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A Comparative Analysis of the Draft Constitutions of Tunisia 2022: Zero-Sum Games

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Introduction

On 30 June 2022, Tunisia's President Kais Saied issued Presidential Decree No. 578 of 2022 in which he declared the publication of the new draft constitution of Tunisia, which will be put to a National Referendum on 25 July 2022 (see Pres. Decree No. 506 of 2022, issued on 25 May 2022). Presidential Decree No. 578 of 2022 was issued pursuant to the infamous Decree No. 117 of 2021 (22 Sept 2021) on the adoption of exceptional measures, Decree-Law No. 30 of 2022 (19 May 2022) on the creation of the 'National Consultative Commission for a new Republic' (الهيئة الوطنية الاستشارية من أجل جمهورية جديدة), and Decree-Law No. 32 of 2022 (25 May 2022) on the 'Invitation to Voters to a Referendum on the New Draft Constitution for the Republic of Tunisia'.

Since 25 July 2021, when Saied dismissed the Prime Minister Hichem Mechichi and the Government invoking the state of exception under Art. 80 of the 2014 Constitution on grounds of an 'imminent danger', none of the processes that have been instituted find any support in the Constitution. Neither the unilaterally acclaimed national dialogue and consultation, the drafting of a new constitution, nor the referendum on the constitution, have been provided for in the 2014 Constitution. Most, if not all, of the steps taken so far have arguably been extra-constitutional, or have contravened explicit constitutional provisions, based on unilateral presidential decrees and exceptional decree-laws issued under the Art. 80 state of exception. There has been no parliamentary scrutiny or approval of any of these measures since the President had already 'frozen' and subsequently dissolved parliament, also using the Art. 80 state of exception, a course of action that is also explicitly prohibited under the 2014 Constitution. The question as to whether any measures can legitimately be taken under Art. 80 in the absence of a Constitutional Court which, according to Art. 80, must be consulted over any such measures, was also entirely ignored. As a result, there is a discernible lack of substantive and procedural legality supporting any of the processes from 25 July 2021 to now. The legality of the Presidential Decrees and the Decree-Laws themselves – many of which explicitly breach provisions of the Constitution and fundamental civil and political rights – are the subject of several judicial challenges in the administrative courts.

There has been some – although limited – pushback from the courts: the implementation of vaccine passports, based on President Saied's infamous Decree No. 117, which led to a number of employees being suspended because they failed to carry the vaccine passports with them, was 'stayed' by the administrative courts, who effectively empowered themselves to assert jurisdiction to carry out administrative review of the decisions (Administrative Court, Monastir, First Instance: Case No. 62 00461, 23 March 2022; Case No. 62 00464, 24 March 2022; Case No. 62 00465, 24 March 2022). On grounds of 'proportionality' and 'necessity', the Administrative Court decided that the decisions taken under the decree were unlawful for numerous reasons, but stopped short of deciding whether they were 'unconstitutional', since constitutional review is not formally within their jurisdiction. Notwithstanding this, the Court creatively used Art. 49 of the 2014 Constitution (proportionality) to justify its decision on

the one hand, and assert the primacy and authority of the Constitution on the other, at a time when the Constitution had been all but eviscerated by the executive. The Court confirmed stays of execution on the original decisions due to the fact that the implementation of the decree failed to comply with the principle of 'constitutionality'. The Court entertained the idea that that though such decrees may not be subject to appeal for annulment, decisions that give effect to the decrees could certainly be annulled. The potential consequences of this decision go further, establishing the important precedent that the implementation of decrees of this nature are not immune from administrative review. Beyond this, it also reveals the willingness of the Administrative Court to take on a more expansive role in the absence of a Constitutional Court. There may be similar decisions to come as, by March 2022, there have been at least 15 appeals lodged against Presidential Decree No. 117 (issued 22 September 2021).

Many parts of Tunisian society, rights organisations, lawyers and judges have lamented the procedural and substantive problems of recent executive decisions. But almost every time the question of legality is raised, it is met with retorts and dangerous rhetoric regarding endemic corruption, the 'purification' of the judiciary, the dire straits of the economy and the necessity of the steps being taken to save Tunisians from the imminent dangers facing them during this exceptional period. With little abating the march of the executive authority, either by judicial or legislative authorities, it may be worth considering the effects of these unilateral and arbitrary processes, glimpses of which we can derive from the draft constitutions proposed for the referendum, as compared with the draft of the National Consultative Commission, which was also the initiative of President Saied, and the current 2014 Constitution.

The Draft Constitution(s)

From the outset, the entire process of drafting a new Constitution has been extremely messy. It has led to monumental levels of dissonance between the draft constitution that was first commissioned by the President and presented to him by the Chair of his own-appointed National Consultative Commission (*al-hayʾa al-waṭaniyya al-istishāriyya* – hereafter 'NCC'), Sadok Belaïd (former Dean of Tunis Law School), and the draft constitution that President Kais Saied then formally presented to the nation, on which there will be a referendum on 25 July 2022 (see the text of the First Draft (Arabic), the Amended Draft (Arabic) published 08 July 2022, and the Unofficial English translation, published 13 July 2022).

