Dhiafa, the prerogatives and direct election of the President of the Republic was reinforced was discussed.[36] However, the issue was not concluded by any of these talks, and discussions continued both in the second ND, and within the NCA. Several of the interviewees expressed that this was a constitutional question where it was necessary to obtain a large national consensus, on the level of the main national parties.

During the last phase of the constitutional process, the issue was also discussed in the final round of National Dialogue mediated by the quartet. However, the interviewees emphasise that even though the political agreements were established outside of the NCA, the changes to content was regulated by the NCA, and the CC in particular.[37] One article in particular which emanated from the last ND was article 71 (then-article 70), which stipulates that both of the two heads hold executive power (M'rad, 2015, p. 95). The agreements reached in the rounds of dialogue outside of the NCA roused criticism from both NCA members and observers, and particular article 71 was deemed contradictory.

As we could expect on the basis of the theoretical framework, this issue appear to have been of great interest of domestic actors throughout the process, as this was one of the issues discussed in most forums outside of the NCA. For one, this issue was discussed in the conferences and closed forums initiated by the Troika government (DD and Carthage). M'rad (2015) claims that when Ennahdha yielded and the prerogatives of the president was

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[34] Interview with Omar Chetoui (CPR).
[35] Interview with Imed Hammami (Ennahdha).
[36] Interviews with Samia Abbou (CPR) and Maya Jribi (no bloc).
[37] Interview with Mouldi Riahi (Ettakatol).

reinforced at DD, this was due to the power relations at the conference, which suggests that political actors put pressure on Ennahdha to enhance this point (M'rad, 2015, p. 89).

Many of the questions concerning the two presidents' prerogatives remained unsolved just until the very end of the process, and members of the CC contends that the final agreement on the form of government was found in the CC. One such question that was regulated within the NCA during the last phase of the process, was the question whether the president should be elected directly by the people or not. Sambia Abbou (bloc CPR) upholds that it was not until they came back to the Commission for the powers after their withdrawl, with the pressure from the street behind them, that Ennahda accepted that the president should be elected by the people, and not the parliament.[38]

In the end, the plenary adopted the provisions concerning the type of government with exceptional high level of agreement. As one example, article 71 (then-article 70), was adopted with 176 votes in favour out of 177 votes cast.[39] Although some measures were taken to clarify the competences of the two heads, some gray areas remain (see (The Carter Center, 2014a, p. 89)).

5.2 Article 148: Transitional provisions

Article 148 in the 2014-constitution stipulates the transitional provisions intended to ensure a smooth transition from the interim constitutional order (the OPPP) to the new constitutional order, in defining the timeline for when the new constitutional provisions will come into force. This is the second last article in the 2014-constitution, and one of two articles included in chapter ten on transitional provisions.[40] This was also the very last article voted through in plenary, on 23 January 2014.

The challenge this issue posed in the process, was due to the adding of the tenth chapter in the fourth draft, by the Drafting committee. This was very controversial, as the Drafting committee was not a constituent commission, and this thereby caused heated debates as to the prerogatives of this committee. The Drafting committee answered the criticism, by explaining it as a "flaw" in the organisation of the drafting process, where this chapter had not been

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[38] Interview with Samia Abbou.
[39] See vote: http://majles.marsad.tn/fr/vote/52d576bf12bdaa635b715eaf. (The exception from this 'consensual voting' was article 73, discussed in section 5.5.)
[40] The last article concerns the military tribunal.

allocated to a constituent commission, and that this had been discovered too late in the process. The Carter Center (2014) claims that the reason why this article was left to the very end, was because it was one of the most complex articles elaborated (The Carter Center, 2014, p. 42). The opposition, however, criticized that the Drafting committee had not left time for this new chapter to be discussed in the constituent commissions, or in plenary. The opposition members in the Drafting committee, also claim that this chapter was presented very briefly, and that the General Rapporteur Habib Khedher left no time to discuss the article. Despite protests from a select few in the Drafting committee, the article passed and was integrated in the fourth chapter.[41]

Further, the Carter Center (2014) notes that the Drafting committee did not accord the discussion concerning the transitional provision the thorough deliberation and consultation afforded other sections of the constitution, because of significant pressure from the NCA's leadership and political parties to finish the work. As theory suggests that domestic politics is more likely to affect structural provisions than those of values and rights, this involvement of political parties from outside of the NCA is not surprising. However, this pressure seem to have had the opposite effects. The hurried process led some to question the coherence and adequacy of the transitional provisions stipulated in the fourth draft (The Carter Center, 2014, p. 42). The transitional provisions set forth in the fourth draft included no timeline or deadline for when different provisions of the new constitution should act into force, nor was a date for the next election set. The transitional provisions were seen by the opposition as a "window of opportunity" for the NCA to never cease to exist, and for Ennahdha to stay in power.[42]

Theory also suggests that contentious issues will be easier to resolve in a closed forum, than in "openness". This is underlined by the contentious issue of structural provisions, as this was the only chapter revised in full by the CC (The Carter Center, 2014a, p. 93). Despite the CC finding an agreement on this issue, however, according to the Carter Center (2014) several commission members feared that the consensus was fragile and thus vulnerable to contestation during the vote. However, the article was adopted with a large majority, with 158 votes in favour, 5 against and 18 abstained.[43]

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[41] Interviews with Mohamed E. F. Moussa (Democratic bloc), Omar Chetoui (CPR) and Rabiî Abdi (Wafa).
[42] Interview with Selma Mabrouk (Democratic bloc).
[43] See vote: http://majles.marsad.tn/fr/vote/52e26fff12bdaa593ad566b7.

5.3 Article 46: Women's rights

Article 46 in the adopted 2014-constitution is situated in chapter two, on rights and freedoms. As such, it was the responsibility of the Commission for rights and freedoms. However, this issue was also discussed in the Commission for the preamble, and featured in varying extent in chapter one on general principles during the drafting process. This article had no predecessor in the old constitution of 1959, but women's rights in Tunisia was largely ensured by the personal status code of 1956, which is considered the most progressive law concerning women's rights and relative equality to men. In the adopted version of the 2014-constitution, article 46 states that:

> *The state commits to protect women's accrued rights and work to strengthen and develop those rights. The state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains. The state works to attain parity between women and men in elected Assemblies. The state shall take all necessary measures in order to eradicate violence against women.*

The elaboration of the article concerning women's rights, had several 'crisis' or blockages, evolving around first, the notion of 'complementarity' during the fall of 2012, second, the phrase concerning violence against women, and third, the phrase concerning gender parity. In the beginning of the drafting process, there was no article intended solely for the rights of women. The idea of an article especially assigned to the woman was developed between the first and second draft, and in subsequent articles the woman was considered independently from the family. This article is considered as a rights and value by the theoretical framework guiding the analysis.

Concerning the notion of complementarity, there is no explicit mention of this in the drafts of the constitution. The first draft merely stipulate that the state shall protect the rights of women.[44] In the Commission for rights and freedom, it was Ennahdha who proposed to elaborate an article on the rights of women. While the article on equality between the genders had just been adopted, they proposed that an article on violence against women was needed. After discussion in the commission, the proposal with the notion of 'complementarity' was put forth by Ennahdha, and adopted with 12 against 8 votes.[45] Before the publishing of the first draft, however, there was a leakage in the commission, carrying a mistranslation of the

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[44] First draft, article 1.10.
[45] Interview with Selma Mabrouk (Democratic bloc).

Arabic wording of the proposed article (Marks, 2014). This leakage warned that the first draft of the constitution included the notion of 'complementarity' of women to men, and caused a massive response from civil society and women's rights organisations (Charrad & Zarrugh, 2013). Ennahdha retreated on the proposition, stressing that it was the complementarity of women in relation to the man *in the family*, and that their intentions with the article had been misinterpreted and misunderstood.[46] Despite Ennahdha's retreat, discussions around complementarity continued during the fall of 2012, and that was reiterated several times, before it was laid to rest (Härgestam, 2014, p. 107–227).

