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**The Carter Center Welcomes Human Rights Protections  
in Tunisia's New Constitution; Calls for Immediate Steps  
to Implement**

The Carter Center released today a statement tracing the evolution of key issues in the text of Tunisia's constitution and highlighting elements, including measures to protect citizens from discrimination, provide security of tenure for judges, and safeguard fundamental freedoms during a state of emergency, which should be strengthened. Tunisian authorities should take legislative action to address these concerns.

"Tunisia's new constitution lays a solid foundation for rule of law and the protection of human rights," said former U.S. President Jimmy Carter. "What is critical now is to conduct a thorough revision of the legal framework to bring it into alignment with the constitution and ensure the full realization of the rights enshrined in the text. In addition, a provisional commission should be established in time to review the constitutionality of draft laws, especially the electoral legislation currently under discussion."

The Carter Center has monitored Tunisia's constitution-making process since February 2012, when the National Constituent Assembly's six constitutional commissions first began their work. Throughout the process, the Center assessed the various drafts against the country's international obligations regarding political and civil rights. This statement focuses on the content of the adopted constitution as well as on the adoption phase. Key recommendations from the statement are below, and the full statement is available at [www.cartercenter.org](http://www.cartercenter.org) and at [www.facebook.com/TCCTunisia](http://www.facebook.com/TCCTunisia).

In the spirit of goodwill and support for Tunisia's continued democratic transition, The Carter Center offers the following recommendations:

*RIGHTS*

- Review and reform Tunisia's existing legal framework to ensure that domestic law and regulations reflect and respect the country's international commitments on

human rights and the rights enshrined in the new constitution.

- Incorporate into organic laws guarantees of the principle of the equality of the vote and prohibitions of discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status. Ensure that these rights apply to all people in Tunisia, citizens and foreigners alike, in accordance with international law.
- Encourage the State to fight not only violence against women but all kinds of discrimination against women. Adopt concrete measures to protect women's rights, such as mechanisms to advance gender parity in nomination lists.
- Specify in relevant legislation Tunisia's obligation to adopt specific mechanisms to guarantee the progressive realization of economic, social, and cultural rights to the maximum of the country's available resources.

#### *ENFORCEMENT*

- Judges should interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom, and to take into account the interpretation of human rights treaties, including from courts and commissions, as a minimum standard.
- Encourage judges and legislators to protect freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, and to ensure that any limitations are consistent with the general limitation clause in the constitution.
- In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review, and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

#### *INSTITUTIONS*

- Incorporate provisions into the legal framework to ensure the independence of the judiciary in regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and, in accordance with the constitution, by reasoned decision of the High Judicial Council, after its establishment.
- Establish a provisional commission promptly to review the constitutionality of draft laws so as to include the draft electoral legislation currently under debate. The commission should have the authority and resources necessary to carry out its duties independently and effectively.
- Consider giving the provisional commission the right to review the Rules of Procedure of the future Assembly of the People's Representatives.

- As was done in the constitution adoption process, facilitate civil society and media access to commission and plenary discussions of the elections law, as well as all future laws debated by the National Constituent Assembly.
- Intensify outreach campaigns to educate the public about the constitution.

**Background:** Following its observation of National Constituent Assembly elections in October 2011, The Carter Center maintained a presence in Tunisia to monitor and assess the constitution-making process and preparations for the next electoral cycle. The Center has met regularly with a broad range of political and civic stakeholders, attending assembly sessions and following public debates and civil society workshops related to the process. The Center assessed the evolution of the constitutional drafts against Tunisia's international obligations to uphold fundamental political and civic freedoms, and commented on the inclusiveness of the process and the extent to which it upholds principles of transparency, and participation of citizens in the public affairs of their country.

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## **The Carter Center Welcomes Strengthened Rights Guarantees in Tunisia's New Constitution; Urges Immediate steps for its implementation**

**April 10, 2014**

Three years following the fall of the Ben Ali regime and more than two years following the election of the National Constituent Assembly (NCA), Tunisians made a decisive step in their quest to break away from the country's authoritarian past, officially adopting a new constitution on Jan. 27, 2014. Though the road to the constitution proved rife with challenges, a spirit of openness to compromise and consensus-building prevailed, ensuring that Tunisia could reach this historic milestone.

Over the course of the two-year process, the text evolved significantly, in many instances towards greater clarity and a higher degree of protection for fundamental freedoms and human rights. The adoption of the constitution is a key step in the country's transition, but on its own is not sufficient to guarantee a successful transition from authoritarianism to democracy.

The Carter Center has monitored the constitution-making process in Tunisia since February 2012, when the NCA began working on the constitution. The Center met regularly with a broad range of political and civic stakeholders, attended NCA sessions, and followed public debates and civil society workshops related to the process. Throughout, the Center assessed the evolution of the various drafts against Tunisia's international obligations to uphold fundamental political and civic freedoms, and commented on their content as well as the process that produced them, including its inclusiveness and the extent to which it upheld principles of transparency and participation of citizens in the public affairs of their country.<sup>1</sup>

In this statement, The Carter Center offers an overview of the constitution-making and adoption processes and an analysis of several key content-related issues in the adopted constitution. The statement notes that Tunisia's new constitution offers many protections for rights and freedoms, and lays the foundation for an independent judiciary. The Center notes, however, that some articles are broadly worded and risk being interpreted in ways that contradict other provisions of the constitution. The implementation phase, specifically the process to bring Tunisia's laws and regulations into alignment with the human rights commitments laid down in the constitution, will be important in securing a strong foundation for the respect of these commitments. This process should be carried out in a way that provides the highest degree of protection of human rights for Tunisians and non-Tunisian residents of the country alike.

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<sup>1</sup> Article 25 of the International Covenant on Civil and Political Rights (ICCPR) (ratified by Tunisia on March 18, 1969) states that "every citizen shall have the right and the opportunity (...) to take part in the conduct of public affairs, directly or through freely chosen representatives...."

## **The Constitution-Making Process**

### ***The Legal Framework***

Two legal texts govern the vote on the constitution – the Provisional Organization of Public Authorities law (commonly referred to using the French acronym “OPPP” or as the “little constitution”<sup>2</sup>) and the NCA’s Rules of Procedure (RoP). The latter does not have the status of law, but guides the work of the assembly.

Article 3 of the OPPP, adopted by the NCA on Dec. 16, 2011, specifies that an absolute majority of NCA members is required to adopt each article, and that a two-thirds majority is needed for the adoption of the constitution in its entirety. In addition, Article 3 specifies that if the NCA fails to reach the required majority during the first reading, the vote is to be repeated within one month. Should the plenary fail to adopt the constitution once again with the required two-thirds majority, the draft constitution is subject to a referendum, where its adoption requires an absolute majority of votes.

The Rules of Procedure underwent four amendments after their initial passage in January 2012 and contained several provisions concerning the vote process.<sup>3</sup> The NCA’s voting procedures were regulated by the general section of the RoP relative to the plenary (Articles 83-93), the section relative to attaining quorum in plenary votes (Articles 94-97), and chapter IV (Articles 103-107), which is dedicated entirely to the review and adoption of the constitution. RoP Article 107 states that the adoption of the draft constitution shall be in accordance with Article 3 of the OPPP.

### ***Background to the Vote***

The NCA commenced its work on the constitution in February 2012, when the six constitutional commissions put in place by the NCA first met.<sup>4</sup> Each commission worked to draft articles under specific chapters. The process concluded two years later, in February 2014, when the adopted constitution was published in the Official Gazette and entered into force.

In August 2012, the constitutional commissions produced their first drafts (“first draft of the constitution”). The draft sections were reviewed by the Coordination and Drafting Committee (the Drafting Committee)<sup>5</sup> and sent back to the commissions, which then

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<sup>2</sup> Constitutional Act n°2011-6 dated Dec. 16, 2011 related to the Provisional Organization of Public Authorities.

<sup>3</sup> The NCA adopted its rules of procedure on the Jan. 20, 2012, (published in the Official Gazette, the JORT, on 14 February 2012). The first amendment took place on March 15, 2013, (published in the JORT on March 22, 2013). Articles 24, 36, 38, 52, 61, 62, 72, 82, 85, 87, 89, 91, 100, 104, 106, 108, 109, 114, and 126 were amended. Article 88 bis was also added. The second amendment of the RoP took place on Nov. 4, 2013 (published in the JORT on Nov. 29, 2013). Articles 36, 79, 106, 126 and 89 were amended. The third amendment took place on Nov. 27, 2013 (published in the JORT on Dec. 6, 2013). Articles 36 (new) and 79 (new) were amended as well as article 20. The fourth amendment of the RoP took place on Jan. 2, 2014 (published in the JORT on Jan. 14, 2014). Article 41 was amended and an article 106 bis added.

<sup>4</sup> Each of the six constitutional commissions looked at one of the following topics: 1) Preamble, fundamental principles, constitutional review; 2) Rights and freedoms; 3) Legislative and executive powers and the relationships between the powers; 4) Judicial, administrative, financial and constitutional justice; 5) Constitutional bodies; and 6) Regional and local public authorities.

<sup>5</sup> The Coordination and Drafting Committee was composed of the NCA’s President, the NCA’s General Rapporteur, his two deputies, and the presidents and rapporteurs of the constitutional commissions.

continued to work on the text. A second compilation of the commissions' work, known as the second draft, was released on Dec. 14, 2012, two days before the launch of a national consultation process throughout the country.<sup>6</sup>

While national consultations took place from December to February 2013, the NCA debated the various chapters of the draft constitution in plenary sessions. This debate enabled NCA members, including those who did not participate in the constitutional commissions, to present their views on the draft.<sup>7</sup> In line with the newly revised RoP, the constitutional commissions reviewed the recommendations from this general debate, as well as from the dialogue with civil society that took place in September 2012, and national consultations.<sup>8</sup> This review process took place from March 21 – April 10, 2013. On April 10, 2013, the updated drafts from each commission (henceforth referred to as *2bis*) were sent to the Drafting Committee for additional review, but were not publicly released.

