



# **The Tunisian Constituent Assembly's By-laws: A Brief Analysis**

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International IDEA resources on Constitution Building

## The Tunisian Constituent Assembly's By-laws: A Brief Analysis

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## Foreword

A constitution is the social contract that people give themselves to organize their collective life and shape their governance structures. As a result, constitutional processes are a perfect occasion to openly express real popular sovereignty. The process through which a constitution is drafted is in itself highly significant, in particular because it is essential to ensuring that a new constitution's contents reflect the values and aspirations of the people.

Rules of procedure should be designed to ensure that law-making bodies operate in a balanced, well structured, professional and systematic manner. This is particularly the case for constituent assemblies that are tasked with drafting legislation while also constructing a new constitutional framework. In that context, priority is given to ensuring that the people's views are adequately represented during the process while at the same time encouraging professionalism and efficiency throughout. Only in this way can the end result reflect the collective views and concerns of the people while at the same time enjoying some form of normative legitimacy as well.

International IDEA is proud to publish this excellent study, which is the first in a series that will be published on constitutional processes in the region. The study has as its aim to assist the Tunisian Constituent Assembly improve its own rules of procedure, as well as to provide guidance to other countries in the region and beyond as they develop and improve their own rules. Bill Proctor and Ikbal Ben Moussa, the authors of this study, have examined each aspect of the Tunisian Constituent Assembly's rules and have developed a series of recommendations that are the result of their own individual analysis.

We hope that this effort will be useful to all interested actors, whether in Tunisia or beyond. We also look forward to continuing to provide support to the ongoing constitutional drafting processes in the region, while of course maintaining a strictly non-prescriptive approach.

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## Executive summary<sup>1</sup>

In response to the Jasmine Revolution, Tunisia is in the process of developing a new constitution. The institution charged with drafting this new constitution is the National Constituent Assembly (NCA). The functioning and processes of the NCA will directly affect the shape of the new constitution and, as a result, its response to the revolutionary demands and the democratic functioning of the state. This study describes and analyses the NCA's rules of procedure and identifies areas of concern and difficulties that arise in its application.

Most parliamentary rules anywhere in the world will reveal certain weak points. It is therefore no surprise that there are indeed a number of potential weaknesses in the NCA's rules of procedure that could lead to unnecessary political conflict or impasse, as discussed below. However, perhaps the most critical weaknesses are those that relate to textual ambiguity and a lack of implementation.

Many individual members of the NCA and outside observers have a multitude of complaints about the Assembly's *modus operandi*. These criticisms are widely aired in the media, and in the electronic media in particular. There are repeated complaints about the organization's failure to publish the agendas and minutes of Assembly proceedings, and particularly those of its committees. These are complaints about the *implementation* of the rules of procedure, and not about the rules themselves. Instances in which a failure in implementation results in a lack of transparency are particularly worrisome, especially when the constitutional drafting process is primarily political, as is explained below. Transparency puts political pressure on the political process to help achieve improved outcomes.

The other major broad weakness relates to ambiguity. Too much is left to chance, to unspoken rules and to informal interparty deals. What the British call the 'usual channels' work reasonably well most (but by no means all) of the time in institutions of great longevity in which custom carries more or less the same authority as written rules. Such informal practices are less reliable, and much more prone to abuse (or simple failure) in newly forged institutions in which there is little continuity of membership or shared experience to enforce their legitimacy. If Tunisia's NCA fails in its principal task of creating a workable constitution, it will be a political failure rather than the result of inadequate internal rules.

In the light of these two broad concerns, as well as criticisms that relate to the functioning of specific processes within the NCA, the authors make the following suggestions for any future revision of the rules:

1. provide the president of the Assembly with a clearly graded series of sanctions, backed by the ability to appeal immediately to the whole Assembly for support, by a formal vote if necessary;
2. reconsider the procedures for legislative initiative and control of the agenda in order to clarify the different procedures available to the government and members of the Assembly, to establish a better balance between them;
3. explore the possibility of adding a time limit for the president of the Assembly to transmit draft laws to committee;
4. consider adding procedures for examining legislative proposals in committee;
5. consider adding procedures for examining legislative proposals in plenary Assembly;
6. consider introducing a rule that would allow the government to set a date by which a committee must submit its report on a proposed legislative text;
7. consider adding an automatic mechanism to ensure that proposed amendments are discussed;
8. elaborate and clarify the chair's powers to enforce discipline and maintain order;
9. clarify the acceptable scope of points of order (and the manner in which they can be raised) and codify the nature of procedural motions from the floor and the procedure for their consideration;
10. consider introducing a procedure for challenging a ruling from the chair on grounds of incompatibility; and
11. explore the possibility of providing opportunities for non-government parties to initiate debate, either in committee or in plenary Assembly, and have some influence over the agenda.



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## Tunisia's constitutional context

### *The Jasmine Revolution*

By what was largely an accident of timing, Tunisia has found itself the focus of worldwide expectations following the so-called Arab Spring. Tunisians were the first to take to the streets, the first to unseat the authoritarian regime that had largely controlled their lives during the previous 50-plus years and the first to set a process in motion to create a new and 'democratic' system of government to replace it.

A 'successful' outcome to the process of constitution building in Tunisia (if success is defined as the establishment of a stable, secular and representative system of government) is the objective not only of the secular political forces in Tunisia itself. It is also the dream of many of their brothers and sisters elsewhere in the Maghreb, the eastern Mediterranean and all well-intentioned democrats in the 'West'—including neo-cons trying to justify their aggressive policy of regime change; liberal socialists seeking confirmation of the inherently democratic character of the peoples of the world; or the United Nations, its agencies and its counterparts in the private sector that have an institutional interest in the worldwide spread of the currently politically correct versions of 'self-determination', 'human rights' and 'fundamental freedoms'.

For those involved in the day-to-day business of shepherding the Tunisian Revolution, this is a fairly heavy burden to bear. Not only do they have to consider the future of the country, the longer-term well-being of their citizens and the need to address their immediate grievances; they are also expected to send the appropriate signals to their worldwide constituency that they are on track to establish the as-yet unrealized dream of an inclusive republic that is simultaneously representative of all strands of opinion (yet Arab and Muslim), and which adheres to Western norms but nonetheless reflects the region's traditional social and religious predilections. If any country is to achieve this metamorphosis, it would have to be Tunisia. In other words, if Tunisia cannot successfully move forward, many will question what hope there is for the rest of the Mediterranean littoral.

### *Moving forward*

Tunisia has many advantages moving forward. First, it has the enormous advantage of a continuous history much longer even than many of its neighbours around the Mediterranean. It was at one time the only serious rival of Rome that could not easily be beaten, and so has its own ancient heroes and heroines, some mythic and some only too real. It has some of the very finest Roman buildings and artefacts to have survived anywhere in the empire. Tunisia was for a long time a nominal fief of Constantinople and then of Istanbul; it was later a colonial protectorate of France for a while. Yet throughout these upheavals, it maintained its borders and its

identity, and perhaps most critically, it maintained its own legal system and its own polity, however much constrained by the Sublime Porte or the French resident in his extravagant Carthaginian palazzo.

Second, despite waves of invasion and occupation over the millennia, Tunisia has remained remarkably homogeneous. Tunisian Arabic (Derja) is almost universally the first language (although it will soon be supplanted in schools by standard Arabic as the main language of instruction and communication). Around 98 per cent of the indigenous population claim Arab-Berber descent, and almost the same proportion professes at least a nominal adherence to Islam.

Third, Tunisia does not seem to qualify as a third world country according to most socio-economic criteria. Insensitive attempts by other countries and external agencies to treat the country as such are sometimes proudly repulsed. Tunisia has achieved a relatively high per capita gross national product compared to its neighbours, and its literacy rate is higher than those of other countries in the region. Prior to the international banking collapse of 2008, Tunisia had a lower official poverty rate than many European countries, and a higher proportion of university graduates than most of them as well. While freedom of expression has been virtually absent in recent Tunisian history, and development statistics presented by the former regime are inexact, Tunisia is certainly not a third world country of the usual caricature.

Fourth, the Tunisian state has, since independence in 1956, been avowedly secular in character: its first constitution proclaimed Islam as its religion but the republic as its government. Thanks to the initiatives of its first president, Habib Bourguiba, the Tunisian state shed the more extreme vestiges of Islam at an early stage, and in particular the influence of sharia, tradition and law. For example, polygamy was abolished and women's rights were more broadly enhanced (especially relating to education, marriage and divorce, and abortion).

