

Economic and social rights and the Tunisian Constitution

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1- Throughout its contemporary history, Tunisia offers a striking illustration of the direct link between modernity and social achievements. The abolition of slavery in Tunisia in 1846 opened the way for the progressive granting of the most essential human rights, and a social modernisation that stood out in the Arab region. Under external pressure, the country established the Fundamental Pact in 1857 (a true declaration of human rights) and a constitution in 1861 (the first in the Muslim world). This positive constitutional approach, which breaks with the Arab-Muslim tradition, granted numerous economic and social rights, such as property rights, the right to legal protection, fiscal legality, criminal legality and freedom of trade and industry. Tunisia acquired since then much progress compared with the rest of the Arab world, which Bourguiba, the first President of the Republic, proclaimed in 1957, consolidated even though he ruled unchallenged for a long period (1956-1987), in disregard of the principles of the republic that he himself had promoted. He continued in power until he was side-lined by Ben Ali. Ben Ali was then, in turn, driven out in 2011 by social movements, the scale of which surprised players and observers, and which were provoked by the dissolution of political institutions and the repeal of the constitution of 1959.

2 - Generating the Arab spring, the Tunisian revolution of 2011 seemed to place Tunisia one step ahead of the Arab States with regard to social and political modernisation. The constitution adopted in January 2014 at the end of a complex crisis was part of the modernisation process, which was very quickly set in motion, and which had broken with the "model" government of Arab-Muslim societies, at least since the 19th century. In its introduction, this constitution claims to be a response to the freedom and dignity demands of the revolution.

3- The revolution began in the most disadvantaged regions of the country in response to a lack of economic and social development that the international financial crisis had made worse. Unemployment massively affected university graduates and there was both social and political discontent. In the collective mind, the lack of development was the result of poor management of public finances and failure to respect socio-economic rights that the State had a duty to support. This shared sentiment produced frustration, in particular among young people, and a strong sense of injustice and arbitrariness that were fatal for the regime. In reality, through this revolution, Tunisia reconnected with a past marred by fiscal rebellions¹, often recalled by historians².

¹ The revolution of 1864, which is the one we know the best, followed poor management of public finances and came shortly before Tunisia lost its fiscal sovereignty in 1869/1870 and its political sovereignty in 1881. Since a visit to Paris in 1846, the Tunisian sovereign was involved in a policy of excessive public spending to modernise the country and create public services and, in particular, an army. At the same time, the monarchy's way of life further increased the State's financial requirements. The tax increase became inevitable. Hence the doubling, in 1864, of a capitation tax named *La Mejba* which immediately provoked a popular uprising that started in the same geographic region as that of 2011.

4- Having said that, we can observe developments during the 1960/2010 period and it is easy to see that the independent Tunisian State achieved notable performances with regard to its economic and social development. The enactment of the personal status code in 1956 having enabled the emancipation of women, the generalisation of education from 1958 onwards, the implementation of a social security system in 1960, birth control in 1961, the legalisation of abortion in 1964, the legislation protecting workers (in particular the labour code of 1966), and the liberalisation of investments in 1969 enabled economic growth of 5%, as well as the emergence of a middle class that represented³ more than **2/3** of the population, prior to the international financial crisis of 2008. The spectacular development of public services, in particular those of electricity, drinking water and public health, contributed to transforming the social landscape and the quality of life of Tunisians. Free schooling was a real social advancement for the most disadvantaged social groups⁴. In addition, the governments of the independent State drew their "legitimacy" not through elections, but from the satisfaction provided by real enjoyment of economic and social rights by an overwhelming majority of citizens.

5- However, the policy of social transfers, which was generous if compared with the country's potential, was not enough to satisfy the unmistakable need of both the new generations and the disadvantaged regions. The extent of unemployment and the blatant disparity between regions and categories, combined with absolute despotism⁵, led to the social explosion in a country that was historically accustomed to rebellions. Although Tunisia was relatively modernised from a socio-economic perspective, it was not democratic. In addition, the decline in the quality of public services foreshadowed the decline of economic and social rights, the effectiveness of which depends on the services provided by the public authorities or under their responsibility.

