

FUNDAMENTALLY FLAWED: TUNISA'S 2022 CONSTITUTION-MAKING PROCESS

QUESTIONS
& ANSWERS

June 2022

In 2014, at the culmination of a two-year drafting process, Tunisia adopted a consensus-based constitution. The text was welcomed as having strengthened the protection of human rights and democracy in the country.

On 13 December 2021, Tunisia's President, Kais Saied, announced a "roadmap" to amend the 2014 constitution, purportedly through a "national consultation" and a referendum in 2022. Over the course of 2022, it became clear that the real objective of the process launched by the President was not merely to amend the 2014 constitution, but to replace it with a new constitution.

Most national stakeholders, including political parties, trade unions and civil society organizations, have refused to take part in the process of drafting this new constitution. Moreover, the lack of any semblance of democratic legitimacy, inclusivity, accountability and transparency - the essential hallmarks of any effective consensus-based constitution-making process - has prompted calls to boycott the 25 July 2022 referendum on the new constitutional text.

President Saied has dismantled a legitimate, legally constituted constitutional order. His actions violate basic rule of law principles and human rights guarantees enshrined in

the 2014 constitution and in international human rights law (IHRL), including the right of Tunisians to participate directly in the conduct of public affairs and to choose their constitution.

In light of IHRL and standards, this Q&A briefing aims to provide a concise overview of the process aimed at replacing the 2014 constitution, and to identify and expose related rule of law and human rights concerns. It addresses the following questions, and provides a set of recommendations for the Tunisian authorities and the international community as the constitutional replacement process unfolds:

I. Overview of the 2022 constitution-making process

II. Would this process meet domestic and international human rights law and standards on constitution-making, including the right to participate in public affairs?

- a. Has the process complied with the principle of legality?**
- b. Has the process been inclusive and participatory?**
- c. Has the process occurred within an adequate timeframe and in conditions allowing meaningful debate?**

III. Conclusions and recommendations

1 OVERVIEW OF THE 2022 CONSTITUTION-MAKING PROCESS



On 13 December 2021, with the stated view of leading Tunisia out of its political crisis, Tunisian President Kais Saied [presented](#) his plan to amend the 2014 constitution. In this speech, and in further speeches over the course of the following months, he set out a four-step constitution-making process: a “**public consultation**” – step one – would purportedly inform “**a national dialogue**” – step two – on the basis of which “a new constitution would be **drafted** by committee” – step three – and then put to a vote through a national **referendum** – step four. The following section provides an overview of each of these four steps.



“Public consultation”

An online consultation [opened](#) on the 15 January 2022 and [closed](#) on the 20 March 2022. Through the online platform ‘[e-istichara](#)’, Tunisian citizens aged 16 and over were invited to respond to 32 questions ‘to identify major reforms’, and ‘support democratic transition’ in Tunisia, under the categories of political affairs; economy; social affairs; sustainable development; quality of life; educational and cultural affairs. Only 534,915 Tunisians participated in the



online consultation, roughly 7.5% of the approximately 7.1 million registered voters (while able to participate, it is unclear how many 16-18 year olds participated). In a speech on the 31 March 2022, President Saied [announced](#) that the consultation had been successful, and would be the basis for moving Tunisia forward into a new era.

Drafting process

On 19 May 2022, President Saied adopted [Decree 2022-30](#) relating to the establishment of a National Consultative Body for the New Republic (NCBNR). Under article 4, the NCBNR was to be composed of three consultative committees: (i) the economic and social affairs committee; (ii) the legal committee; and (iii) the national dialogue committee, consisting of the members of the two committees. Under the Decree, the composition of the economic and social affairs committee was to include representatives of national organizations such as the Tunisian General Labour Union (known by its French acronym ‘UGTT’) (article 7), while the legal committee was to be composed of deans of law faculties (article 12). The economic



and social affairs committee was to agree on a set of proposals relating to the hopes of the Tunisian people (article 8), and the legal committee was to prepare a draft constitution and accompanying report (articles 13-14). The national dialogue committee would receive the proposals of both committees by the 13 June and synthesize them into a proposed draft constitution by the 20 June (articles 2 and 22). Article 2 clarifies that the draft constitution should respect the results of the public consultation and aim to establish a democratic regime. A separate decree, [Decree 2022-32](#), clarified that the draft of the new constitution would be published via Presidential Decree on the 30 June 2022.



