

Codifying Autocracy

The Proposed Tunisian Constitution
in Light of International Law and
Standards

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® Codifying Autocracy: The Proposed Tunisian Constitution in Light of International Law and Standards

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On 3 January 2014, at the culmination of a two-year consensus-based process, Tunisia adopted a Constitution¹ that attested to a departure from the country's former undemocratic constitutional order.

In particular, the 2014 Constitution enhanced the role of the legislative and judicial branches of the State as checks on the power of the executive. Under articles 59 and 60, the Parliament (the 'Assemblée des Représentatives du Peuple', or 'ARP') was given powers of legislative oversight and inquiry and the role and rights of the parliamentary opposition were recognized.² The 2014 Constitution also recognized the independence of the judiciary and of judges. To this effect, it created an independent High Judicial Council (HJC) to end executive interference with judges' careers.³ In addition to guaranteeing the separation of powers, the 2014 Constitution also enhanced the protection of human rights.⁴

On 30 June 2022, the Tunisian President, Kais Saied, published a new draft Constitution to be submitted to voters in a referendum on 25 July 2022. If the outcome of the vote goes in the President's favour, the proposed Constitution will replace the 2014 Constitution.⁵

Between January and June 2022, the President designed and implemented a constitution-making process that lacked legal basis, democratic legitimacy, inclusivity, accountability and transparency; the hallmarks of an effective consensus-based constitution-making process.⁶ The President has controlled every aspect of this process, from commissioning the online 'consultation' on Tunisia's constitutional revision, to limiting participation in the purported 'national dialogue' to those who had supported his 25 July 2021 power-grab,⁷ to appointing the members of the consultative body charged with producing a new constitution,⁸ and deciding on the final text that would be put to a vote by referendum on the 25 July.

In addition to the serious concern around the lack of legitimacy and the illegality of the entire process leading up to the constitutional referendum, the proposed Constitution, if adopted, poses a serious threat to the rule of law, the separation of powers – including, in particular, the independence of the judiciary – and to the protection of human rights in Tunisia. The text favoured by President Saied embodies the crystallization of most of the illegitimate measures he has taken since 25 July 2021, in violation of Tunisia's obligations under international human rights law and the country's 2014 Constitution.⁹

The International Commission of Jurists (ICJ) recommends that the Tunisian authorities withdraw the proposed Constitution and ensure that any process of constitutional reform be consistent with Tunisia's obligations under the 2014 Constitution and international human rights law and standards, including with respect to inclusivity, transparency, effective participation, consultation and accountability.

1. The proposed Constitution and the separation of powers

In comparison to the 2014 Constitution, the proposed Constitution limits the roles of both the legislative and judicial branches of State and gives far more power to the President of the Republic. Among other things, the text empowers the President of the Republic to dissolve Parliament and to dismiss both the Head of Government and the other members of the executive, who are accountable to the President, instead of to Parliament. In addition, guarantees critical to the independence of certain institutions established pursuant to the 2014 Constitution, such as the Elections Committee and the HJC, are absent from the proposed Constitution. The text provides no means of holding the President of the Republic accountable, including by omitting Article 88 of the 2014 Constitution pursuant to which the Parliament could present a motion to remove the President of the Republic in case of grave constitutional breaches.

The proposed Constitution considerably increases the powers of the President of the Republic during a "state of exception" and envisages no checks on its declaration and termination. The ICJ is particularly

¹ Constitution of the Tunisian Republic, 27 January 2014, (hereinafter 'the 2014 Constitution'). For the ICJ analysis of this text at the time, see ICJ, The Tunisian Constitution in Light of International Law and Standards, 31 January 2014, <https://www.icj.org/the-icj-assesses-the-new-tunisian-constitution/>.

² The 2014 Constitution, 27 January 2014, Articles 59 and 60.

³ The 2014 Constitution, preamble and Articles 112-114.

⁴ Human Rights Committee, concluding observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 24 April 2020, para. 3; Committee on Economic, Social and Cultural Rights, Concluding Observations concerning the third periodic report of Tunisia, UN Doc. E/C.12/TUN/CO/3, 14 November 2016, para. 4.

⁵ Presidential Decree No. 578 of 30 June 2022 on the publication of the new draft constitution of the Republic of Tunisia subject to referendum scheduled for Monday, 25 July 2022, available at the Tunisian Official Gazette, (hereinafter 'the proposed Constitution').

⁶ ICJ, Q&A, 'Fundamentally Flawed: Tunisia's 2022 constitution-making process', 29 June 2022, <https://www.icj.org/fundamentally-flawed-tunisia-constitution-making-process/>.

⁷ Agence Tunis Presse, 'President Saied meets with legal expert Said Belaid', 4 May 2022, <https://www.tap.info.tn/en/Portal-Politics/15160494-president-saied>.

⁸ Decree No. 30-2022 of 19 May 2022 on the creation of the 'national consultative body for a new republic'.

⁹ Since the 25 July 2021, when President Saied declared a "state of exception", which is still in operation at the time of writing, he has taken many decisions infringing the rule of law, the separation of powers, judicial independence and human rights protections in the country. See ICJ's website, publications on Tunisia since 25 July 2021 for more information.

concerned over the removal of the role of the Constitutional Court and Parliament in reviewing the decision to declare a “state of exception” and its validity. The proposed Constitution does not set a time limit to a “state of exception”, nor does it require a parliamentary vote for its renewal or extension. Moreover, it fails to stipulate the human rights guarantees from which there can be no derogation, and it does not provide any judicial guarantees to uphold the principle of the separation of powers and protect human rights in times of “public emergency”.