The amended RoP addressed the scope of the Drafting Committee's authority when consolidating and harmonizing the draft chapters.<sup>9</sup> Various political blocs interpreted the language differently. This confusion later resulted in controversy when the Drafting Committee made substantive edits to articles that had been finalized within the various thematic commissions, and also elected to include only one of several proposals for the design of the political system without further consultation with the commissions.

The Drafting Committee's consolidated document was leaked to the media and subsequently officially released on April 22, 2013. A group of experts, who had been selected by the NCA Bureau on the basis of proposals made by the presidents of the constitutional commissions, then reviewed the draft.<sup>10</sup> In the meantime, key actors held two national dialogues to discuss remaining points of contention in the constitution, as well as political, economic, and security issues in Tunisia. The first national dialogue, convened by the President of the Republic, included most of the leading political parties, while the second, convened by the General Union of Tunisian Workers (UGTT), continued a process begun in 2012 and brought together a wider range of parties and civil society groups. The Drafting Committee resumed its work even before the end of the second national dialogue and incorporated some of the agreements reached on constitutional issues during the

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<sup>6</sup> Public consultations started with two sessions which brought together students' representatives in Tunis and Sfax. They were followed by public sessions held through January 2013 in Tunisia's 24 governorates, at a rate of six governorates per weekend. Meetings with expatriate constituencies in France and Italy were also organized in January and February 2013. The Carter Center attended approximately half of the dialogue sessions in Tunisia.

<sup>7</sup> The first anniversary of the Oct. 23, 2011, elections was marked by a general plenary discussion on the Constitution's Preamble and General Principles, as well as on revision procedures and final provisions, while other commissions continued to review their drafts. The general discussion by the plenary on the other chapters took place between Jan. 17, 2013 and Feb. 25, 2013.

<sup>8</sup> Article 104 of the Rules of Procedure as amended in March 2013 states that: "Constitutional commissions shall review the comments and propositions from the general debate and the national consultations on the constitution in a period not exceeding ten working days starting from the date of receipt of the reports."

<sup>9</sup> Article 104 as amended in March 2013 provides that "the Committee meets to prepare the final version of the draft Constitution *based* (emphasis added) on the work of the commissions and with the help of experts."

<sup>10</sup> Some of the selected experts, including renowned constitutionalists, declined to be part of the review group. The experts expressed concerns about the ambiguity in the experts' scope of work and the fact that certain experts were not on the list. Kais Said was the first expert to decline. Iyadh Ben Achour, Chafik Sarsar and Hafidha Chekir declined after a joint letter to NCA President, which requested further clarification regarding the role of the experts (i.e., whether their work was merely of a linguistic nature or also content related), remained unanswered.

sessions. The Committee also added a tenth chapter dealing with transitional provisions to clarify the process and timelines for the anticipated transition from the previous constitutional order to the new one, including parliamentary and presidential elections.

The NCA released the final draft of the constitution (also referred to as the fourth or final draft of the constitution) on June 1, 2013. It was immediately met with protests by some deputies who argued that it was unfaithful to the work of the six constitutional commissions. In particular, some opposition members argued that the Drafting Committee had overstepped its mandate in changing the content of some articles already drafted by the commissions (in “draft *2bis*”) and in adding a chapter on transitional provisions without consulting the commissions.

To overcome the crisis, the NCA’s leadership devised a 23-member ad hoc commission to address the remaining points of contention. NCA President Mustapha Ben *Jaâfar chaired the “Consensus Commission,” which represented the various political blocs at the time as well as some independent NCA members. The commission sought to identify contentious issues in the final draft and then to reach agreement on them. The aim was to facilitate general discussion as planned, as well as the article-by-article vote, and to allow for the adoption of the constitution with as broad a base of support as possible.*<sup>11</sup>

The constitution-making process met its most serious challenge shortly after the formation of the Consensus Commission. The assassination of NCA deputy Mohamed Brahmi on July 25, 2013, sparked a deep political crisis, triggering the majority of the opposition to suspend their participation in the assembly. Less than two weeks later, President Ben *Jaâfar* suspended NCA activities, pending the launch of a national dialogue to resolve the crisis.<sup>12</sup> The Tunisian General Labour Union (UGTT), The Tunisian Union for Industry, Commerce and Handicrafts (UTICA), The Tunisian League for Human Rights (LTDH), and the Bar Association, together often referred to as the Quartet, officially launched a national dialogue process in October 2013, following months of behind-the-scenes negotiations by political parties. This forum has provided a platform for political actors to reach consensus on contentious issues, including the constitution.<sup>13</sup> The NCA resumed activity soon after the launch of the national dialogue discussions.

While the focus of the National Dialogue was largely on the formation of a new government, the NCA’s Consensus Commission assumed the task of putting the constituent process back on track.<sup>14</sup> Despite the interruption of NCA activities for nearly three months, the commission managed to meet a total of 37 times between June 29 and Dec. 27, 2013. During

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<sup>11</sup> The crisis had extended to the general discussion on the fourth and final draft, which took place between July 1-15, 2013, and whose first session was interrupted by the protests of some deputies. The announcement by the NCA’s leadership of the formation of the Consensus Commission helped ease tensions and allowed the discussion to resume.

<sup>12</sup> NCA president Mustapha Ben *Jaâfar* announced his decision to suspend the NCA’s activities in a televised address on Aug. 6, 2013.

<sup>13</sup> The dialogue was organized into three tracks, only the third of which remains: (1) The formation of a new government (2) the adoption of a constitution and (3) the election of the members of the election management body and the adoption of an electoral law.

<sup>14</sup> The Consensus Commission first identified a broad range of contentious issues, touching nearly every chapter of the constitution in addition to the preamble (the list was drawn up on July 11, 2013). This was narrowed down to key contentious issues (agreed on July 16-18, 2013, and referred to as the July 18 list), including the preamble and the transitional provisions. Some of the issues in the more expansive list were also revisited by commission members at a later date.

that period, it reached agreement on 52 points of contention, with agreements affecting the preamble and 29 articles in total<sup>15</sup>. Towards the end of the process, the Commission also sought the advice of prominent constitutional experts, particularly in regards to the transitional provisions.<sup>16</sup>

Disagreement within the NCA centered not only on the constitution's substance, but extended to whether the agreements were binding or not. One of the most controversial issues for months leading up to the vote was how to ensure that the various blocs, parties, and independent deputies within the NCA adhered to the decisions reached by their representatives in the commission. The Consensus Commission had no formal standing in the NCA and was not mentioned in the assembly's RoP, leading some to fear that the plenary would not respect agreements reached within the Commission at the decisive moment.

After much debate, and just one day prior to the launch of the article-by-article vote, the NCA plenary amended the RoP to give the Consensus Commission formal status and to specify that "amendments emanating from the Consensus Commission shall be binding for all parliamentary groups".<sup>17</sup>

### ***Timeline of the vote***

The first concrete step in the long-anticipated article-by-article vote on the constitution took place on Dec. 30, 2013, when for one day only deputies submitted proposals to amend specific articles of the constitution.<sup>18</sup> The following day, the amendments were distributed to all deputies and published on the NCA's website. On Jan. 2, 2014, the same day the plenary met to amend the RoP once more, deputies lodged requests to speak during the plenary session in favor or against proposed amendments. The article-by-article vote itself began on Jan. 3, 2014.

The NCA's leadership hoped to complete the adoption process—meaning the article-by-article vote and the vote on the entire text – by Jan. 14, 2014, the third anniversary of the Tunisian revolution. Adding further pressure on the NCA, the roadmap stemming from the national dialogue set a deadline of Jan. 12 for the constitution's adoption. The NCA could not meet this tight deadline, but, eventually adopted the constitution on Jan. 26, 2014. This was remarkably fast considering the number of articles involved, some of which were controversial and thus requiring a delicate negotiation process on the part of deputies.<sup>19</sup> Furthermore, the constitution was adopted by the NCA in its entirety with an overwhelming

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<sup>15</sup> Document titled "Consensus Commission Meetings", NCA, December 2013.

<sup>16</sup> Article 59 of the RoP entitles the commissions to consult "anyone whose opinion they believe they could benefit from" on a given issue, including experts and government representatives. Experts were consulted at various moments of the process. For example, the constitutional commissions conducted several hearings with Tunisian and international experts, as did the Drafting Committee prior to the release of the final draft of the constitution (on June 1, 2013).

<sup>17</sup> Relevant articles: Articles 41 and 106 (a).

<sup>18</sup> The RoP new Article 106 (as amended on March 15, 2013) gave deputies a total of four days per chapter of the constitution to lodge amendments. It also required that each chapter be announced ten days in advance of the vote on it. The article was amended again on Nov. 4, 2013, and the window to lodge amendments was shortened to one day only. The number of deputies needed to propose an amendment was also raised from a minimum of 5, to a minimum of 15. The requirement to announce the vote on each chapter 10 days in advance was removed.