Fifth, just as the state was not in thrall to the clerics, neither was it in thrall to the military. Although an extensive police network enforced the prohibition on serious organized opposition to the regime of any political colour, there was still a recourse to law, albeit with some recourse to extrajudicial penalties. Opponents of the regime were exiled or imprisoned, but were generally not shot (and hence many have now returned). Neither Bourguiba nor his successor Ben Ali was surrounded or supported in power by a large military entourage, and the relatively small military establishment was therefore a servant of the civil power, not its master.

Hence, Tunisia had a modern secular tradition, was not held together by brute military force (unlike the Ba'athist states of Iraq and Syria) and was not divided by insuperable ethnic or religious conflicts (unlike Lebanon). It had therefore been spared civil war, invasion (other than by the great powers) or regular conflict with its



neighbours. It was not, like Lebanon, Syria, Iraq or even Libya, an artificial creation of the European colonial powers, and although it had been subject to the colonial yoke, its social structures had not been irrevocably distorted—like that of Algeria—by an overwhelming presence of *colons* or artificial attempts to transform it into an adjunct of a European state. Unlike Morocco, it had peacefully completed the transition from monarchy to a form of (at least ostensibly) representative government. And although overwhelmingly Muslim by profession, Tunisia had not been seriously threatened by extreme religious pressures since independence—largely, it may of course be argued, as a result of the constraining policies of the post-independence regimes.

These factors combined to make the rebellion in Tunisia somewhat unlike revolutions that have taken place elsewhere in North Africa or the eastern Mediterranean. Tunisia's revolution was a civil revolt against an essentially civil regime: the armed forces, as became clear very soon into the revolution, were well brought up in the West European tradition and largely followed the orders of the group they recognized as the civil power. It was also a non-sectarian revolt against an essentially non-doctrinaire regime: the Néo-Destour and its successor, the Constitutional Democratic Rally (Rassemblement Constitutionnel Démocratique (RCD)), claimed to be embodiments of Tunisian national identity and serve as essential ladders to personal advancement, but they were not promulgating any particular route to salvation, religious or secular. The revolt was not stimulated by external pressures (national enemies or ideological/religious jihad) or championed by a dominant revolutionary leader.

Its name, the Jasmine Revolution, associated it with the relatively bloodless ousting of the Central European satellite regimes. Although many Tunisians reject this parallel (since it was certainly not bloodless), it nonetheless did share some characteristics of many of the post-Soviet revolts. For example, the events were driven more by general economic and political discontent than by an all-uniting underlying ideology (and there was therefore no obvious flag or leader around whom to unite), the state organs (at both the local and national levels) remained operational, the courts remained open, the stock exchange (*bourse*) suffered no catastrophic loss, and international air services were rapidly resumed.

These factors also somewhat limited the options available when mechanisms needed to be put into place to translate revolutionary aspirations into a viable constitutional framework with a chance of permanence. There was no charismatic leader to usher Tunisia towards a new Jerusalem or a new al-Quds; there was no external invader to impose a constitutional settlement; and there was no armed forces council to enforce a 'non-political' solution in the name of the nation.

Instead, Tunisia maintained a working state machine and a working (and ostensibly democratic) constitution—however unrepresentative it may have been proved in operation. There were also politicians of both the old regime and the erstwhile

opposition who were wise enough and sufficiently sensitive to the long-term national interest to utilize existing legal instruments to finesse the transfer of power to interim institutions that were sufficiently grounded in law to be recognized by the inherited courts and legal establishment, and to be accepted by the international community—and, most vitally, the international financial community—as legitimate. This collective common sense also reflected the essential stability and continuity of the Tunisian state and underlined the fact that this was indeed a revolutionary situation, but one nonetheless that was capable of being worked through by the evolutionary mechanisms of a mature polity.

### ***The beginnings of a new constitution***

In the immediate aftermath of the initial revolt, in December 2010 and January 2011, formally replacing the June 1959 constitution was, surprisingly, not near the top of the agenda. The successor authorities initially planned to call a presidential election, in accordance with article 57 of the then-extant constitution. If implemented, this would have resulted in the election of a president with the full panoply of powers to override the legislature that had previously been available to his predecessor. However, further popular demonstrations in the Kasbah in February 2011—along with the realization that the provisions of article 57 had in any case already expired—resulted in the final departure of the prime minister and other ministers inherited from the old regime. The interim president (himself a survivor of the old regime, the former president of the RCD-controlled Chamber of Deputies) shortly thereafter announced that elections would take place to form what would be called the NCA. Initially, these elections were planned for July 2011 under the existing electoral law. However, they were eventually postponed by decree (dated 8 June 2011) until October 2011, allowing sufficient time to bed in a new electoral authority and partially revise (in September) the electoral laws.

With a nearly 70 per cent turnout, the NCA was elected on 23 October 2011. Ennahda, the avowedly moderate Islamic party, took the plurality of votes (41.7 per cent) and seats (89 of 217), but was a long way from an outright majority. The resulting interim government was therefore a coalition, but one with a large enough majority to command most of the key positions in the new government and Assembly.

On 22 November 2011, the NCA met for the first time in the Palais Bardo, the old palace of the Beys, which was also the seat of the former Chamber of Deputies—thus emphasizing continuity as well as change. On 10 December 2011, the NCA agreed upon interim constitutional arrangements, and eventually (on 20 January 2012) adopted rules of procedure (sometimes known as the Assembly's by-laws, or *règlements*). These rules of procedure were intended to govern the NCA's activities until the adoption of a new constitution<sup>2</sup>.



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## The drafting process and final text

### *Drafting approach*

The rules of procedure for the previous legislative body (the Chamber of Deputies, which is now dissolved) could not apply to the NCA due to the difference in nature between the two institutions. Nevertheless, the old rules were used as a starting point. In the initial stages, the professional advisors of the Assembly apparently did what their counterparts anywhere else would have done: they dusted off the rules that had applied in the same arena to the operations of the previous parliamentary body and, with some tinkering, laid these out as a possible workable template. However, designing appropriate deliberative techniques and legal frameworks were absent during discussions about drafting the rules of procedures. This explains in large part why the discussions were marked by numerous tensions between Assembly members: members of the parliamentary majority accused the opposition of impeding the Assembly's work and wasting time, and members of the opposition said the parliamentary majority was exhibiting authoritarian behaviour and intended to deprive them of their right to express their opinions.

### *Inordinate delay*

Many Tunisians criticized the Assembly for taking longer than expected to complete the rules of procedure. A very active local media alleged that there was an inordinate delay between the establishment of the Assembly and the adoption of its rules. The NCA first met on 20 November 2011, but it was only fully functional when its internal rules were approved nine weeks later, on 20 January of the following year. As a result of the delay and accompanying criticism, no significant revisions are expected until after the Assembly has completed its term.

However, it is unclear when exactly the Assembly will complete its term. In October 2012, the ruling government coalition announced that it would seek to complete the drafting of the constitution by February 2013. While political commitments to follow a certain schedule may be made, there is no legal obligation to complete the draft constitution by a given deadline.

## Substantive overview

The rules of procedure are grouped into 11 separate chapters and comprise 143 separate rules, many of which contain multiple clauses, although they are not necessarily separately numbered. This section of the study discusses some broad issues related to the text as a whole. It is quite clear that the secretary general of the Assembly and his senior staff are fully aware of these weaknesses, gaps and ambiguities, and are well prepared to address them when the right time arrives.

### *Length and complexity*

The draft originally considered by the Assembly included approximately 350 separate rules; they were reduced to 140, of which only 130 would be operational (the first ten rules effectively expired after the inaugural sitting of the Assembly). Tunisian commentators and critics, including a number of Assembly members and experts such as Professor Yadh Ben Achour, have variously criticized the final product for being either too brief and incomplete (and thus open to widely differing interpretations) or too long and complex (and thus burdened with details not necessary for the initial and primary task of constitution building). These criticisms stem from the dual-purpose role imposed on the Assembly and reflect the critics' varying expectations.

