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A CONSTITUTION FOR ALL TUNISIANS

NEW CONSTITUTION PROVIDES A GLIMMER OF HOPE – MANY CHALLENGES STILL LIE AHEAD

Hardy Ostry

Once again, brief moments of euphoria were felt by those of every political persuasion as the feeling spread through Tunisia's Constituent Assembly that they were witnessing a truly historic moment. Adversaries of yesterday – and no doubt of tomorrow – were all able to simply enjoy the moment, hugging and almost fraternising with each other. These were the images on 26 January 2014 as the transitional parliament voted in favour of adopting the new constitution for the Second Tunisian Republic with an impressive majority of 200 votes (with twelve "no" votes and four abstentions). For a few fleeting moments, those present were able to forget their heated disputes and political bipolarity. Over the previous months and years, representatives of the Islamist Ennahda Party, their coalition partners CPR and Ettakatol had been at permanent loggerheads with politicians from the nationalist, secular camp led by the largest of the opposition parties, Nidaa Tounes (Call of Tunisia).

This prompted parliamentary president Mustapha Ben Jaafar to suggest that the newly-adopted constitution would be one "that reflects the needs of all Tunisian men and women". The constitution would safeguard what had been achieved and lay the foundations for a democratic state. It took more than two years to draft this new constitution, which now has to prove that it can provide the basis for a system based on democracy and the rule of law. The whole process was hampered by a great many problems. But in spite of all the delays, obstructions and political manoeuvring from various quarters aimed at torpedoing

the transition process, in the end Tunisia, the political classes and the majority of the population felt proud of what had been achieved. But the problems and difficulties that remain are certainly not being ignored. In terms of the geopolitical context of the region, with Libya desperately trying to recover from the collapse of the state and Syria mired in civil war, it seems that Tunisia is in a better position than most. So it is hardly surprising that the international reaction to what has been achieved in the land of the Jasmine Revolution has been full of superlatives: “exemplary”, “the most modern constitution in the Arab world” and “a model and example for the rest of the Arab world”. When considered in the context of the whole of the North Africa and Middle East region, many people will no doubt feel that the Arab Spring has at least been successful in Tunisia. In face of the tendency to see things in black and white, even when evaluating the progress of some countries in the region, it is time to take a more differentiated view. Tunisia has certainly revived a historical compromise in order to successfully usher in the second phase of its political transition. The constitutional foundations are now in place to successfully build a system based on democracy and the rule of law. But there are still many problems and risks that could have a negative impact on the process.

THE NEW CONSTITUTION: UNIQUE BUT A COMPROMISE

The balance of power within the Constituent Assembly that was elected in October 2011 has undergone some major shifts due to party switches and it soon became clear that only a compromise draft constitution would have any chance of being passed into law. Although the Troika coalition initially had the necessary two-thirds majority within the Assembly, this majority dwindled over time as a result of the departure of representatives, particularly from Ettakatol and CPR. Ennahda could have tried to push through a draft constitution of its own by building an extended coalition. However, this did not appear to be either a politically or socially opportune thing to do, as there was the danger that such an attempt to go it alone might only serve to further exacerbate the political bipolarity within the country and lose the broad support of large sections of the population. From

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the very beginning of work on the new constitution and the presentation of a first draft in December 2012, the secular national opposition accused the Islamist Ennahda and its coalition partners of trying to Islamise the nation and state to a greater or lesser extent. In light of these accusations, Ennahda's president Rachid Ghannouchi was quick to state that his party would not insist on the constitution being anchored in Sharia law. However, doubts were cast on the sincerity of this statement when reports claimed that Ghannouchi had suggested to young Salafists in October 2012 that it was not a question of anchoring Sharia law within the constitution but of winning over state institutions, schools, the military and mosques. There were also fears that the conservative wing of the Ennahda movement would extract a high price for the exclusion of Sharia law from the constitution.



Chancellor Angela Merkel took a great interest in Tunisia's constitutional process. On 4 April, she met a delegation of Nidaa Tounes led by Deputy Chairman Mohamed Ennaceur (4th f.l.) in Berlin. | Source: © KAS.