<sup>19</sup> There were a total of 180 items that had to be voted on: the Preamble which was divided into 8 parts, 146 articles, and 26 headings, in addition to proposed amendments. (source: press conference by Habib Kheder, the General Rapporteur of the constitution, Oct. 18, 2013).

majority of 200 votes out of 216 NCA members present, when only 145 votes in favor were needed for its passage.<sup>20</sup> On Jan. 27, 2014, the constitution was signed into law by the President of the Republic, Mohamed Moncef Marzouki, the NCA President Mustapha Ben *Jaâfar*, and the head of government at the time, Ali Laarayedh. The constitution entered into force on Feb. 10, 2014, through its publication in a special edition of the Official Gazette of the Republic of Tunisia.<sup>21</sup>

### ***The Rules of Procedure: a flexible interpretation***

Though governed by the NCA's Rules of Procedure and Article 3 of the OPPP, the article-by-article vote procedures were not static throughout the process. Rather, the NCA interpreted them in a flexible manner at various moments to avoid political blockages.

While amendments from the Consensus Commission were described as "binding" in the revised RoP, this language was interpreted in various ways: some deputies felt that the NCA was bound to vote in accordance with the agreements, while others considered the term a "loose guideline." Most of the Commission's amendments were adopted and deputies generally voted in line with the agreements reached.<sup>22</sup> This changed, however, during the vote on Article 74<sup>23</sup>, which defines the conditions of eligibility for the office of President of the Republic.<sup>24</sup> This issue was polarizing throughout the process. The language proposed by the Consensus Commission did not pass, and the heads of blocs had to mediate the issue. From this point on, the role of Consensus Commission diminished significantly, and on Jan. 14, 2014, Habib Khedher, the General Rapporteur of the constitution, announced an end to the work of the commission.

The biggest debate among observers of the process in regards to procedures centered not on the role of the Consensus Commission but on the interpretation of Article 93 of the RoP and its extensive use. The article states that the General Rapporteur of the constitution (among other, designated persons) may request that the assembly "reopen the debate on an article already passed, if new relevant elements appear before the close of deliberations on the constitution draft."

The General Rapporteur proposed the use of RoP Article 93 during the first day of voting. He suggested reopening the debate on the fourth paragraph of the preamble, and in particular on the notion of Tunisia's "Mediterranean belonging." His suggestion was not accepted. RoP Article 93 was subsequently applied to reopen review regarding Article 6 of the constitution, which deals with religious freedom and the protection of the "sacred," although this article had been approved in a previous session in its original (June 1, 2013) form.<sup>25</sup> After an altercation between two deputies from opposing camps, opposition

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<sup>20</sup> Mohamed Allouche, deputy from the Third Path party, did not live to see the final vote of the constitution. He died from a heart attack on Jan. 22, 2014.

<sup>21</sup> Special edition of the Official Gazette (the JORT), Feb. 10, 2014.  
[http://www.legislation.tn/sites/default/files/news/constitution\\_1.pdf](http://www.legislation.tn/sites/default/files/news/constitution_1.pdf)

<sup>22</sup> The Consensus Commission continued to meet as needed during the vote, mediating certain issues and proposing amendments, for example on article 46 on the rights of women.

<sup>23</sup> Article 73 of the fourth draft.

<sup>24</sup> Discussion centered on the question of whether to place an age limit on candidates, as well as the conditions to run for office for bi-nationals – both issues directly affecting several potential candidates.

<sup>25</sup> Fourth draft version of Article 6: "The State protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization".

deputies claimed that the conflict had resulted in “new relevant elements” and called for re-amending the article to include an obligation for the state to ban incitement to hatred and violence as well as *takfir* (labeling another Muslim an unbeliever, or *kafir*).<sup>26</sup>

The motion to reopen discussion with regard to Article 6 related to religious freedoms set a precedent. The debate could be reopened on other articles already approved, leaving the process inconclusive. Though RoP Article 93 stipulates that “new relevant elements” must appear before an article could be revisited, it does not clarify what constitutes “new” and “relevant” elements. After much debate, the General Rapporteur decided to designate the heads of blocs as the arbiters on whether Article 93 could be invoked. They permitted its invocation on multiple occasions, usually to resolve controversial issues. The NCA invoked this article to reopen debate on several points, including Article 36<sup>27</sup> (pertaining to the right to strike), Article 39<sup>28</sup> (delineating the values to be taught when implementing the right to education), and Article 74<sup>29</sup> (specifying candidacy conditions for the election to the office of President of the Republic).<sup>30</sup> Article 6, a source of controversy till almost the last moment, was voted on a total of three times, with its final format adopted on Jan. 23, 2014.

### ***Attendance, Public Participation and Communication on the Adoption Process***

Tunisia’s generally deliberative constitution-making process was hampered at various moments by the absence of a realistic and detailed roadmap for the NCA’s work.<sup>31</sup> This dynamic was compounded by a lack of a clear communication strategy, a lack of transparency, and absenteeism on the part of many deputies. Some of the lessons of the previous two years positively affected the adoption process. The NCA leadership showed a marked improvement in communication, establishing clearer procedures for civil society’s access to the vote and provisions to facilitate the media’s coverage of the process.

Although the problem of absenteeism of deputies had plagued the NCA for much of its existence, including during the July 2013 general debate, it was less of an issue during this vote. It was not until the vote on the entire constitution, however, that all the deputies were present at a single plenary vote.<sup>32</sup>

The NCA improved its communication with the media during the final voting and adoption phase. The media played an important role in broadcasting the process to the Tunisian public. Public broadcasting channel *Wataniya 2*, for example, dedicated its programming throughout the voting process to live broadcasting of the plenary sessions and related interviews with various deputies and civil society members. The NCA facilitated the media’s work in this regard, dedicating central space at the assembly for use as a studio during the article-by-article vote.

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<sup>26</sup> A member of the Ennahdha bloc made a declaration to the media that was interpreted by some as putting into question the faith of another deputy from the Democratic Bloc. This resulted in heated debate about the need to add guaranties in the constitution against allegations of *takfir*, which could expose accused individuals to the risk of physical violence.

<sup>27</sup> Article 35 of the fourth draft.

<sup>28</sup> Article 38 of the fourth draft.

<sup>29</sup> Article 73 of the fourth draft.

<sup>30</sup> Other articles that were re-voted on using ROP Article 93 were 12, 32 (was 31 in the fourth draft), 36 (35), 63 (62), 65 (64), 81 (80), 88 (87), 91 (90), 106 (103), 110 (107) and 111 (108), 121 (118), 122 (119) and 147 (145). Articles 13 and 149 were added in the final version, and did not exist in the fourth draft.

<sup>31</sup> Carter Center statements dated (a) May 11, 2012 (b) Sept. 26, 2012 and (c) June 12, 2013.

<sup>32</sup> With the exception of Mohamed Allouche. See footnote 20.

The NCA also made significant efforts to facilitate civil society's access to the voting process. Several weeks before the start of the article-by-article vote, the NCA invited applications by interested civil society observers on its website. According to the NCA, a total of 353 organizations registered on the site, with some organizations registering more than one representative. In general, civil society organizations had a higher visibility during the adoption phase than in previous phases of the constitution-making process, though attendance was not always consistent throughout the three weeks of voting. Nonetheless, civil society's presence at the NCA at key moments of the vote added dynamism to the proceedings and allowed for exchanges to take place at the margins of the plenary, not only between civil society members and NCA deputies, but also between civil society and the media.

In addition, the NCA facilitated the task of observers' following plenary discussions by making the final draft and amendments available to them. Proposed amendments were posted on the NCA's website ahead of the vote, in line with the NCA's Rules of Procedure.<sup>33</sup>

Though the NCA had made various efforts to consult citizens prior to June 2013, these efforts were not extensive. After it issued the final draft in June 2013, the NCA made few efforts to reach out to citizens. This was due in part to the increased pressures and political tensions that permeated the final months of the process. Though some deputies participated in forums organized by civil society and international organizations in various regions of the country<sup>34</sup>, and engaged in conversations with their constituents, the NCA failed to lead public outreach efforts.

The Carter Center welcomes plans by the NCA to launch a round of public meetings in all governorates, starting in April 2014, with the aim of engaging with citizens on the content of the new constitution. The Center recommends that the NCA, government, and civil society intensify efforts to educate Tunisian citizens around the country, including youth, on the new constitution, and to solicit their views and opinions on it. The Carter Center also calls on the international community to support those efforts to the maximum extent possible.

### ***Key Issues in the constitution***

The Carter Center followed Tunisia's constitution-making process closely, from the first draft of the constitution to the final version adopted by the NCA in January 2014. Throughout the two-year process and the various drafts of the constitution<sup>35</sup>, the Center tracked the NCA's progress and assessed the provisions of the constitution against Tunisia's international obligations to uphold fundamental political and civic freedoms, including

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<sup>33</sup> Proposed amendments: [http://www.anc.tn/site/main/AR/docs/constitution/propos\\_proj\\_constit.pdf](http://www.anc.tn/site/main/AR/docs/constitution/propos_proj_constit.pdf) (in Arabic) retrieved on 24 March 2014.

<sup>34</sup> For example civil society organizations Al Bawsala, L'Association Tunisienne pour l'Intégrité et la Démocratie (ATIDE) and Bus Citoyen organized meetings between NCA deputies and citizens.

<sup>35</sup> The NCA released four draft texts over the two-year period. Draft *2bis* refers to the compilation of all the chapters prepared by the constitutional commissions after having incorporated comments emanating from various sources on the second draft. This text was submitted on April 10, 2013, to the Drafting Committee for review, but was not publicly released. It formed the basis of the third draft released by the NCA on April 22, 2013.

principles of human rights, comprised within the international and regional human rights treaties ratified by Tunisia.<sup>36</sup>

The Center congratulates NCA members on their achievement and commends their willingness to incorporate the opinions and views of political representatives, civil society, and citizens into the final constitution. In large part, these efforts strengthened the structure of the text and its internal coherence, particularly in the protection of certain fundamental rights and freedoms. The NCA's various consultative mechanisms also helped to reach consensus on key issues. The Consensus Commission deserves particular mention in this regard, as its work was critical to the successful adoption of the constitution. The mechanism of the heads of bloc meetings was also important in overcoming obstacles that emerged during the final voting process.

