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## Tunisia at a Crossroads: Drafting a New Constitution

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*ASIL Insights*, international law behind the headlines, informing the press, policy makers, and the public.

### Introduction

Tunisians captivated the world's attention in January 2011 when they flooded the streets to protest unemployment, corruption, and the lack of basic freedoms. They ousted the autocratic President Zine Abidine Ben Ali in short order and inspired the "Arab Awakening."

Tunisia claimed a major success in October 2011, when the country held elections to choose representatives for a National Constituent Assembly (NCA). The NCA is tasked with writing a constitution and governing Tunisia until the new constitution and permanent government are in place.

Although Tunisia no longer captures the limelight, the nation is slowly moving forward as it grapples with major challenges, such as a weak economy, high unemployment, and security concerns. Notwithstanding numerous obstacles, Tunisia's prospect for a successful transition is generally seen to be the most promising in the region.

The next major milestone for Tunisia will be to approve a new constitution. Tunisians boast the first constitution in the Arab Muslim world. It was adopted in 1861 and guaranteed certain civil and religious liberties.<sup>[1]</sup> The 1959 Constitution, a successor to the 1861 Constitution, was in place while Ben Ali was in power. It provided for the free exercise of beliefs and equality for all; at the same time, it granted broad presidential powers, which Ben Ali abused. Tunisians chose to start from scratch rather than to amend the existing Constitution. This *Insight* provides an overview of the drafting process in Tunisia and highlights some of the debates.

### Drafting the Constitution

#### Background

Immediately after Ben Ali's departure, Tunisia was ruled by national commissions.<sup>[2]</sup> However, Tunisians were impatient for real change and they soon returned to the streets to

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### DOCUMENTS OF NOTE

[August Draft Constitution](#)

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demand representation by elected officials. In October 2011, Tunisia held elections for a National Constituent Assembly (NCA). Although not perfect, this election won broad praise. Ennahda, an Islamist party, won approximately 40% of the votes cast, far more votes than any other single party. It ultimately joined with two secular parties -- Ettakatol and Congress for the Republic -- to form a government. The country is currently operating under a provisional constitution that the NCA adopted in December 2011.

### **The Drafting Process**

The NCA established six commissions to write the constitution, each focused on a different section: the preamble; basic principles and constitutional amendment provisions; rights and freedoms; legislative and executive powers and their relationship; the ordinary, administrative, financial and constitutional judiciary; constitutional bodies; and state, regional, and local authorities. The President of the NCA and the chairs of the six drafting commissions form a Joint Committee for Coordinating and Drafting (JCCD), which is responsible for reconciling the commission drafts.

The NCA's by-laws set forth a general roadmap for the drafting and ratification process but are vague and silent on significant points.<sup>[3]</sup> The by-laws provide that the full NCA will first vote on each article separately. A majority vote (109 out of 217) on each article is needed. The NCA will then vote on the draft constitution as a whole. A two-thirds vote of the NCA is required for the constitution to be adopted. If that fails, the JCCD may offer revisions and re-submit the constitution to the NCA. If two-thirds of the NCA members do not vote in support of the constitution a second time, it will be submitted to the people for a national referendum. It will be approved if a majority of those voting in the referendum cast their votes in favor of the constitution. The by-laws do not provide further details of the process.

The drafting process began in February 2012. Although the commissions accepted some training at the outset, they decided that their members, not constitutional or legal experts, would draft the document. Few members have governance or legal experience, much less expertise in constitutional law.<sup>[4]</sup> The commissions have not been not guided by an overarching format, methodology, or road map, nor are have they looked to a particular constitution to serve as a model.

Civic outreach and public participation in the drafting process have been limited.<sup>[5]</sup> In late 2012 and early 2013, NCA members convened some sessions to which they invited representatives of civil society.

The commissions have produced three drafts: the first on August 8, 2012; the second on December 14, 2012; and the third on April 23, 2013.<sup>[6]</sup> On June 1, 2013, the JCCD released a fourth draft.<sup>[7]</sup> Members of the NCA, opposition parties, and others criticize the JCCD for exceeding its mandate by making substantive changes to the April draft.<sup>[8]</sup> In fact, sixty NCA members signed a petition objecting to these changes and protests over this issue interrupted the NCA's initial debates on the draft Constitution.<sup>[9]</sup>

### **Discussions on Substantive Provisions**

Below is an overview of some of the issues that have engendered considerable debate in the drafting process.

