



The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights

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A year and a half after the historic elections of Oct. 23, 2011, and the establishment of a National Constituent Assembly (NCA), Tunisia is reaching a decisive moment of the process of drafting its new Constitution.

The article-by-article vote and first complete reading of the Constitution draft, which are to take place in the coming weeks, constitute the final stage of the Constitution drafting process, during which essential decisions will be taken that will shape the future of Tunisia for the next generations. The new Constitution should establish a foundation for building democratic institutions, protecting individual rights and freedoms, and consolidating the gains of the Revolution. The success of the transitional process in Tunisia will provide a model for other countries, both in the Arab region and elsewhere, for an effective peaceful transfer of power from authoritarianism to democratic governance.

The Carter Center has observed the work of the NCA since its formation in November 2011 and the subsequent Constitution drafting process, meeting regularly with a broad representation of political and civic stakeholders, attending NCA sessions, and following public debate and experts' workshops related to the development of the Constitution. The Carter Center also monitored the national consultations that followed the release of the second draft Constitution on Dec. 14, 2012. The Center assesses the Constitution drafting process and the draft Constitution against Tunisia's international obligations to uphold fundamental political and civic freedoms, including principles of transparency and participation in public affairs of one's country.¹

In this report, The Carter Center offers an overview and an assessment of the Constitution drafting process, and an analysis of the evolution of the content in the different drafts of the Constitution. The Center calls upon NCA members to ensure that the future Constitution upholds Tunisia's international treaty obligations on human rights and fundamental freedoms, including on the freedom of religion, the principle of non-discrimination, the protection of women's rights and the conditions to restrict these and other fundamental rights.

The Constitution drafting process

As the NCA undertook its duties to draft a new Constitution, its members were highly attuned to the responsibilities of their role and the unique opportunity to have a lasting impact on the identity and governance of post-Revolution Tunisia. As they embarked on a comprehensive and deliberative process, it was not without difficulty. While the NCA should be commended for the

¹ 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...."

deliberative and careful consideration of a new Constitution, the absence of a realistic and detailed roadmap for the work of the NCA, the absenteeism of some NCA members and a lack of clear communication in the process has hindered its progress.

Timeframe for the adoption of the Constitution

In spite of many calls for it to do so, the NCA never communicated a clear timetable for the Constitution drafting process.² A road map would have helped the NCA to better structure its work as well as to provide the public with greater visibility on the transitional process. NCA members also underestimated the extent to which its legislative functions as well as external political events would extend the Constitution drafting process. The announcement of various dates and timeframes for the completion of the Constitution throughout the drafting process – none of which have been respected – contributed to a lack of clarity on the progress of the NCA’s work as well as a public dissatisfaction with the pace of the drafting process.

The absence of a clear roadmap for the completion of the Constitution also contributed to controversy as well as to questioning of the continued legitimacy of the NCA after Oct. 23, 2012. Most political parties had morally committed, ahead of the NCA elections, not to exceed a one-year period to draft the Constitution.³ As the process unfolded, however, the parties agreed within the NCA to extend the Constitution drafting exercise. Comparative examples show that participatory Constitution drafting processes have been lengthy processes, with an average duration varying between 18 and 24 months and that allowances are not uncommon in order to extend original estimates or stipulated deadlines.⁴

Drafting process

Members of the NCA began the Constitution drafting process on Feb. 13, 2012. The NCA created six constitutional commissions, each responsible for drafting articles under specific chapters of the future Constitution.⁵ The commissions conducted several hearings with Tunisian and international experts, representatives of the government, institutions, civil society, and academics, and studied relevant texts addressing constitutional issues and drafting processes. Some NCA members also undertook study trips to countries that have experienced similar Constitution drafting processes and other locations to study constitutional law. Aside from permanent commissions, the NCA also established a Constitutional Drafting and Coordination Committee (Drafting Committee). This committee, tasked with coordinating the work of the commissions, did not hold regular meetings until September 2012. Prior to this time the commissions worked independently of each other, without a common methodology or work plan.⁶

² “The Carter Center Encourages Increased Transparency and Public Participation in Tunisia’s Constitution Drafting Process; Calls for Progress toward Establishment of Independent Election Management Body,” May 11, 2102; “The Carter Center Recognizes Tunisia’s National Constituent Assembly Progress; Calls for Increased Public Participation, Outreach, and Transparency,” Sept. 26, 2012.

³ “Declaration on the Transitional Process”, signed on Sept. 15, 2011, by 11 of the 12 parties represented at this time in the “The High Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition.” However, the constitutional act on the provisional organization of public authorities, often referred to as the “little constitution”, which has primacy over all other laws, makes no mention of a specific time period.

⁴ See example cited in *Constitution-Making and Reform: Options for the Process*, published by Interpeace, November 2011. P.49. See also *Rédaction d’articles ou d’amendements constitutionnels autour du cas tunisien*, Democracy Reporting International (DRI), 2012.

⁵ 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.

⁶ The Constitutional Drafting and Coordination Committee is composed of NCA President Mustapha Ben Jaâfar from Ettakatol, NCA General Rapporteur Habib Khedher from Ennahdha, his two deputies and the presidents and rapporteurs of the permanent commissions. Article 103, RoP

In August 2012, the six constitutional commissions submitted their respective first drafts to the Drafting Committee, which pointed out inconsistencies, gaps, repetitions, and unclear phrasing, but did not make substantive changes to the content of the articles. The commissions worked to include the comments of the Drafting Committee as they revised their respective sections and progressively released their new drafts between the end of September and mid-December. In September 2012, the NCA organized a two-day dialogue session on the content of the draft Constitution that gathered 300 civil society organizations. The NCA also launched a consultation mechanism on its official website to allow citizens to make suggestions on constitutional issues of importance to them.