Since 25 July 2021, the executive has undermined judicial independence in Tunisia through systematic and arbitrary interference in judicial affairs. In light of this, the ICJ is deeply concerned at the absence in the proposed Constitution of any provisions regulating the HJC’s composition, role and competencies. The ICJ is similarly concerned at the President of the Republic’s direct interference in the appointment, transfer and dismissals of judges. Provisions related to the institutional independence of the judiciary and the individual independence of judges are either absent from the proposed Constitution or fall short of international law and standards.

- ***Powers of the legislature under the proposed Constitution***

Chapter three of the proposed Constitution regulates the legislature. In a significant departure from the 2014 Constitution and the principle of the separation of powers, pursuant to Article 56 of the proposed Constitution, the legislature is no longer an independent branch and power of the State in its own right but, rather, it is reduced to a mere “function” of the State, and is subordinated to the executive branch. Thus, as elaborated in greater detail below, the proposed Constitution allows the arrogation of more powers to the executive while reducing the role and powers of the legislature.

Article 56 of the proposed Constitution introduces a new legislative Chamber, the National Council of Regions and Districts (NCRD), acting as a regional legislative assembly and as secondary legislative Chamber to the ARP. The NCRD is composed of elected representatives from the districts and regions in Tunisia and would work alongside the ARP to approve or reject proposed legislation put forward either by the President of the Republic or by members of the Parliament.

The proposed Constitution falls short of international standards insofar as the legislative role of both the ARP and the NCRD is concerned and allows the executive to interfere with these institutions.

Under Article 97 of the proposed Constitution, “the President of the Republic may submit to referendum draft laws related to the regulation of public authorities [*i.e.*, the executive, judicial or legislative authorities] and the ratification of [international] treaties that may have an impact on the functioning of [State] institutions”. With respect to this, Article 82 of the 2014 Constitution provides that “The President of the Republic may, *in exceptional circumstances*, within the deadlines for return of a draft law, submit to a referendum draft laws related to the ratification of [international] treaties, to freedoms and human rights, or personal status, *which were adopted by the [Parliament]*,” adding that, “the submission to referendum shall be deemed a waiver of the right to return the draft law to the [Parliament].” Under the proposed Constitution, the President of the Republic may at any time, and outside of any exceptional circumstances, submit draft laws to referendum, when they are related to the functioning of the Government or State. Such a broad constitutional delegation to the President undermines the role of the legislature and is difficult to reconcile with the principle of the separation of powers and the rule of law.¹⁰

The proposed Constitution also falls short of international standards by enabling the executive to interfere with the legislature.

First, Article 116 of the proposed Constitution entitles the President of the Republic to dissolve either the ARP or the NCRD, or both of them, in case Parliament presents a second motion of censure against the Government during the same parliamentary term.

Second, Article 61 of the proposed Constitution provides that “the mandates of members of the Parliament can be revoked in accordance with conditions set out in the elections law.” The possibility to revoke the mandates of members of the Parliament did not exist under the 2014 Constitution. The ICJ is concerned that this provision further weakens and threatens the security of tenure of the members of the Parliament under the proposed Constitution. In particular, the proposed Constitution is silent on:

- (i) the required guarantees of the security of tenure of members of the Parliament;
- (ii) the body or individuals in charge of revoking the mandate of members of the Parliament;
- (iii) the exact revocation procedure; and
- (iv) the guarantees against abuse of this procedure.

¹⁰ ICJ, ‘Tunisia: No checks and balances on President Saied’s one-man rule’, 29 April 2022, <https://www.ici.org/tunisia-no-checks-and-balances-on-president-saieds-one-man-rule/>.

While Article 61 refers to the law to set the conditions for such revocations, the ICJ is particularly concerned that, read in conjunction with the unrestricted, unchecked powers given to the President of the Republic under the proposed Constitution, including to propose and draft legislation that takes precedence over legislative proposals by the members Parliament, Article 61 may open the door for the President to either revoke the mandate of members of the Parliament or to dictate inadequate removal procedures in breach of the separation of powers, the rule of law and international standards.

Third, the proposed Constitution envisages no role for the opposition within both the ARP and the NCRD, by omitting Article 60 of the 2014 Constitution, which provides: "the opposition is an essential component of the [Parliament]," and that "[the opposition] shall enjoy the rights that enable them to undertake their parliamentary duties and is guaranteed an adequate and effective representation in all bodies of the [Parliament]."

Fourth, and in a manner similar to the 2014 Constitution, Article 64 of the proposed Constitution generally guarantees parliamentary immunity to members of Parliament. In addition, under Article 65, it is Parliament itself that may lift the immunity of its members. However, unlike the 2014 Constitution, Article 66 of the proposed Constitution provides that members of the Parliament do not enjoy any parliamentary immunity in relation to crimes of "slander, defamation and [...] of violence committed inside or outside the Parliament," as well as in relation to cases of "obstructing the normal functioning of the Parliament." Article 66 is overly broad, and fails to provide precise and narrower grounds based on which parliamentary immunities may be lifted, thus further undermining the members of Parliament's security of tenure or immunity.

