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

Intensify outreach campaigns to educate the public about the constitution.

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

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continued to work on the text.

the second draft, was released on Dec. 14, 2012, two days before the launch of a national consultation process throughout the country.⁶

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

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

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

-member ad hoc commission to address the remaining points of contention. NCA President Mustapha Ben *Jaâfar chaired the* the various political blocs at the time as well as some independent NCA members. The commission sought to identify contentious issues in the final draft and then to reach agreement on them. The aim was to facilitate general discussion as planned, as well as the article-by-article vote, and to allow for the adoption of the constitution with as broad a base of support as possible.¹¹

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

While the focus of the National Dialogue was largely on the formation of a new government, on track.¹⁴ Despite the interruption of NCA activities for nearly three months, the commission managed to meet a total of 37 times between June 29 and Dec. 27, 2013. During

¹¹ The crisis had extended to the general discussion on the fourth and final draft, which took place between July 1-15, 2013, and whose first session was interrupted by the protests of some deputies. The announcement by the

discussion to resume.

¹² NCA president Mustapha Ben *Jaâfar* address on Aug. 6, 2013.

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

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

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

-by-

article vote procedures were not static throughout the process. Rather, the NCA interpreted them in a flexible manner at various moments to avoid political blockages.

revised RoP, this language was interpreted in various ways: some deputies felt that the NCA was bound to vote in accordance with the agreements, while others considered the term a

generally voted in line with the agreements reached.²² This changed, however, during the vote on Article 74²³, which defines the conditions of eligibility for the office of President of the Republic.²⁴ This issue was polarizing throughout the process. The language proposed by the Consensus Commission did not pass, and the heads of blocs had to mediate the issue. From this point on, the role of Consensus Commission diminished significantly, and on Jan. 14, 2014, Habib Khedher, the General Rapporteur of the constitution, announced an end to the work of the commission.

The biggest debate among observers of the process in regards to procedures centered not on the role of the Consensus Commission but on the interpretation of Article 93 of the RoP and its extensive use. The article states that the General Rapporteur of the constitution

article already passed, if new releva

deputies claimed that the conflict had resulted in amending the article to include an obligation for the state to ban incitement to hatred and violence as well as *takfir* (labeling another Muslim an unbeliever, or *kafir*).²⁶ -

The motion to reopen discussion with regard to Article 6 related to religious freedoms set a precedent. The debate could be reopened on other articles already approved, leaving the

Several weeks before the start of the article-by-article vote, the NCA invited applications by interested civil society observers on its website. According to the NCA, a total of 353 organizations registered on the site, with some organizations registering more than one representative. In general, civil society organizations had a higher visibility during the adoption phase than in previous phases of the constitution-making process, though attendance was not always consistent throughout the three weeks of voting. Nonetheless,

proceedings and allowed for exchanges to take place at the margins of the plenary, not only between civil society members and NCA deputies, but also between civil society and the media.

making the final draft and amendments available to them. Proposed amendments were

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Though the NCA had made various efforts to consult citizens prior to June 2013, these efforts were not extensive. After it issued the final draft in June 2013, the NCA made few efforts to reach out to citizens. This was due in part to the increased pressures and political tensions that permeated the final months of the process. Though some deputies participated in forums organized by civil society and international organizations in various regions of the country³⁴, and engaged in conversations with their constituents, the NCA failed to lead public outreach efforts.

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

-making process closely, from the first draft of the constitution to the final version adopted by the NCA in January 2014. Throughout the two-year process and the various drafts of the constitution³⁵, the Center international obligations to uphold fundamental political and civic freedoms, including

³³ Proposed amendments: http://www.anc.tn/site/main/AR/docs/constitution/propos_proj_constit.pdf (in Arabic) retrieved on 24 March 2014.

³⁴

Association Tunisienne pour l'Intégrité et la Démocratie (ATIDE) and Bus Citoyen organized meetings between NCA deputies and citizens.

³⁵ The NCA released four draft texts over the two-year period. Draft *2bis* refers to the compilation of all the chapters prepared by the constitutional commissions after having incorporated comments emanating from

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

Human rights in the constitution and their universality

The final version of the constitution includes several references to human rights and provides for the establishment of a national human rights commission to help ensure respect for human rights and to investigate human rights violations.³⁸ At various moments of the drafting process, the drafters discussed the universality of these rights, a discussion influenced by debates on the place of religion in the constitution. The preamble of the first econd draft, the preamble included a

they are in harmony with the cultu
caused significant protests by civil society and some members of the opposition. In the fourth and final draft, this limitation was removed; however remained implicit, through the qualification of uni
The General Report on the Constitution Project, issued by the Drafting Committee on June 14, 2013, reads:

committee wanted to emphasize the fact that we should build on only those values and principles that have attained supremacy due to their noble content, thus encompassing the meaning intended by the previous formulation [of the third draft], which required building on this s

following it [in the preamble], to drawing inspiration from the civilizational heritage and reform movements based on the elements of the Arab-Muslim identity and the civilizational

