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OBSERVATIONS

ON THE FINAL DRAFT CONSTITUTION

OF THE REPUBLIC OF TUNISIA

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CONTENTS

INTRODUCTION.....	4
PREAMBLE and CHAPTER IX: FINAL PROVISIONS	5
CHAPTER I: GENERAL PRINCIPLES	7
Characteristics of the state.....	7
The state and religion	8
International agreements	10
CHAPTER II: RIGHTS AND FREEDOMS	12
Restrictions to rights and freedoms.....	12
Equality and non-discrimination	12
The right to life	13
Dignity and physical integrity; torture and inhuman treatment.....	13
Privacy, the home, correspondence, personal data	13
The prohibition of withdrawing citizenship, exile and extradition of citizens, and preventing them from returning to their country; political asylum	14
The right to a fair trial	14
The non-retroactivity of criminal law	14
The right to freedom and security	14
Enforcement of sentences	14
Freedom of expression	15
Access to information.....	15
Education and science.....	15
The right to vote.....	15
Freedom of association.....	15
The right to organise and to strike.....	15
Freedom of assembly	16
Health	16
Employment.....	16
The right to property.....	16
The rights to culture, sport, water and a healthy environment.....	16
Protection of children	16
Unprotected rights.....	16
CHAPTER III: THE LEGISLATURE.....	17
Political system	17
The legislature	17
CHAPTER IV: THE EXECUTIVE.....	21
SECTION ONE: THE PRESIDENT OF THE REPUBLIC	21
SECTION TWO: THE GOVERNMENT	24
CHAPTER V: THE JUDICIARY	26
PART I – JUDICIAL, ADMINISTRATIVE AND FINANCIAL COURTS.....	27
SECTION ONE: SUPREME JUDICIAL COUNCIL	27
SECTION TWO: THE JUDICIARY	29
SECTION THREE: THE ADMINISTRATIVE JUDICIARY	29
SECTION FOUR: THE FINANCIAL JUDICIARY	29

PART II – THE CONSTITUTIONAL COURT29
Powers.....30
Ex ante review30
A posteriori review31
Review of the rules of procedure of the Assembly of People’s Representatives.....31

CHAPTER VI – INDEPENDENT CONSTITUTIONAL COMMISSIONS32

CHAPTER VII – LOCAL GOVERNMENT.....33
General remarks33
Particular remarks concerning the different articles33

CHAPTER VIII – AMENDMENT OF THE CONSTITUTION.....36

CHAPTER X: TRANSITIONAL PROVISIONS.....38

INTRODUCTION

1. By letter dated 3 June 2013, the Speaker of the National Constituent Assembly of Tunisia, Mr Mustapha Ben Jaafer, requested the opinion of the Venice Commission on the final draft Constitution of Tunisia as soon as possible.
2. At its 95th Plenary Session (14-15 June 2013), the Venice Commission authorised the rapporteurs, in view of the urgency of the matter, to submit their observations to the National Constituent Assembly before the Plenary Session of October 2013.
3. The observations of the rapporteurs are based on the French translation of the Arabic text sent by Mr Ben Jaafer (CDL-REF (2013)032).
4. The rapporteurs wish to congratulate the Tunisian people on their efforts to provide themselves with a democratic Constitution, based on the universal principles of democracy and human rights. In addition, they welcome the commitment of the National Constituent Assembly to submit to the Venice Commission the text of the final draft Constitution, a result of long negotiations and intense legal discussion.
5. The rapporteurs have made a number of suggestions intended merely to provide assistance to the National Constituent Assembly. These suggestions in no way undermine the esteem held by the rapporteurs for the outstanding work accomplished by the Tunisian National Constituent Assembly.

PREAMBLE and CHAPTER IX: FINAL PROVISIONS

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6. The draft Constitution of the Republic of Tunisia contains a Preamble comprising five paragraphs setting out the spirit of the new Constitution. In accordance with Article 143 of the Constitution, the Preamble forms an integral part of the Constitution. In accordance with Article 144, the provisions of the Constitution shall be understood and interpreted as a “harmonious whole”.

7. The first paragraph of the Preamble explains the context in which this Constitution has been drafted: marking a break with past “injustice, corruption and tyranny” despite the struggles of the Tunisian people to achieve independence and build the state. However, no reference is made to the revolution which prompted the drafting of this new Constitution.

8. The second paragraph refers to the characteristics of the historical and spiritual identity of Tunisia. It mentions:

- the teachings of Islam and its outward looking and moderate ends;
- humanitarian values;
- the principles of universal human rights.

9. It also refers to the inspiration for this Constitution: the cultural and historical heritage of Tunisia, the reformist movement based on the Arab and Islamic identity, the universal achievements of human civilisation and the national achievements of the Tunisian people themselves.

10. The third paragraph relates to the characteristics of the political regime:

- the civil nature of the state;
- the rule of law;
- sovereignty of the people;
- free elections, the precondition for political competition;
- the separation and balance of powers;
- the state’s guarantee of respect for human rights and freedoms, the independence of the judiciary, the principle of equality between citizens, male and female alike, and between all social categories and regions.

11. The fourth paragraph deals with the principles of international law, asserting once again Tunisia’s affiliation to the Arab and Muslim nation, giving rise to:

- support for the Maghreb Union, a step towards Arab unity and complementarity with the African peoples;
- assertion of the right of peoples to self-determination, in particular for the Palestinian people;
- the fight against racism and all forms of discrimination.

12. Lastly, the final paragraph lays down the principle of preserving a healthy environment and ensuring the sustainability of natural resources; it asserts the position of the Tunisian people in the contribution to civilisation.

13. To sum up, this Preamble, drafted in general terms, nevertheless lays down principles of positive law which, where appropriate, could provide the basis or at least justification for an appeal to the Constitutional Court: the civil nature of the state, the principle of equality between all, the guarantee of the sustainability of natural resources, respect for human rights. Similarly, the principles of political and legal organisation asserted therein are generally those on which

democracies are founded: sovereignty of the people, the rule of law, separation and balance of powers. These tie in with the three pillars of the Statute of the Council of Europe, namely human rights, democracy and the rule of law. The emphasis placed in this Preamble on the principal values of a democratic state is to be welcomed.

CHAPTER I: GENERAL PRINCIPLES

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Characteristics of the state

14. The first chapter of the Constitution concerns the characteristics of the Tunisian state, its main duties towards the Tunisian people, and the duties of citizens towards the state.

15. Article 1 is taken from Article 1 of the previous Constitution of 1 June 1959, drafted under the aegis of President Bourguiba. The assertion that the religion of Tunisia is Islam does not prejudice the existence of a state religion but should be understood as asserting that Islam is the dominant religion, that of the majority of citizens.

16. Article 2 sets forth the principle of the civil nature of the state (which is also proclaimed in the Preamble).

17. The sovereignty of the people is made explicit and, as in all representative democracies, is exercised through elected representatives or by referendum (cf. Article 3 of the French Constitution of 1958: "National sovereignty shall be vested in the people, who shall exercise it through their representatives and by means of referendum").

18. Articles 7, 8, 10 (2nd paragraph), 12, and 13 place general obligations on the state: ensuring protection of the family; ensuring that young people (the difference between children and young adults is not made clear) are provided with the necessary conditions to develop their abilities and assume responsibilities and to extend and broaden their participation in social, economic, cultural and political development; the introduction of mechanisms for guaranteeing tax collection, contribution to public expenditure and proper management of public funds, prevention of corruption; achieving social justice, sustainable development, balance between regions and rational exploitation of national resources; support for decentralisation.

19. These general obligations placed on the state could be seen as akin to what in French Constitutional law is called "objectives with a constitutional value". These objectives, deriving from the case law of the Constitutional Council, are requirements which the Council places on the legislature so as to guide it in enacting legislation perfectly in compliance with the Constitution. The legislature must reconcile pursuit of these objectives with the exercise of the constitutionally guaranteed freedoms.

20. In this regard, the principles laid down in Articles 7, 8, 12 and 13 take on their full meaning and could, where appropriate, legitimise unequal treatment between citizens so as to adopt measures promoting, for example, the entry of young people into the labour market, or benefiting families with several children.

21. Article 9 places a duty on citizens to preserve the unity of their country and defend the integrity of its territory. They have an obligation to undertake national service in accordance with statutory requirements. The term "national service" does not necessarily imply that the service is military in nature (Article 17 provides that the army is a force "responsible for defending the nation, its independence and territorial integrity"); it will be for the legislature to decide on this. It should be pointed out that a stipulation in the Constitution of an absolute obligation to accomplish national service will not make it possible to take account of any changes in the positions and expectations of Tunisian society in this field, as has occurred in other states.

22. Article 11 places an obligation on those fulfilling senior state functions, including those who occupy posts in “the independent constitutional authorities or holding any other senior post” to declare their assets. This principle of transparency is important, and its implementation by the legislature should ensure the conditions whereby it will be effective. This responsibility delegated to the legislature is, in point of fact, very broad with regard to other posts for which a declaration of assets is mandatory. This obligation should not concern too great a number of posts as the question of the effectiveness of monitoring would then be raised. While the Constitution may stretch the principle too far, the legislature could be guided by a formula such as “posts which are important for guaranteeing rights and freedoms or the economic and social life of the nation”.

23. Article 13 which places an obligation on the state to support decentralisation is to be welcomed.

24. Consistent with Article 2 which proclaims the civil nature of the state, Article 14 specifies a requirement for the public administration to uphold “the principles of impartiality [and] equality” and Article 15 requires “the neutrality of educational institutions with regard to any use for partisan purposes”, which is to be welcomed. Nonetheless, the words “use for partisan purposes” in Article 15 are imprecise and suggest that only political indoctrination is forbidden in educational establishments. It would be preferable to use a broader and clearer term, such as ideological indoctrination.

25. Article 16 lays down the principle that the state shall have sole power to establish armed forces, national security forces and any other forces. This provision requires no particular comment.

26. Article 17 requires the army to observe “absolute neutrality”, which is to be welcomed. The army shall “support” the civil authorities: it would be a good idea to specify that the army is “subject and subordinate to the democratically elected civil authorities”. In Article 18, the limits placed on the national security forces should be made more explicit, “*within the limits of respect for freedoms and human rights in absolute neutrality*”.

The state and religion

27. The mere fact that a state proclaims that there is a dominant religion is not, in itself, contrary to international standards. However, as pointed out in 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 International Covenant on Civil and Political Rights (ICCPR, which Tunisia has ratified), “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.”¹ It should be pointed out in this connection, that several European countries (in particular the Nordic countries) are perfectly able to reconcile a state religion with freedom of conscience, thought and religion.