Fifth, according to Article 68 of the proposed Constitution "[d]raft laws put forward by the President of the Republic take precedence over proposed legislation put forward by members of the Parliament." In light of the proposed executive powers and the lack of a system of checks and balances over such powers, the ICJ is concerned that Article 68 makes the President the primary source of legislation in the country, thus undermining the very role and *raison d'être* of the Parliament, namely, legislating.

Lastly, Article 96 of the proposed Constitution also amends Article 80 of the 2014 Constitution, which allows the President of the Republic to declare a "state of exception" in certain circumstances, by excluding the right of the Parliament to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain exceptional. Instead, Article 96 gives full powers to the President in declaring a "state of exception", after merely consulting the Head of the Government, the president of the Parliament, and the president of the National Council of Regions and Districts. Such decision is not subject to review, either by the Constitutional court nor by the Parliament. A below section on the Constitutional Court further analyses the dismantling of its role as the final arbiters in reviewing whether a "state of exception" and the powers exercised under it are lawful.

The ICJ is deeply concerned that, because parliamentarians do not benefit from any effective guarantees of independence or security of tenure or immunity, nor do they have any role in approving the Government or in effectively holding Government to account, – and because the Parliament itself is left without any guarantees of financial and administrative independence, or any role for the opposition – the proposed Constitution unduly subordinates Parliament to the executive, allowing the latter to exercise a tight control over the former.

- ***Powers of the executive under the proposed Constitution***

Under the proposed Constitution, the appointment of the Government is no longer linked to the results of parliamentary elections, and the Parliament is no longer required to approve a Government, which itself is under the "directions and choices" of the President of the Republic.¹¹ According to Articles 112 of the proposed Constitution, "the Government shall be accountable for its actions before the President of the Republic", unlike under the 2014 Constitution pursuant to which the Government was accountable to Parliament. By removing the possibility for Parliament to approve the Government, and by decoupling the appointment of the Head of Government and its members from the results of the parliamentary elections, the proposed Constitution undermines the rights of Tunisians to elect their representatives, and to have those representatives act as a check on the Government.

Under the proposed Constitution, the President of the Republic eschews any accountability in relation to any action taken contrary to the constitutional principles, such as the separation of powers. In particular, the proposed Constitution omits Article 88 of the 2014 Constitution, which allowed the Parliament to present a motion to remove the President of the Republic from office in case of grave violations of the Constitution. According to Article 110 of the proposed Constitution, "The President is not accountable for any actions he might take in carrying out his functions." Thus, under the proposed Constitution, the President of the Republic is accountable to no one, even in cases of serious violations of the constitution.

¹¹ The proposed Constitution, Article 111.

Ensuring effective parliamentary oversight of the executive is a critical safeguard against abuse of executive power and authoritarianism. The UN Special Rapporteur on the independence of judges and lawyers has affirmed that, “[...] understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy – which heretofore have been typically characterised by precisely the absence of a separation of powers.”¹²

Because Tunisia is a State party to the ICCPR, the Tunisian authorities are required to adopt legislation and measures to recognize and protect “the right of every citizen to take part in the conduct of public affairs.”¹³ General Comment No. 25 of the UN Human Rights Committee states that “[a]rticle 25 lies at the core of democratic Government based on the consent of the people and in conformity with the principles of the Covenant.”¹⁴ According to the UN Human Rights Council (HRC), “[p]arliaments are cornerstones of national human rights protection systems,” and can be effective through contributing to the application of international human rights obligations and having “an oversight function with respect to human rights.”¹⁵ The HRC has also observed that parliaments should exercise oversight over the executive, thus holding it accountable on behalf of the people, including by ensuring that it fulfils its role of respecting, protecting and promoting human rights. In order to do so effectively, parliamentarians need to be able to speak freely, without fear of reprisal.¹⁶

- **Powers of the judiciary under the proposed Constitution**

Under the proposed Constitution, as with the legislature, the judiciary is no longer considered a separate, independent branch of the State, but it is reduced to a mere “function” of State.¹⁷ The judiciary is subjected to the control of the executive, which threatens its independence as a separate, independent branch of State. An independent and impartial justice system that can oversee and enforce the separation of powers is fundamental.¹⁸

Articles 112-117 of the 2014 Constitution regulating the HJC are completely absent from the proposed Constitution, leaving no constitutional provision to guarantee the independence of the HJC and of the judiciary, and to protect against executive’s interference with the judiciary (See, for example, Decree 11-2022).¹⁹ Further, other provisions of the proposed Constitution undermine the independence of the judiciary as an institution and that of judges as individuals. The proposed Constitution limits the powers of the judiciary and the HJC to appoint judges, and transfers such powers to the President. In particular, Article 120 of the proposed Constitution provides that all judges, including senior judges, are appointed directly by the President of the Republic through presidential decree, based on a mere proposal by the HJC. Under the 2014 Constitution, the President’s decision to appoint judges had to “correspond” to the HJC’s proposal.²⁰ The President could therefore choose to adopt the proposal of the HJC or not.