The atmosphere within the Constituent Assembly and the various associated commissions was, therefore, one of tension and mistrust from the very beginning. As a result three different drafts were necessary (December 2012, April 2013 and June 2013), with the last of the three being submitted for review to a Consensus Commission chaired by President Ben Jaafar himself. The members of the Constituent Assembly could sense the weight of expectation, not only amongst the Tunisian people, but also within the international community. The Assembly

found itself under increasing pressure after a “national dialogue” was launched by the “Quartet”. This dialogue was led by the Tunisian General Labour Union (UGTT), the Tunisian Employers Organisation (UTICA) and included 20 of the country’s most important political parties in a bid to reach a new consensus and lead the country out of the crisis that had continued since the summer. As a result of this dialogue, it was agreed that the Ennahda-led government would stand down and hand over power to a government of technocrats, while work on the constitution would be quickly brought to a conclusion. So at the end of 2013 Assembly members were under increasing pressure to finish the work – perhaps even by 14 January 2014, the third anniversary of the Revolution. In retrospect, we can perhaps ignore the fact that they failed to achieve this target date and that more time was needed for discussions on the final draft than initially expected. The key was to reach a consensus, which was made possible by the fact that even Ennahda was prepared to make some not insignificant concessions.

It was clear that just about all those involved were making a genuine effort to reach a consensus in order at all costs to avoid the need for a referendum, the inevitable outcome if the Constituent Assembly failed to agree on a constitution. A referendum would once again have set the political transition process back by some months and potentially resulted in populist demands on the streets to reintroduce certain provisions that had been painstakingly removed, such as the paragraphs that equated Zionism with racism.

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The agreement that was reached on the draft constitution also provided an important political lesson in terms of procedure. In the past, politicians had been used to insisting that their demands be met otherwise they would simply boycott the discussions. The adoption of the constitution therefore represents a very important step, as all the political decision-makers and representatives successfully passed the test of any democratic political process: the ability to initiate and agree on compromises. This is a gauge by which any democratic system can be measured.



The President of the Constituent Assembly Mustapha Ben Jafaar in 2011: All its members could sense the national and international expectations. | Source: Magharebia, flickr ©.

CIVIL STATE AND THE SEPARATION OF POWERS

The long-discussed preamble to the constitution defines the civil nature of the state, which is based on the principles of a republican democratic system and the separation of powers. Reference is made to Islam by stating that the Tunisian people have close ties to the teachings of Islam, which basically promotes openness, tolerance, human values and the principle of universal human rights. Even the mention of universal human rights provoked much controversial debate. For a long time, there were reservations with regard to religious and cultural traditions. The fact that the text does not allow any such relativism may be seen as significant progress. The state is now seen as the protector of human freedoms and rights. Experts have placed much emphasis on this particular aspect, especially as civil rights generally appear to have been given particular prominence in the new constitution. The first two articles of the constitution, which provide the foundations for the state's oft-discussed national identity, were the subject of long and heated debates and arguments, as the question of Tunisia's national identity was something that was destined not only to be discussed within the Constituent Assembly itself, but was also to be hotly debated by ordinary Tunisians, especially with reference to the role of religion.

The adopted version of Article 1 states that "Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its type of government is the Republic". This contains the first historical compromise relative to the first constitution of 1959. By using this particular wording, it was possible to fend off proposals that Islam be explicitly referred to here and in other places as the state religion. However, critics claim that in this respect, Article 1 can be interpreted to implicitly suggest that Islam is the state religion. However, we should not overlook the fact that this wording and its interpretation clearly represents a historical compromise. The Preamble and Article 1 make reference to religion, but without being more specific and without specifically referring to Sharia law as the basis for the country's legislative principles. Opinions differ on the real meaning of this unclear, open definition of the role of religion. Some commentators see it as a necessary and effective compromise, while others think it may leave the door open to a potentially narrower interpretation at a later date. However, it should be noted in this respect that Articles 1 and 2 are known as permanent paragraphs, which means that amendments to them are explicitly excluded.

There may be some contradictions, or at least need for interpretation, with regard to Article 6. A compromise was found for this particular section of the constitution only after heated and sometimes aggressive discussions during the final weeks. It describes the state as the "guardian of religion", which shall at the same time guarantee freedom of conscience and belief, the free exercise of religious worship and the neutrality of mosques and places of worship from all partisan instrumentalisation. The guarantee of freedom of belief and conscience is revolutionary for an Islamic Arab state, as it also guarantees the possibility to convert. Large sections of the Ennahda movement were reluctant to go this far, preferring to guarantee freedom within the country's own religion, i.e. within Islam itself, and this is indeed echoed in the wording of the constitution. At the beginning of Article 6 the state is referred to as the "guardian of religion" (in the singular).

