



Tunisia Constitutional e-Forum

The National Constituent Assembly, Historical Lessons and Contemporary Stakes

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The National Constituent Assembly, Historical Lessons and Contemporary Stakes

By Bassem KARRAY

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1- Since the downfall of the Ben Ali regime following a “*spontaneous*” uprising, improperly called the “*Jasmine Revolution*” by especially western Media and certain political analysts, Tunisia has embarked on a transition path leading normally to the establishment of a democratic regime. Such transition is hardly progressing owing to the severe effects of the universal economic crisis on the Tunisian economy and the vulnerable social and political environment inherited from the ex-regime. Suffering from censorship and a deep social division for decades, Tunisian protestors demanded, during the uprising, political liberties, social equality and an end to corruption. Paradoxically, almost one year after the National Constituent Assembly (henceforth NCA) election, these demands have been threatened and many democratic voices contest that the present government has distorted “the revolution goals”. In fact, religious parties and groups have taken advantage of the precarious social situation so as to enhance their preaching of a radical Islam at the detriment of the real problems. Thus, popular discussions are strangely focusing on obsolete issues, such as woman’s rights and polygamy. The Tunisian society model is threatened by the invasion of radical interpretation of Islamic rules. By providing rules susceptible to several interpretations, such as incrimination of blasphemy, the full working draft of the constitution is likely to lead to the establishment of religious State.

2- Before the NCA election on October 23, 2011, political forces had successfully pushed the transition process forward by reaching consensus given the popular illegitimacy of the first interim government headed by the ancient Prime Minister of Ben Ali regime: Mohamed Ghannouchi who was replaced after the end of the interim phase by a provisional government headed by Béji Caied Essebsi. By electing the constituent body, main claim of La Kasba II, Tunisia has inaugurated a new phase in its history and since February 8, 2012 the drafting of a new constitution is underway. Although the election results have given new political forces popular legitimacy, the political and social scenes are still characterised by division, misunderstanding and mutual accusation between the government, the opposition and the principal actors of civil society.

3- This disquieting situation is a logical result of the absence of political road map which raises a wide range of questions for the future of the country. In fact, the NCA does not exclusively focus on its natural and principal function: drafting a constitution. By virtue of article 2 of the second Act organising the provisional public authorities dated on December, 16, 2011, the NCA is empowered to supervise the government actions, make legislative acts and elect the President of the Republic. Moreover, the distortion of the transition process goes back to the electoral Campaign. Instead of focusing on the future constitution, most of the political parties and independent lists merely indulged in economic and social promises. Should transitory process fail, the responsibility is incumbent upon political actors, both in the government and the opposition.

4- Tunisia is in this transitory period in crossroad; either it advances in the spirit of shared values of democracy, or it falls down in obscurantism and religious dictatorship.

Without a large consensus on moderate constitutional options, this process will plunge society into an unprecedented political crisis. Besides, social division remains dangerously real. As result, a number of political militants and activists have expressed their concern and pessimism. Many indices show, in their eyes, how the risk of failure is serious: absence of political road map, inexistence of an independent electoral instance, non implementation of Decree-Law n° 115 established the higher authority of mass media and Decree-Law n°120 creating the national anti corruption committee. Furthermore, political clashes between the president of the NCA, the head of provisional government and the provisional President of the Republic worry Tunisian people about the future of their country. Furthermore, many political and social entitlements of the constitution of 1959 are seriously in danger. Certainty, political and social context in which the first NCA, elected in March 25, 1956, and the second one, elected in October 23, 2011 are deeply different but we can pick up certain similarity. The two assemblies managed to lengthen the process in order to fulfil their ideological program and to dominate the political system. As the NCA of 1956 had successfully overturned the Monarchy, some political analyst fear for the reason of State as regard to the deficiencies of public authorities to aggression acts made against public institutions. Even more, fear begins to creep in people's minds of an eventual abdication of the Republic form of the State given the invasion of radical party called Ettahrir, who claims publicly and officially the institution of Khilafa regime.

5- The NCA whose mandate is, by virtue of the decree n° 2011-1085 of August 5, 2011, to draft a constitution within one year from its election, should speed up the process and improve the first draft of the constitution in order to put Tunisia on the right track of modernity. Otherwise, an inconclusive ending of the transitory period is risky. The historical lessons from the first NCA (I) are particularly useful to manage the stakes of the second one (II).

