

Lessons from Constitution-Making in Tunisia

Since October 2011, the National Constituent Assembly of Tunisia has been negotiating and drafting the republic's new constitution, which is intended to institutionalize a new democratic system in the aftermath of the revolution that toppled the dictatorship in January. While the Assembly is still several months away from completing its work and some major issues, notably the system of government, have yet to be resolved, some important lessons have nonetheless emerged that might prove useful for other constitution-making processes worldwide, especially in neighboring Libya.

While the experience of each transitioning country will be unique, there are some common elements and lessons learned—particularly in countries where decades of autocracy discouraged public participation—that can be gleaned from Tunisia. The constitution-making process should have a clear legal framework to give the process a foothold of procedural legitimacy. The body that drafts the constitution should not serve simultaneously as a transitional legislature. Fundamental principles or design questions, moreover, should be decided from the outset as they have downstream effects on the rest of the constitution. Members of the drafting body should have access to legal and comparative analysis, but the number of lawyers involved should be limited in order to ensure a diversity of perspectives. Gaining citizen input is important, and as such the process should be transparent and encourage public participation, but the messaging and release of drafts should be controlled. Finally, there should be one, clear procedure for approving the constitution.

Rafik Hariri Center for the Middle East

The Rafik Hariri Center for the Middle East studies political transitions and economic conditions in Arab countries and recommends US and European policies to encourage constructive change.

Background

Shortly after Zine El-Abidine Ben Ali was driven from Tunisia, protestors and civil-society groups founded the Committee to Safeguard the Revolution, a body that successfully pushed the interim government to suspend the 1959 constitution. The constitution-writing process was then referred to a newly formed body under the chairmanship of Yadh Ben Achour, one of Tunisia's most respected scholars of law and Islam. This body, known as the Ben Achour commission, consisted of a committee of legal experts that prepared bills and a quasi-parliament drawn from representatives of political parties, labor unions, and civil society groups. The commission called for a National Constituent Assembly to draft a new constitution on the grounds that the previous text did not "guarantee democratic, pluralistic, transparent, and impartial elections." Interim president Fouad Mebaaza decreed that an elected Constituent Assembly would produce a constitution by October 2012.

Elections for the 217-member National Constituent Assembly were held on October 23, 2011 based on a closed-list, proportional-representation electoral system with twenty-

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seven constituencies. Ennahda, with a self-proclaimed Islamic tendency, center-left Congress for the Republic (CPR), and social-democratic Ettakatol were the three leading parties in the election and formed a coalition. Ennahda's Hamadi Jebali became prime minister, CPR's Moncef Marzouki assumed the interim presidency, and Ettakatol's Mustapha Ben Jaafar was named the speaker of the Assembly. Together, the three positions are called the Troika. Other groups that won seats in the Assembly formed a loosely organized opposition.