Although the President was not bound by the NCC's draft, the NCC was quick to object to the first version presented by the President and unilaterally released the version they prepared to the press on 3 July 2022, expressing their lack of confidence in the President's draft constitution, and explicitly declaring that their draft was entirely separate to the draft issued by the President, lest it was assumed that theirs was the one the President put forward. The debacle did not end here: after the first draft constitution was published in the Official Gazette on 30 June 2022 and after the NCC's draft was released to the press on 3 July 2022, the President published additional amendments to the first draft constitution in a decree on 8 July 2022, after being 'alerted to some mistakes in the wording and in the structure' of the draft version

(Pres. Decree No. 607 of 2022, 8 July 2022 related to correcting some errors that appeared in the draft constitution published in Presidential Decree No. 578, 2022).

The process, as can be seen from the foregoing synopsis, has been less than ideal – but then again most processes tend to be. What is quite improper – but perhaps not unprecedented – is that a commission is tasked with drafting a constitution to be put to a referendum, but the text that is ultimately submitted is an entirely different one. Compounding this, the entire process has been far from inclusive; the consultation and 'dialogue' to which President Saied invited political groups prior to the appointment of the NCC was exclusive and non-transparent. Even though an external body (NCC) was then invited to draft the Constitution, their draft was not adopted but was instead replaced with a new draft text which was published by the President. The authorship of the new text is still unknown but it is clearly heavily influenced by President Saied's own ideas and has his full backing. This is evidenced by simply comparing the provisions of the draft with the numerous impromptu televised addresses he has given in which he presented his political vision for his 'new democracy' project.

Although the legitimacy of transitional and constitutional processes is of utmost importance in post-conflict transitions, comparative practice has shown that legal probity and legitimacy are often sacrificed at the altar of political expedience and realpolitik; quick resolutions that – whether intentional or not – maintain large elements of the status quo are often preferable to long, drawn out processes that are risky, are subject to several external dynamics and variables that could derail the entire process and lead to further destabilisation and violence. Quick wins and settling for less seem to be the go-to options for both domestic and international elites involved in such processes.

I have often asked Tunisian experts, analysts and colleagues about the alternative options, and there are a select few. None of them are easy or quick. But of all the ideal alternatives posited, political consensus, or cross-party political consensus-building among political parties, seems to be the missing panacea in post-revolution Tunisian politics. The divide between the draft constitution submitted by the NCC and the draft issued by the President are perhaps the clearest example of the divide that exists in Tunisia with regards to a political vision and the relationship between the executive, legislative and judicial authorities. The economic and social aspects remain elusive in President Saied's drafts, as does any concerted emphasis on rights or a rule-based order founded upon equality of opportunity and economic empowerment – which is one of Tunisia's most immediate and crucial challenges. Tellingly, President Saied had promised a text with strong emphasis on social and economic rights, something that would be in line with his selective reading of the Tunisian revolution (in the preamble he drafted, he retained only the date of December 2010 grounding the revolution in social grievances and dismisses the events of 17 January 2011 which symbolized the political demands with the departure of former president Ben Ali). Yet, President Saied ignored almost all socio-economic provisions suggested by the NCC which they prominently wrote into their first chapter. In contrast, comparable provisions in the President's draft were very few and weak.

To some extent, the question that should be addressed in the immediate future for all practical purposes is the one concerning the draft that will be voted upon on 25 July. Only one party – *Afek* Tunis – has officially confirmed they will take part in the referendum, actively advocating its members to vote 'no' to the Constitution. Many others are boycotting the entire process, not wanting to legitimise any aspect of it, while others remain ambivalent. This means that there may be considerable numbers of those who turn up, voting 'yes'. So, what will a 'yes' vote mean, effectively? A comparative assessment of the current (2014) Constitution, the NCC's draft constitution and President Saied's draft constitutions may provide us with some indications.

Preamble

The preamble of the NCC draft begins with a guarantee of social and economic relations between Tunisians, the Tunisian peoples' shared values and identifies with a social-democratic republican form of government based on the supremacy of the constitution – a clear reference to the recent and ongoing economic and governance circumstances in the country. The motto of the Republic is "freedom, dignity, justice, order (*niẓām*). The primacy of the economic, social and socio-economic relations between the State and citizens is clearly the priority for the NCC, and perhaps rightly so. Even then, placing this as the first substantive part of the constitution seems to be entirely out of place, even before the identity of the state and its citizens is mentioned in any substantive way.