28. However, in the draft Constitution under examination, there is some inconsistency between, on the one hand, the predominant position given to Islam, and on the other, the civil nature of the state and the principles of plurality, impartiality and non-discrimination.

a) For example, the Preamble declares that the Constitution is based on “the teachings of Islam” but does not refer to the shari’a and acknowledges “noble humanitarian values” and “the principles of universal human rights”; the Preamble underlines the “Arab and Islamic identity” but also acknowledges the “universal achievements of human civilisation” and proclaims “the principle of pluralism, administrative neutrality [...] ; respect for human rights and freedoms”;

¹ General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18) 30/07/1993, §9 <http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>.

b) Article 1 states that Islam is the religion of Tunisia and Article 141 prohibits any modification of Islam as the state religion, whereas Article 2 defines Tunisia as “a civil state based on citizenship” and both these principles are unalterable (Article 141);

c) Article 6 provides that “the state shall protect religion” but guarantees “freedom of conscience, belief and worship”. Article 6 provides that the state shall “protect that which is held sacred” but shall “ensure the neutrality of mosques and places of worship with regard to any use for partisan purposes”. How does the guarantee of religion and the neutrality of mosques tie in with freedom of religion in general?

d) Article 20 states that “all citizens shall have equal rights and duties. They shall be equal before the law without discrimination” and Article 14 lays down a requirement that the public administration shall be subject to the principles of impartiality and equality, but Article 73 states that the President must be of the Muslim faith. The oath which members of parliament (Article 57) the President (Article 75 and Article 73) and the government (Article 88) must take (judges are exempt from this obligation) is exclusively religious. Furthermore, at the beginning of the Preamble is the formula “in the name of God, the Merciful, the Compassionate”, the last sentence in the Preamble calls on “God’s blessing” and the Constitution concludes with “God is the guarantor of success”. Lastly, the President appoints and dismisses the Mufti (Article 77) which creates a very close link between the state and Islam.

29. These inconsistencies may lead to contradictions and make it difficult to understand and interpret the provisions of the Constitution “as a harmonious whole”, as stipulated in Article 144. In the following paragraphs, these inconsistencies/contradictions and ways to resolve them through interpretation or, where appropriate through amendments, will be looked at in greater detail.

30. Article 6 provides that “the state shall protect religion. It shall guarantee freedom of conscience, belief and worship. It shall protect that which is held sacred and ensure the neutrality of mosques and places of worship with regard to any use for partisan purposes.”

31. The expression “the state shall protect religion” is ambiguous. Does this mean religion taken in its conceptual sense: the protection of religion in general? Or does the singular refer to the dominant religion, in other words Islam? The first interpretation would appear to be the correct one since the following sentence says that the state shall guarantee freedom of conscience, belief and worship; moreover, if such were not the case, there would be a clear problem of compliance with international standards: discrimination between different religions or beliefs would be a violation of Article 26 ICCPR, which explicitly prohibits discrimination on the ground of religion. This first sentence in Article 6 could be a source of ambiguity; it should be deleted, or modified stipulating that the state protects “all religions and non-religious beliefs”.

32. It should also be underlined that the reference to Islam as the state religion as a non-amendable principle contained in Article 141 goes far beyond the wording of Article 1, which states that Islam is the religion of Tunisia (= of the majority of Tunisians). This is problematical, because it is inconsistent with Articles 1 and 2 and with the guarantees of the state’s impartiality and neutrality contained in Articles 14 and 15 (see Chapter VIII).

33. The wording “[the state] shall protect that which is held sacred” is also problematical. A state which proclaims itself to be civil (Article 2) is not competent to decide what is sacred and therefore protect that which is held to be so. Furthermore, such wording could legitimise the criminalisation of sacrilege or blasphemy. It would be preferable to delete it.

34. In principle, it is good that the state should ensure “the neutrality of mosques and places of worship with regard to any use for partisan purposes” as proclaimed in the last paragraph of Article 6. The other places of worship referred to are probably intended to cover those of other religions: but in order to avoid any ambiguity, it would be preferable to say “and all places of worship of other religions”. The expression “use for partisan purposes” is, nevertheless,

imprecise and could be interpreted too broadly in order to justify disproportionate interference in the internal affairs of mosques, churches and other places of worship; this would be in violation of Article 18 § 3 ICCPR.

35. Article 6 is included in the Chapter on “general principles”, and lays down the relationship between the state and religion. It does not guarantee *freedom of religion as such*, but proclaims the role of the state as the protector of religion; it merely guarantees the freedom of conscience, belief and worship. This, considered in the light of the statement in the Preamble that the Constitution is based on the teachings of Islam, the unalterable nature of the principle of Islam as the state religion (Article 141) and the requirement that the President of the Republic be of the Muslim faith (Article 73), could lead to the conclusion that the Constitution protects Islam to the detriment of other religions. Furthermore, the fact that the freedom of conscience, belief and worship is placed in the chapter on general principles could be interpreted as raising these freedoms to a higher rank than the other rights and freedoms guaranteed in Chapter II. The fact is that the freedom to manifest religion or belief is closely linked to the freedom of expression protected by Article 19 ICCPR, and to the freedom of peaceful assembly and the right to organise, guaranteed by Articles 21 and 22 ICCPR: these freedoms should all benefit from the same protection.

36. Moreover, the scope of Article 18 ICCPR is much broader than Article 6 in the draft Constitution. In accordance with General Comment No. 22, “the right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in Article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others (...) and protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. (...) Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in Article 19.1. In accordance with Articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief. (...)”²

37 it is therefore recommended that Article 6 be reworded and that a specific provision be inserted in Chapter II, proclaiming the freedom of religion, conscience and belief, and containing the explicit guarantee of the freedom to have or adopt a religion or belief of one’s choice, and the freedom to manifest one’s religion or belief, individually or in community with others, both publicly and in private, through worship and the observance of rites, practices and teaching.

International agreements

38. Article 19 introduces a hierarchy of rules and standards: treaties have a status superior to legislation, but inferior to the Constitution. Before accepting a new commitment under an international treaty, Tunisia must ensure that it is compatible with its Constitution. If it is incompatible and Tunisia wishes to become a Party to the treaty, it must first of all amend its Constitution, so that there is no conflict with the international standard. The fact that treaties have a status superior to legislation will oblige the legislature to conform to the international treaties signed by Tunisia, in particular those relating to the protection of civil and political rights.

39. Article 19 applies to treaties “approved by the Assembly of People’s Representatives and subsequently ratified”. In so far as this provision refers to the future “Assembly of People’s Representatives”, it is not clear whether it also applies to treaties which have already been ratified by Tunisia and which are in force. This must, however, be the case: in application of the principle “*pacta sunt servanda*”, no new law may be enacted which does not comply with these

² General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18), 30/07/1993, §§ 2, 3.

treaties. Where there are contradictions between the treaties already in force and the new Constitution, Tunisia must amend its Constitution so that there is no conflict with the international standard, and in all cases avoid violating international treaty law. The superior status of treaties already ratified by Tunisia prior to the entry into force of the new Constitution over domestic legislation should be explicitly stated, for example by replacing in Article 19 the expression “approved by the Assembly of People’s Representatives and subsequently ratified” with “ratified by Tunisia”.

40. Lastly, neither the Preamble nor the general principles refer to international custom, to general principles of law, and to the major international instruments on the protection of human rights. The Preamble could be amplified by a reference confirming Tunisia’s allegiance to the ideals proclaimed, in particular, in the UN international conventions protecting human rights.

CHAPTER II: RIGHTS AND FREEDOMS

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Restrictions to rights and freedoms

41. By way of introduction, it will be noticed that a general clause, Article 48, stipulates that *“the law shall determine the restrictions on the rights and freedoms guaranteed by this Constitution and on how they are exercised, without this affecting their essence. Such legislation shall be adopted only to protect the rights of others or for reasons of public security, national defence or public health. (...)”*. Accordingly, this clause is applicable to all the rights protected in Chapter II (with the exception of absolute rights such as the prohibition of torture and inhumane treatment). The provisions relating to certain rights protected in Chapter II nevertheless contain a clause enabling the free exercise thereof to be restricted: this is the case for rights regarding privacy (Article 23), freedom of expression (Article 30) and freedom of assembly (Article 36).

42. This warrants two observations. First, while Article 48 contains important and welcome guarantees such as the principle of legality and the requirement that the restriction of the exercise of a fundamental right must not affect its essence, there is nevertheless a gap, insofar as it fails to require that any interference must comply with the principle of proportionality and “necessity in a democratic society”. Consequently, this principle should be added to Article 48.

43. In addition, the general clause contained in the Article 48 should be co-ordinated with the specific clauses relating to each right and freedom. The solution currently contained in the draft Constitution is unsatisfactory since the presence of a specific clause only for certain rights is inexplicable and confusing. The legitimate aims referred to in Article 48 (protection of the rights of others, public security, national defence and public health) are not all applicable to all rights, and other legitimate aims are recognised by international standards. It would be preferable, therefore, to reword the second sentence of Article 48 in general terms, removing the reference to certain legitimate aims, and adding a specific clause for each relevant right and freedom, based on international instruments for the protection of human rights. As a result, Article 48 would set out the general principles, the application of which is governed in a specific way for each right.

Equality and non-discrimination

44. Article 20 states that “all citizens shall have equal rights and duties. They shall be equal before the law without discrimination (...)”. The explicit recognition of the principle of equality and non-discrimination is important and should be welcomed. It will however be noted that the principle allowing for positive action to eliminate any discrimination is not expressly provided for.

45. The wording of Article 20 limits the principle of equality and non-discrimination to “all citizens” (male and female). In contrast to Article 20, Article 105 of the draft Constitution guarantees the right to a fair hearing to “everyone”. This difference suggests that the principle of non-discrimination does not apply to persons in Tunisia who are not Tunisian citizens. This limitation of the principle of equality and non-discrimination does not conform to international standards: Article 2 of the Universal Declaration of Human Rights states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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” and Article 26 ICCPR states that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language,

religion, political or other opinion, national or social origin, property, birth or other status.” Accordingly, the words “all citizens” should be replaced by “all persons” or an equivalent expression.

46. Article 20 makes no reference to the specific and different forms of discrimination, namely discrimination on the grounds of sex, race, colour, language, religion, political opinion, national or social origin, membership of a national minority, wealth, birth or any other status. Although the expression “without discrimination” is very broad, a reference in Article 20 to the different causes of discrimination would strengthen the impact and scope of the prohibition of discrimination. Still on this point, it is recommended that the text of Article 20 be harmonised with international instruments.

47. Article 45 provides that “the State shall ensure equality of opportunity between women and men in assuming responsibilities (...)”. This sentence is ambiguous and could be interpreted in a restrictive way, with equal opportunities being limited to certain responsibilities, whereas Article 20 provides for no limitation *ratione materiae* on the principle of equality. It would be preferable to delete the words “in assuming responsibilities”.

48. Article 46 places an obligation on the state to ensure legal, social, financial and moral protection for “all children, without discrimination”.

49. Lastly, the state “shall protect persons with disabilities against all forms of discrimination” and shall take all measures to ensure their full integration into society. This provision, which sets out the state’s positive obligation with regard to persons with disabilities and which paves the way for positive action measures is to be welcomed.

