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Student Research

Tunisia's National Constituent Assembly: Current Politics and Next Steps

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BACKGROUND

The paper is intended for all policy analysts interested in Tunisia, but it could be especially helpful for members of the NCA and the legal advisory committee, chaired by Yadh Ben Achour, that was recently established to advise the NCA on constitutional law and drafting procedure. The National Constituent Assembly of Tunisia (NCA) will act as the constitutional convention and transitional legislature of Tunisia and was elected on 23 October 2011.¹ Decree No. 582, released on 20 May 2011, extends a one-year mandate to the NCA to write a new constitution for the republic. This commitment was also reflected in a September 18 agreement signed by Tunisia's largest political parties. Drawing from recent cases and academic literature, this paper explores key procedural questions that will confront the NCA in its first month in office.

PRINCIPLES OF A CONSTITUENT ASSEMBLY

In ensuring legitimacy, the process of drafting a constitution can be as important as its content. Exclusion, which can be external or internal, is one of the most significant barriers to participatory constitution making. External exclusion refers to the ways in which individuals are not represented in a constituent assembly. Internal exclusion occurs when individuals are represented, but their representatives lack the opportunity to influence the thinking of others.²

Tunisian transitional authorities have made provisions to combat external exclusion in the October elections. They chose a proportional representation system with a gender parity principle, and they granted extra seats to rural districts. The newly elected assembly must build on this work to promote internal inclusion.

PREVENTING INTERNAL EXCLUSION

With over 100 registered political parties, plus dozens of independent lists planning to run in October 2011, the constituent assembly will be a diverse and potentially unwieldy assembly. Preventing internal exclusion once the large, 217-member Tunisian assembly is elected will require consideration of democratic models for internal leadership that can maintain the emphasis on political, gender, and geographic equality.

Ahead of the constitution's approval, questions remain about the internal leadership and decision-making processes of both the constituent assembly and the Tunisian provisional government. The constituent assembly should answer these questions with an eye to preventing internal inclusion. What follows is a summary of some relevant questions and examples of how other constituent assemblies from around the world have answered them.³

Internal Leadership

How will it structure its internal leadership?

The constituent assembly will have to select an internal leadership team to moderate debates in the assembly, assign members to committees, supervise staff, interact with international assistance organizations, and more. The assembly could elect a speaker, or it could select an executive committee that is broadly representative of demographic and political groups. If party loyalty characterizes the deliberations, the assembly will have to find a way to ensure that smaller parties are not excluded from deliberations. In South Africa, for example, the subcommittee that drafted key articles of the constitution had flexible membership to involve parties with interest in particular issues over others. The South African assembly also required a two-thirds majority for approving articles to prevent the dominant party, Nelson Mandela’s African National Congress (ANC), from dominating deliberations.

How will it vote?

How will the assembly make decisions? It could require different proportions of votes for different kinds of decisions, such as a majority vote for procedural issues but a two-thirds or three-quarters majority for substantive issues regarding the constitution. In Uganda, the 1988 Constituent Assembly Bill required that, without a two-thirds majority, contentious issues should be sent back to the citizens for consultation.⁴ The Tunisian assembly could also approve draft constitutions by consensus, as was the practice in Afghanistan.

Process of Drafting

How will it organize itself to draft the constitution?

Past constituent assemblies have struggled with the question of where to begin in drafting a constitution. Many have selected a relatively small group of representatives to prepare a first draft that the larger assembly and public could then critique. In Afghanistan, President Hamid Karzai appointed a commission of thirty-five politicians and lawyers, including a six-member drafting committee. The committee wrote a first draft that was approved by the full commission. The public had a chance to comment, and the president rewrote large sections before it was passed to the national assembly, which adopted it by consensus.

The South African process was at first hindered by the large number of representatives in the assembly. All political parties acted as equals to work out provisional arrangements for governance and drafting. The resulting drafting assembly included over 400 party representatives and no technical advisors. Little progress was made. In a second attempt, each of the seven parties sent four delegates and two technical advisors to draft the interim constitution, though all decisions were approved by a plenary session comprised of 10 delegates per party. This interim constitution included broad principles that established a framework for the 490-member assembly that would draft the permanent constitution.