While the economic and social affairs committee reportedly met on [4](#), [11](#) and [12](#) June, concurrently with meetings of the national dialogue committee, the legal committee, in charge of drafting the constitution under article 13 of Decree 2022-30, did in fact never meet following the [23 May](#) refusal of all deans of law faculties to participate. Nonetheless, the President of the NCBNR did [deliver](#) the proposed draft constitution to the President on the 20 June, but it is unclear who drafted it and under which provisions of Decree 30 this was carried out.

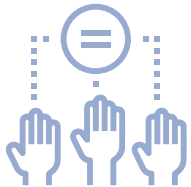


National Dialogue

While not originally envisaged by the President in his December 2021 speech setting out his “roadmap”, the need for a national dialogue has emerged during the first half of 2022, including in response to pressure from national and international stakeholders.

2013 National Dialogue

The phrase ‘national dialogue’ in post-revolution Tunisia is synonymous with the work of four key organisations in the run up to the adoption of the 2014 Constitution: The Tunisian General Labour Union (UGTT, Union Générale Tunisienne du Travail), the Tunisian Confederation of Industry, Trade and Handicrafts (UTICA, Union Tunisienne de l’Industrie, du Commerce et de l’Artisanat), the Tunisian Human Rights League (LTDH, La Ligue Tunisienne pour la Défense des Droits de l’Homme), and the Tunisian Order of Lawyers (Ordre National des Avocats de Tunisie). These four organisations are known as the ‘National Dialogue Quartet’. Recognised by the Nobel Peace Prize in 2015, the Quartet intervened to alleviate a political crisis after rising tensions in the country led the ongoing national dialogue to be brought to a stand-still following the assassinations of Chokri Belaid and Mohamed Brahmi on 25 July 2013. The participation – or non-participation – of these actors in the ongoing national dialogue therefore carries political significance.

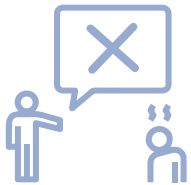


Between April and June 2022, the President held bilateral meetings with representatives of the 2013 Quartet organizations including the UGTT, [LTDH](#) and the [Tunisian Order of Lawyers](#). In June 2022, [Decree 2022-30](#) established the National Dialogue Committee, consisting of the two committees falling under the NCBNR. On 25 May, the President appointed the members of the national dialogue committee via [Presidential Decree 2022-505](#), including representatives of the UGTT and the deans of the law faculties who had previously rejected membership.

Referendum



While it was not initially clear whether the referendum would be asking Tunisians to vote on an amended 2014 constitution or on an entirely new constitution, Article 2 of [Presidential Decree 2022-506](#) of the 25 May resolved this point entirely, providing that the question to be put to public referendum on the 25 July 2022 be: 'Do you approve of the draft of the new constitution for the Tunisian Republic'?



The adoption of several decrees regulated the

referendum procedure. On 21 April 2022, [Decree-law 2022-22](#) was adopted changing the composition of the body overseeing the referendum, the Independent High Authority for Elections (known by its French acronym 'ISIE'), enabling the President to appoint its entire membership by Presidential Decree and, therefore, removing any semblance of independence. The President then appointed all the members of the ISIE by [Presidential Decree 2022-459](#) on the 9 May.

On the 1st of June, [Decree-law 2022-34](#) was adopted granting the ISIE new powers to regulate participation in the referendum campaign and manage voter registration, including mandatory registration of voters. The ISIE has since [threatened](#) legal action against any association or media outlet, organization or person who campaigns for or against the referendum without prior approval of the ISIE. On the 3 June, the ISIE issued an [ISIE Decision 13-2022](#) delineating the referendum campaign and voting process. According to article 11 of the Decision, the referendum campaign would be run from 3 July to 23 July inside Tunisia and from the 1 July to 21 July for Tunisian nationals residing abroad.