Theory suggests that the process of constitution-making will be vulnerable to pressure on the process, and that values and rights will induce more interest from the population than from domestic politics. The notion of 'complementarity' was met with massive popular protest, something which has been highlighted as significant for Ennahdha's retreat, both by interviewees, observers and scholars (The Carter Center, 2014; Charrad & Zarrugh, 2013; Marks 2014; Pickard 2015). In explaining how this article was "won" – because they do portray it as a battle – the interviewees from the opposition (and in particular the Democratic bloc) emphasizes the "help" from civil society and the pressure from the streets. The actions of the women's rights movements, with the sit-in outside of the NCA building on 8 August and the manifestations on 13 August 2012, is mentioned as pivotal in "winning the battle" over the 'complementarity'.[47] In addition, an interesting feature of the popular pressure on the process is the fact that a member of the Commission for rights and freedoms, Selma Mabrouk, encouraged civil society to protest to the notion of 'complementarity', when she posted on her Facebook page, spoke on radio and TV, and launched a petition online.[48] This petition continued to receive signatures through the process, despite the debate on complementarity being concluded (The Carter Center, 2014a, p. 35).[49]

Further, theory also suggests that the more open a process is, the more likely is it to result in politicians posturing their respective principles for the public. Within the NCA, the debate concerning the 'complementarity' took place in the commission and the plenary, where media and civil society were present. Outside of the NCA, the issue was debated in media and in public discussions. Interestingly, and as a departure from theory, it therefore seems that the

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[46] Interview with Farida Labidi (Ennahdha).
[47] Interview with Hasna Mersit.
[48] Interview with Selma Mabrouk.
[49] By the time the Carter Center finished its report in 2014, the petition had gained more than 27,000 signatures.

first blockage was debated and resolved in openness. However, as theory highlight the benefits for politicians in posturing their principles in public, this could be turned around, and help explain why this was resolved in public; if this was in fact a mere misunderstanding, Ennahdha would also be better served at addressing this is public, so that there would be no doubt as to their position. The level of contention, and therefore the difficulty of solving this issue, is questionable, as Ennahdha did not really "fight" for the notion of complementarity.

In the second draft, the rights of women were expanded to involve three different articles, stipulating that men and women are equal before the law (with equal rights and duties), that the state guarantee women's rights and the elimination of violence against women, and that the state shall guarantee equal opportunities between women and men to assume different responsibilities. [50] The third draft added that women and men will be "partners in the construction of the society and the state", while the equality and the "carrying different responsibilities" were upheld.[51] In the fourth draft, the provisions concerning gender and equality was maintained, but assembled in chapter two on rights and freedoms.[52]

The second blockage in the process, concern the formulation of violence against women. While the second draft stipulated that the state guarantees the elimination of all forms of violence against women, the Commission for rights and freedoms later edited this in the commission to say that "the state takes adequate measures to eliminate violence against women" (The Carter Center, 2014a, p. 85). This was done after several national consultations with civil society, and resulted in the unofficial draft called "draft 2bis".[53] However, when this new proposed draft was treated in the Drafting committee, they did not include the phrase "adequate measures". This is another point of theoretical interest, as this phrase was removed from the third draft after discussions in the closed forum of the Drafting committee. However, the Drafting committee argued that the mention of "all necessary means" was contradicting other provisions in the constitution, and that it was removed by a consideration of coherence in the text.[54] As it was members from Ennahdha who had initiated the article, it is puzzling that this committee would work against this provision, as Ennahdha held the majority in the committee. When the third draft was published, this was heavily protested by the opposition,

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[50] Second draft, articles 5,7 and 37. Author's translation.
[51] Third draft, article 6, 11 and 42.
[52] Fourth draft, article 20 and 45.
[53] Draft 2bis was the second draft, re-adressed after consultations with civil society (see context chapter), and this was the draft the constituent commissions handed over to the Drafting committe in order for them to develop the third draft (22 April).
[54] Interview with Habib Khedher (Ennahdha).

and the reference to "necessary measures" resurfaced in the fourth and final draft of the constitution.[55]

The third blockage in the process, was the discussions of gender parity that challenged the final adoption phase in plenary. Even though the issue of gender parity had not garnered much attention in the discussion concerning women's right before, it became an issue of hot debate during the article-by-article vote on the constitution. [56] The article therefore remained contentious up until the last moment, and the discussion in plenary became so heated, that it cause insecurity whereas to whether the article would pass or not[57]. This prompted the CC to meeting during the article-by-article voting, to mediate certain amendments, and to find the final formulation. The interviewees Mersit (independent) and Mabrouk (Democratic bloc) both highlight the importance of the final editing done in this commission. It was also of immense importance to the opposition to adjust the article from the fourth draft, which stated that "[t]he state shall ensure the protection of women and support their gains", in order to talk about "women's accrued rights" and to further stipulate that the state shall "work to strengthen and develop those rights".[58] In the end, the consensual amendment of article 46 (then-article 45), was adopted in plenary on 9 January 2014, with 116 votes in favour, 40 against, and 32 absent.[59] The article was then amended later that day, to include that the state also commits to strengthen and develop those rights, as the opposition had advocated for, adopted with 127 votes in favour.[60]

5.4 Article 6: Freedom of conscience

Article 6 in the 2014-constitution is concerned with freedom of belief, conscience and religious practice, and the neutrality of mosques. This article is situated in chapter one on general principles in the final version of the constitution. It is the sole right addressed in this chapter. This article had no predecessor in the old constitution, as it is the first such right to appear in an Arab constitution (Mandraud, 2014). This article was one of the last the NCA adopted, after vigorous debates. While the liberal secularist parties believed that all Tunisians

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[55] In the English version of the final draft procured for this study, it reads «all necessary measures», while it does not in the fourth. However, this must be a mistake, as the French versions of the fourth and final draft both reads «les dispositions nécessaires».
[56] Interview with Hasna Mersit.
[57] Interview with Zied Boussen (observer).
[58] Fourth draft, article 45, and the final draft, article 46.
[59] See vote: http://majles.marsad.tn/fr/vote/52ce94f312bdaa09ac3f39d1#.
[60] See vote: http://majles.marsad.tn/fr/vote/52cf062a12bdaa77218c8818.

should have the freedom of religious choice, without any intrusion by the state, Ennahdha and other conservative parties wanted to protect the Tunisian Muslim identity. These are the two, apparently opposing, concerns, the final article tries to accommodate, and which posed the major challenge in trying to agree on the article's formulation. This article is considered as a value by the theoretical framework guiding the analysis.

Common belief is that the inclusion of the article 6 in the constitution was due to months of debate in the national dialogues that took place during the spring 2013 (The Carter Center, 2014a, p. 81). However, by studying the drafts of the constitution, one find that the article in fact featured in all of the drafts. From the beginning of the drafting, it was stipulated, with slightly different formulations, that the state is protector of religion, and shall guarantee the freedom of belief and the exercise of religious rites.[61] The incrimination of violation against any religious sanctuaries is also included in the first draft, but not the three subsequent. The questions that therefore arises, therefore, is first of all, why this article was discussed by actors in domestic politics, and second, why these discussions have claimed more attention than the work already done by the NCA, overshadowing the fact that the articles already were enshrined in drafts from the very beginning.

Theory suggests that provisions concerning rights and values are less likely to interest domestic actors. However, contrary to theory, the actors of domestic politics showed a high level of interest in this article, as it was discussed at Dar Dhiafa, Carthage and the national dialogue round organised by the UGTT (M'rad, 2015, p. 88). In the end, the final solution was found in the CC, after the issue was discussed and re-discussed, but with the support of the ND of the quartet.[62] Further, theory also suggests that contentious issues will be easier to solve in a closed forum, which explain why this issue was treated in such closed forums. Article 6 was voted upon a total of three times in the article-by-article voting in plenary, and is by many of the interviewees highlighted as one of the most contentious articles in the process.

The Carter Center (2014, p. 81) claims that the issue appeared settled in the fourth draft, of 1 June 2013, but that this was proven wrong by the plenary vote on the constitution. However, the interviewees from the CC identifies the article 6 as one of the 15 points that the CC sought to find consensus on after its creation 28 June 2013. Presented by the opposition as one of the

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[61] First draft, article 2.3; second draft, article 4; third draft, article 5; fourth draft, article 6.
[62] Interview with Sami Tahri (UGTT).

points they wanted to re-negotiate, the issue appear not to have been settled in the fourth draft. Hammami (Ennahdha) informs that the article 6 was the only remaining point that needed to be resolved in the CC before the assassination of Brahmi on 25 July, 2013. He claims that they had discussed the article the day before the assassination, and was ready to let the plenary vote on the article the following day. However, after the assassination, the opposition withdrew their participation in the NCA, and consequently the CC, and the NCA was paralysed until September, 2013.

