

The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights

June 12, 2013

A year and a half after the historic elections of Oct. 23, 2011, and the establishment of a National Constituent Assembly (NCA), Tunisia is reaching a decisive moment of the process of drafting its new Constitution.

The article-by-article vote and first complete reading of the Constitution draft, which are to take place in the coming weeks, constitute the final stage of the Constitution drafting process, during

deliberative and careful consideration of a new Constitution, the absence of a realistic and detailed roadmap for the work of the NCA, the absenteeism of some NCA members and a lack of clear communication in the process has hindered its progress.

Timeframe for the adoption of the Constitution

In spite of many calls for it to do so, the NCA never communicated a clear timetable for the Constitution drafting process.² A road map would have helped the NCA to better structure its work as well as to provide the public with greater visibility on the transitional process. NCA members also underestimated the extent to which its legislative functions as well as external political events would extend the Constitution drafting process. The announcement of various dates and timeframes for the completion of the Constitution throughout the drafting process—none of which have been respected—contributed to a lack of clarity on the progress of the NCA's work as well as a public dissatisfaction with the pace of the drafting process.

The absence of a clear roadmap for the completion of the Constitution also contributed to controversy as well as to questioning of the continued legitimacy of the NCA after Oct. 23, 2012. Most political parties had morally committed, ahead of the NCA elections, not to exceed a one-year period to draft the Constitution.³ As the process unfolded, however, the parties agreed within the NCA to extend the Constitution drafting exercise. Comparative examples show that participatory Constitution drafting processes have been lengthy processes, with an average duration varying between 18 and 24 months and that allowances are not uncommon in order to extend original estimates or stipulated deadlines.⁴

Drafting process

Members of the NCA began the Constitution drafting process on Feb. 13, 2012. The NCA created six constitutional commissions, each responsible for drafting articles under specific chapters of the future Constitution.⁵ The commissions conducted several hearings with Tunisian and international experts, representatives of the government, institutions, civil society, and

In August 2012, the six constitutional commissions submitted their respective first drafts to the Drafting Committee, which pointed out inconsistencies, gaps, repetitions, and unclear phrasing,

The Drafting Committee's consolidated document (also referred to as the third draft of the Constitution) was leaked to the media and subsequently officially released on April 22, 2013. The draft was then submitted to a group of experts selected by the NCA Bureau on the basis of proposals made by the presidents of the constitutional commissions. Some of the selected experts, including renowned constitutionalists, declined to be part of the review group, citing concerns about the ambiguity in the experts' scope of work and the fact that certain experts were not on the list.¹⁰ The remaining nine experts worked from April 23 to May 2, 2013, on the draft Constitution, at first separately and then together with the Drafting Committee.

In the meantime, two national dialogues were held to discuss remaining points of contention in the Constitution, as well as political, economical and security issues in Tunisia. The first national dialogue, convened by the President of the Republic, was held with most of the leading political parties, while the second, convened by the General Union of Tunisian Workers (UGTT), continued a process begun in 2012 and brought together a wider range of parties and civil society groups.

The Drafting Committee resumed its work after the end of the two national dialogues in order to

The NCA must review and approve each article individually by an absolute majority of all members of the NCA, before passing to a vote on the entirety of the Constitution. The full Constitution must be approved by a two-thirds majority of all members. Should the NCA not reach a two-thirds majority, a second vote on the same text will be held within a period of one month. If the Constitution is again not approved by a two-thirds majority, it will be submitted to a national referendum.¹³ In this case, the Constitution would be approved if an absolute majority of those who cast ballots approve it; there is no minimum threshold for participation. There are no legal provisions foreseen if the Constitution is rejected in a referendum.

If a constitutional referendum is required, a legal framework for conducting the referendum would be needed and the electoral management body would have to be given the necessary means and time to ensure a credible and inclusive democratic process.

The Carter recommends that the NCA consider amending to the '1st Constitution' to provide for the possibility in which the Constitution is rejected in a referendum.

Need for further outreach and communication

In its May and September 2012 statements on the Constitution drafting process, The Carter Center highlighted the benefit of a participatory and accessible process in terms of increased legitimacy and stronger acceptance of the new constitutional order and urged the NCA to create a more inclusive, transparent process.¹⁴ Unfortunately, the NCA has taken few steps to implement an effective national public outreach campaign during the drafting process, and has communicated on an irregular basis with the public.