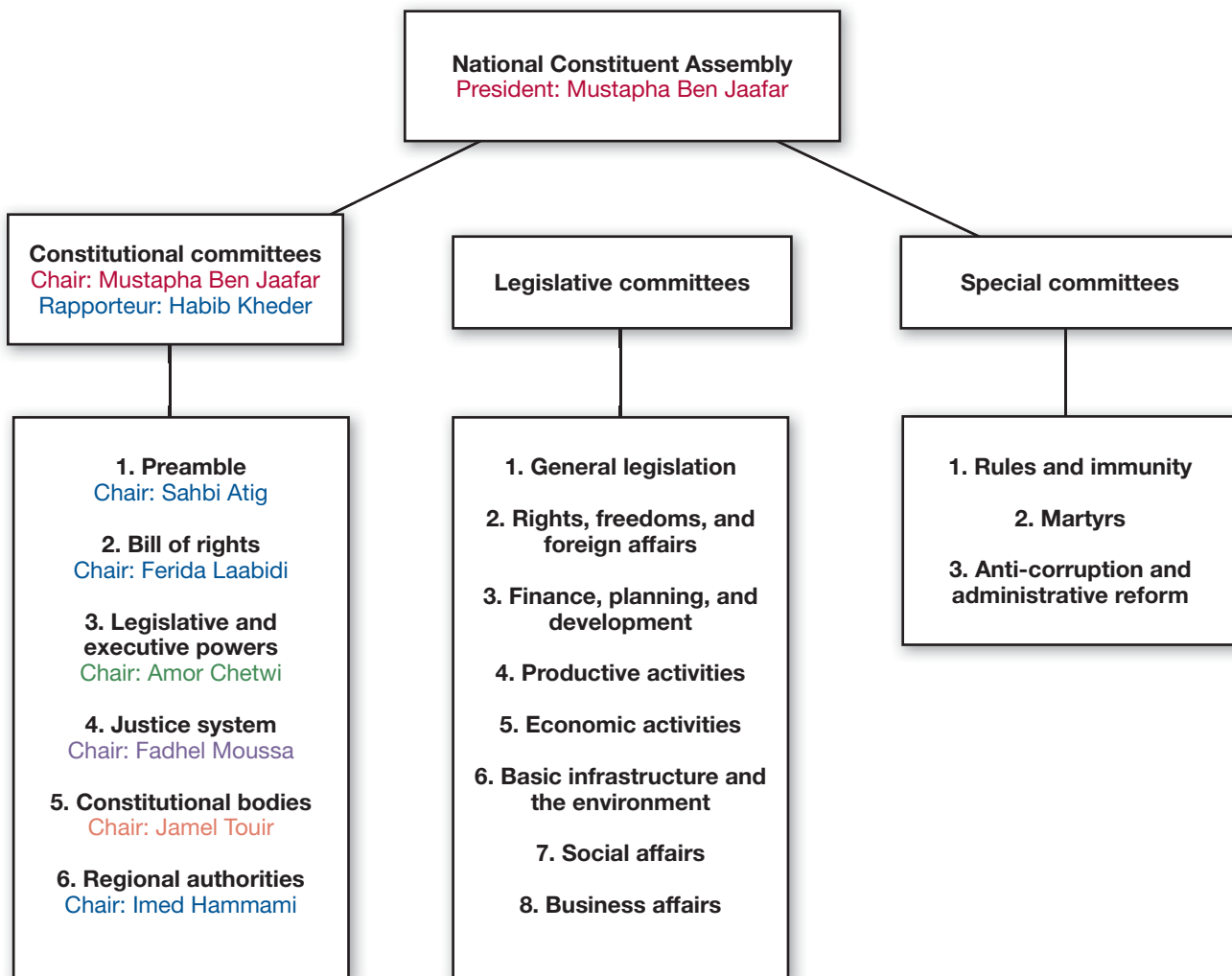
The Constituent Assembly met for the first time on November 22, 2011, as the sovereign authority of Tunisia. The Assembly did not consider itself bound to any previous law or declaration, whether from the president, the prime minister, or the Ben Achour commission. The Assembly approved a new government, drafted a state budget, and wrote a “mini constitution” that outlined its own provisional authorities as well as those of the government, president, courts, military, and independent commissions. The mini constitution, plus

the Assembly's rules of procedure, also governed the constitution-making process. The Assembly was both an interim legislature and a constituent assembly (a constitution-making body).

The Constitution-Making Process

Most members of the Constituent Assembly sit on both legislative and constitutional committees (see below). Each constitutional committee is organized around a different theme. The constitutional committees each have about twenty members, distributed roughly in proportion to the membership of the Assembly as a whole. Each committee has a chair and a rapporteur; Ennahda holds three chairs, while CPR, Ettakatol, and Modern Democratic Pole, a secular opposition group, each hold one.

Each of the chairs also sits on the constitutional coordinating committee, charged with stitching together a coherent draft from the chapters passed to them by the six committees.



Assembly president Mustapha Ben Jaafar chairs the coordinating committee but plays a largely formal role. The general rapporteur, a lawyer named Habib Kheder, who will take the lead on integrating the committees' drafts, does the day-to-day coordination.