When the CC resumed its work, they found an agreement and presented a so-called consensual amendment to the plenary.[63] The first round of voting, on 4 January, a formulation was adopted by 149 votes in favour.[64] The only difference from the fourth draft was that the article then read that the state is the "guardian of religion", not that it sponsors it. There were four attempts to amend this article, which entailed removing 'freedom of conscience' and/or 'free exercise of religious practices', or including that the state should also protect other religions in addition to Islam, as well as an absolute prohibition of all forms of apostasy charges and incitement to hatred and violence (*Takfir*[65]). All of these amendments fell in the plenary vote on 4 January. A note of interest is that Ennahdha voted overwhelmingly against the removal of 'freedom of conscience' and 'free exercise of religious practices', together with the Democratic bloc and Ettakatol, seemingly keeping to the agreement reached in the CC. However, they voted against adding the criminalisation of Takfir, which made the suggestion fall, as all of the other parties voted almost exclusively in favour, with only a few abstentions.[66]

This issue was re-addressed the following day, 5 January, in a second round of voting. A new formulation of article 6 was proposed, with an inclusion of a phrase forbidding Takfir and incitement of violence, and then an amendment of this article, changing 'Takfir' to 'charges of apostasy'. Both these amendments received 131 votes in favor, out of the 176 votes that were cast (amounting to 74,4%), and the amendment was adopted.[67] A majority of Ennahdha members supported the suggestion, 53 out the 78 Ennahdha members casting a vote.

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[63] Interview with Imed Hammami (Ennahdha).
[64] See vote: http://majles.marsad.tn/fr/vote/52cb128d12bdaa7f9b90f473.
[65] Takfir: «labeling another Muslim an unbeliever, or kafir" (The Carter Center, 2014a, p. 45).
[66] See vote: http://majles.marsad.tn/fr/vote/52caf7b612bdaa7f9b90f464.
[67] See vote: http://majles.marsad.tn/fr/vote/52cde39b12bdaa09ac3f39bf.

However, despite the article being adopted, the issue was not resolved. During the article-by-article voting in the NCA in January, there were several clashes between deputes concerning the role of religion in the constitution, with a repeatedly focus on the already adopted article 6. The openness of the discussions, as theory suggests, resulted in much popular interest in the issue. The discussions, tantrums, fights, and tears, caused by this article in plenary have contributed to several account of "big", or even "funny", moments in the constitutional process, complete with pictures and video clips.[68] In addition, there were a great deal of popular pressure on the process in the NCA. During the article-by-article voting in January, several religious groups demonstrated against freedom of conscience and criminalisation of Takfir. A delegation of imams also tried to exercise pressure on deputies, by being present in the NCA building and handing out leaflets condemning the provisions in article 6. The article was also of concern for many international and human rights organisations, who lobbied towards the deputes in favour of the article.

After the issue being re-iterated, a third and last round of voting on article 6, was held on 23 January. This was one of the last days in the voting process. The article adopted included a second paragraph to the one adopted on 4 January, adding that "[t]he state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred."[69] The adding of this second paragraph was adopted with 150 votes in favour, while the article as a whole was adopted with 152 votes.[70]

5.5 Article 74: Candidacy for the presidency

Article 74 in the adopted 2014-constitution is situated in chapter four, on the executive authority, and the Commission for the powers was charged with elaborating this article. In the old 1959-constitution, it was stated on the President of the Republic that his religion must be Islam, and that only those holding exclusively a Tunisian nationality, and who could trace this nationality to all grandparents without discontinuity, could become president.[71] In addition,

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[68] For instance, this collection of the "best and worst" of the constitutional process, in Business News Tunisie: http://www.businessnews.com.tn/La-nouvelle-Constitution,-le-meilleur-et-le-pire,519,43839,3.
[69] Final version of the constitution, article 6.
[70] See the voting here: http://majles.marsad.tn/fr/vote/52e294d412bdaa593ad566c7 and http://majles.marsad.tn/fr/vote/52e2954312bdaa593ad566c8.
[71] Article 38 and 40 in the 1959-constitution.

the age limit was limited to 40–75 years of age. The final version of article 74 in the 2014-constitution is less strict on the ancestry, by stating that "[e]very male and female voter who holds Tunisian nationality since birth" can stand for election.[72] In the case of a dual-nationality, a sentence was added that the candidate must "submit an application committing to abandon the other nationality if elected president". Further, the upper age limit was removed, while the candidate must be at least 35 years old. Like in the old constitution, it is emphasised that the president's religion must be Islam.

The article concerning the right to pose a candidacy for presidency is above all a question of who is "eligible" to be President of the Tunisian Republic, and is, in essence, a value-based question of citizenship and the 'Tunisian identity'. The requirements set forth for a potential presidential candidate includes faith, nationality and age, and are inherently an expression of desired values and qualities of the future president. However, these requirements will also have some limiting effects, and some more direct than others. In the first draft, this article had as many as five different suggestions. Even though all of the articles opted for in the drafts presented throughout the process included the requirement for the candidates to be Muslim, two of these multiple versions of the article in the first draft did not. However, this did not trigger much debate (The Carter Center, 2014a, p. 88). It was particularly restrictions concerning age and nationality that caused debate.

Until the fourth draft, the constitutional drafts stipulated that candidates must be 40-75 years old, like the old constitution, and that it was only those possessing a Tunisian nationality (and not dual-nationals) that could pose their candidature. In the fourth draft, however, the article on the right to candidacy stipulated that this was a "right entitled to every male and female voter who holds Tunisian nationality by birth and no other[73]", which made it impossible for those with a dual-citizenship at birth to pose their candidature, even if they denounced the non-Tunisian one. The age limit from the old constitution was kept. Both of these provisions affected several potential candidates, and the article was hotly debated (The Carter Center, 2014, p. 45, 87).

As theory suggests, this issue was treated in the CC, and after discussions there, the article 74 (then-article 73) was changed so that the age limit was lowered from 40 to 35 years, and the limiting maximum age of 75 removed. In addition, those with dual-nationality could run for

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[72] Article 74 in the 2014-constitution.
[73] Artcile 73, Draft Constitution of the Tunisian Reoublic, 1 June 2013

presidency, as long as they abandoned the second nationality in the case they were elected. This was presented in a plenary session on 30 October 2013, during a reading of the progress of the work in the CC (B'Chir, 2013). However, this might not be a "breakthrough" just by the virtue of the CC. The removal of the maximum age limit is widely attributed as a concession done on Ennahdha's part, to allow for Nida Tounes' nomination of Essebsi (86 years) by Nidaa Tounes. Claims have been made that Ennahdha made this concession in exchange for Nida's concessions part on other points (M'rad, 2015, p. 95). Some also tribute this agreements to "key political stakeholders", in addition to the members of the CC (The Carter Center, 2014, p. 87). While others are more direct in in attaching this agreement to the meeting between Ghannouchi and Essebsi in Paris in September 2013.[74]

Despite this apparent solution, the issue remained controversial during the final plenary vote (The Carter Center, 2014, p. 87). The NCA had to vote on the article several times in January 2014. First presented on 11 January, as a so-called "consensual amendment", a new article was proposed by the CC. This amendment kept to the before-mentioned agreement, with a minimum age of 35 years, no maximum age limit, and the requirement of revoking the second nationality only if elected. The resulting vote was 81 in favor and 70 against, and the suggestion fell.[75] This was the first time a suggestion from the CC was rejected by the plenary, and the group of Heads of blocs had to mediate a resolution (The Carter Center, 2014, p. 45). Amongst the 79 Ennahdha deputes who participated in the voting, only 38 voted in favour of the suggestion. This took many by surprise, as they believed Ennahda had an agreement with Nidaa Tounes.[76] The only bloc largely in favour was the Democratic bloc. Two other amendments were presented in plenary the following day, one with an age restriction of 35-75 years, the other with the condition that potential candidates should not have another nationality the day he or she poses his or her candidature. Both suggestions fell, with respectively 42 and 55 votes in favour. Ennahdha voted largely against both suggestions.

Further, we find that article 74 was discussed at the closed forum of Carthage and Dar Dhiafa, as well as in the national dialogue rounds (ND).[77] This issue was therefore of interest for domestic politics. The pressure on the process caused by the rounds of dialogue, both at Dar Dhiafa and by the National dialogue, caused a different kind of pressure than that from the

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[74] Interview with Mongi Rahoui and Hasna Mersit.
[75] See vote: http://majles.marsad.tn/fr/vote/52d1a55512bdaa635b715e36.
[76] Interview with Hasna Mersit.
[77] Interview with Maya Jribi.