For instance, although in March 2013 the NCA had set a binding deadline of April 27 for completing the draft, the postponement of the start of the article-by-article discussion of the Constitution by the plenary was not communicated to the public through a press conference or by a press release. Instead, it was only during the course of a visit of French senators on May 6 that Assembly President Ben Jaâfar informed journalists that the vote by the plenary would not start before June.¹⁵ A week later, a member of the Drafting Committee posted an updated calendar adopted by the Committee on his private Facebook page, indicating that the Committee would submit the Constitution to the President of the Republic on May 22 and the article-by-article vote would start on June 8. When the deadline was extended, NCA officials again did not offer a formal explanation, or communicate the potential timelines to the public. By the end of May, NCA members and the general public expected the Constitution to be released at any moment, and confusion was created by contradictory statements made in the press and on social networks by different actors involved in the process until it was eventually released on June 1.

consultations involved only around 5000 citizens and that only 217 people submitted responses via the internet consultation mechanism on the NCA website.

The Carter Center notes that, beyond these consultation mechanisms, the NCA did not undertake any further outreach or information campaign on the draft Constitution or on the work of the NCA. More broadly, the NCA has not had an effective communication strategy. While the Center welcomes the wide access that the NCA granted to media representatives, direct communication by senior NCA members with the media, including through press conferences and the official website, has not been sufficient and regular. A well conceived outreach campaign might have raised public understanding of the NCA members' work and the importance of the process, as well as the perceived legitimacy of the Constituent Assembly.

The Center encourages the NCA, in order to fulfill its representative role, to launch a comprehensive information campaign using all forms of media during the article-by-article vote on the draft Constitution. Citizens should be made aware of the final text of the Constitution and the importance of current discussions and their outcome, as the future Constitution will establish the fundamental principles of the Tunisian society, including those intended to protect civil and political freedoms, provide checks and balances between state institutions, and determine their

amended in the same sense as Article 52. On several occasions during the votes on other legislation, including the law to establish an election management body, the required absolute majority quorum required to start the debates was only reached after one hour and was sometimes lost during the sessions as members left the plenary session during the debates.¹⁷ In an effort to put pressure on members to attend sessions, the NCA introduced a system of magnetic cards in late November 2012 for each member as a means to control not only absenteeism and tardiness, but also to facilitate vote tracking. The revised RoP also mandate the publishing of the attendance records of plenary and commission sessions by the CA Bureau within three days of the end of the session. The list should specify whether the absence was justified.¹⁸ The Carter Center regrets that such a list has never been published as of yet, although some NCA members continue to be absent during the sessions.

Recent statistics prepared by the civil society organization Al Bawsala show that the average attendance rate during 124 votes on different pieces of legislation monitored was 62 percent, with attendance by parliamentary groups ranging from 79 percent for the Ennahdha bloc and 45

Religion in the Constitution

The right to freedom of religion or belief is a key principle of international law, and it is essential that it is protected and spelled out in a country's Constitution. This right, as defined by Article 18

The Carter Center recommends that the Constitution state explicitly that the mention or references to religion should not be used to restrict other rights and freedoms, nor should it result in discrimination against persons with another religion or without any religion. The Center encourages the NCA to open the requirements for the presidency to all qualified Tunisians, regardless of religious affiliation, and not to discriminate on the basis of religion.

Structure of the political system

International law obligations do not dictate a specific political system, and it is the choice of the Tunisian people to decide on the design of structure of the public authorities and the balance of powers among them. The content of the Constitution should, however, ensure that all requisite elements of a democratic system are respected. The balance of power implies collaboration between the different powers of the state and the creation of mechanisms of mutual control and of countervailing powers.

The choice of the political system has been particularly contentious. Options supported by parliamentary groups varied between a presidential system, a parliamentary system or a mixed system. Although the principle of separation of powers has been established since the first draft, the debate has revolved around the balance of powers between the executive and the legislative, and between the President of the Republic and the prime minister.