A second compilation of the commissions' work, known as the second draft of the Constitution, was released on Dec. 14, 2012, two days before the launching of a national consultation process. Public consultations started with two sessions with 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 each weekend. Meetings with expatriate constituencies in France and Italy were also organized in January and February 2013.⁷

While national consultations took place from December to February 2013, the NCA held general debates in plenary on the various chapters of the draft Constitution, enabling NCA members, including those who did not participate in the six constitutional commissions, to present their views on the various articles.⁸

New urgency was injected into the Constitution drafting process by a governmental crisis, the perceived lack of improvement in the economy, and increasing political violence, which culminated in the assassination of political party leader Chokri Belaid on Feb. 6, 2013. Confronted with this political crisis, the NCA accelerated the Constitution drafting process, including by revising the Rules of Procedure (RoP) in March 2013 after much debate. The amendments aimed to clarify the prerogatives of the Drafting Commission and the constitutional commissions regarding the incorporation of the recommendations and suggestions made during the national consultations and the plenary discussions on the second draft Constitution. The amendments also streamlined the procedures for debate by limiting the number of amendments to the draft Constitution that could be proposed in plenary sessions.

In line with the revised RoP, the six constitutional commissions reviewed the recommendations and suggestions emanating from the general debate in plenary sessions, the dialogue with civil society, and the national consultations from March 21 to April 10, 2013.

On April 10, the updated drafts from each commission were sent to the Drafting Committee but were not publicly released. The Drafting Committee reviewed the final drafts of the six commissions. However, the wording of the revised Article 104 of the RoP did not clearly delineate the scope of the Drafting Committee's authority when consolidating and harmonizing the drafts.⁹ This later resulted in controversy when the Drafting Committee made substantive edits to articles that had been finalized within the commissions and decided between various proposals for the design of the political system without further consultation with the commissions.

⁷ The Carter Center attended almost half of the dialogue sessions in Tunisia, with observers present in the governorates of Tunis, Sfax, Sousse, Monastir, Gabès, Beja, Zaghouan, Nabeul, Ben Arous, Ariana, Medenine, Tozeur.

⁸ The first anniversary of the Oct. 23, 2011, elections was marked by a general discussion by the plenary 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.

⁹ 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."

The Drafting Committee's consolidated document (also referred to as the third draft of the Constitution) was leaked to the media and subsequently officially released on April 22, 2013. The draft was then submitted to a group of experts selected by the NCA Bureau on the basis of proposals made by the presidents of the constitutional commissions. Some of the selected experts, including renowned constitutionalists, declined to be part of the review group, citing concerns about the ambiguity in the experts' scope of work and the fact that certain experts were not on the list.¹⁰ The remaining nine experts worked from April 23 to May 2, 2013, on the draft Constitution, at first separately and then together with the Drafting Committee.

In the meantime, two national dialogues were held to discuss remaining points of contention in the Constitution, as well as political, economical and security issues in Tunisia. The first national dialogue, convened by the President of the Republic, was held with 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 after the end of the two national dialogues in order to incorporate agreements reached on constitutional issues during the sessions. The Committee also added a tenth chapter dealing with transitional provisions. By doing so, the Committee followed a different process for this chapter than for all the others, which were drafted by constitutional commissions.

On June 1, 2013, NCA President Mustafa Ben Jaâfar officially presented the final draft of the Constitution to the media. There were strong reactions to this draft, with some members claiming that agreements reached during the national dialogues were not respected and some claiming that the Drafting Committee had overstepped its authority by making substantive changes to the articles agreed in the six commissions. A number of NCA members stated their intention to file a lawsuit regarding the Drafting Committee's actions.

In accordance with Article 104 of the amended RoP, the draft was then resubmitted to the constitutional commissions, which had an opportunity to make a last assessment of their sections and submit a report summarizing their comments within 48 hours. All commissions met on June 4, with the exception of the Commission on Executive and Legislative Powers. Its president refused to call for a meeting of the commission in protest of the Drafting Committee's procedure to finalize the Constitution draft.¹¹ Without a report from all of the commissions, the draft Constitution has not moved forward. At the time of writing, discussions were underway regarding how to resolve this issue.

Upon resolution of this situation, the draft Constitution, together with the commission reports, will be submitted to the President of the Republic and the Prime Minister. 15 days after that submission, the NCA will begin to consider and vote on each of the 146 articles separately.

Following the revised RoP, amendments must be submitted by a group of at least five deputies; each deputy can take part in one group per article. Suggested amendments have to be submitted a minimum of four days before the plenary debate on the concerned chapter.¹²

¹⁰ 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.

¹¹ M. Chetoui complained that the constitutional commissions did not receive authentic copies of the last draft. He also contested the liberties taken by the Drafting Committee to modify the content of the constitution draft and to bring changes to articles that had been agreed upon by the constitutional commissions. Moreover, he argued that the support of experts was limited by the fact that only linguists reviewed the draft but no experts in constitutional law.

¹² Art. 106 (new), amended RoP.

The NCA must review and approve each article individually by an absolute majority of all members of the NCA, before passing to a vote on the entirety of the Constitution. The full Constitution must be approved by a two-thirds majority of all members. Should the NCA not reach a two-thirds majority, a second vote on the same text will be held within a period of one month. If the Constitution is again not approved by a two-thirds majority, it will be submitted to a national referendum.¹³ In this case, the Constitution would be approved if an absolute majority of those who cast ballots approve it; there is no minimum threshold for participation. There are no legal provisions foreseen if the Constitution is rejected in a referendum.