President Saied's draft reads like a list of indictments of what went wrong and seeks to justify the remainder of what is to come in his draft, citing the 'national' dialogue as a pretext and mandate that led to this draft. His references to previous constitutional texts is extremely selective and his reference to the 'Mizan' as a constitution is anachronistic. The preamble of this draft also makes reference to the electronic consultation process and the national dialogue process to convince readers of the inclusivity of the entire process. It refers to the new draft constitution as a means of realising justice, freedom and dignity: "there is no justice without societal peace; there is no human dignity in the absence of freedom, there is no honour for the nation without full sovereignty and real independence". Similarly, it continues to state that true democracy cannot be successful unless it is supported by political democracy, economic democracy, and societal democracy. It also includes a statement against 'joining foreign alliances', but emphatically affirms their support of self-determination for the Palestinian people, their right to their 'usurped land' and to Jerusalem as its capital. The section referencing Tunisia belonging to the 'Arab Ummah' and 'humanist dimensions of Islam' and their belonging to the 'African continent' are addressed in the section on religion, below.

The preamble – as is often the case – is hard to disagree with and therefore may be enough to convince voters that this is something hard to vote 'no' to. The rhetoric currently seems to be that to vote 'no' to this constitution means to vote 'no' to the preamble and all the negatives it seeks to root out and the positive aspirations it confirms. If President Saied's draft is approved, the main thrust of the preamble

may, at worst, be employed as a pretext for the justification and imposition of several extra-constitutional norms on the interpretation of other constitutional provisions.

System of Governance

In the current 2014 Constitution, the form of government is a mixed presidential system, comprising a President (Ch.4, Arts. 71-88) and a Prime Minister ('Head of Government', Arts. 89-101). The NCC draft proposes a presidential system, under which the President serves a term of five years, renewable only once, it seems, subsequent to the first term. The draft does not specify that the President necessarily must be a Muslim, but then it does not need to – the oath that the President must take begins with 'I swear by Almighty Allah…' (Art. 74, NCC Draft). The President is directly accountable to the Government and could be impeached by MPs if a majority of two-thirds believe the President has committed a 'grave violation of the constitution' (Art. 92, NCC Draft), ultimately to be confirmed by the Constitutional Court.

President Saied's Draft reads very differently. The President must be a Muslim (Art. 88), with two uninterrupted maternal and paternal generations of Tunisians. The President can only serve a maximum of two terms, whether successive or otherwise (Art. 90), in which resignation also counts for one full term. In a typical attempt to ensure a hold over the executive, the Government is effectively answerable to the President, and not to Parliament directly (Art. 112). Parliament can submit a motion of no-confidence ('censure') but only together with the Council of Regions (Art. 115). Thus, the parliamentary system that was established under the 2014 Constitution to ensure a more participatory and representative form of democratic governance will be undone, giving parliament a purely legislative role only "within the fields prescribed to it under this constitution" (Art. 67), and removing their function of effective scrutiny over the acts of the Government. Art. 110 grants the President absolute immunity throughout his term, and there are no mechanisms for accountability of the President by MPs or by the Government.

Art. 90 of President Saied's draft also provides that in case of war or 'imminent danger', the President's term is extended by issuing a law to that effect, without specifying any limit to the extension of the term. Notably, the provision on 'the state of exception' also provides no limit to the period for which exceptional measures can take place. Otherwise important prohibitions that prevented the dissolution of parliament, for example, have been retained from the 2014 Constitution. As I explain below, it is understandable why these provisions are retained, even though they were directly contravened by the President without any accountability or pushback when he first 'froze', and ultimately dissolved parliament on 30 March 2022 (Pres. Decree No. 309, 2022). A more rigorous, protective process against such a fundamental overreach could easily have been conceived and incorporated, but would have been an indictment of past practices. Similarly, removing these provisions would have been synonymous with indicting himself for past breaches of these provisions. It is notable that the NCC draft offers no improvement to this aspect either. One would have expected that the flagrant breaches of constitutional provisions during the state of exception would have been egregious enough to alert drafters of the necessity of strengthening such

provisions, imposing sanctions for their breach or any other mechanisms to curtail the arbitrary aggregation of powers during a state of exception. Not so, it seems. As a result, the potential for abuse and arbitrariness is still present, and potentially even greater since previous breaches have remained unpunished.

In this context, the President's direct appointment of the Prime Minister and of the Government members upon suggestions from the Prime Minister (Art. 101), coupled with the fact that the President can also dismiss the government or any of its members, either upon the PM's suggestion or unilaterally, make the Government directly accountable to the President and not to Parliament (Art. 102).

The Legislature

President Saied's draft proposes retaining the 'Assembly of the Peoples' Representatives' ('Assembly') but supplementing it with a second representative chamber, the 'National Council of Regions and Provinces' ('Council', Arts. 56, 81-86). This potentially weakens the role of the representative national parliamentary chamber further, since the Council, made up of elected representatives from the regions and provinces who cannot be members of the Assembly at the same time, will effectively be a second competing chamber, with a focus on regions and provinces. There is no detail as to the specific areas of delegated legislation that will be reserved for the Council, as opposed to the Assembly, or if these competences will be shared. This risks creating two competing chambers, without any provisions related to the resolution of any territorial, jurisdictional or substantive conflicts among the two institutions.

