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Tunisian Constitutional Reform and Fundamental Rights:

Reactions to the Draft Constitution of the Republic of Tunisia

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"Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia"

Abstract

This paper presents an analysis of the fundamental rights set out in the three draft Constitutions of the Republic of Tunisia, as made public in August 2012, December 2012, and April 2013. The author raises a number of general issues relevant to the protection of fundamental rights, provides reactions to specific rights, and considers the mechanisms proposed in the April 2013 draft Constitution for the protection of rights, including judicial review and the creation of a Constitutional Court, the Independent Media Authority, and the National Authority for Human Rights. The analysis closely follows the text of the April 2013 draft Constitution itself.

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Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia

Jörg Fedtke

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Preliminary observations

These comments are based on an English version of the draft Constitution of the Republic of Tunisia dated 22 April 2013, a revision of earlier drafts dated 14 August 2012 and 14 December 2012.[1] The December 2012 draft includes amendments, comments, and alternative provisions, particularly those submitted by the Committee on General Provisions with respect to Chapter 1 and the Joint Commission for Coordination and Drafting. The April 2013 draft Constitution purports to resolve these disagreements and presents only one version of each provision. This paper also relies on a commentary on the protection of fundamental rights in the Tunisian constitutional reform process by Biel Lotfi and Emira Chaouch.[2]

The paper raises some general issues relevant to the protection of fundamental rights in Part I, provides reactions to a number of specific rights as currently contained in the April 2013 draft Constitution in Part II, and closes with some considerations concerning the envisioned judicial review of violations by the Constitutional Court, oversight – more generally – by the Independent Media Authority and the National Authority for Human Rights, and a right to petition in Part III. References are to the April 2013 draft Constitution, unless otherwise noted. The analysis will track closely the text of the April 2013 draft Constitution itself, although the paper should be read bearing in mind that further amendments might occur in the course of further negotiations.

Part I: General issues

1. Structure and potential overlap

Provisions dealing with the protection of fundamental rights are found not only in the Preamble to the April 2013 draft Constitution, which is an integral part of the Constitution (Art. 138), but also (and more importantly) in *both* Chapters 1 ("General Principles") and 2 ("Rights and Freedoms").

This is, in principle, not unusual. Constitutions often refer to fundamental rights provisions in their preambles (see, e.g., the French Constitution of 1958) and – if these exist – in general parts that precede the main components of their respective constitutional settlement. Particularly important rights and values are sometimes singled out and thus given some kind of enhanced status. In South Africa, so-called "Founding Provisions" (e.g., human dignity, the achievement of equality, the advancement of human rights and freedoms, and universal adult suffrage (section 1); citizenship rights (section 3); or the status of languages (section 6)) are thus set apart from the rest of the text (as Chapter 1) and – in part – given enhanced protection against constitutional amendment: Section 74 of the Constitution of the Republic of South Africa (1996) provides that the provisions contained in Chapter 1 of the Constitution can be amended only with a supporting vote of at least 75 per cent in the National Assembly and the support of at least six of the nine provinces represented in the National Council of Provinces.

In Tunisia, the April 2013 draft Constitution does not distinguish the Preamble from the rest of the text (Art. 138), and amendment of the Preamble must proceed according to the same procedures as amendment of Chapters 1 and 2 (Art. 137). Interpretative questions might nevertheless arise given the different location of provisions pertaining to fundamental rights. Will it matter whether a concept or right is placed in the Preamble (e.g., references to "les principes des droit de l'Homme" or "la neutralité de l'administration" in the French Constitution), is enshrined as part of the "General Principles" (Chapter 1), or is included in the list of "Rights and Freedoms" itself (Chapter 2)? The point is underscored by the fact that, *first*, important provisions such as Art. 3 of the April 2013 draft Constitution (which references the right to vote) or Art. 6 (equal rights and duties) are found in Chapter 1, which also contains a number of other provisions such as Art. 1 (nature of the Tunisian state), Art. 16 (armed forces), or Art. 9

(decentralization) that most observers will regard as fundamental; and, *second*, that there seems to be some overlap between provisions found in the two chapters.