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public. Nonetheless, external pressure on the process that the politicians would have to take into account. This forum of discussion outside of the NCA, also created a possibility for Nidaa Tounes to sit openly at the table with Ennahdha and the other parties in the ND. However, if it is correct that this provision was the result of an agreement between Ghannouchi and Essebsi, then it is likely to believe that the "breakthroughs" in the process came during more enclosed talks during the DN (which was very open to the public).

Concerning the nature of the process to reach an agreement, theory tells us that contentious issues will be easier to resolve in a closed forum. According to Imed Hammami (Ennahdha), member of both the Drafting committee and the Consensus commission, the question of the candidacy of presidency was elaborated in parallel with discussions in the plenary. Sometimes they discussed the issue in one forum, while at other times they would suspend the debate in order to find a solution at the level of the CC. In order to find agreement, it was sometimes necessary to leave a problem, and return to it later.[78] This was in other words, an issue discussed in several forums, with a varying degree of openness. As there are many Tunisians who have a dual-nationality, this question concerned many of those active in politics, even within the NCA. As a consequence, advocacy efforts within the NCA has been noted as significant for this article(The Carter Center, 2014a, p. 88).

Consequentially, this was one of the remaining issues to be solved as the final articles were adopted in the constitution. On 20 January, a new 'consensual amendment' was proposed for then-article 73. This amendment was adopted, with 115 votes in favour. The adopted article thus read that the minimum age was 35, with no maximum age limit, and that in the case of dual-nationality, a candidate must sign a commitment to revoke the second nationality if elected, and only abandon this in such an event. Further, it was also adopted with 111 votes in favour, in a separate voting, that the right to pose its candidacy is a right to all Tunisians of birth ("male or female voter"), whose religion is Islam. It was, in other words, the same articles as proposed on January 11, with the addition of the signed commitment by dual-national posing their candidature.

In analysing these five contentious issues, this study is concerned with how contentious constitutional issues were solved during the process of making the Tunisian 2014-constitution. In identifying two of the articles as structural provisions, the analysis show how

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[78] Interview with Imed Hammami.

domestic politics did take interest in the questions concerning the type of government and transitional provisions. Conversely, the notion of popular pressure were largely induced by issues concerned with rights and values, as the issue of women's rights and freedom of conscience show. However, treating article 74 as a 'value or right' proves less useful than the two previous. This puzzling article, and further the overall usefulness of this theoretical distinction, will be discussed in the next chapter. By analysing these five contentious issues, several interesting aspect of the political context is uncovered. As a main point of this study is to capture how the constitution-makers reacted in response to the context of the constitution-making process, their expressed views and opinions about the process of solving these issues will in the next chapter be discussed, to further shed light on some aspects of the political landscape in Tunisia in the period of constitution-making.

This analysis will constitute the basis for the next chapter, where certain aspects of the process that are revealed and those aspects that cannot be understood by the virtue of the analytical tool, will be discussed.

6 Discussion

This chapter is concerned with what the analysis of five contentious articles can tell us about the constitution-making process in Tunisia as a whole. As noted in the method chapter, the insights the analysis offer of the process is not able to include all aspects of the constitution-making process, but rather a select few. This is not a comprehensive study of the constitution-making process as a whole. However, by focusing on how particular contentious issues were solved in the context of political upheaval and uncertainty, this process do point to some interesting features of Tunisian politics at the time of constitution-making. By virtue of the theoretical framework, it is possible to say something about the nature of the contentious content, and how this affected the way in which it was treated. It is also possible to say something about the forums of discussion, and especially forums of solutions to these problems. Last, but not least, it gives some very interesting insights into how the constitution-makers in Tunisia perceived and thought about the pressure on the process. In this respect, this study aims at presenting some new knowledge about the process, or at least provide a new perspective to knowledge we already have.

6.1 The notion of strategic behaviour

First of all, it is very hard, not to say impossible, to identify and trace actual bargains. However, the strategic-realist approach still proves useful. There are especially two aspects that came forth in the interviews: first, both parties[79] that the other "side" was playing a strategic game, and second, a strong disagreement as to when the constitution could have been finished, had it not been for the second political assassination in July 2013.

The discussion in the Commission for the powers give an indication of a high level of contention. Samia Abbou, member of the commission, claims that Ennahdha tried to "force through" issues when they were in the majority, due to absence in the opposition. The opposition decided to organise themselves and found common ground on the main questions in the commission. Concerning the issue of the type of government, the opposition opted for a mixed, semi-presidential system. Accordingly, when the commission started to vote on the articles in the chapter, the opposition won 13 to 9 votes, due to this reuniting behind one

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[79] By the two "parties" are here meant Ennahdha and their allies at the one side, and the opposition on the other.

suggestion.[80] "When Ennahdha realised that we had 'played the game', they disrupted the voting by starting the debate again", expands Abbou. This suggests a highly strategic environment for discussions in the commission.

Another aspect uncovered in the analysis, is the significant role played by the CC as a forum of reaching agreements, especially during the last phase of the drafting process. Rim Mahjoub (Democratic bloc), gave an account of hard negotiations in the Consensus commission:

> *We would take the extremes, and we would go in the middle. We would discuss what we should mean here and there. We divided the roles, and prepared how to negotiate a particular article; Who should speak, and further who should speak first, second, and last... It was really very good. It's a shame that neither Al Bawsala, nor the media, not other deputes was a part of the commission – it was closed. Because it was very interesting, to see how everyone fought for their ideas, and afterwards we advanced and could say either "fine, we accept" or not.*

The notion of strategic behavior is in this account also related to whether the forum of discussion was open for the public or not. However, NCA President Mustapha Ben Jaafar and Mouldi Riahia, both from bloc Ettakatol, and both members of the CC, mentions the virtue of the CC being a closed forum, due to the up-coming elections after the constitution was adopted.

> *Everytime we sign a paper, agreeing on an article, [members of the Consensus commission] would leave the meeting saying that they won this and that – everyone plays this game. Well, we knew that there would be elections in a few months time.[81]*

Another thing to note, is that it was very important for many of the interviewees to highligh the fact that the CC was established and started its work before the second assassination. It was important for them to emphasise that the CC was not created afterwards, and, as many believes, as a result of the ND. The creation of the CC came as a consequence of an overall feeling was that a constitutional body that corresponded with the political landscape was needed, as the NCA was heavily critised for lacking this reflectivity of the actual political landscape after two years.[82] The creation of the CC was by many perceived as a "levelling of the playing field" (see for example (Al-Ali & Ben Romdhane, 2014)). As there was no possibility to do this within the Rules of Procedures (RoP), the creation of the CC was at first

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[80] Interview with Samia Abbou.
[81] Interview with Mustapha Ben Jaafar.
[82] Interview with Mustapha Ben Jaafar (Ettakatol).

an ad hoc and informal group within the NCA structures, not included in the until 3 January, 2014 (The Carter Center, 2014a, p. 33). However, the inclusion of the CC in the RoP was an important point for many of the opposition members. They feared this group would result in nothing, just as an empty promise.[83] The formal inclusion in the RoP meant that the discussions in the CC could be a source for later interpretation of the constitutional text. Another important feature, was that the decisions made in the CC became binding for the deputes represented in the CC, which therefore rendered support in the plenary voting more predictable. Concerning the workings of the CC, between 10 days and two weeks were spent on agreeing on the rules, and these discussions was a crucial prerequisite for the oppositions participation.[84]

Further, there is a strong disagreement concerning when the constitution could have been finished. Members of Ennahdha claim that the constitution was practically done by the time of the second assassination.[85] According to most of the interviewees from Ennahda, a consensus was reached on 14 out of 15 points before July, 2013. The 15th point that rested was article 6, but Imed Hammami explain that they had already discussed this article during their last meeting on 24 July, and that it was ready to be voted upon in plenary the day after. "We were almost finished, we only lacked that 1%"[86]. However, on the other side, the oppositions views on the progress in the CC is quite different. "Before the ND, it was not possible to achieve anything in the CC", states Selma Mabrouk, and attributed this to Ennahda's unwillingness to change anything. According to another opposition member, Ennahda did not bring any amendments to the table[87]. They did, however, according to Samia Abbou present a proposition for the preamble on the 23 July, after just a couple of days with discussions. The opposition wanted to take it into consideration, as it was a new formulation[88]. However, the processes stopped before it could be adopted. This boils down to different opinions on how well the CC was working before and after the ND. While members from notably Ettakatol, Wafa and Ennahdha claims that the constitution would have been finalized by the end of August without the assassination of Brahmi on 25 July 2013[89], the opposition members states that it before the suspension of the deputies of the opposition, the

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[83] Interview with Selma Mabrouk, Samia Abbou, Mongi Rahoui, Rim Mahjoub, etc.
[84] Interview with Selma Mabrouk.
[85] Interview with Meherzia Labidi.
[86] Interview with Imed Hammami (Ennahdha).
[87] Interview with Mongi Rahoui (Democratic bloc).
[88] Interview with Samia Abbou (Democratic bloc).
[89] Interview with Mustapha Ben Jaafar, for one.

