

Constitution Making After Jasmine Revolution: The Case of Tunisia

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Abstract

Since the fall of the Ben Ali Regime on 14 January 2011, Tunisia has been going through an important process of political transformation. The Tunisians made their choice on constitution making in favour of electing a National Constituent Assembly instead of holding a new parliamentary election after the Jasmine Revolution. This preference was primarily based on the difficulty of respecting the relevant constitutional arrangements of the 1959 Constitution in face of the Tunisia's political situation and the Tunisian people's will to exercise his full sovereignty within the framework of a new Post-Jasmine Revolution Tunisian Constitution. Tunisia overcame its first big democratic challenge with the succesful National Constituent Assembly Election. Nevertheless the post-election process is as important as the election process in the democratic constitution-making. Therefore the constitution-making process of the new Post-Jasmine Revolution Constitution should be inclusive, participatory and transparent.

Keywords: Constitution making, Tunisia, National Constituent Assembly

Özet

14 Ocak 2011'de Bin Ali Rejimi'nin devrilmesinden itibaren Tunus, önemli bir siyasi dönüşüm süreci içerisindedir. Yasemin Devrimi sonrasında Tunus, yeni bir parlamento seçimi yapmak yerine, öncelikle Ulusal Kurucu Meclis seçimini gerçekleştirmeyi tercih etmiştir. Yasemin Devrimi sonrası mevcut siyasi koşulları içerisinde 1959 Tunus Anayasası'nda yer alan düzenlemeleri uygulamadaki güçlükler ve de Tunusluların yeni, demokratik bir anayasaya ka-

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vuşma arzusu bu tercihte etkili olmuştur. Ulusal Kurucu Meclis seçimi demokratik bir ortamda gerçekleşmiştir. Bununla birlikte demokratik bir anayasa yapım süreci için yeni anayasayı hazırlayacak organın seçimi kadar seçim sonrası sürecin de demokratik olması önemlidir. Bu nedenle yeni Tunus Anayasası'nın yapım süreci kapsayıcı, katılımcı ve şeffaf olmalıdır.

Anahtar Kelimeler: Anayasa yapımı, Tunus, Ulusal Kurucu Meclis

INTRODUCTION

On 17 December 2010, Mohammed Bouazzizi -a 26 years old fruit-vegetable street vendor in Sidi Bouzid- set himself on fire as a protest after being subject to inhuman, degrading treatment by the police. Although he was graduated from university, he was unemployed and could only earn his living by fruits, vegetables including jasmines. On that day, the police confiscated his goods because he did not have the required licence nor did he bribe the police controlling him. After being mistreated by the police, he tried to get his goods back but couldn't succeed. He burned himself to death in front of the municipal office as a reaction to the injustice. His self-immolation became the igniter of "the Tunisian Jasmine Revolution" by sparking off popular anti-government protests against Ben Ali regime, firstly in Sidi Bouzid and then in the whole country.

In less than one month, after several weeks of mass anti-government demonstrations, Ben Ali fled Tunisia on 14 January 2011. Since the fall of Ben Ali regime, Tunisia has been going through an important process of political transformation. As a country aiming to transit from an autocratic regime to a democratic one, a democratic constitutional making process is vital for the new, Post-Jasmine Revolution Constitution which will organize the political power and secure fundamental rights and freedoms. In this context, firstly, in this article, we will try to analyse the Tunisian choice of drafting the new constitution by the National Constituent Assembly and then to explain the necessity of a democratic constitutional making process for the new Tunisian constitution.

I. TUNISIA'S CHOICE: DRAFTING THE NEW TUNISIAN CONSTITUTION BY THE NATIONAL CONSTITUENT ASSEMBLY

The period between the fall of Ben Ali regime on 14 January 2011 and the election of the National Constitution Assembly on 23 October 2011 had been the initial/preparatory phase of the Tunisian transformation process from authoritarianism to democracy. Both the socio-political developments realized during this transition process and the impossibility of setting/making the new legal arrangements for the new democratic regime under the existing legal framework of the 1959 Tunisian Constitution made the Tunisian choice of draft-

ing the new constitution by the National Constituent Assembly obligatory.

After the fled of Ben Ali from the country on 14 January, primarily the supporters of the old regime wanted to find a solution to the ongoing crisis within the framework of the 1959 Constitution. The Article 56 of the Tunisian Constitution was considered as a way to come out the crisis while maintaining the previous political regime by the old political elites which could not comprehend the importance of the Revolution process.¹

The Article 56 of the 1959 Constitution, which is related to the temporary vacancy of the Presidency of Republic, reads:

“In case of temporary disability, the President of the Republic may delegate his powers by decree to the Prime Minister, with the exclusion of the power to dissolve the Chamber of Deputies. During the temporary disability of the President of the Republic, the Government, even if it is the object of a motion of censure, shall remain in office until the end of this disability. The President of the Republic shall inform the President of the Chamber of Deputies and the President of the Chamber of Councilors of the provisional delegation of his powers.”

In his address on state television, Prime Minister Mohammed Ghannouchi declared that on the basis of the article 56 of the Tunisian Constitution, he had taken over as the interim president. Therefore he interpreted the fled of Ben Ali from the country as a case of temporary vacancy of the presidency.² Interestingly, until now, there is no trace of the decree of 14 January 2011 by which Ben Ali delegated his powers as the President to the Prime Minister Ghannouchi³.