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The state is therefore considered to be the guardian of openness and tolerance, while at the same time protecting what is "sacred" and prohibiting any form of accusation of apostasy and incitement to violence. This last aspect truly reflects the emotional discussions that took place in the Constituent Assembly: one member of the assembly had accused another of "apostasy", which under an extreme form of interpretation of Islam would have led to calls for him to be murdered. However, by contrasting two different elements of this particular article, experts in constitutional law believe that there may be an inherent contradiction. On the one hand there is the freedom of conscience and belief, while on the other is the somewhat vague "protection of the sacred". "Protection of the sacred" refers first and foremost to objectionable representations of the Prophet or of the religion, something which became more and more of an issue as a result of events during the process of drafting the constitution. As a result, the use of the expressions "freedom of conscience and belief" and "protection of the sacred" could lead to a conflict of interest at some point in the future. There are other potential contradictions between the freedom of expression and freedom of information (Article 31) and the prohibition against making accusations of apostasy.

The debate on the country's national identity also sparked fierce discussions about the roots and use of the Arab language. There were protracted disagreements between those in favour of more Arabisation and those who took a more pragmatic view in light of the waves of Arabisation that characterised the 1970s and 1980s and their impact on education in particular. Article 39 refers to the "Arab-Islamic identity" and the "strengthening and promoting of the Arabic language", but also refers to openness to foreign languages.

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MORE RIGHTS FOR WOMEN

The personal status laws introduced by Tunisia's founding father Habib Bourguiba in 1956 were considered to be a sign of real progress in comparison to the other countries of the Arab world, and it is against this background that politically and socially active women in particular were

afraid that Ennahda might try to reduce women's rights in order to protect a traditional, conservative view of the role of women. The previous personal status laws had guaranteed equality between men and women and granted Tunisian women the right to file for divorce. The wording of the first draft of the constitution, which referred to the "complementarity" of the roles of men and women, sparked fears that changes would be made to the constitution that disadvantaged women. As a result, men and women came out in equal measure to defend existing equal rights.

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The constitution that has now been adopted actually goes one step further and Article 21 states that men and women have equal rights and duties as "citizens". This article may have far-reaching consequences, as it paves the way for possible new initiatives aimed at changing existing inheritance laws, which have until now always favoured men. This has already been called for by many civil society associations. Article 46 covers similar ground. The state is described as both the protector of women's rights and the guarantor of existing rights and gender equality. The most far-reaching political change that is enshrined in this article is the state's commitment to seek parity between men and women in elected bodies. In terms of the upcoming drafting of new electoral laws, this effectively means 50 per cent of candidates on electoral lists must be women. Experiences during the Constituent Assembly elections in 2011 would suggest that implementing this rule may prove to be difficult, especially in rural areas. For this reason, there was broad cross-party agreement in the Constituent Assembly on the constitutional and political necessity of strengthening the political participation of women, including in the interior of the country. A similar rule relating to the electoral lists was applied to the elections in 2011, but it did not work out as planned, as many independents effectively stood as single candidates. In spite of this, 65 women were elected to parliament, mainly from Ennahda.

Although Articles 21 and 46 protect women's rights, some observers believe the new constitution may also be creating some new obstacles. Article 7, for example, defines the family as the basic structure of society, which suggests that

under certain circumstances limitations on the right to file for divorce might be introduced at a later date. Women's rights experts also point out the suggestion in Article 22 that "the right to life is sacred" might lead to abortion being banned, even though early phase termination is currently legal. International human rights organisations have also criticised this article, as it protects the integrity of human life on the one hand, but does not remove the possibility of the death penalty being imposed. This does not, however, appear to be politically enforceable, and it should be noted that while the death penalty has been imposed in the past, it has not actually been enforced since 1991.

LEGISLATIVE AND EXECUTIVE POWER

There was a particular sense of anticipation about the rules that would be incorporated in the new constitution relating to the legislative and executive branches of government and the relationship between them. In the wake of the 2011 elections, there was much discussion about whether it was better to have a parliamentary or a semi-presidential system. Ennahda, along with a broad section of the government coalition and even some members of the opposition argued in favour of a purely parliamentary system for the country's new democratic structure, arguing that a presidential or semi-presidential system put too much power in the hands of the President and could result in abuses, as had been shown in the past. The opposition, especially representatives from Nidaa Tounes and political supporters of the Destour movement, were in favour of retaining the office of President and suggested its powers be reduced but not removed.

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Behind their arguments lay a belief that the country could not afford to relinquish a potential central position of power in the form of a President in the face of a dominant Islamic majority. Their position may also have been a political reaction to recent polls suggesting that the President of Nidaa Tounes, Beji Caid Essebsi, has the best chance of winning the presidential elections, whereas Ennahda has no such favourite. However, the potential results of the parliamentary elections paint a different picture. Here, Ennahda and Nidaa Tounes have largely been neck and neck in the polls for months. In

this respect, the structure agreed in the constitution has as much to do with political reality as with noble constitutional intentions.

