

## AMNESTY INTERNATIONAL PUBLIC STATEMENT

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# TUNISIA: ADOPTION OF NEW CONSTITUTION MUST NOT INSTITUTIONALIZE EROSION OF HUMAN RIGHTS

A new constitution, adopted by the 25 July referendum in Tunisia entered into force on 17 August 2022. It could lead to the weakening of human rights safeguards and the rule of law, Amnesty International said. The adoption of the new constitution comes after a year marked by a regression on human rights protections in Tunisia.<sup>1</sup>

The drafting process of the new constitution was designed and controlled by President Kais Saied, was marked by a lack of transparency, and did not respect the right of the public to have access to the information. After appointing a committee to draft the constitution that excluded, as per the President's own words, all those who oppose the "25 July path," President Kais Saied presented to the public a different draft from the one prepared by the committee, without disclosing its process. The public did not have any way to follow the work of the committee and there were no avenues for civil society to engage with the process as the presidential decree creating the committee imposed "secrecy of deliberations" for their work.

While the new constitution still includes several provisions on human rights as set out in the Chapter on Rights and Freedoms, it removes all reference to universal human rights principles from its preamble and significantly weakens the institutional guarantees for the rule of law and human rights protection that the previous 2014 constitution contained.

The new constitution does not provide the necessary safeguards for the judiciary to function with full independence and impartiality, including because it grants the executive branch the right to intervene in the discipline and removal of judges and authority on their nomination. Compared to the 2014 constitution that included several guarantees to the right to fair trial, the new constitution significantly weakens the right to a fair trial by removing a provision that prevented the trial of civilians before military courts.

In addition, it opens the door to authorities to interpret rights in restrictive ways in the name of religion. It grants the President sweeping emergency powers without the necessary oversight mechanism which could be wielded to curtail human rights and undermine the rule of law. Furthermore, the new constitution undermines guarantees for the independence of the Constitutional Court, a vital institution for the protection of human rights, and restricts its mandate by removing its oversight on the constitutionality of extending the State of Emergency.

## A FRAUGHT CONSTITUTION-MAKING PROCESS

The 2022 Constitution is the result of an exclusionary process shrouded in secrecy that was concluded by a referendum on 25 July. Exactly one year earlier, on 25 July 2021, President Kais Saied invoked [exceptional measures](#) citing Article 80 of the 2014 Constitution, suspended the parliament and dismissed the government. Over the following months, Saied granted himself the exclusive right to rule by decree, suspended most of Tunisia's 2014 constitution then dissolved parliament and granted himself the mandate to change the Constitution.

On 1 May 2022, President Kais Saied announced in a speech the upcoming establishment of a committee that will be mandated with holding a national dialogue and drafting a new constitution. In the same speech, Saied declared that the national dialogue will exclude any political parties and any organizations or other actors who questioned the process of what he calls "the 25 July path" in reference to his rule after his power grab.<sup>2</sup> On 19 May 2022, President Saied adopted Decree 30-2022 establishing a National Consultative Body for the New Republic (NCBNR) composed of three

<sup>1</sup> Amnesty International, *Urgently Reverse Alarming Backsliding on Human Rights*, 21 July 2022, [amnesty.org/en/latest/news/2022/07/tunisia-urgently-reverse-alarming-backsliding-on-human-rights/](https://www.amnesty.org/en/latest/news/2022/07/tunisia-urgently-reverse-alarming-backsliding-on-human-rights/)

<sup>2</sup> France 24, *Tunisia Announces "National Dialogue", Excluding Opposition Groups*, 3 May 2022, [france24.com/en/afrique/20220503-tunisia-announces-national-dialogue-excluding-opposition-groups](https://www.france24.com/en/afrique/20220503-tunisia-announces-national-dialogue-excluding-opposition-groups)

committees, mandated among other things with drafting a new constitution. The NCBNR was supposed to be composed of an economic and social affairs committee, a national dialogue committee and a legal committee.<sup>3</sup> Under Articles 8 and 13 of Decree 30 respectively, the Economic and Social Affairs Committee was mandated to present a set of proposals relating to the hopes of the Tunisian people and the legal committee -composed of the deans of Tunisian law universities, was responsible for drafting the text of a new constitution that “responds to the aspirations of Tunisian people and guarantees principles of justice and freedom under a real democratic regime.”<sup>4</sup> According to articles 10,16, 20 and 22 of the decree states that the national dialogue committee receives the proposals of the legal and social and economic committees by 13 June and synthesizes them into a proposed draft constitution to deliver to President Saied by 20 June. Article 22 of Decree 30 states that the outcomes of the work of the NCBNR can only be published after permission from the president. All members of these committees were appointed by the President and nominated by decree.

