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Tunisia: Improve Guarantees for Judicial Independence *Ensure Judiciary Has Powers to Protect Human Rights*

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

As Tunisia's National Constituent Assembly (NCA) is discussing the chapter on the judicial powers in a new constitution, Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center urge members to strengthen guarantees for judicial independence.

The judiciary under former President Zine el Abidine Ben Ali was subservient to the executive branch and lacked independence. It is essential that Tunisia's new constitution fully guarantee the independence of the judiciary and the impartiality of justice, the groups said.

"Tunisians deserve a constitution that has crystal clear guarantees for an independent judiciary," said Marion Volkmann, director at The Carter Center Office in Tunis. "Tunisia's new constitution should signal a real departure from a past marred by political interference by the executive and ensure the judiciary has the necessary power and independence to protect human rights."

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center have followed the constitution-making process since it began in February 2012. Their January 3, 2014 joint statement made recommendations for strengthening human rights and freedoms in the constitution.

The draft chapter on judicial power contains several important articles that incorporate general principles on the independence of the judiciary. For example, article 100 stipulates that: "the judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms." The independence of judges is confirmed in so far as they are accountable, in the performance of their duties, solely to the constitution and the law. Article 106 prohibits any outside interference in the judiciary.

The four organizations welcome these provisions, which accord with international standards. The UN Basic Principles on the Independence of the Judiciary, for example, require that principles relevant to the independence of the judiciary should be set out in the country's constitution.

However, the draft chapter contains weak guarantees for the tenure of judges, contrary to international standards, for example the UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to Fair Trial in Africa. While prohibiting removal of judges or their transfer without their consent, the draft envisages exceptions "in accordance with guarantees provided for by the law," a formulation that could be misused by the executive and legislative powers and risks undermining the essence of this protection.

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center therefore recommend that the NCA state clearly in article 104 that any disciplinary measure against a judge should be possible only for serious misconduct, as determined by the High Judicial Council and by respecting guarantees of due process.

The draft constitution provides for the creation of a High Judicial Council with a mandate of “ensuring the prevalence of justice and respect for the independence of the judiciary, proposing reforms and making recommendations with respect to draft laws related to the judiciary, and deciding on the professional conduct of and disciplinary measures for judges” in article 111. The draft proposes that half of the members of this council will be judges, the remainder non-judges.

The Consensus Commission, tasked with reaching broad agreement on the most contentious constitutional issues, proposed an amendment that would raise the number of judges on this council to two-thirds, “the majority of them elected by their peers and the rest appointed,” with the remaining third comprising individuals of demonstrable independence and expertise.

However, this formulation falls short of ensuring full independence of the judiciary on two levels. First, the judges elected by their peers could be a minority on the council, which could leave it under the control of members appointed either by the executive or by parliament. Several international instruments recommend that such bodies have a substantial proportion or even a majority of members elected by the judiciary. For example, the 1998 European Charter on the Statute for Judges “envisages the intervention of an authority independent of the executive and legislative powers within which at least one-half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”

Second, the proposed amendment does not indicate how the non-judge members should be selected, whether directly by the government, an election by parliament, or any other procedure. This leaves excessive discretion to government authorities regarding the procedures for their selection and does not offer sufficient constitutional guarantees for their independence from the two other branches of the state.

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center recommend that the NCA state in article 109 that at least half of the High Judicial Council be composed of judges elected by their peers. They further recommend that the constitution should specify appointment procedures to ensure that the selected non-judges enjoy broad confidence and legitimacy and that any appointment by parliament should require no less than a two-thirds majority.

The constitution has also extended the guarantees of independence to the public prosecution, which “shall form part of the judiciary and shall enjoy the same safeguards.” Article 112 requires public prosecutors to “discharge their duties in accordance with state prosecution policy in compliance with procedures laid down in law.” The four organizations recommend that the NCA retain that formulation and reject an amendment changing it to “governmental prosecution policy,” and specify that this policy should be consistent with rights and freedoms protected in the constitution and international human rights standards.

For more background, please see below.

For more details on other provisions of the constitution, please see:

- Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, January 3, 2014, “Tunisia: Strengthen New Constitution's Human Rights Protection, Guarantee Equality for All, Affirm International Law Obligations”
<http://www.cartercenter.org/news/pr/tunisia-010314.html>
- The Carter Center, June 12, 2013, “The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights”
<http://cartercenter.org/news/pr/tunisia-061213.html>
- Amnesty International, June 5, 2013, “Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution”
<http://www.amnesty.org/en/library/asset/MDE30/005/2013/en/10fae36f-a04f-4237-9767-b0ca42225178/mde300052013en.pdf>

- Human Rights Watch, May 13, 2013, “Tunisia: Revise the Draft Constitution”
<http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution>

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Background

The NCA began voting on the constitution in plenary session on January 3, 2013. To date, it has completed voting on the preamble, general principles, rights, and freedoms, and the legislative and executive powers chapters. The article-by-article vote and first complete reading of the draft constitution will be the final stage of the constitution-making process. The rules the assembly set for passage require a separate vote on each article, with a simple majority required for passage. The assembly must then approve the entire draft in a separate vote. If the draft fails to pass by a two-thirds majority, the draft will be submitted again for voting with the same two-thirds majority required. If the second attempt fails, the draft goes next to a national referendum.