



DEMOCRACY AND CITIZENSHIP IN NORTH
AFRICA AFTER THE ARAB AWAKENING:
CHALLENGES FOR EU AND US FOREIGN POLICY
(EUSPRING)

May 2014

ARAB CITIZENSHIP REVIEW No.5

TUNISIA

The New Tunisian Constitution and Citizenship Rights

By Ahmed Driss and Fadhel Blibech

Centre for Mediterranean and International Studies

This series of policy briefs provides a regular update of debates concerning key rights issues in three Arab states, Morocco, Egypt and Tunisia. In a first round of briefs on the three countries, we provide background on these debates since the beginning of the Arab spring.

This project is supported by Compagnia di San Paolo



INTRODUCTION

On 26 January 2014, a new constitution was adopted in Tunisia. This is the fourth fundamental law of the country's history. The new constitution represents a compromise negotiated between the Islamist party Ennahda – which has a plurality in the Constituent Assembly - and opposition forces, led by a quartet from civil society.¹ The document enshrines important freedoms, sets up a dual executive, commits to constitutional justice and, without precedent in the Arab world, promises gender parity.

The articles of the constitution were written and debated in committees between 2011 and 2013, and then debated and voted -article by article- at plenary sessions in January 2014. The final text was adopted by the National Constituent Assembly with 200 votes in favour, twelve against and four abstentions. It entered into force on 10 February.

The new constitution contributes to the consolidation of citizenship rights in a number of ways.

A MAJOR ADVANCE FOR RIGHTS AND FREEDOMS

Considered by some as the first tangible result of the revolution,² the 2014 constitution undoubtedly advances Tunisian constitutional rights and freedoms.

Article 2 states that Tunisia's political system will be based on democratic citizenship, the will of the people and the rule of law - not the supremacy of Sharia.

Chapter 2, related to rights and freedoms, confirms freedoms already enshrined in the Constitution of 1959, but adds essential freedoms. Article 6 is key. This declares that the state is the guardian of religion and "what is sacred". It has the duty to guarantee freedom of conscience and belief, and the free exercise of religious practices, as well as the political neutrality of mosques and places of worship; these are not to be used for party political gain. The state undertakes to disseminate the values of moderation and tolerance. This article was adopted despite the opposition of conservative forces such as the radical wing of the Ennahda party and some representatives of small political groups like the Al Omma party and the Tayyar Al Mahabba (former Al Aaridha), which are very active within the assembly and did not want to accept the freedom of conscience. However, under pressure from civil society groups they relented, accepting reference even to the freedom of worship.

The new constitution adds: the prohibition of torture (Article 23); the right to a fair trial (Article 27); the right to information and the right of access to information and communication networks (Article 32); and academic freedom (Article 33).

¹ Composed by the main Labour Union: the UGTT, (who led the quartet), the main Trade Union: the UTICA, the largest association for the Defense of Human Rights: the LTDH, and the National Council of the Order of lawyers.

² Ben Hammouda, H., "La constitution : La première victoire de la révolution !", article by February 16, 2014 at <http://www.leaders.com.tn/article/la-constitution-la-premiere-victoire-de-la-revolution?id=13385>

Some rights, considered second generation of human rights, are now established in the new constitution as citizenship rights including the right to health (Article 38), to education (Article 39) and to culture (Article 42).

Also, the Constitution seems to fit into the pattern of the constitutions established by countries that experienced a democratic transition since the 1990s.³ This may lead to the modernisation of Tunisian law, devoting significant attention to the so-called third generation rights. Indeed, several provisions are devoted to the right to a healthy and balanced environment, the right to sport and the rights of people with disabilities.

Many Tunisians are proud of the fact that their new fundamental text has enshrined gender equality (Article 20) and the obligation to implement the principle of parity in elected assemblies (Article 34). The new constitution underlined the place of women and the freedoms enjoyed since independence, which reflected the specificity of the Tunisian social model in the Arab world. The re-emergence of the old conservative voices after the revolution had caused serious concern about gender equality, which resulted in an unprecedented mobilisation of civil society and feminists. As a result, gender equality has become a shared democratic consensus.

However, while many welcome the affirmation of equality as opposed to the “complementarity” proposed in the first drafts of the constitution, others feel that equality is just smoke and mirrors.⁴ As with all new constitutions, there is a gap between commitments in the text and social reality. Much effort and time will be required to make the equality embodied in the new constitution real and effective. The effective implementation of gender equality will be challenged and will need to be monitored.

It is worth highlighting that Article 49 introduces a qualitative improvement over the 1959 Constitution. It should restrict governments from denying the exercise of rights and freedoms. Any restriction on personal freedoms must now be robustly justified. This article is one of the most important provisions of the new constitutional order.⁵

WEAKNESSES IN THE NEW CONSTITUTION

Advances at the level of rights and freedoms, including the rights of citizenship and the consolidation of citizen participation, must not overshadow the limitations and shortcomings of this text.

The right to freedom of economic initiative was not included in the constitution, even though the entire political class believes that domestic and foreign investment is one of the sources boosting the economy, and therefore job creation and regional development. The timidity of the Assembly during the vote on this amendment is disappointing especially in light of fact that the principle of

³Huntington, S. P., *Troisième vague, Les démocratisations de la fin du XX^e siècle*, Manille (Philippines) : Nouveaux Horizons, 1996 ; Salcedo, C., *La transition démocratique sud-africaine*, Paris : Fondation Varenne, 2011.