What, for example, is the relationship between:

(a) The principle of equality in Art. 6, providing that "[a]ll citizens, male and female, shall have equal rights and duties, and shall be equal before the law with no discrimination", the principle that "[w]omen and men shall be partners in the construction of the society and the state" (Art. 11), and women's rights providing, among other things, that "the state shall ensure equal opportunities for men and women in carrying different responsibilities" (in Art. 42)? It is also concerning that there is no *right* to equality listed separately in Chapter 2.

(b) The principle that the state shall "protect family structures and maintain their cohesion" (Art. 10), and children's rights to "dignity, care, education and health *from their parents and the state*" (Art. 45, emphasis added)?

(c) The principles of sustainable development (in Art. 8) and the right to a "sound and balanced environment" (Art. 38)?

It is worth noting, finally, that Art. 5 provides that the state shall guarantee freedom of belief and religious rituals, but Chapter 2 does not confer a discrete right to freedom of religion or belief.

The development of the draft Constitution from the first draft in August 2012 to the third in April 2013 shows a gradual elimination of overlaps of this kind.[3] Nevertheless, further clarity might still be achieved by distinguishing between provisions of a more general character (Chapter 1) and the substantive content of the Bill of Rights (Chapter 2).

2. Level of detail

A second more general remark concerns the level of detail in which fundamental rights are set out in the April 2013 draft Constitution. The language of Chapter 2 is very succinct. This is, in itself, not an issue; indeed, many constitutions – including those of the United States and Germany – follow this approach. Other constitutions, for example the Constitution of South Africa, are much more elaborate. While these differences may result in substantively different levels of constitutional protection, less detailed constitutions might also invite – or require – more *judicial activism*; the more specific a provision, the less leeway judges will, in general, enjoy in interpreting rights and obligations in a particular way. Both approaches can work well in practice but the dynamics resulting from different levels of detail should be kept in mind.

3. General provisions

Fundamental rights provisions often raise general questions pertaining to their *status within the general constitutional framework* of a nation, their *application*, their *interpretation*, and/or their *limitation*. While many constitutions leave these questions more or less unanswered (see, e.g., the French Constitution of 1958), and thus leave it to the judiciary to develop solutions on a case-by-case basis, other texts (such as the German Basic Law of 1949, the South African Constitution of 1996, or – to a *much* lesser extent – the Iraqi Constitution of 2005) contain important operational provisions which address these issues openly (albeit in varying degrees of detail). Systems with a mixed track record of human rights protection in general, or with limited practical experience in the adjudication of human rights disputes by the courts, may find much value in the implementation of some general rules in this area.

The April 2013 draft Constitution in its current form does not provide much guidance as far as these issues are concerned. International experience strongly suggests that the text should at least identify procedures and criteria for the valid *limitation* of fundamental rights (see § 3.2 below).

3.1 Application

3.1.1 Fundamental rights bind the state

Many constitutions contain provisions that clearly state that fundamental rights bind the exercise of power by public authorities. All branches of government (legislative, executive and judicial) on all levels of the state (national, regional and municipal), as well as any other organs of state (such as the various commissions established by the April 2013 draft Constitution), should be included within the ambit of fundamental rights protection. The following examples from Germany, South Africa, Namibia, and Iraq reflect this notion:

> German Basic Law (Grundgesetz für die Bundesrepublik Deutschland, 1949), Article 1(3):
>
> The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

> Constitution of South Africa (1996), Section 8(1):
>
> The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

> Constitution of Namibia (1990), Article 5:
>
> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

> Constitution of Iraq (2005):
>
> Article 2:
> (1) Islam is the official religion of the State and is a foundation source of legislation.
> (A) No law may be enacted that contradicts the established provisions of Islam.
> (B) No law may be enacted that contradicts the principles of democracy.
> (C) No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.
>
> Article 13:
> (1) This Constitution is the preeminent and supreme law in Iraq and shall be binding on all parts of Iraq without exception.

> (2) No law that contradicts this Constitution may be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

Note that the German, South African, and Namibian provisions bind all three branches of government; the Iraqi text, on the other hand, binds the legislature with respect to, inter alia, fundamental rights – see Arts. 2(1)(C) and 13(2) – while the executive and judicial branches are not specifically mentioned.