The right to life

50. Article 21 protects the right to life which “shall be sacred and shall not be violated except in extreme cases specified by law”. This provision does not require any particular observation.

Dignity and physical integrity; torture and inhuman treatment

51. Article 22 protects the dignity of individuals and their physical integrity and prohibits “all forms of physical and psychological torture”. Article 29 stipulates that “all detainees shall be entitled to humane treatment”. In international law, the prohibition of torture and the prohibition of inhuman or degrading punishment and treatment are considered equally important and are proclaimed in the same provision. To underline the absolute nature of the prohibition of inhuman (and degrading) (punishment and) treatment, this could be added to Article 22: this would confirm that this prohibition applies to all persons in all circumstances, and not only in a situation of detention.

Privacy, the home, correspondence, personal data

52. Article 23 protects different and varied rights: privacy, the inviolability of the home, the confidentiality of correspondence, communications and personal data; free movement, choice of place of residence. It adds that “no restrictions may be placed on these rights and freedoms except in cases provided for by law and on the basis of a judicial decision.”

53. The rights protected by Article 23 are generally contained in separate and specific provisions: on the one hand, the right to respect for privacy, the home, correspondence; on the other, the right to choose one’s place of residence and to move freely. The legitimate aims of any interference with these rights should be indicated specifically in each of the provisions.

The prohibition of withdrawing citizenship, exile and extradition of citizens, and preventing them from returning to their country; political asylum

54. Amongst other things, Article 24 prohibits the extradition of citizens. This absolute prohibition should not be interpreted as preventing Tunisia from handing citizens over to international courts.

55. Article 25 requires no particular comment.

The right to a fair trial

56. Components of the right to a fair trial before an independent and impartial court are contained in several articles. Article 26 guarantees defendants the presumption of innocence and a fair trial. Article 105 also guarantees that everyone shall have the right to a fair trial. Article 101 places an obligation on judges to display impartiality and Article 100 stipulates that the judiciary shall be independent. Articles 100 and 101 are included in Chapter V on the judiciary and Article 105 in Part 1 on judicial, administrative and financial courts in the same Chapter.

57. The right to a fair trial before an independent and impartial court is a fundamental individual right in a state governed by the rule of law. Accordingly, it would be preferable to include this in Chapter II on rights and freedoms. This would make it possible to formulate this right in a much more precise way. The general criterion in Article 101 whereby judges must display impartiality, included in the Chapter on the judiciary, refers to the appropriate selection of judges and the quality of the judicial institution. In contrast, a defendant's right to be heard by an impartial court is more specific. Furthermore, if all these components of the right to a fair trial were included in a single provision in Chapter II, the clarity of this fundamental right would be enhanced.

The non-retroactivity of criminal law

58. Article 27 provides that "sentences shall be personal and shall be delivered only on the basis of legislation existing prior to the offence unless subsequent legislation is more favourable to the defendant." This provision requires no particular comment.

The right to freedom and security

59. Under the terms of Article 28 "a person may not be arrested or placed in detention unless *in flagrante delicto* or on the basis of a judicial decision. Detainees shall immediately be informed of their rights and of the charge brought against them. They shall have the right to be represented by a lawyer. The duration of the arrest or detention shall be specified in law." In this way, Article 28 guarantees the protection of freedom and security. This guarantee should be supplemented by the right of every individual arrested or detained for any criminal offence to be brought promptly before a judge or other officer authorised by law to exercise judicial power, and to be judged within a reasonable time or released. In addition, it is necessary to guarantee that whoever is deprived of his or her liberty through arrest or detention, has the right to appeal before a court so that the latter may decide without delay on the lawfulness of the detention and order release if detention is not lawful (Article 9 ICCPR). The addition of these two guarantees would bring Article 28 into conformity with the international law of *habeas corpus*.

Enforcement of sentences

60. Under the terms of Article 29, when enforcing custodial sentences, the state shall consider "the interests of the family". This wording needs to be clarified.

Freedom of expression

61. Article 30 gives as legitimate aims of restriction the protection of the “rights of third parties, their reputation, their safety or their health”, to which must be added the aims provided for under Article 48 “public security, national defence or public health”, to reflect substantively the legitimate aims contained in Article 19 ICCPR (respect of the rights or reputation of others, protection of national security, public order, public health or morals). The suggested changes (§§ 36 and 38) would make the applicable legal framework clearer and more accessible.

62. In addition, as it stands, Article 30 does not contain the essential guarantee of the principle of proportionality and necessity in a democratic society.

Access to information

63. Article 31 guarantees the “right to access information”; it would be desirable to recognise more specifically “the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [the individual’s] choice”, protected by Article 19 ICCPR.

64. Article 31 makes this right conditional on national security and “the rights set out in the Constitution”: this last phrase is far too broad. As for Article 30, the legitimate aims of any restrictions are exclusively those provided for under Article 19 ICCPR.

Education and science

65. Article 32 guarantees academic freedom and freedom of scientific and technological research; this requires no particular comment.

66. Article 38 guarantees the general and unconditional right (and obligation) to free public education up to the age of 16. This right, together with the educational establishments’ obligation of neutrality, is to be welcomed. The second paragraph could appear in the general principles.

The right to vote

67. Article 33 guarantees “electoral rights, the right to vote and the right to stand as a candidate (...) in accordance with the law”. The principles of universal, free, direct and secret suffrage are contained in Articles 54 and 74. In the said provisions, however, the principle of equal suffrage (see Chapter III) is missing. Conditions relating to the right to vote and the right to stand as a candidate are also contained in Chapter III of the Constitution.

Freedom of association

68. Article 34 protects the freedom “to establish political parties, trade unions and associations” adding that the law shall stipulate the establishment procedures and specifying the undertakings to be made for the exercise of this freedom. Lastly, it lays down an obligation for political parties, trade unions and associations to respect the Constitution, the law and financial transparency and to reject violence. We would point out that this Article should also include the principle of proportionality and necessity in a democratic society and comply with international standards with regard to the permitted restrictions.

The right to organise and to strike

69. Article 35 protects the right to organise, which corresponds to the right of everyone to “join trade unions for the protection of his interests” guaranteed in Article 22 ICCPR.

70. It also protects the right to strike; this right is an independent right guaranteed by Article 8 of the International Covenant on Economic, Social and Cultural Rights, provided that it is exercised in conformity with the law. There should therefore be a provision relating specifically to the right to strike.

Freedom of assembly

71. Article 36 protects the freedom of assembly and peaceful demonstration, in accordance with the procedural requirements provided for in law; but such requirements must not infringe the substance of this freedom. It should be pointed out in relation to this Article that there is a need to add the principle of proportionality and necessity in a democratic society and to comply with international standards in relation to the permitted restrictions.

Health

72. Article 37 proclaims the right to health for every human being and sets out the obligations of the state with regard to the quality and accessibility of the national health system. This article does not require any particular comment.

Employment

73. Article 39 stipulates the right of every citizen to work and the obligation placed on the state to take the necessary measures to guarantee this right in fair and decent conditions. This article could be supplemented by the right to freely choose one's profession or occupation, as is the case in certain European constitutions such as the Constitutions of Germany, Poland, the Czech Republic and Croatia.

The right to property

74. Article 40 recognises the right to property, including intellectual property, stating that this right shall be exercised within the limits of the law. There would appear to be a need to add guarantees in the event of expropriation.

The rights to culture, sport, water and a healthy environment

75. Articles 41, 42, 43 and 44 do not require any particular comment.

Protection of children

76. The wording of Article 46 could be brought closer to that of the International Convention on the Rights of the Child, expressing not only children's rights, but also more clearly the respective obligations of parents and the state.

Unprotected rights

77. Lastly, there are certain fundamental rights that are protected by international instruments which do not appear in the draft Constitution under examination: the right to respect for family life (Article 17 ICCPR; a general principle obliges the state merely to ensure protection of the family), the prohibition of slavery, servitude and forced labour (Article 8 ICCPR); the principle of *ne bis in idem* (Article 14 §7 ICCPR). This gap should be filled.

CHAPTER III: THE LEGISLATURE

**J-C Colliard
M. Frendo
J-C Scholsem**

Political system

78. The draft Constitution of 1 June 2013 provides for a semi-presidential parliamentary system in Tunisia. The system is undoubtedly parliamentary in that there is a head of government (Prime Minister), appointed in accordance with the results of the parliamentary elections (Article 88) and accountable to the Assembly of People's Representatives. But there is also a President of the Republic, elected by universal direct suffrage, who retains significant political powers, in addition to his or her representative and symbolic function and the tasks traditionally associated with a head of state (granting pardons and bestowing decorations).

79. There is nothing to indicate the order in which the presidential elections and the parliamentary elections take place, if they are not held at the same time. If the presidential election precedes the parliamentary election, it cannot be ruled out that there would not be a form of "presidentialisation" and bipolarisation as can happen in France. The aim of the parliamentary elections would be to give the President a parliamentary majority. Everything depends on the political context and the personalities in the first elections. However, this scenario seems somewhat improbable. First of all, the death or resignation of the President would break this sequence of elections. Second, the President of the Tunisian Republic does not have the discretionary right of dissolution available to the French President (Article 12 of the Constitution of the Fifth Republic) and the Portuguese President (Article 195.2 of the Portuguese Constitution). The President may dissolve parliament only in the very specific case of a failure to form a government (Article 88 of the draft).

80. There are provisions relating to the resolution by the Constitutional Court of disputes concerning the powers of the President of the Republic and the Prime Minister (Article 99).

81. The chapter on the Legislature precedes that on the Executive, which is divided into two parts, the President of the Republic and the government. This further substantiates the parliamentary nature of the system.

The legislature

82. Article 49 provides for the exercise of legislative power by the Assembly, and also by referendum, with this general provision being illustrated by Article 81 specifying the cases in which a referendum may be held: in certain areas, the President may, instead of requesting a new reading of a bill passed by the Assembly, submit the bill in question to a referendum (see § 119).

83. Article 51 establishes the administrative and financial independence of the Assembly of People's Representatives within the framework of the state budget. This means that the Assembly will be able to adopt its budget and recruit and manage its staff independently of the executive. It would be useful to indicate this explicitly. The first and third paragraphs of Article 51 appear slightly redundant. If the Assembly already enjoys financial independence, since it votes on its budget (paragraph 1) what is the advantage in repeating that the state (not further specified) will provide the "human and material resources necessary to enable every member to perform his or her duties properly" (paragraph 3)?

84. One may wonder about the difference in wording between Article 52 ("who is not covered by any statutory disqualifications") and Article 53 ("meets the requirements specified by electoral law"). The former, referring to eligibility, is preferable by far. The Constitution should itself lay down the basic conditions regarding the electorate, and leave it to the law to specify possible exceptions (for example, in the event of civil disability). Article 52 lays down a

requirement of 10 years of Tunisian nationality to be eligible for election to the Assembly. There does not appear to be any qualifying period of time in order to vote and this distortion may be a source of discontent.