If a constitutional referendum is required, a legal framework for conducting the referendum would be needed and the electoral management body would have to be given the necessary means and time to ensure a credible and inclusive democratic process.

The Carter recommends that the NCA consider amending to the 'little Constitution' to provide for the possibility in which the Constitution is rejected in a referendum.

Need for further outreach and communication

In its May and September 2012 statements on the Constitution drafting process, The Carter Center highlighted the benefit of a participatory and accessible process in terms of increased legitimacy and stronger acceptance of the new constitutional order and urged the NCA to create a more inclusive, transparent process.¹⁴ Unfortunately, the NCA has taken few steps to implement an effective national public outreach campaign during the drafting process, and has communicated on an irregular basis with the public.

For instance, although in March 2013 the NCA had set a non-binding deadline of April 27 for completing the draft, the postponement of the start of the article-by-article discussion of the Constitution by the plenary was not communicated to the public through a press conference or by a press release. Instead, it was only during the course of a visit of French senators on May 6 that Assembly President Ben Jaâfar informed journalists that the vote by the plenary would not start before June.¹⁵ A week later, a member of the Drafting Committee posted an updated calendar adopted by the Committee on his private Facebook page, indicating that the Committee would submit the Constitution to the President of the Republic on May 22 and the article-by-article vote would start on June 8. When the deadline was extended, NCA officials again did not offer a formal explanation, or communicate the potential timelines to the public. By the end of May, NCA members and the general public expected the Constitution to be released at any moment, and confusion was created by contradictory statements made in the press and on social networks by different actors involved in the process until it was eventually released on June 1.

Recent surveys indicate that there is little awareness among citizens regarding the content of any of the different drafts of the Constitution and the issues at stake¹⁶. While the NCA's initiatives to consult citizens by various means were a positive effort to raise public understanding of and support for the Constitution drafting process, the Center notes that the

¹³ Article 3 of the Constitutional Act n°2011-6 dated December 16, 2011 related to the provisional organization public authorities

¹⁴ The UN Human Rights Committee recommends that constitutional reform should be a "transparent process and on a wide participatory basis" (see Concluding observations to the 2005 state report on Bosnia and Herzegovina, CCPR/C/BIH/CO/1, paragraph 8.d.).

¹⁵ "MBJ la Constitution sera présentée au vote en plénières à partir de juin 2013".

www.tuniscope.com/index.php/article/25032/actualites/politique/mbj-juin-585523#.UYodHqI96KF

¹⁶ A study conducted by the UNDP indicates that 56.3 percent of surveyed youth are unaware of the content of the draft constitution and that 68.8 percent feel little or not involved in the constitution drafting process see « *Enquête nationale sur les attentes des jeunes à l'égard du processus constitutionnel et de la transition démocratique en Tunisie* », Rapport de synthèse, April 2013. See also *Prioritizing patriotism: Tunisian citizens express their views*, NDI, June 2013

consultations involved only around 5000 citizens and that only 217 people submitted responses via the internet consultation mechanism on the NCA website.

The Carter Center notes that, beyond these consultation mechanisms, the NCA did not undertake any further outreach or information campaign on the draft Constitution or on the work of the NCA. More broadly, the NCA has not had an effective communication strategy. While the Center welcomes the wide access that the NCA granted to media representatives, direct communication by senior NCA members with the media, including through press conferences and the official website, has not been sufficient and regular. A well conceived outreach campaign might have raised public understanding of the NCA members' work and the importance of the process, as well as the perceived legitimacy of the Constituent Assembly.

The Center encourages the NCA, in order to fulfill its representative role, to launch a comprehensive information campaign using all forms of media during the article-by-article vote on the draft Constitution. Citizens should be made aware of the final text of the Constitution and the importance of current discussions and their outcome, as the future Constitution will establish the fundamental principles of the Tunisian society, including those intended to protect civil and political freedoms, provide checks and balances between state institutions, and determine their form and role.

As the article-by-article vote will be the last opportunity for the NCA to raise public understanding about the Constitution drafting process, The Carter Center urges the NCA to redouble its outreach efforts, including by taking advantage of expert advice offered by various international organizations. The planned establishment within the NCA of a media center and special area to hold press conferences is a welcome development, and the Center recommends that the NCA makes full use of these facilities

The Carter Center also reiterates its call for the NCA to hold regular press conferences to answer journalists' questions. The article-by-article vote will take several weeks of discussion and it will be crucial that the NCA and its members provide updates on the content of the debates, on the articles that were passed or rejected, and explanations of the process, so that the media has adequate access to information and can provide thorough and informed coverage to the public. The Center also encourages media representatives to provide substantive and balanced professional coverage of this important phase, and to help bridge the gap between elected officials and their constituents.

Attendance and Accountability

Given the range of their responsibilities, from drafting the Constitution to adopting legislation to evaluating candidacies and appointing members of special commissions, the majority of NCA members appear to be very committed and diligent in carrying out their work. However, in many commission sessions that it attended, The Carter Center observed that commissions worked without the full presence of its members, even during crucial discussions and votes on sensitive articles of the Constitution. This is partly due to the fact that some members are part of several commissions, whose work sometimes overlapped; yet other absences occurred without apparent justification. In addition to the absences, Carter Center observers noted that commission sessions could frequently not begin on time because the quorum of the absolute majority of members was not reached, leading to significant delays in the commissions' work. In this regard, the Center welcomes the amendment of Article 52 of the RoP reducing the amount of time (from one hour to half an hour) after which commissions can start working even if the quorum of members is not reached.