6- The revolution was the result of this difference between the legitimate ambitions created by this progress among a young generation that was less and less prepared for the employment market, and the harsh economic reality in the face of ruthless globalisation. Therefore, the blocking of social advancement, provoked by the economic and political crisis, was quick to produce injustices and create discontent that not only threatened social order, but also jeopardised national unity and social cohesion. Under the effect of several factors, including the level of education of a demanding population, the lack of social justice became more problematic. The revolution intensified the weakening of the authority of the State.

² To illustrate the correlation between the revolutions and tax, Gabriel Ardant referred to two famous revolutions: the first is already from a thousand years ago, that of the man with the donkey, and the second took place only 150 years ago, that of Ben Ghdhim of 1864. Gabriel Ardant, *The history of tax*, p.399.

³ It was not by chance that the crisis in the Gafsa mining basin in 2008, the origin of the Tunisian revolution, was triggered at the same time as the international crisis. The power in place did not have the financial means to satisfy the local needs.

⁴ All the development indicators (school enrolment rate, electricity instalment, drinking water supply, number of doctors per inhabitant, population management, average income per inhabitant) demonstrate that the public policies produced a real modernisation of society. All the public services and their generalisation throughout the national territory reflects wise choices and management of public finances, even though the quality of certain public services decreased significantly for very complex reasons, the first being that they were free.

⁵ On the inside, the authority had practically no allies left since they had accomplished the feat of standing against all structures and leaders that refused allegiance to the President.

7- How did the power of Tunisian constituents approach the economic and social rights, especially since the impatience and expectations were increasing while the wealth to distribute was declining? Did the constitution set the principles and instruments that force future rulers to achieve the social justice formally proclaimed as an objective by the constituent power? Does the new constitutional provision, whose architecture and quality of writing at times leave a lot to be desired,⁶ promote meritocracy and the diffusion of knowledge as the main forces to achieve equality of conditions between human beings? The new constitution certainly proclaimed the vital economic and social rights, the so-called "second generation" rights **(I)**. In this respect, it is richer and more explicit than the constitution of 1 June 1959. However, this proclamation, as formal as it may be, is neither exhaustive nor sufficient to make the enjoyment of these rights real. In addition, companies were unintentionally forgotten in a world where they occupy a prominent position in the creation of wealth that we have a duty to redistribute **(II)**

I- The rights proclaimed

8- The slogan of the Tunisian revolution, 'human **dignity**' was granted constitutional status since it constitutes an essential attribute of human nature. In addition to its ingrained religious connotation⁷, this legally protected value is the foundation of all human rights and, in particular, economic and social rights. It now forms part of the motto of the Republic, alongside freedom, justice and order (art. 4 of the constitution), while in the initial version of the constitution of 1959, it was simply referenced in the introduction. It expresses an unmistakable social need to recognise rights, freedoms, and redistribution, in order to break with the subject status and end intolerable inequalities. The term "dignity" is repeated several times in the text of the constitution: twice in the introduction and three times in articles (art. 4, 23 and 30). This repeated reference to dignity expresses a desire by the constituent power to establish both redistribution in the name of social solidarity and recognition of underprivileged categories in the name of diversity as a major priority. In addition to this common denominator of various human rights, in a long chapter dedicated to rights and freedoms (art. 21 to 49), the constitution granted important economic and social rights.