Bardo sit-in and the beginning of the ND, was impossible to reach 'consensus' on any of the issues in the constitution.[90]

As a last comment, based on the interviews, the rhetoric of strong strategic behavior is most present with the opposition. The interviewees from Ennahdha rather emphasised the consensual nature of the agreements reached. On a general note, in the interviews with the opposition, much emphasis was put on how important it was to battle Ennahdha on the constitutional issues.[91] However, Habib Khedher (Ennahdha), the General rapporteur of the constitution, claims that the delays in the constitutional process were not caused by constitutional issues, but because there were "attempts at blocking the process", mainly from the opposition in the NCA, but also from opposition outside of the NCA.[92] This was a perspective shared by other interviewees from Ennahdha too. The question whether the blockages were of a constitutional nature, caused by the nature of the content, or whether it was something else that caused the blockages, therefore arises.

6.2 What blocked the process?

Whether or not it was any specific constitutional issues that blocked the constitutional process, or whether it was the over-all political situation in the country that caused the ruptures in the process, is hard to discern. The two spheres are closely linked. Two features become apparent from the analysis of the contentious articles; first, the usefulness of the distinction between structural provisions and rights and values, as it appears the latter, contrary to what theory suggests, was constitutional issues that interested actors in domestic politics. Both article 6 on freedom of conscience and article 74 on the candidacy of the president was heavily discussed outside of the NCA as well, in closed forums for political actors. Article 46 on women's rights was seemingly solved in public, but several of the interviewees claimed this article in particular was used in order to obtain other political goals. This is the second feature concerning the blockages in the process that appeared in the interviews, and it will be treated in the next section, as a part of the 'pressure on the process' perspective.

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[90] Interview with Selma Mabrouk, for one.
[91] Interviews with Selma Mabrouk, Rim Mahjoub and Hasna Mersit (Democratic bloc) and Samia Abbou (CPR).
[92] Interview with Habib Khedher (Ennahdha).

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First, on the usefulness of the distinction between structural provisions and rights and values, and the expectation that the latter will not interest domestic politics as much as the former will. The question concerning the role of religion entrenched many articles and aspects of the constitutional process, and all of the three value-based articles discussed in treated in this study. This appears as a specific aspect of the Tunisian constitution-making process that the strategic-realist have difficulty to encompass. Interestingly, the Commission for the preamble was by many perceived as the commission were the "stakes were highest", and where all of the strategy concerning the role of religion played out.[93] However, the strategic-realist approach does allow for strategic behaviour to be put in the background, and be overcome by the power of values and ideals. Further, values and ideals can also be heavily contested politically, and therefore does not necessarily induce less strategic behaviour amongst politicians than structural provisions. Even though values and rights are not expected to be of interest of political actors outside of the situation of constitution-making, the question of the role of religion in the new constitutional order proved such an important issue in Tunisian politics, that it was treated in the same manner as structural provisions, in trying to find a solution. This is evident of especially article 6 on freedom of conscience.

Article 6 on freedom of conscience was one of the most contentious in the constitutional debate. At first glance, this issue of freedom of conscience is confusing as to the rational and strategic behavior we expect politicians to have. But on the other hand, it could also be strategic for the politicians to posture so strongly before their principles, as this would garner support for their views, and maybe increase their political prospects. However, when we see the video clip of Brahim Gassas (independent, later Nidaa Tounes) disrupting a plenary session with his infamous angry rant, or a member from Ennahdha bursting into tears following a discussion concerning freedom of conscience and Takfir, this indicates that we must go beyond the perspective of politicians as mere rational and strategic actors. Fortunately, the strategic-realist approach does allow for values to come into focus. As mentioned in chapter 2, politics is not always about manifestation of power. If allowing the theoretical framework to guide our understanding of the constitution-making process in Tunisia, therefore, article 6 is arguably best understood as an issue where the strategic-behavior allow for the power of values. Sometimes, and seemingly in the case of this article,

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[93] Interview with Samia Abbou.

the mere politics of it all must give way for the fundamental discussion of the Muslim identity in Tunisia and the people's different relationship with Islam.

The notion of Islam in politics have been devoted little attention in this paper. However, a small mention should be made on Ennahdha's position in this regard. Ennahdha was the only political party in the NCA who considered to include Islamic sharia in the constitution. Despite not stated in their electoral campaign to the NCA, internal debates in Ennahdha had flourished and reiterated the issue after the elections (Marks, 2014). An internal document from Ennahdha, stating that Islamic sharia would be "a source among source" of legislation, had circulated since February, and at a public protest in March, the crowd, with Ennahdha's parliamentary leader Sahbi Atig in the forefront, had shouted that sharia would be the main source, and the only source (Pickard, 2015, p. 21). Tensions were high both within and outside the NCA. Mustapha Ben Jaafar and Ettakatol threatened to withdraw from the Troika coalition if Ennahdha opted for to mention sharia in the constitutional text. This was a heated subject in both public debates as well as the NCA, and uncertainty existed as to the position Ennahdha would take. Ennahdha's stance was not clear before the Shoura council, Ennahdha's highest decision-making organ, made an official announcement on 26 March, with an overwhelming support for *not* mentioning sharia in the constitution. Thus, this important issue was resolved before the first draft was published on 14 August 2012. Still, the role of religion beyond Islamic sharia was a point of contention between Ennahdha and the secular parties throughout the drafting process (Pickard, 2015, p. 22).

However, it should be noted that the issue of article 6 also had implications for the procedures in the voting process. There was an infamous dispute between Mongi Rahoui, a leftist member of the Democratic bloc who belonged to the same party as Chokri Belaïd, and Habib Ellouze, a conservative member of Ennahda, motivated by this article. The latter questioned the religious faith of his colleague in the media, stating that he was "known for his enmity of Islam" (Meziou, 2014). As Rahoui reported that he had received threats within 48 hours after this accusation, and with two political assassinations in the backdrop, this incident resulted in heated debate where the opposition felt that article 6 also should include an obligation for the state to ban incitement to hatred and violence, as well as Takfir, as this could endanger the accused. This article therefore became a special case in the voting process, as it was the first article to be reconsidered and voted upon anew. After this conflict had resulted in "new elements", as stipulated in article 93 in the RoP, the article could be readdressed by the

plenary. Whether this can be allocated to a strategic behavior or temperatures rising in the plenary, is very hard to discern. In any rate, this set a precedent, and this article was after this incident applied extensively during the final vote.[94]

Further, especially the characteristics of article 74 pose a challenge to this distinction provided by theory. This article was one of the very last articles to be adopted in the voting process, and is regarded as highly contentious especially amongst domestic politics. It seems that this article is more complex in the case of the Tunisian constitution-making than this distinction incorporates, and that it might be better to understand this article's appearance in the process more in the manner of a structural provision. This article concerning the candidacy for presidency does not fit the definition of structural provisions. However, it does affect the future of political elites. This fact, it seems, can account for the difficulties in finding an agreement. This article becomes important for any politician aiming at presidency in the future, or for his or her supporters. While the theoretical framework tells us that rights and values will not affect the future of political elites, we find that in the case of article 74 it actually does. By understanding this article as both a value-based question[95], but also one with some aspects as a structural provision, we might be better equipped for understanding the process of reaching an agreement, as this issue was of interest of actors within domestic politics. Even though Ennahdha had no motivation or aspirations for the seat of the president, they did, as the relative majority in the assembly, have the power to exclude the opposition's presidential candidate Essebsi, by a mere age limit. Interestingly, although many attribute the resulting article, and the removal of the age limit, to an agreement between Ghannouchi and Essebsi, Ennahdha turned in their vote during the first voting on the article. As long as a potential agreement between the two politicians remain secret, however, it is hard to attach any possible explanations to Ennahdha's actions in the plenary vote.

6.3 Perception and use of the pressure

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[94] Fears were that the extensive use of the article could prolong the discussion and leave the process inconclusive. After much debate, the heads of blocs were assigned as the arbiters on whether RoP article 93 could be invoked. The article was invoked on a number of occations, usually to resolve controversial issues, like for instance the candidacy conditions for presidency, article 74 (The Carter Center, 2014a, p. 45).