Although the prime minister declared himself as the interim president of the Republic on 15 January, he withdrew from this post because of the decision of the Tunisian Constitutional Council. The Constitutional Council declared that the depart (absence) of the President of the Republic from the Tunisian territory in the circumstances of crisis (circonstances de crise) -without delegating his powers or presenting his resignation- were assimilated to a case of permanent

¹ Ben Mrad, H., “La problématique constitutionnelle de la transition”, (çevrimiçi) [http://observatoire-tunisien.org/upload/file/BenMradCORR\(1\).pdf](http://observatoire-tunisien.org/upload/file/BenMradCORR(1).pdf), s.4., 9 Eylül 2012.

² During this period, some circles feared that Ghannouchi's statement was an act of evasion of the constitution, merely to serve Ben Ali's interests; the others argued that Ghannouchi said he was temporarily president because he was not sure if Ben Ali had fled, or he thought Ben Ali could resume his post. *DAWN.COM*, Tunisia constitutional council sees vote in 60 days, 15 January 2011, (çevrimiçi) <http://www.dawn.com/2011/01/15/tunisia-legal-body-says-speaker-is-interim-president.html>; *ALJAZEERA*, Constitutional Debate, 14 January 2011, (çevrimiçi) <http://www.aljazeera.com/news/africa/2011/01/2011114204942484776.html>, 7 Mart 2012.

³ Ben Mrad, op.cit., s.5.

disability⁴ which is one of the three conditions of the permanent vacation of presidency according to article 57 of the Tunisian Constitution.

The article 57 provides that: “In case the Presidency of the Republic becomes vacant on account of death, resignation, or permanent disability, the Constitutional Council shall meet immediately and pronounce the permanent vacancy by absolute majority of its members. It shall address a declaration to this effect to the President of the Chamber of Councilors and the President of the Chamber of Deputies, who shall be invested immediately with the functions of Interim President of the Republic for a period of at least 45 days and at most 60 days. If the permanent vacancy coincides with the dissolution of the Chamber of Deputies, the President of the Chamber of Councilors shall be invested with the functions of Interim President of the Republic for the same period...”

The Constitutional Council vested Fouad Mebazza as the President of Chamber of Deputies with the functions of the interim president until the presidential elections were held at most in two months⁵. The first interim government was established on 17 January and headed by Mohammed Ghannouchi who was reappointed by Mebazza as the prime minister even though he was prime minister under Ben Ali Regime since 1999⁶.

As stated by Ginsburg, the political developments realized in Tunisia until the establishment of the first interim government seemed to be an interesting example of constitutional compliance under a collapsing authoritarian regime because it looked as if the provisions of the 1959 Constitution were being followed⁷.

On 17 January, the interim government mandated the Higher Political Reform Commission to reform the electoral system for the election of the President of Republic according to article 57 of the Constitution⁸. It was also known as the Ben Achour Commission because it was led by Prof. Dr. Yadh Ben Achour, an eminent legal scholar of public law. This commission was later institutionalized and transformed into a committee called “the High Commission for the Fulfilment of Revolutionary Goals, Political Reforms and Democratic Transition” under the second interim government.

⁴ Ibid., s.8.

⁵ *Jurist*, Tunisian Constitutional Council announces interim president, new elections, 15 January 2011, (çevrimiçi) <http://jurist.org/paperchase/2011/01/tunisia-constitutional-council-announces-interim-president-new-elections.php>, 9 Mart 2012.

⁶ Mohammed Ghannouchi was also Minister of Finance from 1989 to 1992 and Minister of International Cooperation from 1992 to 1999 under Ben Ali regime.

⁷ *Ginsburg*, T., Tunisia and Constitutional Transition, (çevrimiçi) <http://www.comparativeconstitutions.org/2011/01/tunisia-and-constitutional-transition.html>, 24 Mart 2012.

⁸ *Nouira*, A., “Tunisia: Elections...and then what?” Arab Reform Brief 54, 15 January 2012, s.1.

The first interim government was dissolved just after ten days since its establishment, because of the popular demonstrations against it. Although the government was composed of some ministers from former opposition parties, it was largely composed of members linked to the previous regime. However the demonstrators demanded a complete break with the past and the removal all officials associated with the old regime. As a consequence of the demonstrations, the second interim government was established on 28 January but it was again headed by Ghannouchi who was also the prime minister under Ben Ali Regime.

On 7 February 2011, the Chamber of Deputies, the lower house of the Tunisian Parliament, passed a bill which authorized the Interim President to legislate by decree. The bill was approved by the Chamber of Councilors/Advisors, the upper house of the Tunisian Parliament, two days later. The Tunisian Parliament, authorized the delegation of the powers of the Tunisian Parliament to the interim president by the law no.5 of 9 February 2011 on the basis of the article 28 of the 1959 Constitution.

The article 57 of the Tunisian Constitution provides that: "...The Chamber of Deputies and the Chamber of Councilors may authorize the President of the Republic to issue within a fixed time limit and for a specific purpose decrees-laws which he shall submit, depending on the case, to the approval of the Chamber of Deputies or of both Houses upon expiration of the time limit..."

The law no 5 consists of a large list of competences, which is not exhaustive and doesn't exclude the issues concerning the justice, on the basis of which the interim president may legislate⁹. According to Ben Achour, the collapse of the legitimacy of the political institutions which were established under the former 1959 Constitution is crystallized in this decision of the delegation of powers which resembles to a "political harakiri".¹⁰ These institutions had signed their declaration of death by accepting this delegation of powers.