Comparisons are sometimes made with the rules of procedure established by the earlier NCA in June 1956. These comprised a mere 38 articles, and are a fine example of brevity employed to encompass the inevitably complex operations of a representative assembly. Comparison with the situation in 2012 is, however, otiose. First, although it was described as a constituent assembly, the body elected in 1956 was, in all but name, a constitutional convention. While its rules contained a few provisions that would be appropriate to a regularly functioning national parliament (such as the possibility of interpellations), it was otherwise restricted to the task of constitution building. Second, the 1956 assembly had no role in the creation, dismissal or systematic scrutiny of the government (with the exception just noted) and—most important of all—it had no legislative function whatsoever. Legislation in this post-independence period was entrusted to the head of government. From the point of view of those espousing the rights of women and all other relatively liberal causes, this was just as well, since by exercising this unique and unregulated legislative power in the early years of independence, Bourguiba was able to sweep away many of the traditional constraints inherited from the Beys and create the momentum towards the modern state that Tunisia has since become. This situation could not have been replicated 60 years later in the absence of a comparable revolutionary and unifying national leader.



The issue now, therefore, is whether the rules adopted in January 2012 are adequate to regulate the operations of an assembly that is entrusted with dual functions; is composed of diverse (and in some cases mutually antagonistic) political groups, which are made up of individuals without any previous parliamentary experience; and lacks the guiding hand of an external authority—whether an individual, a rival claimant to national authority (such as the military), or a foreign or international power. It is by no means a simple task to draw up rules that control the activities of an entirely new organization—especially one with an unusual mix of duties. The answer has to be, quite simply, that six months into its active life, the NCA has proved itself capable of pursuing its tasks with what amounts to a ‘normal’ level of political and partisan disputes that are characteristic of any healthy representative assembly.

### ***Solutions to avoid a repeat of grievances***

Some of the tensions that occurred during discussions about drafting the rules of procedure (described above) affected the content of the final document. More specifically, some of the causes of tension were addressed with solutions, and these solutions are reflected in the rules of procedure. For example, members’ floor time was carefully determined, the powers of the president of the Assembly were defined broadly to provide him or her with the authority to help ensure the orderly conduct of the sessions, and the president was required to observe prayer times when conducting plenary sessions.

### ***Comparison with the previous rules of procedure***

In terms of both substance and form, the rules of procedure of the NCA were largely inspired by the rules of the former Chamber of Deputies, which were last amended on 20 July 2004. These rules contained the full operational details required for a new assembly to get under way. Despite the overwhelming change of personnel, the old rules had the advantage that they reflected Tunisia’s indigenous tradition. However, these rules were designed to operate an orthodox parliament in an effectively single-party environment, and—perhaps more importantly—they were tainted by association with the former (and now discredited) regime. The new rules were expected to reflect the reality of an entirely new political situation, while also being practically workable. More specifically, they were expected to fulfil the immediate tasks, but were not anticipated to last.

Interestingly, the rules that emerged from the interparty negotiations were not merely a cut-down version of the Chamber of Deputies’ previous rules. They also contained provisions new to the Tunisian parliamentary experience that were derived from the well-established French parliamentary tradition: most notably the *conférence des présidents* (Presidents’ Colloquy), which brings together the Assembly committee chairpersons—and most importantly, the political group leaders—and the president

in what is formally described as an advisory or ‘consultative’ role (rule 38). The establishment of this body, which in practice has more important powers than those of the Bureau of the Assembly, is a good indication that the final drafters of the rules of procedure were fully cognizant of the critical importance of the group leaders in what had emerged as a multiparty Assembly.

Nevertheless, some of the provisions of the rules of procedure are a faithful transcript of those of the former Chamber of Deputies. This fact only serves to reinforce the criticism that the rules resemble those of a legislative assembly more than those of a constituent assembly. However, this feature of the rules of procedure is due to the NCA's combination of legislative and constitutive functions.

### ***Dual purpose***

The current Assembly rules are therefore a somewhat uneasy mix of provisions that relate to preparing the new constitution and regulating the Assembly's activities as a lawmaking and government-controlling parliament. This was the inevitable outcome of the decision that eventually emerged in the months after the start of the ‘revolutionary’ process to dispense with the old parliamentary structures while simultaneously operating a parliamentary system pending the approval of a constitution. The Assembly elected in October 2011 is, therefore, as its title makes clear, a *constituent assembly*, and not merely a constitutional *convention*. Alternative options would have been either to continue with the old Chamber of Deputies, which would have been politically unacceptable, or to replace it through new elections while electing a separate convention exclusively responsible for preparing a new constitution. This is the alternative that Libya's National Transitional Council appears to have adopted. While such an arrangement clarifies the immediate responsibilities of the two bodies, and in theory allows them to concentrate exclusively on their own ring-fenced tasks, it also creates the potential for tension and conflict between two nationally elected bodies with rival claims to popular legitimacy.

Another means of avoiding, or minimizing, the tensions between the Assembly's two roles would have been for the Assembly deliberately to split itself into two divisions—one group specifically and uniquely tasked with drafting the constitution, and the other group left with the ‘normal’ parliamentary responsibilities of passing legislation, forming governments, and engaging in investigation and scrutiny. This possibility has also been floated in the Libyan context and elsewhere. However, for the individual Assembly member, who must regard him- or herself as tasked with fulfilling both duties—to write a new constitution *and* to keep the government under control—relegation to only one division might well seem like a dereliction of duty, and difficult to explain to their electorate.



It is clear, however, that in deciding to assume shared responsibility for both of the Assembly's functions, the newly elected politicians and their parties imposed a considerable burden of work on themselves, as well as a considerable intellectual challenge. It is not only the Constituent Assembly as a collective that is pulled in both directions, but also individual Assembly members. One role—that of the convention member—ideally requires a degree of statesmanlike detachment from immediate policy concerns, while in the other role—that of legislator, investigator and critic—the Assembly member is expected to espouse causes and employ the usual partisan tactics to ensure their success.

## The lawmaking process

The legislative function of the NCA, as with all legislative assemblies, involves several stages. The rules of procedure set out certain provisions for each of these stages, which are discussed below.

### *Legislative initiative*

Under the terms of article 4 of Constitutional Act no. 2011-6, dated 16 December 2011, relating to the provisional organization of public authorities (known as Constitutional Act no. 6 or the interim constitution) and rule 108 of the rules of procedure, legislative initiative belongs either to the government or to no less than ten members of the Assembly. This minimum number of members who can introduce a legislative initiative is in line with the number required to establish a parliamentary group, which, in practice, denotes the will to make the legislative initiative of members a privilege of parliamentary groups. For example, a draft law to prohibit officials of the former ruling party, the Constitutional Democratic Rally, from running for office for a period of ten years was proposed by the Congress for the Republic bloc, one of the three parties of the governmental coalition.

Rule 108 addresses the legislative initiative of both the government and Assembly members, but does not appear to distinguish between draft laws (*projets de lois*) and proposals for laws (*propositions de lois*)—unlike the French system, which makes a clear distinction between proposals (which are introduced by members) and draft laws (which are proposed by the government). Accordingly, Assembly members appear to have the choice to submit either a draft law or a simple law proposal, while logic would dictate that the government can only submit draft laws.

The ambiguity is made worse by the second paragraph of rule 108, which provides that proposals for laws (*propositions de lois*) and amendments may not result in a reduction in public resources or an increase in public expenditure without distinguishing between the proposals of members and those of the government; however, this prohibition does not extend to draft laws (*projets de lois*). It therefore seems likely that the draftsmen intended Assembly members to introduce only proposals for laws, and not draft laws, but this is not what the first paragraph of rule 108 actually says. According to the strict letter of the rules, therefore, there is nothing to prevent Assembly members from proposing draft laws, which are not covered by the financial restrictions described above.

It should also be noted that the government's initiatives and members' initiatives are not on an equal footing. Rule 39, which determines the responsibilities of the Presidents' Colloquy, mentions that the latter proposes the draft agenda for plenary sessions and that government bills have priority.



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## ***Legislative procedures in committee***

Once a draft law or legislative proposal is delivered to the president of the Assembly, he transmits it for consideration to one of the eight standing committees listed in rule 67 of the rules of procedure. It must be noted that the rules do not specify a time limit for the president of the Assembly to transmit the proposed draft to the concerned committee. The absence of such a deadline carries the risk that the president may delay, or altogether abstain from transmitting, a draft law that he or his political group does not favour.

Rule 69 provides for the possible intervention of committees other than the lead committee. The text states that any legislative committee can, with the approval of the president of the Assembly or at his request, study the aspects pertaining to its area of competence regarding a topic that has been referred to another legislative committee, then prepare a written report and transmit it to the committee concerned. Similarly, rule 69 allows any legislative committee to seek the advice of another legislative committee regarding a topic that has been submitted to it, after informing the president of the Assembly.