Further, the proposed Constitution ends protection against the executive’s interference with the judiciary, by omitting Article 109 of the 2014 Constitution, according to which “all kinds of interference in the functioning of the judicial system are prohibited.” The UN Human Rights Committee has made clear that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.²¹

The proposed Constitution also falls short of international law and standards insofar as judges’ security of tenure is concerned.

First, the proposed Constitution envisages no role for the HJC to decide on matters related to the security of tenure of judges. In particular, according to Article 107 of the 2014 Constitution, “Judges cannot be

¹² Report of Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, 6 February 1995, para. 55.

¹³ ICCPR, Article 25.

¹⁴ UN Human Rights Committee, *ICCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 1.

¹⁵ UN Human Rights Council, 38th Session, Contribution of parliaments to the work of the Human Rights Council and its universal periodic review - Report of the Office of the United Nations High Commissioner for Human Rights, 17 May 2018, A/HRC/38/25, para. 18.

¹⁶ *Ibid.*, para. 21.

¹⁷ The Proposed Constitution, Chapter four ‘the function of the judiciary’, Articles 117-124.

¹⁸ See the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, (adopted at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association), 19 June 1998.

¹⁹ ICJ, Tunisia: Q&A on the High Judicial Council and judicial independence in light of Decree 11, 05 May 2022, <https://www.icj.org/tunisia-qa-on-the-high-judicial-council-and-judicial-independence-in-light-of-decree-11/>.

²⁰ The 2014 Constitution, Article 106.

²¹ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 19.

dismissed or suspended from their functions, nor be subject to *disciplinary* sanction, except in the cases regulated by the law and in accordance with a reasoned decision by the High Judicial Council.” Instead, Article 121 of the proposed Constitution leaves out any role for the HJC in decisions on the transfer, dismissal, suspension or punishment of judges. The ICJ is concerned that this omission echoes Presidential Decree 35-2022 empowering President Saïed to unilaterally dismiss judges and automatically make them liable to criminal prosecution. The ICJ has denounced Decree 35-2022 for being in violation of the principles of the separation of powers and judicial independence, as well as due process guarantees in relation to the disciplining of judges, not only under domestic laws abrogated since 25 July 2021, but also under international law and standards.²² Proposed Article 121 and Decree 35-2022 run counter to Tunisia’s obligations under international law, as well as the UN Basic Principles on the Independence of the Judiciary, which make clear that any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly, and adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge’s due process rights are respected.²³ The disciplining of judges must be based on established standards of judicial conduct. Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.²⁴

Second, the proposed Constitution no longer fully and explicitly prohibits the arbitrary transfer of judges but rather makes the matter contingent on considerations related to “the work interest”, which Article 121 defines as “the interest arising from the necessity of filling a vacancy, judicial appointments based on new judicial plans, or facing a significant increase in the volume of work.”²⁵ Because of its broad wording, Article 121 fails to enshrine fully the principle of security of tenure and to protect judges against arbitrary transfer.

The UN Human Rights Committee has affirmed that Article 14 of the ICCPR imposes on States the obligation to take measures guaranteeing the independence of the judiciary “through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.”²⁶ The requirement of security of tenure, which is a cornerstone for the independence of judges, should be fully embedded in countries’ constitutions and laws. The Judicial Integrity Group, in its Commentary on the Bangalore Principles of Judicial Conduct, has concluded that one of the “minimum conditions for judicial independence [is] Security of tenure: i.e. a tenure [...] that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.”²⁷

Departing from Article 36 of the 2014 Constitution, the proposed Constitution also deprives judges of the right to strike, imposing a blanket prohibition on all judges’ right to strike. Like other people, judges and prosecutors are entitled to exercise their rights to freedom of expression, opinion or belief, association and peaceful assembly on an equal basis with others. As highlighted by the Special Rapporteur on the independence of judges and lawyers, “[...] judges and prosecutors have special duties and responsibilities that justify the introduction of specific restrictions on their fundamental freedoms.”²⁸ However, such restrictions “[...] are only legitimate when provided by law and when they are necessary in a democratic society to pursue a legitimate aim, such as the protection of the independence, impartiality and authority of their institutions.”²⁹ The Special Rapporteur has further emphasized that “[t]he jurisprudence of regional courts has established that in situations where there is a breakdown of constitutional order, judges may even have a duty to speak out in favor of the restoration of democracy and the rule of law.”

• **Military tribunals**

The proposed Constitution completely omits Article 110 of the 2014 Constitution, according to which “no exceptional courts may be established, nor any exceptional procedures that may prejudice the principles of fair trial”, and “military courts shall have jurisdiction over military offenses and that the jurisdiction, structure, functioning and procedures of military courts will be determined by subsidiary legislation.” The ICJ has been deeply concerned at the widespread use of military tribunals in connection with serious human rights violations that were committed during the January 2011 popular uprising and at their

²² ICJ, Tunisia: Arbitrary dismissals a blow to judicial independence, 10 June 2022, <https://www.ici.org/tunisia-arbitrary-dismissals-a-blow-to-judicial-independence/>.

²³ UN Basic Principles on the Independence of the Judiciary, para. 17.

²⁴ *Ibid.*

²⁵ The proposed Constitution, Article 121, paras 3 and 4.

²⁶ HRC, General Comment No. 32, para. 19.

²⁷ Judicial Integrity Group, Commentary of Bangalore Principles of Judicial Conduct, March 2007, p. 36.