### **International Law**

The NCA took a conservative stance in the first two drafts of the constitution with regard to the status of international law and its hierarchy vis-à-vis Tunisian law and the constitution. These drafts made Tunisia's respect of its international commitments conditional upon those commitments' conformity with domestic law. This position contradicted Tunisia's commitments under the Vienna Convention on the Law of Treaties, which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>37</sup> The Drafting Committee specified in the third and fourth drafts that international treaties approved and ratified by Tunisia are above domestic law and beneath the constitution. The language in the fourth draft, however, referred to treaties approved by "the Assembly of the People's Representatives," the name of the future legislative body. This implied, perhaps unintentionally, that treaties which had been approved by former legislative bodies would not necessarily have the same legal status.

The Carter Center welcomes the final wording of this provision in the constitution, which now extends it to "the legislative body," which should encompass all legislative bodies, past, present, and future.

However, the NCA did not clarify the weight of international law and the scope of its influence in relation to Tunisia's legal framework. The constitution does not state clearly that Tunisia commits itself to respect all of its international obligations, including those based on customary law. The constitution also fails to give courts explicit incentives to make wider use of international human rights instruments. This omission could lead judges to restrictive interpretations of constitutional rights and freedoms and ordinary laws that affect human rights.

These omissions open the possibility that the constitution could conflict with Tunisia's obligations under the Vienna Convention, which clearly states that domestic laws cannot be

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<sup>36</sup> These treaties include amongst others the International Covenant on Civil and Political Rights (ICCPR) ratified by Tunisia in 1969, the International Covenant on Economic, Social and Cultural Rights (ICESC) ratified by Tunisia in 1969, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified by Tunisia in 1985, the African Charter on Human and Peoples' Rights (AfCHPR) ratified by Tunisia in 1981, The Vienna Convention on the Law of Treaties ratified by Tunisia in 1971, the International Convention on the Elimination of all Forms of Racial Discrimination ratified by Tunisia in 1966 and the Convention on the Rights of the Child ratified by Tunisia in 1989.

<sup>37</sup> Article 27, Vienna Convention on the Law of Treaties.

used as a justification to disregard treaty obligations. The Carter Center encourages authorities to interpret the domestic legislation in conformity with Tunisia's international commitments, including customary law, which is recognized as part of international law. Provisions of international treaties should also always be interpreted in conformity with their universally accepted meanings.

### **Human rights in the constitution and their universality**

The final version of the constitution includes several references to human rights and provides for the establishment of a national human rights commission to help ensure respect for human rights and to investigate human rights violations.<sup>38</sup> At various moments of the drafting process, the drafters discussed the universality of these rights, a discussion influenced by debates on the place of religion in the constitution. The preamble of the first draft referred to "noble human values." In the second draft, the preamble included a reference to "principles of human rights." While the word "universal" was added in the third draft, this reference was undermined by the simultaneous addition of the phrase "insofar as they are in harmony with the cultural specificities of the Tunisian people." This wording caused significant protests by civil society and some members of the opposition. In the fourth and final draft, this limitation was removed; however remained implicit, through the qualification of universal human rights values as "supreme". *The General Report on the Constitution Project*, issued by the Drafting Committee on June 14, 2013, reads:

"In describing the "human values and principles of human rights "as "noble/supreme", the committee wanted to emphasize the fact that we should build on only those values and principles that have attained supremacy due to their noble content, thus encompassing the meaning intended by the previous formulation [of the third draft], which required building on this second basis insofar as it was "consistent with the cultural characteristics of the Tunisian people." This is particularly the case when taking in consideration the reference following it [in the preamble], to drawing inspiration from the civilizational heritage and reform movements based on the elements of the Arab-Muslim identity and the civilizational gains of humanity."<sup>39</sup>

Despite advocacy by various human rights organizations, this issue never became a priority during the Consensus Commission discussions. The word "supreme" was retained in the final version of the constitution, despite the fact that it implies that there is a hierarchy of human rights in which some may be more important than others. This places a burden on the Tunisian judiciary to interpret the phrase in a way that does not compromise the rights and freedoms enshrined in the constitution and remains consistent with the Vienna Declaration, which states that "all human rights are universal, indivisible and interdependent and interrelated." The Declaration further states that, regardless of political, economic, and cultural system, states have an obligation to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."<sup>40</sup> Tunisia's 1959 constitution was more precise than the current constitution in this regard, stating that "the

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<sup>38</sup> Human rights are cited twice in the preamble, while Article 39 requests the State to spread the culture of human rights in the context of free public education and Article 49 forbids any amendments that undermine any human rights acquisitions or freedoms guaranteed in the constitution.

<sup>39</sup> The Coordination and Drafting Committee, "The General Report on the Constitution Project" (in Arabic), June 14, 2013, National Constituent Assembly.

<sup>40</sup> Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on June 25, 1993 – UN/General Assembly, Vienna 14-25 June 1993 (A/CONF.157/23).

Republic of Tunisia shall guarantee fundamental freedoms and human rights in their universality, comprehensiveness, complementarity and interdependence.”<sup>41</sup>

### **Religion in the constitution**

From the outset, the place of religion in the new constitution mobilized political parties and civil society. The heart of the debate was how best to find a balance between the Arab-Muslim identity of the majority of the Tunisian people and the desired secular nature of the State. The debate also extended to how best to guarantee full equality to all people regardless of their religion while recognizing Tunisia as a Muslim country.

In the first draft, the preamble contained both explicit and implicit references to religion. Even before the release of the first draft, political parties reached a consensus not to mention *Sharia* directly and to keep the emblematic first Article of the 1959 constitution, which reads: “Tunisia is a free, independent, and sovereign state. Its religion is Islam, its language is Arabic, and its form of government is a Republic.” This article affirms Tunisia’s Arab-Muslim identity without clearly defining Islam as the State religion.

A debate arose, however, with the introduction of a subsequent article<sup>42</sup> which, instead of stating that certain articles could not be amended, enumerated several inviolable concepts of the new constitution, including “Islam as the State religion.” This change resulted in much controversy. Many politicians and academics said that the concept of a State religion exceeded the intentionally ambiguous wording of Article 1 - *its religion is Islam*. The Consensus Commission addressed the issue, reaching an early agreement to state clearly at the end of Article 1 that it could not be amended. The NCA honored this agreement in the plenary vote.

The adopted constitution also forbids amending Article 2, which proclaims “the civil nature of the State.” Some civil society representatives have argued that defining the state as both civil and Islamist in nature is contradictory. For that reason, they argued that prohibiting amendments to both Articles 1 and 2 could create conflict.<sup>43</sup>

The NCA also debated vigorously the concepts of freedom of religion and conscience. Freedom of conscience, included in the fourth draft of the constitution, had been absent in previous drafts. Its inclusion was the product of long months of debate and the result of extended negotiations between political parties and other stakeholders during the spring 2013 national dialogues. The NCA eventually stipulated in Article 6 that “the state protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization.” The issue appeared settled, but the plenary vote on the constitution proved otherwise. Clashes between NCA members of different ideologies and political affiliations around the issue of the status of religion in the constitution resulted in calls to amend the article.<sup>44</sup>

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<sup>41</sup> Article 5 paragraph 1, added by article 2 of Constitutional Law n° 2002-5 dated June 1, 2002.

<sup>42</sup> Article 148 of the second draft which became Article 136 in the third draft and then 141 in the fourth.

<sup>43</sup> Besides Article 1 and 2, the words “can not be amended” appear in two other instances in the constitution: Article 49 (no amendment of the constitution can undermine human rights and freedoms guaranteed in the constitution) and Article 75 (the number and length of presidential terms).

<sup>44</sup> A member of the Ennahdha bloc made a declaration to the media that was interpreted by some as putting into question the faith of another deputy from the Democratic Bloc. This resulted in heated debate about the need to

Some NCA members considered that the State should be a protector of religion and of “the sacred.” Others believed that the constitution should leave each person the freedom of religious choice, without intrusion or interference. In the end, the NCA plenary voted on three different formulations before finding a compromise between the major political blocs, though some deputies remained vehemently opposed to the article or parts of it. Article 6 in the adopted constitution tries to accommodate both concerns: “the state protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization. The State commits itself to the dissemination of the values of moderation and tolerance and to the protection of the sacred and the prohibition of any offense thereto. It commits itself, equally, to the prohibition of, and the fight against, appeals to *takfir* and incitement to violence and hatred.”

The Center is concerned that the obligation for the State to “protect the sacred” – a vague notion – could be used in the future to curb free speech if that speech is considered as an attack against religion.<sup>45</sup> According to the United Nations Human Rights Council, however, accusations of defamation of religion should not be used to limit freedom of expression.<sup>46</sup>

The freedoms of religion and conscience are the only rights addressed in the general principles chapter, as opposed to the later rights and freedom chapter. Their exclusion from the latter should not be interpreted to mean that they merit less protection than other fundamental rights and freedoms. Despite their omission from the later chapter, these rights are still subject to the General Limitations clause (Article 49).

The judiciary will likely play an important role in interpreting Article 6 should conflict arise. The Center encourages judges and legislators to protect freedoms of speech, conscience and religion as defined by international standards, including the freedom to adopt, change, or renounce a religion or belief.<sup>47</sup>

Additional religious elements included in all four drafts and in the final version of the constitution are the prescribed oaths of office sworn by elected officials, which are religious in nature, and the requirement for candidates running for President of the Republic to be Muslim. The requirement for a candidate for elected office to subscribe to a particular religious faith contravenes Articles 25 and 26 of the International Covenant on Civil and Political Rights (ICCPR), which address the principle of participation in public affairs, non-discrimination, and equality before the law.