(I) Lessons of political and legal History

6- As it is positive system based on man-made norms, the Tunisian legal system is - similar to a pyramid in which the constitution occupies the summit. Every legislative Acts or administrative measures should be in conformity with it; or else they will be qualified as unconstitutional. The fundamental norm determines the political system and guaranties citizen's liberties and rights. Its supremacy emanates from its elaboration and its revision procedures. The Original Constituent Assembly in charge of drafting constitution is different from the Derivate Constituent Assembly whose role is to review some constitutional rules.

7- The Original Constituent Assembly is an elected collegial body whose aim is to draft constitution. It is the sovereign and supreme authority with unlimited functions. Besides, the first one elected on March 25, 1956 had made a tabula rasa of the State's form by overthrowing the Monarchy and establishing the Republic.

8- Tunisia is going through adoption by democratic way its second constitution. The constitution dated April 26, 1861 which was the first one in both Arab and Islamic countries, was not adopted by elected constituent body but was granted by the Bey. This text was enacted within a framework of political reform inaugurated by the adoption of the Fundamental Pact in September 9, 1857, which was similar to the French Human Rights declaration of 1789. Thus, the modernisation of the Tunisian society had started in the mid 19th century through the gradual abolition of slavery. January 26, 1846 Act gave slaves right to get freedom by lodging a request with official agent located in three marabouts: sidi mehrez in Tunis, Zaouia Alboukria in Sousse and Sidi Mansour in Sfax. This agent examined the request and delivered the emancipation Act to its demander.

9- Unfortunately, a popular uprising guided by Ali Ben GHDEMHEM in 1864 against the excessive fiscal pressure ended this political modernist phase. Therefore, the Tunisian Bey suspended the constitution of 1861, despite the considerable contribution of its rules to institutionalization of the political regime. Inversely, the 2011 popular uprising triggered a process of drafting a new constitution. The decision to set up a NCA pronounced by the interim President under the pressure of the second Kasbah sit-in, helped defuse the political crisis caused by the downfall of Ben Ali.

10- The second constitution dating back to June 1st, 1959 marked the phase of setting up an independent State after the attainment of internal independence by the treaty of June 3, 1955 signed between the French and the Tunisian authorities. In December 29, 1955, Tunisian Bey, Mohamed Lamine BACHA, enacted two important Acts. The first one related to customs rules, which was a sign of sovereignty recovery, and the second one convened a NCA to draft a constitution for the Monarchy. A week later, a Decree fixing the ballot system for the election was enacted (January 6, 1956). According to its terms, members of the NCA are elected on one round majority basis. The elections took place on March 25, 1956, i.e. five days after the signature of the French-Tunisian Protocol recognizing the Tunisian independence.

11- In the first meeting of the NCA held in April 8, 1956, Habib BOURGUIBA pronounced a speech in which he emphasised the popular legitimacy of the Assembly. He also stressed that sovereignty belongs to the Tunisian people. He completely ignored the monarchy sovereignty and he overshadowed in his speech the Bey authority as though he prepared an eventual overthrow.

12- During its sessions, the National Constituent Assembly debated the content future constitution content. On January 9, 1957 it adopted the first bill which maintained the Monarchy form in conformity with its mandate fixed by the Act dated December 29, 1955. The political system was very much akin to the parliamentary one. But on July 25, 1957 the NCA relied on its sovereignty and supremacy to abolish the Monarchy regime through a declaration pronounced in the name of Tunisian people providing that Tunisia is a Republic. Habib BOURGUIBA was appointed to the presidency by the Assembly.

13- Six month later, the NCA adopted a second bill which established a presidential regime largely similar to the American one. An improved version was finally enacted by The President of the Tunisian Republic at a ceremony organized in Bardo palace on June 1st, 1959. In his speech, the President stressed on the importance of the constitution in the process of setting up a modern State. The Tunisian society had been already placed straightway in a modernisation process by the enforcement of the personal status code on August 13, 1956. Since then, The Tunisian society has seemed irreversibly evolving to modernist values. Nevertheless, woman's rights and consequently the social model are now in danger due to the ascension of a religious fanatic tendency. Besides, the full working draft of the constitution does not clearly consecrate the principle of gender equality. Some articles are not well-written (article 21) and others are susceptible to various interpretations (article 28).