#### **Relationship Between the State and Islam**

Under Presidents Habib Bourghiba and Ben Ali, the Tunisian state was firmly secular. Tunisia's 1959 Constitution represented one of the few in the Arab Muslim world that did not refer to Shari'a as a basis for the governing law, although it did provide that the nation's religion is Islam.<sup>[10]</sup> One of the most hotly contested and polarizing issues in Tunisian

society today is the role religion should play in public life and laws.

Initially, the drafters discussed whether to add a provision that would cite Shari'a as "a" or "the main" source of governing law. This suggestion fueled an intense debate. Ultimately, the Ennahda Party changed its position and officially stated that it did not support a reference to Shari'a.[11] The June draft retains the wording of the 1959 Constitution: "Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its form of government is a republic." [12] It also provides that "Tunisia is a civil country based on citizenship, the will of people, and the supremacy of law." [13] The Preamble recognizes the "the open and moderate objectives of Islam." [14] Some believe that the wording in the Preamble will have no legal consequences, while others are concerned. [15] Further, the draft provides that certain parts of the Constitution cannot be amended, including "Islam, being the religion of the state." [16]

### **Women's Rights**

Tunisian women are widely considered to enjoy more rights than women in other countries in the Middle East and North Africa, largely due to the efforts of Bourghiba and Ben Ali to reform the family code and to promote girls' education. Women's rights and secular-leaning groups have been particularly concerned about safeguarding women's rights in the new Tunisia.

The August draft fell short and was strongly criticized. It provided that women had "a role complementary" to men in the family. [17] Subsequent drafts eliminated the reference to the complementary role and have provided stronger support of women's equality. The June draft provides that "All citizens, male and female alike, have equal rights and duties and are equal before the law, with no discrimination." [18] It also affirms that the state shall ensure "the protection of women and support their gains" and "equal opportunities for men and women in carrying different responsibilities." [19]

### **Judicial Reform**

Under the Ben Ali regime, the judiciary lacked independence and was broadly regarded as corrupt. Judges were punished if they did not rule in conformity with the regime's wishes.

Consequently, a central debate has centered on the composition of the critical body charged with appointing, assigning, disciplining, and removing judges: the Supreme Judicial Council. The draft Constitution provides some guidance but leaves many issues to be decided by future legislation.

The Supreme Judicial Council will be composed of the Judiciary Council, Administrative Judicial Council, Financial Judicial Council, and the Judicial Councils Organization. [20] The June draft specifies that half of each of these councils will be composed of judges and the other half will be non-judges. [21] The NCA will be responsible for formulating laws to address the mandate, organization, and procedures for the Supreme Judicial Council as well as for the four councils that make up the Supreme Judicial Council. [22]

The draft Constitution affirms that judges are independent and may only be transferred in accordance with decisions of the Supreme Judicial Council. [23] However, it fails to identify the circumstances under which a judge can be removed; the NCA consequently will need to decide this issue. [24] The June draft changes some criteria for membership on the Constitutional Court and grants the Prime Minister a greater number of nominations to the Court than in the April draft. [25] The Public Prosecutor is to be part of the judiciary. [26]

### **Freedom of Expression and Opinion**

Under Ben Ali's police state, dissenters were imprisoned, the media was tightly controlled,

and free speech and assembly rights were severely restricted. Since Ben Ali's ouster, the issue of freedom of expression as it relates to religion has been divisive and contentious. Salafists have instigated numerous attacks on peaceful protesters, artistic expression, and local religious shrines.[27] There have been high profile court cases against the media and artists for allegedly insulting Islam.

