

Tunisia's New Constitution

An analysis of its legal design

Dr. Klaus Hofmann

February 2014



*Bardo Palace, here Tunisia's deputies worked out the new constitution
(Photo: Wikipedia)*

Tunisia's New Constitution – An Analysis of its Legal Design¹

General Principles

Like many constitutions around the world, the Tunisia's Constitution adopted on 26 January 2014 confirms that "sovereignty belongs to the people (..), shall be exercised through their freely elected representatives and by referendum." Besides elections people also have the possibility for a direct vote on political issues.² The constitutional text³ will later define the conditions of the direct democracy instrument, called "referendum".

Article 1 identifies Tunisia as an Islamic state and determines Islam as its religion.⁴ But it is also to "protect religion, guarantees freedom of belief and conscience and religious practices, protects sanctities, and ensures the neutrality of mosques and places of worship away from partisan instrumentalisation."

The state is committed to spreading the values of moderation and tolerance, and to protect the sacred and prevent it from being attacked, and is also committed to prohibit charges of apostasy ("takfir") and incitement to hatred and violence, and to combat them."⁵

Fundamental Rights

The fundamental rights are laid down in Chapter 2 of the constitution. The section starts with a clear commitment to equality of males and females and so sets an unique example in the region⁶. The article does not allow to discriminate against citizens. Additionally Article 45 binds the state to "protect women's achieved rights and seeks to support and develop them", "seeking equal representation in elected councils."

Article 22 says that the "state protects the human dignity and physical integrity", and therefore recognizes the "human dignity" as a kind of "preconstitutional" value. Yet the future will show if the wording of this article is sustainable to guarantee this fundamental idea of human dignity. The constitution prohibits torture. Moreover, it guarantees prisoners a "humane treatment that protects his/her dignity". This does not ban the death penalty.

The preamble anchors Tunisia in the "dignified status of humankind " Yet the constitution does not include further anti-discrimination clauses based on race, ethnic background or sexual orientation.

Further articles⁷ guarantee the rights of "freedom of opinion, thought, expression, media and publication" and other basic civil rights like voting, scientific research, to join syndicates, demonstration, peaceful assembly and others. The adopted text includes social rights like education, work, adequate working conditions, culture and admits to "contributions to a sound climate" and "a sound and balanced environment".

¹ The following analysis is based on the translation of the Constitution of Tunisia, provided by <http://www.tunisia-live.net/> at: <http://www.tunisia-live.net/2014/01/21/tunisias-draft-constitution-an-english-translation/>

²Article 3

³See below

⁴Article 1

⁵Article 6. The preamble braces the country "to the principles of Islam and its open and moderate objectives, on sublime human values and the principles of universal human rights (..)"

⁶Article 20

⁷Article 30ff

Restrictions of the rights and freedoms are only allowed on the basis of law and where "necessary in a civil democratic society and with the purpose of protecting the rights of others or where required by public order, national defense, public health or public morals", but those restrictions "shall not compromise the essence of the rights and freedoms".⁸

Separation of Powers

Generally, the legislative power belongs to the parliament⁹. Executive power is shared between the directly elected president and the prime minister (suggested by the president and elected by parliament)¹⁰. The judiciary is independent¹¹. Additionally the constitution installs several "Independent Constitutional Bodies"¹²

As often in constitutional designs around the world the ideal of separation of powers barely is conducted in a pure form. The Tunisian Constitution provides dependencies between the parliament, president and the prime minister.

Legislation

Basically there are two types of laws: organic and ordinary laws. Organic laws shall be ratified with absolute majority in parliament, ordinary laws need a majority of votes of the members of the Chamber of Deputies.¹³

The state budget law is considered an organic law¹⁴. The President has the right to return a ratified budget law by the parliament to parliament for a second reading. The law, upon the request of the President of the Republic, the Prime Minister, or thirty members of the Chamber of Deputies. then can contested the unconstitutionality at the Constitutional Court. The rule says, that "If the draft finance law is not ratified by 31 December, the law can be implemented where it relates to expenditures, in installments of three months, subject to renewal by a presidential order, and revenues shall continue to be collected in accordance with the laws in force. "¹⁵

In this context, an important right of the President is described in Article 80: He shall seal and approve the publication of laws. But he has the possibility "except for draft constitutional laws, (..) during a period of ten days as from the receipt of a draft law from the President of the Chamber of Deputies, to return the draft law to the Chamber for a second reading. In the case of ordinary laws, the draft law must be ratified by an absolute majority of the members of the Chamber, and in the case of organic laws, by a majority of three-fifths of its members. On ratification by the Chamber, the President of the Republic shall seal and approve its publication within a period of no more than fifteen days as of receipt thereof from the Constitutional Court ."

⁸Article 48

⁹Article 49 ff

¹⁰Article 70 ff

¹¹Article 100 ff

¹²Article 122 ff

¹³Article 63. Article 64 defines which laws are considered ordinary laws.

¹⁴Article 65

¹⁵Article 65

As mentioned above, the Tunisian constitution knows an instrument of direct democracy. Article 81 states: "The President of the Republic may, in exceptional circumstances, submit for a referendum, the draft laws related to ratification of treaties, or to rights, freedoms, or personal status, which were ratified by the Chamber of Deputies (..) The submission for a referendum shall be deemed a waiver of the right to return the draft law. If the result of the referendum is the ratification of the draft law, the President of the Republic shall seal and publish the draft law within a period exceeding no more than fifteen days as of the date of announcement of the results of the referendum.