1) Rights linked to well-being

9- Among these rights, we cite **the right to health** granted to each *human being*, as specified by article 38 paragraph 1, and not only for citizens, whereas in the constitution of 1959, the right to health was the subject of a reference in the preamble . This same article did not settle for proclaiming this right, but it conferred upon the State the obligation to guarantee prevention and healthcare, this time to "*all citizens*". The State also guarantees free healthcare for "*persons*" without support and with low income. This variability of the concepts used (person, citizen or human being) has far-reaching consequences. The text even ventured as far as obligating the State to provide the means necessary to guarantee "the security and quality of health care services". The question arises

⁶ The drafting of the text is far from fulfilling legal rigour. The literary wording that sometimes lacks force or specific meaning, leaves the jurist perplexed. This is the case for the wording of §1 of article 8, according to which "youth are an active force in building the nation". In the same way, articles 39 and 42 should have been consecutive or even merged since they were the result of a difficult but badly designed compromise between two trends: that of traditionalism and that of modernity.

⁷ As early as 1486, an Italian renaissance author (Pico della Mirandola) wrote the following in a book entitled "*De dignitate hominis*" [Oration on the Dignity of Man]: "I have read in the ancient writings of the Arabians that there was nothing to be seen more marvellous than man". Encyclopaedia Universalis, see humanism.

regarding the realism and the appropriateness of such a provision, given the State's limited resources and the disputes this can create.

10- Among the rights that contribute to well-being, the constitution states that "*the right to water is guaranteed*" (art 44). This provision may create enthusiasm, but the weather conditions of the country risk making it hypothetical. There may well be disputes regarding the failure to guarantee this right for a significant proportion of the population, since 20% of Tunisians do not yet have running water. Here again, the authors of the constitution lacked realism. As it judiciously did for **sport and leisure** (art. 43), the constituent power should have envisaged an obligation of means with regard to this, rather than an obligation to guarantee a right that we know is almost impossible to fulfil under the current circumstances.

11- The same article of the constitution did not omit the right to **social security** while referring to the law. It must be noted that the silence of the constitution of 1959 with regard to the right to social security did not prevent the legislator from gradually proceeding to generalise social security. The constitutionalisation of this right obligates the State to generalise cover for all "persons", including those of foreign nationalities who are residents of Tunisia.

2) Rights linked to personal fulfilment

12- The **right to free, public and compulsory education** that has been in place for several decades has been the subject of dense and confused constitutionalisation which, during the creation of the constitution, was at the origin of disagreements linked to the desire of Islamists to Arabise and Islamise education. The abandoning of the initial version of what became article 39 is a lesser evil, since the use of foreign languages was inserted in extremis to suppress the strong protests that were fuelled by the provisions of said article. The constitutional obligation to *ingrain the Arab-Muslim identity in the young generations* was a reaction to the modernisation of the education system undertaken by the government beginning in 1958. It strongly risks constituting a constitutional basis for Islamisation and Arabisation initiatives that could jeopardise the modernisation and the democratisation of the Tunisian system.

13- The right to **culture**, set out by article 42 is part of the international developments that guarantee cultural diversity, tolerance, openness, dialogue between civilisations, the right of future generations and protection of cultural heritage. The text is well designed and fulfils the country's ambitions to join and contribute to human civilisation, as has always been the tradition.

13- The constitutionalisation of the rights of **the child** (art 47) and persons suffering from **disabilities** (art 48) meets a real social need to take responsibility for these two vulnerable categories. Even though the State already drafted a legislation to protect them, this does not change the fact that the constitutionalisation of these rights consolidates the status of said categories, especially since the public or private structures responsible for them already fall short of requirements. Now, the State is obliged to take action to protect children and disabled people, otherwise its liability may be incurred.