Typically, in other jurisdictions, once the bill is before the committee, it will task a rapporteur with an in-depth study of the text. Rule 58 presents this approach as an alternative available to the committees. Rule 59 encourages the study of different legal options by providing that the committee can hear any person or organization that may shed light on the ‘subjects under discussion’.

Rule 67 does not specify how a legislative proposal is examined within committee. Rule 60 describes the committees’ voting procedure, which is done in person and in public by majority vote. In fact, a committee will only prepare the discussions in public sessions and will not take any final decisions. All the committee’s work is recorded in a report that will be referred to the Bureau of the Assembly upon committee approval. Upon approval, it will also become a plenary Assembly agenda item and be published on the Assembly’s website (rule 62).

It must be noted that, contrary to rule 40 of the previous rules of procedure, rule 54 of the current NCA rules of procedure stipulates that committee meetings shall be public. This indicates a preoccupation with transparency and the will to break with the past, at least on this issue.

It is noteworthy that rule 57 requires the committee chairman to ‘seek to encourage agreement through the discussion of differing points of view, proposals and opinions’. It goes even further by stipulating that, in the absence of consensus, the differing points of view must be recorded and an opportunity provided for the Assembly as a whole to decide. This is an important procedural safeguard against the

suppression of minority opinions, which should indirectly enable minority groups to get their amendments onto the floor of the plenary simply by refusing to endorse the consensus in committee. Such safeguards are not found in many other rules of procedure.

### ***Legislative procedures in plenary Assembly***

The rules are vague in describing how exactly legislative proposals will be examined within the Assembly. As far as proceedings in the plenary Assembly are concerned, rule 91 appears to have been drafted mainly to deal with proposed amendments to the draft constitution (with the emphasis on referring amendments back to committee in case of disputes), and does not seem to provide adequately for the consideration of the multifarious amendments that can routinely arise in draft laws. In particular, there is no basic stipulation about the precedence or priority to be given to conflicting amendments. In many European assemblies, for instance, a basic rule provides that amendments furthest from the original text should be considered first. This is a formidable weapon and does not always produce the happiest of results—but it at least establishes a clear order of priority that can rarely be argued about.

The Assembly may be required to meet in plenary once again in order to consider amendments proposed by members from the floor (rule 91). Referral back to the lead committee would indicate that the Assembly requires clarification on the text. Adopting such a motion means that discussions have to be suspended until the committee submits a new report. Since a referral back to the committee results in the suspension of the legislative process, it may therefore result in thwarting the government's right to have priority consideration of the drafts it submits. This is why rules of procedure usually allow the government to set a date by which the committee must submit its new report. The rules of procedure for the Tunisian NCA do not offer the government this possibility, which may be regarded as a shortcoming.

### ***Amendments***

Rule 91 of the rules of procedure grants Assembly members the right to propose amendments to draft laws during plenary sessions. Many commentators consider the right of amendment to be a true substitute for parliamentary initiative in matters of legislation. Indeed, while certain amendments may be pure formalities, others can, in their own right, constitute small but real proposals of law. This perhaps explains the laborious process that governs the procedure for the proposal of amendments under rule 91. It must be kept in mind that, as is the case for proposals of draft laws, the amendments are not to result in increasing public expenditure or diminishing public resources.



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### ***Ratification of treaties and international agreements***

Draft laws authorizing the ratification of a treaty or the approval of an international agreement usually only include a very short provision (one rule only) to which is attached the text of the agreement or treaty. Rule 113 stipulates that the vote is not on each individual article of treaties or other international agreements. It prohibits the tabling of any amendment to the text of such agreements, but what should perhaps have been specified was that any substantive amendment concerning a draft law authorizing ratification can also not be tabled. According to rule 113, the Assembly can adopt the international agreement, adopt it with reservations, postpone a decision or reject the international agreement in its entirety.

### ***Adoption of laws***

The adoption of draft laws takes place following the closure of discussion during a plenary session. Rule 95 distinguishes between the majorities required for adopting ordinary draft laws and for adopting organic draft laws. Ordinary draft laws are adopted by a majority of attending members, provided that the percentage of favourable votes is no less than one-third of NCA members. Organic draft laws are adopted by an absolute majority of NCA members. The distinction between organic laws and ordinary laws is determined by article 6 of the interim constitution.

As for the voting procedure, rule 96 provides that, with the exception of elections, all voting takes place publicly. It lists three different procedures for public voting: electronic voting, vote by show of hands and a roll-call vote. During the first plenary sessions, the Assembly opted for a vote by show of hands. Then, during the vote on the draft law for the supplementary budget, electronic votes were used.

## Legislative oversight

In parliamentary systems, legislative authorities can review and evaluate the activities of the executive branch of government in order to ensure that its activities are administered efficiently, appropriately and in accordance with the law. This section discusses those techniques for government scrutiny that are specifically covered in the rules of procedure.

### ***Techniques for scrutinizing government***

#### *Written and oral questions*

By collecting information on its activity, the NCA can exert a degree of indirect control over the executive arm of government. Under the rules of procedure, NCA members are entitled to interrogate the government by means of written or oral questions.

According to rule 114, written questions must be specific, brief and without any personal references. In other systems, written questions are usually posed by one member of parliament (MP) and addressed to a specific minister. However, these rules do not require such specificity. One or several members may address written questions to the government as a whole. The government must provide its response to the president of the Assembly within one month. Questions and answers are published in the NCA's *Official Journal of Deliberations* and on its website.

Rule 115 stipulates that oral questions must be prefaced by a written request addressed to the president of the Assembly. The questions themselves must also be specific, brief and without any personal references.

It must be noted that the rules of procedure do not offer the procedure of questioning practised in other parliamentary systems, whereby an oral question is used to open a general discussion, which is followed by a vote on a resolution. With this process of interpellation, an unfavourable draft resolution can lead to the resignation of the government. The rejection of this technique by the Tunisian NCA is probably justified by a desire to ensure greater governmental stability.

#### *Government discussion sessions*

In addition to the written and oral questions, rule 117 of the rules of procedure stipulates that one session a month be held during which the Assembly can conduct discussions with the government about its 'work ... as a whole and on individual departmental policies'. These sessions begin with a presentation by a member of the government on a given topic. He then answers the Assembly members' questions but is entitled to take time to prepare his explanations. However, in spite of the importance



of these dialogue sessions for Assembly members, who can keep themselves updated on governmental activities, and for the government, which has the opportunity to explain its policies, the frequency of such sessions established by rule 117 has not thus far been respected.

### *Committee investigation*

The NCA can also collect information on governmental actions within the framework of the committees. The second paragraph of rule 59 stipulates that standing legislative committees may request a hearing of government representatives.

Moreover, the special committees of inquiry provided for by rule 73 can constitute an effective method of overseeing government actions if their independence vis-à-vis the government is maintained. However, as the various committees are constituted in accordance with the principle of proportional representation, one cannot help but be sceptical as to their independence. In fact, independence already seems to have been compromised with the special committee that was investigating the events that occurred on 9 April 2012. On that day, a demonstration was organized on Habib Bourguiba Avenue despite the minister of the interior's ban on demonstrations on this avenue. The demonstration was violently repressed by government forces. In response, the committee was tasked with investigating the events and establishing responsibility, with a special focus on the role of the minister of the interior. However, the committee is chaired by a deputy of the Ennahda party (the party to which the minister belongs) and eight of the committee members also belong to this party. After several months, it seems as though the committee has barely made any progress with its work.

### *Techniques to promote responsible government*

Executive branch accountability before parliament is the basic principle of all parliamentary systems. The rules of procedure contain techniques for the NCA to promote government responsibility through mechanisms of accountability, which are described below.

### *Motions of censure*

Article 19 of the interim constitution regulates how the NCA can challenge the government's responsibility by passing a motion of censure. According to this provision, a motion of censure can target either the entire government or a specific minister.

Rule 118 of the rules of procedure may seem incomplete, as it does not address essential points such as the majority required to adopt a motion of censure. However, this is justified by the fact that the motion of censure is addressed in detail by article

19 of the interim constitution. Indeed, this provision specifies that the proposed motion of censure must be justified and proposed by no less than one-third of NCA members, that withholding confidence from the cabinet requires that the motion of censure be adopted by an absolute majority of NCA members, and that should this motion fail, no other motion against the government or against the same minister may be tabled for a period of three months. In order to promote government stability, the motion of censure is bound by several conditions that tend to limit recourse to this ultimate weapon by the Assembly. In addition, article 95 of the rules of procedure, which specifies the different majorities required to adopt different types of draft laws, states that the motion of censure must be carried by an absolute majority of Assembly members.