The initial draft included an article that criminalized "all attacks on the sacred." [28] It provided no definition of "the sacred" or what constituted "attacks." This language caused significant debate in an already polarized atmosphere. The subsequent drafts dropped this controversial reference. They then enhanced the protections of freedom of expression in some respects but simultaneously decreased them by allowing for media restrictions if there is "a law protecting the rights, reputation, safety and health of others." [29] Moreover, the JCCD added a provision in the June draft that allows the rights and freedoms in the Constitution to be restricted by laws enacted "to protect the rights of others or based on the requirements of public order or national defense or public health," so long as they do not "compromise" the "essence" of these rights.[30] In addition, the Chamber of Deputies is responsible for selecting members of media, human rights, electoral and other commissions.[31]

### **Presidential Versus Parliamentary System of Government**

Tunisians have also debated whether they should retain a presidential system, albeit with modifications, or adopt a parliamentary system. Broadly, Ennahda initially preferred a parliamentary system while other parties favored a presidential system.[32] Ennahda subsequently decided to support a mixed system, with both a president and prime minister. The first two drafts reflected this debate, with competing versions of potential language because the commission was unable to reach consensus.[33]

The final draft sets forth that the President is the head of state and shall serve no more than two five-year terms.[34] The June draft narrows some of the presidential duties that had been set forth in the April draft and appears to grant somewhat greater authority to the Prime Minister, including in foreign policy matters.[35] The legislative branch will be composed of a single chamber, a Chamber of Deputies; the Deputies will serve five year terms. The June draft inserts new language that authorizes the Chamber of Deputies to extend the terms for the President and Deputies in the case of war or imminent danger but does not set any limit on the lengths or numbers of such extensions or define what constitutes an "imminent danger." [36]

### **Comments by the International Community**

Various international organizations have provided detailed comments on the draft constitutions.[37] Some suggest that the drafters change the language of the Constitution to close loopholes, to meet international standards, and to address issues that may not have been foremost on the drafters' minds. For example, the International Commission of Jurists and Human Rights Watch have urged the NCA to include provisions that clearly affirm Tunisia's commitment to its international human rights and other treaty obligations.[38] Other areas of concern include references to rights that may be undermined by future legislation and vague language on issues such as separation of powers and the independence of the judiciary.[39]

### **Concluding Remarks**

What will happen next? It has taken longer than anticipated to draft the Constitution and Tunisians are ready to close this chapter in their transition. [40] On July 1, 2013, the NCA began to debate the draft Constitution, although protests that the JCCD exceeded its

authority in making certain changes to the draft interrupted the discussion. Elections to put a permanent government in place have been postponed to December 29, 2013, given the slow pace of the drafting process.

According to one survey, the vast majority of Tunisians favor voting on the Constitution through a national referendum rather than leaving it to the NCA to approve. [41] This preference is not surprising, given that Tunisians are proud of the grassroots nature of their revolution. The NCA would be well-advised to consider this alternative, which would enhance public ownership of the Constitution, particularly in light of the limited public involvement in the process. In addition, Tunisians seem to be losing some confidence in their elected representatives.[42]

Tunisians have witnessed significant changes in the past two years and understand that they have much work ahead. The country would benefit from a broad civic education campaign regarding the Constitution, to ensure that Tunisians understand the meaning of their new blueprint for democratic rule and to help prepare them for the next stage of their transition.

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### Endnotes:

[1] See Kenneth Perkins, *A History of Modern Tunisia* 26-27 (2004).

[2] The commissions focused on political reform, human rights abuses committed during the revolution, and investigating corruption. Ben Ali regime holdovers appointed members of the commissions.

[3] See Bill Proctor and Ikbal Ben Moussa, *The Tunisian Constituent Assembly's By-laws: A Brief Analysis* 27 (2102), <http://www.idea.int/publications/tunisian-constituent-assemblys-by-laws> (discussion of Article 3 of Constitutional Act no. 6).

[4] The commissions do have access to experts if they wish to consult them. The commissions are largely writing the text of the constitution themselves.

[5] N. Rowsell and A. Ben Yahia, *Prioritizing Patriotism: Tunisian Citizens Express Their Views* 7, 18-19 (Nat'l Democratic Inst. June 2013), <http://www.ndi.org/files/Tunisia-prioritizing-patriotism-focus-groups-june-2013.pdf> [hereinafter *Prioritizing Patriotism*].