The interim constitution guided the debate and allowed deliberations to take place in a less volatile political climate. A proportional 44-member constitutional committee was created to write a first draft. This committee was broken down further into a 20-member subcommittee that was the primary forum for negotiation among political parties on constitutional provisions. Three committees of 30 members each were established on the lines of the interim constitution's principles to review draft articles from the constitutional committee.

The Eritrean constitutional commission had 50 members, broken down into a 10-member executive committee that drafted the constitution. The full commission had to approve drafts by consensus, and a constituent assembly approved the final draft. The assembly also was given full legislative autonomy and was charged with overseeing the transition to the new government. The assembly, however, never disbanded the old constitution and the draft constitution, approved in 1997, has not been enacted.

The constituent assembly of East Timor did not rely on a strong central committee to draft articles. Instead, the 88-member assembly elected a president that appointed a Systemization and Harmonization Committee (SHC), which created four thematic committees tasked with drafting articles related to each committee's theme: fundamental freedoms, duties, defense, and security; state and political power; economic, social, and financial organization; and control of constitutionality, fundamental principles, amendment, transition. The whole assembly approved a first draft by simple majority, followed by a public consultation period and a second draft.

Similarly, in Uganda, where elections were not party-based, caucuses formed in the assembly around key issues, such as nationalism and women's rights. These caucuses, not a central committee, drafted articles related to their interests.

How will the judiciary be involved?

There are three general roles the judiciary could play in the drafting process. The first is that the judiciary remains entirely independent and uninvolved in the process, on the grounds that it will be involved in interpreting the constitution after it is written. The second is direct involvement, such as judicial review of the constitution after it is written. The Tunisian Supreme Court, as the South African constitutional court did in 1996.⁵ The third is somewhere between the two, including consultations with former and current judges, either formally or informally. Involving the judiciary, however, could sacrifice its independence after it is adopted. On the other hand, involving it could help achieve strong buy-in from government leaders, help the assembly think through complex constitutional challenges, strengthen the rule of law in Tunisia by bolstering the capacity of the judiciary, and help protect minority groups.

Will a referendum be required at the end?

Will Tunisians be asked to vote up-or-down on the constitution once it is adopted? Venezuela required a referendum to establish the constituent assembly and to ratify the constitution, but this is not characteristic of constituent assemblies. If a referendum is called for, how much time will be given for voter education and debate after the constitution is drafted before it is voted on? There will be little time if the referendum will be held before the November 2012 deadline for legislative and presidential elections. In Venezuela, the referendum was held two months after the draft constitution was approved, and King Hussein in Morocco this summer provided less than two weeks between his reform proposal and the national referendum.

Operational Capacity***How will it interact with the public?***

The constituent assembly will have to come up with a public communications strategy for interacting with the public. There is already confusion about the work of the assembly. After conducting 12 focus groups across Tunisia, the National Democratic Institute (NDI) reported in July that respondents wanted the assembly to focus largely on creating jobs plus “infrastructure, water, better standards of living, and improved conditions for the poor.”⁶ Most did not mention constitutional reform.

Tunisian protesters have had little patience for what they see as the slow pace of reform. Protests were called when assembly elections were delayed from July to October. Tunisians, especially in the rural districts, have recently decried the lack of government

programs to combat joblessness and poverty. The assembly's current mandate extends one year, but most drafting processes surveyed here took around four years. The assembly will have to work very quickly or else find a way to manage the expectations of the electorate.

The assembly might fail the expectations of some Tunisians even before its first meeting. According to an IFES poll from May, fewer than half of Tunisian adults correctly identified that the upcoming vote will be for a constituent assembly. Nearly a quarter expected to elect a president.⁷ It is difficult to predict how misinformed Tunisians will react when they learn that electing an executive is still a year off, especially when they look to Egypt, which expects to hold its own presidential elections around the same time as Tunisia's assembly elections.

The Tunisian assembly will have to give some thought to outreach campaigns targeting illiterate voters and rural districts with sparse Internet access. According to the 2004 Tunisia census,⁸ 19 percent of the voting-age population is illiterate, 68 percent of whom are female. Illiteracy is higher among older people: 83 percent of Tunisians older than 70 are illiterate, compared with only nine percent of Tunisians between 20 and 29. Geographically, illiterate people tend to live in the interior governorates, where 27 percent of residents are illiterate.