2



WOULD THIS PROCESS MEET DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS ON CONSTITUTION-MAKING, INCLUDING THE RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS?

The right of Tunisians to participate in constitution-making processes is guaranteed by international human rights law, including article 25(a) of the International Covenant on Civil and Political Rights ([ICCPR](#)), by which Tunisia is bound, which requires that State parties to guarantee that every citizen has:

'[...] the right and the opportunity [...] to take part in the conduct of public affairs, directly or through freely chosen representatives.'

The Human Rights Committee (HRCOM), the body charged with monitoring the implementation of the ICCPR, has clarified that '[c]itizens [...] participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum [...] and by taking part [...] in bodies established to represent citizens in consultation with government' [General Comment 25, ¶16].

The right to participation in the conduct of public affairs is also contained in article 13 of the [African Charter on Human and People's Rights](#).

In addition to the HRCOM's authoritative interpretations of the ICCPR, guidance from other international human rights authorities and expert bodies provides additional interpretation of the scope of the international legal standards pertaining to the right to take part in constitution-making processes. These includes: the [African Charter on Democracy, Elections and Governance](#) (henceforth 'ACDEG') the [OHCHR guide to Human Rights and Constitution Making](#) (henceforth 'OHCHR guide'), the [Compilation of Venice Commission Decisions and Reports Concerning Referendums](#) (henceforth 'Venice Commission Referendums') and the [Compilation of Venice Commission Decisions Concerning Constitutional Provisions for Amending the Constitution](#) (henceforth 'Venice Commission on Constitutions').

The aforementioned international human rights law and standards articulate four key guarantees for intrinsic to the right to participate in constitution-making processes, which are set out in the next section. Each has been undermined by the current constitution-making process.

a. Has the process complied with the principle of legality?

States must ensure that their constitution-making processes comply with the principle of legality. The HRCCom has stipulated that ‘the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.’[General Comment 25, ¶15, see also Venice Commission on Constitutions, p. 9]. In relation to referenda, the HRCCom further provides that ‘An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant’[¶20].

The 2022 constitution-making process has not been provided for by the existing constitution. Under articles 143 and 144 of the [Tunisian Constitution of 2014](#), it is possible to amend the constitution through referendum after two steps have been taken. First, the Constitutional Court must review the proposal to establish that the proposal ‘does not concern that which, under the current constitution, cannot be revised’ and second, the Parliament must approve the proposal by absolute majority. Tunisia is yet to establish a Constitutional Court and Parliament was [suspended](#) on the 25 July 2021 and [dissolved](#)

on the 20 March 2022. The proposed process is therefore not compliant with the existing Constitutional order and therefore in violation of article 25 of ICCPR.

The 2022 constitutional-making process has not been established pursuant to other laws. [Decree 2021-117](#) reinforced the ‘State of Exception’ in Tunisia and empowered the President to introduce political “reforms” with the assistance of a committee, and put these reforms to a referendum (article 22). [Decree-Law 2022-22](#) amending the composition of the ISIE and [Decree-Law 30-2022](#) creating the NCBNR were adopted under the framework of Decree 2021-117. The ICJ considers that Decree 2021-117 lacks a legal basis because the state of exception invoked as its inherent justification is inconsistent with article 80 of the [2014 constitution](#). Under this article, a State of exception may only be imposed if parliament is in session and a constitutional court is in place. As such, decrees 2021-117 and subsequent decrees, including those that underpin the 2022 constitution-making process, are null, void and of no legal effect.

These decrees run counter to Tunisia’s obligations under both the 2014 constitution and international human rights law. For example, not only does [Decree 2022-22](#) amending the law on the ISIE lack any constitutional or legal basis, it also creates a

situation in which the ISIE falls short of the standard required of an ‘independent election authority’, as provided for under article 25 of the ICCPR (see above, page 5). [see [HRCOM Concluding Observations Cameroon, ¶43](#)] which require that the body in charge of referenda be independent of the executive. As asserted by the [Venice Commission](#), Decree-law 2022-22 ‘subordinate[s] the ISIE] to the executive branch’ in a way that ‘jeopardises its independence and impartiality’.

b. Has the process been inclusive and participatory?