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Despite advocacy by various human rights organizations, this issue never became a priority during the Consensus Commission

religious choice, without intrusion or interference. In the end, the NCA plenary voted on three different formulations before finding a compromise between the major political blocs, though some deputies remained vehemently opposed to the article or parts of it. Article 6 in the adopted constitution tries to accommodate both concerns:

guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization. The State commits itself to the dissemination of the values of moderation and tolerance and to the protection of the sacred and the prohibition of any offense thereto. It commits itself, equally, to the prohibition of, and the fight against, appeals to *takfir* and incitement to violence and

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

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

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

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

Rights and Freedoms

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

The final text of the constitution upholds many key civil and political rights, such as freedom of religion, freedom of conscience, freedom of expression, gender equality, and the protection of women's rights. Several key economic, social, and cultural rights are also protected. The Rights and Freedoms chapter ends
is allowed that undermines any human rights acquisitions or freedoms guaranteed in this

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Restriction on fundamental rights

While the enshrinement of fundamental rights and freedoms is crucial in a constitution, it is also important to delineate when and how those rights can be restricted, keeping in mind that these restrictions must not only be lim

Following the advocacy of various stakeholders, this general limitation clause, delineating how rights should be interpreted in their application, was introduced in the fourth draft. While they welcomed this inclusion, civil society and other stakeholders continued to advocate for the full protection of fundamental rights without restrictions so as to conform

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The Consensus Commission reached agreement early in its work to reformulate the general limitations clause (Article 48 of the final draft, now Article 49 of the constitution) in order to

These amendments were accepted in the NCA plenary vote.

The invocation of the principles of proportionality and necessity represent an important human rights gain in the Tunisian constitution.⁵¹ In the past, freedoms granted in the constitution were commonly restricted

voting process. A pressure group of deputies, mainly women, from various blocs coalesced to
ghts in the constitution. The
Consensus Commission adopted the issue and proposed an amendment to Article 45 of the

protect the acquired rights of women and works to support and develop them. The State
guarantees equality of opportunity between men and women in assuming various
responsibilities and in all fields. The State works to achieve parity between women and men
in elected assemblies. The State takes adequate measures to eliminate violence against

The language was by no means universally acceptable in the NCA, and for several days
during the plenary vote it was not clear whether the amendment would be adopted. After
much negotiation, lobbying by civil society groups, and the involvement of senior political

electoral law that put in place measures to achieve gender parity in nomination lists, and the law.⁶⁰

Economic, social and cultural rights

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

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

In some cases, subseq

Tunisian authorities to devote appropriate resources to the implementation of these rights, in order to

Election Rights

Guarantees for electoral rights evolved significantly from the first draft of the constitution to its adoption. While the right to vote did not appear in the first draft – an unfortunate

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

The Carter Center notes that U.N. General Comment 25, the interpretive document for Article 25 of the ICCPR indicates that any restrictions on the right to be elected and on the

⁶⁶ Comment 25 identifies minimum age as a potentially reasonable restriction for holding office, as is lack of mental capacity. While the provisions for maximum age may endeavor to address mental and physical capacity to hold public office, they do not inherently reflect these qualities and may therefore discriminate against

positive, as it brings the criteria for candidacy in closer alignment with international norms. The lowering of the minimum age to 35, as opposed to the 40 in previous drafts, is also a positive change that encourages wider participation by younger candidates in the

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

Role of the Judiciary

The Tunisian constitution lays a strong foundation for the independence of the judiciary. The chapter on judicial authority contains important guarantees in this regard, including administration of justice, the supremacy of the constitution, the sovereignty of the law, and what ensures the

Though this issue was apparently not discussed prior to the adoption phase of the

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

Transitional Provisions

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

The Carter Center welcomes the fact that transitional provisions adopted set clearer timelines and deadlines for the entry to force of the various provisions of the constitution.

jurisdiction to examine the constitutionality of laws immediately upon its creation, rather than three years later, as previously specified. The establishment of the Constitutional Court, however, is dependent on the timing of the upcoming legislative elections and could take up to one year from that date, leaving a void in judicial review that will not necessarily be covered by the court system at large, given that Article 148 para. 7 of the constitution explicitly states that the court system is not allowed to review the constitutionality of laws. The constitution calls for the establishment of an interim commission charged with considering the constitutionality of draft laws until the permanent body is in place. As this body does not have a mandate to consider the constitutionality of current laws, including

framework is in conformity with the new constitution. In addition, prior to the establishment of the Constitutional Court, there is no mechanism to arbitrate potential conflicts between the two heads of the executive, leaving a potential vacuum should conflicts arise in the short term.

Furthermore, Article 120 mandates the future Constitutional Court to review the legislative

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

The Center strongly encourages the NCA to establish the commission in time to review the

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

Encourage judges and legislators to protect freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, and to ensure that any limitations are consistent with the general limitation clause in the constitution.

In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review, and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

INSTITUTIONS

Incorporate provisions into the legal framework to ensure the independence of the judiciary in regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and, in accordance with the constitution, by reasoned decision of the High Judicial Council following its establishment.

Establish a provisional commission promptly to review the constitutionality of draft laws, so as to include the draft electoral legislation currently under debate. The commission should have the authority and resources necessary to carry out its duties independently and effectively.

Consider granting the provisional commission the right to review the Rules of

As was done in the constitution adoption process, facilitate civil society and media access to commission and plenary discussions of the elections law, as well as all future laws debated by the NCA.

Intensify outreach campaigns to educate the public about the constitution.

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