The problem of absenteeism and late arrival also affected votes in plenary session. However, Article 80 of the RoP, which sets the functioning rules of the plenary session, has not been

amended in the same sense as Article 52. On several occasions during the votes on other legislation, including the law to establish an election management body, the required absolute majority quorum required to start the debates was only reached after one hour and was sometimes lost during the sessions as members left the plenary session during the debates.¹⁷ In an effort to put pressure on members to attend sessions, the NCA introduced a system of magnetic cards in late November 2012 for each member as a means to control not only absenteeism and tardiness, but also to facilitate vote tracking. The revised RoP also mandate the publishing of the attendance records of plenary and commission sessions by the NCA Bureau within three days of the end of the session. The list should specify whether the absence was justified.¹⁸ The Carter Center regrets that such a list has never been published as of yet, although some NCA members continue to be absent during the sessions.

Recent statistics prepared by the civil society organization Al Bawsala show that the average attendance rate during 124 votes on different pieces of legislation monitored was 62 percent, with attendance by parliamentary groups ranging from 79 percent for the Ennahdha bloc and 45 percent for the Ettakatol bloc. The five members that are or have been serving in both Ministerial and NCA member functions have the lowest rate of presence. Apart from these special cases, the presence of individual members varies considerably, ranging from nine percent to 100 percent attendance.

The Carter Center calls upon all political parties to ensure the presence and active participation of their respective NCA members during the article-by-article vote of the Constitution and strongly encourages members to fulfill the duties for which they were elected. NCA members who are not in a position to attend debates and voting sessions, because of illness or additional responsibilities within another state institution, should consider resigning from their NCA mandate so that they may be replaced by the next candidate from their electoral list.¹⁹ Such a step was taken by many members of the government, including recently by Khalil Zaouia, Minister for Social Affairs who resigned from his NCA mandate. The Center also encourages the NCA to implement the provisions of the RoP that foresee financial penalties in case of repeated unjustified absences in order to increase NCA members' accountability to their constituents.²⁰

The Carter Center notes that on several occasions, and notably during the vote on amendments of the RoP, some NCA members were not able to vote due to technical issues with their magnetic cards. The Carter Center recommends that before the start of the article-by-article debate a test be conducted to identify and resolve any technical problems, to ensure that all NCA members will be able to vote.

Evolution of critical issues in the different drafts

While recognizing the principle of State sovereignty in terms of choices made by the NCA and keeping in mind that the draft Constitution is the product of the Tunisian people, The Carter Center has followed the development of crucial issues that marked the different steps of the Constitution drafting process. The Center assesses provisions of the draft Constitution against Tunisia's international obligations to uphold fundamental political and civic freedoms, including principles of human rights, comprised within the international and regional human rights treaties that the country has ratified.²¹

¹⁷ The votes on the ISIE law took place from November 8 to Dec. 12, 2012.

¹⁸ Article 126 RoP.

¹⁹ Article 123, RoP.

²⁰ Article 126, RoP.

²¹ 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

Religion in the Constitution

The right to freedom of religion or belief is a key principle of international law, and it is essential that it is protected and spelled out in a country's Constitution. This right, as defined by Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights (ICCPR), is a wide-ranging right covering a large number of issues.

Since the beginning of the Constitution drafting process, the place of religion in the new Constitution has mobilized political parties and civil society. From the first draft, the preamble contained both explicit and implicit references to religion. In addition to these references, some believed that *Sharia* should be identified as a formal source of legislation while others firmly opposed this. Before the release of the first draft a consensus was reached not to mention *Sharia* directly and to keep the emblematic first article of the 1959 Constitution, which reads as follows: "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 the Arabic-Muslim identity of Tunisia without clearly defining Islam as the State religion.

However, a debate arose with the introduction of an article (Article 148 of the second draft which became Article 136 in the third draft and then 141 in the fourth one) which, instead of stating that certain articles cannot be amended, enumerates several non-amendable concepts of the new Constitution. According to this article, one of the elements that cannot be amended is "Islam as the State religion." This is different than the wording of Article 1. In addition, another element that cannot be amended is "the civil nature of the State," thereby creating the potential for conflict between these two concepts.

Additional religious elements included in all four drafts are the requirement for candidates running for the position of President of the Republic to have Islam as their religion, and the prescribed oaths of office sworn by elected officials, which are religious in nature.

The establishment of a High Islamic Council was also a controversial matter in the constitutional Bodies Commission. The issue was also debated during the national consultations and the general discussions on the second draft Constitution in plenary sessions. The High Islamic Council did not figure in any of the drafts. However, the provisions on the composition of the Constitutional Court were changed between the second and third drafts in a way that some NCA members said would allow for the inclusion of religious law scholars on the Court. Namely, while in the second draft the Constitutional Court was to be entirely composed of lawyers having a minimum of 20 years of professional experience, the third draft lowered these prerequisites, requiring a majority of lawyers with a minimum of ten years experience. An intermediate solution is proposed by the fourth draft, which opted for a two-thirds composition of lawyers with a minimum of 15 years of experience.

Although the notion of a State religion is accepted under international human rights law, this should not result in any "impairment of the enjoyment of the other rights recognized by the ICCPR under the ICCPR (...) nor in any discrimination against adherents to other religions or non-believers".²²

The requirement for a candidate for president to have a particular religion appears to contravene Articles 25 and 26 of the ICCPR, which lay down the principle of participation in public affairs and equality before the law.

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.

²² Human Rights Committee, General Comment 22, para. 9 and 10.

