Implementing Tunisia’s New Constitution

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Tunisia has achieved an elusive goal in the political development of the Arab Mediterranean: a democratic constitution drafted outside the influence of a foreign occupier or an authoritarian dictator. To be sure, democracy is not yet secure in Tunisia, as implementation of the constitution amid pressing challenges of economic growth and domestic security will present enormous challenges. Yet the constitution gives hope for the region’s first home-grown democracy. The constitution is democratic, progressive and the result of broad political consensus. The question remains whether it can work in practice.

Process Design

The Tunisian constitutional process was characterised by a commitment to consensus building. Elites from across the political spectrum contributed to various stages of the transition, broadening the number of actors with a sense of ownership and a stake in the outcome. The electoral law for the National Constituent Assembly was written by a political-reform commission of French-influenced law professors and opposition political parties. Ennahda, the self-described Islamic party, won the elections and formed a coalition government with two secular parties, which assumed the offices of Speaker of the Assembly and President of the Republic. When the constitutional process stalled in the wake of two political assassinations in 2013, the President called a National Dialogue with representatives from leading opposition parties, the national labour union and the human-rights league, among others. All of these institutions, except for the National Dialogue, were founded in laws developed with wide consensus among political groups and consultation with civil society. The result is a highly credible constitution. Of course, the constitution is only a means to an end; it must now be implemented, and the challenges of political development might be even stronger in the face of risks to national security and economic growth. For the moment, however, the political transition in Tunisia is headed in the right direction. Tunisia has pulled off a snowball effect of legitimacy for democratic institutions in a way that other political transitions in the Arab world have not yet been able to achieve.

Text Analysis

The key remaining question is whether political groups in Tunisia will maintain their commitment to the rule of law and consensus building. The constitution provides the foundation of the political bargain, and it is a good place from which to start. Constitutions in the Arab world have often set out to violate rights or to consolidate the power of one person or party. Tunisians are fond of saying that the Ben Ali regime ignored the constitution. While Ben Ali certainly saw himself as above the constitution, he also used it as a tool for extending state power and directing the institutions of state in his favour. For example, a 2002 amendment to the constitution created an upper house of Parliament, the Chamber of Advisors, the members of which were appointed by Ben Ali, thus expanding his control over law making. The Tunisian constitution departs from the tradition of constitutional authoritarianism and, at least in its
written form, could serve as a genuine guarantor of democracy.

The question is how the institutions created by the new constitution will work in practice. In particular, the care which constitution-makers took to check executive authority might result in a system where decision-making is convoluted, given the limited power of the President and Prime Minister. The President is directly elected and has exclusive authority over foreign affairs and national security. The President also can veto legislation and, under certain circumstances, declare a state of emergency and dissolve Parliament. The Prime Minister is indirectly elected and directs the cabinet and the general policy of the State.

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The President and the Prime Minister are both powerful – a result of compromises between political parties, and to diffuse the executive in order to prevent the kind of antidemocratic consolidation of power that has plagued other attempts at democratisation in the Arab world. The impulse was genuine, but the system created raises the possibility of what Cindy Skach has called a divided minority government. In such a situation, the President and Prime Minister are from different parties, neither of which has a majority in Parliament. Skach argues that a divided minority government doomed Germany’s Weimar Republic, among others. Indeed, the political scientist Robert Elgie has chronicled twenty-two experiments with semi-presidentialism in the twentieth century and found that sixteen of them were “democratic failures” (such as Armenia, Belarus and Niger), largely due to divided governments.

More positively, the constitution takes new steps to ensure the balance of power. The legislature is empowered as a genuine oversight body, with the authority to call ministers to testify and strict control over the state budget. The constitution also prevents single-party rule by enshrining important rights of opposition parties, as well as assigning the chairmanship of the powerful finance committee to a member of the opposition.

The constitution also calls for a new Constitutional Court, which is empowered to rule on the constitutionality of bills and laws. The court will also arbitrate in times of potential constitutional crises, such as in disputes between the President and Prime Minister, during a state of emergency, or in the absence of the President. Members of the court will be appointed by the President, Parliament and Supreme Judicial Council – a further check against partisan control over this important body. The court will be a new institution in Tunisia, as it is much more powerful than the previous Constitutional Council. The court will have to quickly establish itself as an equal player to the executive and the legislature.

In addition to providing a workable and democratic structure of the State, the constitution is also progressive. The rights and freedoms chapter includes a comprehensive list of protections, based on and sometimes exceeding international obligations. Article 46 includes perhaps the world’s most progressive provision regarding women’s representation, declaring equal representation between men and women a priority of the State. The constitution protects individual rights to health, education, a healthy and clean environment, expression and freedom from torture, among many others. The constitution makes no reference to Islamic sharia after Ennahda refused to put it on the table.

The constitution not only lists rights but also accounts for the implementation of rights protections. The constitution establishes a human-rights commission and guarantees the right of persons to seek recourse in courts for alleged rights violations. Article 49, which specifies how rights can be lawfully limited in accordance with international obligations, is the first of its kind in the Arab world. Many Arab constitutions attach a familiar phrase to a protected right, saying, for example, “The right of peaceful meetings is guaranteed within the limits of law” (Article 25 of the 1951 constitution of Libya). Arab parliaments or dictators would then abridge the protected right in subsequent legislation. The Tunisian constitution defends against this by copying language from the International Covenant of Civil and Political Rights about the conditions under which
rights can be limited, such as for reasons of public health or public safety.
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Looking Ahead: Next Steps in Implementation

No matter how detailed constitutions are, precedents and traditions are important to the way that a political system operates. The parties that win the next parliamentary elections will be the next stewards of the transition in Tunisia and will play an important role in defining how the new political system works. Whether the winning parties commit themselves to the same principles under which the constitution was drafted is the next big question about Tunisia’s political future. Large democracies can survive constitutional hiccoughs, such as the 2000 election in the United States or the recent ouster of the Prime Minister in Australia. Fragile democracies, like Tunisia, are less resilient to those shocks.

Elections are likely in the fall, under an election law to be adopted by the Constituent Assembly. The elections have the potential to exacerbate the partisanship between Tunisia’s largest political parties. The two most important now are Ennahda and Nida Tounes, led by Beji Caid Essebsi, a senior official from the era of Habib Bourguiba and Ben Ali. Nida Tounes represents the old, secular elite, while Ennahda has marketed itself as the party that can leverage Islam to restore the dignity of Tunisia by getting over the past. Tunisian voters could hardly be presented with more distinct parties in history or outlook, but no single party has emerged in the middle. The Tunisian electoral system tends to favour small parties, meaning that it is unlikely for any one party to win an outright majority in Parliament. A coalition government is thus likely, perhaps further complicating the sharing of executive powers.

The Constituent Assembly has adopted an organic law on the establishment of an interim constitutional court, comprising six judges, who are the current appellate judges. The new Parliament will draft another organic law to create the permanent Constitutional Court with twelve members. The interim court could be an important guarantor of democracy in the meantime. The permanent court would be a natural target for assistance from the European Union.

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The Tunisian constitution should be celebrated for the system that it creates, the rights it protects and the manner in which it was written. It is an historic document and one answer to the problem of how to build a democracy, which has beguiled the region in the modern era. But the constitution alone will not run the country; indeed, a system of government based on compromise and consensus is more democratic but less streamlined than an authoritarian one. Tunisia’s political parties – the winners and losers of the next elections – will have to commit themselves to the rule of law and the peaceful transfer of power.

References