85. Article 54 establishes the principle of “free, fair, transparent, direct and secret universal suffrage”. These principles correspond to the European constitutional heritage, but the principle of equal suffrage is missing.³

86. Under the terms of Article 55, the Assembly of People’s Representatives is elected for a five-year term. The President is also elected for five years (Article 74). It may be important for the dynamics of the regime to know which election takes place first. Article 55 provides for elections to the Assembly during the last 60 days of the parliamentary term. It says nothing about any time-frames in the event of dissolution. Should one take the view that the starting point for the 60-days period is therefore the dissolution decree?

87. Article 56 provides that the ordinary session shall begin “in the month of October” and end “in the month of July”, without any other indication. Following the elections, the request for convocation must come from the Speaker of the outgoing Assembly. What happens in the event of the latter’s death, lack of goodwill or any other impediment? Would it not be better to stipulate a maximum period of time to convene the Assembly once the results of the elections had been announced? Article 56 also provides for the possibility of extraordinary sessions at the request of the President, Prime Minister or a third of the Assembly’s members. This is a very small number; it should perhaps be stipulated that this may occur only once in the recess period.

88. In Article 57, only a religious oath is provided for. There should be provision for an alternative, non-religious formula, in order to comply with Article 20 which guarantees equality of all citizens.

89. The concept of the commissions of inquiry, in Article 58, third paragraph, which “all authorities shall assist (...) in the performance of their duties”, is particularly weak and restrictive. In comparative law, the powers of commissions of enquiry go much further: generally they can avail themselves of all the powers assigned to investigating judges.

90. Recognition of the opposition in Article 59 is to be welcomed, although its rights are not very extensive. But how is the opposition defined? It should not be limited to belonging to a particular political party. Useful criteria could be the fact of having voted against the investiture of the government or the budget. Thought should also be given to situations in which a member of parliament is quite simply in disagreement with a decision or with draft legislation.

91. Under the terms of Article 61, government bills may be introduced by the President or the head of the executive. No doubt this is the result of a compromise, but is it logical? Draft legislation is typically a way in which the executive can implement its political and legislative programme. Furthermore, one should not overlook the fact that all draft legislation must be discussed in the Council of Ministers (Article 92, final paragraph). This doubtless also applies to draft legislation introduced by the President. Government bills take precedence over private members’ bills. But how is the priority determined between bills introduced by the President and those introduced by the Prime Minister? Would it not be advisable to limit the President’s right of legislative initiative to the specific areas belonging to his/her reserved field of competence?

92. Article 64 follows the French approach: regulatory power is general and residual (Article 64, last paragraph). The area of the law is specified. In this area, a distinction must be made between ordinary laws (Article 64, 1st paragraph, 15 bullet points) and institutional laws (Article 64, 2nd paragraph, 14 bullet points). The arrangements for the passing of these two categories are quite distinct (Article 63). Therefore, one must not only define the area of the law, but also decide whether it is an ordinary law or an institutional law. Normally, interpretation should give

³ Venice Commission, Code of good practice in electoral matters, CDL-AD(2002)023rev

precedence to ordinary laws, as institutional laws are a sort of exception, but it would be better for this rule of interpretation to be written down. For example, a distinction should be made between the proceedings before the various categories of courts (ordinary law: Article 64, first paragraph, 4th bullet point) and the organisation of the judiciary (institutional law: Article 64, second paragraph, 2nd bullet point).

93. There is some uncertainty regarding the approval and ratification of treaties. Ordinary law provides for “arrangements governing ratification of international treaties”; institutional law, the “approval of treaties”. Does this mean all treaties or only those which, under Article 66, must be approved? This second solution is preferable by far and Article 64 should refer, on this point, to Article 66 which specifies the treaties subject to the approval of the Assembly of People’s Representatives. Article 66 concludes by saying “treaties shall come into force only after being ratified”. In addition, Article 76 assigns the authority – which is quite natural – to the head of state to ratify treaties. Is one to conclude that approval by the Assembly equates to authorisation to ratify by the President? This could be clarified.

94. Constant judicial review by the Constitutional Court is imperative to ensure that the law does not encroach upon the area of regulatory power and to determine the type of law that is in question. Furthermore, Article 64 concludes by saying “general regulatory power may be used for matters not covered by the parliamentary legislative sphere”. The word “may” would appear to indicate that this is merely a possibility and that therefore the law may intervene in an area for which it has no jurisdiction. It would therefore be better to say “shall be used” instead of “may be used”.

95. Taxes fall conventionally under the ambit of ordinary law (Article 64, 1st paragraph, 7th bullet point), but a rare and potentially dangerous exception authorises delegations to the Prime Minister in pursuance of finance and tax laws.

96. Everything relating to human rights and freedoms falls under the ambit of institutional law (Article 64, 2nd paragraph, 10th bullet point). No doubt this provision is motivated by the best intentions, but there are question marks as to whether it is realistic. Human rights and freedoms are not a separate sector, a watertight category. Every law has the potential to interfere with these fundamental rights. One only has to think of criminal procedure, regulated by ordinary law (Article 64, 1st paragraph, 4th bullet point), which nevertheless involves the most fundamental of human rights, freedom and security.

97. A further question relates to whether or not the list of institutional laws is exhaustive. As a matter of principle, it should be complete. However, Article 65 refers to the institutional law which lays down the principles of the budget, not referred to in Article 64.

98. Under the terms of the last paragraph of Article 65, “if the Finance Bill has not been passed by 31 December, it can be implemented in renewable quarterly instalments, by government decree”. As this system is not limited in time, the government has a large margin of manoeuvre.

99. Under the terms of Article 67, parliamentary immunity relating to parliamentary duties (opinions and votes) applies only during a member’s term of office. We believe that it should be perpetual and final, as for example in France and Belgium.⁴

100. Article 69 sets out the procedure for legislative decrees. This article makes a distinction between two situations: cases where the Assembly is dissolved or in recess and no enabling Act is required, and other cases where there is a need for an enabling Act passed by a three-fifths majority. This procedure presents a risk of abuse by the government. The first situation is the most worrying. When the Assembly is in recess (in August and September), parliament may be convened in extraordinary session at the request of the President of the Republic or the Prime Minister or at the request of one third of its members (Article 56, 3rd paragraph). This leaves the relatively short period in the event of dissolution, but this is a particularly intense

⁴ However, a Venice Commission study would appear to accept this less protective formula (CDL-INF(1996)007).

electoral period. Furthermore, Article 69 excludes the electoral system from legislative decrees. It would therefore be prudent to eliminate this situation by providing that the former Assembly remains in function until the opening of the first session of the new Assembly or a very few days before that date. The second situation requires an enabling Act passed “for a specified reason” by a three-fifths majority, which constitutes a guarantee. It would nevertheless be useful, in the second paragraph, to specify that it is the “period in question”, which does not seem to correspond to the situations in the first paragraph in which the Assembly cannot vote, as it is not sitting.

CHAPTER IV: THE EXECUTIVE

SECTION ONE: THE PRESIDENT OF THE REPUBLIC

J-C. Colliard
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101. The President of the Republic is the “head of state. He or she shall embody its unity, guarantee its independence and continuity and ensure compliance with the Constitution” (Article 71).

102. The President of the Republic is the only person who must be of the Muslim faith. The 1959 Constitution, in addition to requiring in Article 40 that candidates to the presidency must be of the Muslim faith, stipulates in Article 38 that “The President of the Republic is the Head of State. His religion shall be Islam”. However, we would point out that the draft Constitution clearly proclaims the civil nature of the state (Preamble, Article 2), the equal rights and duties of all citizens (Preamble, Article 20) and the principles of impartiality and equality on the part of the public administration (Article 14). The exclusion of any candidate who is not of the Muslim faith does not tie in well with those provisions.

103. In order to be elected President, there is a requirement to be Tunisian by birth, not to have any other nationality on the date nomination papers are submitted and to be at least 40 years of age and no more than 75 years of age (Article 73). The second age condition is not usual; it was, however, also provided for in the 1959 Constitution (Article 40.2).

104. The candidacy conditions are very vague: “a given number of members”; the text does of course state that more precise details will be given by the electoral law, but the importance of the subject – the list of candidatures will obviously influence the result – would no doubt justify greater clarity on this point in the Constitution.

105. The President is elected for a five-year term in a two-round ballot (if no candidate achieves an absolute majority in the first round) (Article 74). The provisions on the postponement of the elections if a candidate dies or is unable otherwise to continue the candidacy are not very clear: for the first round, would it be necessary to postpone the elections if a “minor candidate” was prevented from continuing and would it not be better to leave it to the Constitutional Court to decide whether or not the election should be postponed?

106. For the second round, the wording is unacceptable: the candidate with the next largest number of votes may have a very different political affiliation than the candidate he or she is replacing and a very large proportion of public opinion could find itself without a candidate representing its views. In the event of a candidate in the second round dying or being unable to continue, it is essential for the whole process to start again.

107. The last paragraph of Article 74 provides that no one may hold office as President of the Republic for more than two complete terms, whether successive or separate. The number and duration of presidential terms, in terms of being increased, cannot be the subject of any constitutional revision (Article 141, see Chapter VIII). There is no doubt that these provisions are to be welcomed as they seek to moderate the negative consequences which could arise for democracy if the same person occupied the presidency over an excessive period.

108. As a guarantee of his or her “impartiality”, the President may not combine his or her office with any party responsibilities (Article 75, 2nd paragraph). This prohibition will no doubt be very difficult to monitor, as the President could always act underhand or in a roundabout way.

109. The President has a sort of reserved field of competence regarding defence, foreign relations and national security (Article 76, 1st paragraph).

110. He or she chairs the National Security Council (Article 76, 2nd paragraph, 2nd bullet point). He or she is commander-in-chief of the armed forces (Article 76, 2nd paragraph, 3rd bullet point), declares war (following approval by a majority of three fifths of the Assembly of People's Representatives) and sends forces abroad (with the consent of the Prime Minister and the Speaker of the Assembly of People's Representatives).⁵ The President also ratifies treaties (Article 76, 2nd paragraph, 6th bullet point).

111. The President makes senior public, military, diplomatic and national security appointments, but the relevant parliamentary committee retains a potential right of veto (Article 77, 1st paragraph, 3rd bullet point): this intervention of the Assembly is to be welcomed. Ideally, there should be an indication of at least some of these senior positions.

112. The President has the power to "appoint and dismiss the Mufti": this provision does not tie in well with the civil nature of the state (Preamble and Article 2). In a civil state, the state should have a neutral and impartial organisational role regarding the practice of religions, faiths and beliefs; this role helps ensure public order, religious peace and tolerance in a democratic society. The state should respect the independence of religious communities.

113. The appointment of the Minister of Foreign Affairs and the Minister of Defence must be made in consultation with the President (Article 88, 1st paragraph).