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add guaranties in the constitution against allegations of *takfir* which could expose accused individuals to the risk of physical violence. *Takfir* is labeling another Muslim a non-believer, or *kafir*.

<sup>45</sup> See also Amna Guellali, Human Rights Watch Country Director for Tunisia and Algeria, “The problem with the new Constitution”, Feb. 3, 2014, <http://www.hrw.org/news/2014/02/03/problem-tunisia-s-new-constitution>

<sup>46</sup> United Nations Human Rights Council, A/HRC/RES/16 /18, Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief, adopted by consensus on March 24, 2011.

<sup>47</sup> Article 18 of the ICCPR and Article 18 of the Universal Declaration of Human Rights, see also UN Special Rapporteur on Freedom of Religion or Belief, *Rapporteur's Digest on Freedom of Religion or Belief (excerpts of the Reports from 1986 to 2011)*, p.4:

<http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>

## Rights and Freedoms

The scope and interaction of fundamental rights and freedoms sparked heated discussions throughout the process. The Rights and Freedoms chapter was one of the most dynamic, evolving the most throughout the different drafts. While several rights were listed in the chapter on general principles for much of the process, all fundamental rights, with the exception of the freedoms of religion and conscience were consolidated into a chapter on rights and freedoms in the fourth draft.

The final text of the constitution upholds many key civil and political rights, such as freedom of religion, freedom of conscience, freedom of expression, gender equality, and the protection of women's rights. Several key economic, social, and cultural rights are also protected. The Rights and Freedoms chapter ends with the statement that “no amendment is allowed that undermines any human rights acquisitions or freedoms guaranteed in this constitution.”<sup>48</sup>

### *Restriction on fundamental rights*

While the enshrinement of fundamental rights and freedoms is crucial in a constitution, it is also important to delineate when and how those rights can be restricted, keeping in mind that these restrictions must not only be limited but also necessary and appropriate.<sup>49</sup>

Initially, and up to the final draft, the constitution gave wide scope to the law to determine whether limits could be placed on many rights and freedoms. Furthermore, the language limited certain rights to various degrees. It was not always clear how the drafters had determined the limitations or on what basis. The fourth draft, for example, guaranteed the right of access to information “within limits that do not prejudice national security, or the rights that are guaranteed by the constitution.” Freedoms of expression, media, and publication could not be restricted except by virtue of a law protecting “the rights, reputation, safety, and health of others.” Academic freedom and freedom of scientific research were not limited and remain so. The right to peaceful assembly and demonstration was guaranteed, but could only be exercised as per procedural regulations provided for by the law “without prejudice to the essence of the right.” The right to privacy and freedom of movement could be limited by law but required a judicial order. This variation from one right to the next risked creating confusion and opened the door to an eventual erosion of those rights.

It is therefore a positive development in the evolution of the text that the final version is free of specific restrictions on rights and freedoms in the majority of provisions, including freedom of movement; freedom of expression, information, and publication; freedom to form political parties; and the right to assembly and peaceful demonstration. The articles dealing with the right to life (Article 22), pretrial detention (Article 29), electoral rights (Article 34), the right to health coverage (Article 38), and the right to property (Article 41) still contain specific referral to the law, however, and may not fully benefit from the guarantees spelled out in the general limitation clause (Article 49).

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<sup>48</sup> Article 49.

<sup>49</sup> Lawful Restrictions on Civil and Political Rights, DRI, Briefing Paper 31, October 2012.

Following the advocacy of various stakeholders, this general limitation clause, delineating how rights should be interpreted in their application, was introduced in the fourth draft. While they welcomed this inclusion, civil society and other stakeholders continued to advocate for the full protection of fundamental rights without restrictions so as to conform to Tunisia's obligations under international law.<sup>50</sup>

The Consensus Commission reached agreement early in its work to reformulate the general limitations clause (Article 48 of the final draft, now Article 49 of the constitution) in order to detail that any restriction of rights and freedoms "can only be put in place where necessary in a civil democratic state." The same article invokes the principle of proportionality, directing the state to respect "proportionality between these limitations and their motives." These amendments were accepted in the NCA plenary vote.

The invocation of the principles of proportionality and necessity represent an important human rights gain in the Tunisian constitution.<sup>51</sup> In the past, freedoms granted in the constitution were commonly restricted through legislation, removing all meaning from those rights. The constitution further instructs judicial authorities, which will likely have wide scope to interpret constitutional provisions around rights and freedoms, to "ensure that rights and freedoms are protected from all violations."

Despite these important gains, The Carter Center expresses some concerns about rights guarantees in the new constitution. While Tunisia has observed a moratorium on the death penalty since 1991, the constitution does not ban the death penalty outright, even if the right to life is defined as "sacred" by the constitution (Article 22) and can only be limited in extreme situations by law. It should also be noted that, in addition to the conditions delineated in Article 49 to limit rights, the constitution allows the president to take exceptional measures in times of state emergency – which often results in curtailing individual freedoms.<sup>52</sup> The constitution does not elaborate on the status of rights and freedoms once a state of emergency has been pronounced. The Carter Center recommends that subsequent legal reform restrict limitations to only those necessary for a specific period of time to meet the exigencies of the emergency situation. Further, rights considered non-derogable in international law should never be limited under emergency powers.<sup>53</sup>

### *The principle of non-discrimination*

During the drafting process, debates around the principle of non-discrimination revolved mainly around gender issues. Other possible grounds of discrimination – including race, color, language, religion, political or other opinion, and national or social origin – received

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<sup>50</sup> See joint statements by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, on July 24, 2103, and Jan. 3, 2014, both can be found at

[http://www.cartercenter.org/news/publications/peace/democracy\\_publications/tunisia-peace-reports.html](http://www.cartercenter.org/news/publications/peace/democracy_publications/tunisia-peace-reports.html)

<sup>51</sup> Zaid El Ali and Donia Ben Romdhane (International IDEA), "Tunisia's new constitution: progress and challenges to come", opendemocracy.net, 16 February 2014 <http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to->

<sup>52</sup> Article 80 of the Tunisian constitution allows the President to take exceptional measures in the event of an imminent danger threatening the entity, security, and independence of the country, after consultation with the head of government, president of the Assembly of People's Deputies and requires him to give notice to the head of the constitutional court. After a lapse of 30 days, the constitution court may examine continued need for the measures, on request from the head of the Assembly of the People's Deputies or 30 deputies.

<sup>53</sup> Article 4 of the ICCPR and Human Rights Committee General Comment 29.

far less attention. The unofficial version (draft *2bis*) that incorporated the comments of the constitutional commissions to the Drafting Committee mentioned “all forms of discrimination.” However, this specification was not incorporated into the third and fourth drafts. As a result, while language regarding gender equality improved in each successive draft, the adopted constitution does not explicitly prohibit all manner of discrimination as warranted by international law.<sup>54</sup>

Article 21 specifies only that “all citizens, male and female alike, shall have equal rights and duties, and shall be equal before the law with no discrimination.” Not only are grounds for discrimination other than gender not mentioned, but the clause does not conform to Tunisia’s obligations under the ICCPR, which specifies that equality before the law is a right of the individual and is not limited to citizens only.<sup>55</sup>

The Carter Center recommends that legislators revisit relevant laws, taking into account Tunisia’s international obligations, and incorporate clear prohibitions of discrimination on all grounds, including race, color, language, religion, political or other opinion, national or social origin, property, birth, or other status, towards all people and not only citizens.

It is noteworthy that, while Article 21 does not refer to other grounds of discrimination, its contribution to the protection of Tunisian women’s rights and equality is essential, and was a central issue during the entire constitution-making process.

#### *Protection of women’s rights and equality*

The first draft of the constitution ignited a heated debate on women’s rights in Tunisia, as it mentioned the “complementary roles of men and women inside the family” without reference to the equality of men and women. More generally, the rights of women in the first draft were largely considered in the context of the family.<sup>56</sup> Widely criticized, the notion of “complementarity” was subsequently abandoned. The second and successive drafts considered women independently from the family. The concept of the State as a guarantor for equality of opportunity between women and men in “assuming various responsibilities,” as opposed to in all areas, nonetheless endured.

Furthermore, in relation to violence against women, the first and second draft noted that “the state *guarantees* the elimination of all forms of violence against women.” The NCA commissions charged with drafting specific chapters later edited this clause. Unofficial draft *2bis* specified that “the state *takes adequate measures* to eliminate violence against women.” The reference to “adequate measures” disappeared in the third draft, but resurfaced in the fourth and final draft. None of the drafts touched on the issue of gender parity.

Though the issue of parity did not garner much attention in the immediate months leading to the article-by-article vote on the constitution, it became a hotly debated issue during the final

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<sup>54</sup> Article 2 (1) of the ICCPR states, “Each State Party (...) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>55</sup> Article 2 of the ICCPR stipulates that States undertake “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”, Article 26, ICCPR “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

<sup>56</sup>In the first draft the State was entitled to “protect women’s rights, preserve the unity of the family and maintain its cohesion.”

voting process. A pressure group of deputies, mainly women, from various blocs coalesced to push for the inclusion of stronger language on women's rights in the constitution. The Consensus Commission adopted the issue and proposed an amendment to Article 45 of the final draft (Article 46 of the adopted constitution) to stipulate that "the State commits to protect the acquired rights of women and works to support and develop them. The State guarantees equality of opportunity between men and women in assuming various responsibilities and in all fields. The State works to achieve parity between women and men in elected assemblies. The State takes adequate measures to eliminate violence against women."