### *Commitment on passing bills*

It may be noted that neither the interim constitution nor the rules of procedure provides for a technique that is common within parliamentary systems, namely, the formal engagement of confidence in the government on the passing of a government bill. It is the government's ultimate pressure over parliament, as it leaves the Assembly no other choice but either to adopt the legislation proposed by government or to throw the government out. Such a rule would oblige the majority to rally to support the government and provide a technique for terminating protracted legislative proceedings. It is a formidable weapon in the hands of any government. In view of the effective control of the agenda and timetables by the majority parties in the NCA, it is probably just as well that this additional weapon has not been added to the government's armoury.



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## Committees

Few assemblies are able to function effectively when all their members are present, or study all the issues that are submitted to them without conducting any preliminary work. Typically, this preparation is performed by committees. In view of the variety of functions assigned to the NCA, the rules of procedure have established three types of committees (rule 41): constitutional standing committees, legislative standing committees and special committees.

The rules provide that both standing and special committees are appointed in proportion to the representation of parliamentary groups and independent members in the Assembly (rule 42), and therefore reflect the political composition of the Assembly. Each committee is headed by a bureau that reflects the political composition of the NCA and is composed of a chairman, a deputy chairman, a rapporteur and two assistant rapporteurs (rules 49 and 50). Thus, the overwhelming majority of chairmanships, or even all the members of the bureaux, may belong to the majority parliamentary group.

Committee deliberations are open to the public (barring exceptions), and are on the record (rules 54 and 55). This promotes transparency and accountability among the various committees.

In view of the large number of standing committees of all types, and since each committee is limited to 22 members, rule 48 allows members to stand on more than one committee provided that the committees are not of the same type. However, this rule does pose some constraints with regard to scheduling committee meetings. Indeed, meetings must be coordinated in such a way that no two committees that have members in common meet at the same time. It is nevertheless possible to schedule committee meetings according to their type. Furthermore, this plurality of tasks places a heavy burden on Assembly members and can affect their work. More specifically, there is a risk that it may slow down their main function: the preparation of a new constitution.

### ***Standing committees***

Constitutional committees, as their name suggests, are charged with writing a draft constitution, each within the framework of their area of competence (rule 65). Rule 64 provides for six such constitutional committees.

Legislative committees, on the other hand, are charged with studying draft laws or other matters that may be submitted by the president of the NCA, within the framework of their subject matter area.

### ***Special committees***

The rules of procedure provide for three special committees: the Committee on Rules of Procedure and Immunity (rule 71) as well as two monitoring and investigation committees that conduct inquiries into matters of urgent national priority (rule 72)—the Committee on the Revolutionary Martyrs and Injured and General Legislative Amnesty Enforcement, and the Committee on Administrative Reform and Anti-Corruption.

Furthermore, rule 73 allows the establishment of additional special committees ‘to investigate important issues’. The procedure for their establishment requires a written request from one-third of NCA members and the approval of an absolute majority of NCA members. For example, a special committee of inquiry was formed under rule 73 to investigate the 9 April 2012 demonstration on Habib Bourguiba Avenue.

Although these special committees are clearly established by the rules of procedure, there is some dispute about the powers associated with them. In its monthly report (rule 72), the Special Committee on the Revolutionary Martyrs and Injured and General Legislative Amnesty Enforcement stressed that the rules of procedure do not grant it the necessary authority to act and proposed a review of the rules in this respect. It should be mentioned that the period following the overthrow of the previous regime in January 2011 was marked by numerous claims and protests on the part of the wounded of the revolution, who are still waiting for their health care coverage to be settled, and on the part of those people where alleged perpetrators were given a general amnesty after the revolution and whose rights have still not been restituted and remain without any compensation.



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## The constitutional drafting process

### *The role of committees*

Article 2 of the interim constitution, which lists the NCA's various powers, identifies its primary function as drafting a new constitution. The rules of procedure devote two specific chapters to the constitutional function: Part 2 of Chapter 3 pertaining to constitutional committees and Chapter 4, which is entitled 'Preparation of the Draft Constitution'.

The task of drafting a constitution is entrusted to six standing constitutive committees, each of which is charged with studying and then writing a draft for the articles that fall within its area of competence. Taking into consideration the possibility that the topics of certain committees may overlap, rule 66 allows two or more committees to meet together to consider overlapping issues, either at their own initiative or at the request of the Joint Committee for Coordination and Drafting.

Drafting a constitution is a procedure that, in addition to being influenced by political choices, requires knowledge of constitutional law and coding techniques, which NCA members do not necessarily possess, even if some of them have legal backgrounds. The constitutional committees' task is all the more difficult due to the general rapporteur's statement upon his election that the NCA members shall begin from scratch and not rely on any preliminary draft constitution. However, this statement did not prevent certain parties, such as the Committee of Experts of the High Authority for Achievement of Revolution Objectives and the General Union of Tunisian Workers, from submitting draft constitutions they had drawn up.

Nevertheless, the constitutional drafting process has consisted of more than simply comparing the draft constitutions made available. The constitutional committees have made wide use of rule 59, which allows them to 'seek advice' from persons or organizations capable of shedding light on relevant issues. Indeed, the constitutional committees have met with a large number of experts, former politicians and civil society representatives.

Rule 103 of the rules of procedure, in parallel with the constitutional committees, provides for the establishment of a Joint Committee for Coordination and Drafting. It is to be chaired by the NCA president and composed of the constitution general rapporteur and his two assistants (who are elected in two rounds by an absolute majority of NCA members) as well as the chairmen and rapporteurs of the six constitutional committees. As its name indicates, this committee is tasked with coordinating the work of the various constitutional committees, drawing up the general report on the draft constitution before it is submitted to the plenary and preparing the final version of the draft constitution in the light of the decisions of

the plenary meeting. The joint committee held its first meeting on Thursday 7 June 2012 to discuss the progress of the various constitutional committees.

### ***Procedure***

The specific procedure for discussing the draft constitution during the plenary session is laid out in rules 105 and 106, but the general rules for conducting business in the plenary Assembly (rules 75 to 102) also apply.

It should be noted that rule 78 of the rules of procedure provides for the possibility of holding a plenary session in camera at the request of its president, the chairman of a parliamentary group or no less than ten NCA members. The request must be approved by an absolute majority of NCA members. However, rule 78 does not apply to plenary sessions pertaining to the constitution, which indicates the importance and specificity of the NCA's constitutional function. Nothing should be beyond the glare of public opinion where the constitution is concerned.

### ***Method of adoption***

The rules of procedure provide little direct guidance on the procedure for adopting the constitution. Rule 107 merely refers to article 3 of the interim constitution, even though rule 95 in the rules of procedure includes some elements pertaining to this issue.

According to article 3 of Constitutional Act no. 6, the draft constitution is to be adopted one article at a time by an absolute majority of NCA members. The entire draft must then be adopted by a two-thirds majority. If this majority is not reached, the draft is to be adopted with the same required majority following a second reading, which must take place within one month of the first reading. If the draft constitution does not obtain the required majority following the second reading, it is to be submitted to a referendum.



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## The Constituent Assembly's administration

### *Members of the Assembly*

Members of the Constituent Assembly are regulated in order to serve a twofold objective: to maintain their independence in the face of outside pressures and interference, and to avoid conflicts of interest between their political lives and private interests. The need for the independence of NCA members is clearly reflected even in the representative nature of their role and their duties to the citizens of Tunisia. Rule 119 states that 'each member of the NCA is the representative of all the people', in accordance with the principle underpinning the representative system. In order to achieve this twofold objective, the rules of procedure impose certain constraints, incompatibilities and interdictions on NCA members but also offer them guaranties in the exercise of their mandate, such as immunity and compensation.

Incompatibilities, unlike ineligibilities, are evaluated at the time of nomination. They offer the elected member a choice between his mandate and the function that is incompatible with this mandate. One of the incompatibilities provided for by decree no. 35 (dated 10 May 2011) pertaining to the election of NCA members was reaffirmed by rule 119, namely, that the private employment of a member is incompatible with civil service. The rules of procedure do not dwell on cases of incompatibility, as most known cases of incompatibility in comparative law have been adopted by decree no. 35 pertaining to the election of the NCA.