3.1.2 The bearer of the right

Various provisions of the April 2013 draft Constitution identify "citizens" as the bearers of rights (in Chapter 1, in Arts. 6, 7, 9, 13 and 18; and in Chapter 2, in Arts. 24, 25, 32, 33 and 44) while others refer to "persons" or leave the bearer of a right unspecified. Distinctions of this kind very often have a rationale; indeed, the terms "citizen" or "person" may have acquired a well-defined legal meaning within a system, and some constitutions very deliberately choose which rights to confer on which category. Two distinctions are often associated with the use of these terms:

(1) "citizen(s)" is often meant to include *nationals* and, perhaps, those with special rights of residence in a country, while "person(s)" refers to *all individuals physically present in a country, which includes foreigners*;

(2) some systems use the term "citizen(s)" as a reference to *natural* persons while "person(s)" is understood to include both *natural* and *juristic persons/legal entities*.

Whatever rationale is followed in a particular case, technical terms should be used consistently throughout a constitution. Note, for example, that in the December 2012 draft Constitution, Art. 11 imposed on "citizens" a duty to comply with the law, while Art. 35 stated that all "persons shall pay taxes and contribute to public expenditure based on a fair and just tax system." Article 19 of the April 2013 draft Constitution eliminates this confusion by providing only that paying taxes is "an obligation in accordance with a fair and equitable system" and that the state shall develop mechanisms for the collection of taxes. In a similar vein, the right to health has been redrafted to eliminate confusion in the December 2012 draft Constitution between "all citizens" and "all persons." Article 37 now refers only to "every person."

However, the principle of equality as formulated in Art. 6 still provides that all "*citizens* … shall have equal rights and duties, and be equal before the law with no discrimination." The provision conferring rights on persons with special needs, similarly, maintains a distinction: Art. 44 provides that the state "shall protect *persons* with disabilities against any form of discrimination" but that "[e]very disabled *citizen* shall have the right to benefit … from all of the measures guaranteeing their full integration into society" (Art. 44, emphasis added). Article 7 provides that "the state shall grant *citizens* individual and public rights and freedoms, and provide them with sources of a dignified life." It is not immediately apparent that the use of "citizen(s)" in these instances is motivated by any particular rationale. If not, they should be eliminated as has been done with the right to health.

Other cases, such as the limitation of the right to work to every "citizen" (Art. 32) or the obligation of all "citizens" to maintain the unity of the homeland and defend its sanctity (Art. 18) seem very appropriate. If these rights/obligations are deliberately limited to *Tunisians* (or individuals with a permanent right to residency in the country), consideration should also be given to the question whether the same rationale should be applied to other socio-economic rights (e.g., the right to education) or some politically particularly sensitive rights (e.g., freedom of association in Art. 30 and the right to peaceful assembly/demonstration in Art. 31) – rights that are currently granted without any qualification.

A second distinction that is sometimes associated with the terms "citizen" and "person" is the one between *natural persons* (often termed "citizens") and *juristic persons/legal entities* (often included in the more general term "persons"). While this is clearly *not* the rationale behind the use of these terms in the April 2013 draft Constitution (juristic persons, for example, cannot be arrested – see Art. 28 – or have health that would require protection – see Art. 37), it seems desirable to clarify the status of legal entities (e.g., companies, associations, or political parties) with respect to the fundamental rights (if any) that they should be able to exercise in Tunisia under a future constitutional settlement. Many constitutions contain provisions that *do* allow juristic persons to invoke constitutional rights under certain conditions. Germany and South Africa provide the following general clauses that address this issue:

> German Basic Law (1949), Article 19(3):
>
> The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

> Constitution of South Africa (1996), Section 8(4):
>
> A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

3.1.3 Fundamental rights between citizens

An increasingly important question in many systems is the effect (if any) of fundamental rights in the *private* sphere – should these rights be applicable to ('horizontal') relationships between private parties in addition to ('vertical') relationships between citizens and the state? The April 2013 draft Constitution identifies two specific instances in which fundamental rights are to apply horizontally: Art. 45 (children's rights) expressly declares that "children are entitled to dignity, care, education, and health *from their parents*" (emphasis added) and Art. 33 grants a right to strike, which individuals will in most cases exercise vis-à-vis their *private* employers. On a more general level, the Preamble defines Tunisia as a state where "justice, equality of rights and duties prevail *between all male and female citizens* and *between all groups and regions*" (emphasis added) – a phrase which could be understood to extend the traditional vertical application of fundamental rights (citizen against state) to private relationships (citizen against citizen) more generally.