[6] For the August 2012 draft, see [http://www.constitutionnet.org/files/2012.08.14\\_-\\_draft\\_constitution\\_english.pdf](http://www.constitutionnet.org/files/2012.08.14_-_draft_constitution_english.pdf) [hereinafter *August draft*]; for the December 2012 draft, see [http://www.constitutionnet.org/files/tunisian\\_constitution14\\_dec\\_2012-english-undp.pdf](http://www.constitutionnet.org/files/tunisian_constitution14_dec_2012-english-undp.pdf) [hereinafter *December draft*]; for the April 2013 draft, see [http://www.constitutionnet.org/files/tunisian\\_constitution-22\\_april\\_2013-\\_third\\_draft\\_-english-idea.pdf](http://www.constitutionnet.org/files/tunisian_constitution-22_april_2013-_third_draft_-english-idea.pdf) [hereinafter *April draft*]. Different sources provide varying dates to the April draft, including April 22, 23, and 25.

[7] For the final draft issued on June 1, 2013, see [http://www.constitutionnet.org/files/fourth\\_draft\\_english\\_idea.pdf](http://www.constitutionnet.org/files/fourth_draft_english_idea.pdf) [hereinafter *June draft*].

[8] Article 104 of the NCA's Internal Regulations provides: "[t]he Joint Coordinating and Drafting Committee is responsible for: the immediate and ongoing coordination of the work of the standing committees of the NCA; preparation of a general report on the Constitution before its submission to the plenary session; the establishment of the final draft of the Constitution in conformity with the resolutions of the plenary session." International Commission of Jurists, *Enhancing the Rule of Law and Guaranteeing Human Rights in the Constitution* 15, n. 29 (Feb. 1, 2013), <http://icj.wengine.netdna-cdn.com/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION->

REPORT-FINAL.pdf [hereinafter *ICJ Report*]. For example, the following articles in the June draft either were not in the April draft or substantive changes were made: 5 (Maghreb region), 48 (limitations clause); 20 (equality); 31 (right to access information); 61 (legislative initiative and the introduction of bills); 70 (executive authority), 77 (presidential appointment powers), 91 (Prime Minister's mandate), 92 (presiding over the Council of Ministers); 112 (composition and mandate of judiciary), 115 (composition and nomination of members of Constitutional Court), 126 (commission of sustainable development and for the rights of future generations), and 127 (commission for good governance and anti-corruption). The following articles were in the April draft but deleted from the June draft: 7 (citizen rights), 11 (women and men), and 77 (President's role in foreign policy). These are not exhaustive lists. See *infra* note 9.

[9] See Salma Bouzid, *NCA Debate Over Constitution Quickly Grinds to a Halt*, TunisiaLive, July 1, 2013, [www.tunisia-live.net/2013/07/01/nca-debate-over-constitution-quickly-grinds-to-a-halt/](http://www.tunisia-live.net/2013/07/01/nca-debate-over-constitution-quickly-grinds-to-a-halt/); Amira Masrouf, *Petition Denouncing Constitution Signed by 60 NCA Members*, TunisiaLive, June 17, 2013, [www.tunisia-live.net/2013/06/17/petition-denouncing-constitution-signed-by-60-nca-members/](http://www.tunisia-live.net/2013/06/17/petition-denouncing-constitution-signed-by-60-nca-members/).

[10] Ninety-eight percent of Tunisians are Muslim and Islam is an integral part of culture and life. Historically, Tunisian judges did not interpret this language from the 1959 Constitution in a way that imposed Shari'a. The Constitutions of most Arab countries refer to Shari'a as a source of at least some laws, if not all laws. See U.S. Comm'n on Int'l Religious Freedom, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Majority Muslim Countries and other OIC Members (2012 Update)*, [http://www.uscirf.gov/images/USCIRF%20Constitution%20Study%202012%20\(full%20Text\(2\)\).pdf](http://www.uscirf.gov/images/USCIRF%20Constitution%20Study%202012%20(full%20Text(2)).pdf).