²⁸ García-Sayán, Diego, UN. Human Rights Council. Special Rapporteur on the Independence of Judges and Lawyers, ‘Independence of judges and lawyers: report of the Special Rapporteur on the Independence of Judges and Lawyers’, A/HRC/41/48. (hereinafter ‘Special Rapporteur, Independence of Judges and lawyers’)

²⁹ Special Rapporteur, Independence of Judges and lawyers, para. 2.

exceptionally broad subject matter and *personal* jurisdiction, as well as the use of military courts to try President's Saied's critics, including members of Parliament, journalists and human rights defenders.

Under international human rights law and standards, the jurisdiction of military tribunals must be restricted solely to "offences of a purely military nature committed by military personnel."³⁰ Under the Tunisian framework, the notion of what constitutes "specifically military offences" must be interpreted narrowly and be restricted to "infractions strictly related to their military status", including disciplinary offences.³¹ In addition, when adjudicating such matters, military tribunals must in any event fully comply with international fair trial standards.³² Military tribunal should never have jurisdiction to try and adjudicate serious violations of international human rights law and international humanitarian law, including crimes under international law.³³

• **The Constitutional Court**

Under Articles 118-124 of the 2014 Constitution, the Constitutional Court of Tunisia is granted substantive powers, under which it is the sole body competent to review the constitutionality of laws submitted to it, *inter alia*, by the President of the Republic, the Head of the Government, members of the Parliament or by the courts.³⁴ The Constitutional Court was to be composed of 12 senior judges, of which the President of the Republic, the Parliament, and the HJC should each appoint one third of the 12, meaning four members each. Article 125 of the proposed Constitution reduces the composition of the Court to a nine-judge bench. The nine judges are to be named by a presidential order, where the first third (i.e., three judges) are from the most senior judges of the Cassation Court, the second third are from the High Administrative Court and the last third are from the Financial Court. Best practice in relation to safeguarding the independence of the judiciary requires that judicial appointments be made by an independent body and not by either the legislative or the executive branch.³⁵

In addition, the proposed Constitution weakens the powers of the Constitutional Court. Article 127 provides a list of the Constitutional Court's competencies in reviewing the constitutionality of, *inter alia*, draft constitutional amendments; draft laws; treaties; and laws referred to it by domestic courts.

Contrary to Article 80 of the 2014 Constitution, under Article 96 of the proposed Constitution, the Constitutional Court has no longer any power or role in relation to the President of the Republic declaration of a "state of exception". In particular, the President of the Republic is no longer required to inform the president of the Constitutional Court ahead of such a declaration, and members of the Parliament are no longer entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances necessitating such a declaration remain valid.³⁶ To safeguard the rule of law and the indivisibility of all human rights, all measures adopted to address an emergency, including those taken pursuant to a declared "state of emergency" must be subject to judicial oversight and review.³⁷ Affected persons must have the right to challenge the legality of these measures, including their conformity with national or international law through fair and effective judicial proceedings.

The ICJ is particularly concerned that under the proposed Constitution the Constitutional Court no longer has the power to review the actions of the President of the Republic, including decisions relating to a "state of exception", nor does it have the power to decide on the required legal consequences in cases of serious violations of the Constitution by the President of the Republic. In particular, Article 88 of the 2014 Constitution provides that the Parliament may present "a motion to bring to an end the President of the Republic's term for a grave violation of the constitution," following which the matter would be referred to the Constitutional Court to vote over the motion and order the removal of the President of the Republic from office, without excluding the possibility of eventual criminal prosecution when necessary.

It is essential that the body that oversees the constitutionality of legislation and guards against unconstitutional actions by the executive and/or the legislature be fully independent, have a

³⁰ Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 29; See also African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Doc. OS(XXX)247, 2003, principle L(a).

³¹ Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles), principle 8.

³² Human Rights Committee, General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14), UN Doc. CCPR/C/GC/32 (23 August 2007), para. 22; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle L(b); Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles), principles 13-17.

³³ Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles), principle 9.

³⁴ Article 120, the 2014 Tunisian Constitution.

³⁵ UN Human Rights Committee, Concluding Observations on Honduras, CCPR/C/HND/CO/1, para. 16

³⁶ See below under the section entitled 'limitations and derogations.'

³⁷ See ICJ, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, 2011, p. xvi-xvii, available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

comprehensive mandate and be accessible to all individuals. An independent Constitutional Court with effective powers of constitutional review and remedy is vital for the protection of constitutional rights. The proposed Constitution falls far short of these standards.

- **The Elections Commission (ISIE)**

According to Article 134 of the proposed Constitution, “the High Independent Elections Commission (ISIE) is responsible for the management and organization of elections and referenda, supervising them in all their stages, ensuring the regularity, integrity, and transparency of the election process, and announcing election results.” The ISIE is to be composed of nine independent, impartial, and competent members, who undertake their work for a single six-year term. One third of its members are to be replaced every two years. However, the proposed Constitution is silent on how the Commission’s members should be appointed, based on which criteria, and by whom, contrary to the 2014 Constitution. In particular, Article 125 of the 2014 Constitution provides that members of the ISIE are elected by the Parliament by a qualified majority. Members of the ISIE were also accountable to the Parliament and should submit an annual report to it. The proposed Constitution omits Article 125 of the 2014 Constitution completely, leaving the ISIE unprotected from any influence or interference by the President of the Republic, who has the power under the proposed Constitution to propose draft laws. The ICJ is particularly concerned that the omission of Article 125 of the 2014 Constitution paves the way for the executive to directly appoint members of the ISIE, in line with Decree Law 2022-22, adopted on 21 April 2022, enabling the President of the Republic to appoint and change the entire composition of the ISIE.³⁸ The Venice Commission has found that Decree Law 2022-22 “subordinates the Independent High Authority for Elections to the executive branch” in a manner that “jeopardises its independence and impartiality.”³⁹