The constitutional committees began their work in January 2012, after the state budget and mini constitution were passed in late 2011. The chair of each committee exercised much control over the committees' structure and timeline in the subsequent months. Some committees, such as the first (preamble), began writing almost immediately. Others—including the second (rights and freedoms) and third (legislative and executive powers)—held long periods of public comment before beginning internal deliberations. The committee chairs invited civil society groups, international advisors, and legal scholars to their meetings. The committees have a small team of lawyers to support their work, but they perform largely administrative functions and offer little advice on constitutional design.

The Assembly's legislative function delayed the constitution-making process by dividing members' attention. The constitutional committees generally met three days a week and the legislative committees for two, but this schedule was often disrupted by pressing concerns. A deadly snowstorm in February, the sacking of the governor of the central bank in July, and economic distress throughout the Assembly's tenure were three legislative issues that demanded members' attention and time from constitution making.

Nevertheless, the constitutional committees were able to present a draft by August, reflecting months of dissent and compromise. One of the most important issues that had been settled was the extent to which Sharia would be mentioned in the constitution. This was the subject of much public debate throughout the spring, with uncertainty as to what position Ennahda would take. An internal Ennahda draft had been circulated in February that included a reference to Sharia as a "source among sources" of legislation. At a public protest on March 16, Ennahda parliamentarian Sahbi Atig shouted that Sharia would be "the main source of legislation." The crowd chanted in response, "the only source!" Meanwhile, Ben Jaafar declared that he would resign and withdraw Ettakatol from the ruling coalition should the word Sharia appear in the constitution in any form.

Despite the strong rhetoric from several leaders, Ennahda's institutional stance on the issue was not clear until the party's political council made a formal announcement on March 26. Of the eighty members who voted, only twelve supported some mention of Sharia. Ennahda was the only parliamentary group that even considered a Sharia provision, and the word was left out.

The main fight between secular and Islamic parties was not over Sharia but over the system of government. Ennahda prefers a parliamentary system of government for several reasons. First, party leaders believe that a parliamentary system is both best suited for Tunisia as an emerging democracy and consistent with the principle of *shura*—or consensus-based decision-making—that is fundamental to Islamic governance. Ennahda party leaders also see parliamentarism as in their best interest because they prefer to govern through a coalition and diffuse inevitable criticism that is inherent to transitions to democracy. Furthermore, in a crowded landscape of political parties, Ennahda feels confident in its ability to command a plurality of seats in parliament in at least the next few parliamentary elections.

Secular parties are pushing for a presidential or semi-presidential system, which they see as the best way to check Ennahda's power. Some CPR parliamentarians seek a semi-presidential system in order to maintain their party's presidency in the Troika, succumbing to a common view in transitional governance that current politics will endure. Semi-presidentialism also attracts support from Assembly members who would support a secular president to check the power of an Ennahda prime minister. More centrist parliamentarians—like those from the former PDP—support a US-style presidential system. They argue that Ennahda won only 40 percent of the seats nationwide, which means that 60 percent of Tunisians would support a secular candidate for president. They hold this view despite the fact that secular parties in Tunisia are desperately fractured and would be hard-pressed to capture the support of the entire 60 percent.

The debate over the system of government led to a stalemate in the third constitutional committee, which was responsible for drafting chapters related to executive and legislative powers. In the draft released in mid-August, the committee released two versions of the relevant chapters, one calling for

a parliamentary regime and the other for a semi-presidential one with a particularly strong president. The debate in the committee was deadlocked, and the issue was elevated out of the committee to be settled in a plenary session or a grand compromise among leading political parties.

In October, the Troika managed to find a partial compromise on the issue of the presidency. Ettakatol, CPR, and Ennahda agreed that the president would be directly elected and that legislative and presidential elections would be held in June 2013. The announcement did not settle all the issues at hand, however, and it is too early to conclude what the executive structure will look like. The Troika did not assign powers to the president and prime minister. In fact, Ennahda has considered proposing a weak, directly elected president for several months now.¹

The draft contained two other controversial provisions. The first granted women the same rights as men in their status, but as man's "complement" in society. Women's advocacy groups and many Tunisians across the country—both secular and religious—were offended by the notion that women derive their rights from men and do not hold equal rights inherently. Apparently, the committee responsible for this language agreed upon it under significant pressure to meet the deadline set by the coordinating committee. Assembly members, both men and women, have since vowed to amend the text to remove the principle of complementarity.