Rule 124 specifies the interdictions. In order to safeguard the independence of NCA members and avoid their function being used for purposes not related to the public interest, certain acts are forbidden for members during their term. Members are prohibited from using their position to promote any 'financial, industrial, vocational or trade projects'. Likewise, they are prohibited from signing contracts to engage in commercial activities with the state, local public enterprises or public institutions. Independence from private interests imposes specific constraints on the members of certain professions. Indeed, rule 124 prohibits lawyers and court experts who are members of the NCA to take part in any action or proceeding against the state or public entities in the course of exercising their professional duties.

Rule 123 addresses the issue of member vacancies, which may be caused by death, resignation or disqualification. The next candidate on the same electoral list serves as a replacement, as provided for by decree no. 35 (dated 10 May 2011) pertaining to the election of the NCA. This method offers the double advantage of not having to resort to special elections on the one hand and safeguarding the balance of partisan forces on the other.

Members are entitled to a monthly salary in accordance with the terms of rule 121, and any expenses incurred in the exercise of their elective functions are reimbursed. The parliamentary allowance helps prevent those who do not have a personal fortune from deviating from their duties for fear of losing all sources of income during the exercise of their mandate. In other words, it allows members of parliament to devote themselves fully to public affairs and thereby avoid conflicts of interest. Under rule 126, deductions may be made from this salary for non-attendance: in the case of three consecutive unauthorized and unjustified absences, the Bureau of the Assembly may decrease the parliamentary allowance proportionally with the length of the absence. The overall salary is set by the president of the Assembly, who enjoys broad privileges in this respect. The issue of NCA salaries has drawn sharp criticism in Tunisia in the recent past, following an *in camera* session during which the question of increasing this salary was discussed.

In addition to their salary, NCA members are also granted various facilities and security in order to fulfil their mandate under the terms of rule 122. They are granted immunity (rules 128 to 134) to protect them from prosecution that may be intended as an arbitrary attempt to prevent the exercise of their mandate. Immunity, however, will not be used to escape justice for acts that are condemned by law.

Intended to cover acts that occur outside the mandate and are likely to be sanctioned by law, immunity only applies to major or minor criminal offences; civil actions and infractions are excluded. The Assembly's authorization is necessary for prosecution or arrest, except in cases of *flagrante delicto*. The Assembly is entitled to ask for the suspension of legal proceedings or detention at any time at the request of one or more members, which constitutes an effective weapon against *flagrante delicto*.

Rules 131 and 132 stipulate the procedure for requesting a waiver of immunity and suspending detention (committee report, consideration during a plenary session, majority vote by attending members). Unlike the provisions of countries in which immunity is a matter of public policy (i.e., a member cannot renounce it), rule 129 (paragraph 2) stipulates that a concerned member has the right to renounce immunity. To date, the immunity of MP Khémais Ksila has been lifted for involvement in a traffic accident that resulted in the loss of lives.

### **Maintenance of order**

The rules of procedure do not address parliamentary irresponsibility, as this has already been regulated by article 8 of the interim constitution. The provision prevents a member of the NCA from being prosecuted, arrested or judged because of opinions, proposals or tasks performed in the exercise of his mandate. This covers words spoken by a member during plenary sessions, in committee meetings and on missions outside the precincts of the Assembly, as well as opinions expressed in reports or written questions.



However, parliamentary irresponsibility that is absolute and applies to opinions expressed during the mandate even after its expiration does not preclude sanctions against parliamentarians whose behaviour disrupts the normal progress of plenary sessions. In this respect, rule 100 provides for sanctions ranging from warnings to censure. During the discussion of the draft of the rules of procedure, this provision raised criticism from a number of members of the opposition. It was suspected of being a means for muzzling the opposition. In fact, such provisions are found in the rules of almost all parliamentary assemblies, and are an essential safeguard to prevent intimidation of the minority by the majority, just as much as to prevent intimidation of the majority by the minority (or even one or two maverick individuals) and to ensure that an assembly can conduct its business within the framework of the other rules of procedure—which is generally recognized as the overriding responsibility of the assembly’s president.

Famously, the president of the Assembly attracted widespread criticism in the media when, during a plenary sitting on 16 April 2012, he appeared to have misinterpreted his powers by expelling two deputies, members of the Popular Petition group, despite the fact that the power to expel under rule 101 quite clearly does not extend to members of the Assembly. In doing so, the president was probably relying on what are sometimes called the ‘inherent powers of the chair’, but the incident only demonstrated the incompleteness of the rules (rules 99 to 102) concerning the maintenance of order.

### ***Written and oral questions***

Each member has a theoretical right to submit written or oral questions to the government (rules 114 and 115), but these have to be transmitted through the president of the Assembly and filtered by the Bureau, which is empowered to decide whether such questions comply with the principles of brevity, precision and the avoidance of personal references. It is one thing to require the monitoring of questions by a neutral agency according to very precise and politically neutral rules (which is quite normal in parliamentary systems around the world); but entrusting the assessment of questions to a body of politicians in which the government coalition hold the majority, and according to manifestly vague rules, allows for the possibility that the majority will censor any questions to the government that may cause embarrassment.

### ***The limited rights of individual members of the Assembly***

In other respects, individual Assembly members are very much constrained by the rules in their current form (although this is a professional hazard shared by the majority of their counterparts worldwide). Apart from questions, individual members have no *individual* rights to act independently, since the proposal of legislation, for instance, requires the signatures of at least ten members. In effect, this means that

individual members must normally work through their political group, which in turn depends on the internal mechanisms of the political groups, which are, of course, unregulated. It is even more difficult for independent members. Similarly, a theoretical right to submit amendments to draft texts (rule 91) is of little value if there is no automatic mechanism to ensure that such amendments can be discussed. Overall, there are few provisions to regulate procedural motions from the floor, and although priority over other speakers is given to points of order of very limited duration (rule 89), nowhere is the nature and scope of valid points of order—or of the procedural motions that may accompany them—explained or enumerated.

### ***The president***

According to the rules of procedure, the president is directly responsible for organizing the Assembly's work. Indeed, under the terms of rule 24, he represents the Assembly and oversees the proper implementation of the provisions of the rules of procedure, the decisions of the Assembly's Bureau and the recommendations of the Presidents' Colloquy. Furthermore, he ensures that order is maintained both within the Assembly and in its surroundings.

The president serves as the anchor of the Assembly, as virtually everything goes through him. He assumes a number of important tasks (rules 24 and 25), sometimes in his capacity as president of the Assembly and sometimes in his capacity as chairman of the plenary sittings, a function for which he can be replaced by the deputy presidents if he is absent (rule 26).

As chairman of the Assembly, he receives the declarations of parliamentary groups (rule 18), announces the formation of parliamentary groups during plenary sessions (rule 19), is informed of any changes that affect the groups (rule 20), announces the changes during the plenary session following the receipt of the statement and authorizes their publication in the Assembly's official journal of deliberations (rule 22). The president also convenes the plenary session (rule 79), can request that the session be held in camera (rule 78), and receives requests for rectification and opposition formulated by NCA members with regard to the minutes of the plenary sessions (rule 98). Moreover, the president of the Assembly receives draft laws submitted by the government or at the initiative of no less than ten members (rule 108), together with written questions from members to the government (rule 114) and written requests for oral questioning of a member of government during a plenary session (rule 115). Motions of censure are also submitted to the president of the Assembly; he must convene the plenary to decide on this motion within two weeks of the date of its submission (rule 118).

The president also enjoys broad powers pertaining to the holding and conduct of plenary sessions. Thus, he opens plenary sessions at the appointed time once the



quorum requirements are met (rule 80); can, with the approval of the majority of attending members, suggest that certain items be added to the agenda (rule 81); directs the proceedings; announces the adjournment of the session; organizes the discussion; manages the voting and announces the results (rule 83). The decision to end discussions about a specific topic (i.e., the closure) is taken by the Assembly on his initiative, since rule 88 provides that the president may move to close a discussion if he considers that the subject has been extensively discussed. The proposal is put to a vote after two speakers are heard, one in favour of ending the discussion and one against, each for a period not exceeding two minutes. The decision to continue or put an end to the discussion is taken by the majority of attending members. The president can also suggest that the time reserved for the discussion of a topic be extended if he considers it to be insufficient. Such decisions are taken by a simple majority of those present, and without debate (rule 86). It is clear from these provisions that the president controls the discussion and progress of agenda items at the plenary session. Indeed, though a decision will need to be passed by a majority of attending members, this vote only takes place at the president's proposal; no other member has the right to speak either in support or opposition.