2. Human rights definitions, guarantees and limitations

While the proposed draft Constitution reproduces most of chapter 2 of the 2014 Constitution on rights and freedoms, the definition and scope of several human rights are still inconsistent with Tunisia’s obligations under international human rights law. In 2014, the ICJ provided an extensive legal analysis of these provisions as they featured in the 2014 Constitution.⁴⁰ In particular, the proposed draft subjects the rights and freedoms recognized in the Constitution to undue limitations that run counter to the requirements of necessity and proportionality under international human rights law. The proposed draft also omits a number of guarantees that are inherent to the right to a fair trial.

Human rights guarantees must be recognized and provided for in full accordance with international human rights law, including with respect to right to life, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, the right to equality and non-discrimination, the liberty and fair trial rights, the principle of legality, and limitations on and derogations to human rights. The changes introduced by the proposed Constitution to the rights and freedoms provisions of the 2014 Constitution are analyzed below.

- **Right to life**

As with the 2014 Constitution, the new proposed Constitution does not recognize the right to life as a non-derogable right, in violation of Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Tunisia is a party. According to Article 24 of the proposed Constitution, the right to life is sacred and “cannot be infringed upon except in grave cases provided for by law”. The ICJ is concerned that this language is too vague and, because the circumstances in which the right to life may be violated are undefined, Article 24 runs the risk of undermining the essence of the right to life. In Tunisia, the death penalty has been subject of a *de facto* moratorium since 1991. The ICJ opposes the death penalty in all cases as a violation of the right to life.

³⁸ Decree-Law No. 2022-22 of April 21, 2022, amending and supplementing certain provisions of Organic Law No. 2012-23 of December 20, 2012, relating to the Independent High Authority for Elections, <https://legislation-securite.tn/law/105252>.

³⁹ See Tunisia - Urgent Opinion "on the constitutional and legislative framework on the referendum and elections announcements by the President of the Republic, and in particular on the decree-law n°22 of 21 April 2022 amending and completing the Organic law on the independent High Authority for Elections (ISIE)", issued on 27 May 2022 pursuant to Article 14a of the Venice Commission’s Rules of Procedure, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2022\)026-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)026-e).

⁴⁰ ICJ, The Tunisian Constitution in Light of International Law and Standards, 31 January 2014, available at: <https://www.icj.org/the-icj-assesses-the-new-tunisian-constitution/>.

- ***Right to freedom from torture and other cruel, inhumane or degrading treatment or punishment***

Article 25 of the proposed Constitution prohibits all forms of physical and psychological torture and provides that the crime of torture has no statute of limitations, in terms similar to the Constitution 2014. However, Article 25 continues to fail to prohibit other acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture, as required by Article 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), to which Tunisia is a party. Moreover, while Article 36 of the proposed Constitution requires that detainees be treated with humanity and dignity (and the State must consider providing this treatment while enforcing liberty-depriving punishments), the proposed Constitution does not feature a comprehensive prohibition in line with Article 16 of the CAT.

Article 25 of the proposed Constitution does not define the act of torture, permitting the definition of torture contained in Article 101 *bis* of the Tunisian Criminal Code⁴¹ to remain into force. This definition, however, fails to provide for criminal responsibility for those who consent or acquiesce to acts of torture. In his report on Tunisia, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment emphasized “[...] *the importance of penalizing all acts of instigation, consent or acquiescence of torture by public officials or other persons acting in an official capacity, including those who order subordinates to torture or who cover up torture after the fact*”.⁴² Under the CAT, State parties must ensure that not only acts of torture but also attempts to commit torture and acts of complicity or participation in torture are offences under its criminal law.⁴³

- ***Equality and non-discrimination***

According to Article 23 of the proposed Constitution, men and women have equal rights and obligations and that they are equal before the law without any discrimination. Article 51 further affirms that “the [S]tate commits to protect women’s established rights and works to strengthen and develop those rights,” and guarantees “equality of opportunities between women and men to have access to all levels of responsibility and in all domains.”

The ICJ is also concerned that under Article 23 of the Constitution, equality before the law and non-discrimination are guaranteed only to citizens of Tunisia. Article 2(1) of the ICCPR provides that State parties must respect and ensure the rights contained therein “[...] to all individuals within its territory and subject to its jurisdiction [...] 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”.

- ***Arrest, detention and fair trial rights***

The proposed Constitution’s provisions on the right to liberty and the right to fair trial, in particular Articles 33, 35 and 123, omit specific guarantees contained in the ICCPR. Specifically, Article 35 on the right to liberty does not include the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer exercising judicial authority; the right to trial within a reasonable time or to release pending trial; the right to challenge the lawfulness of any detention before a court; and the right to compensation in the event of unlawful arrest or detention, as provided for in Article 9 of the ICCPR.