Although the main reason of the establishment of the second interim government was the popular demonstrations against the first one because of its composition, the second interim government didn't also succeed to have a positive, reliable image on the eyes of Tunisian people.¹¹ When compared with the

⁹ *Democracy Reporting International*, La Transition Entre Dans Une Nouvelle Phase Menant A L'Election D'Une Assemblée Constituante, Briefing Paper No.10, 17 March 2011, s.2.

¹⁰ He made this reference in his presentation on democratic transition in Tunisia in the Conference "The Constitutional Processes in the Mediterranean Basin" at Marmara University which was organized by the Association of Constitutional Law Research in Turkey, the French Association of Constitutional Law and the Tunisian Association of Constitutional Law in İstanbul on 27 April 2012.

¹¹ *Ulutaş, U., Torlak, F.*, Devrimden Demokrasiye Tunus'un Seçimi, SETA Analiz, Sayı:46, Kasım 2011, s. 7.

first interim government, some positive changes were made especially in the composition of the government like the inclusion of civil society representatives. However some members linked with the former regime still remained in the cabinet despite the lack of the presence of the members of the banned parties under Ben Ali regime and the new political forces. The hesitant and unclear approach of the second interim government on distancing totally itself from the old regime and the adoption of some policy measures which were not enough to break clearly with the past were largely deemed inadequate, cosmetic changes on the part of Tunisians¹².

The second interim government should have persuaded the public of its will and capacity to engage in the most urgent reforms to respond to the pressing demands of Tunisians for radical change by adopting a clear, definite, publicized roadmap of reforms and deadlines for elections¹³. However it failed to elaborate such a plan including the announcement of elections and this situation made the legitimacy of the government to be questioned by the public and led up to mass anti-government protests.¹⁴

The second interim government was accused of not involving opposition groups that had led the Jasmine Revolution in the Tunisian transition process by the protesters and they not only demanded the resignation of the prime minister but also the election of a National Constituent Assembly which would have the power to elaborate the new Tunisian Constitution.¹⁵ After a demonstration of 100.000 people in Tunis, Prime minister Ghannouchi resigned from his post on 27 February.

On 3 March, the interim president Mebazza declared that the 1959 Constitution, no longer reflected the aspirations of the people after the revolution and was an obstacle to transparent elections and announced the election of a Constituent Assembly that would rewrite the Constitution and chart the country's transition to democracy to be held on 24 July¹⁶. According to Mebazza, since

¹² *Paciello, M.C*, "Tunisia: Changes and Challenges of Political Transition", MEDPRO Technical Report No.3, May 2011, s. 10.

¹³ *Cassarino, J-P*, "Confidence-buildig in Tunisia after the Popular Uprising: Strategies and Dilemmas of the Interim Government", IAI Working Papers 1104, Instituto Affari Internazionali, February 2011, s.4.

¹⁴ *Paciello, op.cit.*, s.11.

¹⁵ *Afrol News*, Tunisia PM Ghannouchi Resigns, 27 February, (çevrimiçi) <http://www.afrol.com/articles/37455>, 25 Mayıs 2012; *Le Point*, Manifestation contre le gouvernement de transition, 20 Fevrier 2011, (çevrimiçi) http://www.lepoint.fr/monde/tunisie-manifestation-contre-le-gouvernement-de-transition-20-02-2011-1297533_24.php, 25 Mayıs 2012; *Le Monde*, Deux nouvelles démissions au sein du gouvernement tunisien, 28/02/2011, (çevrimiçi) http://www.lemonde.fr/afrique/article/2011/02/28/nouvelle-demission-au-sein-du-gouvernement-tunisien_1486336_3212.html, 25 Mayıs 2012.

¹⁶ *BBC News*, Tunisia president Fouad Mebazza calls election, 3 March 2011, (çevrimiçi)

the constitution no longer had any credibility, he would stay in office beyond the limit which was foreseen in the Constitution for the interim president and he stated that the president and a new transitional government to be formed by new interim Prime Minister Beji Caid Essebsi would create a "public authority" that would cease functioning when the Constituent Assembly was elected¹⁷.

The composition of the third interim government headed by Essebsi remained the same except the five newly appointed ministers but it was wholly formed of members who hadn't served as ministers under the last government of Ben Ali.¹⁸ On 23 March, the interim president promulgated the Decree-law n° 2011-14 relating to the Provisional Organisations of Public Authorities. The Decree-law n° 2011-14 regulated provisionally the functions of the legislative, executive and, judiciary powers until a National Constituent Assembly was elected. The Parliament (The Chamber of Deputies and The Chamber of Advisors), The Economic and Social Council and the Constitutional Council were dissolved under article 2 of the decree-law.¹⁹

Concerning the legislative power, according to the decree-law the legislative texts should be enacted in form of decree-laws and the Interim President should enact the decrees-laws after the deliberation in the council of Ministers.²⁰ Under article 6 of the decree-law, the executive power would be exercised by the Interim President assisted by a provisional government run by a Prime Minister. The Interim President would remain on duty until the establishment of the national constituent assembly and he might not present his candidacy neither to the national constituent assembly nor to any other election following the promulgation of the new constitution.²¹ The Prime Minister and the other members of the provisional government might also not submit their candidacy to the national constituent assembly²². Under article 18 of the decree-law n° 2011-14, the decree-law would cease to be applicable as soon as a national constituent assembly took its functions and fixed another organization of the public authorities.