Disputes between private parties have prompted courts in other jurisdictions to think very carefully about the scope of fundamental rights protection in the private sphere. Tensions may, for example, arise between the exercise of free speech and human dignity; free speech/freedom of the press and media and the protection of privacy; free access to information held by *private* entities (be it a company or an individual); or the right not to be discriminated against by other private parties in a wide variety of private relationships (equality). It would be desirable to include in the Constitution, as finally approved, a provision that gives some guidance as to how (if at all) courts are to give effect to fundamental rights in the private sphere in disputes of this kind. This could avoid future conflict and litigation between private parties. Examples from Namibia and South Africa illustrate the issue:

Constitution of Namibia (1990), Article 5:

> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Constitution of South Africa (1996), Section 8(2):

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

An alternative way to give effect to fundamental rights in the private sphere is to interpret private law in the light of constitutional values as reflected in a bill of rights. This approach (often referred to as an 'indirect' or 'radiating' effect of fundamental rights and followed in Germany and in South Africa prior to the enactment of the Constitution of 1996) would require judicial intervention.

3.2 The limitation of fundamental rights

Most societies limit fundamental rights in some form; every piece of legislation that regulates human activity (even fairly simple things such as traffic rules, permits/licenses, or health and safety regulations) carries in it at least the potential for the limitation of some right. This well-accepted starting point shifts the emphasis of fundamental rights protection from *granting* rights (which the April 2013 draft Constitution does quite generously) to the conditions under which rights may be *limited* (which the April 2013 draft Constitution mentions only in a very rudimentary fashion). Article 22 indicates that the right to life shall not be prejudiced "*except as provided for by law*"; Art. 18 states that the rights to private life and freedom of movement "shall not be prejudiced *unless under circumstances provided for by law and a judicial order*"; Art. 27 ties punishment to the existence of a *"legal provision issued prior to the occurrence of the punishable act, except in the case of a more favorable provision*"; and Art. 40 stipulates that freedom of expression, media and publication may not be restricted "*unless by virtue of a law protecting the rights, reputation, safety, and health of others*" (emphasis added). These are so-called 'special limitation clauses' that set up conditions for the limitation of specific rights. The German Basic Law follows a similar approach but also contains two operational provisions which enjoy more general application:

German Basic Law (1949), Article 19 – Restriction of Basic Rights:

> (1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.
>
> (2) In no case may the essence of a basic right be affected.

Generally, limitations of fundamental rights should require legislation. The formal condition established by Art. 19(1) of the German Basic Law – that the affected right be specifically mentioned in a statute – serves to alert the legislator to any adverse impact that a law might have on fundamental rights, and helps

citizens identify (and, possibly, challenge) limitations. Rights that do not have a special limitation clause, as is the case with most rights contained in the April 2013 draft Constitution, are thereby *not* deemed to be granted *without* limitation; German courts have expanded the ambit of Art. 19(1) of the German Basic Law to include these rights but will, in essence, require a stronger justification for any limitation envisaged by the state in these areas. The reference to a law of "general" application, finally, places a constitutional limit on special legislation targeted at or privileging particular groups or individuals.

Article 19(2) of the German Basic Law is not particularly important in German constitutional practice though the provision, homage to Germany's history of human rights violations during the Third Reich, has been regarded as an absolute (but rarely – if ever – reached) lower threshold or absolutely protected core and, again, a warning to the legislator not to overreach. A similar provision was adopted in Iraq:

> Constitution of Iraq (2005), Article 46:
>
> Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

The (Interim) Constitution of South Africa (1993) also contained a clause protecting the "essential content" of the rights enshrined in that document; the current Constitution of 1996, however, focuses only on the principle of proportionality, which seems to be preferable.