- ***The principle of legality***

According to Article 34 of the proposed Constitution, penalties are individual and are to be imposed only by virtue of a legal provision applicable at the time the criminal offence was committed. However, as currently formulated, this provision does not adequately reflect the principle of non-retroactivity of criminal law enshrined in Article 15(1) of the ICCPR, which envisages “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Article 15(2) of the ICCPR further prohibits “[t]he trial and punishment of any person for any act or omission which, at the time when it

⁴¹ Article 101 *bis* of the Tunisian Criminal Code defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or when such pain or suffering is inflicted for any other reason based on discrimination of any kind.”

⁴² Report of the Special Rapporteur on torture and other cruel, or degrading treatment or punishment, Juan E. Méndez, Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, para. 16.

⁴³ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 4, (hereinafter ‘CAT’).

was committed, was criminal according to the general principles of law recognized by the community of nations”.

This omission of international law as a valid legal source to determine whether an act or an omission constituted a criminal offence at the time when it was committed is particularly problematic because some of the most serious crimes under international law, including acts of torture and other ill-treatment, have not been properly criminalized under national law in Tunisia, and the prosecution of such crimes following the ouster of President Ben Ali has been widely inadequate. Tunisian law must therefore not be used to prejudice the trial and punishment of those responsible for acts or omissions that constitute crimes under international law, even if these acts or omissions were not crimes under Tunisian law at the time they were committed. The Tunisian authorities should ensure that the domestic provisions purportedly enshrining the principles of legality and non-retroactivity of criminal law in domestic Tunisian law be not used to shield perpetrators of international crimes from accountability.

- **Limitations and derogations**

Under the 2014 Constitution, a general clause on the rights contained in the Constitution is included in Article 49. It provides that the law will determine the limitations that may be imposed on the exercise of the rights and freedoms guaranteed in this Constitution in a way that does not undermine their essence. It further provides that any such limitations can only be put in place for reasons “necessary to a *civil and democratic State* and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.”⁴⁴

Article 55 of the proposed Constitution also provides for a general limitation clause on the rights guaranteed under the Constitution that echoes the same clause in the 2014 Constitution. However, Article 55 omits the phrase “necessary to a civil and democratic State”, featured in the 2014 Constitution, and replaces it, instead, with “necessary to a democratic regime,” as a justification to limit rights and freedoms guaranteed constitutionally. Under international human rights law, most human rights may be subject to limitations under certain strict conditions. The laws establishing the limitations should ensure that the respective rights are not restricted beyond the limits established by international human rights law.⁴⁵ The expression “in a democratic society”⁴⁶ is among these strict conditions. The burden is upon the State imposing limitations on rights to demonstrate that such limitations do not impact the democratic functioning of the society. A democratic society can be defined as a society that recognizes and respects international human rights law.⁴⁷

The ICJ is concerned that, under the proposed Constitution, undue restrictions might be imposed on rights and freedoms, especially in light of Article 5 of the proposed Constitution where the State, as part of the Islamic nation, is the only authority that has the power “to achieve the purposes [and goals] of Islam,⁴⁸ including life, honour, money, and religion.” For instance, while Tunisia has officially lifted key reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it has maintained a general declaration stating that the country “shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution.”⁴⁹ Chapter I of the 2014 Constitution provided that the religion of the State is Islam. The proposed Constitution takes a step further and gives the State the sole power to achieve the purported “goals and purposes of Islam”, even when might be in contradiction with Tunisia’s obligations under international human rights law.

⁴⁴ Emphasis added.

⁴⁵ Under the ICCPR, most rights and freedoms are limitable, such as the freedom of expression, the freedom of association and the right to privacy. Such limitations are intrinsically related to the rights and freedoms. However, other absolute rights cannot be restricted or limited or even derogated from, even during a declared state of emergency, such as Freedom from torture and other cruel, inhuman or degrading treatment or punishment, and Prohibition against the retrospective operation of criminal laws; See UN Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, 28 September 1984, Principle 1, (hereinafter “Siracusa Principles”).

⁴⁶ See for instance ICCPR, Articles 14(1), 21, and 22(2); See also Siracusa Principles, Principles 19-21.

⁴⁷ Siracusa Principles, Principle 19.

⁴⁸ Under Islamic law, the specific purpose of objective of Islam is the preservations of five essentials: life; honour (lineage); money; religion; and intellect. See Abbas Amanat; Fraks Griffel (eds.), “Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Legal Theory”, Vol. Shari’a: Islamic Law in the Contemporary Context, Stanford University Press, 2007.

⁴⁹ See UN, “Reservations to the Convention on the Elimination of all forms of Discrimination Against Women – Weakening the protection of women rom violence in the Middle East and North Africa region”, available at: <https://www.un.org/unispal/document/auto-insert-205832/>.

In addition, Article 4(2) of the ICCPR lists provisions of the treaty that cannot be subject to derogation. The UN Human Rights Committee has explained that other provisions are non-derogable by implication.⁵⁰ Even where a right is not listed in Article 4 of the ICCPR, this does not mean that it may be subject to any derogation at all. Rather, any derogating measure imposed by State parties must be “[...] strictly required by the exigencies of the situation” and such measures must not “[...] involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” In General Comment No. 29, the UN Human Rights Committee stated: “[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature”.⁵¹ In addition, “derogation” does not mean complete suspension of rights. As the UN Human Rights Committee has made clear, “[t]he mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.”⁵² Article 96 of the proposed Constitution provides for the conditions required for the declaration of a “state of exception”. However, it fails to specify that certain rights and freedoms are non-derogable even in states of exception or emergency.