The NCBNR was highly criticized by civil society and opposition political parties for failing to be inclusive and for lack of transparency of its work. Many actors including the main Tunisian workers’ union decided not to participate in this process.<sup>5</sup>

While the social and economic committee and the national dialogue committee were combined and met three times, the legal committee never met due to the [refusal](#) of all deans of law universities to participate in the NCBNR. Despite the failure of the legal committee to meet and the disparities between what Decree 30 stipulates about the constitution making process as stated above and how the committees’ works were conducted, the NCBNR proceeded with the process of drafting the constitution without disclosing to the public the modalities of this process or clarifying who was involved or under which provisions of Decree 30 it was conducted.

This has raised questions of not only transparency but of legality of the process, with organizations like the International Commission of Jurists finding that the process had failed to respect the rule of law.<sup>6</sup>

The NCBNR’s president coordinator delivered a proposed draft constitution to President Kais Saied on the 20 June. This draft was not made public nor was the final report of the NCBNR’s outcome published.

The public did not have any ways to access the work of the NCBNR nor avenues for civil society to engage with the process as the presidential decree creating the NCBNR imposed “secrecy of deliberations” for their work.<sup>7</sup>

On 30 June, President Saied published the draft constitution in the Official Gazette. On 3 July, the president coordinator of the NCBNR, Sadok Belaid, said the draft published by President Saied was completely different to the one the committee had prepared. Subsequently, Sadok Belaid published the original draft that they had submitted to the President in one of the main Tunisian daily newspapers. The two versions are distinctively different, once again emphasizing the lack of transparency of this constitution-making process.

On 8 July, President Saied announced in a speech that a few “mistakes leaked into the draft constitution” and that an amended version of the draft would be published. Late the same evening, a presidential decree containing 46 amendments in form and in substance was published in the official gazette. The publication of these amendments came after political parties and other political actors partaking in the referendum had declared their intention to vote for or against the draft and started campaigning for or against the new constitution.

According to the UN Human Rights Committee, states should proactively put in the public domain government information of public interest in order to give effect to the right of access to information. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.<sup>8</sup>

The process that resulted in the new constitution contained several problematic aspects. The absence of effective consultation and the different obscure phases that resulted in two versions made it impossible for Tunisians to participate in the process and to have clarity on how their country’s constitution was drafted and by whom.

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<sup>3</sup> Presidential Decree 30 of 19 May 2022, Article 4.

<sup>4</sup> Presidential Decree 30 of 19 May 2022, Article 8 and 13.

<sup>5</sup> Aljazeera, Tunisia Union to Boycott President Saied’s National Dialogue, 23 May 2022, [aljazeera.com/news/2022/5/23/tunisia-union-calls-for-strike-rejects-president-dialogue-move](https://www.aljazeera.com/news/2022/5/23/tunisia-union-calls-for-strike-rejects-president-dialogue-move)

<sup>6</sup> International Commission of Jurists, Fundamentally Flawed: Tunisia’s “constitution making” process, 29 June 2022, [icj.org/fundamentally-flawed-tunisias-constitution-making-process/](https://www.icj.org/fundamentally-flawed-tunisias-constitution-making-process/)

<sup>7</sup> Presidential Decree 30 of 19 May 2022, Article 4.

<sup>8</sup> UN Human Rights Committee, General Comment 34, para 19, [www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf](https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf)

## **A PREAMBLE DEVOID OF ANY INTERNATIONAL HUMAN RIGHTS REFERENCES**

Unlike the preamble of the 2014 Constitution, the preamble of the 2022 Constitution no longer includes any references to the principles of universal human rights and equality between all. It is regrettable that these references were removed entirely from the Preamble of the current constitution, Amnesty International said.

The preamble is an integral part of the text, and it sets forth principles of positive law which could provide the basis for an appeal to the Constitutional Court in human rights-related cases. The fact that the new preamble does not provide for the state's commitment to the rule of law, the principle of equality between all and the respect for universal human rights removes the possibility to use the preamble as justification to appeal to the Constitutional Court in human rights-related cases.

## **RIGHTS AND FREEDOMS CHAPTER**

The chapter on Rights and Freedoms in the new constitution retains most of the key civil, political, social, economic, and cultural rights that were included in the 2014 Constitution. These include the rights to life, bodily integrity and freedom from torture, freedom of movement, opinion, expression, assembly, and association. The rights to freedom of religion, privacy and asylum are also included.