Second, the draft bans normalization with "Zionism" and the "Zionist entity," but gives no further comment on what was meant by normalization or Zionism. Tunisia has a rich Jewish history with a small, but vibrant community still living in the country that, in fact, was invited to present its concerns to the rights and freedoms committee. Some Tunisians also questioned whether the constitution interfered with what should be the exclusive domain of foreign policy. It is not clear how this provision found its way into the draft or whether it will survive in its current form.

The current draft of the Tunisian constitution now sits with the coordination committee. The committee will prepare comments on the draft, pointing out inconsistencies, gaps, repetitions, and unclear phrasing. One glaring omission that the coordination committee has vowed to correct is the right to vote, which is not mentioned in the constitution; apparently the rights and freedoms committee thought this was the

domain of the founding principles chapter, and vice versa. The coordination committee will sponsor plenary sessions on each of the draft chapters and return the drafts with its own comments to the individual committees. The coordination committee will then consolidate the comments into a single draft. Kheder, the general rapporteur, has suggested that the constitution will be ready by February 2013—already months beyond the original mandate—though further delay into the summer is not unlikely. The Assembly spent November discussing a law on the independent elections commission and will debate the 2013 budget through December. Some parliamentarians do not expect to return to the constitution until January or February, jeopardizing the June target for elections.

It is not clear, however, whether Kheder expects the final text to be completed by February, or whether voting will begin then on a comprehensive draft. The question is important because there are two methods for approving the constitution. Both processes start with a majority vote in the Assembly to approve each article. Then, under the first method, the plenary session would vote to approve the constitution by a two-thirds majority. If it fails the first vote, the coordination committee would make changes in the interest of compromise, and return it to the plenary session. If the second vote again fails to achieve a two-thirds majority, the draft constitution would be sent to public referendum, which can adopt the constitution with a simple majority of valid votes in favor.

The next several months will be critical to Tunisia's political development. While some of the key questions remain unanswered regarding the final shape of Tunisia's political system and the approval process, the constitution-making process to date already offers valuable lessons for future constituent assemblies.

Recommendations

- **Separation of legislative and constitution-writing functions** - Assembly members have noted that working on constitutional and legislative issues simultaneously drained and distracted them. The constitution-making process continued in the backdrop of pressing legislative priorities, notably high unemployment in the interior regions, and separating

¹ Weak, directly elected presidents are rare, but democratic models can be found in Austria, Bulgaria, Finland, Iceland, Ireland, Portugal, Slovakia, and Slovenia.

these prerogatives would have allowed for more concentrated deliberations in both domains. According to a recent poll, when Tunisians were asked what the government's top priority should be, only 1 percent said the constitution as a first response; 81 percent said job creation.² The constitution-making process must go on, but Tunisians want to see their elected officials working on issues that relate more directly to their daily lives. Giving parliamentarians the chance to address concerns of economic policy might have done more to satisfy this public demand.

- **Ensuring legitimacy of the Assembly members and the process** - The Assembly has faced a lot of criticism from the public, but its role as the authoritative representative of the Tunisian people has not been called into question. This is due to both the highly credible October 2011 elections and the fact that the Ben Achour commission provided the Assembly a foothold of procedural legitimacy through an agreed upon electoral and legal framework. On the other hand, the integrity of the constitution-making process might be called into question based on the process of final approval, regardless of whether it is approved by two-thirds majority vote or referendum. In the first case, it will not be subjected to a public vote; in the second, the Assembly will have rejected the final document. Either situation will provide fodder for political actors who oppose the final text to challenge its legitimacy.
- **Proper integration of legal expertise** - The Ben Achour commission granted constitution-making authority to the representatives of the people, not their lawyers. Ultimately, lawyers should interpret a constitution, not write it, as they represent one profession and one social class, whereas constitutions should represent all people in a society. Lawyers are critical, however, to ensuring that a text makes legal sense and can be used in court to keep the state within its legal bounds. In fact, the Assembly should have expanded its legal capacity by hiring staff lawyers for the constitutional committees and by recruiting a committee of scholars to provide legal analysis and comparative research. The Assembly has instead relied on only two staff lawyers who were too

overburdened with administrative responsibilities to contribute constructive analysis.

