
THE TUNISIAN CONSTITUTION: THE PROCESS AND THE OUTCOME

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The National Constituent Assembly (NCA) recently passed the new Tunisian Constitution on 26 January (and endorsed it officially on 27 January), to emotional and widely reported scenes. This constitution may be as important in the way it came about as in what it actually says. In both its formation and its content, much is at stake for Tunisia, the continuing revolutions in the Arab world, and beyond. In a previous extended article, I discuss the culture of constitutionalism in Tunisia, and how this latest episode is related to this tradition and bears its imprint.

The first phase of the transition after the Ben Ali dictatorship was rich in constitutionalism.

Paradoxically, the second phase was designed to facilitate the writing of a constitution by electing the NCA, but got bogged down in electoral politics and sidelined its own mission. Another paradox is that the parties entrusted with this task ended up literally unable (many of them perhaps unwilling) to bring it to a conclusion, until civil society mediators compelled them to turn their minds to it in the aftermath of political assassinations and mass street protests. The first of these, the killing of Chokri Belaïd on 6 February 2013, was a turning point in the transition period in the country. It marked the silencing of an influential voice that often spoke about

“Tunisian intelligence,” by which Belaid meant a critical mass of educated elite formed through a specific educational system, and a confluence of historical and geographic factors unique to the country. That intelligence, he argued, was both what would save the nation and in what the post-revolution state should invest.

Part of this cadre of intellectuals and elite are the labor movement and civil society. Indeed, throughout the past three years, and through five governments and three presidents, one thing remained constant; this was namely the culture of dialogue, compromise, and what may be called institutionalism. By the latter, I mean a belief in and a consolidation of institutions even as the system as a whole was faltering. The frame of dialogue and the “political road map” were masterminded by the main trade union (the Tunisian General Labor Union, known by its French acronym, UGTT) and three key civil society organizations: the association of business owners (*Union Tunisienne de l’Industrie, du Commerce et de l’Artisanat*), the Tunisian League of Human Rights, and the Lawyers’ Association. These groups have been the determining factors in the text as well as the context of the constitution.

There has been a lot of pressure from outside parties, the European Union, Algeria, and the United States (to name a few), but the dialogue in its leadership, mechanisms, and the road map emerging from it was an indigenous invention. A brief reminder is in order here:

When polarization and mistrust reached their climax in the aftermath of the July 2013 assassination of NCA member Mohamed Brahmi, a leader in the Popular Front, the UGTT leadership and its partners, (which will become known as the Quartet) stepped in to forge agreements. They worked out an overall plan based on three key points. These were: a governmental process, a constitutional track, and an electoral track. The overall aim of the plan was to establish a new government of independent technocrats, to establish the

High Election Commission, and to complete the constitution while protecting against a power vacuum. The president was largely kept in place to provide legal continuity, while the NCA was recognized as a legitimate body. In order to speed up the constitutional track—our focus here—the formula was as follows: the Consensus Committee within the NCA would review every article before presenting it to the general session of the NCA for debate and vote. When agreement proved impossible within the committee, the presidents of blocs within the assembly would meet with the assembly president to hammer out a compromise. If no agreement was reached there—and this did happen when dialogue broke down both over Article six and over the status of the judiciary—then party presidents and the Quartet sponsoring the dialogue would meet and find a way through.

A thorough comparison between the 1 June version of the constitution and the one that was eventually adopted reveals the extent of the compromises reached and hints at the tensions, the drama, and even the comical moments played out for all to see. (Debates were aired live on a national channel and painstakingly monitored by the media as well as dedicated civil society associations, chief among them Bawsala.) Overall, most of the contentious elements in the previous version have been eliminated or smoothed out. I will focus on key issues, referring to the relevant articles, in an attempt to trace their history, note their transformation, and draw some conclusions about both the text and the process. I will conclude with some remarks on drawbacks and prospects.

WHEN THE SHOUTING MATCH BETWEEN TWO DEPUTIES IS ONLY THE TIP OF THE ICEBERG

Perhaps no two members of the NCA have generated more controversy and attention than Mongi Rahoui and Habib Ellouz. In important ways, they illustrate the diversity within the

assembly in terms of style, generation, region, and ideology, and how the constitution came to be. Rahoui, in his late forties, represents Jendouba, a poor area in the northwestern part of Tunisia, and hails from the same leftist party as the late Chokri Belaid. Ellouz, in his sixties, is a founding member of Ennahda and is considered an unreformed hawk. He comes from the powerful and dynamic city of Sfax. The conflict started around Article I and ended up affecting Article 6. Article I reads: "Tunisia is a free, independent, and sovereign state. Islam is its religion, Arabic its language, and the republic its system [sic]." While debating whether Islam is the religion of the state or the people in the phrase "Islam is its religion," Ellouz mentioned on a radio program that Rahoui, who insisted the pronoun "it" refers to the people rather than the state, was known for his enmity toward Islam. Immediate reactions resulted in threats to Rahoui's life on the grounds of apostasy. Rahoui addressed the threats in the NCA effectively and emotionally, and he insisted that unless calls for apostasy were banned, no freedom of conscience could take place, and thus, a key demand of the revolution would be denied. The whole consensual process came to a halt until a change was debated and approved. Article I remained the same but Article 6 was changed to accommodate this demand. It now reads:

The state shall protect religion, guarantee freedom of belief and conscience and religious practices, and ensure the impartiality of mosques and places of worship away from partisan instrumentalization. The state shall commit to spreading the values of moderation and tolerance, protecting sanctities and preventing attacks on them, just as it shall commit to preventing calls of *takfeer* [calling someone an unbeliever] and incitement to hatred and violence and to confronting them.