[11] Mona Yahia, *Tunisia Rules out Sharia-based Constitution*, Magharebia, April 3, 2012, [http://magharebia.com/en\\_GB/articles/awi/features/2012/04/03/feature-03](http://magharebia.com/en_GB/articles/awi/features/2012/04/03/feature-03).

[12] *June draft*, *supra* note 7, at art. 1.

[13] *Id.* at art. 2.

[14] *Id.* at Preamble.

[15] Article 143 provides that the Preamble is "an integral part" of the Constitution. *Id.* If the Preamble is considered a substantive enforceable provision, then the reference to the "cultural specificity" of Tunisians is problematic, as it could conflict with Tunisia's international treaty obligations, particularly in human rights treaties, and is so vague that it could be subject to a range of interpretations.

[16] *Id.* at art. 141. Article 141 also provides that the "state's civil nature" cannot be amended. It is unclear how these provisions will ultimately be applied.

[17] *August draft*, *supra* note 6, at art. 2.28 ("The state shall guarantee the protection of the rights of women and shall support the gains thereof as true partners to men in the building of the nation and as having a role complementary thereto within the family. The state shall guarantee the provision of equal opportunities between men and women in the being of various responsibilities.").

[18] *June draft*, *supra* note 7, at art. 20.

[19] *Id.* at art. 45 ("The state shall guarantee the elimination of all forms of violence against women." The April draft had added Article 11, which stated: "Women and men shall be partners in the construction of the society and the state," but this language does not appear in the June draft).

[20] *Id.* at art. 109.

[21] *Id.*

[22] *Id.* at arts. 109, 112 – 114.

[23] *June draft*, *supra* note 7, at art. 104.

[24] It does provide that a judge "shall be held accountable for any shortcomings in the performance of his duties" but provides no further details. *Id.* at art. 98; see *Id.* at art. 101.

[25] Compare *June draft*, *supra* note 7, at art. 115 with *April draft*, *supra* note 6, at art. 112.

[26] The April draft eliminated references to the Public Prosecutor; however, it re-appears in the June draft. Compare *December draft*, *supra* note 6, at art. 114 with *April draft*, *supra* note 6, at art. 109 and *June draft*, *supra* note 7, at art. 112.

[27] Salafists are broadly described as a Sunni Muslims who adhere to a literal, fundamental, and puritanical interpretation of Islam and who seek to have a strict form of Shari'a imposed. See International Crisis Group, *Tunisie: Violences et Défi Salafiste* 9-10 (Feb. 13, 2013),

<http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/Tunisia/137-tunisie-violences-et-defi-salafiste.pdf>.

[28] *August draft*, *supra* note 6, at art. 3.

[29] *June draft*, *supra* note 7, at art. 30 ("The right to freedom of opinion, thinking, expression, and media shall be guaranteed. Freedom of expression, media, and publication may not be restricted unless by virtue of a law protecting the rights, reputation, safety, and health of others. Such freedoms shall not be subject to prior censorship."). See *December draft*, *supra* note 5, at art. 36; *April draft*, *supra* note 6, at art. 40.

[30] *June draft*, *supra* note 7, at Art. 48.

[31] *Id.* at arts. 122 – 127. These provisions have been criticized as politicizing these purportedly independent bodies. The June draft added two bodies/commissions to this list that were not in the April draft: sustainable development and good governance and corruption. Compare *June draft*, *supra* note 7, at arts. 122 – 127 with *April draft*, *supra* note 6, at arts. 119-122.

[32] Ennahda sees a parliamentary system as in its interests, given that in the October 2011 election it garnered by far more votes than any other single party and consequently would be in a strong position to retain the Prime Minister's post in future elections. See Duncan Pickard, *Lessons from Constitution-Making in Tunisia*, Issue Brief (Atlantic Council), Dec. 2012, [http://www.acus.org/files/publication\\_pdfs/403/mec121213tunisia.pdf](http://www.acus.org/files/publication_pdfs/403/mec121213tunisia.pdf), at 3.

[33] *August draft*, *supra* note 6, at arts. 50-52, 73; *December draft*, *supra* note 6, at arts. 87, 91, 92.

[34] *June draft*, *supra* note 7, at arts. 71, 74.