[95] Age nonetheless has a value dimension as well, as one can argue that the lower threshold of the age limit was value inspired, in the sense that it would make it possible for relatively young people to pose their candidature, and thereby encourage wider participation by youth in the political affairs of their country (The Carter Center, 2014a, p. 88).

The second feature concerning the blockages in the process, is related to the notion of pressure on the process, and how constitutional issues concerning rights and values could induce a popular pressure that would form into a larger pressure on the process as well. The even more interesting aspect uncovered here, is how this was done intentionally by the politicians in the NCA.

In this respect, especially the women's rights article provide an interesting discussion. In analysing this article, and even more evident in the interviews, this article uncovers several interesting features. For one, this issue was debated large and wide, and was a constitutional question that the civil society was concerned with. The women's rights activists of Tunisia are very protective of the status they hold, and were in the constitutional debate more eager not to see their rights curtailed in any way, more than actually advancing their claim (Charrad & Zarrugh, 2013). With Ennahdha in majority, many feared that they would impose a more traditional view on the role of women, both in the family and society, than the modern and secular opposition would promote. It was a struggle over the values of the family, and the fear of a conservative religious relapse.[96] This pressure on the constitution-makers affected both the following discussion concerning the women's rights article, but it also transcended to other areas as well.

According to the interviewees from Ennahdha, the issue of women's rights was not really as contentious as portrayed by the opposition. Farida Labidi (Ennahdha), president of the Commission for rights and freedoms, expressed a strong feeling that Ennahdha's position, and intentions in introducing the 'complementarity', was misinterpreted by the opposition from the very beginning, and in the very worst way possible.[97] Selma Mabrouk (Democratic bloc), on the other hand, contends that Ennahdha's "true intentions" came to show in the discussions in the constituent commission. This, she says, was the reason why she posted a "warning" on her Facebook page, because she wanted the people to be aware of the dangers behind Ennahdha's suggestions. Labidi found Mabrouk's actions as an obstacle to further discussions and contends that this discussion was framed by the opposition as a "smear campaign" against Ennahdha. Labidi further contends that the notion of 'complementarity' was never meant to mean not-equality. Both she and other Ennahdha members maintain that the proposed article concerning the 'complementarity' of women were misunderstood, and became symbol-

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[96] Interview with Samia Abbou (CPR).
[97] Interview with Farida Labidi.

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politics (for this view, see also (Charrad & Zarrugh, 2013)). Marks (2014) also notes that, more than anything, this article deepened the divide between Ennahdha and the opposition.

Further, the continued support for the petition launched by Selma Mabrouk, even after the issue was concluded, suggests that the issue drew popular support even after Ennahdha retrieved the suggestion and withdrawn the suggestion. This act of promting the population to react, and mobilise in a petition, is a very interesting feature. Even though the debate concerning the first blockage in the process, the notion of complementarity, appears as the one that caused the most popular uproar, the popular protests and uproar this caused, could be used by the opposition as support to negotiate still advances on women's rights more.

According to Latifah Habachi, the most "devastating" pressure on the process, that was the political pressure. According to her, it was a good activity with the civil society, with national consultations in both Tunisia and abroad, and they presented suggestions, etc.

> *But, there were some questions that were misunderstood, like the infamous article concerning complementarity, and I assure you that this problem was first and foremost a political problem. The «popular pressure» was mostly a political political pressure.*[98]

On the whole, the issue of women's rights is regarded as one of the blockages in the constitutional process. Several interviewees from Ennahda and their support parties claim that the opposition just used this, and other "small issues" to justify their suspension from the ANC, and to claim that the national dialogue was actually about constitutional issues, not "politically contentious". Some also meant that the opposition had used these issues, that according to Ennahdha was already solved, and reiterated the debate in order to drag out the process, making government-party Ennahdha even more unpopular, or use these issues as an electoral campaign, in order to get more voters in the upcoming elections.

This does not necessarily mean that the issue of women's right was a constructed struggle. However, it does shed light upon some fundamental aspects of Tunisian politics in that period, like the fear of Ennahdha and "Islamisation" of society, or the fact that Ennahdha did have an "upper hand" in the constitutional bargaining by mere numbers, after the election in 2011, which the opposition wanted to weaken in order to improve the balance of power.

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[98] Interview with Latifa Habachi (Ennahdha).

According to Habib Khedher, it was not the constitutional questions that caused a problem and blocked the constitutional process.

> *It was problems on the political scene. There were parties that did not accept the result from the elections [in 2011]. And to say openly that they do not accept these results, was not accepted by the public opinion. Therefore, they had to use every mean possible to exert pressure to block the process.[99]*

However, most of the non-Ennahdha interviewees highlights that there was an overall sense of the process having to come to an end soon, in one way or another. Most of the interviewees express the need to find a common way ahead, and the importance of finding a 'consensus' around the constitutional text, and other political tensions during the process. Maya Jribi (no bloc) gives the overall account that:

> *There was no support for the Troika in the population. In the media, in the streets, in demonstrations – in the daily life – there was an ambience of a population not with the Troika, not with Ennahhda, not with the constitution. We had to search for other things. (...) That is why we had to sit down around a table and discuss, in order to find a common plan.*

Others are more sombre in their account of why an agreement came forth in the end. According to Samia Abbou (CPR) they found an agreement in the end, because they had to. There was no other choice. Abbou expressed a strong discontent with the resulting constitutional text, but admitted that the pressure on the process left no other alternative than to either get the constitution finalised, or leave it.

> *There had been two murders. We had to exit the transition phase soon, we needed new elections. Everyone said that the assembly was finished. We were under an enormous pressure, and it was impossible to advance this constitution further.[100]*

It seems the overall pressure on the process had culminated to a point where the dominating want was to finalise the constitution and get it passed by the NCA. The process was already long overdue, and the pressure had grown to a point where it is hard to discern between the different sources of the pressure on the process. It could also argue that it would have an iterative effect, by that popular pressure would induce domestic actors to involve themselves

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[99] Interview with Habib Khedher (Ennahdha).
[100] Interview with Samia Abbour (CPR).

even more, and that by domestic politics getting involved in the constitution-making process as well, this triggered even more popular interest and pressure.

Concerning the National Dialogue and the mediation of the quartet, most of the interviews either highlight the mediation by the quartet as positive, or refrain from saying much about it. However, as all of the interviewees from the quartet stressed, the involvement of the quartet was first and foremost to "facilitate the transition" and support the NCA in its work.[101] However, interestingly to note, is the difference in which the NCA members talk about the involvement of the quartet. While the opposition portray this as something they called for, as necessary in order to "balance the discussion", and make Ennahdha listen to them instead of ignoring the opposition's remarks. However, interviewees from Ennahdha, and their sympathisers in Ettakatol and Wafa, note the importance of the DN to bring the opposition back to the institution of the NCA. Latifa Habachi (Ennahdha) notes that:

> *[The National Dialogue] was very positive for the constitutional process, because those who wanted to discuss the issues concerning the constitution, that was the members of the NCA. The others [the opposition] wanted to dissolve the NCA, and then it would be no constitution. But the quartet imposed on the others parties that it was absolutely necessary to complete the constitution, and they made our colleagues return to the constitution and resume the work with consensus.[102]*

On this final comment, this analytical approach of some of the contentious issues in the constitution-making process in Tunisia has reached its limit. As mentioned before, the process of drafting a new constitution in Tunisia is still a contentious topic. The overall experience of the constitution-makers will differ as to who you approach and the questions you ask. And how much light can be shed upon the process as a whole is limited. However, in this discussion, some features in the process which was uncovered by the analysis, has been presented, as they concern the usefulness of the theoretical distinctions applied in the study. The overall conclusions that can be drawn for the process as a whole are very tentative. However, the analysis of the five contentious issues have provided some knowledge about the process of constitution-making. These will be summarised in the next chapter, the conclusion.

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[101] Interview with Sami Tahri (UGTT). This is supported by other analysts of the process as well, see M'rad 2015; Pickard 2015.
[102] Interview with Latifa Habachi (Ennahdha).