114. The President chairs meetings of the Council of Ministers in the fields for which he or she is responsible (Article 92, 3rd paragraph). He or she may also attend the other meetings of the Council of Ministers, in which case he or she chairs them (Article 92, 3rd paragraph). No limit would appear to be placed on the President's attendance at (and consequently chairing of) these "other meetings"; this is clearly a step towards presidentialisation and could be a source of abuse and of conflicts between the President and the Prime Minister. It would therefore be desirable to limit the President's attendance at meetings of the Council of Ministers outside the specific fields of competence of the President, to exceptional cases.

115. No act by the President is subject to ministerial countersignature. Any counterweight there is comes from the Assembly of People's Representatives.

116. The President also has the right to take exceptional measures "in the event of imminent danger threatening the nation's institutions, security or independence and impeding the proper functioning of the public authorities" (Article 79). This provision would appear to be inspired by Article 16 of the French Constitution. Nonetheless, these exceptional powers appear to be well regulated by the text, politically through the action of the Assembly and legally through the intervention of the Constitutional Court. This provision is to be welcomed.

117. However, there is no reference to the possibility of and conditions for exceptions to the rights and freedoms guaranteed in Chapter II in a situation equating to a "public emergency which threatens the life of the nation" (see Article 4 ICCPR).

118. The President also takes action in the legislative procedure. First of all, he or she has a right of initiative (Article 61, 1st paragraph, see § 86). He or she may refer any government bill to the Constitutional Court (Article 117, 1st paragraph, 1st bullet point). He or she may request a second reading of bills (with the exception of finance bills and Constitutional bills) within a period of 10 days from the forwarding of the bill by the Speaker of the Assembly of People's Representatives (Article 80, 2nd paragraph), and the bill must then be passed by an absolute majority of the members of the Assembly (and not merely a majority of members present). If the bill is passed by an absolute majority of the members of the Assembly, the President must promulgate it. In other terms, the President has the power to demand for any law the majority required for institutional acts.

⁵ However, the Assembly must meet to consider the matter within a period of no more than 60 days (Article 76, 2nd paragraph, 4th bullet point)

119. In addition, “in exceptional circumstances”, the President may put to a referendum certain texts adopted by the Assembly relating to human rights, freedoms or personal status (Article 81). The translation does not make it clear if it is only the treaties relating to these subjects which can be put to a referendum or if bills may also be put to a referendum. This verification by the people is not in itself something to be criticised, provided that the President does not make excessive use of this possibility. In this regard, the only limit is the expression “in exceptional circumstances” in Article 81 which has no regulatory scope.

120. If the President is unable temporarily to discharge his or her duties, he or she may delegate his or her powers to the Prime Minister for a period not exceeding 30 days, renewable only once (Article 82). If the delegation of authority is impossible, the Constitutional Court must immediately confirm the temporary vacancy and confer upon the Prime Minister the functions of the Presidency for a period not exceeding 60 days. If the vacancy period exceeds 60 days or if the President tenders his or her resignation, the Speaker of the Assembly of People’s Representatives shall be vested with the functions of the Presidency (Article 83). There is therefore some discrepancy in the rules for replacing the President, depending on whether or not the temporary vacancy exceeds 60 days. On the face of it, this discrepancy does not seem necessary.

121. The President is also involved in the formation of the government and can, in this context, exercise the right of dissolution (see § 126).

122. The President also exercises other powers, in particular with regard to the courts. He or she appoints judges, with the assent of the Supreme Judicial Council (Article 103).

123. The President is also involved, along with the Speaker of the Assembly of People’s Representatives, the Prime Minister and the Supreme Judicial Council, in other words with 25% responsibility, in nominating candidates for the Constitutional Court (Article 115). Nonetheless, the appointment is the responsibility of the Assembly, by a three-fifths majority.

124. The President also plays a major role in the process of revising the Constitution, to the exclusion of the Prime Minister (see Chapter V Part II).

125. The powers of the President are therefore far from negligible. He or she cannot be seen as a mere ceremonial president or a “neutral” arbiter. He or she is vested with significant political powers, but the underlying idea seems to be the following: these powers are limited to what is essential. In this respect, he or she has a reserved field of competence regarding defence, security and external relations. He or she chairs the Council of Ministers on these matters (optional for other meetings of the Council of Ministers). He or she can initiate laws, together with the Prime Minister and can, unlike the Prime Minister, refer bills to the Constitutional Court. He or she may request a second reading of bills, which entails an obligation to obtain the absolute majority of the members of the Assembly. He or she can in “exceptional” cases request a referendum on certain texts. Lastly, he or she may use the referendum with regard to revision of the Constitution.

126. These powers are such that a dismissal procedure has been provided for in the event of manifest violation of the Constitution. This procedure is very cumbersome: the initiative must be taken by a majority of the members of the Assembly and then confirmed by a two-thirds majority. It is the Constitutional Court which has final decision on the matter (Article 87). In addition to this quite exceptional procedure, the Constitutional Court will have a key role in resolving conflicts of competence between the President and the Prime Minister. Such disputes must be settled within one week (Article 99). The intervention of the Constitutional Court to settle such disputes is to be welcomed. The composition and the impartiality of this Constitutional Court are therefore essential for the harmonious functioning of the regime.

127. Article 86 provides for immunity for the President for the duration of his or her term of office, which is indeed desirable. But in providing that the President may not be prosecuted for acts undertaken in the course of his or her duties, which is quite normal, this is in contradiction

with Article 87 which provides for the possibility of criminal prosecution in the event of dismissal: the fact is that such dismissal would probably be related to the exercise of his or her duties. These two articles should therefore be harmonised, for example by stating in Article 86: "Subject to the provisions of Article 87, proceedings cannot be brought against the President of the Republic...".

SECTION TWO: THE GOVERNMENT

J-C. Colliard
M. Frendo
J-C. Scholsem

128. The formation, structure and powers of the government are much more conventional and require only a few comments.

129. The formation of the government is regulated in detail by Article 88. The wording for the appointment of the Prime Minister is very satisfactory. The choice of the candidate of the main parties is occasionally a constitutional rule (in Greece for example), and is, in any event, a practice very broadly observed in the majority of the Council of Europe member states. The involvement of the President of the Republic in the choice of ministers with regard to his or her main fields of competence (foreign affairs and defence) is a wise one in order to prevent any conflicts.

130. The intervention of the President is closely regulated. However, if Tunisia were to experience numerous ministerial crises, the powers of the President, albeit regulated, would exert considerable influence.

131. If, within four months of the appointment of the first candidate for Prime Minister, the government does not obtain a vote of confidence, the President may decide to dissolve the Assembly of People's Representatives (Article 88, 4th paragraph). This is the only case of dissolution available to the President of the Republic

132. "The Prime Minister shall decide general state policy and ensure its implementation" (Article 90). This is a conventional formulation, but must be read in the light of the powers conferred upon the President which, with rare exceptions, do not require the agreement of the Prime Minister.

133. The last paragraph of Article 91 is problematical: if the Prime Minister is temporarily unable to discharge his or her duties, "he or she shall delegate his or her authority to one of his or her ministers". However, this inability may result from a situation preventing him or her from taking a decision (ill health for example). It would therefore be better to make provision for a more precise solution, and indicate explicitly that the replacement would be the highest ranking minister, for example.

134. It is the motion of constructive censure, based on the German model, which has been opted for to organise the accountability of the government before the Assembly (Article 96). The vote must be passed by an absolute majority of the members of the Assembly, and must also include the replacement for the Prime Minister. This replacement will then be instructed by the President of the Republic to form a new government (Article 96, 2nd paragraph).

135. This system should result in a degree of stability. However, nothing is provided for in the event that the government no longer has a majority to pass its bills (including the finance bill), and where no positive alternative majority emerges to provide the name of a replacement. In other words, what would happen if the majority in place were to break apart and no other majority emerged putting forward a new candidate for the position of Prime Minister? The Constitution does not appear to offer a solution to break out of this impasse and, in contrast, excludes the possibility of presenting a new motion of censure for six months. This means that

for an excessively long period, the government does not have the requisite legitimacy. The final solution should be to organise new elections.

136. The system provided for in the draft is also such as to give the Prime Minister significant authority over his or her ministers: it is the Prime Minister who appoints ministers (in consultation with the President in the case of the Minister of Foreign Affairs and the Minister of Defence) (Article 88, 1st paragraph). It is also the Prime Minister who dismisses them and receives their resignation (Article 91, 1st paragraph, 2nd bullet point).

137. Article 96 however re-establishes the individual liability of ministers. While this has the advantage of avoiding a transfer to criminal liability, this system of dual accountability (with regard to the Prime Minister and the Assembly) should not undermine the cohesion of the governmental team. Nor should the Assembly be paralysed by the multiplication of requests targeting ministers, one after the other.

CHAPTER V: THE JUDICIARY

J. de Guillenchmidt
G. Neppi Modona

138. This chapter is divided into two parts: (1) judicial, administrative and financial courts; and (2) the Constitutional Court. They are preceded by introductory provisions applying to both parts.

139. These introductory provisions comprise three articles (100 to 102). Article 100 sets out the principle of the independence of the judiciary – this principle is also set out in the Preamble and justice features in the motto of the Tunisian Republic (Article 4) – which guarantees the delivery of justice, the supremacy of the Constitution, the rule of law and the protection of rights and freedoms. It could be further clarified that the judiciary shall be independent “of the legislative and executive and any other power”. The independence of judges is confirmed in so far as they are subject, in the performance of their duties, solely to the Constitution and the law. This wording, which guarantees independence both external (from the executive and legislative) and internal (from any undue interference, pressure, recommendation or instruction from within the judiciary), is to be welcomed.

140. In order to further strengthen the principle of internal independence, consideration could be given to adding the principle of the equality of all judges (with judges being differentiated only by their functions) which is an obstacle to the hierarchical organisation of the judiciary, typical of authoritarian regimes.

141. Article 101 stipulates that “judges shall have competence” which at first sight seems axiomatic and is something not usually found in constitutional texts, unless one relates this principle to that of “lawful judge”, whereby every citizen must be judged by the court whose jurisdiction to deal with the matter in question has been previously established by law.

142. The recognition of the obligation of impartiality, fairness and accountability in the judges’ performance of their duties is to be welcomed.

143. Lastly, Article 102 introduces judicial immunity for judges, who cannot be prosecuted or arrested unless their immunity has been withdrawn. This would appear to be too broad: Judges indeed do need to be protected from civil prosecution for acts committed in good faith in the performance of their duties. However, they should not enjoy general immunity protecting them from all prosecution for any criminal acts they may have committed, and for which they must be accountable before the courts.⁶ Judges should therefore benefit from an exclusively functional immunity. Article 102 does not specify the body which could withdraw immunity. According to the following sentence, it is only in cases of arrest in flagrante delicto that the Judicial Council will decide on an application to withdraw immunity. Its jurisdiction could logically be extended to all requests for withdrawing immunity, with the intervention of an independent body being a guarantee for judges that there would be no instrumentalisation of the withdrawal of immunity. An alternative approach could be for immunity to be granted by the Judicial Council on a case-by-case basis.