The language was by no means universally acceptable in the NCA, and for several days during the plenary vote it was not clear whether the amendment would be adopted. After much negotiation, lobbying by civil society groups, and the involvement of senior political figures from various sides of the spectrum, the proposed Article 46<sup>57</sup> eventually passed with 116 votes in favor, 32 abstentions, and 40 against.

Human rights groups and women's rights activists welcomed the adoption of Article 46, in conjunction with Article 21's prohibition of discrimination and specification of equality in rights and duties between male and female citizens. The language is progressive in that it not only preserves the rights acquired thus far by women in Tunisia, but also requests the State to support and further extend these rights. It also entrenches the principle of parity in elected bodies by introducing an obligation for the state to seek the achievement of parity in all elected councils. This language, while it does not mandate gender parity, is notable for its aspiration.

The constitution also introduced gender-sensitive wording in relation to key issues, such as the right to work and the right to decent working conditions (Article 40) and the right to stand for election (Articles 34 and 46). And while Tunisia's 1959 constitution stipulated that the President of the Republic must be a man, Article 74<sup>58</sup> now provides that "every male and female voter" has the right to stand for election for the position of president. The constitution can thus be seen as a further step in the advancement and protection of women's rights in Tunisia and maintains Tunisia's historical precedence within the Arab region in regard to the rights of women in society.

The Center commends the NCA for strengthening women's rights and tackling discrimination against women and applauds the progress made in strengthening women's position in the constitution. The language used in Article 34 ("the state seeks to guarantee women's representation in elected councils") is weaker, however, than the language used in Article 46. The Center encourages Tunisian authorities and political parties to do their utmost to "achieve parity in elected assemblies." The Center encourages the State to adopt positive measures in all areas in order to achieve the effective and equal empowerment of women and to fight to eliminate not only violence against women, but more widely all forms of discrimination against women.<sup>59</sup>

In its current elaboration of an election law, the NCA faces a first test of the principle of gender parity as enshrined in the constitution. The Center welcomes provisions in the draft

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<sup>57</sup> Article 45 of the fourth draft.

<sup>58</sup> Article 73 of the fourth draft.

<sup>59</sup> Human Rights Committee, General Comment No. 28, para. 3.

electoral law that put in place measures to achieve gender parity in nomination lists, and suggests that the state tackle all barriers to women's participation in the implementation of the law.<sup>60</sup>

### *Economic, social and cultural rights*

The area of economic, social, and cultural rights is one of the few that did not consistently evolve towards stronger protections over successive drafts. In some instances, the language in the adopted constitution does not fulfill the vision of the Rights and Freedoms constitutional commission, which worked on these issues.

The constitution guarantees many economic, social, and cultural rights, including the right to health (Article 38), education (Article 39), culture (Article 42), water (Article 44), and more broadly to a clean environment (Article 45). Many of these rights, however, are neither spelled out with further explanation as to how they are to be exercised and achieved, nor subject to a judicial mechanism designated for their enforcement if the state fails to meet its obligations. In addition, the constitution does not obligate the state to realize these rights to the maximum of its available resources and in a progressive manner, as stipulated in the International Covenant on Economic, Social and Cultural Rights, to which Tunisia is a party.<sup>61</sup>

In some cases, subsequent drafts of the constitution actually diluted the state's obligation to enforce or protect a given right. This is illustrated, for example, by a closer examination of the right to water (Article 44). In the draft submitted by the constitutional commissions to the Drafting Committee (draft *2bis*) before the release of the third draft, the right to *drinkable* water was guaranteed, with the state being obligated to protect water resources, use them efficiently, and work for their fair distribution. The third draft read merely "the right to water is guaranteed." The final draft reintroduced the obligation to protect water resources and use them efficiently, but both the "State and society" were obligated to do so in this version. The obligation to work for a *fair* distribution of water resources was eliminated. The plenary eventually adopted this language: "The right to water shall be guaranteed. The conservation and the rational use of water shall be a duty of the State and society."

The Carter Center welcomes the addition of a new provision in the last days of the article-by-article vote stipulating that "natural resources are the property of the Tunisian people, and the State exercises sovereignty over them on the people's behalf. Investment contracts related to these resources shall be submitted to the competent committee of the Assembly of the People's Representatives. Agreements ratified in relation to these resources shall be submitted to the Assembly for approval (Article 13)."

The realization of economic, social and cultural rights often has financial implications and requires the establishment of concrete enforcement mechanisms. The Center encourages

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<sup>60</sup> The draft electoral law was published on the website of the National Constituent Assembly on March 26, 2014: [http://www.anc.tn/site/main/AR/docs/projets/projet\\_election.pdf](http://www.anc.tn/site/main/AR/docs/projets/projet_election.pdf)

<sup>61</sup> Article 2 of the ICSECR notes that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Tunisian authorities to devote appropriate resources to the implementation of these rights, in order to meet the new constitution's human rights commitments.

### *Election Rights*

Guarantees for electoral rights evolved significantly from the first draft of the constitution to its adoption. While the right to vote did not appear in the first draft – an unfortunate omission addressed in the second draft – the characteristics of genuine elections in the adopted constitution align closely with those elaborated in international law.<sup>62</sup>

The Carter Center commends the NCA for its efforts to protect the electoral process and voting rights, which form the foundation of the modern democratic state. The constitution requires that legislative, presidential, and local elections be universal, free, direct, secret, fair, and transparent.<sup>63</sup> The words “fair and transparent” were added in the fourth draft, a positive step that reinforces the democratic nature of elections.

Unfortunately however, some concerns remain. Article 34 on election rights is one of the few articles that retained a specific limitation, and thus may escape the stringent conditions set in the General Limitation clause for restricting rights (Article 49). Given that the article gives wide scope to the law to determine the limits that could be placed on electoral rights, The Carter Center also recommends that, should any measures be placed to restrict these rights, the restrictions should be reasonable, proportional, and necessary in a democratic society, as per the conditions spelled out in the General Limitation clause.

The adopted constitution further omits the principle of equality in the articles related to voting rights. This omission is significant, and lawmakers should make every effort to incorporate the principle into Tunisia's organic laws relating to elections.

Equality is a fundamental element of the right to vote and is directly mentioned in the Universal Declaration of Human Rights as well as the ICCPR. The equality of the vote refers to the principle of “one person, one vote” so that no citizen's right to vote is greater or less than that of another citizen. It is one of the bases of measures to combat election fraud, since such fraud is a violation of equality. Equality of the vote also means that every citizen's vote should have the same value; for example, the number of citizens or voters per elected representative should be generally equal when representatives are elected from different constituencies.

Furthermore, the criteria for candidacy for election to the office of President of the Republic, which were hotly debated during the entire constitution-making process. Discussion centered on the question of whether to place an upper age limit on candidates, as well as on the restrictions on dual nationals. Both measures directly affected several potential candidates.

The second and subsequent drafts of the constitution stipulated that candidates for the office of the President of the Republic have a minimum age of 40 and a maximum age of 75.

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<sup>62</sup> Article 25 of the ICCPR states that “every citizen shall have the right and opportunity...(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...”

<sup>63</sup> Articles 55 (legislative elections), 75 (presidential elections), and 133 (local elections).

All drafts made reference to the candidate being Muslim.<sup>64</sup> Key stakeholders and members of the Consensus Commission managed to reach an agreement to remove the age restrictions on presidential nominees, as well as to soften the interdiction of candidacy for persons holding dual citizenship by providing that the nominee sign a commitment to revoke the second citizenship should she or he be elected. During the vote both issues remained controversial and generated much debate. The assembly was forced to vote twice on the article (Article 74).<sup>65</sup>

The Carter Center notes that U.N. General Comment 25, the interpretive document for Article 25 of the ICCPR indicates that any restrictions on the right to be elected and on the right of people to freely choose their representatives “must be justifiable on objective and reasonable criteria.”<sup>66</sup> Comment 25 identifies minimum age as a potentially reasonable restriction for holding office, as is lack of mental capacity. While the provisions for maximum age may endeavor to address mental and physical capacity to hold public office, they do not inherently reflect these qualities and may therefore discriminate against otherwise fit candidates. The NCA’s decision to remove the age ceiling in the constitution is positive, as it brings the criteria for candidacy in closer alignment with international norms. The lowering of the minimum age to 35, as opposed to the 40 in previous drafts, is also a positive development, which may encourage wider participation by younger candidates in the political affairs of their country.

The nationality of the president also generated heated discussion. Until the fourth draft, persons possessing only the Tunisian nationality and none other in addition could run for the presidency. This condition was refined in the fourth draft, which specified that, on the date of the submission of the application, the candidate is not allowed to hold another nationality – obliging dual nationals to give up any other nationalities before presenting their candidacy to run for president. After advocacy efforts by dual nationals serving within the NCA, the Assembly eventually opted to ease the conditions for candidacy. Candidates must now abandon any other nationality only if elected President of the Republic (Article 74).

### **Structure of the political system**

International law obligations do not dictate a specific political system, as “every State possesses a fundamental right to choose and implement its own political, economic and social systems.”<sup>67</sup> The content of the constitution should, however, ensure that all elements of a democratic system that guarantee the implementation of rights are respected. The separation and balance of powers are fundamental principles of democratic systems, and

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<sup>64</sup> When submitting their chapters for the first draft in August 2012, several commissions proposed multiple versions of articles. Regarding the candidacy conditions for the election to the office of President of the Republic, five different options were presented and two did not include the requirement for the candidates to be Muslim.

<sup>65</sup> Article 73 of the fourth draft.

<sup>66</sup> U.N. General Comment 25, para 15.