According to Article 50, the people exercise legislative power through their elected representatives. This has particular significance in light of the country's experiences under the former autocratic regime of Ben Ali, which lacked a genuine parliamentary culture. The independence of members of parliament, the opposition and political parties is guaranteed. In addition, the parliament has the right not only to vote on draft legislation and the state budget, but also to exercise legislative initiative, so long as proposals for new laws are initially supported by at least ten deputies (Article 62). The Prime Minister and the President of the Republic may also propose draft legislation.



Demonstration of Nidaa Tounes' supporters: First drafts to a new constitution led to intense criticism and protests. | Source: © Mohamed Messara, epa, picture alliance.

As far as the executive is concerned, the constitution provides for a clear division of responsibilities, inspired by other semi-presidential models, which in the reality of political negotiations is unlikely to have been agreed upon without some form of disagreement. Article 71 states that "executive authority is exercised by the President of the Republic and a government which is presided over by the Prime Minister". This means that both the head of state and

the head of government are responsible for key functions of government, with the President, who is directly elected by the people and who may only hold the position for two terms of office, being responsible for determining general state policies in the areas of defence, foreign relations and national security (Article 77). This means that under the new constitution the head of state actually has fewer powers than before. However, it remains to be seen exactly how the relationship between the President and the government, and the Prime Minister in particular, will play out in reality, especially in those areas where the President has been granted executive powers. An attempt by Ennahda to impose a maximum age on presidential candidates in order, among other things, to prevent Essebsi from running, was unsuccessful. In the end, only a minimum age of 35 was agreed upon.

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The division of power and areas of responsibility between the two heads of the executive branch mirrors the current political balance of power in the country and is another sign of the willingness to compromise on all sides.

The Prime Minister has executive responsibility for all the other areas of government that have not been explicitly given to the President (Articles 91 and 92). The government can be asked to resign if it fails to survive a constructive vote of no-confidence (Article 97). The President also has the right to initiate such a vote, but will lose his own position if he is unable to gain the necessary absolute majority by the end of a second vote at the latest.

THE JUDICIARY AS GUARANTOR FOR THE RULE OF LAW

After the experiences of Ben Ali's rule, the independence of the state judicial system became one of the key demands during the demonstrations that took place in Tunisia prior to his overthrow on 14 January 2011. As a result, judges and lawyers were very aware of the need to protect their independence in the new constitution. The exact form that judicial independence should take was the subject of heated debate in the run-up to passing the new constitution. Even during the debates, some elements of Ennahda tried to achieve the greatest possible separation between the judicial branch and the executive arm. But it was only

when judges and lawyers once again went on strike to demand their institutional and procedural independence that the necessary pressure was created for an agreement to be reached. The latest version of the constitution emphasises the role of the judiciary as the protector of constitutional rights (Article 49, 102). Judges are no longer appointed by the Ministry of Justice. Instead, they are appointed by the President of the Republic on the recommendation of the High Judicial Council (Article 106). The High Judicial Council is also responsible for ruling on transfers, reprimands and even dismissals (Article 107). The Council itself comprises four separate organs. Two-thirds of each of these organs is made up of elected representatives and one-third of qualified, independent

individuals who are not themselves judges. Another innovation that has attracted international recognition is the establishment of a Constitutional Court (Article 118 et sqq.). Its

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twelve members are appointed in equal proportion by the President, the Chamber of Deputies and the High Judicial Council. The responsibilities of the Constitutional Court are limited to examining the constitutionality of laws and legal acts (Article 120). To date, there is no planned mechanism for constitutional complaints, but this may change as part of the legal definition of the organisation and procedures of the Court (Article 124).

THE END OF POLITICAL STAGNATION – PERSISTENT CHALLENGES

The Constituent Assembly fulfilled the main task that was mandated by the elections of 23 October 2011 when it completed its work on the new constitution for the Second Tunisian Republic. Despite the compromises included in the document, the country's leading political parties and the majority of civil society are unanimous in believing that this constitution provides a good foundation for the next phase in Tunisia's political transition. This now has to continue in the preparations for the first regular elections to the Chamber of Deputies and to the presidency. To this end, a new High Electoral Commission has been set up with the task of preparing for and conducting the elections. Discussions on the new electoral law began immediately after the passing of the new constitution.



First free democratic elections in Tunisia: the election of the Constituent Assembly took place on October 23, 2011. | Source: Magharebia, flickr ©.