According to an April 2011 national poll from the International Republican Institute, television was the first choice of 69 percent of Tunisians for local news and information. Radio came in second at 33 percent and newspapers third, at 25 percent. Internet placed fourth nationally but first among Tunisians aged 18 to 24 (37 percent) and last among those aged 44 to 54 (six percent).⁹

Other constituent assemblies have worked toward internal inclusion by soliciting consultations from a broad populace. Deliberations in South Africa took place behind closed doors for the first two years, but from 1994 through 1996, the public was broadly consulted. They educated voters through a media and advertising campaign using newspapers, radio and television, billboards, and the sides of buses; an assembly newspaper with a circulation of 160,000; cartoons; a web site; and public meetings. Together these efforts reached an estimated 73 percent of the population. The assembly received 2 million submissions, from individuals and many advocacy groups, professional associations, and other interests.¹⁰

A similar campaign was conducted in Eritrea, where the responsibility of outreach and education fell to the commission. Feedback was gathered primarily through question-and-answer format; the commission formulated a list of general questions about how voters would like to structure their constitution and compiled feedback from public forums.¹¹

Comics and radio addresses reached illiterate voters. Five hundred thousand Eritreans, out of a total population of 4.3 million, participated in the consultation process. The commission had a budget of \$4.3 million for voter outreach.

How will it interact with international assistance organizations?

At least four international organizations with experience in rule-of-law assistance — the United Nations Development Program (UNDP), the European Union, the International Foundation for Electoral Systems, and the American Bar Association — have opened programs in Tunisia and could be available to support the constituent assembly. Will it seek the advice of international organizations, or will it distance itself from these groups as the elections administration has?

The South African assembly had an informal relationship with foreign advisors that included occasional consultations on technical issues with lawyers. Eritrea facilitated a more formal relationship with a 14-member board of lawyers, political scientists, historians, and an anthropologist, chaired by a professor from Yale Law School. In East Timor, the Asia Foundation played the biggest role among international observers. After hours of meetings with assembly members on exactly what their role would be, the Foundation established a nine-person team of experts on particular aspects of law, such as property and international law. The Foundation also ran a seminar on public consultation for the assembly, prepared dozens of option papers, held weekly meetings with members of the assembly, and commented on a draft of the constitution. The new constitution explicitly acknowledged East Timor’s treaty obligations but not customary international law.

Transitional Governance

How will the assembly appoint a new government? How will it hold this new government accountable?

The constituent assembly will be sovereign to appoint a new government, review old laws and pass new ones, and dissolve existing government bodies. The assembly will have to define the role of a provisional government and its relationship with it, particularly by deciding how much responsibility for issues of daily governance it will want to supervise or direct. In South Africa, a committee on government in the assembly oversaw the cabinet, members of which were assigned to parties proportional to the makeup of the assembly.

Will the constituent assembly pass an interim constitution?

How will the assembly outline its own authority and that of the transitional government? If it chooses to write an interim constitution, will the entire assembly be involved in writing it or will that be the responsibility of a committee? In South Africa, representatives of political parties drafted an interim constitution that outlined both a provisional government and principles for the full assembly that guided final deliberations. In Afghanistan, the government operated under the existing constitution, dating to 1890, until a replacement was approved.

CONCLUSIONS

For legitimacy, the process of lawmaking can be as important as the product. The Tunisian constituent assembly, in order to build legitimacy for itself, the constitution it drafts, and next year's legislature, must carefully develop its internal leadership structure to ensure that all political interests are represented in the drafting process. This paper has used cases of recent constitutional drafting processes to outline some key questions that the constituent assembly might consider when formulating its own action plan for the next year's work.

APPENDIX 1: SUGGESTED READINGS FOR POLICYMAKERS

Vivien Hart, “Democratic Constitution Making,” United States Institute of Peace, special report 107 (July 2003), <http://www.usip.org/publications/democratic-constitution-making>.