3) The right to non-regression

14- The status of women was the subject of a real revolution when Bourguiba, who was prime minister at the time, enacted the code of personal status on 13 August 1956, after having taken the power to enact texts from the Tunisian monarchy ten days previously.⁸ This was the first real constitution that was to revolutionise Tunisian society. Unique in the Arab world, the status of women is regularly questioned loudly, by certain Islamists who have never accepted the abolition of polygamy and repudiation, as well as the legalisation of adoption and abortion, which they consider to be an enemy of Islam. Questioning the rights of women, which are fears perfectly justified, have led supporters of modernity (among them political parties and civil society actors) to demand 'the immunisation' of said rights from the risk of a possible majority that may be tempted by a return to so-called Islamic traditions. To this end, besides the obligation to take the necessary steps to eradicate violence against women, the State must guarantee equality of opportunity between women and men to assume different responsibilities and implements the parity in elected bodies and assemblies (art. 46 and 34) because it is not enough to proclaim equality between women and men as postulated in Article 21 as the formula is somewhat restrictive as is for citizens

15- Since then, article 46, one of the most important of the constitution, establishes the principle of non-regression with regard to women's rights. Pursuant to this article, the State is committed to protecting and strengthening women's accrued rights. For this purpose, in addition to the obligation to take the necessary measures to eradicate violence against women, the State has a duty to guarantee equal opportunities between women and men so that they have access to all levels of responsibility and also must work to attain parity in elected bodies and assemblies (art. 46 and 34),. It is not sufficient to proclaim equality between men and women, as supposed by article 21, because its wording is somewhat restrictive as it refers to citizens, male and female; the equality in question in article 21 may be interpreted as limited to the context of rights granted by citizenship, by those who are very hostile towards equality between men and women, and of which there are many, including among women at university. Does the discrimination banned by article 21, paragraph 1 of the constitution include discrimination with regard to succession? The banning of discrimination only concerned the scope of paragraph 1, and not all of the rights granted by paragraph 2 of this same article 21. The drafting of this text does not appear neutral to us, even if, pursuant to article 146, the general organisation of the constitution should result in the banning of any discrimination to the detriment of women. Tunisia committed to this by lifting the reservations regarding the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁹.

4) Economic rights

16- In addition, the constitution of the 2nd republic confirmed the status of the right to property, the constitutionalisation of which dates back to 1857/1861. The constitution of 1959 itself

⁸ On 3 August 1956, Bourguiba obtained the delegation of normative power from the Bey.

⁹ The statutory order n°103 of 24 October 2011. However, Tunisia maintains its declaration, which may serve as an excuse for refraining to implement the constitutional principle of equality between men and women.

was required to renew a right that was almost sacred in history¹⁰, and in the collective mind. When the State ventured into a collectivisation policy in the 1960s, its policy failed due to people's attachment to their property, farmers in particular. The new constitution considered it necessary to reserve a special mention for intellectual property in the same article 41 which, incidentally, referred to the law for the guarantees and possible limitations of the right to property. The legislation relating to both expropriation in the public interest and requisition must be updated to grant real rights to owners against potential misuse when the public authorities are obligated to act in the name of the general interest and to the detriment of the right to property.

5) **The rights linked to professional interests.**

17- Compared with the 1959 constitution, the constitution of 2014 was considerably innovative with regard to the rights linked to professional interests. It is far more generous insofar as several provisions were dedicated to this category of rights. In this way, the freedom to form trade unions, which was omitted by the constitution of 1959, was clearly granted by article 35 of the supreme text, which requires these entities to respect the constitution, the law and financial transparency and to reject violence. Of course, the law has provided for this freedom since 1966, but this has not always been respected by the public authorities. It is regrettable that this provision, applicable to parties and associations, did not require these entities to respect democratic principles with regard to their organisation. The organic law should be able to address this omission in order to avoid the creation of anti-democratic organisations.