The two parliamentary chambers can each put forward a motion of opposition and censure against the government if half of the members of both chambers agree. The President will only accept the resignation of the government on such a basis if such a motion is issued by a majority of two-thirds of the members of the two chambers combined (Art. 115). Art. 116 brings out yet another a novelty: if a second motion of censure is issued in the same representative term of government, then the President may either accept the resignation of the government, or dissolve the Assembly of Representatives and the National Council of Regions, or both of them. It is hard to understand the logic of this from the perspective of good governance and representative democratic processes, but this mechanism is there to resolve deadlocks between the government and the two chambers, giving the President the unilateral discretion to decide which to dissolve and which to retain. The risk inherent in this mechanism is that through this procedure, the President could exert control over one legislative organ against the other.

The conditions for standing as a Member of the Assembly seem quite ordinary, but surprisingly, in the President's first draft, there was no mention of direct elections, which is quite an oversight. This was promptly rectified – likely due to subsequent criticisms of this omission – in the amended version, which specified that the elections of MPs would be "universal, free, direct, and through secret ballot" (Art. 60).

Both the NCC's draft and President Saied's draft provide for full immunity for MPs for any acts committed in the exercise of their duties as MPs, unless that immunity is lifted from them by Parliament (Arts. 59-

60, NCC draft; Arts. 64-65 President Saied's draft). Where they differ, however, is that President Saied's draft provides for a 'qualified immunity', which does not extend to 'defamation, slander and violent exchange' committed either inside or outside the Assembly, or for preventing the normal functioning of the Assembly (Art. 66).

In President Saied's draft, if elections cannot be held or have to be postponed due to an 'imminent danger', MPs can extend their own term by issuing an ordinary law, which would presumably be issued by the members of parliament, themselves (Art. 63). The 2014 Constitution protects the parliament from dissolution or other acts which may curtail their function at the most important time – a state of exception – when power can be aggregated to a head of state, and ordinary checks and balances can be bypassed due to emergency needs. Whilst this provision maintains that the term of the Assembly can be extended, rather than this being self-executing, the President is empowered to approve any such extension to their term, which the President could quite easily withhold.

President Saied's draft also seems to misplace some part of Art. 68, which refers to the right of the President to introduce a Bill of Law, Bills of Ratification of Treaties and Finance Bills. Even though this is part of the legislative function, since it is the President who initiates them, this should perhaps have been placed under the sections related to the competencies of the President, rather than in the provisions related to the functions and competences of the legislative organs.

The amalgamation of provisions related to the powers of the legislative authority and the competences of the President over the legislative power is paradigmatic of the lack of clear separation of powers and competences between the Executive (President) and the Legislature (Assembly of Representatives). Without a clear separation of powers between the two, the risk of deadlock, competing institutional conflict, usurpation of authority and instability are increased. The provisions indicate that the President is effectively seeking to give constitutional cover to some of the arbitrary processes and mechanisms that have become the hallmark of the methods of governance over the past year and reminiscent of the pre-revolution period in Tunisia, all of which sought to normalise and perpetuate the state of exception.

Independence of the Judiciary

Provisions related to the organisation of justice and the judiciary have been identified as 'Organic' or 'Basic Laws' in President Saied's draft (Art. 75), inferring that these are crucial to the development of the rule of law and good democratic governance and that they should, usually, be very difficult to enact or amend. This is why they are passed only with an absolute majority of the members of the legislative authority, whereas ordinary laws are passed with a simple majority of the members present, as long as they comprise no less than one-third of the total members. This is certainly a good thing, but it is no improvement over the 2014 Constitution, as it is taken directly from it. The list of organic laws includes laws on 'methods of applying the constitution', 'the organisation of justice and the judiciary', 'ratification of treaties', 'liberties and human rights' and 'personal status' laws.

The 2014 Constitution established a High Judicial Council which was composed of four bodies – the Judiciary Council, the Administrative Council, the Financial Judicial Council and the General Assembly of the three Judicial Councils (Art. 112). Two-thirds of each were composed of judges, a majority of whom were to be elected and others appointed on merit, and the last third comprised non-judicial independent specialists.

The NCC draft retains the High Judicial Council as a supreme and independent judicial regulatory authority (Arts. 115-118) and dedicates an entire sub-section to this. The High Judicial Council is made up of three-sub councils, each of which is comprised of elected and appointed judges, and other independent and competent lay-members (Art. 115), the last of which seems to be a reference to the kinds of lay-members that authored this draft.

The President's draft envisages a High Judicial Council comprising three separate judicial 'high councils' (Art. 119) that oversee each of the three judicial divisions. The first draft additionally mentioned that 'the relevant law would regulate its competences and composition', but this is now omitted in the final draft. It is anyone's guess as to whether these provisions refer to the same institution, but in line with recent practice, the President's 'high councils' could just be smaller, less independent versions of the temporary institution that he created to replace the 2014 Constitution's High Judicial Council, which he dissolved on 13 February 2022, and replaced with a Temporary Judicial Council whose members he directly appointed.