7 Conclusion

The initial research question facing this study is:

> *How were contentious constitutional issues solved during the process of making the Tunisian 2014-constitution?*

By analysing five constitutional issues thought of as highly contentious in the constitution-making process, the aim of this study was analyse how the process of solving contentious issues in the constitution-making process in Tunisia unfolded. To aid in this endeavour, a theoretical framework was constructed from different constitutional theories within the strategic-realist approach, and an analytical tool developed in order to structure the analysis. As the theory suggested, domestic actors did take interest in the constitutional issues concerning the type of government and transitional provisions, which created a pressure on the constitution-making process from the greater context of domestic politics. However, the analysis also uncovered that contentious issues concerning rights and values also proved to be of great importance to domestic politics, as these issues were also treated in closed forums outside of the NCA as well. The only exception was the article concerning women's rights, which was seemingly solved in public.

Further, and based on the analysis, the study finds that the contentious issues treated here mostly are treated in a closed forum, with little or no access for the public, as theory suggests. However, there is an important exception with the women's article, as this was both debated and seemingly solved in public. This can be interpreted in several ways, but one explanation offered by theory is politicians need and want to posture their principles and make a "grand standing" on principled matters. However, as the interviewees from Ennahdha presented it, this issue was not really very contentious. Ennahdha would then be well served with explaining the misunderstanding in a public forum, or explain the nuances they could not broadcast if the discussions where in a closed forum. However, it appears this did not work as intended, as the "fear of Ennahdha" did not subside, but rather grew, with time.

However, what theory suggested concerning popular pressure, to a large extent proved a valuable expectation in the analysis of the five contentious issues, as it was only in relation to the issues concerning rights and values that the interviewees revealed a perception that popular pressure mattered. Overall, as the process evolves, the pressure on the process grows,

and is harder still to discern from pressure concerning other aspects. It seems a culmination of pressure on the process was of high importance, in finding a solution for the remaining contentious issues and making the final adoption of the constitution possible. It is the constitution-makers' perception of pressure from the greater political context, with both the popular pressure and the pressure from domestic actors, which is the essential element in this study of the process, as it is assumed that actors involved in constitution-making will act in response to how much pressure they feel they are under.

7.1 What insight of the political landscape?

Further, some aspects of the political landscape in Tunisia during the period of constitution-making is derived from the analysis. The last discussion uncovered some features of the process of solving these issues, that to a certain extent can shed light on the situation of constitution-making and the overall political landscape. Concerning the completion and adoption of the constitution, there exist disagreements as to when the constitutional process could have been ended, and divided opinions as to the significance of the National Dialogue mediated by the quartet. However, as most other disagreements, this depends on the perspective. This study opts for the version that the ND was important to gather the parties to the table, while its influence on content, as the unified actor 'the quartet', was limited. Even though all of the organisations had interests, visions and expectations to the content of the constitution, and lobbied for this in a "conventional" manner, there exists agreements from all parties that the rounds of ND was not convened to interfere with the substantive drafting of the constitution. It was merely an initiative to steer the process back on track. This view is supported by other analysis done, for example by M'rad (2015) and Pickard (2015).

Another aspect uncovered in the analysis, is the significant role played by the CC. However, uncertainty persists as to whether this role could have been played out without the mediation of the quartet. As noted in the discussion, there is a deep divide amongst the interviewees as to the "climate" of discussion in the CC before the second political assassination. As expressed by the opposition, the CC did not function at all and no progress on the constitutional contentious issues were made. On the other side, interviewees from Ennahdha, Ettakatol and Wafa claims that the constitution was nearly done by the time of the second assassination, lacking only consensus on one out of the 15 points they had decied to find an agreement on. Sadly, due to the closed nature of the CC, proper insight as to this

bepuzzlement will have to wait until the day the NCA decides to release the minutes from the meeting.

Although the analysis cannot uncover actual 'bargains', as the theoretical framework suggests, the perspective offered by the strategic-realist approach still proves useful. It might be too ambitious to unravel whether it was the constitutional issues that blocked the process of elaborating the constitution *by their substance*, or whether the political opponents used these issues as means for achieving something else in the political game of constitution-making. However, by identifying and "tracing" some of the constitutional issues connected to what is perceived as the crisis or blockages in the process, and see how the process to find an agreement was on the different issues, both inside and outside of the NCA, we get some indications as to how the situation of constitution-making was in Tunisia, in the challenging political landscape in times of political upheaval.

Today, the world's eyes are turned to Tunisia. Just as 2014 was an uplifting year, the year of 2015 was troublesome. While we saw the adoption of the constitution, parliamentary and presidential elections, and a relatively successful transfer of power in 2014, the subsequent year brought a terrorist attack at the National Bardo Museum in February, a shooting of tourists at a beach in Sousse in June, and a suicide bomber in a bus carrying the presidential guard in central Tunis (the capital) in November. Terrorism and security issues are challenging the fairly new-born regime in Tunisia, as well as the economic repercussions caused by years of popular unrest and terrorist threat. The awarding of the Nobel peace prize of 2015 to the Tunisian Dialogue Quartet was a tribute to the steps Tunisia has taken towards a new, more democratic political order, but Tunisia is still a country in transition.

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Appendix 1 – List of interviewees

Date	Name	Parliamentary bloc* (Political affiliation)	Role in the process
24/11	Rim Mahjoub	Democratic bloc (Afek Tounes)	CC. Commission for the powers.
30/11	Meherzia Labidi	Ennahdha (Ennahdha)	Vice-president of the NCA.
02/12	Sahbi Atig	Ennahdha (Ennahdha)	Drafting committee. CC. Commission for the preamble.
02/12	Oussama Al Sagir	Ennahdha (Ennahdha)	Commission for the powers.
02/12	Habib Khedher	Ennahdha (Ennahdha)	General rapporteur of the constitution. Drafting committee. CC.
04/12	Mohamed Fadhel Mahfoudh		The quartet: President of the ONAT.
05/12	Sami Tahri		The quartet. Assistant Secretary General of the UGTT.
05/12	Mabrouk Hrizi	Wafa (CPR → Wafa)	Drafting committee.
07/12	Selma Mabrouk	Democratic bloc (Ettakatol → Al Massar)	CC. Commission for rights and freedoms.
08/12	Noura Ben Hassen	CPR (CPR)	Commission for public authorities.
08/12	Kais Sallami		The quartet. UTICA, member of the executive board.
08/12	Rabiî Abdi	Wafa (CPR → Wafa)	Drafting committee. CC. Commission for constitutional bodies.
09/12	Imed Hammami	Ennahdha (Ennahdha)	Drafting committee. CC. Commission for public authorities.
09/12	Mouldi Riahi	Ettakatol (Ettakatol)	CC. Commission for the preamble.

10/12	Zied Boussen		Observer. DRI → Al Bawsala.
11/12	Maya Jribi	No bloc (Al Jomhouri)	Facilitator of Dar Dhiafa. Commission for the preamble.
11/12	Ikbel Msadaa	CPR (CPR)	CC. Commission for the powers.
11/12	Mongi Rahoui	Democratic bloc (Mouvement des Patriotes Démocrates)	CC. Commission for public authorities.
14/12	Latifa Habachi	Ennahdha (Ennahdha)	Drafting committee. CC. Commission for the justice.
14/12	Mohamed Elarbi Fadhel Moussa	Democratic bloc (Al Massar)	Drafting committee. Commission for the justice.
14/12	Farida Labidi	Ennahdha (Ennahdha)	Drafting committee. CC. Commission for rights and freedoms.
15/12	Ahmed Galaï		The quartet. Vice-president in the LTDH.
15/12	Mustapha Ben Jafaar	Ettakatol (Ettakatol)	President of the NCA. Drafting committee. CC.
15/12	Omar Chetoui	CPR (CPR)	Drafting committee. Commission for the powers.
15/12	Hasna Mersit	No bloc (Independent)	CC. Commission for rights and freedoms.
15/12	Samia Abbou	CPR (CPR → Courant Démocratique)	CC. Commission for the powers.

*Information collected from Al Bawsala's Marsad Majles site, and supplemented with interviews.

Appendix 2 – Interview guide

Des informations générales:

- Nom, âge, profession
- Activité politique aupravant
- Parti politique
- Bloc parlementaire

Thème I: Le travail dans l'ANC

1) Concernant le travail de …

2) Comment est-ce qu'est ce travail a été reçu par les commissions constituantes?

Thème II: Trouver un accord

3) Quelles sont les questions qui ont bloqué le processus constitutionnel?

4) Comment était-il possible de trouver un solution de la crise politique? Et surtout sur les questions constitutionnelles?

5) En ce qui concerne le processus constitutionnel de l'ANC, comment est-ce que le dialogue nationale soutient le processus dans l'ANC?

6) Comment avez-vous réussi à trouver un accord politique?