144. The principle of the irremovability of judges is explicitly set out in Article 104, which is to be welcomed;⁷ this could also have been included in the general principles relating to the judiciary.

⁶ Report on the independence of the judicial system – Part I: the independence of judges, CDL-AD(2010)004, §60.

⁷ Report on the independence of the judicial system – Part I: the independence of judges, CDL-AD(2010)004 §43.

PART I – JUDICIAL, ADMINISTRATIVE AND FINANCIAL COURTS

145. The provisions common to these three types of courts first of all relate to the status of the judges comprising those courts:

- appointment of judges by presidential decree with the assent of the Supreme Judicial Council (SJC)
- the fact that they may not be transferred without their consent
- the competence of the SJC for disciplinary matters

146. These principles are in keeping with those generally in force in democracies where the judiciary is independent and are to be welcomed. The principle of the non-transferability of judges could be augmented by a guaranteed position until the statutory retirement age.⁸

147. Article 105 sets out the principle of the right to a fair hearing within a reasonable time, the equality of all court users in the eyes of the law, the principle that court hearings shall be public unless otherwise provided for in legislation, and the principle of legal aid for the most underprivileged. The reference to a “fair hearing” is a welcome allusion to Article 6 of the European Convention on Human Rights.

148. “The right to take part in court proceedings and the rights of the defence” are asserted. These rights of the defence are based on the principle of adversarial proceedings and the balance of rights between parties. They are the cornerstone of a fair hearing and presuppose, for example, the reciprocal communication of evidence and arguments. Accordingly, the Tunisian Constitution complies with a principle to be found in all democracies and which is constitutionally guaranteed. However, it is a matter of regret that the right to a fair hearing before an independent and impartial court is not enshrined as a fundamental right in Chapter II of the draft Constitution (see Chapter II).

149. Articles 106 and 108 set out principles which are not normally found in constitutions but which are to be welcomed as they constitute significant guarantees for the external independence of judges: the prohibition of all interference in the functioning of justice and the prohibition of failure to enforce court judgements or impeding their enforcement. It will be for ordinary law to determine the corresponding offences.

150. The establishment of special courts and the introduction of exceptional procedures would not appear to be prohibited unless they violate the principles of a fair trial. This principle should not prevent the Assembly of People’s Representatives from approving the setting up of specialist courts in certain types of disputes, such as in the field of labour law. The establishment of such courts or procedures is limited by the obligation to comply with the principles of a fair hearing.

SECTION ONE: SUPREME JUDICIAL COUNCIL

151. A specific section (Articles 109 to 111) is devoted to the Supreme Judicial Council, which is to be welcomed as an expression of the Tunisian Constitution’s commitment to assigning supervision of the judicial system to an independent body composed largely of judges elected by their peers.

152. The SJC consists of four bodies (Article 109): three sub-bodies specialising in the judiciary, administrative justice and financial justice, and the “Judicial Councils Commission”. It is not clear if this is a separate body, or whether it refers to the plenary session of the three judicial councils. This point should be clarified. Furthermore, if the sole responsibility of the Judicial Councils Commission was to give its opinion on draft laws submitted to it, it would be of little consequence and could possibly be abolished.

⁸ Report on the independence of the judicial system – Part I: the independence of judges, CDL-AD(2010)004, §§39-43.

153. Article 109 of the Constitution sets forth the rules common to these four bodies, relating to their composition, the status of their members and their powers. These councils comprise an equal number of judges and non-judges. Half of the judges are elected and half are appointed, the non-judges are appointed. The Chair of the SJC is elected by its members from among the most senior judges.

154. Legislative delegation is very broad: it is for the legislature to determine the appointment authorities and specify the arrangements for the election of the elected members. The Constitution itself should lay down these rules, intimately linked to the conditions inherent in the constitutional principle of the independence of justice. The appointment of members of the SJC could be assigned to several authorities; any appointment by parliament should be made by a two-thirds majority.

155. The number of appointed members is much higher than the number of elected judges since non-elected members will represent three quarters of the Council, which raises a problem regarding the independence of this Council. Furthermore, the Chair, elected by members of the Council, which in itself is positive, must be chosen from "among those of its members having the status of senior judges". Provision could, in contrast, be made for a non-judge to chair the SJC in order to avoid any risk of corporatist management. In any event, there should be provision for the election to be carried out by a two-thirds majority.

156. The terms of reference of this Chair are not specified, whereas each of the constituent bodies of the SJC has its own Chair. Are these Chairs hierarchically subordinate to the Chair of the SJC? While there is reference to the law for the remit of each of these bodies, their composition, organisation and rules of procedure (as we have stated above, there is an insufficiently regulated delegation), there is no such reference to the law with regard to the Chair. The link between his or her role and that of the Chairs of the constituent bodies of the SJC should be specified in the Constitution.

157. The principle of financial and administrative independence (Article 110) is to be welcomed. It is important, for its independence, that it is the Council in itself which defends its budget before parliament.

158. The wording "the three councils shall have jurisdiction in disciplinary and career matters relating to judges" is too general. The Constitution should specify all the competencies of the SJC: appointments, assignments, transfers, promotions, dismissals and all decisions regarding the status of judges. Should the councils always sit in plenary, will there be special commission to deal with disciplinary matters (comprising a majority of judges for example)?

159. In contrast, the provision regarding the annual report, which is clearly useful, could appear in an institutional act.

SECTION TWO: THE JUDICIARY

160. Article 112 regulates the (ordinary) judiciary. It provides that “the prosecution service shall form part of the judiciary and shall enjoy the same safeguards.” These guarantees are therefore those set out in Article 104, foremost of which is non-transferability. Tunisia has therefore opted for an independent prosecution service, having no hierarchical link with any other body. However, it is stated that “public prosecutors shall discharge their duties in accordance with state prosecution policy in compliance with the procedures laid down in law.” This would imply that they must apply the directives of general criminal policy adopted by the government and that they receive only general instructions and not particular instructions relating to a given case. This approach does not require any particular comment.

161. For the annual Court of Cassation report, the same remark as for the annual SJC report may be made: a law is sufficient.

162. The last paragraph of Article 112 provides that “the law shall specify the organisation of the judiciary, its powers, procedures and the rules governing its members.” This provision should be harmonised with Article 64 of the Constitution which states that the “organisation of the courts and the judiciary” shall be specified in an institutional act.

SECTION THREE: THE ADMINISTRATIVE JUDICIARY

163. Article 113 regulates the administrative judiciary. The same comments as for the judiciary may be made: the annual report should not be mentioned by the Constitution, the rules governing the status of judges should be specified in an institutional act. The wording “[the administrative judiciary] shall act in an advisory capacity in accordance with the law” requires no particular comment other than this advisory function in dualist regimes is reserved exclusively for the highest administrative court (in France, the Conseil d’Etat); if this is the intention of the authors of the Constitution, this should be specified. It would be helpful if the Constitution provided that conflicts of competence between the administrative judiciary and the judicial judiciary were settled by a joint body under conditions stipulated in an institutional act.

SECTION FOUR: THE FINANCIAL JUDICIARY

164. Article 114 on the financial judiciary requires no particular comment, other than that it should be an institutional law and not an ordinary law that should specify the status of the judges of the court.

PART II – THE CONSTITUTIONAL COURT

165. The creation of an independent Constitutional Court in Tunisia is to be welcomed.

Composition

166. The Constitutional Court comprises 12 members chosen from among competent persons having at least 15 years’ experience, two thirds of whom shall be law specialists. The wording “law specialists” is vague. For greater precision, the Constitution could specify professional categories: judges, lawyers, law professors, for example. The two-thirds proportion is satisfactory.

167. The Assembly of People’s Representatives elects the 12 members from among the proposed candidates, six of whom are submitted by each of the President of the Republic, the Speaker of the Assembly of People’s Representatives, the Prime Minister and the SJC, making a total of 24. The Assembly of People’s Representatives elects the 12 members of the Court, three from each of the six members presented by each nominating authority. This leaves a certain margin of appreciation for the Assembly which is to be welcomed.

168. The majority is set at three fifths which, in principle, should make for consensus between the majority and the opposition. However, if “the requisite majority is not obtained, a further vote shall be held to elect the remaining candidates by the same majority. If the necessary majority is not obtained, fresh candidates shall be nominated and a new election held using the same method.” This complex arrangement could lead to an impasse if members of the majority and the opposition are unable to reach agreement. States which practice this type of appointment have experienced such situations, Spain being one example.

169. In any event, it would be useful for the Constitution to provide that the members in place remain in post until the election of their replacements, as is the case in Spain. The Constitutional Court must always be in a position to deliver judgments.

170. The election of the president and vice president by members of the Court does not pose any problem in itself. The Constitution should, however, specify whether this election is for nine years or for each three-year period.

Powers

171. The Constitution establishes *ex ante* and *a posteriori* review.

Ex ante review

172. The Constitution distinguishes between government bills and constitution bills. The term “bills” probably indicates laws that have been passed but not yet promulgated.

173. It is only the President of the Republic who may refer government bills to the Court prior to promulgation.

174. There is also provision for review of proposed amendments to the Constitution tabled by members of the Assembly of People’s Representatives. The Speaker of the Assembly is obliged to submit them to the Constitutional Court for opinion so that, in compliance with Article 142 of the Constitution, it can be verified that the amendments do not affect any matter whose revision is prohibited by the Constitution in Article 141, namely “Islam as the state religion; Arabic as the official language; the republican form of government; the civil nature of the state; existing human rights and freedoms guaranteed under the Constitution; and the number and duration of presidential terms, which may not be increased.” (See Chapter VIII). This review which is similar to that carried out by the French Conseil d’Etat of all draft legislation prior to their being passed in the Council of Ministers is, in itself, a useful provision. The proposed amendments can be submitted to the Court by the Speaker of the Assembly for verification of compliance with the procedural rules.

175. These provisions warrant a number of observations. First of all, the fact that only the President of the Republic may refer laws to the Court for *ex ante* review is too narrow and should be extended to a given percentage, specified in the Constitution, of members of the Assembly of People’s Representatives, or to the Prime Minister. The main advantage of this would be to enable the opposition of the moment to ensure the immediate verification of the constitutionality of a law it has opposed, reduce political argument and help ensure greater acceptance of the law by those who had opposed it in the course of parliamentary debate.

176. While the introduction of reviewing laws amending the Constitution is to be welcomed, it is a matter of regret that referral to the Court falls solely to the Speaker of the Assembly of People’s Representatives, whether it concerns a substantive *ex ante* review for opinion of proposed amendments or examination of draft amendments to ensure compliance with the rules of procedure. In this area, it is indispensable that the opposition has an opportunity to refer matters to the Court: the Speaker of the Assembly who in virtually all situations will belong to the same party as the heads of the executive will rarely be inclined to refer an amending law to the Court. It is difficult to justify such a narrow scope for referral, which is even narrower than

what was available in France between 1958 and 1974, and which is no longer prevalent in any traditional democracy.