The Carter Center recommends that the Constitution state explicitly that the mention or references to religion should not be used to restrict other rights and freedoms, nor should it result in discrimination against persons with another religion or without any religion. The Center encourages the NCA to open the requirements for the presidency to all qualified Tunisians, regardless of religious affiliation, and not to discriminate on the basis of religion.

Structure of the political system

International law obligations do not dictate a specific political system, and it is the choice of the Tunisian people to decide on the design of structure of the public authorities and the balance of powers among them. The content of the Constitution should, however, ensure that all requisite elements of a democratic system are respected. The balance of power 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 has been particularly contentious. Options supported by parliamentary groups varied between a presidential system, a parliamentary system or a mixed system. Although the principle of separation of powers has been established since the first draft, the debate has revolved around the balance of powers between the executive and the legislative, and between the President of the Republic and the prime minister.

Both in the first and second draft 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 decided to put forth two or three options for consideration for several articles. In the third draft, the Drafting Committee made a choice between the different options the Powers Commission had presented in favor of a political system that would give considerable power to the parliament and government, while providing for the direct election of the President, whose prerogatives would be strictly limited.

The fourth draft did not change substantially the prerogatives of political power holders, but introduced some precisions to clarify their respective roles. A new provision (Article 70), introduced at the beginning of the chapter on executive powers, clearly states that both the President of the Republic and the government, led by a head of government, “hold the executive power.” The changes introduced in the fourth draft, resulting to some extent from positions agreed during the national dialogues, were however not seen as sufficient by many opposition members and others.

The role and rights of the political opposition, not mentioned in the first and the second drafts, is a specific positive outcome of the national consultations held in December 2012 and January 2013.²³ The third draft includes a reference to the role and the rights of the opposition as an integral element of the Assembly of Representatives of the People (Article 57), and in the fourth draft similar language (Article 59) was extended to grant “the opposition the right to create and preside an inquiry commission every year”.²⁴ The Carter Center supports this addition, which will provide for a clearer protection of the views of the political minority and is an essential element of any democracy.²⁵

²³ 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 et Sidi Bouzid p. 49-50.

²⁴ While Article 59 refers to inquiry commissions, it does not give any further information on their status and prerogatives. These commissions are not mentioned in any other article of the constitution.

²⁵ [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

Status of international law

Contrary to international norms, the current draft of the Constitution does not adequately confirm the primacy of international law. The first draft referred to international law in Article 17 (Article 15 in the second draft), which read as follow: “Peace, based on justice, shall be the basis of relations with other countries and peoples. International treaties shall, where no contradiction with the provisions of the present Constitution exists, be respected.” This article only took conventional treaty law into account, without any mention to customary international law, which is also binding on Tunisia. In addition, as it was worded, the article would have conditioned the respect of Tunisia’s international commitments to internal law, which is in contradiction with the Vienna Convention on the Law of Treaties ratified by Tunisia. This Convention states in Article 27 that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Furthermore, the wording of the article did not determine the place of international law in the hierarchy of legal norms.

In this respect, the third draft was an important improvement, as Article 15 was suppressed. It was replaced by an Article 21 (Article 19 in the fourth draft) which specifies the rank of international treaties in Tunisia – they are to be infra-constitutional and supra-legislative.²⁶ However, this article stops at this statement and does not clearly state that Tunisia commits itself to respect all its international obligations, which comprise also customary law. Furthermore, the treaties referenced in the article are those approved by the Assembly of Representatives of the People, which is the name of the future legislative body. This could have as a consequence that treaties that were approved by the former legislative body would not necessarily have the same legal status. According to the UN Human Rights Committee, which interprets the ICCPR, the rights enshrined in the Covenant belong to the people living in the territory of the State party. The Committee underlines that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party.²⁷

The Carter Center recommends that the Constitution should ensure that domestic law clearly reflects and respects Tunisia’s international commitments. Article 19 should refer to treaties “duly approved and ratified” instead of specifying that these treaties are those approved by the Assembly of People’s Representatives, in order to avoid any differentiation between international treaties ratified by Tunisia in terms of their applicability, as this would be contrary to the Vienna Convention.

Universality of human rights

There has been an ongoing debate throughout the drafting process regarding the universality of human rights, affected by the overall discussion of the place of religion in the Constitution. The evolution of the preamble in this respect is to some extent the positive result of a constant focus by Tunisian civil society organizations and the willingness of the NCA to consider their arguments. In the first draft, the preamble made no mention of the universality of human rights but only referred to “noble human values”. In the second draft, the preamble added a reference to “principles of human rights” but did not include their universality. The word “universal” was added in the third draft, but the reference to the universality of human rights was undermined by the simultaneous addition of the limiting phrase “insofar as they are in harmony with the cultural specificities of the Tunisian people.” In the fourth draft, the universality of human rights is recognized, but with a wording referring to their supreme nature (the supreme and universal human rights principles). This wording is ambiguous as it may imply that there is a hierarchy of universal human rights, with some more important than others.

²⁶ Article 21: “The international agreements approved by the Chamber of Deputies and then ratified shall be superior to laws and inferior to the Constitution.”

²⁷ Human Rights Committee, General Comment 26.

While The Carter Center welcomes the positive evolution throughout the different drafts that led to the recognition of human rights in their universal aspect in the preamble, it recalls that the universal human rights are indivisible, interdependent and inter-related. The Constitution should clearly reflect this principle.

Rights and freedoms

International law regarding rights and freedoms is rich in instruments, many of them ratified by Tunisia, starting with the 1966 international Covenants relating respectively to civil and political rights and to economic, social and cultural rights as well as the Arab Charter on Human Rights, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child.