As the chairman of the Assembly, the president ensures that the plenary sessions are properly conducted. To this end, he has the power to impose sanctions on members who do not abide by the ground rules of discussion (e.g., subject matter, time limitations) (rule 85) or anyone who disturbs the order of the plenary sessions (rules 100 and 101). The president may order the expulsion of any person (other than a member of the Assembly) who causes any disturbance. As part of his responsibility to ensure the proper functioning of the work of the plenary session, the president has the power to suspend or adjourn a plenary sitting should any event occur that impedes the normal running of a session or threatens the maintenance of order (rule 102).

The president of the Assembly presides over the Bureau of the Assembly, the Presidents' Colloquy, and the Joint Committee for Coordination and Drafting. He also chairs the plenary sessions and all the committees he attends (rule 25).

During the preparation of rule 103 pertaining to the composition of the Joint Committee for Coordination and Drafting, a conflict arose between the parliamentary groups Ennahda and Ettakatol (the latter being the group to which the president of the NCA, Mustapha Ben Jaafar, belongs). Rule 25 provides that the president of the Assembly presides over the committees he attends; he will therefore chair the Joint Committee for Coordination and Drafting whenever he attends. Ettakatol insisted that the Joint Committee for Coordination and Drafting, which would lead the constitutional drafting process, be chaired by the president of the Assembly in line with rule 25, while Ennahda wanted the chairmanship of this committee for

one of its members. Among the arguments put forward by Ennahda was that the president of the Assembly already has a number of heavy responsibilities. The power struggle between the two parliamentary groups belonging to the majority coalition ended in favour of the Ettakatol party. The determining factor was probably that a member of opposition group the Popular Petition revealed to the media that he had been approached by a member of the Ennahda party who had asked him to vote for a member of the Ennahda group for the chairmanship of the Joint Committee for Coordination and Drafting because it was the best means of safeguarding the Islamic identity of the state in the new constitution. In other words, having the committee chaired by an Islamic member—rather than by Mustapha Ben Jaafar, who is a layman—would be an advantage for the promotion of an Islamic state.

The responsibilities of the president of the Assembly are broad, and although he is constrained in some of his activities by the advice of the Bureau or the Presidents' Colloquy, he appears to have considerable discretion in the exercise of these powers. Although much in practice no doubt depends on the extent to which the president is able (or, indeed, willing) to act independently of the political group to which he is attached, his theoretical control of the Assembly is almost absolute. Not only does he chair the main organizing committees (the Bureau and the Presidents' Colloquy), but he is also *ex officio* chairman of the joint committee responsible for the final draft of the constitution, and has the rather unusual right (under rule 25) to take the chair at any other committee that he chooses to attend. Not only does he have the power to control (with the advice of the Colloquy) the agenda of the Assembly, but he is also the only instigator of certain key actions, such as closure (rule 88), which in many other parliamentary assemblies would be triggered by procedural motions from the floor.

As mentioned above, the president of the Assembly is also the arbiter and enforcer of order in the plenary. But his powers in relation to the maintenance of order are far from clear. In this respect he is accorded too little power; more or less his only specific power to discipline Assembly members is that he can withdraw speaking rights from members who persist in disorderly conduct (rule 100). He does not have the power to exclude such members from the chamber or (as is common in many other parliaments) the ultimate right to exclude them from the Assembly's precincts altogether. There are, in effect, no sanctions available to the president to enforce his decisions if they are resisted by the individuals concerned, other than the extreme sanction (under rule 102) to suspend or, if necessary, adjourn the sitting concerned, which is, of course, to hand victory to the perpetrators of disorder. In an already-celebrated incident on 16 April 2012, the president found himself without the necessary power to enforce his will over the Assembly and instead expelled two opposition members under a power (rule 101) designed to control the behaviour of



those in the public gallery; this led, understandably, to allegations of partisanship in the conduct of the chair, thus creating a real threat to his authority.

In such a situation, the president and the Assembly require a clearly graded series of sanctions that are backed by the ability to appeal immediately to the Assembly as a whole for its support, by a formal vote if necessary. Otherwise the president is left potentially fatally exposed, likely to be derided by one side for weakness and vacillation, and by the other side for partiality. Most presiding officers of most elected assemblies have, at one time or another, been tempted to resort to what amounts to extrajudicial authority (or the ‘inherent powers of the chair’) in order to maintain progress in legislating and/or constitution making. While at times they may have exercised this authority without too much detriment to their political authority, most often it has ultimately weakened it.

Therefore a further provision might also be needed to help the president regain his authority after an episode of this kind. What might be useful is for members, or perhaps groups of members, to be able to propose a motion challenging any particular ruling of the chair on grounds of incompatibility with the rules of procedure. The presentation, discussion and voting on such a motion would allow the various groups to express their discontent, but would also encourage the majority to rally round the president or vice-president and to reaffirm their support.

Such a procedure would fall far short of a motion for the dismissal of the president (a much more serious matter) that is indirectly referred to in rule 95, which stipulates the majorities required for different kinds of decisions. The rules governing a motion to remove the president of the Assembly are set out in article 5 of the interim constitution. The NCA may dismiss the president based on an absolute majority of its members and a reasoned request filed with the Bureau of the Assembly from at least one-third of its members. In the rules of procedure, provision is also made for proposals to remove any of the president’s deputies or assistants (rule 30).

### ***The Bureau of the Assembly***

Under the terms of rule 28, the Bureau is composed of the president of the Assembly, two deputy presidents and seven assistants to the president, whose scope of work is defined by subject matter. This composition takes into account the political make-up of the Assembly, as the assistants are appointed for the full term of the Assembly’s mandate in accordance with the rule of proportional representation. This means that the groups with the largest number of members have priority (rule 29). Indeed, three out of the seven assistants belong to the Ennahda party group. Furthermore, the election of the two deputy presidents, in accordance with rule 5, allowed the three parties of the coalition to prevail. Indeed, the president of the Assembly is a member of Ettakatol, the first deputy president is a member of Ennahda and the

second deputy president was initially a member of the Congress for the Republic party, which he left when the party split.

The deputy presidents stand in for, and represent, the president in the event of his absence (rule 26). The assistants support the work of the president in their assigned area (rule 35). Decisions within the Bureau are taken by the majority of attending members; however, as the Bureau has an even number of members (the president, along with nine members for a total of ten), rule 37 stipulates that in the event of a tie, the president has the casting vote.

Furthermore, even though rule 37 clearly stipulates that the minister in charge of relations with the NCA (or one of his representatives) may attend the Bureau's meetings, the Bureau did not initially respect this requirement in practice, and simply failed to inform the minister about the dates of meetings. This practice can be explained as an encouraging sign that the Bureau, as a parliamentary body, jealously guards its areas of competence and shows a certain healthy distrust of government interference in its activities.

### ***The Presidents' Colloquy***

The composition of the Presidents' Colloquy (*conférence des présidents*) is set out in rule 38 of the rules of procedure. This body does not appear in the rules of procedure for the previous Chamber of Deputies, last amended on 20 July 2004. The concept is likely to have been borrowed from the rules of procedure of the Assemblée Nationale and other francophone assemblies. Rule 38 specifies that it is a 'steering consultative council', which is responsible for general planning and coordination.

Although the Presidents' Colloquy is only advisory in nature, its areas of action are broad and significant. Among other things, it is tasked with planning the Assembly's constituent and legislative activities, proposing the agenda for plenary sessions and organizing the proceedings for plenary debates (e.g., distributing time and making specific time allocations for discussion) (rule 39).

The important role that the Presidents' Colloquy can play in the overall functioning of the NCA lies in its composition, which includes the two deputy presidents, the president's assistants, the constitution general rapporteur, the committee chairpersons and the leaders of parliamentary groups (rule 38). By including these leaders of various bodies and parties, especially the heads of parliamentary groups, the Presidents' Colloquy can provide a favourable framework for dialogue and other exchanges that may ease tensions.

However, the actual functioning of the Presidents' Colloquy suggests that it is dominated by the political majority. Given its broad influence, this may be a problem.



Rule 39 gives the Presidents' Colloquy responsibility for proposing the Assembly's work programme, setting the agenda for plenary sittings, organizing debates and allocating speaking time. It also categorically states that in the plenary Assembly, 'government projects will have priority'. If the latter provision were to be taken literally, it would mean that the majority coalition could prevent the initiation of any business at all from opposition (or in any case non-coalition) parties, even when other provisions of the rules allow for such initiatives—as, for instance, in the case of oral questions to members of the government. Although rule 40 provides that the decisions of the Presidents' Colloquy are taken 'by consensus', this would not appear to override the clear priority accorded to government business in the previous rule.