[35] See *June draft*, *supra* note 7 (including the deletion of Article 77 from the April draft and changes to Articles 70, 77, 91, 92, and 115 in the June draft).

[36] *June draft*, *supra* note 7, at art. 64 (these provisions were not in the April draft). Cf. *April draft*, *supra* note 6, at art. 68.

[37] These groups include, but are not limited to the International Commission of Jurists, Human Rights Watch, and Article 19. See *ICJ Report*, *supra* note 8 (provides extensive comments). See Human Rights Watch, *Tunisia: Revise the Draft Constitution: An Analysis of Human Rights Concerns* (May 13, 2013), <http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution> [hereinafter *HRW comments*]; Human Rights Watch, *Letter to Members of the Tunisian National Constituent Assembly* (Sept. 13, 2012), <http://www.hrw.org/news/2012/09/13/letter-members-tunisian-national-constituent-assembly>; Human Rights Watch, *Letter to the Tunisian National Constituent Assembly on the Draft Constitution* (Jan. 22, 2013), <http://www.hrw.org/news/2013/01/22/letter-tunisian-national-constituent-assembly-draft-constitution>; Press Release, Article 19, Tunisia: Report Finds Draft Constitution Fails to Protect Fundamental Human Rights (Nov. 9, 2012), <http://www.article19.org/resources.php/resource/3510/en/tunisia:-report-finds-draft-constitution-fails-to-protect-fundamental-human-rights>; Amnesty International, *South Africa: Justice for Marikana Deaths Hangs in the Balance* (Aug. 16, 2013), <http://www.amnesty.org.au/news/comments/30831.1/>; Canadian Journalists for Free Expression, *Tunisia's National Constituent Assembly Retaining Restrictions on Free Expression in New Constitution*, [http://www.cjfe.org/resources/protest\\_letters/tunisias-national-constituent-assembly-retaining-restrictions-free-express](http://www.cjfe.org/resources/protest_letters/tunisias-national-constituent-assembly-retaining-restrictions-free-express) (June 13, 2013).

[38] See *ICJ Report*, *supra* note 8. The April draft added Article 21, which provides that "international agreements approved and ratified by the Chamber of Deputies shall be superior to laws and inferior to the Constitution." *April draft*, *supra* note 6. This provision is identical in the June draft. *June draft*, *supra* note 7, at art. 19; see *ICJ Report*, *supra* note 8; see also *HRW comments*, *supra* note 37.

[39] See *supra* note 37.

[40] See *Prioritizing Patriotism*, *supra* note 5, at 17-18; see Williams and Assocs., *Survey of Tunisian Public Opinion*, Dec. 19, 2012 – Jan. 7, 2013 (Feb. 14, 2013), [http://www.iri.org/sites/default/files/2013%20February%2014%20Survey%20of%20Tunisian%20Public%20Opinion%2C%20December%2019%2C%202012-January%207%2C%202013\\_0.pdf](http://www.iri.org/sites/default/files/2013%20February%2014%20Survey%20of%20Tunisian%20Public%20Opinion%2C%20December%2019%2C%202012-January%207%2C%202013_0.pdf); see also The Int'l Republican Inst., *IRI Tunisia Index* (2013), <http://www.iri.org/sites/default/files/2013%20February%2014%20IRI%20Tunisia%20Index%2C%20December%2019%2C%202012-January%207%2C%202013.pdf> (survey analysis) [hereinafter *IRI Tunisia Index*]; N. Rowsell and A. Ben Yahia, *Confidence Gap: Citizen Priorities on the One-Year Anniversary of the National Constituent Assembly Elections* (Nat'l Democratic Inst. Dec. 2012), <http://www.ndi.org/node/19845>; N. Rowsell and A. Ben Yahia, *Framing the Future: Citizen Attitudes*

about Electoral and Constitution Drafting Processes (Nat'l Democratic Inst. Sept. 2011), <http://www.ndi.org/node/18088>.

[41] *IRI Tunisia Index*, *supra* note 40.

[42] *Id.*; *Prioritizing Patriotism*, *supra* note 5, at 11-13, 18-19, 21-24.