   → En ce qui concerne cette chronologie, comment décririez-vous…

7) Quel était l'importance de la société civile pour aboutir à un accord politique?

Eventuellement: Avez-vous quelque chose à ajouter?

Appendix 3 – Timeline for interviews

Chronologie : des faits marquants

14 janvier, 2011
La chute de Ben Ali

23 octobre, 2011
Élection de l'ANC

21 novembre, 2011
Formalisation de la Troïka

Octobre 2012
Une première tentative par UGTT de « dialogue national » → avortée

16 octobre, 2012
Le première conférence du dialogue national de l'UGTT
- Ennahdha
- CPR

14 décembre, 2012
2ème version de la Constitution

6 février, 2013
Assassinat de Chokri Belaid

13 mars, 2013
gov. de Jebali → gov. de Larayedh

14 août, 2012
1ère version de la Constitution

15 avril – 15 mai, 2013
The Dar Dhiafa national dialogue

22 avril, 2013
3ème version de la Constitution

mi-mai 2013
UGTT rélance son offre de méditation

16 mai, 2013
2ème conférence du dialogue national de l'UGTT
+ Ennahdha
+CPR

1 juin, 2013
4ème version de la Constitution

29 juin, 2013
1ère réunion de la commission des consensus

25 juillet, 2013
Assassinat de Mohamed Brahmi

30 juillet, 2013
l'UGTT : joindre de l'UTICA, LTDH, et des avocats

6 août, 2013
→ Mustapha Ben Jaafar : suspend l'ANC
→ UGTT : joint les protests anti-gov.

14 août, 2013
Rdv à Paris entre Ghannouchi et Essebsi

22-28 août, 2013
3ème conférence du dialogue national de l'UGTT

17 septembre, 2013
Reprise de l'ANC

5 octobre, 2013
la « feuille de route » accepté - CPR

24 octobre, 2013
gov. Larayedh promet de démissionner

25 oct – 25 nov, 2013
dialogue national du quartet

26 janvier, 2014
Signature de la Constitution

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Appendix 4 – Letter of information

Demande de participation au projet de recherche :

”Le processus constitutionnel en Tunisie"

Contexte et objet de l'étude

L'objectif de cette étude est de mettre en lumière le processus constitutionnel en Tunisie, dans le sillage de la révolution tunisienne de 2010-2011. La transition de la Tunisie d'un régime autoritaire à une forme de gouvernement plus démocratique a été célébrée comme un succès. En particulier, l'élaboration de la Constitution de 2014 est considérée par beaucoup comme une pierre blanche de la démocratie arabe. Elle est mise en surbrillance parce qu'elle est la première constitution démocratique arabe rédigée sans l'influence d'une puissance étrangère ou militaire nationale. Elle est également considérée remarquable par le consensus sur lequel se fond le texte final.

Cette étude aboutira à une thèse de maîtrise à la Faculté de sciences politiques à l'Université d'Oslo, en Norvège. Le projet est également soutenu et financé par le Chr. Michelsen Institute.

Qu'implique la participation à cette étude ?

Vous êtes invité à participer à cette étude dans la capacité de votre position et sur la base des connaissances que vous possédez sur le processus constitutionnel en Tunisie 2011-2014. Les données empiriques pour cette thèse consisteront d'entretiens semi-structurés. Des informations générales sur les participants seront recueillies à partir de la base de données de l'Assemblée nationale constituante fourni par Al Bawsala (parti politique, la composition des commissions, des audiences ou auditions dans le Parlement, etc.).

Les participants sont invités à réfléchir sur une chronologie des événements qu'ils jugent particulièrement importants dans l'élaboration de la constitution de 2014. Au début de l'entrevue, ou avant l'entrevue si cela vous convient mieux, vous pouvez noter les événements les plus importants et les réalisations dans le processus constitutionnel.

Qu'est-ce qui se passe avec l'information recueillie ?

Toutes les informations personnelles sensibles seront traitées confidentiellement. Cependant, comme cette étude en grande partie traite de personnalités publiques, les informations extraites des entretiens ne seront pas classées comme sensible, sauf indication contraire explicite. S'ils ne se sont pas réservés contre ceci, les participants dans l'étude seront par conséquent reconnaissables dans la publication de la thèse.

Le projet sera finalisé au 1er mai, 2016. Les enregistrements audio et les notes des entrevues seront conservées sur un disque dur externe, et seront traités par l'étudiant chercheur exclusivement. Les informations recueillies seront conservées en toute sécurité pour une utilisation ultérieure, pour d'autres projets, suivi des travaux de la thèse, etc. L'étudiant de recherche sera le seul à avoir accès aux informations conservées.

Participation volontaire

C'est volontaire de participer à cette étude, et vous pouvez à tout moment retirer votre consentement, jusqu'à la date limite de dépôt de la thèse: le 1er mai, 2016. Si vous choisissez de retirer votre contribution à l'étude, toutes les informations données par vous, seront rendues anonymes.

Cette étude est rapportée au Service des données de sciences sociales norvégien (NSD), un médiateur de la vie privée pour la recherche et qui fournit des conseils sur les politiques de confidentialité aux étudiants et chercheurs.

Coordonnées:

Si vous avez des questions concernant l'étude, ne pas hésiter à contacter le chercheur d'étudiant ou sa contrôleuse :

> Lisa-Marie Måseidvåg Selvik
> lisamarie.selvik@cmi.no // lmselvik@student.sv.uio.no
> Tel.: (+47) 412 76 077

Directrice: Inga Brandell
inga.brandell@stv.uio.no

L'étudiant chercheur sera à Tunis dans la période du 16 novembre à 15 décembre 2015.

Consentement à participer à cette étude

Par la présente, je confirme que j'ai reçu l'information à propos de l'étude et je consens volontairement à participer à cette étude.

(Nom, date)

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Appendix 5 – Constitutional documents

Rules of Procedure, 16 December 2011

- "The 2011 Tunisian Constituent Assembly's Rules of Procedure". Unofficial translation prepared by International IDEA. Collected from: http://www.constitutionnet.org/files/ constituent_assemblys_rules_of_procedure_-_english-final.pdf. [19.09.2015]

First draft, 14 August 2012

- "First draft of the Constitution", Unofficial translation prepared on behalf of International IDEA**.** Collected from: http://www.constitutionnet.org/files/draft_constitution-english.pdf. [07.09.2015]

Second draft, 14 December 2012

- "Projet de la Constitution", Unofficial translation produced by the United Nations Development Programme in Tunisia. Collected from: http://www.constitutionnet.org/files/constitution_de_la_republique_tunisienne_fr-pnud.pdf. [07.09.2015]

Third draft, 22 April 2013

- "Draft Constitution of the Tunisian Republic", Unofficial translation prepared by International IDEA. Collected from: http://www.constitutionnet.org/files/tunisian_constitution-22_april_2013-_third_draft_-english-idea.pdf. [07.09.2015]

- "Projet de la Constitution de la Tunisie", Unofficial translation produced by the United Nations Development Programme (UNDP) in Tunisia. Collected from: http://mjp.univ-perp.fr/constit/tn2013.pdf. [07.09.2015]

Fourth draft, 1 June 2013

- "Draft Constitution of the Tunisian Republic", Unofficial translation prepared by International IDEA. Collected from:
http://www.constitutionnet.org/files/fourth_draft_english_idea.pdf. [07.09.2015]

- "Projet de Constitution de la République Tunisienne", Unofficial translation produced by Al Bawsala. Collected from:
http://majles.marsad.tn/uploads/documents/constitution_tunisie_fr_2013_06_01.pdf.
[07.09.2015]

Final version, 26 January 2014

- Tunisia's Constitution of 2014, Translated by UNDP and reviewed by International IDEA. Collected from:
https://www.constituteproject.org/constitution/Tunisia_2014.pdf. [07.09.2015]

- Constitution de La République Tunisienne, Unofficial translation produced by Al Bawsala. Collected from: http://www.observatoirepharos.com/c/afrique/tunisie/al-bawsala-constitution-de-la-republique-tunisienne-traduction-francaise-non-officielle-26-01-2014-fr. [07.09.2015]

The 1959-constitution

- The Constitution of Tunisia. Collected from:
http://confinder.richmond.edu/admin/docs/Tunisiaconstitution.pdf. [07.09.2015]

- Constitution du 1er juin 1959. Collected from:
http://www.wipo.int/edocs/lexdocs/laws/fr/tn/tn028fr.pdf. [07.09.2015]