

December 2013

About this Series

Op-Med is an ongoing series of opinion pieces on topical issues in Mediterranean politics from a transatlantic perspective. The series brings together European, North American, and southern Mediterranean experts through the German Marshall Fund–Istituto Affari Internazionali strategic partnership. The series examines key questions surrounding the political, societal, and economic evolution of specific Mediterranean countries as well as the broader regional and international dynamics at play in the Mediterranean region as a whole.

Tunisia's Constitutional Process: Hurdles and Prospects

by *Duncan Pickard*

Despite its current political impasse, Tunisia still represents the best chance for a successful homegrown democracy in the Arab world. Tunisian political leaders have already accomplished a number of “firsts” for Arab governments: credible elections won by an Islamic party that ruled in coalition with two secular partners; a representative constitution-making process that has not been co-opted by authoritarian forces; and a pledge by Ennahda, the leading party, to resign peacefully in favor of a non-partisan (read: secular) government. The current political crisis, characterized by mistrust and partisanship, is critical, but the momentum that has been built over the past two years leaves ample cause for optimism. Tunisia appears to be working to achieve the region's most elusive political goal yet: constraint of the executive without resorting to religious or military domination.

Tunisia is close to a final deal that will embed that principle in a new political order, setting the stage for presidential and parliamentary elections under a new constitution sometime next year. But three unsettled and related issues — the completion of the constitution, the legal framework for elections,

and the replacement of the current government — jeopardize the progress that has been made so far. The chief political parties of Ennahda, currently in power, and Nidaa Tunis, a leading secular party led by long-time politician and former prime minister Beji Caid Essebsi, are currently negotiating the terms of a deal that would cover these three contentious issues. The fundamental socio-political tension in Tunisia can be boiled down, if somewhat crudely, into these two camps: for Nidaa Tunis and a return to the progressive, French-style secularism of former president Habib Bourguiba, and for Ennahda and the rebirth of a Tunisian political identity rooted in Islam. This divide is the theme of the current crisis and likely will remain even in the new constitutional order. The negotiations took a step in the right direction with the nomination of Mehdi Jomaa as Tunisia's new prime minister, an agreement that might break the political deadlock over the future of the transition.

Agreement on the passage of the constitution, the electoral law, and a new government is elusive, but the architecture is in place. The constitution is nearly finished; it has been

Op-Med

adopted by the joint committee coordinating the drafting, and it is ready for plenary debate. It represents major concessions from Ennahda, especially in the area of executive powers. Ennahda favored a parliamentary system, largely based on calculations of its own electoral success in winning a plurality of seats in the next few elections. Secular parties, which are much more fragmented, favored a stronger president in the style of Bourguiba to counter an Ennahda plurality in parliament. The result is a semi-presidential system that gives important powers to both a prime minister, elected by parliament, and a directly elected president. The prime minister forms a cabinet and sets general domestic policy; the president controls foreign and national-security policy, including the appointment of the defense and foreign ministers, and can veto legislation, among other powers.

The rights and freedoms chapter of the constitution was controversial during drafting, especially for a largely misinterpreted article that said that men and women enjoyed equal rights given women's status as man's "complement" in society. The phrase was poorly translated from Arabic into both French and English. Nevertheless, the article was poorly drafted and amended to guarantee equality in more absolute terms. Ennahda also did not pursue a "repugnancy clause" that would have banned certain types of speech that is "offensive to Islam." The rights and freedoms section as it stands is quite comprehensive. More structural criticisms emerge, however, when looking at the text as a whole. In particular, there are some potential contradictions between the chapter on general principles, the chapter on rights and freedoms, and the preamble (which Article 138 declares to be an "integral part" of the constitution). The constitution is also weak on lawful limitations to rights, and on judicial enforcement of rights.¹

The proportional system used for the parliamentary elections will likely remain similar to the system used in 2011 for the Constituent Assembly elections. That system favored small parties, like the fractured secular party landscape, and discouraged large ones, like Ennahda. For one thing, there were a large number of seats per district; small parties tend to fare better with more seats per district because more

seats mean more potential winners. Furthermore, the 2011 electoral formula (the mathematical calculation used to translate votes into seats) favored smaller parties. Indeed, Tunisia's formula assigned 87 of 217 seats to Ennahda; another acceptable formula used just as frequently worldwide would have granted Ennahda 150 seats.² The electoral law and constitution also include no threshold, whereby parties would have to win a minimum percentage of the national vote in order to be eligible for seats, which is typically a barrier to small parties. This electoral system all but guarantees that no party will win a majority of seats, leading to either a coalition or a minority government.

The electoral system and the constitution taken together show a potentially dangerous future for Tunisian politics. The constitution creates two powerful positions in the president and prime minister, each elected through different means. The secular parties are banking on their calculation that a secular presidential candidate will win against a candidate from Ennahda, given that the party received only 40 percent of seats in the 2011 elections. Current polling data also suggest that a secular candidate would stand a good chance of winning in a head-to-head election, though the number of undecided voters is quite high. Furthermore, the electoral system for parliamentary elections effectively proscribes an outright majority for any party. The stage is set for what Cindy Skach has called a *divided minority government*: a semi-presidential system where the president and prime minister are from different parties, and neither has a majority in parliament.³ Divided minority govern-

The secular parties are banking on their calculation that a secular presidential candidate will win against a candidate from Ennahda.

1 Jörg Fedtke, "Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia," *International IDEA & Constitutional Transitions Working Paper Series*, No. 4, June 2013, <http://constitutionaltransitions.org/working-paper-no4>.