Each of the high councils are to be regulated according to a law issued for this purpose, but the President's draft doesn't mention who will appoint the members of the high councils. The draft explicitly states that judges are to be appointed by the President, based on a recommendation of the relevant 'supreme council' (Art. 120). It does not state that these recommendations are binding, indicating that they are mere recommendations, and there is no mention of who can dismiss judges. This is of crucial importance since President Saied issued a decree in June 2022 dismissing 57 judges. Only if the appointment (and dismissal) of the high councils' members are entirely independent of the President, can the recommendations of the high councils claim any substantive independence, thereby protecting the independence of the judiciary against executive interference. This ambiguity is further compounded by the choice of terms in the provision stipulating that the 'recommendations' by the supreme councils are non-binding, thereby granting the President yet more discretion on judicial appointments (Art. 120). The provisions of the 2014 Constitution were much more rigorous in terms of the protection afforded to judges against arbitrary transfer and dismissal, but we have seen that in practice, even these were bypassed and contravened by Presidential decrees.

The implications of these provisions, the lack of detail and omissions of basic principles of judicial independence cannot be underestimated. The 2014 Constitution created the High Judicial Council to protect the judiciary from executive interference and ensured that most of its members were elected by judges, but these were contravened and directly interfered with by the President. All of the proposed provisions related to the creation of the three judicial councils create a 'smoke-and-mirrors' effect: more institutions and more laws must mean more regulation and more independence. While there may be

more institutions, the composition of these institutions are set to be influenced at best, and determined at worse, by the President in their various instances, and therefore provide a direct mechanism for executive interference over the affairs of the judiciary and curtailment of their independence.

The Constitutional Court

The 2014 Constitution was hailed for its relatively innovative approach to the establishment of the Constitutional Court, especially the method of nomination of Members, involving each of the three branches of power (President, Assembly of Representatives and Judicial Council) in the nominations process. Though innovative compared to other Courts in the MENA region, this is a direct importation of the model in the Italian Constitution (Art. 135, Constitution of Italy, 1947, amended 2020). The Italian Constitutional Court has fifteen judges, a third of whom are nominated by the President, a third by parliament and a third by the ordinary and administrative supreme courts. But this innovative process presumed and required a certain level of consensus with and among the three branches of authority in the State, which remained permanently elusive in Tunisia, resulting in their inability to establish a Tunisian Constitutional Court to date.

President Saied's draft returns to a more traditional 'judicial' mode of creation for the Constitutional Court (Arts. 125-132). Stated to be an 'independent judicial body', its nine envisaged members will be *from* the three most senior district presidents of the Court of Cassation, the Administrative Court and the most senior members of the Court of Accounts (Art. 125). Though there may be questions about the level of specialisation they will have in constitutional law, it is clear, at least, that the members of the Constitutional Court will be full-time professional judges and will not be allowed to take on any other functions (Art. 126). But the draft does not mention who will be appointing the judges to the Constitutional Court. The notion that they will likely be *the* senior-most judges within their specialist jurisdictions means that effectively the judicial authority – namely the three judicial 'high councils' – will have immense influence over who is even 'eligible' for appointment at the Constitutional Court, since it is these judicial authorities that decide who is promoted to senior levels within the three court divisions. But the actual nomination and appointment to the Constitutional Court seems to be entirely missing from the draft. This is either yet another oversight or error, or it is wilfully absent to allow for the possibility of the President to appoint the members of the Court, as he has done with the temporary High Judicial Council, recently.

President Saied's design is certainly pragmatic when considering the difficulties that have plagued the establishment of the Constitutional Court thus far, but it cannot be ignored that this also risks creating a Court that is deferential to the executive authority and therefore lacks full independence.

The NCC draft proposed something radically different: all nine members of the Constitutional Court would be either law professors, judges or senior lawyers of the Court of Cassation, three each to be appointed by the President, the Prime Minister and the President of the Judicial Council, for a one-time

non-renewable period of seven years (Art. 119). This composition would, unsurprisingly, make many of the NCC's members eligible for a position at the Court. Notwithstanding this, such a Court is much more likely to enjoy more institutional independence. Notably, under the structure proposed in the NCC's draft, President Saied would have had to refer to the Constitutional Court before issuing a call for the current referendum. The NCC's draft also proposes that all draft laws have to be sent to the Constitutional Court, and if these are held to be unconstitutional, they have to be amended and sent back to the Court by the President to recheck for constitutionality.

Islam and the Shariʿa in the Constitution

The 2014 Constitution is relatively muted on the inclusion of a role for religion in legislation and governance in general. The preamble mentions "a commitment to the teachings of Islam and its aims (*maqāṣid*) characterised by openness and moderation", the "enlightened reformist movements that are based on the foundations of our Islamic-Arab identity". Art. 1 asserts that the religion of the State is Islam, Art. 39 obliges the state to "work to consolidate the Arab-Muslim identity" and there is a clear requirement that the President must be a Muslim (Art. 74).