Proportionality is, by international standards, arguably the single most important factor when it comes to the limitation of fundamental rights. German courts have been at the forefront in developing the idea of proportionate state action despite the fact that the Basic Law itself contains no direct reference to the concept. Acts of public authorities (whether legislative, executive, or judicial) must hence pursue a legitimate aim/interest; must be suitable to achieve this aim (*geeignet*); must deploy the mildest possible means (*erforderlich*); and must be proportionate in relation to the extent of the limitation and the importance of the affected fundamental right (*verhältnismäßig im engeren Sinne*).

A preferable solution, especially for systems with a poor track record of human rights protection in general and/or enforcement by the courts in particular, might lie in the incorporation of a constitutional provision that expressly sets out substantive criteria for the limitation of fundamental rights. This model – the so-called 'general limitation clause' – can be found, inter alia, in Canada and South Africa:

> Canadian Charter of Rights and Freedoms (1982), Section 1:
>
> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

> Constitution of South Africa (1996), Section 36 – Limitation of Rights:
>
> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

It should be noted that Germany (*without* a general limitation clause that contains the concept of proportionality) and South Africa (*with* such a clause) often reach very similar results in the adjudication of disputes between citizen and state. The challenge for the courts in each country is, however, quite different. While German courts after 1949 were able to utilize pre-Nazi case law and rich academic literature on the question of balancing state interests with (competing) interests of citizens in the enjoyment of their fundamental rights, South African courts initially struggled with the concept of proportionality after the end of apartheid and the enactment of a new constitutional settlement in 1993/1994. The existence of – first – section 33 of the (Interim) Constitution of 1993 and – later – section 36 of the Constitution of 1996, arguably helped judges to adjudicate complex fundamental rights issues in practice and paved the way to a very robust and well-respected record in the area of human rights protection. Tunisia, too, should adopt this approach. Every system will ultimately resolve conflicts between legitimate state interests and the fundamental rights of citizens differently in terms of substantive outcome; the proportionality analysis outlined above, however, provides sound theoretical guidance for this exercise and – as a tool – today enjoys wide international support.

3.3 States of emergency

The April 2013 draft Constitution contemplates the possibility of exceptional measures being taken under circumstances of "imminent danger" (Art. 78) but does not specify what (if any) effect such measures or circumstances would have on the exercise of fundamental rights. The importance of this question, especially if states of "imminent danger" extend over longer periods of time, is quite obvious and calls for an answer on the constitutional level. Particular attention should be given to the derogation of fundamental rights and the rights of detainees. The 1996 Constitution of South Africa offers a very elaborate solution (the relevant sections are appended to this paper).

4. Socio-economic rights

The April 2013 draft Constitution contains a number of socio-economic rights such as the right to work (Art. 32), the right to education (Art. 35), the right to health and social coverage (Art. 37), the right to water (Art. 39) and the right to a sound and balanced environment (Art. 38). Of these and other rights in the Bill of Rights, only Art. 35 (education), Art. 36 (academic freedom) and Art. 46 (sport) impose on the state a qualified obligation, in that the state is enjoined to "seek to provide" the benefits laid out in each provision.

Other rights, by contrast, impose obligations on the state that are *unqualified* – the provision on citizens' rights states that the state "*shall provide [citizens]* with sources of a dignified life" (Art. 7, emphasis added); the right to work provides that the state "*shall take the necessary measures* to ensure the availability of work" (Art. 32, emphasis added); and the right to health provides that the "*state shall provide* health care," "*shall ensure* free health care for those without support," and "*shall guarantee* the right to social coverage as specified by law" (Art. 37, emphasis added).

Given the limited availability of resources, socio-economic rights – while a desirable feature of any constitutional settlement – invite caution. The elimination from earlier drafts of the unqualified guarantees to a "suitable place of residence" and a "minimum level of income" is thus to be welcomed. A constitution should not require a government to provide (or allow citizens to claim) assets or services that exceed a nation's resources. Obligations to exert best efforts, possibly even under some form of judicial control, provide intermediate ground between *not* offering socio-economic rights *at all* and promising *too much* (*both* of which could frustrate the expectations that citizens might have in a new constitutional settlement). It should also be noted that socio-economic rights, *if legally enforceable*, are particularly prone to cause tensions between a government and the courts.