18- The **trade union right** was renewed, with regard to its principle, by article 36, with the same terms used by article 8 of the constitution of 1959, which was particularly laconic. However, in order to overcome the difficulties posed by the former constitutional provision, article 36 provided three clarifications: first of all the **right to strike** is explicitly recognised as a right connected to trade union law. It is regrettable that the wording "including the right to strike" is used, since this could mean that the right to strike is not separate from trade union law. Next, internal security forces and customs officers do not have the right to strike, although they do benefit from the trade union right. Each of the two rights is unique and the ban on the right to strike should have been limited to active customs officers, to avoid extending the ban to officers that do not have clearly exorbitant rights. Finally, members of the national army are deprived of the trade union right and the right to strike. These clarifications were made necessary by both the interpretations of the former constitutional provision, which opened the way for restrictive interpretations of trade union law; and the post-revolutionary context, which saw the occurrence of wildcat strikes, including by internal security force and customs officers. The rationalisation of trade union law, exercised by the body that constitutes the main core of the State, was made even more necessary since the State's authority was greatly tested by sometimes anarchist practices in the name of the exercise of rights and freedoms. This rationalisation is practised in democratic countries.

II- 19- From a legal perspective, the **right to work** is a true social achievement, In the former constitution, the right to work is simply referred in its introduction, while the

¹⁰ In 1382, one of the greatest historians and sociologists of all time, Ibn Khaldoun, suggested that infringement of the right to property was a precursor to the collapse of the State.

2014 Constitution dedicated article 40 to this right. This article obligates the State to take the necessary measures to guarantee this right, on the basis of aptitude and fairness. This is a strong response to the unemployment that is affecting a significant proportion of the population, particularly university graduates in so-called inner areas.¹¹ The same text took other steps with regard to guarantees in favour of workers, since it grants "*every citizen, male or female... the right to work under decent conditions and with a fair wage*". These innovations shall not fail to produce their effects in infra-legislative texts, as well as in relations between social partners, in particular with regard to the concept of a fair wage, which is not easy to determine. The State must also reorganise its public employment service, in order to be able to meet this constitutional requirement under conditions that respect both merit and fairness. Equality before this public service and the principle of non-discrimination with regard to employment must be ensured. This approach is part of the international commitments of Tunisia, which, very early on, ratified several conventions of the ILO, in particular, numbers 111 (in 1959) and 122 (in 1965). **The rights omitted**

20- Despite the length of its chapter regarding rights, the new constitution was not exhaustive concerning economic and social rights. The silence with regard to certain rights is especially astonishing since the trade unions put particular pressure on the constituent assembly to have said rights upheld. The tense social context at the time should have encouraged the constituent to be more concerned about promoting a social democracy, which would be more likely to contain the enthusiasm of social partners

These omissions concern employers in particular, who are worried with rights and freedoms in the same way as employees¹². Despite this, the two main worker and employer unions, along with the Bar Association and the Tunisian Human Rights League, played an historic role in the context of the "National Dialogue" to seek the compromises that enabled the country to overcome the crisis triggered by political assassinations and the desire to Islamise the law and institutions. However, it is possible that this political role played by the two main trade unions created a certain wariness within the assembly with regard to the mentioned organisations and the economic and social rights they support. This political role of the trade unions clearly demonstrated the inability of the political parties to reach a compromise alone. The gravity of the political situation led the trade unions to give priority to the political solution, rather than the socio-economic issues for which they are normally responsible.

21- The new constitution did not see fit to grant the **freedom of trade and industry**. Yet, this economic freedom was proclaimed in 1857 by the Fundamental Pact. It may be considered that this is not a simple omission, especially since, following the example of the powerful trade union, the historical employer organisation requested that the Constituent Assembly grant rights that it considers legitimate and necessary for the next step. Clearly, the grievances of the employers' union

¹¹ In 2014, the unemployment rate of university graduates was 33%. This is more than double the unemployment rate calculated for the working age population.

¹² The freedom of association, which is essentially governed by the labour code of 1966, is granted to the employers who had been organising themselves into employer associations for several decades, and who became social partners.

were not received by the constituent in the same way as those of the trade union. The wariness with regard to capital, combined with the proximity of the former leaders of said trade union to the former president and his entourage did not favour economic players being granted certain rights that were likely to restore the balance of the relationships between the social partners.