The chapter on Rights and Freedoms is one of the chapters that has evolved the most, reflecting lively discussions over the past year, especially regarding freedom of religion, freedom of conscience, freedom of expression, gender equality and the protection of women's rights.²⁸

There has been a reorganization of rights and freedoms throughout the different drafts, with several rights being listed in the chapter on general principles. In the fourth, most of these rights have been included in the chapter on the rights and freedoms. Only the freedom of religion remains in the general principles chapter, which could be interpreted to mean that it merits less protection than other rights and freedoms.

As the NCA reviews the final draft of the Constitution, the Center urges its members to uphold Tunisia's international treaty obligations on human rights and political freedoms. Specifically, The Carter Center wishes to draw attention to the following issues in the draft Constitution:

- Freedom of religion and freedom of conscience

Article 18 of the ICCPR states that "Everyone shall have the right to freedom of thought, conscience and religion" and that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

These freedoms were not included in one single article of the draft Constitution but spread out in different chapters. While the freedom of thought, added in the third draft, is coupled with the freedom of opinion, expression, information and publication in Article 40 (Article 30 in the fourth draft), the freedom of religion, which was included from the beginning, is found in Article 6 in the general principles chapter.

Freedom of conscience – the freedom of an individual to hold or consider a fact, viewpoint, or thought – has been a contentious issue. Some NCA members did not want to include it, as it was perceived as a protection of apostasy. A reference to freedom of conscience was only included in the final draft, after the conclusion of the political negotiations under the national dialogue processes. Freedom of conscience has been integrated into Article 6, which focuses on the State's duty to protect religion and religious rights. Article 6 is now worded as follows "The state is the guarantor of religion. It ensures freedom of belief, of conscience and worship, protects the sacred, and ensures the neutrality of places of worship with respect to partisan use."

The right to freedom of religion or belief, as defined by international standards, is a wide-ranging right covering a large number of distinct yet interrelated issues.²⁹ The Carter Center

²⁸ The constitution also protects the right to strike; initial limitations on this right have been the subject of protest by trade unions and were removed in the fourth draft (Article 35). In the fourth draft, the principle of continuity of public service was added to Article 14 spelling out the obligations incumbent on the public administration.

²⁹ 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.

encourages the NCA to widen the scope of the right to freedom of religion and conscience to cover all facets of these rights, including the freedom to adopt, change or renounce a religion or belief.³⁰ Further, the NCA should consider incorporating the language regarding the right of freedom of religion and conscience into the rights and freedoms' chapter to ensure that it is granted the same legal value.

- The principle of non-discrimination

Under international law, Tunisia has an obligation to prohibit discrimination based on sex, religion, or other status.³¹

The only article that deals with the principle of non-discrimination is Article 20 (Articles 6 and 7 of the third draft were merged) states that "all citizens, male and female alike, shall have equal rights and duties, and shall be equal before the law with no discrimination".³² While this wording establishes equality among citizens, and should be applauded, it might allow for inequality for foreigners, who could be subject to unfair discrimination. In accordance with the ICCPR, equality before the law is a right of the individual and is not limited to citizens.³³ In addition, it seems to imply that the prohibited ground of discrimination is only based on gender.

In addition to the strengthening of protection for the principle of equality, the Center recommends that a separate principle of non-discrimination be included to enshrine this right in constitutional law. In addition, the Constitution should prohibit 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.

- Protection of women's rights and equality

Under international law, and Tunisian obligations, women are guaranteed equal treatment. Article 2 of the ICCPR guarantees equal treatment to all individuals,³⁴ and Article 3 requires that State parties commit "to ensure the equal right of men and women to the enjoyment of all civil and political rights". A similar provision exists in the International Covenant on Economic, Social and Cultural Rights³⁵ as well as in Article 2 of CEDAW.³⁶

The first draft ignited a heated debate on women's rights in Tunisia, as it mentioned the complementary roles of men and women inside the family without any reference to the equality of men and women.³⁷ Widely criticized, the notion of "complementarity" was abandoned in the

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

³⁰ Article 18 of the ICCPR and Article 18 of the Universal Declaration of Human Rights.

³¹ 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."

³² There is also a reference to non-discrimination in the Preamble.

³³ Article 2 § 1 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."

³⁴ "1. Each State Party to the present Covenant 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 distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

³⁵ Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

³⁶ Article 2 (a): "State parties [...] undertake: To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle"

³⁷ The committee responsible for monitoring and interpreting the CEDAW has recognized that complementarity is a lesser standard than full equality.

second draft. More generally, the rights of women in the first draft were mostly considered in the context of the family.³⁸ In the third and fourth draft, women are considered independently from the family. Gender equality is, however, not fully consecrated since Article 20 only applies to citizens (male and female alike) and not more generally to men and women.

With regard to women's rights, Article 45 provides that "the State guarantees the protection of women's rights and supports their gains." The same article goes on to say "the State guarantees equal opportunity between men and women to assume responsibilities. The State guarantees the elimination of all forms of violence against women." This provision only partially embodies the principle of equality between men and women. It refers to equal opportunity in "assuming responsibilities" as well as to "the elimination of violence" and not to the broader right to equal opportunities in political, economic, cultural, and social spheres and to the elimination of discrimination against women.

The Carter Center encourages the NCA to spell out the principle of equality of men and women in all its facets. It would also welcome a provision that requests the State to adopt positive measures in all areas so as to achieve the effective and equal empowerment of women.³⁹ Considering Tunisia's leading role in the advancement and protection of women's rights and its historical precedence within the Arab region with regards to the role of women in society, the NCA should ensure that the new Constitution fully protects these advances.