Since the fall of Ben Ali regime, the political transition in Tunisia generally appeared to continue within the framework of the 1959 Constitution until the promulgation of the decree-law n° 2011-14 in which it was clearly declared that because of the situation in Tunisia, the full implementation of the provisions

<http://www.bbc.co.uk/news/world-middle-east-12642942>, 21 Nisan 2012.

¹⁷ ALJAZEERA, Tunisia to elect constituent team, 4 March 2011, (çevrimiçi)

<http://www.aljazeera.com/news/africa/2011/03/20113405133628865.html>, 20 Nisan 2012.

¹⁸ *Jeune Afrique*, Tunisie: Essebsi forme son gouvernement provisoire, 07/03/2011, (çevrimiçi)

<http://www.jeuneafrique.com/Article/ARTJAWEB20110307170427/>, 24 Mayıs 2012.

¹⁹ Article 2.

²⁰ Article 4.

²¹ Articles 8 and 11.

²² Article 15.

of the 1959 Constitution had become impossible.

Fouad Mebazza and the third interim government decided to announce the election of a National Constituent Assembly instead of a new parliamentary election or a presidential election, primarily because of two main reasons. The first one was concerned with the difficulty of continuing to respect the relevant constitutional arrangements of the 1959 Constitution in face of the Tunisia's political situation²³. The provisions of the constitution concerning the competencies of the interim president, the presidential and the parliamentary elections made it too difficult, nearly impossible to find a solution to the ongoing crisis within the current legal framework of the 1959 Constitution.

According to article 57 of the Constitution, in contrast to the competencies of the President, the interim president is not vested with the same full rights of an elected president. It does not have the power to dissolve the Chamber of Deputies or to resort a referendum. During the interim presidency, no amendment of the constitution is also admissible²⁴.

Holding new parliamentary elections was not possible under the current framework of the 1959 Constitution since it prohibits the dissolution of the parliament by the interim president. According to the seventh paragraph of article 57, only the new president may dissolve the Chamber of Deputies and organize early legislative elections. And article 63 of the Constitution stipulates that the decree dissolving the Chamber of Deputies must convene the voters to new (parliamentary) elections within a maximum period of thirty days. Therefore it's only after the election of the new president, the new parliamentary elections could be called²⁵. If the elected president decides to dissolve the Chamber of Deputies in conformity with the provisions of Article 63, the early legislative elections must be realized within one month²⁶.

Consequently, firstly, the presidential election gained importance in the Tunisian transition process instead of the parliamentary election due to the relevant provisions of the Constitution. However the timing of the presidential election

²³ *Democracy Reporting International*, Overcoming Obstacles to Democratic Elections in Tunisia: A Preliminary Analysis of Constitutional Provisions, Briefing Paper No.8, January 2011, s.1.

²⁴ According to article 76 of the Constitution, the initiative for the amendment of the Constitution shall belong to the (elected) President of the Republic or to at least one-third of the members of the Chamber of Deputies, subject to the reservation that it does not affect the republican form of the State. The President of the Republic may submit the draft constitutional amendments to a referendum.

²⁵ *Democracy Reporting International*, Overcoming Obstacles...,op.cit.,s.3.

²⁶ The first paragraph of Article 63 states that "If the Chamber of Deputies has adopted a second motion of censure with a two-thirds majority during the same legislature, the President of the Republic may either accept the resignation of the Government or dissolve the Chamber of Deputies".

stipulated in the Constitution also seemed problematic for the Tunisian transition process because it left insufficient time to improve the relevant legislation, i.e. preparing a new democratic Electoral Code, for the presidential elections²⁷. According to Article 57 of the Constitution, the interim president assumes the interim presidency for a period of at least 45 days and at most 60 days. Therefore, within the constitutionally-mandated timeframe, the presidential election should have been realized until 16 March 2011 which covered a short period that was not enough to prepare the relevant legislation essential for a democratic presidential election.

Moreover even if it was legally possible to revise the Constitution after the presidential election according to the article 76 of the 1959 Constitution, the Tunisian people didn't prefer this option as it was demonstrated clearly in the manifestations. It was not sufficient for the Tunisians to accept limited constitutional review of the 1959 Constitution, which only covered some amendments to some articles of the Constitution. Like it was declared in the decree-law n° 2011-14, the Tunisian people had expressed during the Jasmine revolution his will to exercise his full sovereignty within the framework of a new constitution.

As a consequence of the Jasmine Revolution which is "a turning point in the collective memory of all Tunisians"²⁸, Tunisia should adopt an entirely new Constitution which will reflect the fundamental/dominant values of the Revolution like the protection of human dignity and guarantee the protection and promotion of human rights. When we consider the starting point of the Jasmine Revolution, it's certain that not only civil and political rights but also the social and economic rights should be involved and secured in this Constitution.

In addition if the presidential and parliamentary elections were realized prior to the drafting of the new constitution, this might have simply turned over the machinery of authoritarianism to a new set of actors.²⁹ Some argue that even if the presidential election was realized prior to reforms, in such a scenario there was a risk that as the only legitimately elected person in the country, the new president could turn into the next dictator.³⁰

The 1959 Constitution established a highly presidential system by which the balance of power was lost and as stated by Gluck, it greatly privileged the former ruling party at the expense of the opposition, making free and fairly elec-

²⁷ *Democracy Reporting International*, Overcoming Obstacles...,op.cit.