- This report examines the role of constitution making as part of peacemaking, particularly in divided societies, where the process of participatory constitution making may sometimes provide a forum for reconciling divisions, negotiating conflict, and redressing grievances. The report analyzes recent practices of constitution making across the globe and documents the emergence of international human rights norms that recognize the right to public participation in changing or creating a constitution. The author concludes with a reflection on lessons learned and stresses the importance of process as well as outcome in evaluating the final product.

Charles Cullimore, “Uganda: The Making of a Constitution,” *Journal of Modern African Studies*, 32.4 (December 1994), 707-711.

Angela Banks, “Expanding Participation in Constitution Making: Challenges and Opportunities,” *William & Mary Law Review* 49.4 (2008), 1043–1069, <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2>.

Chris Ansell & Alison Gash, “Collaborative Governance in Theory and Practice,” *Journal of Public Administration Research & Theory* 18 (2007), 543–571, http://wiki.dbast.com/images/8/82/Collaborative_Governance_in_Theory_and_Practice.pdf.

- Over the past few decades, a new form of governance has emerged to replace adversarial and managerial modes of policy making and implementation. Collaborative governance, as it has come to be known, brings public and private stakeholders together in collective forums with public agencies to engage in consensus-oriented decision-making. In this article, the authors conduct a meta-analytical study of the existing literature on collaborative governance with the goal of elaborating a contingency model of collaborative governance. After reviewing 137 cases of collaborative governance across a range of policy sectors, the authors identify critical variables that will influence whether or not this mode of governance will produce successful collaboration. These variables include the prior history of conflict or cooperation, the incentives for stakeholders to participate, power and resources imbalances, leadership, and institutional design. The authors also identify a series of factors that are cru-

cial within the collaborative process itself. These factors include face-to-face dialogue, trust building, and the development of commitment and shared understanding. The authors found that a virtuous cycle of collaboration tends to develop when collaborative forums focus on “small wins” that deepen trust, commitment, and shared understanding. The article concludes with a discussion of the implications of the authors’ contingency model for practitioners and for future research on collaborative governance.

Laurel Miller, ed., *Framing the State in Times of Transition: Case Studies in Constitution Making* (New York: United States Institute of Peace, 2010).

APPENDIX 2: TUNISIA’S TREATY OBLIGATIONS

Tunisia may also be subject to treaties and customary law related to political inclusion that could bear on the constitutional drafting process, including the International Covenant on Civil and Political Rights (ICCPR) and the African (Banjul) Charter on Human and Peoples’ Rights. See appendix for relevant excerpts. Furthermore, in 1991, the United Nations Commission on Human Rights authorized a specific right to participate in constitution making as an undoubted part of public affairs under Optional Protocol I of the ICCPR. Though Tunisia is not a signatory to this treaty, it still could be bound to this obligation through customary international law.

Treaty	Signature	Ratification	Accession	Succession
International Covenant on Economic, Social and Cultural Rights	30-Apr-68	18-Mar-69		
International Covenant on Civil and Political Rights	30-Apr-68	18-Mar-69		
International Convention on the Elimination of All Forms of Racial Discrimination	12-Apr-66	13-Jan-67		
United Nations Convention against Transnational Organized Crime	13-Dec-00	19-Jun-03		
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Preamble, supplementing the United Nations Convention against Transnational Organized Crime	13-Dec-00	14-Jul-03		
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery			15-Jul-66	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	26-Aug-87	23-Sep-88		
Convention on the Rights of the Child	26-Feb-90	30-Jan-92		
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts	22-Apr-02	2-Jan-03		
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour		28-Feb-00		
Freedom of Association and Protection of the Right to Organise Convention		18-Jun-57		
Right to Organise and Collective Bargaining Convention		15-May-57		