It is important to consider the political, economic and social context when evaluating what has been achieved so far, and particularly the passing of the draft constitution. Above all, it is vital to understand the political crisis and stagnation that beset the country after the politically-motivated assassinations of leftist opposition politicians Choukri Belaid (6 February 2013) and Mohamed Brahmi (25 July 2013). Tunisia was almost completely politically paralysed throughout the summer and into the late autumn. The government and opposition were irreconcilably divided to such an extent that Ben Jaafar, President of the Constituent Assembly, was forced to temporarily suspend the work of the Assembly from August to September because of a strike by 70 opposition deputies. These political incidents and their negative results, accompanied by more widespread terrorist threats, led the Tunisian economy to deteriorate still further. At times, the country was threatened with insolvency due to a shortage of foreign exchange. The World Bank, the International Monetary Fund and the EU provided loans that were linked to clear progress in the political process. Meanwhile, the precarious security situation in Libya led to an escalation of Tunisia's security problems. Jihadist Salafists, terror groups belonging to the Al-Qaeda network in the Maghreb and Ansar Al-Sharia all carried out a number of attacks and publicly threatened further violence. The opposition and even the security services accused the governing Troika, and particularly Ennahda, of displaying a lack of decisiveness in the face of these clear dangers.

The Tunisian trade union UGTT and the employer's association UTICA (together with the Tunisian Human Rights League and the Bar Association) were given a particular role in helping to find a way out of the crisis. In September, the Quartet relaunched the national dialogue initiative, which included the main political parties and representatives of civil society. Some elements in the two camps made up of the governing parties and the opposition (National Salvation Front) adopted a confrontational stance.

The opposition laid down its ultimatums: the resignation of the Ali Laarayedh (Ennahda) government; the appointment of a technocracy; the dissolution of the Constituent Assembly; the establishment of an Electoral Commission and the dissolution of the Leagues for the Protection of the Revolution, considered to be Ennahda-supporting militias. After much debate and further delays, the national dialogue finally managed to reach a compromise.

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This agreement consisted of a negotiating package with a very tight schedule that required all work to be completed on the constitution, the withdrawal of the Laarayedh government and the appointment of a new Prime Minister and cabinet made up of technocrats within just four weeks. The cabinet members were selected on the condition they provided a personal commitment that they would not stand in the next elections. This timetable was also not adhered to, although Laarayedh announced his resignation in the face of increasing public pressure and remained in office only to oversee the government until the next government took over.

At the same time, Parliamentary President Ben Jaafar set an equally ambitious timetable for the debate on the text of the constitution. This began on 3 January 2014 and was to be finally agreed by 26 January. With the passing of the constitution, the new government took office, led by acting Prime Minister Mehdi Jomaa. It is his responsibility to prepare for the imminent regular parliamentary and presidential elections on the basis of a more stable political situation. He is also facing the challenge of improving the security situation and continuing the fight against terrorism. But above all, he has to restore foreign investors' confidence in the Tunisian political process.

Led by the UGTT, the Quartet has the task of moderating the dialogue process – which has often teetered on the brink of failure – and progressing it still further. It is generally recognised that Ennahda, as the strongest political party in the Constituent Assembly, has made some significant concessions in its attempt to lead the country out of crisis. Tunisia has little alternative but to pass the draft constitution. Ennahda itself has often evoked the Egyptian scenario and stressed that this cannot be allowed to be repeated in Tunisia. This has inevitably led to compromises.

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The fact that the party and the Troika government had lost the support of broad sections of the public may have facilitated the adoption of this compromise. And it may also have been the ongoing unresolved economic, social and security challenges that attracted broad public consensus on a solution. In making preparations to leave government, there may be a strategic moment when it is hoped that inescapable and often painful decisions (such as reducing subsidies, reforming the job market and the health system) can wherever possible be left to others.

Over the last few months Ennahda has learnt not to pursue policies from a position of denial nor by excluding large sections of the population. Inversely, the opposition has also learned lessons from what has happened. It has listened to the warning voices of civil society stating that a negative definition and anti-Ennahda stance is not enough in itself to qualify as a political manifesto. With impressive consistency, all the polls taken over recent months on the upcoming parliamentary elections point to a neck-and-neck race between Ennahda and Nidaa Tounes. At the same time – and the political class surely realises this – all these polls reveal a growing number of people who are either not going to vote or who are currently undecided about which party to vote for.

The increasing frustration with politicians felt by broad sectors of society, particularly young people, threatens to erode the trust that Tunisians need to have in the political process. In this context, the new constitution and the installation of a technocracy at least opens up an opportunity to win back this lost trust en route to the next stage in

the transition process. The political elites, and particularly the parties, should use this window to reorganise themselves in order to better meet the expectations of the people. It will fall to them and to civil society to use the new constitution as a basis for a new social reality and a democratic, constitutional culture.