²⁸ *Today's Zaman*, Tunisia's Ben Achour: Salafi might cause chaos, 6 May 2012, (çevrimiçi) http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=279497, 7 Mayıs 2012.

²⁹ Gluck, Jason, "Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia", United States Institute of Peace, PEACEBRIEF 92, 29 April 2011, s.1.

³⁰ Meyer-Resende, M., O'Grady, P., "What's Next for Tunisia?", The New York Times, 26 January 2011.

tions simply impossible under the current framework.³¹ By introducing the idea of holding election for an assembly charged with writing a new constitution which was popular among members of the protest movement, the third interim government thus preferred to choose a new political system prior to holding presidential and parliamentary elections³².

The new Tunisian Constitution which will replace the 1958 Constitution will be the fundamental consensus document for the new legal order of the post Jasmine Revolution period. Therefore, because of its high importance, the Tunisians prioritised its drafting over early elections and favored its drafting by a National Constituent Assembly whose main task is to elaborate the new constitution³³.

II. THE NECESSITY OF DEMOCRATIC CONSTITUTION MAKING PROCESS FOR THE NEW TUNISIAN CONSTITUTION

The High Commission for the Fulfilment of Revolutionary Goals, Political Reforms and Democratic Transition”, commonly referred as The Ben Achour Commission which was institutionalized by decree 06-2011 of 18 February 2011 had a broad mandate like drafting the necessary laws, e.g. the electoral law, law on political parties for the transition period. But although it had a broad mandate, its first priority was to set up the framework for the election of a Constituent Assembly.³⁴

After the resignation of Ghannouchi, the Commission which was composed of a technical commission and a political committee expanded its mandate to include responsibilities of transitional governance beyond just political reform.³⁵ Its legitimacy was largely criticized because of the absence of the members of youth, women and some political parties.³⁶ As a result, the enlargement

³¹ According to Weitzman, the intention was presumably to establish a parliamentary democracy with clear limitations on presidential powers. *Maddy-Weitzman*, B., Tunisia’s Morning After Middle Eastern Upheavals, Middle East Quarterly, Summer 2011, s.13; *Mihalakas*, N., “The benefits of a Constituent Assembly for Tunisia and the Arab Spring”, Federalism Project, 30 September 2011, (çevrimiçi) <http://mihalakas.wordpress.com/2011/09/30/the-benefits-of-a-constituent-assembly-for-tunisia-and-the-arab-spring/>, 19 Mayıs 2012; *Gluck*, op. cit., ss.2-3.

³² *Arieff*, A., Political Transition in Tunisia, Congressional Research Service, 16 December 2011, s.1.

³³ *Kausch*, K., Constitutional Reform in Young Arab Democracies, FRIDE Policy Brief, No.101, October 2011, s.2.

³⁴ *Democracy Reporting International*, La Transition Entre Dans Une Nouvelle Phase...,op.cit.,s.3; This commission was initially composed of 71 members but then the number of members increased to 145.

³⁵ *Pickard*, D., “Challenges to legitimate governance in post-revolution Tunisia”, The Journal of North African Studies, Vol.16., No.4, December 2011, s.638.

³⁶ *Magharebia*, “Le Processus de réforme en Tunisie entravé par des différends”, 22/03/2011, (çevrimiçi) <http://magharebia.com/cocoon/awi/xhtml1/fr/features/awi/features/2011/03/22/feature-02>, 8 Haziran 2012.

of its composition was approved by Prime Minister Essebsi on 5 April and the number of the members of the political committee was increased from 71 to 155 in such a manner as to strengthen the representation of political parties, youth, women, regions, national figures and civil society representatives like the Tunisian General Labour Union, the National Order of Lawyers, General Union of Tunisian Students, The Tunisian Union of Unemployed University Graduates.³⁷

Until the election of the National Constituent Assembly, several decrees and decree-laws which provide the legal framework for the elections in Tunisia were firstly drafted by the Ben Achour Commission and took effect upon the signature of the interim president.³⁸ An Independent High Authority for the Elections (ISIE) was established to manage the election of the National Constituent Assembly. The Election Law which was promulgated in May 2011 but later modified, laid out a one-round election system based on proportional representation with a parity reservation for women on candidate lists. The members of Rassemblement Constitutionnel Democratique (RCD) who had served under the governments of Ben Ali, the senior members of RCD and anyone who had signed petitions that Ben Ali run for the 2014 presidential election were excluded to become candidates for the National Constituent Assembly Election.³⁹

Despite some high-tensioned discussions on the postponement of the election date among the ISIE, the Ben Achour Commission and the Cabinet, the prime minister accepted the National Constituent Assembly Election to be held on 23 October because of some technical difficulties with the voter registration process as advanced by the ISIE. The election calendar was published by the ISIE on 11 July.⁴⁰

According to the official results announced by the ISIE on 14 November, 17 parties obtained 217 seats, 32 independent lists received 34 seats and a coalition, PDM won 5 seats in the National Constituent Assembly⁴¹. Among the political parties, Ennahda received 89 seats, the Congress for the Republic 29 seats, the Ettakatol 20 seats, the Progressive Democratic Party 16 seats and Al-Moubadara 5 seats; among the independent lists, Al Arihda won 26 seats in the 217-member National Constituent Assembly.⁴²

³⁷ *La Presse de Tunisie*, Composition de la Haute Instance, 8/04/2011, (çevrimiçi) <http://www.lapresse.tn/08042011/26510/composition-de-la-haute-instance.html>, 10 Haziran 2012.