- **Compliance of the Constitution with international law and standards**

The principle of the rule of law under international law can be most clearly secured by explicitly specifying within the Constitution that all domestic law must be consistent and compliant with it, and in case of a conflict, international legal obligations must prevail. The supremacy of international law in relation to the Constitution as such helps prevent abuse of power within different spheres of the Government by binding the legislature and the executive and by providing an interpretative framework for the courts.

Article 20 of the 2014 Constitution provides that “international agreements *approved and ratified* by the [Parliament] have a status superior to that of laws and inferior to that of the Constitution.”⁵³ According to Article 74 of the proposed Constitution, “international agreements *approved* by the President of the Republic and *ratified* by the Parliament have a status superior to that of laws and inferior to that of the Constitution.”⁵⁴

By increasing the President’s powers in approving conventions, by providing that international treaties ratified by Tunisia are inferior to the Constitution, Article 74 of the proposed Constitution could be used to narrow the protection offered by international human rights law, both treaty and customary, in violation of Article 27 of the *Vienna Convention on the Law of Treaties* according to which a State party “*may not invoke the provisions of its internal law as justification for its failure to perform a treaty*”. As pointed out by the Human Rights Committee, “Although article 2, paragraph 2, [of the ICCPR] allows States parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.”⁵⁵

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

- **Withdraw the proposed draft Constitution, end the “state of exception” and re-establish the constitutional order;**
- **Ensure that no Constitutional revision or constitution-making process takes place until and unless the constitutional order is compliant with principles of the rule of law, the separation of powers, including the independence of the judiciary, as well as international human rights law and standards;**
- **Clearly and unambiguously recognize the primacy of the Constitution over all other aspects of domestic law, and ensures that domestic laws are adopted and implemented in full compliance with the Constitution;**

⁵⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 7.

⁵¹ General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 2.

⁵² General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 4.

⁵³ Emphasis added.

⁵⁴ Emphasis added.

⁵⁵ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.4.

- **Ensure that the Constitution and domestic laws comply and are consistent with Tunisia's obligations under international law in spirit and letter;**
- **Fully embed the rule of law in the framework for the functioning of the State, including by ensuring the separation of powers, attribution of competences and adequate checks and balances between the legislature, the executive and the judiciary, as independent authorities and not as mere functions of the State;**
- **Clearly specify that presidential immunity cannot be used to shield the President of the Republic from accountability in case of serious violations of the Constitution, including interference in the legislative and the judiciary;**
- **Ensure full independence of the judiciary as an institution and judges as individuals from the executive's interference, in compliance with international laws and standards, including by ensuring that an independent HJC oversees all aspects related to the selection, appointment, transfer and disciplining of judges based on objective, merit-based criteria, and transparent procedures, guaranteeing the security of tenure of members of the judiciary until a set retirement age, and adequately protecting the fundamental freedoms of judges;**
- **Enshrine guarantees for the independence of the Constitutional Court, including the independence of its members, as well as independent appointment procedure for the selection of its members;**
- **Ensure the enforceability of international law, including human rights treaties, in the domestic legal order;**
- **Provide the explicit non-derogability of the right to life, and abolish the death penalty in all circumstances;**
- **Ensure the explicit prohibition of all acts of cruel, inhuman or degrading treatment or punishment falling short of torture, and the adoption of a new and comprehensive definition of torture, fully in line with Article 1 of the CAT, in the Tunisian Criminal Code;**
- **Introduce legal and policy reforms to respect and ensure the rights of anyone under Tunisian jurisdiction regardless of citizenship status, and specify the prohibited grounds of discrimination, in line with Tunisia's international obligations under Article 2(1) of the ICCPR;**
- **Provide explicitly for the prohibition of all forms of discrimination against women, and extend responsibility to both public and private actors, in line with Article 2(e) of the CEDAW Convention; guarantee that any purportedly Islamic rules in the Constitution be consistent with Tunisia's international obligations under Article 1 of CEDAW;**
- **Withdraw Tunisia's general declaration to the CEDAW, and make sure that the country's Constitution is not used as an excuse for not complying with international law and standards;**
- **Ensure that guarantees relating to the right to liberty, to security of person, and to fair and public hearing by a competent, independent and impartial tribunal established by law are addressed in the Tunisian Criminal Code and the Tunisian Code of Criminal Procedure, and are consistent with Tunisia's obligations under international law under the ICCPR;**
- **Ensure that any limitation of human rights conforms to the criteria for such limitations under international human rights law and, in particular, that they be demonstrably necessary to a free and democratic society. Limitations must identify the right to be limited and must not impair the essence of the right; and**
- **Ensure that provisions on a "state of exception" in the Constitution accord with Tunisia's obligations under international law, including by incorporating all aspects of Article 4 of the ICCPR, as well as the additional non-derogable rights mentioned by the UN Human Rights Committee in its General Comment 29.**

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March 2021 (for an updated list, please visit www.icj.org/commission)

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