- **Separation of electoral politics from constitution writing** - One issue that the Ben Achour commission did not anticipate in designing the Constituent Assembly is the way that its parliamentary nature would cloud the decision-making process. Adopting the dual structure is problematic since constitutions are intended to embody lasting principles of the state, not the current political arrangement. The most significant constitutional bargain made so far—to elect the president directly—was decided by the governing coalition of Ennahda, CPR, and Ettakatol with no input from the opposition parties. While it might be anticipated for the most powerful parties to have a dominant voice in the process, a more inclusive process would have included greater input from opposition voices. Fortunately, the process has been fairly consensus-driven inside the Assembly due to the fact that Ennahda has sought to include other actors in the process; Ennahda, for example, divided the leadership of the constitutional committees among the coalition partners and even gave one chair to an opposition group. Ennahda also did not stack the most important committees with its own members, has been willing to compromise on the system of government, and avoided a potentially drawn-out battle by leaving aside the question of Sharia.
- **Deciding questions with downstream effects at the outset** - The decisions that are made with regard to the system of government could require that other committees revisit decisions that have already been made. This problem could have been avoided if, at the outset, the Assembly had declared certain principles that would steer the remainder of the debate. The South African constitution-making process followed this model, whereby political parties agreed on a Declaration of Intent, which set forward a common set of principles (such as respect for universally-accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly). This allowed the drafters of the South Africa constitution to

² "Survey of Tunisian Public Opinion: July 26–August 8," International Republican Institute, 3 October 2012.

start from a mutually-agreed upon foundation and then delineate specific articles consistent with those norms.

- **Maintaining transparency and public engagement -** Although Assembly members were intended to consult and gain feedback from their constituencies, very little was actually done. Members were granted one week off a month to return home for this purpose, but few took this opportunity for a robust dialogue and there was no formal mechanism for incorporating that feedback into the draft text. One example where the public voice was not heard was related to the question of Sharia. In the weeks before Ennahda's decision regarding reference to Sharia, thousands of Tunisians gathered in the streets to support what they thought would be Ennahda's stance. When the political council decided to leave out reference to Sharia, those protestors had no formal opportunity to engage with or be represented in the process. While Ennahda has the political strength to withstand such protests, it would have set a positive precedent to foster transparency and public engagement through forums fostering government-citizen dialogue and consultation.
- **Engaging in ongoing civic education -** The Assembly did not lead a civic-education campaign before the constitution-making process started in order to prepare the public to give thoughtful feedback. Assembly members are expected to return to their constituencies to solicit feedback on the August draft,

but most Tunisians will enter this conversation with little understanding of the basic principles of constitutional design that Assembly members have been debating for months.

- **Manage public relations in the release of draft texts -** The Assembly should be applauded for releasing draft texts as they were completed, but these drafts often have the unintended effect of elevating extreme and poorly formed positions from the Assembly to the mainstream. Tunisians were outraged, for example, by the idea that women receive their rights by virtue of being the complement of men, and Ennahda has been widely criticized in local and international media for imposing inequality of the sexes. Many believe the complementarity line was the hunger-driven result of a Ramadan stupor, not the consensus of Ennahda, the Assembly, or even the committee that wrote it. The language will be corrected, but in the future it is important to ensure that potentially controversial drafts are debated more carefully before public release. The coordination committee could have better controlled the messaging around the draft constitution before it was released, streamlining the document and flagging potentially problematic constructions without violating the autonomy of the constitutional committees.

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