³⁸ *IFES FAQ*, Elections in Tunisia: The 2011 Constituent Assembly, 13 July 2011, s.2.

³⁹ *Journal Officiel de la Republique Tunisienne*, 154eme Annee, No.3, 10 May 2011, p.653, Art.15.

⁴⁰ *IFES*, op.cit., s.3

⁴¹ *Leaders*, L'ISIE proclame les resultats definitifs and recommande sa perennisation, 14/11/2011, <http://www.leaders.com.tn/article/l-isie-proclame-les-resultats-definitifs-et-recommande-saperennisation?id=6927>, 10 Haziran 2012.

⁴² For the composition of the National Constituent Assembly: *IFES*, National Constituent Assem-

On 22 November, Mustapha Ben Jaafar, the President of the Progressive Democratic Party was chosen as the President of the Assembly in the first session of the National Constituent Assembly. Moncef Marzouki, the President of the Congress for the Republic, was elected as the President of Republic on 12 December who appointed Hamadi Jebali, the General Secretary of Ennahda, as the prime minister two days later. Consequently, the top three state posts were shared among these three political parties according to a coalition agreement signed by them on 21 November.⁴³

The National Constituent Assembly (NCA) adopted a legislation, “the Law n° 2011-6 of 16 Decembre on the Interim Organisation of Public Powers” according to which the public authorities should be provisionally organized during the interim stage until the adoption of the new Tunisian Constitution.⁴⁴ The 1959 Constitution which was suspended before, ceased to be applicable from the date of the promulgation of this law. At the same time, the decree-law n°2011-14 relating to the provisional organisations of public authorities ceased to be applicable.⁴⁵ As it is stipulated in the second article of the law, The NCA has a dual role of constitutional convention and interim legislation. It must principally elaborate the new Tunisian Constitution but also exercise the legislative power and control the action of Government.

The National Constituent Assembly Election, the first democratic election in Tunisia since its independence, may be generally considered as a good example of democratic elections for the countries transitioning from authoritarianism to democracy. International election observers from the Organization for Security and Co-operation stated that as genuinely free and fair elections, the elections laid a first solid corner stone for future democratic institution-building and they did not witness any widespread or systematic irregularities despite some problems.⁴⁶ For the observers, the elections demonstrated the will of the Tunisian

bly Election Results Announced in Tunisia, 21 November 2011, (çevrimiçi) <http://www.ifes.org/Content/Publications/News-in-Brief/2011/Nov/National-Constituent-Assembly-Election-Results-Announced-in-Tunisia.aspx>, 5 Haziran 2012.

⁴³ *BusinessLive*, Tunisian Parties Seal Coalition Deal, Share Top Jobs, 22 November 2011, (çevrimiçi) <http://www.businesslive.co.za/africa/2011/11/22/tunisian-parties-seal-coalition-deal-share-top-jobs>, 6 Haziran 2012.

⁴⁴ *Democracy Reporting International*, Traduction non-officielle de la Loi constituante n° 2011-6 du 16 décembre 2011 relative a l’organisation provisoire des pouvoirs publics, 16 décembre 2011, (çevrimiçi)

[http://www.mpil.de/shared/data/pdf/l_20116_organisation_provisoire_des_pouvoirs_publics_fr_dr_i\(2\).pdf](http://www.mpil.de/shared/data/pdf/l_20116_organisation_provisoire_des_pouvoirs_publics_fr_dr_i(2).pdf), 1 Haziran 2012.

⁴⁵ Article 27.

⁴⁶ Observers did cite restrictive policies on public advertising, the exclusion of followers of the authoritarian regime from the elections, and an imperfect voter registration system as issues in need of addressing to comply with Tunisia’s international obligations under the ICCPR as well as national legislation. OSCE, Parliamentary observers applaud Tunisian elections: vote shows coun-

people to send out a clear and promising signal that the country is on its way to guaranteeing freedom, human rights, and a democratic rule based on good governance and controlled by an independent judiciary.⁴⁷ According to the Ad Hoc Committee of the Parliamentary Assembly of the Council of Europe, The Tunisians, for the first time had freely elected their NCA, laying the foundations of democracy and thus transformed the revolutionary dynamic into a legal and legitimate institution, thereby setting an example for the entire region.⁴⁸

As it was stated by these organizations and commentators, The NCA Election demonstrated that Tunisia overcame its first big democratic challenge successfully.⁴⁹ Nevertheless the election should not be overestimated since it was only a strong start to Tunisia's long journey towards democracy.⁵⁰ As stated by Ayoub, however important may it be, it only constitutes one pillar of the democratic construct, the first round of the democracy building process.⁵¹

After adopting its Rules of Procedure on 20 January, The NCA established six permanent constituent commissions composed of 22 members proportionally allocated according to their representation in the NCA. Each of these commissions are charged with drafting a specific theme of the future constitution. These specific themes are divided into six groups: The preamble, the fundamental principles and the revision of the constitution; The rights and freedoms; The legislative and executive powers and the relationship between them; The civil, administrative, financial and constitutional justice; The constitutional institutions; The regional and local public authorities.⁵²

When the permanent commissions complete drafting of the articles of the

try on its way to guaranteeing freedom, human rights and democracy, 24 October 2011, (çevrimiçi) <http://www.osce.org/pa/84325>, 20 Haziran 2012.

⁴⁷ Loc.cit.