These provisions were the result of intense disagreements and ultimately compromise between the secularist and Islamist political blocs, concluding in the removal of any role for Islamic Law as a source of law, but retaining Islam as the official religion of the state. 'Religious' and 'secular' are difficult to precisely characterise in Tunisia, as they are in many other nations. In Tunisia, many 'secularists' will readily identify as Muslims in whatever way they see fit, some even in terms of belief, but differentiate themselves from 'Islamists', who promote Islamist politics and a role for Islam in public policy and law. Likewise, some Muslims consider themselves to be ideologically and politically secular in their preference for public law and governance that is absent of any religious impositions.

Prior to even completing the final NCC draft, the head of the NCC Sadok Belaïd publicly confirmed in an interview that the draft constitution would remove any references to Islam, especially as the religion of the State, claiming that "80% of Tunisians are against extremism and against the use of religion for political ends". Putting aside his conflation of Islam with extremism, this seems to have been a surreptitious dig at Ennahda – the main Islamist political party – and its leadership, rather than any point on principle. After all, the provision identifying Islam as Tunisia's official religion in the 2014 Constitution was the result of a compromise, which did not lead to the implementation of any specific Islamist policies in the State, nor did it lead to any discernible rise in religious-based conflicts in the country.

The references to Islam in the NCC's draft are certainly minimal in quantity, but Belaïd's public pronouncements don't seem to play out on closer examination. The only specific mention that is removed is that of Art. 1 of the 2014 Constitution which held "Islam as the official religion" of Tunisia. Aside from this, the NCC's preamble retains much of the text of the 2014 Constitution's preamble on holding to "the enlightened and moderate teachings of Islam and its objectives/aims (*maqāṣid*)" and affirms Tunisia's

belonging to the "*Arab and Islamic family*". As I suggest below, these very specific terms pack more than what may be expected.

The *maqāṣid* refers to a well-known technical concept, namely the legal objectives sought to be achieved through the implementation of Islamic Law (*maqāṣid al-Sharīʿa)*. This effectively means that even under the NCC's draft constitution, the State will continue to work to achieve objectives sought by Islamic Law. One of the earliest proponents of the classification of the *Maqāṣid al-Shariʿa* into the (i) necessary (*ḍarūrī*), (ii) complementary *(ḥājjī)* and (iii) refining (*taḥsīnī*) elements and objectives of Islamic Law, was al-Juwaynī (d. 1085). These were later promoted by his student, al-Ghazālī (d. 1111) and more comprehensively treated by al-Shāṭibī (d. 1388), and continues to be developed, expanded and refined by Muslim jurists to the present day. By retaining this in the draft constitution, the focus has arguably moved away from Islam as the official state religion which, in terms of implementation was vague, to the very specific implementation of the objectives of Islamic Law.

Beyond this, the NCC's draft constitution, which we should recall was supposed to remove references to Islam, specifies that the words of the oath for both parliamentarians and the President start with "I swear by Almighty Allah (God)…" (Arts. 56 and 74). The exact wording is provided in the constitution and suggests that only Muslims would be able to take such an oath, including for members of parliament. This risks discriminating against non-Muslim minorities from taking oaths as elected members of Parliament.

Lastly, the preamble of the NCC's draft ends with "We, the free, sovereign Tunisian People, adopt this Constitution with the blessings of God (*Allāh*)". We could discount this as a secular call to something higher, perhaps, but it really begs the question as to what 'references to Islam' other than Art. 1, were actually removed in the NCC's draft. More than likely, the claim was probably part of a sustained anti-Islamist rhetoric used to garner credibility and legitimacy among liberal elites and positions this draft against others – even if the content fails to substantiate its claims. Based on the emphatic statements issued by Belaïd prior to the publication of the NCC's draft, it was surprising that many references to Islam largely survived in the NCC's draft constitution.

The President's amended draft is certainly more plentiful in its references to Islam. President Saied also tried to set his own narrative for the draft that will be put to a referendum. When he recently met pilgrims on their way to Mecca at Carthage Airport in Tunis, he mentioned that "the *Umma* and the State are two different things" and clarified that Islam is the religion of the nation (*Ummah*) and not of the State (*Dawla*).

The preamble of President Saied's draft refers to a commitment to "the human dimensions of Islam", where 'human' could refer to 'humanitarian', but probably not 'humanist' in the sense of classical humanism, which generally rejects theism. More crucially, the draft being proposed for the referendum also includes the same references to the objectives (*maqāṣid*), but removes it from the preamble and places it in Art. 5 of the draft constitution. This is a significant upgrade, implying that it would be executable legally by a law giving effect to it, more so compared to a provision in the preamble.