- Restriction on fundamental rights

While the enshrinement of fundamental rights and freedoms is crucial in a Constitution, it is also important to delineate when appropriate limited restrictions can be applied. International law permits limited restrictions on rights and freedoms, under certain conditions, in an effort to balance the interests of the individual with those of others and with those of the state.⁴⁰

These restrictions are best done through a general limitation clause which applies to all rights protected by the Constitution. Such a clause would facilitate application of the norms by the legislature, the executive and judges, and the public's ability to grasp the limitation concept being used.⁴¹

The Carter Center welcomes the inclusion in the fourth draft of a general limitation clause, in Article 48, which delineates how rights should be interpreted in their application. The provision states that rights can only be restricted by a law and that restrictions should not touch upon the essence of the rights. Further, provision states that the law shall only be adopted to protect the rights of others for reasons of public security, national defense or public health. Judges shall ensure the protection of these rights from any violation. However to be in conformity with international law obligations, The Carter Center recommends that language be added to the article stating that any restrictions must be necessary and proportional to secure a legitimate aim.⁴²

³⁸ In the first draft the State was entitled to "protect women's rights, preserve the unity of the family and maintain its cohesion."

³⁹ Human Rights Committee, General Comment No. 28, para. 3

⁴⁰ Article 29 II and 30 of the Universal Declaration of Human Rights (UDHR) and Article 5 ICCPR

⁴¹ *Lawful Restrictions on Civil and Political Rights*, DRI, Briefing Paper 31, October 2012

⁴² See the proposed language for such a clause by HRW. Restrictions are only permitted when (1) They are defined in a clear law; (2) They are permissible for a reason set out in a human rights treaty as a permissible reason to limit that specific right; (3) They are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; (4) They are not directly or indirectly discriminatory; and (5) The scope of a limitation referred to in the constitution is proportionate to the interest to be protected, and shall not be interpreted to jeopardize the essence of the right concerned or be interpreted in a restrictive way. In *Tunisia: Revise the Draft Constitution*, May 2013 <http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution>

In addition, to ensure that rights are treated equally when it comes to their restriction, language limiting rights in specific articles should be removed. In the fourth draft, restrictions to freedom of expression, assembly, association and the right of access to information, remain vague and still vary in scope, which may lead to the erosion of these rights.

The Carter Center also strongly encourages the NCA to specify that during state of emergency situations,⁴³ limitations will only be those that are necessary for a specific period of time to meet the exigencies of the situation, and that rights that are considered non-derogable in international law should never be limited under emergency powers.⁴⁴

- Election Rights

The essential elements of democratic elections are delineated by Article 25 of the ICCPR, which provides for the right “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...”

The right to vote did not appear in the first draft, an unfortunate omission that was addressed in the second draft. Regarding the characteristics of genuine elections identified in the ICCPR, the Constitution requires that the legislative, presidential, and local elections have to be universal, free, direct and secret.⁴⁵ The words “genuine and transparent” were added to these attributes in the fourth draft, a very positive step that reinforces the democratic nature of elections.

However, the principle of equality is a significant omission in all the articles related to voting rights. 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” and ensures that no citizen's right to vote can be greater or less than that of another citizen. It is also the basis of measures to combat election fraud, since such fraud is fundamentally 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. To guarantee the equality of the vote, The Carter Center recommends that specific references to this principle be added to each article related to voting rights.

Article 73 sets out the conditions for election to the office of President of the Republic, including a maximum age of 75. U.N. Comment 25, which is the interpretive document for Article 25 of the ICCPR, notes that the right to be elected is protected against any form of discrimination.⁴⁶ It further states that any restrictions on the right to be elected and on the right of people to freely choose their representative “must be justifiable on objective and reasonable criteria.”⁴⁷ U.N. Comment 25 identifies minimum age as a potentially reasonable restriction for holding office, as is lack of mental capacity.

Under these conditions, candidacy requirements should be restricted as little as possible to meet these narrow objectives. While the provisions for maximum age may endeavor to address mental and physical capacity to hold public office, age does not consistently reflect these qualities and may therefore discriminate against otherwise fit candidates. The Carter Center encourages the NCA to reconsider age restrictions for the office of the presidency and allow voters to determine a given candidate's capacity to govern. The Center notes that only the office of the presidency is subject to age restrictions, while similar requirements are not delineated in the draft Constitution for the office of the prime minister.

⁴³ Article 79 allows the President to impose a “état d’exception” in the event of an imminent danger threatening the entity, security, and independence of the country.

⁴⁴ Article 4 ICCPR and Human Rights Committee, General Comment 29.

⁴⁵ Articles 54 (legislative elections), 74 (presidential elections), and 130 (local elections).

⁴⁶ U.N. General Comment 25, para 3.

⁴⁷ *Ibid.*, para 15.

Finally, the characteristics of democratic elections are not specified for referenda. The Carter Center recommends that a reference to the fundamental characteristics of genuine elections be added to the provisions on referenda.

Transitional provisions

A new chapter was added to the fourth draft Constitution dealing with transitional provisions. This tenth chapter was absent from all previous drafts, and its addition by the Drafting Committee is welcome in principle. Nevertheless, the process followed to draft this chapter differed from the other chapters, as no discussions were held in the constitutional commissions on its content. Instead the Drafting Committee adopted the transitional procedures at the very last stage of the process, leaving little time for members to discuss and reflect on their implications.

The transitional provisions, grouped into two articles (145 and 146), regulate the entry into force of the Constitution once adopted, since a number of articles will not come into force until after elections or until after the NCA or the new legislative Assembly has created the institutions foreseen in the Constitution.

There are two apparent gaps in the transitional provisions. The first concerns the ability for individuals to address the judiciary to ensure respect of their constitutional rights and freedoms. Article 146 states that the Constitutional Court's power to find laws unconstitutional does not enter into effect until three years after the formation of the Court.