⁴ Charfi, S., Interview for the daily Arabic newspaper *Akher Khabar*, January 20, 2014.

⁵ Article 49 “The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only to be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations.

There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.

freedom of trade and industry is one of the fundamental principles enshrined in the Pact of 1857 and the constitutions of 1861 and 1959.

Some also regret that the new constitution is ambivalent on the rights and freedoms of foreigners, and of ethnic and religious or linguistic minorities in Tunisia.

Civil society supported the “The Tunisian Pact for the rights and freedoms”⁶ and was disappointed by the lack of reference to this document in the preamble of the new constitution. Such a reference would have given this statement a strong symbolic value and an indirect legal value in the defence of citizenship rights.

Tunisians welcomed the negotiations that led to compromises around several points of contention. However, the compromises have generated ambiguities. Indeed, the drafting of the 2014 constitution was often made in a context of tension or of great political and ideological divergence. This resulted in some semantic and grammatical choices that may lead to formulas that are unclear.

There remain unresolved tensions between stipulations on the freedom of conscience and non-infringement of the sacred. Following the reference to universal human rights in the preamble, the word "supreme" is used, implying that some rights might be given primacy over others.⁷ Also problematic is the fact that the document affirms that the right to life is sacred but then gives a possibility to limit it (Article 22). It is ambiguous then, whether the right to life is to be considered “supreme” or “inalienable”.⁸

The ambiguity is even more noticeable with regard to rights other than citizenship rights. Matters of personal status, intimate and family relationships between the sexes have been regulated in a civil code strongly influenced by *fiqh* of the Maliki Sunni school of law, a human interpretation of Sharia. While personal status should be immutable, equality in personal relationships has not been expressly enshrined in the constitution. Those opposing reform of the Personal Status Code to eliminate the remaining pockets of inequality (such as the role of the man as the head of the family, paternal authority, or the inequality for inheritance) use the provisions of the preamble proclaiming the attachment of the Tunisian people to the teachings of Islam, characterized by its “openness and tolerance” and to the first article of the constitution which states that Islam is the religion of the state. Reference is also made to Article 7, which commits the state to “protect the family and to preserve it”, and to all the other provisions of the preamble and of the constitution that encourage the preservation of the Arab and Muslim identity (Article 39) or prohibit any undermining of religion (Article 6). Since personal status is sacred, and since the family is the basic unit of society, some would argue that the traditional model is the only guarantee of Arab and Muslim identity.

These examples and many others show how the imprecisions in this text, which have been maintained despite warnings from experts, give the constitution elements of uncertainty and ambiguity. While legal texts often carry multiple interpretative possibilities, in a text of this importance, the areas of clarity ought to outweigh the ambiguities.

⁶ Prepared by the Arab Institute for Human rights, <http://www.fidh.org/en/north-africa-middle-east/tunisia/the-tunisian-pact-on-rights-and-liberties-13237>

⁷ Paragraph 2 of the Preamble: “Expressing our people’s commitment to the teachings of Islam, to their spirit of openness and tolerance, to human values and the highest principles of universal human rights, inspired by the heritage of our civilisation, accumulated over the travails of our history, from our enlightened reformist movements that are based on the foundations of our Islamic-Arab identity and on the acquisitions of human civilisation, and adhering to the national gains achieved by our people.”

⁸ Article 22: “The right to life is sacred and cannot be prejudiced except in exceptional cases regulated by law.”

Many Human Rights activists accuse the "post-revolutionary" constituent assembly for not having, due to a lack of majority in the NCA, dared to cross the final remaining step to ban the death penalty in Tunisia.

This said the new constitution is, despite many limitations, an undeniable step forward in terms of freedom, decentralisation, the balance of powers, checks and balances, constitutional justice, and gender equality.

It is important that the constitution, and the process which led to the agreement on the text, also enabled the Tunisian civil society to play a significant and productive role.

The constitution's real impact will depend on the responsibility of the political class, citizen mobilisation and authorities in charge of its interpretation. Those authorities, in addition to the administration, ordinary and constitutional courts, will have the necessary and difficult task of giving meaning to the text, clarifying ambiguities and of determining the latent arbitrations.

The creation of the Constitutional Court, unanimously accepted in the assembly, was an important political step which will be crucial for the implementation of the Constitutional provisions. Despite the controversy generated by the discussion on the powers and composition of the Constitutional Court, all political groups strongly defended its creation and managed to reach a consensus which bodes well for the Court's future ability to ensure respect of the Constitution. The priority now is to establish the provisional committee for the control of constitutionality⁹ in order to navigate the many laws which may be in conflict with the new constitution.

All withstanding, even the best constitutions may be amended, misapplied or even transgressed.¹⁰ 27 January 2014 was a starting point for the new Constitution of Tunisia. In fact, a long process is just beginning.

⁹ § 7, Article 148.

¹⁰ Ben Yahmed, B., "Constitution tunisienne: Le verre est à moitié plein", *Jeune Afrique*, n°2769 of February 2 - 8, 2014.