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Tunisia: Let Constitution Herald Human Rights Era ***Judges Should Base Interpretation on International Standards***

Joint Statement by Al Bawsala, Amnesty International and Human Rights Watch

The adoption of Tunisia's new constitution should set in motion a wide-ranging overhaul of laws and public institutions, Al Bawsala, Amnesty International and Human Rights Watch said today.

The constitution, which guarantees many fundamental rights and freedoms, should be implemented in a way that will provide the highest degree of protection of Tunisians' human rights.

The National Constituent Assembly (NCA) adopted the constitution on 26 January 2014 by a large majority, after its members debated and voted article by article throughout the month. The text represents a significant improvement over the first draft, proposed in July 2012. It incorporates several recommendations to strengthen human rights protection that the three organizations and others made in the past two years.

"Tunisia's National Constituent Assembly voted for a constitution that contains bold language in favour of human rights," said Eric Goldstein, deputy Middle East and North Africa director at Human Rights Watch. "Now it's up to the courts, lawmakers, prosecutors and other officials to make sure that their policies, procedures and laws comply with the rights enshrined in the Constitution."

The constitution upholds many key civil, political, social, economic, and cultural rights. These include rights to citizenship, to create political parties, to bodily integrity and freedom of movement, opinion, expression, assembly, and association. They include a right not to be detained arbitrarily and fair trial guarantees. The constitution prohibits torture or any statute of limitations on prosecuting torture. It also guarantees the right to political asylum.

The constitution includes stronger protection for women's rights, including article 46, which provides that, "The state 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." It makes Tunisia one of the few countries in the region with a constitutional obligation to work towards gender parity in elected assemblies.

The constitution also protects the rights to health, education and work. The Tunisian authorities should adopt specific measures to achieve progressively the full realization of these rights to the maximum of the country's available resources, in accordance with the standards of the international Covenant on Economic, Social and Cultural Rights, which Tunisia has ratified.

The chapter on judicial authority contains important guarantees for the independence of the judiciary. For example, article 102 stipulates that "the judiciary is an independent authority that ensures the administration of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms." The constitution makes judges

accountable solely to the constitution and the law in the performance of their duties. Article 109 prohibits any outside interference with the judiciary.

The assembly amended the provisions on the High Judicial Council, the independent supervisory body for the judiciary. Earlier drafts said half the members would be judges and half would not be, but under the new constitution, judges, most elected by their peers, will occupy two thirds of the seats.

“The adoption of the constitution must mark a definitive end to the interference of the authorities in the judiciary,” said Hassiba Hadj Sahraoui, Middle East and North Africa Deputy Director at Amnesty International. “Tunisia must put in place a High Judicial Council that can act fully independently from the authorities, and whose members are selected transparently. This will help ensure the council’s credibility, including when it votes on disciplinary measures against judges.”

The constitution provides for the creation of a constitutional court that will have the power to strike down laws that are not in harmony with the constitution. It will allow individuals to challenge the constitutionality of laws during disputes before courts under conditions to be set out by law. It also provides for the establishment of a national human rights commission to oversee respect for human rights and investigate human rights violations.

However, the text contains ambiguous articles that could be used to trample on rights. For example, during the voting on 23 January on Article 6, which guarantees freedom of conscience and freedom of belief, the plenary assembly introduced a prohibition of “attacks on the sacred,” alongside provisions that prohibit making accusations of apostasy and inciting to violence or hatred. This vague additional prohibition raises concerns that lawmakers or courts could interpret it in a way that would allow them to punish criticism of religions and other beliefs and ideas, a vital component of the right to freedom of expression.

The constitution does not abolish the death penalty, even though authorities have in effect observed a moratorium on its application since the early 1990s. Tunisian authorities should protect the right to life, enshrined in the constitution, by taking steps to abolish the death penalty, the three organizations said.

The next challenges for Tunisia are to ensure that Tunisia’s authorities, including the courts, interpret and implement human rights in the constitution in a manner that is consistent with their meaning in international conventions ratified by Tunisia and begin to overhaul laws that are inconsistent with the new constitution.

Interpretation of the Constitution

Tunisia has a duty to ensure that its constitution and laws comply with its international obligations, but the supremacy of international law remains problematic under the new constitution. Article 20 states that “international agreements approved and ratified by the representative assembly are superior to laws and inferior to the constitution.” This provision should not be interpreted in a way that is incompatible with the Vienna Convention on the Law of Treaties, ratified by Tunisia, which 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.”

Article 20 should not lead judges and legislators to ignore Tunisia’s international obligations on the basis that they contradict the new constitution. Customary international law is also binding on Tunisia, even though the constitution does not mention it.

Judges should rely on article 49, which sets limits on the scope of permissible restrictions to rights and freedoms, when interpreting laws. This article states that any restrictions imposed on the human rights that the constitution guarantees must not compromise the essence of such rights; must not be imposed except where necessary in a civil and democratic society to

protect the rights of others, public order, national defence, public health or public morals; and that such restrictions must be proportionate to the intended objective.

In 2013, many journalists, bloggers, artists, and others who peacefully expressed themselves, were prosecuted on the basis of penal code provisions criminalizing “defamation,” “offences against state agents,” and “harming public order” or “public morals”, all of which can result in prison terms. Applying article 49 in future similar cases will be crucial to preventing such violations of the right to freedom of expression. A critical first step will be for the authorities to make a commitment not to bring any charges that would violate the rights guaranteed in the constitution.

Overhaul of legislation

The final provisions of the constitution govern the transitional period from the moment of its adoption to future legislative and presidential elections. During this period, the National Constituent Assembly will maintain its legislative functions. The penal code and code of criminal procedure are among laws that most need to be revised to comply with the new constitution.

For example, article 29 gives detainees “the right to be represented by a lawyer.” Article 108 states that “the law facilitates access to justice and assures legal assistance to those without financial means.” But under the code of criminal procedure, the right to consult a lawyer is required only after the person appears before an investigative judge. In practice, by that stage, most detainees have signed a police statement that could well be used against them during trial.

The absence of a right to legal counsel during the initial period of detention is a serious gap in Tunisian law that violates what is now the constitutional right to access to justice. Lawmakers should amend the code of criminal procedure to provide suspects with access to counsel shortly after being placed in detention, the three organizations said. Until they do so, authorities should grant such access, using the constitutional right as a basis.

Tunisian laws contain several provisions that should be brought into compliance with the constitution to protect media freedom and the right to freedom of expression. Lawmakers and courts should eliminate all provisions of the penal and press codes that provide prison terms for non-violent speech, such as for distributing tracts “that can harm public order or good morals” and those relating to “defamation of public officials,” the organizations said.

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