<sup>67</sup> International Court of Justice (ICJ), Case concerning military and paramilitary activities in and against Nicaragua, (Nicaragua v. The United States of America), 27 June 1986, p. 131: “A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems” and ICJ, Advisory opinion, Sahara Occidental, 16 October 1975, pp. 43-44: “No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.”

the idea of balance of powers implies collaboration between the different powers of the state and the creation of mechanisms of mutual control and of countervailing powers.

The choice of the political system was particularly contentious during the drafting process. Although the first draft of the constitution established the principle of separation of powers, the debate revolved around the balance of powers between the executive and the legislative, and between the President of the Republic and the head of government (prime minister), in a mixed system with an executive power with two leaders.

In both the first and second drafts, several aspects of the political system remained unresolved. In the absence of consensus within the Commission on Executive and Legislative Powers (Powers Commission), its members put forth two or three options of several articles for consideration. In the third draft, the Drafting Committee incorporated one of the options presented by the Powers Commission. The selected political system granted considerable power to the parliament and the government, while providing for the direct election of the President, whose prerogatives would be strictly limited.

The fourth draft of the constitution did not substantially change the prerogatives of the two heads of the executive, but introduced details to clarify their respective roles and attempted to create a more even balance between them. A new provision (Article 70 in the fourth draft and 71 in the constitution) clearly stated that both the President of the Republic and the government, led by a head of government, “hold the executive power.” These changes, emanating to some extent from the national dialogues, were considered insufficient by many opposition members and others, however.

In the end, the plenary adopted measures that clarified the competence of the head of government and the President of the Republic, but some grey areas remain. In several instances, the constitution foresees that the President of the Republic shall take decisions after consultation with the head of government.<sup>68</sup> These provisions may prove complicated to implement, should the executive powers fail to reach agreement. The constitution stipulates in Article 101 that in the case of a dispute arising between the heads of the executive, the “most concerned” of the two parties may refer the matter to the Constitutional Court for a ruling, which must be issued within a week. While the court could in principle act as arbitrator, there is a danger of the court becoming politicized if it is called upon to arbitrate between the actors frequently, and the constitution does not offer specific guidelines for making judgments. In addition, the Constitutional Court may not be established for up to a year following the upcoming legislative elections, leaving a potential vacuum should conflicts arise in the immediate term.<sup>69</sup>

Another issue that may generate future difficulties concerns the ratification of international treaties. Article 77 stipulates that the President of the Republic is responsible for ratifying treaties and authorizing their publication, while the head of government is “exclusively competent to present draft laws relating to the approval of ratification of treaties” (Article 62). The constitution is silent, however, on how to deal with a scenario in which the head of government chooses not to present a draft law or fails to do so in a timely manner, thereby

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<sup>68</sup> Articles 77, 78, 80, 106.

<sup>69</sup> The constitution foresees the establishment of a temporary commission that is tasked with reviewing the constitutionality of draft laws. Its mandate will not extend to arbitration between political powers.

blocking the ratification process. Such a situation could lead to a political crisis affecting the balance of powers.

Finally, some provisions regarding the political system are very complex and may prove difficult to implement. The President of the Republic is allowed to ask the assembly to renew or withdraw confidence from the government up to two times during his or her term (Article 99). Should the assembly choose to do withdraw confidence, the president is tasked with designating someone to form the new government in a period not exceeding 30 days. Should this person fail to do that, or should the assembly fail to give confidence to the new government, the president is authorized to dissolve the Assembly and to call for elections. On the other hand, should the assembly give the government its confidence twice, the president must submit his or her resignation. The system does not give either party strong incentives to practice checks and balances, since the cost of failure is extremely high for both the president and the assembly.

In order to avoid stalemates, the Carter Center calls on Tunisian political actors to continue seeking consensus in the current phase of the transition and beyond, as they did in the months leading to the constitution's adoption. Maintaining this spirit will help to integrate this positive aspect of the Tunisian constitution-making process into the wider political culture of the country, and could help to reduce the potential for conflict, particularly while permanent institutions, including the constitutional court, are not yet in place.

#### *Role and rights of the political opposition*

The role and rights of the political opposition, which were not specified in the first and the second drafts, is one of the main positive outcomes of the national consultations held in December 2012 and January 2013.<sup>70</sup> The third draft includes a reference to the role and the rights of the opposition as an integral element of the Assembly of the People's Representatives (Article 57), and in the fourth draft (Article 59) similar language is used to grant "the opposition the right to create and preside an inquiry commission every year," but without giving any further information on the status and prerogatives of such a commission.

The final text of the constitution not only retains the explicit recognition that the parliamentary opposition is an "essential component" of the legislature, but also provides for a member of the opposition to head the parliament's finance committee. This committee plays a key role in controlling the State's funds. It is charged with reviewing the state's annual budget before it is voted on in parliament as well as with assessing whether the state's monies are being used wisely.<sup>71</sup> The constitution also extends the right to refer a draft law to the Constitutional Court to the President of the Republic and the head of

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<sup>70</sup> The UNDP report on the national consultation process highlights that the inclusion of the rights of the opposition in the Constitution was insisted upon in the governorates of Monastir, Bizerte and Sidi Bouzid. See PNUD, "Dialogue National Sur Le Project de La Constitution: Rapport General", Tunis March 2013, p. 35.

<sup>71</sup> For a more detailed analysis of the importance of this explicit recognition see Zaid El Ali and Donia Ben Romdhane (International IDEA), "Tunisia's new constitution: progress and challenges to come", <http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to->

government, as well as any 30 members of the assembly.<sup>72</sup> This provision should further boost the rights of the opposition and, by extension, the democratic nature of the state.<sup>73</sup>

### **Role of the Judiciary**

The Tunisian constitution lays a strong foundation for the independence of the judiciary. The chapter on judicial authority contains important guarantees in this regard, including Article 102, which affirms that “the judiciary is an independent authority that ensures the administration of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms.” Article 109 prohibits outside interference with the judiciary.

The language concerning the appointment of judges was significantly improved in the adopted text of the constitution (Article 106).<sup>74</sup> Initially, this provision noted that judges would be appointed by presidential decree based on decisions by the High Judicial Council (the independent supervisory body for the judiciary). There were no provisions made for the appointment of senior judges, which meant that all power for the appointment of senior civil servants would rest with the head of government, as per Article 92. In the final text, the NCA put in place stronger guarantees to ensure that the judiciary does not fall hostage to the government. The final draft gives the President the responsibility of appointing senior judges, but only in consultation with the head of government and based on a proposal by the High Judicial Council (Article 106).

Furthermore, later drafts strengthened the immunity of judges. Until the fourth draft, it was possible to lift the immunity of a judge in the event that he or she is caught red-handed (*in flagrante delicto*). In the final text, the judge must be caught red-handed *committing a crime*. Only then could his or her immunity be removed. It should be noted that there were no provisions in the 1959 constitution to protect judicial independence. The guarantees of judicial independence in the new constitution can be seen as a key turning point in Tunisian history, in light of past practices of authorities - both prior to the revolution and to a lesser extent since - that made the judiciary vulnerable to the executive power.

The NCA also improved the final text establishing the membership of the High Judicial Council. According to the adopted constitution, the Council must be established within six months of the upcoming legislative elections, and will play an important role, among other duties, in selecting the members of the Constitutional Court. A key aspect of the Council’s work will be to deal with all matters relating to the appointment, promotion, dismissal, and career progression of judges. Initially, and until the fourth draft, it was foreseen that half the members of the Council would be judges, while the other half non-judges. This measure was amended to increase the percentage of judges to two thirds. The adopted constitution also strengthened measures for the election of most judges and non-judges. Article 112 stipulates, moreover, that “the remaining third (non-judges) shall be composed of specialized independent individuals,” and that “elected members shall undertake their functions for a single six-year term,” which are further guarantees of independence.

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<sup>72</sup> Article 120.

<sup>73</sup> The Human Rights Council adopted a resolution that emphasizes the crucial role played by the political opposition and civil society in the proper functioning of a democracy. (A/HRC/RES/19/36). See also “The constitutional rights of the opposition”, DRI Briefing Paper 34, February 2013

<sup>74</sup> Article 103 of the fourth draft.

Though this issue was apparently not discussed prior to the adoption phase of the constitution-making process, a group of deputies proposed an amendment to enshrine the profession of lawyers in the constitution for the first time in Tunisian history. The resulting article (Article 105) states that: “The profession of lawyer is a free independent profession that contributes to the establishment of justice and to the defense of rights and freedoms. Lawyers are entitled to the legal guarantees that ensure their protection and the fulfillment of their task”. This article should be read in the context of Tunisia’s authoritarian past, in which lawyers were frequently subjected to harassment by state security. In this sense, the adopted language could play a role in strengthening a lawyer’s right to provide defense and right to a fair trial. The right to appeal - another ingredient of the right to a fair trial - first appeared in the second draft (Article 104) but was removed in the fourth, then eventually reintroduced in the final version of the constitution (Article 108).

Despite these strong guarantees, security of tenure requires further elaboration in the law. Article 107 states that no judge may be transferred, dismissed, expelled, or subjected to disciplinary punishment “except in accordance with the guarantees provided for by law.” Though the article requires a decision by the High Judicial Council before any of the above actions can be taken, it leaves wide scope to the law to determine the criteria for dismissal. These measures could be used in future to undermine the judiciary.