22- Among the guarantees omitted was that of the **ban on forced labour** even though independent Tunisia ratified, very early on, conventions n°29 and n°105 of the international labour organisation. The constitution had everything to gain if it constitutionalised this fundamental guarantee of the human being, already recognised by the infra-constitutional measure, and immunised it from any attempt at social regression. In the same way, **freedom of work**, in the case of a strike, was not granted by the constitution due to very strong hostility from the employees' trade union. The impact on the social climate, already very tense since the revolution, could not be ignored. The infringement of this freedom is certainly incriminated by the criminal code, but this incrimination has fallen into disuse.

23- In addition, the refusal by the National Constituent Assembly to constitutionalise the **social dialogue** is surprising since it was within the constituent that an important document, the so-called Social Pact, was signed on the anniversary date of the revolution, 14 January 2013. This text, which has political value, envisages creating social democracy, and more specifically, the right to collective bargaining, which becomes unavoidable. The refusal to constitutionalise the social dialogue seems to have discouraged the initiators and the social players since this document, which was signed in 2013, has to date not been followed by tangible effects. However, the difficult national context should have encouraged the constitutionalisation of social dialogue, and thus favouring the democratic spirit implied by said dialogue. Indeed, the weakening of the acquisition power of employees resulted in what appears to be social disorder, since the reckless increase of strikes affects the competitiveness of the economy and further weakens the public finances that constitute the tool for the redistribution of wealth.

24- In addition, the international context should have led the constituents to explicitly extend the rules of sound management to companies, to protect them against risks from either their managers or the sometimes excessive audits conducted by the competent public authorities. The proclamation in the text of the constitution of freedom of enterprise could have constituted a useful message to economic operators, to encourage them to invest and reassure them in the face of turbulence of any nature. The creation of jobs and wealth to redistribute in order to establish the essential social justice is achieved through investment, and its protection against risks and abuse of any nature.

25- The silence of the constitution with regard to social finances is difficult to understand, especially since these finances have recorded worrying losses that threaten the durability of the social security system. Their management is assigned to the executive power, out of the control of the parliament. An annual law governing social finances, and taking into account their specific nature, while imposing the essential balance of different welfare funds, should have been envisaged. The protection of social security beneficiaries and their rights is attained through this requirement of sound management, the constitutionalisation of which would have allowed the reckless permissiveness and borrowing to be contained.

26- Certainly, in its article 12, the constitution proclaimed social justice as an objective that falls under the responsibility of the State¹³. However, the State is hiding a power balance that requires a compromise between the rights of the socio-economic players. In reality, social justice is both a **project**¹⁴ aimed at collective well-being¹⁵ and an **approach** undertaken to contain the inequalities and injustices created either by nature or by the social system itself. More involved and more determined voices will say that social justice is a fight against inequality, whose devastating effects on social cohesion are clearly evident. The protection of the most vulnerable social categories should not jeopardise the rights of investors, who are developers and creators of wealth. The equation that rulers face is far from simple since, due to a lack of sufficient public capital, the State essentially has a regulatory role. The welfare State, revisited and redesigned, still has a bright future in front of it.

27- In addition, it would be a mistake to believe that social injustice is the result of pure economic inequality. The redistribution of wealth is certainly the most visible part of social justice, in that it implies measures to correct economic inequalities that have become increasingly problematic. Another requirement has appeared, which is no less essential for the launch of the social justice process: that of recognition. Denial of social justice is a risk that governments have a duty to avoid. As generous as the constitutional provision is, this alone is not enough to make economic and social rights a reality.

¹³ Article 12 assigns the State the duty "to seek to achieve **social justice**, sustainable development and balance between regions based on development indicators and the principle of positive discrimination. In addition, the state shall seek to exploit natural resources in the most efficient way".

¹⁴ The Declaration of Philadelphia of 1944 specifies that social justice is "the central aim of national and international policy". Therefore "all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective" (art. II c).

¹⁵ According to the Declaration of Philadelphia "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity" (art. II a).