14- By giving the account of these historical events, we can draw several lessons. Firstly, the functions of the NCA were various and complicated and so it needed more than 3 years to draft the constitution. Secondly, the NCA members belonged to the National Front Movement headed by Habib BOURGUIBA. The majority ballot system led to homogenous Assembly; however, the ballot system based on proportional representation consecrated by the electoral Act of May 10, 2011 has given rise to a heterogeneous Assembly.

15- The constitution of June 1st, 1959 contributed to modernise the Tunisian society but it did not lead to setting up a democratic regime, it was invalidated two years after its fiftieth

anniversary. By the beginning of 2011, the pace of political events was speeding in an unprecedented way. The internal context was characterized by waves of protests against the interim government headed by Mohamed Ghanouchi. The demonstrators of Kasbah sit-in claimed a real rupture with the ancient heritage of Ben Ali. The 1959 constitution was looked at as a symbol of tyranny and dictatorship insofar as Ben Ali maintained power through constitutional manipulation.

III/ The stakes in the second NCA (2011-...)

16- The common denominator between the first and the second NCA is the distortion of their functions. After a period of seeking the right scenario to defuse the political crisis, the interim Tunisian President declared in a speech delivered in March 3, 2011 that NCA should be elected by July 24, 2011 to draft a new constitution. This election date was postponed to October 23, 2011 owing to the report of the Higher Independent Authority for the Elections (HIAE) which was created by the Decree-Law dated April 18, 2011 to monitor the NCA electoral process. The electoral Act was enacted in May 10, 2011 by the interim president under the proposition of the higher authority for the achievement Objectives of the Revolution, Political Reform and Democratic Transition (HAAROPRDT). The latter was set up to fulfil functions the chamber of representatives which was formally dissolved by the first Act organising the public authorities dated March 23, 2011. It was assigned consultative roles by proposing projects of Laws related to the political aspects of the government. This advisory higher authority is created by merging the committee of political reforms, created by the Government among others measures, with the Council for the Protection of the Revolution which is formed by some political parties, associations, professional orders and the Labour Union... Its projects were adopted by consensus; otherwise by vote. Its members were heterogeneous: political parties and representatives of civil society.

17- By creating the HIAE, the electoral process is no longer under the grip of the interior ministry. The function of this authority consisted in guaranteeing a democratic, pluralist, sincere and transparent election. Given that the election process is a long one, the Higher Authority led all the process from the preparatory acts to the proclamation of results. The HIAE cumulated both administrative and jurisdictional functions and therefore it was made up of a central Authority in the capital and derivate ones in the electoral districts. Its successful outcome should not hide its various deficiencies.

18- After long discussion within the HAAROPRDT, the electoral Act was adopted. Despite the gaps detected during its implementation, this act was well-written and in conformity with the international standards. It provided for principles of transparency and neutrality of places of worship, public administration and schools. We can reproach to legislator the dispatch of electoral disputes settlements between the HIIIE, magistrate's tribunals and administrative tribunal.

19- The electoral Campaign was generally smooth and timid, except for the event of Nesma TV affair which Islamist lists took advantage of. Many irregularities were committed by the majority of participants but they did not sensibly affect the results which were not contested by the political actors. The Revenue Court report, recently published, has revealed some financial irregularities. Tunisian's first free elections have proven to be tremendously successful. The polling day was quiet and with no security problems. However, some election law violations took place. Several technical problems indicate the lack of experience. The high rate of registered voters' reflected the Tunisian citizens' awareness and consequently gave legitimacy to the NCA.

20- The Ennahdha Islamic Party, which relied on a religious speech and a return to the conservative values of a certain majority of Tunisian citizens to attract voters, won the

election. The proportional representation system resulted in the scattering of voices between the 1662 lists.

21- Despite the social and economic origins of the uprising, the political debate was centred upon religious and anachronistic issues such as polygamy and the place of Islamic rules in the future constitution. Such issues, which were intentionally raised by Islamic list, diverted the Tunisian people's attention away from their real expectations. The Ennadha called to include a reference to the Shariaa, as a source among sources, in the first article of constitution. It renounced its proposal following a fierce opposition from several parties and its allies in the government. Nevertheless, this party defended the insertion of an Islamic Higher Council in the chapter related to constitutional bodies with no reference to its functions. This council will probably watch over the conformity of positive Laws to the Shariaa ones. As result, the latter will be indirectly made constitutional. Furthermore, the Abdellia affair was a pretext to debate the anti-blasphemy rules, liberty of speech and limits to works of art. As result, the full working draft of the constitution provides a reference to the criminalization of the Sacred which disclosed the real and the undeclared purpose of Ennahdha parliamentary group to set up gradually a religious State. This reference is susceptible to several interpretations and consists a threat to liberties and rights status which boundaries are continuously disputed.