2 John M. Carey, "Electoral Formula and the Tunisian Constituent Assembly," May 9, 2013, <http://sites.dartmouth.edu/jccarey/files/2013/02/Tunisia-Electoral-Formula-Carey-May-2013-reduced.pdf>.

3 Cindy Skach, *Borrowing Constitutional Designs. Constitutional Law in Weimar Germany and the French Fifth Republic*, Princeton University Press, 2005, pp. 12-29.

Op-Med

ments have been characterized by gridlock in transitional democracies throughout the 20th century. Robert Elgie found 16 “democratic failures” (Armenia, Belarus, Niger, etc.) compared with 6 “democratic successes” (France, Poland, South Korea, etc.) among semi-presidential systems.⁴

The consequences of deadlock would be catastrophic considering the depth of challenges facing Tunisia, which make the constitution look like child’s play. The Tunisian economy has contracted since the revolution, despite the centrality of economic opportunity to the demands of the protestors. Furthermore, unemployment has continued to rise — 30 percent nationwide, and up to 60 percent among youth with a higher degree — even though jobs were a central demand of the revolution. Tunisia needs to quickly implement policies to promote foreign investment, bolster competitiveness, and make capital more available to entrepreneurs. The international community can help by sponsoring investor and trade delegations, and by donating to innovation and business-incubator funds.

Political development is also important. The constitution calls for a new and poorly developed scheme of decentralization, which appears to empower municipal governments to take more responsibility over local affairs but provides them few resources to do so. The relationship between the national and local governments will have to be further clarified by law. Security-sector reform is desperately needed in Tunisia to reorient the security services toward the public interest and not that of the political leadership. The constitution sets up provisions to ensure civilian control over the military, but it says little about the domestic police and intelligence services. The constitution calls for a new constitutional court but does not provide much guidance to other courts as to how they should interact with it. Add to that the rivalry between two judges’ unions fighting for key appointments, and judicial reform rises to the top of the list of priorities for reform — a list that also includes transitional justice, media oversight, and anti-corruption measures. Islamic and secular parties will have to work together on each of these issues no matter the results of the elections in order to avoid the wholesale exclusion of one group or another, as has happened in Egypt. To this end, Tunisia

Tunisia needs to quickly implement policies to promote foreign investment, bolster competitiveness, and make capital more available to entrepreneurs. The international community can help by sponsoring investor and trade delegations, and by donating to innovation and business-incubator funds.

should consider bolstering the rights of the parliamentary opposition through the constitution and parliamentary rules of procedure.

The bottom line is that, while a final deal on the constitution and the electoral framework will signal a major accomplishment, the adoption of a constitution settles none of the most pressing policy challenges facing Tunisia today. Indeed, consensus on these and other issues could become more elusive given the possibility of a divided minority government.

The good news is that the international community is in a better position to assist with Tunisia’s policy objectives after the constitution is passed. There could be a role for the international community in breaking the current conflict, either by providing an impartial mediator or closely supervising the next elections. The United Nations (UN) thus far has had little direct impact on the political transition beyond support to the elections commission despite an ambitious agenda by the United Nations Development Programme; providing a mediator or taking a more central role in administering the elections could be a natural role

⁴ Robert Elgie, “Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies,” *Taiwan Journal of Democracy*, Vol. 3, No. 2, December 2007, p. 67, <http://doras.dcu.ie/4515>.

Op-Med

for the UN to play. The United States has supported Tunisia's transition through economic assistance: cash transfers, support for IMF loans, and investment funds. The United States also sees Tunisia as a valuable partner in counterterrorism in North Africa, although policymakers in Washington still do not grasp the extent of the threat of terrorist cells in Tunisia. The EU should deepen its trade partnership with Tunisia and continue to support the political transition through grants to non-governmental organizations that provide technical assistance to policymakers and civil society organizations, especially on international democracy standards. The policy priorities mentioned above are ripe for standards-based reform advocacy.

About the Author

Duncan Pickard is a non-resident fellow at the Rafik Hariri Center for the Middle East. He has worked on constitutional and electoral reform in Tunisia and Libya since 2011. He holds degrees in history and international affairs from Tufts and Harvard University.

About GMF

The German Marshall Fund of the United States (GMF) is a non-partisan American public policy and grantmaking institution dedicated to promoting better understanding and cooperation between North America and Europe on transatlantic and global issues. GMF does this by supporting individuals and institutions working in the transatlantic sphere, by convening leaders and members of the policy and business communities, by contributing research and analysis on transatlantic topics, and by providing exchange opportunities to foster renewed commitment to the transatlantic relationship. In addition, GMF supports a number of initiatives to strengthen democracies. Founded in 1972 through a gift from Germany as a permanent memorial to Marshall Plan assistance, GMF maintains a strong presence on both sides of the Atlantic. In addition to its headquarters in Washington, DC, GMF has seven offices in Europe: Berlin, Paris, Brussels, Belgrade, Ankara, Bucharest, and Warsaw. GMF also has smaller representations in Bratislava, Turin, and Stockholm.

About IAI

The Istituto Affari Internazionali (IAI), founded by Altiero Spinelli in 1965, does research in the fields of foreign policy, political economics, and international security. A non-profit organization, the IAI aims to disseminate knowledge through research studies, conferences, and publications. To that end, it cooperates with other research institutes, universities, and foundations in Italy and abroad and is a member of various international networks. More specifically, the main research sectors are European institutions and policies, Italian foreign policy, trends in the global economy and internationalization processes in Italy, the Mediterranean and the Middle East, defense economy and policy, and transatlantic relations. The IAI puts out an English-language quarterly (*The International Spectator*), an online webzine (*Affari Internazionali*), a series of research papers (*Quaderni IAI*) and an Italian foreign policy yearbook (*La Politica Estera dell'Italia*).