The electoral law shall regulate the means of conducting the referendum and announcing its results".

Legislative Initiative

Article 61 determines that the legislative initiative belongs to at least ten deputies, the President of the Republic, or the Prime Minister. The latter one is only able to present draft legislation regarding to the ratification of treaties and the draft budget law.

Law proposals or amendments presented by deputies "shall not be admitted if their ratification would cause prejudice to the state's financial balance as determined by the budget law. "¹⁶

Executive

Presidential Powers

The Presidential Powers are described in Article 76. He is in charge of

- representing the state,
- determining the general state policies in the domains of defense,
- foreign relations and national security related to protecting the State and national territory from internal and external threats,
- dissolving the Chamber of Deputies in accordance with the Constitution's provisions,
- presiding the National Security Council,
- Commander-in-Chief of the armed forces,
- declaring war and establishing peace, upon the approval by a 3/5th majority of the Chamber of Deputies,
- taking measures that are required by a state of emergency, and to declare such measures in accordance with article 79,
- ratifying treaties and authorising their publication, undertaking appointments etc.

The President suggests the candidate of the party or coalition having won the largest number of seats in the Chamber of Deputies to form the government. If a four-month period elapses from the date of appointing the first candidate and the members of the Chamber of Deputies did not elect the government, the President of the Republic is entitled to dissolve the Chamber of Deputies and to call for new legislative elections.¹⁷

¹⁶Article 62

¹⁷Article 88

In certain cases the President "may request the Chamber of Deputies to vote on a vote of confidence for the Government to continue its tasks, a maximum of two times in a presidential term. Such a vote would be by absolute majority of the members of the Chamber. If the Chamber does not give a vote of confidence to the Government in such an event, it would be considered to have resigned and the President of the Republic shall task the most capable person with forming a government (..) If the set period expires without the formation of a government, or if it does not gain a vote of confidence from the Chamber of Deputies, the President of the Republic may dissolve the Chamber and call early legislative elections (..) If the Chamber of Deputies grants the government a vote of confidence on two occasions when requested by the President of the Republic, the latter shall be deemed to have resigned. "¹⁸

Prime Minister

The Prime Minister, beyond others, is able to exercise general regulatory powers and to issue individual decrees. He shall create, amend and dissolve ministries and bureaus of state and governs the administration .

Article 99 rules, that any dispute arising with respect to the powers of the President of the Republic and of the Prime Minister shall be referred to the Constitutional Court.

Judiciary

The Tunesian Constitution establishes an independent judiciary¹⁹. How will judges be selected? Article 103 determines that Judges are nominated and installed by the President "with the assent of the Supreme Judicial Council. Senior judges shall be nominated (..) by the President after consultation with the Prime Minister, based on the sole opinion of the Supreme Judicial Council. Senior judicial posts shall be determined by law."

Article 109 describes the structure of "The Supreme Judicial Council", being "composed of four bodies, which are the Judiciary Council, the Administrative Judicial Council, the Financial Judicial Council, and the Judicial Councils Organisation.

Two-thirds of each of these entities are composed of judges, the majority of whom are elected, as well as judges appointed by capacity, while the remaining third shall be composed of specialised independent individuals. The majority of the composition of these bodies shall be elected. Elected

members shall undertake their functions for a single six-year term.

The Supreme Judicial Council shall elect its president from amongst its most senior judges.

A law shall regulate the mandate, structure, and organization of each of the four entities as well as the procedures applicable to each."

Constitutional Court

Decisions about challenges of constitutionality are assigned to the Constitutional Court, especially concerning:

-
- Draft laws, upon the request of the President of the Republic, the Prime Minister, or thirty members of the Chamber of Deputies.

¹⁸Article 97

¹⁹Article 100 f. The Chamber of Deputies' rules of procedure presented to it by the President of the Chamber.

- Constitutional draft laws submitted to it by the President of the Chamber of Deputies as specified in Article 142 or to determine whether the procedures of amending the Constitution have been respected.
- Treaties presented to it by the President of the Republic before they are ratified by law.
- Laws referred to it by courts as a result of a request filed by a litigator, in accordance with the procedures provided for by law, to claim the unconstitutionality thereof.
- The Chamber of Deputies' rules of procedure presented to it by the President of the Chamber.²⁰

"(..)If the Constitutional Court determines that the law is unconstitutional, the law shall, within the limits specified by the Court, no longer be applied²¹."

In Chapter 6²² the Tunisian Constitution institutionalizes "Independent Constitutional Bodies ", elected by parliament, which

"shall seek to support democracy"²³: The Electoral Commission , The Audio-Visual Communication Commission , The Human Rights Commission , The Commission for Sustainable Development and the Rights of Future Generations , The Commission for Good Governance and Anti-Corruption .

Most commissions have advisory and regulatory powers. The Human Rights Commission also is competent to "conduct investigations into violations of human rights with a view to settlement or referral to the competent authorities. " The Commission for Good Governance and Anti-Corruption is able to "monitor cases of corruption within the public and private sectors, investigating and confirming them (..)".

*Dr. Klaus Hofmann works as an academic scientist in Democracy International's office in Cologne. He is in charge of the **Direct Democracy Navigator**, a global information and collaboration platform that features all types of modern direct democracy.*



²⁰Article 117

²¹Article 120

²²Article 122 f.

²³Article 122