Art. 5 states that "Tunisia is part of the Islamic *Umma* and the State must, within the framework of a democratic system, endeavour to achieve the objectives (*maqāṣid*) of the noble Islam in the preservation of life, honour, wealth, faith, and freedom." This provision makes it an obligation upon the State to achieve these objectives. While it takes away all authority from the *ʿUlamāʾ* (religious scholars) and religious institutions to interpret and achieve these objectives, it leaves ambiguous the identification of which State authority will be responsible for interpreting, defining and achieving these objectives. This was the interpretation shared by Abid al-Briki (Secretary-General of the *Ḥizb Tunis ila-l'amām* political party), who supports the President's draft proposed for referendum, and believes that the provision prohibits the possibility for individual interpretations of religion, since it holds the State responsible for realising its objectives and for protecting them. But this would effectively mean that the State would be the interpreter of religion and of the objectives of Islam – which is in itself problematic, not least in the backdrop of the heated debates about the separation of Islam from government during the drafting of the 2014 Constitution. It is more problematic on many other fronts. First, from the perspective of the theory of *'maqāṣid al-Shariʿa'*, it ignores the original classification of life, faith, wealth, intellect and progeny, replacing 'intellect' (*ʿaql*) with 'freedom' (*ḥurriya*). It is possible that in the draft text, freedom is synonymised with intellect, in the sense of freedom of thought or conscience, but using just 'freedom' suggests that fundamental freedoms in general will be protected only in the context of the *maqāṣid* of Islam. Whilst the *maqāṣid* have numerous benefits for a broader, more fluid interpretation of Islamic law, this really depends on which dominant interpretations are being applied.

A good comparison of such an interpretation would be the obligation on the State to protect the 'right to life' in the Indian Constitution. When this was challenged in Court by those living in slums in India, the government claimed this only referred to the right to live, free from the threat of death. The Supreme Court, however, stepped in and has since delivered numerous landmark judgements holding that the right to life necessarily includes within it the 'right to shelter, food and clothing', that it is upon the State to provide these additional rights within the broader conception of the right to life, and that only on provision of these can they confirm that the 'right to life' is protected. Contrary to this, the relevant provision referring to the State's role in achieving the *maqāṣid* of Islam means that the State will be the arbiter and the interpreter of Islam, not the legislative authority, nor the judicial authority.

Rabih Khraifi, researcher in constitutional law, also expressed the idea that the provision prohibits any interference from religious organisations, suggesting that it is a more advanced development from the provision in the 2014 Constitution, which blocks the paths for 'political Islam'. Confusingly, though, he claimed that if this provision is accepted, no religious organisation, or political organisation or anyone else who gives religious opinions can proffer Islamic interpretations. Instead, all religious interpretations will now be "objectives-derived (*maqāṣidī*) and not based on schools of Islamic jurisprudence (*madhhabī*), and therefore there would be absolute and wide freedom." This is oxymoronic – the *maqāṣid* is itself derived from rules of Islamic jurisprudence, developed by jurists from the *madhhabs* (schools of islamic jurisprudence).

On the contrary, others suggested that the drafting of Art. 5 is effectively constitutionalisation of the *Shariʿa*. Historian Adil Latifi said that "the President has gifted to the Islamists that which they were unable to incorporate in the 2014 Constitution…what we fought so hard for, Kais Saied came and inserted it with a stroke of his pen." Others of similar persuasions are concerned that since one of the objectives of Islam are explicitly mentioned as 'freedom', fundamental constitutional freedoms will also be interpreted in light of Islamic objectives, which, they allege, will be constrained interpretations of freedom in a particularly 'Islamic' context. They claim that, as a result, whenever freedoms are defined, they will be regulated by the Islamic understandings of freedom, in line with the *maqāṣid* of Islam, and will effectively establish an Islamic state.

Another possible reading, though not one that seems to be prevalent among many, may be that the reference to the State means that the objectives of Islam are only those that are enacted by the State, namely, the Parliament and the President who have the jurisdiction for legislating in the President's draft. This is a plausible option, and one that is perhaps more democratic, but still leaves open the question regarding the standards and principles that will be determine the interpretation of the objectives of Islam.

Ultimately, there is a stark shift from the position where 'Islam is the religion of the State', to 'the State will work to achieve the objectives of Islam…'. The former entails no specific or active obligation to implement any particular legal framework, whereas the latter explicitly does, while omitting any mention of the civil nature of the state.

Ambiguities

Finally, the ambiguities in the President's draft have been pointed out in many of the opinion pieces linked to in this analysis, and these have usually been dismissed as oversights in drafting of the constitutional text. Sometimes, this lack of clarity or coherence in the text is due to incompetent drafting or lack of care and due diligence. But in many post-revolution and post-conflict constitutions, ambiguities can be of the 'constructive' sort – either due to a lack of final agreement on the specifics of the provisions and how such provisions should eventually be applied. Similarly, ambiguities can be conscientiously engineered by drafters based on their belief that such details should properly be left to either elected representatives of the people within the legislative bodies to decide (as opposed to a selected/appointed commission), or for the courts to interpret and define how they should be implemented. This is both strategic and risky at once. But in this context, where the drafters of the various versions – including the version that will be put to a referendum – have not arrived at these provisions through a transparent, inclusive and representative consultation and dialogue process, some ambiguities seem to be of the first type – those that have resulted from a rushed and non-inclusive process. If the draft passes in the referendum, the only way to resolve the issues will be for the legislative authorities to rectify them through clear and precise drafting of laws to implement and give effect to those constitutional provisions.