The Court's role as guardian of these rights is to consider the constitutionality of laws, which is the exclusive competence of the Constitutional Court, both by "a priori" and "a posteriori" control. The first is prior to the entry into force of the law, and is open to public authorities only, while "a posteriori" control is by consequence of a judicial trial, where an individual argues that a statutory provision is unconstitutional. The court in question must then refer the matter to the Constitutional Court for decision.

Until the establishment of the Constitutional Court, the Administrative Court will be assigned the authority of "a priori" control. However, under the current draft, Article 146 states that no court has the authority to consider the constitutionality of a law "a posteriori" prior to the establishment of the Constitutional Court and during the first three years of activity of the Constitutional Court. This means that there is no judicial means of challenging the constitutionality of legislation enacted by the NCA prior to the entry into force of the Constitution, or that of legislation adopted by the Chamber of Deputies prior to the revolution, until three years after the formation of the Constitutional Court.

The second gap is the absence of clearly defined deadlines for the entry into force of the various provisions of the Constitution. For instance, no clear deadlines have been established to create the High Judicial Council, to establish the Constitutional Court, and for the end of the mandate of the NCA, potentially leaving the door open to indefinite delays regarding the full entry into force of the Constitution.

The Carter Center encourages the NCA to give the Court the full power to consider the constitutionality of laws from the moment of its creation in order to ensure full protection of rights and freedoms acknowledged in the Constitution. The Carter Center also calls upon the NCA to set deadlines for the entry into force of the various provisions of the Constitution.

Conclusion and recommendations

The Carter Center has conducted meetings with relevant stakeholders, including NCA members and administrative staff, civil society organizations, political parties' representatives, and Tunisian academics, to understand the work of the NCA and assess the strengths and weaknesses of the Constitution drafting process thus far. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement. In the hope of further consolidating the gains of the revolution towards the establishment of a democratic system of governance, that protects the fundamental civil and political rights of Tunisian citizens, The Carter Center encourages the NCA to:

Outreach and communication

- Launch a comprehensive information campaign using all forms of media during the article-by-article vote on the draft Constitution. Citizens should be made aware of the final content of the draft and its importance in establishing the fundamental legal principles of Tunisian society, including those intended to protect civil and political freedoms, provide checks and balances between state institutions, and determine the form and role of those institutions.
- Hold regular press conferences to answer journalists' questions about the process. The essential dissemination of information discussed above can only occur if citizens, through the media, have regular updates on the debates, including which articles are passed and rejected and why.
- Assist media representatives in providing substantive and balanced professional coverage of this important phase and to help bridge the information gap between elected officials and their constituents.

Accountability and attendance

- Encourage political parties to ensure the presence and active participation of their respective NCA members during the article-by-article vote of the Constitution and strongly encourages members to fulfill the duties for which they were elected. NCA members who are not in a position to attend debates and voting sessions, because of illness or additional responsibilities within another state institution, should consider resigning from their NCA mandate in favor of the next candidate from the list on which they were elected.
- Implement the provisions of the RoP providing for financial penalties in case of members' repeated unjustified absences. Enforcement of these provisions will increase NCA members' accountability to their constituents.
- Conduct a test, before the start of the article-by-article debate, to identify and resolve any technical problems with the electronic voting system in order to ensure that all NCA members will be able to vote.

Substantive elements of the Constitution

In order to conform fully with international law, the Constitution should:

Religion

- Open the requirements for the presidency to all qualified Tunisians, regardless of religious affiliation, and not to discriminate on the basis of religion.

International law

- Guarantee that domestic law reflects and respects Tunisia's international commitments. Article 19 should refer to treaties "duly approved and ratified" so as to encompass all international treaties ratified by Tunisia.

Freedom of religion and conscience

- Ensure that the scope of the right to freedom of religion and conscience covers all facets of these rights, including the freedom to adopt, change, or renounce a religion or belief.

The principle of non-discrimination (Article 20)

- Enshrine the principle of non-discrimination in one specific provision.
- Prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status, and apply these rights to all people in Tunisia, citizens and foreigners alike.

Women's rights

- Articulate the principle of equality between men and women in all its facets. The Center would also welcome a constitutional provision that encourages the State to adopt positive measures to achieve the effective and equal empowerment of women.

Restriction of fundamental rights

- Reflect Tunisia's international legal obligations, which stipulate that any restrictions to rights and freedoms should also be limited to those necessary and proportional to secure a legitimate aim. This would require adding language to the Article 48 (general limitation clause) to bring the clause into conformity with international law.
- Provide for full protection for fundamental rights, including those pertaining to freedom of expression, assembly, association and the right of access to information. The current limitations in these articles remain vague and vary in scope, which could cause an erosion of individual rights in the future.
- Specify allowable limitations on rights during a state of emergency situation, and to restrict potential limitations by time and scope to meet the exigencies of the situation. Further, the Constitution should protect rights that are considered non-derogable in international law, and ban their restrictions under emergency powers.

Election rights

- Include a reference to the equality of the vote in each article related to voting rights.

- Reconsider maximum age restrictions for the office of the presidency.
- Include references to the fundamental characteristics of genuine elections in the provisions on referenda.

Transitional provisions

- Give the Constitutional Court the full power to consider the constitutionality of laws from the moment of its creation.
- Set clear deadlines for the entry into force of the various provisions of the Constitution.

Approval of the Constitution

- The NCA should consider amending the “little Constitution” to provide for the case in which an eventual referendum on adoption of the Constitution is unsuccessful.

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