5. Constitutional amendment of fundamental rights

Fundamental rights may be amended according to the same procedure as all other provisions of the April 2013 draft Constitution. The substantial limitations envisioned by Art. 136 (declaring that amendments may not prejudice certain enumerated principles and guaranteed fundamental rights and freedoms) seem, by international standards, too restrictive. That said, many constitutions *do* identify core values and impose higher standards for their amendment. Some fundamental rights or values, such as the protection of human dignity in Art. 1 of Germany's Basic Law, even enjoy absolute protection.

Article 8.3 of the August 2012 draft Constitution required a fairly low threshold of support in the Chamber of Deputies for constitutional amendment (one third of the members), coupled with support by an "absolute" majority of the people in a referendum (which seems to indicate a majority of *all* eligible voters). Such an arrangement would send mixed signals as to the desirability of absolutely protected fundamental rights provisions: the support of one third of the legislature would be deemed far too low by international standards, although an "absolute" majority in a referendum offers greater protection against undue interference with the most important rights of citizens.

Article 137 of the April 2013 draft Constitution changes this position, requiring the approval of two thirds of the members of the Chamber of Deputies and the approval of an absolute majority at referendum in respect of the Preamble and the provisions of Chapters 1 and 2; and the approval of two thirds of the members of the Chamber of Deputies in respect of all other parts of the Constitution. These arrangements provide a good balance between flexibility and rigidity, and ensure a greater level of protection for core elements of the Constitution, including rights and freedoms.

6. Fundamental rights and international law

Article 21 of the April 2013 draft Constitution addresses the relationship between the future Tunisian constitutional settlement and international treaties. It declares that international agreements approved and ratified by the Chamber of Deputies shall be superior to ordinary laws but inferior to the Constitution. The declaration is supplemented by Art. 67, which provides that treaties related to specified subjects must be submitted to the Chamber of Deputies for approval, and that treaties shall not be deemed enforced unless based on the principle of reciprocity.

The Constitutional Court is competent to determine whether treaties are in conformity with the Constitution (Art. 114(4)). Presumably, the Constitutional Court's powers of constitutional review of ordinary legislation enable it to consider whether draft or promulgated legislation is in conformity with treaties. While Art. 67 looks forward to *future* treaties and their status in Tunisia, Art. 21 has the potential to affect international human rights treaties that Tunisia has *already validly entered into* by requiring

that these treaties conform to the Constitution.[4] This approach creates tensions with Art. 27 of the Vienna Convention on the Law of Treaties (itself ratified by Tunisia), which declares that "a party may not invoke the provisions of its internal laws as a justification for its failure to perform to a treaty." This potentially opens the door to restrictive interpretation – and, possibly, the violation – of Tunisia's international treaty obligations by the courts. A preferable approach, which retains Art. 67, would be to declare Tunisia bound by international treaties and agreements which were duly ratified on the day that the Constitution takes effect. This could be combined with a provision that requires courts to consider international law in the interpretation of fundamental rights granted by the Constitution.

Part II: Specific rights

Chapter 2 contains a list of 27 provisions that offer substantial protection for many key civil, political, social, economic and cultural rights. Some common aspects of these provisions have already been discussed under the general headings above. The following – very brief – section identifies some additional items specific to particular articles.