Both in the first and second draft several aspects of the political system remained unresolved. In the absence of consensus within the Commission on Executive and Legislative Powers (Powers Commission), its members decided to put forth two or three options for consideration for several articles. In the third draft, the Drafting Committee made a choice between the different options the Powers Commission had presented in favor of a political system that would give considerable power to the parliament and government, while providing for the direct election of the President, whose prerogatives would be strictly limited.

The fourth draft did not change substantially the prerogatives of political power holders, but introduced some precisions to clarify their respective roles. A new provision (Article 70), introduced at the beginning of the chapter on executive powers, clearly states that both the President of the Republic and the government, led by a head of government, “hold the executive power.” The changes introduced in the fourth draft, resulting to some extent from positions agreed during the national dialogues, were however not seen as sufficient by many opposition members and others.

The role and rights of the political opposition, not mentioned in the first and the second drafts, is a specific positive outcome of the national consultations held in December 2012 and January 2013.²³ The third draft includes a reference to the role and the rights of the opposition as an integral element of the Assembly of Representatives of the People (Article 57), and in the fourth draft similar language (Article 59) was extended to grant “the opposition the right to create and preside an inquiry commission every year.”²⁴ The Carter Center supports this addition, which will provide for a clearer protection of the views of the political minority and is an essential element of any democracy.²⁵

²³ The UNDP report on the national consultation process highlights that the inclusion of the rights of the opposition in the constitution was insisted upon in the governorates of Monastir, Bizerte et Sidi Bouzid p. 49.

²⁴ While Article 59 refers to inquiry commissions, it does not give any further information on their status and prerogatives. These commissions are not mentioned in any other article of the constitution.

²⁵ The Human Rights Council adopted a resolution that emphasizes the crucial role played by the political opposition and civil society in the proper functioning of a democracy. (A/HRC/RES/19/36) See also *The constitutional rights of the opposition*, DRI Briefing Paper 34, February 2013

While The Carter Center welcomes the positive evolution throughout the different drafts that led to the recognition of human rights in their universal aspect in the preamble, it recalls that the universal human rights are indivisible, interdependent and interrelated. The Constitution should clearly reflect this principle.

Rights and freedoms

encourages the NCA to widen the scope of the right to freedom of religion and conscience to cover all facets of these rights, including the freedom to adopt, change or renounce a religion or belief.³⁰ Further, the NCA should consider incorporating the language regarding the right of freedom of religion and conscience into the rights and freedoms' chapter to ensure that it is granted the same legal value.

The principle of non-discrimination

Under international law, Tunisia has an obligation to prohibit discrimination based on sex, religion, or other status.³¹

The only article that deals with the principle of non-discrimination is Article 20 (Articles 6 and 7 of the third draft were merged) states that “all citizens, male and female alike, shall have equal rights and duties, and shall be equal before the law with no discrimination³². While this wording establishes equality among citizens, and should be applauded, it might allow for inequality for foreigners, who could be subject to unfair discrimination. In accordance with the ICCPR, equality before the law is a right of the individual and is not limited to citizens³³. In addition, it seems to imply that the prohibited ground of discrimination is only based on gender.

In addition to the strengthening of protection for the principle of equality, the Center recommends that a separate principle of non-discrimination be included to enshrine this right in constitutional law. In addition, the Constitution should prohibit discrimination on all grounds,

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second draft. More generally, the rights of women in the first draft were mostly considered in the context of the family.³⁸ In the third and fourth draft, women are considered independently from the family. Gender equality is, however, not fully consecrated since Article 20 only applies to citizens (male and female alike) and not more generally to men and women.

With regard to women's rights, Article 45 provides that "the State guarantees the protection of women's rights and supports their gains." The same article goes on to say "the State guarantees

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In addition, to ensure that rights are treated equally when it comes to their restriction, language limiting rights in specific articles should be removed. I

Conclusion and recommendations

The Carter Center has conducted meetings with relevant stakeholders, including NCA members and administrative staff, civil society organizations, political parties' representatives, and Tunisian academics, to understand the work of the NCA and assess the strengths and weaknesses of the Constitution drafting process thus far. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement. In the hope of further consolidating the gains of the revolution towards the establishment of a democratic system of governance, that protects the fundamental civil and