⁴⁸ However it also stated some problems with managing the electoral rolls and assigning polling stations to voters which caused delays on polling. And although it welcomed the the compliance with the gender-parity rule in the list of candidates, it also noted with disappointment that the main political parties were guided merely by the letter of the law, not the spirit and put only %7 of women candidates at the top of the list. *Parliamentary Assembly*, Observation of the Election of a National Constituent Assembly in Tunisia (23 October 2011), Doc.12795, 24 November 2011, s.8, par. 54-57.

⁴⁹ Billingsley, A., "Writing Constitutions in the Wake of the Arab Spring", Foreign Affairs, 30 November 2011, (çevrimiçi) <http://www.foreignaffairs.com/articles/136699/anthony-billingsley/writing-constitutions-in-the-wake-of-the-arab-spring>, 5 Mayıs 2012.

⁵⁰ Ottoway, M., "A Strong Start to Tunisia's Long Journey", The National Interest, 29 December 2011, (çevrimiçi) <http://nationalinterest.org/commentary/strong-start-tunisia-long-journey-6317>, 1 Nisan 2012.

⁵¹ Ayoub, A., The Arab Spring delivers its first democratic elections, 24/10/2011, (çevrimiçi) <http://www.idea.int/wana/arab-spring-first-democratic-elections.cfm>, 3 Mart 2012.

⁵² Règlement Interne de l'Assemblée Nationale Constituante Tunisienne (Traduction personnelle de BsiLi AdeL, Conseiller Juridique à l'Assemblée Nationale Constituante), Les articles 42, 64.

specific chapters of constitution for which they are responsible, they will submit their report to a joint committee on co-ordination and drafting of the constitution which is responsible for coordinating the work of the permanent commissions, preparing a general report on the draft constitution before its submission to the plenary assembly and establishing a final version of the report on the draft constitution in conformity with the resolutions adopted in the plenary assembly⁵³. However, since the prerogatives of the joint-committee were not laid out in detail in the Rules of Procedure, as rightly stated by Pickard, it's not clear to what extent the general rapporteur of the committee or the coordinating committee will be at liberty to change the text of the articles submitted by the permanent commissions.⁵⁴ It is also obvious that the need for a clear timeline for the commissions' work plan is necessary in view of the lack of reference to the duration of the NCA's mandate in the Rules of Procedure⁵⁵.

Once the complete draft constitution is submitted to the President of the NCA, he will transmit the draft constitution, a general report on the constitution and the reports of the permanent commissions to all members of the NCA, the president of the Republic and the prime minister, two weeks before the plenary session of the Assembly.⁵⁶ After being discussed by the plenary session, the draft constitution will be firstly considered and voted article by article and then in its entirety by the NCA. Each article of the draft constitution will be adopted by an absolute majority and then the entire draft constitution will be adopted by a two-thirds majority of the NCA members. In the case of the lack of a two-thirds majority, the draft constitution will be again reconsidered and voted by the NCA within maximum one month from the date of the first vote. If the NCA members don't reach the required majority again, the complete draft constitution will be submitted to a popular referendum and be adopted by the simple majority of the voters.⁵⁷ If the draft constitution is rejected by the popular referendum, it's unknown what would happen since it's not prescribed in the law. This possibility should also have been foreseen in the law since Tunisians have the right to know the options before them in the case of the reject of the draft Constitution.

⁵³ Les articles 65, 104 du Règlement Interne de l'Assemblée Nationale Constituante Tunisienne.

⁵⁴ Pickard, D., The Current Status of Constitution-Making in Tunisia, 19 April 2012, (çevrimiçi) <http://carnegie-endowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia>, 2 Haziran 2012 ; *The Carter Center*, The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress Toward Establishment of Independent Election Management Body, 11 May 2012, s.2.

⁵⁵ Ibid.,s.3.

⁵⁶ L'article 105 du Règlement Interne de l'Assemblée Nationale Constituante Tunisienne.

⁵⁷ L'article 107 du Règlement Interne de l'Assemblée Nationale Constituante Tunisienne; L'article 3 de la Loi constituante n° 2011-6 du 16 décembre 2011 relative à l'organisation provisoire des pouvoirs publics.

It's also important to note that public participation to the democratic constitution-making process should not only be limited to the election of a representative body like constituent assembly or a parliament directly by people. If the desired outcome of the constitution-making process is to adopt a democratic constitution, then the methods of the constitution-making should be analyzed within this context. It's obvious that the election of a constitution-drafting body directly by people is very important for the democratic constitution-making, especially because of its legitimacy. However the other forms of direct participation of citizens to the constitution-making process should not be neglected since they are as important as the election of a representative body.

Concerning the Tunisian NCA election, it must also be noted that some 1.6 million people out of 6.1 million citizens entitled to vote were not registered and the turnout represented %54 of the population eligible to vote.⁵⁸ Over one hundred political parties emerged in the Tunisian political scene before the NCA election and this situation also led to the fact that as a country without a consolidated political party system, a significant number of votes for the small parties were lost and they were not represented in the NCA because of this compartmentalisation.⁵⁹ Therefore it's especially important for the transitioning states without an established political party system to lay out and improve other forms of direct involvement of citizens to the constitution-making process in order to avoid the frustration of a large proportion of society who may feel not adequately represented in the NCA.⁶⁰

As it was stated by the UN Secretary General, constitution-making processes should be inclusive, participatory and transparent since they are more likely engender consensus around the constitutional framework agreeable to all.⁶¹ Participatory constitution-making process is especially important in the post revolutionary context, like in Tunisia, because it may also contribute to the stability of the new constitutional order by increasing the legitimacy of the new constitution, strenghtening the people's ownership of it.⁶² Not only the political

⁵⁸ *Parliamentary Assembly of Council of Europe*, Political Transition in Tunisia, Doc.12949, 7 June 2012, s.7; *Commission Européenne Pour La Democratie Par Le Droit*, Developpements Constitutionnels Recents En Tunisie (Octobre-December 2011), CDL(2012)003, Strasbourg, 2 Fevrier 2012, s.2 .