Ennahda made a major climb down, but the article remains less than straightforward and should prove a serious challenge for legislation.

Nevertheless, preventing accusations of apostasy marks a key innovation among constitutions in the Arab world, a matter consolidated in the chapter devoted to rights and freedoms. These include freedoms of creativity, academic research, and improved rights for women. Indeed, the adopted constitution brought about further gains to an already relatively advanced legislative situation.

In earlier versions, women were designated as "complementing" men, which was vehemently opposed by active and powerful Tunisian women, among others. Article 46 extends rights of women to parity in elected office and equality in work opportunity. This was achieved thanks, in part, to a coalition of women from across party lines within the ANC.

The other key achievements, again in line with the aims and demands of the revolution, are in the areas of the judiciary, good governance, and the consolidation of democratic rule.

The battle to enshrine the independence of the judiciary has been long and arduous, and it was not achieved until the very last debate of the relevant articles in the constitution (Articles 102-124). Ennahda insisted all along on some level of control or oversight by the executive over the judiciary, but in the end, they lost that argument. The appointment of judges is now by "exclusive" right of the Supreme Judicial Council. The latter also has financial and legal independence. It must be noted that corruption and politicization in this sector has been high; it will be interesting to see how much this self-governance can impact matters in the long run. But there may be mechanisms built into the new constitution, which could tackle this.

Indeed, good governance is addressed through devolution to elected bodies at the regional level, and a dedicated Constitutional Commission for Good Governance and Anti-Corruption (Articles 125-130), together with other measures of control. This commission is

part of a number of independent constitutional bodies not commonly found in other countries: the Constitutional Commission for Human Rights; Constitutional Commission for the Audio Visual Communications to oversee the media; and the Constitutional Commission for Sustainable Development and the Rights of Future Generations to act as watchdog on development policy.

NARRATIVES AND PROSPECTS

This complex constitution enshrines principles of devolved government, independent judiciary, and media. It entails a complex set of principles that in parts seem contradictory (e.g. protecting sanctities and protecting freedom of artistic expression), and outlines an elaborate balance of power sharing between the office of the president and that of the president of the government. I can foresee a situation where interpretations and counter-interpretations will be the order of the day. I can also foresee how the two branches of the executive may be one of the thorniest issues. It is no secret that Ennahda has always preferred a parliamentary system. Their main argument has been that such system would prevent the dangers of accumulating executive power in the hands of a president in a situation that might open the door for a return to previous abuses. The party also estimated that its chances would be better within a parliamentary framework due its perceived popularity, particularly in 2011. Other political actors argued that a mixed system would create chances for better balance, especially if parliamentary elections result in a dominant winner. Now that a mixed system has been agreed upon, elections become important, as does whether they take place at the same time or at different times (the latter an argument put forward by Ennahada's rivals). However, the electoral code is now under debate within the same dialogical framework mentioned above and should settle this issue.

The Tunisian constitution is the outcome of a process of a struggle over what the post-revolution society is going to be like. The deadlock did not lead to open conflict, but instead, to negotiation and tradeoffs. The development of the constitution over the last three years is organically linked to the dynamics in the country over the same period. Its final version bears the traces of mutual distrust among the two main political poles. And just like any compromise, it opens room for interpretation. One thing is certain: the turn towards a religious state in Tunisia has been aborted. Now begins the work to consolidate and enshrine into laws the foundations of a democratic, civil, and just state. For this reason, the next elections are absolutely crucial to the future of Tunisia, to the role of political Islam, and to the region as a whole.

On a more prospective level, this process is ingenious. I am not sure how it came about or whether it had a precedent elsewhere. But it is certainly worth studying, and perhaps even emulating in similar situations, since it has been the determining factor in bringing about a decisive turn to democratic and civil rule in Tunisia. One further issue is worth bearing in mind. The national dialogue in Tunisia resulted in three simultaneous outcomes: an independent government whose members are not allowed to run for office in the next elections, a consensual constitution, and an independent election commission. All three have been designed to remove political parties from government until next elections. This has evened out the playing field and changed the rules of the game for the next elections. Ennahda is no longer driving the agenda, and its opponents can no longer continue capitalizing on opposing its policies. The outcome of this unprecedented situation is anyone's guess. For now, attention is directed toward constructing narratives of a complex process and capitalizing on the outcome. For Islamists, the question now is how to sell the

new constitution to their base. Ennahda has been forceful, at least at the public level, in packaging this as a party victory. The party's political future depended on its ability to remain a major player, which could only be achieved by offering meaningful concessions. Many of the party's supporters were only too aware that a situation similar to Egypt must be avoided. On the other side, the effort is underway to claim it was the opposition who delivered a democratic and honorable constitution to the country, restoring the image of Tunisia as a success story in the outside world.

Measured against the aims of the revolution, the constitution can be said to have met a number of key expectations. But for those in the marginalized parts of the country, seeking tangible improvement in their social and economic situation, the constitution is not going to do that-not immediately at least-and,

in truth, does not guarantee it on the long-run. The state, in Article 12, promises no more than "striving to," rather than the much demanded "commits to" achieve regional balance within the framework of positive discrimination.

A further troubling feature of the constitution relates to amendments. While there is more prominent room for future changes in adopted version than in the previous one, a number of articles are expressly protected from amendments. These exceptions reflect mutual distrust between the two main poles in the country with regard to the issue of religion and the state, the protection of freedoms (Articles 1 and 2), and a desire to prevent the return to the practice of extending presidential terms (Article 75). However, this finality deprives future generations the right to change the constitution to suit their time and aspirations, except by suspending the constitution itself. ❄

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