The provisions of the ICCPR, African Charter and other international human rights standards require that the means by which citizens participate in constitution-making processes be inclusive and participatory.

First, under article 25 of the ICCPR, Tunisia must guarantee to each citizen the right and opportunity to take part in constitution-making processes ‘without any of the distinctions mentioned in article 2 and without unreasonable restrictions’. Article 2 (a) prohibits discrimination in the enjoyment of treaty rights on an open-ended list of grounds, including race, language, political or other opinion. Unreasonable restrictions on the right to take part in public affairs, including constitution-making processes, have been described by the HRCOM to mean those based on

anything other than ‘objective and reasonable criteria’ [[GC 25, ¶14](#)]. In this context, the HRCOM has thus found that restrictions to article 25 rights based on membership of political parties amount to unreasonable restrictions [[Chiiko Bwalya v. Zambia, ¶6.6](#) and [Pietraroia v. Uruguay, ¶16](#)]

Tunisia’s management of the national dialogue falls far below these standards. President Saied has excluded from participation in the national dialogue any person, organization or political party who rejects the legitimacy of the 25 July 2021 (the date on which President Saied dismissed government, declared himself the head of the executive branch and suspended parliament, changing the legal and political order in Tunisia), including political parties, such as the party Ennahda. This exclusion was given the force of law through [Decree 2022-30](#), which deliberately excluded political parties from membership in the “national dialogue” committee or other NCBNR committees. Under the aforementioned jurisprudence of the HRCOM, President Saied’s deliberate exclusion of individuals and political parties who rejected his 25 July 2021 power grab amounts to an unreasonable restriction on article 25 rights to participate in the conduct of public affairs under the ICCPR and possibly discrimination on the grounds of political opinion, in violation of article 2(l) read with 25.

Second, international standards require states to adopt positive measures to ensure wide participation in constitution-making processes to ensure national ownership of constitution drafting and adoption. The HRCOM has said that States should ‘guarantee the effective and meaningful participation of all relevant actors, including representatives of opposition parties and civil society’ [CO Sudan, 6]. The OHCHR, citing to the Guidance note of the UN Secretary General on UN assistance to constitution making, elucidates:

‘[n]ational ownership should include the official actors, political parties, civil society and the general public’, and “human rights defenders, associations of legal professionals, media and other civil society organizations, including those representing women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons, and labour and business” should be given a voice in inclusive and participatory constitution-making processes.’[p.15].

The 2022 constitution-making process in Tunisia has not met these standards. First, the national e-consultation (as described above at page 2), purported to gauge the will of the people in advance of the drafting process, failed to secure wide participation, with only 7.5% of those registered voters doing so. The “national dialogue” itself did not involve political

actors, as shown above, or a wide range of civil society actors aside from those who participated in the original 2013 Quartet (the Tunisian League of Human Rights). This failure has been borne out by the loud opposition to the referendum process and the national dialogue since April 2022, including the [refusal](#) of one of the quartet members – the UGTT – to participate.

c. Has the process occurred within and adequate timeframe and in conditions allowing meaningful debate?

IHRL and standards recommend that the Tunisian authorities provide adequate time and transparent, effective procedures for public consultations and dialogue throughout the constitution-making process. In relation to the an effective timeframe for constitution drafting, guidance provided by the UN Secretary General advises to provide at least one year from the outset of the constitution-making process to the date of the referendum itself [UNSG, p. 8]. Conditions allowing meaningful debate include transparency around processes and results and safeguards around freedom of expression.

The ICJ considers that the process undertaken in Tunisia has failed to meet these criteria. President Saied gave the NCBNR only one month from the date of its establishment

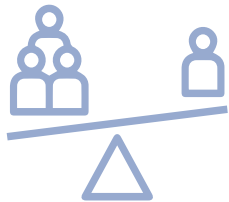
(20 May 2022) to produce a draft constitution. The draft constitution to be put to referendum was to be published on 30 June after Presidential review, only 25 days before the referendum on its adoption. The government made no provision for the draft to be published prior to finalization for individuals and stakeholders to debate it, provide comments on it and have their inputs meaningfully considered by the drafting committee. Additionally, the tight timeline left no space for a wider consultation period with key actors, such as political parties, civil society and journalists before and after the draft was finalized. As such, this process has failed to provide both the time and the opportunity for the Tunisian public to meaningfully engage in elaborating the content of the constitution.