The constitution also provides for the rights to health, education, and work. The Tunisian authorities should adopt specific measures to progressively achieve 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 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, by taking steps to abolish the death penalty.

## **INDEPENDENCE OF THE JUDICIARY**

The independence of the judiciary is a fundamental pre-condition for the full respect for human rights, not only because it is a pre-requisite to the right to a fair trial but also because the judiciary is expected to play a critical role in enforcing respect for human rights including by ensuring accountability for human rights violations. The 2022 Constitution fails to comply with international standards on the independence of the judiciary.

The UN Basic Principles on the Independence of the Judiciary states that the independence of the judiciary "shall be guaranteed by the State and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."<sup>9</sup>

Before 2011, Tunisia's judiciary was under the effective control of the executive power which compelled courts to serve oppressive policies and allowed for human rights violations including systematic torture and enforced disappearances to happen with complete impunity. Moreover, the independence and impartiality of judges were constantly undermined through the use of policies and practices to intimidate and pressure independent judges. The 2014 Constitution strived to address this legacy and provide the necessary guarantees for judges to exercise their essential functions, and to protect them from the interference suffered in the past.

The 2022 Constitution sets back these efforts by removing most of these guarantees from its chapter on the "Judicial Function."

Several important articles included in the Chapter on Judicial Authority in the 2014 Constitution, are no longer included in the 2022 Constitution. It does not include provisions to guarantee the independence of the High Judicial Council (HJC),

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<sup>9</sup> United Nations' Basic Principles on the Independence of the Judiciary, Article 1, [ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary](https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary)

an independent and self-managing judicial oversight body established by the 2014 Constitution to oversee the sound functioning of the judiciary aiming at ensuring its independence and accountability (Articles 113 and 114).

Under the 2014 Constitution, HJC used to be responsible for the appointment, removal, promotion, and transfer of judges, as well as for ruling on requests for the lifting of judicial immunity, judges' resignations, secondment, early retirement and leave of absence. It assessed the needs of each court and established the annual rotation of judges. The HJC also ruled on disciplinary cases, sitting as a disciplinary council for judges. The 2022 constitution states that judges are appointed by direct presidential order upon recommendation from the HJC, a setback compared with the 2014 Constitution which required the president to follow a binding opinion of the HJC for the appointment of judges.

The guarantee that judges cannot be suspended, be subject to arbitrary dismissal, or disciplinary measures without a "reasoned decision from the HJC" which was set out in Article 107 of the 2014 Constitution was removed, opening the door for the disciplining and revocation of judges by the executive authorities.

The Chapter entitled "the Judicial Function" that replaced the 2014 chapter "the Judicial Authority" no longer specifies that the judiciary's role is to ensure "the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms." (Article 102 in the 2014 Constitution)

## THE CONSTITUTIONAL COURT

The 2014 Constitution provided for a constitutional court with the power to strike down laws deemed unconstitutional, including those inconsistent with the human rights enshrined in the constitution, and to resolve disputes over interpreting the constitution itself. However, the creation of the court is six years overdue as successive parliaments failed to agree on the appointment of the court's members. Article 125 of the 2022 Constitution states that the constitutional court is to be composed of nine judges. The judges are to be nominated by a presidential order. Of the nine, one third is composed of the most senior judges of the Cassation Court, one third are from the High Administrative Court and the last third are from the Financial Court. The 2014 provided that the Court would be composed of 12 judges, of whom the President of the Republic, the Parliament, and the HJC should each elect or appoint one third, but the 2022 Constitution now grants the President the right to appoint all judges of the Constitutional Court, which risks putting it under the direct influence of the executive.

The UN Human Rights Committee has determined that executive branch interference in the judiciary — including control over the appointment and careers of judges — violates the right to trial by an "independent and impartial tribunal" as guaranteed by Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which Tunisia has ratified.

Article 14 of the ICCPR, guarantees a fair, public trial before a competent, independent, impartial tribunal established by law. According to the UN Human Rights Committee, judicial independence means, in particular, that judiciary be independent in deciding the appointment, promotion, transfer, and dismissal of judges. Furthermore, the HCR guidance states that "[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary."<sup>10</sup>

Previous to publishing the draft constitution, President Said had taken a number of steps that significantly undermined the independence of the judiciary and the rule of law. The President has unilaterally [replaced](#) the [High Judicial Council](#) and followed by [illegally](#) granting himself the powers by which he [summarily dismissed](#) 57 judges. The new constitution institutionalizes these practices and raises great concerns on the future of the judiciary and protection of human rights and the rule of law in Tunisia.