177. Lastly the Constitution should specify the time-frame within which the Court should deliver its judgment as it does with regard to a posteriori review.

A posteriori review

178. An objection of unconstitutionality is provided for in the 5th bullet point of Article 117 and in Article 120. It is submitted at the request of one of the parties to a court case, and the Court must consider only the arguments relied upon and rule on them within a period of three months which may be extended once. Under the terms of Article 120, when the Constitutional Court finds that a law is unconstitutional, its application shall be suspended.

179. The possibility for citizens to challenge the Constitutionality of a law applicable to them is clear democratic progress. However, there is no filter limiting the subjects for which a point of law may be raised, which runs the risk of overloading the Court, or indeed paralysing its operation. Ideally, the institutional law drafted for the application of procedures before the Court should contain such provisions.

180. When the Constitutional Court finds that the law is unconstitutional, its application shall be suspended “within the limits stipulated by the Court”. The word “suspended” is ambiguous: a legislative provision which violates the Constitution should be annulled and not suspended. It would appear that this term had been chosen to enable the Court to rule on the effects of annulment. For example, the Court could defer the effects of the annulled decision in order to enable the Assembly to pass a new provision, but in this case the legislative provision is indeed annulled as it is contrary to the Constitution, even though certain of its effects may remain provisionally in force. Similarly, it would be useful for the Court to rule on the effect of the declaration of unconstitutionality on trials which are ongoing, ruling out, of course, any effect on cases for which a final decision has been delivered.

Review of the rules of procedure of the Assembly of People’s Representatives

181. Lastly, the Court is required – it would appear – to state its views on the rules of procedure of the Assembly of People’s Representatives. This aspect of the Court’s terms of reference is particularly important to ensure that the Assembly does not seek, through its rules of procedure, to circumvent the constitutional rules and distort the balance of powers.

182. Finally, Article 121 provides that the rules governing the organisation of the Court, the procedures to be followed before it and the guarantees enjoyed by its members shall be specified in law: these provisions should be set out in an institutional law and not an ordinary law.

CHAPTER VI – INDEPENDENT CONSTITUTIONAL COMMISSIONS**F. Flanagan**

183. Chapter VI is devoted to the five independent constitutional commissions, competent in the fields of elections, information, human rights, sustainable development and the rights of future generations, and good governance and anti-corruption.

184. Article 122 applies to all commissions, whose aim is “to strengthen democracy”. The commissions have legal personality and enjoy financial and administrative independence, which is to be welcomed. They are elected by the Assembly of People’s Representatives to which they are accountable. The composition, organisation and supervisory procedures are stipulated in law.

185. These commissions must be independent. And it would also appear necessary for the composition of these commissions to be sufficiently diversified, i.e. in terms of competence and experience, and to reflect the composition of Tunisian society, including from the point of view of gender and regional balance.

186. The criteria mentioned are that the commissions must be “independent” (for all commissions, except the sustainable development commission), “impartial” (the human rights, information, electoral, sustainable development commissions), “competent” and comprise “upright members” (electoral, sustainable development and good governance commissions), and “experience” (information commission). It is not easy to understand why the commissions have different criteria.

187. The draft Constitution provides that the commissions “shall be elected by the Assembly of People’s Representatives”. It would appear essential to provide that the elections in question require a qualified majority. The terms of office of the members of these commissions are specified, but there is no guarantee that the reasons for any interruption to a term of office shall be provided for in law. The provision whereby the term of office of the members of these commissions is non-renewable is to be particularly noted.

188. The Information Commission is responsible for regulating and developing the information sector, which includes freedom of expression and information, the right to access information and the creation of a pluralist and fair media landscape. Accordingly, it combines the roles of regulator of the audio-visual sector (which in other countries is assigned to an independent authority) and the press and electronic media sector (which most frequently falls to professionals, under a self-regulatory structure and bodies generally called “press councils”). The Constitution should provide that the composition of this commission is such that it is able to carry out these two different roles.

CHAPTER VII – LOCAL GOVERNMENT

S. Bartole
Ch. Behrendt

General remarks

189. The chapter which the draft Constitution devotes to local government is drafted succinctly and comprises only 12 articles (128 to 139), which refer to implementing laws (such references to the law are to be found in Articles 128, 130, 132, 136, 137 and 138).

190. This way of dealing with the issue – which consists of stipulating in the Constitution only the main lines of approach and relying for the remainder on legislative implementing rules – is perfectly in keeping with the practice of numerous other Constitutions, particularly in Europe: it is not appropriate to overload the Constitution, which should remain brief.

191. In achieving such a “shared approach” between the constitutional and legislative levels, it is nonetheless important to avoid, as far as possible, too great a time lag from the point of view of *ratione temporis*: in other words, the two phases – constitutional and legislative – should coincide more or less. If this is not the case, then the constitutional provisions could be ineffective, at least as long as the legislative rules which are supposed to ensure their implementation, have not been adopted.

192. Chapter VII lays down the foundations for the recognition and protection of local self-government, which is a positive step.

Particular remarks concerning the different articles

193. Article 128 sets out the principle of the decentralisation of local government. Decentralisation “within the framework of the unity of the state” is a commitment of the state (Article 13). The Constitution does not explicitly guarantee “local self-government”, which denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.⁹ Nonetheless, legislation will be bound by the principles contained in this chapter, in particular through the designation of local authorities to which powers will be devolved and the principle of administrative independence (Article 129); the principle of local self-government is therefore implicitly guaranteed, which is to be welcomed.

194. Article 130 deals with the elections of municipal and district councils (2nd paragraph) and regional councils (3rd paragraph). The first two are elected by direct suffrage, and the third by indirect suffrage by the members of the first two.

195. With regard to the direct elections of the first two (municipal and district councils), some words have to be said about the type of electoral system that will be applied: the draft text is silent on this point. By electoral system, we mean here first-past-the-post or proportional representation, and within the proportional representation system (if that is the one that is chosen), the applicable mathematical method: there are in fact several proportional representation systems (the D'Hondt system, the Imperiali system, the Sainte-Laguë system, and many others).

196. We believe that it would be helpful to settle these major questions directly in the Constitution and not leave them to a particular law. These are certainly not questions of detail, and experience has shown that if these questions are not settled in the Constitution itself, they are likely to exert – precisely because they are set out only in legislative rules – a permanent temptation for the majority in place to change them as they see fit. In order to avoid political

⁹ European Charter of Local Self-Government, Article 3.

manoeuvring in such a sensitive area, it would be better to specify the choices made in the text of the Constitution itself: an additional sentence would be sufficient. The way in which the law will guarantee “that young people are represented” is not clear.

197. Article 131 provides for a division of powers on the basis of the principle of subsidiarity, but it no longer contains (in relation to previous versions of the draft Constitution), the principle of transfer “by means of blocks of powers”, which is regrettable because this would make for a more structured and coherent approach. The fact that local authorities shall have regulatory authority and their regulatory decisions shall be published is to be welcomed.

198. Article 132 regulates the financing of local authorities. It lays down the general rules, whereby “these resources shall be consistent with the powers granted to them by law.” This is to be welcomed. The last paragraph of this provision adds that “the financial arrangements governing local authorities shall be specified by law”. Nevertheless it would be advisable to set out the main lines of approach. In addition to the financial regime, the transfer itself should also be specified by law.

199. The importance of the law in question is clear to everyone. Local authorities will not be genuinely independent until this law has been passed: until such time, local authorities will have no legal basis to levy own taxes; they will depend, for their funding, on the goodwill of central government and its delegates. While therefore, in principle, the attention of the Tunisian drafters of the Constitution must be drawn to the value of ensuring, as far as possible, that the entry into force of the new Constitution coincides with the laws which will implement the Constitution (cf. above, general remarks), this comment is of particular importance regarding the law which will specify the general framework for the financing of local authorities.

200. Because of its importance for the effectiveness of the system put in place – and also because of the large sums the allocation of which it will regulate – such a law could, in addition, quickly become the target of all sorts of political and party political temptations. It would therefore be particularly desirable to subject any amendment of the law to particular rules, stricter than those applicable to ordinary laws (in this connection inspiration could be drawn from the arrangements for the passing of institutional acts in France, or the special laws in Belgium which require, for their enactment, a larger, two-thirds majority).

201. The principle of equity and equality in the rights and responsibilities between the regions is set out in the Preamble. Article 12 sets out the state’s objective of securing “balance between regions”. Article 133 clarifies these principles. In comparison with a previous version, this provision no longer refers to economic and social disparities, nor balanced and sustainable development, and contains fewer indications for the legislative which will be responsible for implementing this principle. The term “solidarity” used in this provision is understood to be a reference to the concept of financial equalisation which must exist between the different local authorities and which must be organised by central government.

202. Such an equalisation mechanism seeks to ensure – at least to a certain extent – a degree of solidarity between the better-off authorities and the less well-off throughout the country. While it is important for social cohesion to give a degree of independence to local life, it is just as important to avoid the emergence of excessive disparities in wealth between one authority and another: such disparities can, if blatant and persistent, undermine social cohesion in the country or give rise to population movements.

203. In this context, it is nonetheless imperative to avoid the emergence of undesirable phenomena such as solidarity mechanisms which would be so strong as to deprive the most virtuous and provident local authorities of all their efforts, to allocate the amounts thus gathered to entities whose financial difficulties are a result not of structural poverty but of mismanagement: if it is possible for a municipality to become poor by spending left, right and centre, such an approach to management does not deserve to be rewarded through a financial equalisation mechanism.

204. Article 135 provides for a posteriori review of the legality of the activities of local authorities, which is to be welcomed. Judicial review is not mentioned, while the jurisdiction of the administrative judiciary in matters of conflicts of competence is maintained (Article 139).

205. Article 136 refers to instruments of “participatory democracy” and to the principles of “open governance”, which are to be specified in law.

206. Article 137 authorises co-operation and partnerships between local authorities, including the establishment of external relations, although the possibility of joining international or regional federations of local authorities is not explicitly provided for.

207. Article 138 provides for the establishment of a Local Authorities Council; this requires no particular comment other than no provision is made for the possibility for members of this Council to communicate with the Assembly of People’s Representatives, although the Chair may be invited to attend the deliberations of the Assembly.

CHAPTER VIII – AMENDMENT OF THE CONSTITUTION

**S. Bartole
J-C. Scholsem**

208. Under the terms of Article 140, the President shares the right of initiative with the Assembly of People's Representatives, in the latter case at the initiative of one third of its members. However, amendments initiated by the President shall take precedence (Article 140).