1. Right to life (Art. 22): The possibility of a limitation (by law) of this – perhaps most fundamental – right highlights the need for a clause that sets out conditions under which rights may be limited.
2. Freedom of conscience and worship (Art. 5): The article provides that the state "guarantees freedom of belief and religious rituals" but the April 2013 draft Constitution does not mention specifically the right to freedom of religion. The right to freedom of religion as it appeared as Art. 2.3 of the August 2012 draft Constitution was, in fact, eliminated. It is worth considering whether it is preferable to frame these freedoms as *rights* held by individuals, rather than as freedoms *the state bears an obligation to guarantee*.
3. Public administration (Art. 13): This provision requires that public administration will work "in accordance with the principles of impartiality and equality, and the rules of transparency, integrity and efficiency." What is the relationship of this provision to Art. 6 (equality)? An additional dimension of good public administration (of which impartiality is but one aspect) is *just administrative action*. Citizens should have a right to administrative action that is lawful, reasonable, fair and efficient, and a right to be provided with written reasons for any administrative action which might affect them adversely.
4. Detention (Art. 28): An additional right that should be included in this provision is the right to be brought before a court as soon as reasonably possible (legal hearing). Many systems set an absolute outer limit for this to happen at 48 hours after an arrest. There might also be a right to be released from detention if the interests of justice so permit, subject to reasonable conditions (e.g., bail).
5. Punishment (Art. 29): The phrase "humane treatment that preserves [every prisoner's] dignity" could be better defined and include physical exercise and the provision – at state expense – of adequate accommodation, food, reading material, medical treatment, and interaction with other inmates.
6. Freedom of association (Art. 30): What is the relationship between this provision and Art. 33, which provides that the right "to join and form syndicates" and the right to strike "shall be guaranteed"? Article 30 provides that the statutes and activities of parties, syndicates and associations shall conform to the provisions of the Constitution and to principles of financial transparency and non-violence. Questions arise as to who enforces this, and what the consequences are of a violation of these requirements.

7. Right to work (Art. 32): What is the ambit of this right? Beyond the entitlement to "work" (see the comment regarding socio-economic rights above), international experience suggests that the right to freely *choose* a trade, occupation or profession, as well as the right to pursue any education or training that might be necessary for a variety of reasons (e.g., to ensure the safety of others) are specific aspects of individual 'economic activity' that merit protection. The provision could be rephrased to: "Every person (citizen?) has the right to choose their trade, occupation or profession freely. The state shall exert all effort to ensure the availability of work in a sound and fair environment."
8. Right to join and form syndicates and right to strike (Art. 33): The right to "join" syndicates is a welcome addition to the April 2013 draft Constitution. What about the right to establish and join employers' organizations? What about the right to engage in collective bargaining?
9. Right to access information (Art. 34): Does this right offer access to information held by *private* entities (which might be just as powerful as the state)?
10. Right to education (Art. 35): In its unqualified form (right to free public education at all stages) this provision may lead to serious resource issues especially in the area of higher education. It is not clear how the state's qualified obligation to "seek to provide the necessary means to offer quality education and training" relates to the obligation to provide free education.
11. Academic freedoms (Art. 36): The second subsection of this article raises the question whether *individual* academics (rather than academic *institutions*) have a claim to "the necessary means to develop scientific and technological research."
12. Right to health (Art. 37): What is the ambit of this right? What is meant by "social coverage"? Does allowing "social coverage" to be specified by law denude the right of any content?
13. Right to a sound and balanced environment (Art. 38): The August 2012 and December 2012 draft Constitutions combined guarantees of a "peaceful and balanced environment" and "sustainable development." This suggested a focus on the security of neighborhoods rather than to a healthy *natural* environment. The present formulation eliminates "sustainable development" (the phrase appears in Art. 8) and focuses the right to environment more clearly on the natural environment.
14. Right to water (Art. 39): What is the ambit of the right to water? Is every person entitled to a minimum quantity of water, and does this extend to water quality?
15. Freedom of opinion (Art. 40): The title of this article has been changed to "Freedom of opinion" in the April 2013 draft Constitution from "Freedom of expression" in the December 2012 draft. The ambit of the right to freedom of expression, in particular, could perhaps be qualified by limitations on propaganda for war or advocacy of hatred that is based on race, ethnicity, gender or religion.
16. Women's rights (Art. 42): What is the relationship between this provision, Art. 6 (equality), and Art. 11 (women and men)?
17. Property rights (Art. 43): This provision does not guarantee fair compensation in cases of expropriation.

Part III: Judicial review and commission oversight

1. Judicial review

Article 117(g) of the December 2012 draft Constitution provided an important procedural safeguard for the protection of fundamental rights by granting citizens individual access to the Constitutional Court

once all other legal remedies have been exhausted. This provision seemed to focus on allegations of unconstitutional *legislation* ("provisions") and was perhaps not intended to include all acts of public authorities (legislative, executive/administrative and judicial) that allegedly violate the fundamental rights guaranteed by the Constitution.