Convention concerning Forced or Compulsory Labour		17-Dec-62		
Equal Remuneration Convention		11-Oct-68		
Abolition of Forced Labour Convention		12-Jan-59		
Discrimination (Employment and Occupation) Convention		14-Sep-59		
Employment Policy Convention		17-Feb-66		
Convention against Discrimination in Education		29-Aug-69		
Convention relating to the Status of Refugees				24-Oct-57
Protocol Relating to the Status of Refugees			16-Oct-68	
Convention on the Reduction of Statelessness			12-May-00	
Convention relating to the Status of Stateless Persons			29-Jul-69	
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity			15-Jun-72	
Convention on the Prevention and Punishment of the Crime of Genocide			29-Nov-56	
African (Banjul) Charter on Human and Peoples' Rights	16 Mar 1983			
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	9-Jun-98			
African Charter on the Rights and Welfare of the Child	16-Jun-95			
Convention on the Rights of Persons with Disabilities	13-Dec-06			
Optional Protocol to the Convention on the Rights of Persons with Disabilities	13-Dec-06			

Country	Years	Drafting authority	Appointed commission	Public participation process	Referendum for ratification	Interim arrangement	Judicial review
Afghanistan	2002–2004	Constitutional convention	35-member commission prepared draft modified by the executive	Weak/limited process		Transitional provisions in Bonn Agreement	
East Timor	2001–2002	Constituent assembly, converted to national assembly after adopting constitution	None	Weak/limited process			
Eritrea	1994–1997	National assembly approved and constituent assembly ratified product of commission	Independent 50-member commission	Yes		Self-appointed provisional government and appointed transitional parliament	
South Africa	1993–1997	Constitutional assembly, dual-hatted as ordinary parliament, drafted and adopted final constitution	None	Yes		Political parties negotiated interim constitution	Yes
Uganda	1989–1995	Constituent assembly, with elected and appointed members	Government-controlled commission	Yes, but emphasis on civic education over consultation			
Venezuela	1999	Constituent assembly	None		Yes		

APPENDIX 3: STRUCTURAL ELEMENTS OF DISCUSSED CONSTITUTION-MAKING PROCESSES

Excerpts from International Treaties Relevant to the National Constituent Assembly of Tunisia

International Covenant on Civil and Political Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

African (Banjul) Charter on Human and Peoples' Rights

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 9

1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.

Convention on the Rights of Persons with Disabilities

Article 29: Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
 - i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

ENDNOTES

- 1 See appendix.
- 2 Angela Banks, “Expanding Participation in Constitution Making: Challenges and Opportunities,” *William & Mary Law Review* 49.4 (2008): 1062.
- 3 Models discussed, unless otherwise noted, come from the case studies in Laurel Miller, ed., *Framing the State in Times of Transition: Case Studies in Constitution Making* (New York: United States Institute of Peace, 2010).
- 4 Thomas M. Franck and Arun Thiruvengadam, “Norms of International Law Relating to the Constitution-Making Process,” in Miller, 17.
- 5 Franck and Thiruvengadam, 10.
- 6 Nicole Rowsell and Ian T. Woodward, “Imagining the Road Ahead: Citizen Attitudes about Tunisia and the Constituent Assembly Election Period,” National Endowment for Democracy, July 2011, <<http://www.ndi.org/files/The-Road-Ahead-Tunisia-FG-0711-ENG.pdf>>.
- 7 “Tunisia Voter Registration and Voter Confidence Assessment Survey,” International Foundation for Electoral Systems, 23 May 2011, <<http://www.ifes.org/Content/Publications/Survey/2011/Tunisia-Voter-Registration-and-Voter-Confidence-Assessment-Survey.aspx>>.
- 8 Census data are available from the National Institute of Statistics at <http://www.ins.nat.tn/>.
- 9 “IRI Tunisia Index,” International Republican Institute, 19 May 2011, <<http://touensa.org/wp-content/uploads/2011/03/2011-April-10-IRI-Tunisia-Index-March-5-18-2011.pdf>>.
- 10 Miller, 8.
- 11 Examples of the commission’s questions are on page 66 of Miller.

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The Dubai Initiative is a joint venture between the Dubai School of Government (DSG) and the Harvard Kennedy School (HKS), supporting the establishment of DSG as an academic, research, and outreach institution in public policy, administration, and management for the Middle East. The primary objective of the Initiative is to bridge the expertise and resources of HKS with DSG and enable the exchange of students, scholars, knowledge and resources between the two institutions in the areas of governance, political science, economics, energy, security, gender, and foreign relations related to the Middle East.

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