209. Article 141 contains a list of principles which are not open to amendment. The Venice Commission has previously called for a prudent and restrictive approach to interpreting and implementing "non-amendable" provisions.¹⁰

210. The first non-amendable principle is "Islam as the state religion". This goes far beyond the wording "Islam shall be its religion" contained in Article 1 of this draft Constitution (taken from Article 1 of the 1959 Constitution) on which there would appear to be consensus in Tunisia. Islam as the "state" religion sits poorly alongside Article 2 which establishes the principle of a civil state, and the guarantees of state impartiality contained in Articles 14 and 15. Yet Article 144 stipulates that the Constitution shall be understood and interpreted as a "harmonious whole". It would therefore seem appropriate to refer here, echoing Article 1, to "Islam as the religion of Tunisia".

211. The second non-amendable principle is "Arabic as the official language"; this provision requires no particular comment.

212. The third non-amendable principle, "the republican form of government" is to be found in other Constitutions in Europe,¹¹ and requires no comment.

213. The "civil nature of the state" is also elevated to a non-amendable principle. It is expressed in the Preamble and in Article 2.

214. The fifth non-amendable principle refers to "existing human rights and freedoms guaranteed under this Constitution". This is a fairly widespread unamendability clause, whose interpretation by the Constitutional Court must take account of debates within Tunisian society.¹²

215. The last principle which is not open to amendment refers to "the number and duration of presidential terms, which may not be increased". This principle echoes the last paragraph of Article 74 which provides that "no person may hold office as President of the Republic for more than two complete terms, whether successive or separate." The duration of the President's term of office is five years. The constitutional limitation of consecutive terms of office of the President of the Republic seeks to limit the negative consequences for democracy if the same person occupied the post of President for an excessive period.¹³ Establishing this principle as a non-amendable clause is an important guarantee against any authoritarian dysfunctioning in a country, such as Tunisia, whose democratic structures and the cultural foundations of those structures have not yet been consolidated.

¹⁰ Venice Commission, Report on Constitutional amendment, CDL-AD(2010)001, §§ 225 to 237. Provisions or principles not open to amendment are to be found in the Constitutions of the following countries in Europe: Azerbaijan, Belgium, Czech Republic, Cyprus, France, Germany, Italy, Luxembourg, Moldova, Romania, Russia, Turkey and Ukraine. The Portuguese Constitution also stipulates a number of fundamental principles which cannot be modified by an amendment.

¹¹ France and Italy.

¹² Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, §§ 146 et seq.

¹³ Venice Commission, Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan, CDL-AD(2009)010, § 14.

216. The Constitutional Court is involved in the revision process in two ways: first, in order to ascertain that the proposal does not affect any matters whose amendment is prohibited (Article 142, 1st paragraph), and second, to verify that the formal procedures for amending the Constitution have been complied with (Article 117, 1st paragraph, 3rd bullet point). In such cases the initiative for referring the matter to the Constitutional Court falls exclusively to the Speaker of the Assembly of People's Representatives. For laws and treaties, it is the President of the Republic who is competent (Article 117, 1st paragraph, 1st and 4th bullet points). (See Chapter V). This difference in treatment should be justified.

217. Moreover, it is essential to enable a given number of members of the Assembly (i.e. the opposition) the possibility of referring a matter of constitutional revision to the Constitutional Court, as the Speaker of the Assembly, who in virtually all situations will belong to the same party as the heads of the executive, will rarely be inclined to bring the amending law before the Court.

218. The procedure provided for in Article 142 is, however, difficult to understand. First of all, the Constitutional Court must ascertain whether the amendment relates to matters which cannot be amended. This decision can be taken only on the basis of the finalised "constitution bill". Next, the Assembly of People's Representatives must approve "the principle of the amendment" by an absolute majority and subsequently pass the amendment by a majority of two thirds "without prejudice to Article 141" (the non-amendable clauses). The sequence of these three steps does not seem logical: the decision in principle by the Assembly should take place first of all, before the constitution bill has been finalised; it is difficult to understand otherwise why the Assembly would vote on the bill first of all, requiring an absolute majority and then a second time, with a two-thirds majority. The judicial review should take place after the decision in principle and before it is passed by the Assembly. Moreover, it should be stipulated that if the bill is substantively modified by the Assembly in the debates prior to its being passed, it should be submitted once more for review by the Constitutional Court, since if such is not the case, the authority of the Court could be circumvented.

219. The Venice Commission has previously expressed reservations regarding judicial review of the merits of constitutional amendments on the basis of "non-amendability"; the Commission believes that "non-amendable" provisions and principles should be interpreted and applied narrowly and that judicial review should be conducted with prudence and moderation, leaving a margin of appreciation to the authors of the Constitution.

220. The last paragraph of Article 142 is also not clear. The president "may put the amendment to a referendum, in which case it must be adopted by an absolute majority". The translation is ambiguous: is one to understand that when the President submits the amendment to a referendum, the absolute majority of members of the Assembly is sufficient, with the amendment then being approved by popular vote? Or is the "absolute majority" referred to rather the absolute majority of the electorate? If the same ambiguity appears in the original text, it should be clarified. Furthermore, if the absolute majority refers to the referendum, it should be specified whether this concerns the persons taking part in the referendum or the votes cast.

221. In this context, the Venice Commission has previously taken the view, on the basis of several experiences in Europe over the last 20 years, that "there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies. As a result, Constitutional amendment procedures allowing for the adoption of constitutional amendments by referendum without prior approval by parliament appear in practice often to be problematic, at least in new democracies". It should therefore be explicitly stipulated that the President of the Republic may not submit a constitutional law to referendum until it has been passed by the Assembly of People's Representatives.

CHAPTER X: TRANSITIONAL PROVISIONS

**J. de Guillenchmidt
J-C. Scholsem**

222. Article 145 provides that the Constitution shall be ratified pursuant to the provisions of Constituent Law No. 6 of 16 December 2011. Section 3 of that law provides for three stages: vote on each article requiring an absolute majority of members, then on the whole text with a majority of two thirds and if that majority is not obtained a new vote requiring the same majority is held within one month. Lastly, if the majority is still not obtained, the Constitution will be adopted by referendum. Article 142 of the draft fortunately adopts a much more straightforward process.

223. The 1st paragraph of Article 146 states that “the Constitution shall enter into force gradually through enactment of legislation complying with it; legislation currently applying shall remain in force until repealed”. The 2nd paragraph of the same article provides that “the provisions of the Constitution shall enter into force on the first day of the month following its promulgation”. These provisions are difficult to understand; one imagines that the first paragraph represents an exception to the principle established in the second (in which case they should be inverted). This first paragraph would seem to make the new Constitution depend on the good will of the legislature. No time-frame is given for the enactment of implementing laws: there needs to be a deadline laid down for the establishment of the institutions of the Republic. The question of which parts of the Constitution enter into force upon promulgation and which will require implementing legislation will not be easy to resolve.

224. The 4th paragraph provides for exceptions (and exceptions to the exceptions). In the French translation these exceptions are introduced by the word “notamment” (“in particular”) (Article 146, 4th paragraph). This is very imprecise whereas in the field of transitional provisions the greatest precision is required. The drafting of this paragraph is not easily understood. It would appear, however, that all provisions relating to elections enter into force on the day of promulgation of the Constitution and with regard to the establishment and organisation of the different powers, on the day of election of their incumbent.

225. With regard to Chapter III on the legislature, Articles 52 on the conditions for eligibility to the Assembly of People’s Representatives, 53 on the conditions for entitlement to vote, and 54 on the mode of voting enter into force immediately and the elections to the Assembly will therefore take place in accordance with those provisions. The remainder of Chapter III will enter into force on the same day as the announcement of the final results of the first general election. This concerns everything relating to the organisation of the Assembly of People’s Representatives (seat, term, duration of sessions, election of the Speaker, committees, role of the opposition, area covered by ordinary legislation, area covered by institutional laws, criminal liability of members of the Assembly, delegation to the government to act in the legislative sphere, etc.). The same applies for the chapter relating to the government, which is closely linked to the Assembly of People’s Representatives.

226. The entry into force of Part I of Chapter IV relating to the President of the Republic is the same day as the announcement of the results of the presidential election. Only Articles 73 and 74 which set out the rules for election to the Presidency of the Republic shall enter into force upon promulgation of the Constitution. The organisation, powers and status of the President of the Republic shall enter into force following the announcement of the final results of the presidential election. As we understand it, this entry into force in two stages is coherent.

227. The provisions relating to the judicial, administrative and financial courts shall enter into force once the SJC has been established. As a law is required to establish this Council (Article 19), ultimately it will be a law which shall determine the entry into force of the Constitution. There is no explanation for this postponement. First, one fails to see the reason for making the guarantees of the independence of the judiciary conditional upon the existence of the SJC.

Second, the functions of the SJC will be carried out by the Provisional Judiciary Authority, whose members have just been appointed.

228. The 3rd paragraph of Article 146 provides that “the Administrative Court shall exercise the powers of the Constitutional Court, apart from those of ruling on an objection of unconstitutionality relating to a law and on suspension of the President of the Republic.” This is probably the existing Administrative Court (Article 69 of the 1959 Constitution). This competence of the current court would appear to be reasonable, provided that a time-frame is specified: four or six months at the most. The main functions of this court would be to deal with disputes over elections to the Assembly of People’s Representatives and the Presidency of the Republic. The Administrative Court has some experience in this field since it has already dealt with electoral disputes concerning members of the current Constituent Assembly.

229. It is unfortunate, moreover, that the transitional provisions do not set out a deadline for the establishment of the Constitutional Court.

230. The three-year time-frame for the entry into force of the review of constitutionality arising from an objection would not appear to be excessive; by way of example, in France, the priority question of constitutionality was passed with the constitutional revision of 23 July 2008 and came into force on 1 March 2010. However in the absence of a time-frame for the establishment of the Constitutional Court, this means of reviewing constitutionality could enter into force within a time-frame which could be excessive, which would be problematical if the possibility for referring questions to the Constitutional Court is not extended to members of the parliamentary opposition (see Chapter V, Part II).

231. The 7th paragraph of Article 146 stipulates that the crime of torture shall not be subject to the statute of limitations and applies to all crimes of torture committed before the entry into force of the Constitution. This is an infringement of the universally established principle of the non-retroactivity of criminal law, with the statute of limitations generally being considered as a substantive and not procedural rule. Clearly, the authors of the Constitution have an almost absolute sovereignty in domestic order but one can only deplore such a provision which, furthermore, runs counter to the need for national reconciliation.

232. The final paragraph of Article 146 provides that “following the promulgation of the Constitution and pending election of the Assembly of People’s Representatives, the National Constituent Assembly shall undertake to pass laws and establish bodies to enforce the provisions of the Constitution”; this provision is very broad and very vague: can the NCA choose which laws to adopt and which authorities to establish in the place of the new Assembly of People’s Representatives? In any event, a maximum time-frame should be given to the Constituent Assembly to enact the implementing laws of the Constitution and an exhaustive list of the matters on which the Constituent Assembly is authorised to take action should be provided.