This provision has been deleted from the corresponding provision of the April 2013 draft Constitution (Art. 114). Individual litigants may request the Constitutional Court to consider the constitutionality of legislation (Art. 114(5)) – but only in the context of existing litigation. The impugned law must be referred to the Constitutional Court by another court. The removal of provisions for direct access to the Constitutional Court in the April 2013 draft is disappointing.

2. Independent Media Authority; National Authority for Human Rights

This paper is not specifically concerned with the additional safeguards provided for the protection of fundamental rights by independent commissions such as the Media Authority (Art. 121) or the Authority for Human Rights (Art. 122). The importance of such independent commissions should nevertheless be highlighted. Separate ombudsmen or commissions charged with the duty to oversee *just and fair public administration* or the *protection of personal data* might be desirable. A separate right of constitutionally prescribed commissions not only to "propose amendments to human rights system" or to "conduct investigations into the violation of any human rights" (see Art. 129 with respect to the Authority for Human Rights) but to present their findings regularly *directly* to the Chamber of Deputies should be contemplated.

3. Right to petition

Citizens should be granted a right to individually or collectively with others address written requests or complaints to all competent public authorities and to the Chamber of Deputies.

* * *

Appendix

Constitution of South Africa (1996), Section 37:

The first parts of this provision set out the conditions under which a state of emergency can be declared, how long it may last, and what the role of the courts is in determining the validity of any declaration to that effect. Sections 37(4)-(8) then address the effects of a state of emergency on fundamental rights:

> (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that
> (a) the derogation is strictly required by the emergency; and
> (b) the legislation
> (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
> (ii) conforms to subsection (5); and
> (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
>
> (5) No Act of Parliament that authorizes a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorize
> (a) indemnifying the state, or any person, in respect of any unlawful act;
> (b) any derogation from this section; or
> (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 ***Section Number***	*2* ***Section Title***	*3* ***Extent to which the right is protected***
9	*Equality*	*With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language*
10	*Human dignity*	*Entirely*
11	*Life*	*Entirely*
12	*Freedom and security of the person*	*With respect to subsections (1)(d) and (e) and (2)(c).*
13	*Slavery, servitude and forced labour*	*With respect to slavery and servitude*
28	*Children*	*With respect to:* *- subsection (1)(d) and (e);* *- the rights in subparagraphs (i) and (ii) of subsection (1)(g); and* *- subsection 1(i) in respect of children of 15 years and younger*

1 ***Section Number***	*2* ***Section Title***	*3* ***Extent to which the right is protected***
35	*Arrested, detained and accused persons*	*With respect to:* *- subsections (1)(a), (b) and (c) and (2)(d);* *- the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d)* *- subsection (4); and* *- subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.*

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Notes

[1] Draft Constitution of the Republic of Tunisia, 22 April 2013, unofficial English translation prepared by International IDEA, available online at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Tunisia-third-draft-Constitution-22-April-2013.pdf.

[2] Biel Lotfi and Emira Chaouch, "Tunisian Constitutional Reform and Fundamental Rights" (International IDEA, 2012), available online in the original Arabic from the International IDEA website, at www.IDEA.int (forthcoming 2013).

[3] See, for example, the overlap in the August 2012 draft Constitution between provisions guaranteeing equal rights and obligations in Chapter 1 (Art. 1.6) and the right to equality in Chapter 2 (Art. 2.22); citizen duties framed as principles in Chapter 1 (Art. 1.13) and obligations to the nation in Chapter 2 (Art. 2.24), and a provision regarding Zionism placed in Chapter 2 (Art. 2.27), which might have been more appropriately located in Chapter 1 (the provision has since been deleted entirely). The December 2012 draft Constitution resolved some of these overlaps, but carried its own too, such as between citizen duties in Chapter 1 (Art. 11) and the obligation to pay taxes in Chapter 2 (Art. 35).

[4] These include, among many others, the Convention against Torture and other Cruel or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights (with exception of the 2011 Protocol), the International Covenant on Economic, Social and Cultural Rights, the Convention of the Rights of the Child, the Convention of the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities.

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