The restrictions in the run up to the referendum also contravene the right to freedom of expression and to participate in public affairs. Under the new powers bestowed to them by [Decree 2022-22](#), article 4, the ISIE has the power to both [regulate](#) who can campaign for and against the referendum and to restrict campaigning time to the 20 days (3-23 July). These restrictions are similar to those that have been found to constitute “unreasonable restrictions” on the right to participate in public affairs by the HRCOM, who noted that Azerbaijan’s limiting of permission to campaign for an election to 22 days was a ‘severe restriction’ [[CO Azerbaijan 2016](#), ¶42].

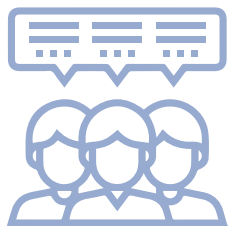
3 CONCLUSIONS AND RECOMMENDATIONS



By amending the Constitution via referendum during a State of Exception, without parliamentary or constitutional oversight, an independent elections commission or a Constitutional Court, the President violates the very letter of article 144 of the 2014 Constitution, as well as international human rights law and standards on the right to participation in public affairs.



The establishment of the National Consultative Body for the New Republic lacks democratic legitimacy, illustrated by its exclusive composition and the procedures by which it has been asked to produce the highest law of the land. The online public consultation and the ‘national dialogue’ have been neither inclusive nor participatory and cannot be described as an accurate representation of the will of the people so as to reflect national ownership over the process. The timeframe provided for the drafting and adoption process has been unconscionably short and does not create the conditions for

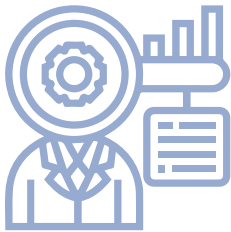


meaningful public debate around the draft prior to the referendum.

As such, President Saied’s current process of constitution-making and adoption by referendum runs counter to international human rights law and standards on consensus-based constitution making processes and violate Tunisian and international law and standards on the right to participation in public affairs.

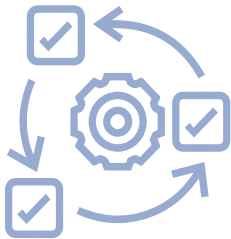
In light of this conclusion, the ICJ calls on the Tunisian authorities to:

- **Withdraw the draft constitution, end the state of exception, and re-establish the constitutional order;**
- **Ensure that no Constitutional revision or making process takes place until and unless the constitutional order is compliant with principles of the rule of law, separation**



of powers, and the independence of the judiciary, as well as international human rights law and standards;

- Ensure that any such process is inclusive, participatory and transparent, involving all Tunisians and their representatives, and allowing for public and meaningful debate;
- Ensure that any such process is conducted outside the framework of the State of Exception, with the involvement of all legitimate, legally constituted authorities and constitutional bodies, including an independent electoral Commission; and
- Refrain from any attacks, intimidation or threats, including threats of legal action, against those opposing the current constitution-making process, and ensure they are able to express their views freely, including through equal access to public media.



The ICJ calls on the international community to:

- Urge the withdrawal of the draft constitution and stress the need to ensure that constitution-making processes comply with the procedural framework provided in article 144 of the Constitution (namely, with the oversight of the parliament and the Constitutional Court) and international standards on the participation of Tunisians in public affairs and constitution making processes; and
- Monitor the referendum and assess its freedom and fairness.

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

© **Fundamentally Flawed: Tunisia's 2022 Constitution-Making Process**

A Q&A Briefing by the International Commission of Jurists, June 2022

© **Copyright International Commission of Jurists, June 2022**

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

**International Commission of Jurists
P.O. Box 1270
Rue des Buis 3
1211 Geneva 1
Switzerland**