⁵⁹ According to Pickard, one-third of votes were cast for parties that won no seats in the NCA. Pickard, "Challenges to legitimate governance...", op.cit., s.639; *Parliamentary Assembly*, Political Transition..., op.cit., s.9.

⁶⁰ *Democracy Reporting International*, Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, Briefing Paper No. 20, November 2011, s.4.

⁶¹ *United Nations*, Guidance Note of The Secretary General United Nations Assistance to Constitution-making Processes, April 2009, s.4.

⁶² Samuels also points to the importance of the participatory constitution-making process for creating a stable state in the post-conflict context. See *Samuels, K.*, An opportunity for peace-

parties represented within the NCA but also the political parties who are not represented in the NCA, the civil society organizations, NGOs, the interested citizens -briefly all the political and societal actors- should also have the right to participate in the constitution-making process in order to achieve the desired outcome, to adopt a fundamental consensus document of the whole nation.

The transparency of the process is also vital for a democratic constitution-making so that the public can have information about every stage of the process and have the chance to influence the outcome of the process by influencing the NCA. According to the Rules of Procedure of the NCA, in principle the commission meetings are public and the commissions may only decide closed meetings with the majority of its members. The plenary sessions of the NCA are likewise public and broadcast on television.⁶³ However, it was noted that, in practice the access to the NCA plenary and commission sessions is restricted especially for the civil society organizations and although some of them were invited by the NCA to submit their views to the permanent commissions, these invitations seemed to be limited.⁶⁴

Another important point that has to be mentioned that though the submission of the views, proposals of interested citizens, NGO's, civil society organizations etc. to the NCA is essential for a democratic participatory constitution-making process, only the submission of the views is not sufficient by itself to make the whole process democratic and participatory. These submissions, proposals, petitions which can be called as public input should be analyzed, taken into consideration seriously by the NCA as they demonstrate the fundamental priorities of the different societal actors and provide considerable new information to the members of the NCA which can influence and change the whole constitution-making process. Therefore it's essential that a formal and transparent procedure should be primarily formulated by the NCA in order to incorporate this important public input into the drafting process at the end of which the fundamental consensus document will be crystallized.

The Rules of Procedure permit the NCA members to communicate with the citizens in one week a month.⁶⁵ It's an opportunity both for the NCA members and for the citizens. The NCA members can consult directly to their constituencies and get feedback about the work of the NCA and the citizens can get information about the NCA work and submit their views, comments and recommendations directly to the members. But in practice, this initiative for citizen in-

building dialogue? Somalia's constitution-making process, *Accord 21*, Issue 21, 2010, s.86; *Democracy Reporting International*, *Lessons Learned...* op.cit.,s.4.

⁶³ Articles 54 and 76 of the Rules of Procedure.

⁶⁴ *Carter Center*, op.cit.,s.3; *Parliamentary Assembly of Council of Europe*, *Political Transition*, op.cit.,s.8; *Pickard*, *The Current Status of Constitution Making in Tunisia*, loc.cit.

⁶⁵ Article 79 of the Rules of Procedure.

volvement is highly dependent on the individual initiative and performance of the each member of the NCA because of a lack of a formal procedure established by the NCA.⁶⁶ Therefore this problem should also be resolved as soon as possible in order to provide the citizens to influence the work of the NCA since by this way, it may be a democratic participatory constitution-making process.

CONCLUSION

After The Jasmine Revolution, the Tunisians made their choice on constitution-making in favour of electing a National Constituent Assembly instead of holding a new parliamentary election. This choice was both as a result of the difficulty of respecting the relevant constitutional arrangements of the 1959 Constitution in face of the Tunisia's political situation after the Revolution and the Tunisian people's will to exercise his full sovereignty within the framework of a new Tunisian Constitution as it was clearly manifested by the demonstrations.

As a country transitioning from authoritarianism to democracy, Tunisia overcame its first big democratic challenge with the succesful National Constituent Assembly Election. However this success should neither be overestimated nor undersetimated. The election of a constitution-drafting body directly by people is very important for the democratic constitution-making process and the Tunisian case may set an exemple for the countries of the Arab Spring. However it's an undeniable fact that the post-election process is as important as the election process in the constitution-making.

The direct participation of NGO's, civil sociey organizations, citizens etc. to the constitution-making process should not be neglected since they are as important as the election of a representative body. If the new Tunisian Constitution would be a democratic consensus document of the Tunisian people, then the methods of drafting and adopting the constitution should be determined within this context. The constitution-making process of the new Tunisian Constitution should be inclusive, participatory and transparent. Therefore the challenges that hinder the democratic constitution-making process should be overcome as soon as possible in order to reach the desired outcome, the democratic Post-Jasmine Revolution Tunisian Constitution.

⁶⁶ *Pickard*, The Current Status of Constitution Making in Tunisia, loc.cit.; *Carter Center*, op.cit.,s.6.

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