The Center recommends that the government, the NCA, and the future Assembly of the People’s Representatives incorporate stronger provisions on the independence of the judiciary into the legal framework, consistent with international standards, including the unambiguous affirmation of security of tenure in regards to appointment, promotion, and discipline, with removal of judges possible only for serious misconduct and only following a fair trial.<sup>75</sup>

The Tunisian constitution accords the judiciary wide powers to interpret the constitution and, by extension, to enforce the freedoms and rights guaranteed therein. Furthermore, authorities have up to a year following the upcoming legislative elections to establish the Constitutional Court. This leaves a potential void in constitutional oversight that may not be met entirely by the provisional commission foreseen by the constitution’s transitional provisions, which has only *a priori* oversight of laws (Article 148, paragraph 7).

The Carter Center recommends that judges be required to interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom. In addition, the interpretation of human rights treaties from any official treaty body, including courts and commissions, should be taken into account as a minimum standard.

A further concern is the question of the supremacy of the constitution. Until the fourth draft of the constitution, Article 102<sup>76</sup> stipulated that “judges are independent. No power shall be exercised over their rulings other than the power *of the constitution* and the law” (emphasis added). In the final text, the word “constitution” was removed, a move that put in question the provisions of the first paragraph, which instructs judges to enforce the supremacy of the constitution yet in the second paragraph essentially asks them to refer to the law only. This may lead to the prevalence of the law over the constitution where contradictions exist

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<sup>75</sup> The UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to Fair Trial in Africa.

<sup>76</sup> Article 100 in the fourth draft.

between the two, and a systematic referral of cases to the Constitutional Court, even where the constitutionality of the issue in question is clear. This could result, on a practical level, in an overburdening of the Constitutional Court and delays in judgment.

However, given that Article 102 instructs the judiciary to ensure the constitution's supremacy, the article assumes paramount importance during the remainder of the transitional phase, particularly in the absence of the Constitutional Court. It should be read in the context of the larger constitution, which sets limits on the scope of permissible restrictions to rights and freedoms (Article 49).

#### *Composition and competence of the Constitutional Court*

Until the fourth draft, the Assembly was mandated to elect twelve Constitutional Court members from among candidates proposed by the President of the Republic, the head of government, the President of the Assembly, and the President of the High Judicial Council. In the final version, the NCA designated the same four authorities to appoint the court's members, without the assembly playing a role in their selection. This measure was a positive step that strengthens the balance of powers and ensures that no one entity controls the court.

The first and second drafts mandated that the Constitutional Court be composed entirely of legal specialists with a minimum of 20 years of professional experience. The Drafting Committee lowered these prerequisites in the third draft, requiring a majority of legal specialists with a minimum of 10 years' experience.<sup>77</sup> Opposition members, civil society representatives and some members of the constituent commission dealing with judicial powers that had initially drafted the article protested these changes. The fourth draft proposed a compromise of a two-thirds composition of legal specialists with a minimum of 15 years of experience (Article 115). NCA members eventually opted for an intermediate solution, namely an increase of the number of legal specialists to three-quarters and a return to the initial 20 years of professional experience requirement initially foreseen by the Judicial Powers Commission (Article 118).

The second draft of the constitution articulated the Constitutional Court's competencies, including the mandatory referral to the Constitutional Court of any proposed amendments to the constitution, draft organic laws, and ratification of treaty laws, as well as an optional referral under certain conditions for draft legislation (Article 117). Any five assembly members, in addition to the President of the Republic, the President of the Assembly, and the head of government, could refer legislative matters to the court. Although the judicial constitutional commission increased the number of deputies to 10, the Drafting Committee kept only the mandatory referrals and removed the mechanism of optional referral in the third draft. National and international organizations criticized this decision.<sup>78</sup> A Consensus

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<sup>77</sup> The provisions on the composition of the Constitutional Court were said to have been changed as a compromise between advocates for the establishment of a High Islamic Council and its opponents. The Court's composition was widened by the Drafting Committee so as to allow for the inclusion of non-legal specialists thus opening the door for the inclusion of religious law scholars.

<sup>78</sup> « Observation sur le projet final de la constitution de la République tunisienne », Strasbourg, le 17 July 2013, Avis 733/2013 (French only), Council of Europe, Venice Commission; para. 176 [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2013\)034-f](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2013)034-f) and "Strengthen New Constitution's Human Rights Protection, Guarantee Equality for All, Affirm International Law Obligations", joint statement by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, Jan. 3, 2014, <http://www.cartercenter.org/news/pr/tunisia-010314.html>

Commission proposal allowing a minimum of 30 assembly members to seize the court was adopted in the plenary votes. This measure will allow deputies, particularly the opposition, the power to challenge draft laws before the Constitutional Court while at the same time reducing the risk of blockage by a small number of deputies.

### **Transitional Provisions**

A new chapter was added to the final draft of the constitution, which dealt with the transitional provisions intended to ensure a smooth transition between the former and new constitutional orders. The drafting process with regard to the transitional provisions was unique. The constitutional commissions did not discuss their content, nor did any of the commissions have a mandate to address these provisions. Instead, the Drafting Committee adopted the transitional provisions at the very last stage of the process, leaving little time for members to discuss and reflect on their implications. Stakeholders widely criticized both the process and the content of the chapter. It was the only chapter that was reevaluated in full by the Consensus Commission, which debated, among other issues, the timeline of the establishment of the Constitutional Court, the prerogatives of the NCA, and the deadlines for the entry into force of the various provisions of the constitution, including the upcoming election date.

The Carter Center welcomes the fact that transitional provisions adopted set clearer timelines and deadlines for the entry to force of the various provisions of the constitution. The Center also applauds the NCA's decision to grant the Constitutional Court full jurisdiction to examine the constitutionality of laws immediately upon its creation, rather than three years later, as previously specified. The establishment of the Constitutional Court, however, is dependent on the timing of the upcoming legislative elections and could take up to one year from that date, leaving a void in judicial review that will not necessarily be covered by the court system at large, given that Article 148 para. 7 of the constitution explicitly states that the court system is not allowed to review the constitutionality of laws. The constitution calls for the establishment of an interim commission charged with considering the constitutionality of draft laws until the permanent body is in place. As this body does not have a mandate to consider the constitutionality of current laws, including those inherited from the former regime, a void exists to ensure that Tunisia's legal framework is in conformity with the new constitution. In addition, prior to the establishment of the Constitutional Court, there is no mechanism to arbitrate potential conflicts between the two heads of the executive, leaving a potential vacuum should conflicts arise in the short term.

Furthermore, Article 120 mandates the future Constitutional Court to review the legislative body's Rules of Procedure as presented to it by the President of the Assembly. This review is critical in guaranteeing that the exercise of legislative power is in conformity with the perquisites of the constitution. There is no mechanism foreseen in the transitional provisions to review the future Assembly of the People's Representatives' Rules of Procedure, which are likely to be adopted well before the establishment of a permanent Constitutional Court.

Currently the transition between temporary and permanent governments is regulated by the transitional provisions as well as the OPPP. It would have been preferable to integrate the still-applicable provisions of the OPPP in the transitional provisions so as to ensure greater coherence and to fully reflect the force of the new constitution.

The Center calls on the NCA and the new government to put in place the legal framework necessary to implement the provisions of the constitution, in particular the timely establishment of a provisional commission to review the constitutionality of draft laws.<sup>79</sup>

The Center strongly encourages the NCA to establish the commission in time to review the draft elections law, currently under discussion. The Center further recommends that the NCA mandate the commission to review the future Assembly of the People's Representatives' Rules of Procedure, which are likely to be adopted before the establishment of a permanent Constitutional Court. This step would respect the spirit of Article 120, which mandates the future Constitutional Court to review the legislative body's Rules of Procedure as presented to it by the President of the Assembly. This review is critical in guaranteeing that the exercise of legislative power is in conformity with the prerequisites of the constitution.

### *Recommendations*

The Carter Center encourages the NCA, the government, participants in the national dialogue, civil society organizations, and the future members of the Assembly of the People's Representatives to consider the following recommendations:

#### *RIGHTS*

- Review and reform Tunisia's existing legal framework to ensure that domestic law and regulations reflect and respect the country's international commitments on human rights and the rights enshrined in the new constitution.
- Incorporate into organic laws guarantees of the principle of the equality of the vote.
- Prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status. Ensure that these rights apply to all people in Tunisia, citizens and foreigners alike, in accordance with international law.
- Encourage the State to fight not only violence against women but all kinds of discrimination against women. Adopt concrete measures to protect women's rights, such as mechanisms to advance gender parity in nomination lists, including in the draft legislation currently under debate in the National Constituent Assembly.
- Specify in relevant legislation Tunisia's obligation to adopt specific mechanisms to guarantee the progressive realization of economic, social, and cultural rights to the maximum of the country's available resources.

#### *ENFORCEMENT*

- Judges should interpret the law, including the Constitution, to favor the enforcement of a right or fundamental freedom, and to take into account the interpretation of

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<sup>79</sup> As stipulated in article 148, paragraph 7 of the constitution.

human rights treaties, including from courts and commissions, as a minimum standard.

- Encourage judges and legislators to protect freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, and to ensure that any limitations are consistent with the general limitation clause in the constitution.
- In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review, and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

### *INSTITUTIONS*

- Incorporate provisions into the legal framework to ensure the independence of the judiciary in regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and, in accordance with the constitution, by reasoned decision of the High Judicial Council following its establishment.
- Establish a provisional commission promptly to review the constitutionality of draft laws, so as to include the draft electoral legislation currently under debate. The commission should have the authority and resources necessary to carry out its duties independently and effectively.
- Consider granting the provisional commission the right to review the Rules of Procedure of the future Assembly of the People's Representatives.
- As was done in the constitution adoption process, facilitate civil society and media access to commission and plenary discussions of the elections law, as well as all future laws debated by the NCA.
- Intensify outreach campaigns to educate the public about the constitution.

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