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<sup>10</sup> United Nations' Human Rights Committee, General Comment 32, para 20

## RIGHT TO FAIR TRIAL

The guarantees of the right to fair trial are significantly weakened in the 2022 Constitution compared to the 2014 Constitution. The 2022 Constitution does not include guarantees that used to be stipulated in Articles 109 and 110 of the previous constitution, prohibiting any interference in the functioning of the judiciary by the executive and banning the creation of exceptional courts or enacting of exceptional procedures that affect the general principles of a fair trial. Moreover, Article 110 of the 2014 Constitution explicitly stated that military tribunals are only competent to rule over military crimes, effectively excluding civilians from its jurisdiction.

Tunisian legislators failed to reform the laws on military justice after 2014 to comply with Article 110 which led to the persistence of violation of the right to a fair trial as civilians continued to appear before military courts. After 25 July 2021, Amnesty International documented an increase in the military trials of civilians, with more than 12 civilians prosecuted in the course of the year compared to six prosecuted in ten years. Removing Article 110 will only make it easier to further erode the right to free trial.

## UNCHECKED EMERGENCY MEASURES

According to international standards, emergency powers and exceptional measures should only be applied when it is strictly necessary to protect national security from a threat to 'the life of the nation'. The Human Rights Committee has stated that measures derogating from the provisions of the ICCPR pursuant to a state of emergency must be exceptional and temporary. The state's predominant objective must be the restoration of the state of normalcy.<sup>11</sup>

The 2022 Constitution's Article 96 on exceptional measures does not meet this standard unlike Article 80 of the 2014 Constitution which explicitly stated that "the measures shall guarantee, as soon as possible, a return to the normal functioning of state institutions and services." Article 80 also provided for the oversight of the Constitutional Court and parliament in the case of the declaration of exceptional measures due to national emergency and allowed for the possibility to challenge the necessity of the maintenance of the exceptional measures before the Constitutional Court after 30 days. These guarantees were removed from the 2022 Constitution whereby Article 96 does not stipulate any possibilities for remedy or any time limit on the state of emergency.

President Kais Said has [invoked Article 80](#) on 25 July 2021 and has not yet decided the return to the normal functioning of state institutions.

Amnesty International has documented several instances where steps taken by the executive power under Article 80 [undermined](#) or [threatened human rights](#) and the [rule of law](#).

Furthermore, Article 96 of the 2022 Constitution does not explicitly specify the rights which are not derogable in a state of emergency.

Under international human rights law, there are a number of provisions of the ICCPR from which there can be no derogation at any time, including: the right to life; to be free from torture and other ill treatment; to be free from slavery; to not be arrested because of an inability to fulfil a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; and freedom of thought, conscience and religion.

The Human Rights Committee General Comment No. 29 explains that a number of other provisions of the ICCPR are also non-derogable by implication. For instance, "states parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."

## RISKS OF INTERPRETATION OF ARTICLES 5

Article 5 of the 2022 Constitution states that Tunisia "belongs to the Islamic Ummah" and that the state alone is required to "achieve the purposes of Islam in preserving [people's] souls, money, religion, and liberty under a democratic regime." This article could constitute grounds for legal amendments that aim to align legislation with the purposes of Islam and

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<sup>11</sup> United Nations Human Rights Committee, General Comment 29, para 1,2

allow Tunisia to repudiate its international human rights commitments under the pretext that they are not in line with the 2022 Constitution.

Article 5 must not lead judges to disregard international human rights law on the basis that they contradict the 2022 Constitution or lead lawmakers to review the Tunisian legislations pertaining to human rights and equality that are considered to contradict certain religious principles.

Furthermore, Article 74 maintains the same hierarchy of norms as the 2014 Constitution: international treaties are superior to legislation, but inferior to the constitution. Before accepting a new commitment under an international treaty, Tunisia will have to ensure that it is consistent and compatible with its constitution which might limit Tunisia's engagement and respect for the international human rights system or lead to making reservations on key articles in some treaties such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

General Comment No. 22 of the Human Rights Committee on the right to freedom of thought, conscience and religion, guaranteed under Article 18 of the ICCPR states that "the fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers."<sup>12</sup>

Article 5 should not be interpreted in a way that is inconsistent and 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."

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<sup>12</sup> United Nations' Human Rights Committee, General Comment 22, para 18, [refworld.org/docid/453883fb22.html](https://refworld.org/docid/453883fb22.html)