It is one of the key principles of multiparty assemblies that, although the majority may ultimately be able to win, the minority must have the right to initiate proceedings and therefore to control the agenda for at least part of the time. It is certainly true that the Assembly's rules enable the opposition parties to wield the ultimate weapon of the motion of censure (rule 118), which would appear to take precedence over other business, but this weapon can only be used sparingly (under the provisions of the interim constitution of December 2011, it can only be used once in each three-month period), and in any case contributes nothing to the ongoing work of the Assembly. Opposition parties can also submit proposals for draft laws (rule 108), but there is nothing in the rules to ensure that such proposals will either be considered by the relevant committees or reach the agenda of the plenary Assembly. In principle, therefore, the rules provide no real opportunities for non-government parties to initiate debate, either in committee or in the plenary. In practice, no doubt, proposals for laws and other initiatives will be considered for inclusion in the agenda, but this will only be with the agreement of the majority parties and not, in reality, by right. And, although the agenda is read over at the beginning of each sitting, there is no opportunity for the plenary assembly to vote on its own agenda as a whole, and only the president may propose additions (rule 81).

### ***Parliamentary groups***

It should be noted that the provisions regarding parliamentary groups are not part of Chapter 3, which describes the organs of the NCA. Instead, Chapter 2 is separately dedicated to parliamentary groups. The organization of the rules of procedure therefore indicates that parliamentary groups are *not* considered to be part of the internal organization of the NCA.

Rules 16 to 18 stipulate that members can form a parliamentary group if they are at least ten in number and if they submit a declaration to the president of the Assembly. The minimum number required was criticized during the discussion of the draft rules of procedure because some parties that are represented in the Assembly have

less than ten members. The rules of procedure further specify that a political party cannot form more than one parliamentary group (rule 16) and that a member can belong to only one group (rule 17). Also, no member is under any obligation to join a specific parliamentary group (rule 17). The number of independent members, went up to 27, as a result of various dissenting movements from the political parties<sup>3</sup>.

Rule 17, with its pronouncement that every member of the NCA is authorized to join the parliamentary group of his choice, sparked a lively debate. From the outset, this choice given to members was strongly resisted, particularly by the Popular Petition group, which had experienced the first resignations. The reasons deployed against the provision did not lack broader relevance. It was argued that the elected member received the votes that enabled him to become a member of the NCA thanks to his party affiliation, so leaving the parliamentary group would be to subvert the people's vote. This suggestion can in turn be criticized because clinging so strongly to the idea of parliamentary groups does not seem compatible with the principle of representation embodied in both the interim constitution and the rules of procedure themselves. This principle proclaims that each member of the NCA is the representative of 'all the people' (rule 119) and that he represents neither a specific political party nor a part of the territory. However, most parliamentary assemblies throughout the world have accepted some degree of adherence to party affiliation (formal or informal), as it has proved necessary for the proper functioning of constituent and legislative assemblies; but most also allow for the possibility of defection and 'crossing the floor'.

Indeed, legislative work could not be prepared in the same way for consideration in plenary sessions were it not for the fact that the committees reflect the political composition of the entire assembly. Rule 42 specifies that committees are constituted in accordance with the rule of proportional representation between parliamentary groups (also taking independents into account). Parliamentary groups are required to involve themselves in the appointment of committee members. Parliamentary groups are also involved in running the Presidents' Colloquy, in the allotment of floor time, and in the composition of the Bureau of the Assembly as well as the committee bureaux. In addition, the seating in the chamber is arranged in a manner that takes the parliamentary groups into account (rule 82).

The rules of procedure grant the heads of parliamentary groups a role in the work of the Presidents' Colloquy (rule 38). Moreover, the chairman of a parliamentary group can request that a plenary Assembly meeting be held in camera (rule 78) and can take the floor concerning a proposed amendment to a draft law (rule 91). Chairmen also have the power to request the suspension of a plenary sitting for a maximum of 30 minutes for the purposes of consultation, once per subject matter (rule 102).



As a result of the upheavals caused by the initial configuration of parliamentary blocs and the crises witnessed by certain parties, there are currently seven parliamentary groups within the NCA: the Ennahda bloc (89 members), the Democratic bloc (a coalition of parties and independents with 31 members), the Congress for the Republic bloc (at the outset, this bloc was composed of 29 members, but it now has 17 members due to political rifts); the Ettakatol bloc (which also experienced a political crisis, and now has 18 members); the Liberty and Democracy bloc (13 members); the Liberty and Dignity bloc (11 members); and the Popular Petition bloc (following the original elections, this party ranked third in terms of the number of seats in the Assembly, but then a number of group members left to join the Free Patriotic Union Party, which now has 11 members). Finally, there are 27 independent members (*non-inscrits*) who do not belong to any parliamentary bloc.

## Conclusion

This report has provided a description and assessment of the rules of procedure of the Constituent Assembly. Whatever may be the strengths and weaknesses of these rules, they are intended to help the elected politicians carry out their collective tasks. Although the clerks in Westminster or the secretaries general of the Assemblée Nationale and numerous other European parliamentary assemblies would like us to think otherwise, an assembly's rules of procedure are created not by external and neutral authorities, but by the politicians themselves. Their effectiveness in practice also depends on the willingness of all parties—the majority parties in particular—to recognize the authority of the rules and to cooperate in their implementation, even when this may not appear to be in a particular party's immediate interest. However much detail may be added to make them watertight, there is probably not a single set of rules of procedure in any parliamentary assembly in the world that is completely safe from abuse either by a minority or (a much greater risk) by a majority determined to exploit its preponderance of votes.

Rules of procedure are effective and have merit only if they are universally accepted as valid by the political actors concerned, and respected in practice even if they may be regarded as needing improvement. And despite the occasionally successful export of ready-made parliaments by the British and the French during the decolonization process, there is no 'one-size-fits-all', off-the-shelf solution. There is, therefore, no simple test or yardstick against which a particular set of rules can be assessed as either successful or unsuccessful. However, certain basic principles have proved sufficiently robust in operation, and in many different arenas, to become something like standards.

Set against these standards, most parliamentary rules anywhere in the world will reveal certain weak points. It is therefore no surprise that there are indeed a number of areas in which the current rules of procedure of the Tunisian NCA have potential weaknesses that could lead to unnecessary political conflict or impasse, as discussed above. However, perhaps the most critical problems are those arising from a lack of *implementation* of the rules or from textual ambiguity in the rules as currently drafted.

Many individual NCA members and outside observers have a multitude of complaints about the modus operandi of the Assembly, which are widely aired in the media, and the electronic media in particular. There are, for instance, repeated complaints about the organization's failure to 'do what it says on the box' in regard to publishing the agendas and minutes of Assembly proceedings, particularly those of its committees. These are complaints about the implementation of the rules of procedure, and not about the rules themselves. Instances in which a failure in implementation results in a lack of transparency are particularly worrisome, especially when the constitutional



drafting process is primarily political. Transparency puts political pressure on the political process to help achieve improved outcomes.

The other major broad weakness relates to ambiguity. Too much is left to chance, to unspoken rules and to informal interparty deals. What the British call the ‘usual channels’ work reasonably well most (but by no means all) of the time in institutions of great longevity in which custom carries more or less the same authority as written rules. They are less reliable, and much more prone to abuse (or simple failure), in new institutions. But if Tunisia’s Constituent Assembly were to fail in its principal task of creating a workable constitution, it would be a political failure, and not the result of inadequate internal rules.

## About the authors

**Bill Proctor** was a Senior Clerk (1972–80), Deputy Principal Clerk (1980–92) and then Principal Clerk (1992–2004) at the House of Commons in the United Kingdom. Over the years, he has acted as a parliamentary consultant in a variety of other jurisdictions. For example, he worked for the United Nations Development Programme and the British Department for International Development on projects relating to Iraq and Ukraine, respectively.

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## Endnotes

- <sup>1</sup> The authors are grateful to Aneesa Walji (research fellow at International IDEA; LL.M. (New York University), J.D. (University of Toronto), B.A. (University of Toronto)) for her assistance in completing this paper.
- <sup>2</sup> An unofficial English translation of the full text of the rules from the original Arabic can be accessed at [http://www.constitutionnet.org/files/constituent\\_assembly\\_rules\\_of\\_procedure\\_-\\_english-final.pdf](http://www.constitutionnet.org/files/constituent_assembly_rules_of_procedure_-_english-final.pdf).
- <sup>3</sup> Statistics cited in this paper, relating to the constituent assembly's composition, were up to date as of September 2012.



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