22- The public authorities' deficiencies with regard to violence committed by salafist groups (Islamic radical tendency) led to the dramatic events of the American Embassy. The tolerance to their aggression against artists and political figures seems to be a part of a political strategy to hide the government deficiency and its unpopular measures, and to keep popular intention n away from their real problems. As expected, these unprecedented facts had repercussion the discussion of the NCA committees insofar as the full working draft of the constitution marks the internal division of the government coalition and also the cleavage between Ennahdha party and the democratic voices about mainly the status of liberty and rights and the government system.

23- The controversy related to the system of government and which marks the work of committee of legislative and executive powers and relations between them will be probably the bone of contention in the plenary session discussions, unless an eventual political agreement between main groups of the NCA occurs. Drafters have to choose between parliamentary, presidential and mixed systems. This choice should be made in the light of the Tunisian political scene which is characterized by the scattering of political forces. A mixed system where executive power is shared between a government appointed by parliament and accountable for its decisions, and an elected president, seems adequate to Tunisian context. The balance of powers cannot be assured in the absence of checks and balances principle even between parliament and executive power and inside the latter. An elected President vested with specific functions may defuse a possible crisis between the parliament and the government caused for example by the vote on motion of censure. In such a case the President's functions may be exceptionally stretched until the recovery of the situation.

24- The NCA appeals less to Tunisian people struck by the high cost of living. This sovereign authority seeks to preserve its credibility by enhancing consensus and focusing more and more on its first function. As we are approaching to the deadline to vote on constitution fixed by the decree of August 3, 2011 and the engagement act signed by 11 parties represented in HAAROPRDT on September 15, 2011, it seems that the assembly is not able to fulfil its function by October 23, 2012. A heated debate about the continued legitimacy of the NCA is generated among political parties and civil society representatives. After this time limit, some political and legal analysts consider that we can reach an impasse owing to the expiry of the NCA legitimacy. Others link the Assembly's legitimacy to the

progress made on constitution, its principal mission. They believe that a predetermined deadline cannot be imposed on members of Assembly. Considering to its supremacy and sovereignty, can the Constituent Assembly freely determine its work schedule? In reality, it is under the unique authority of the Tunisian people who has elected their representatives, according to the decree of August 3, 2011, to draft the constitution during a year. By avoiding reference to the deadline in the Act of December 6, 2011, the NCA seeks to avoid being at a dead end through predetermining the legitimacy period. But, the existence of two contrary legal Acts has led to a serious problem which cannot be resolved in the absence of consensus. The NCA should not unreasonably stretch the period of drafting the supreme norm given the perverse effects on social peace and political stability. Recently, the coordination committee of the NCA proposed a calendar in its meeting of September 3, 2012. In accordance with its terms, the vote of the first and the second reading of the bill will be held in March 1st and 27, 2013 respectively. In case it will not be passed, a referendum should be held on 1st May, 2013. The legislative and the presidential elections will be organised in September 8, 2013, just after enacting the electoral Act.

25- Bearing in mind the internal dissension of the troika and the strained social political environment, this road map seems so long and it far from being realistic. Political parties and figures are irreversibly engaged in a political war of position, whereas transitory period needs a high level of consensus which cannot be reached without making concessions and real and conclusive debates. Consensus technique in law-making should normally help to shorten the transitory process. During the first ten months after the elections of October 23, troika has the absolute majority to pass any bill in the NCA. Nevertheless, after many disagreements upon several political affairs, Ennahdha party can no longer rely on its allies especially after its failure to pass the bill dealing with justice reform. The Congress for the Republic and the Democratic Forum for Labor and Liberties, ravaged by internal dissension, are not already the second and the third political power in the NCA. In the terms of the provisional act, articles should be discussed line-by-line and voted on in two readings on an absolute majority. Having just above 40% representation in the NCA, Ennahdha is inclined to seek compromise with the democratic group which has become henceforth the second political force in NCA.