This does not apply to more crucial and fundamental provisions of the Constitution – constructive ambiguity serves no positive purpose in provisions related to the form of government, eligibility for the head of state and the principle of non-discrimination, the separation of powers, the independence of the judiciary and control over the operation of the emergency regime. In fact, any ambiguity here only serves to entrench arbitrary and unlimited powers in the hands of certain people and institutions to the exclusion of others.

Concluding remarks

It is clear that the draft constitution presented for the referendum on 25 July 2022 has not resulted from an inclusive or representative process. This is despite the fact that various diplomatic delegations have recently visited Kais Saied and others have issued statements reiterating the need for an inclusive process involving civil society. There are no indications that the bottom-up constitutional reforms that formed the basis of the President's electoral campaign feature at all in this constitution. The proposed draft constitution lacks any form of scrutiny or rigour as to basic checks and balances on the executive power and is therefore effectively an entrenchment of what Zaid al-Ali has typified as 'hyper-presidentialism' – a trend that seems to be increasing in the last decade, particularly in the MENA region.

If the draft constitution passes in the upcoming referendum, there is no interim process by which President Saied's rule can be restricted, effectively allowing him to continue to rule by decree and continue to bypass the 2014 Constitution until the election of a new parliament. Even after a new parliament is elected, he will still retain an imbalance of power in his favour.

We also should not pretend that the NCC's draft was technically or substantively superior. It retains some of the core essences of the 2014 Constitution but fails to do what it intended or perhaps what it should have intended. This is perhaps due to a lack of informed agreement on contentious issues and frustrated attempts at dealing with the political failures that led to a lack of implementation of the 2014 Constitution.

There are very few actual, substantive changes between the first draft the President issued, the NCC's draft, the amended draft issued by the President and the 2014 Constitution. The NCC's draft differs mainly in that it includes provisions that focus on economic and trade matters, with some questionable placement, but it does nothing to strengthen the constitutional framework to prevent abuse of Art. 80, as has very recently been experienced. I would have thought this was a priority seeing that the entire process up until now has been engineered under those exact provisions, and there is nothing in the draft to prevent that from reoccurring.

The draft constitution being put to a referendum certainly hands more authority to the President and less accountability for the Government and the President to the elected legislature. It provides an ambiguous and complicated legislative structure based on two houses with very little information about

their respective competences and substantive functions. The judiciary and the Constitutional Court are both designed structurally in a way that they could be controlled entirely by the President. The emergency regime is also even easier to operate for the President, with even less independent oversight from the Constitutional Court than in the current 2014 Constitution, which already proved ineffective in providing adequate checks and balances.

It is extremely difficult to find any significant improvement in the draft constitution being presented for the referendum, the NCC's draft or indeed the 2014 Constitution from the perspective of principles of constitutional law, the rule of law and good governance**.**

While President Saied cannot legitimately claim to have complied with the 2014 Constitution in this process – indeed he has stated on many occasions that it is extremely discombobulated and must be amended – he breached some of its most fundamental provisions arguing 'necessity' and 'imminent danger' under the framework of the state of exception which he declared. Notwithstanding this, there are serious questions to be asked to his predecessors in and to the previous governments about the level of implementation of the 2014 Constitution up until the time he took office. The record is found wanting on many, many fronts. The failure to implement the constitution, root out corruption, establish a constitutional court and provide for effective mechanisms for transitional justice were President Saied's failings, as much as they were failings of those before him. Indeed, he has taken very radical and extra-constitutional steps to deal with a lot of the problems, but these problems were not new, neither were they of his making. They existed before him and very little was done to resolve them. When President Saied took office, with quite a substantial mandate, he used that opportunity to resolve some of the problems – whether these have indeed been resolved is debatable – but it certainly was not done in accordance with the principles of the rule of law or within the constitutional framework.

The referendum, therefore, is the proverbial looking-glass, through which Tunisia must take a long-distance gaze. Whether the draft constitution passes in the referendum or not – it most likely will, one way or the other – the challenge of establishing a culture of constitutionalism will remain as crucial as it has been since 2014. The Tunisian people have a tall challenge facing them, but it is one that they must approach head-on.

Related Readings

There have been some very good analyses of the Draft Constitution thus far. These have taken various forms that are all worth reading: a Twitter thread (01 July 2022), a longer op-ed (08 July 2022) in the Washington Post, all by Zaid al-Ali; an analysis of the official draft by Prof. Nathan Brown (13 July 2022); a detailed thread analysing of the effects of the President's draft constitution on the political system, political and constitutional governance and a useful tabular comparison between the first draft and the draft submitted by the National Consultative Commission by legal expert Omar Hammady; a 'first look' (14 July 2022) at the official draft published in the Official Gazette in Tunisia by Iqbal ben Musa and Muna al-Tabai, published on the website of the Journal of Constitutional Law in the Middle East and North Africa (Arabic).

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