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The Arab Association of Constitutional Law

Tunisia Working Group Final Report

The Legal Framework on Rights and Freedoms in Tunisia: An Agenda for Urgent Reforms

April 2024

Overview of the Tunisia Working Group

In the wake of the constitutional referendum that was held in Tunisia on July 25, 2022, and the entry into force of the new constitution on August 17, 2022, the Arab Association of Constitutional Law (AACL) took the initiative to establish the Tunisia Working Group (the Group) to discuss constitutional and legislative options in relation to the guarantee of rights and freedoms. In particular, the aim was to explore the protection of these rights and freedoms in the context of states of exception, and to formulate recommendations to guarantee them in accordance with the requirements of international human rights law and democratic constitutional options. The Group consists of 10 professors and experts in public law, seven of whom are from Tunisia while the other three are from Jordan, Morocco, and Italy respectively.

The Group focused on the following three issues:

- Determining the constitutional and legislative framework regarding rights and freedoms in Tunisia, to enable a comprehensive analysis of the new constitutional framework and assess the extent to which it provides adequate protection for human rights as well as the extent of the coherence of the national human rights legal system as a whole and its relationship with the relevant international eco-system
- Explaining the challenges posed by states of exception, especially in the field of human rights protection
- Defining the role of the constitutional judiciary in guaranteeing rights and freedoms, especially through the plea of unconstitutionality before the Constitutional Court

The Group began its work in December 2022 and held several virtual and in-person meetings that culminated with the drafting of this report, which includes a diagnosis of the basic issues mentioned above along with a number of recommendations. The report offers multiple options with regard to some of these recommendations and assesses the pros and cons of each option, while building on comparative law whenever useful. This report will be presented as a working paper to political actors and stakeholders in the fields of human rights and legal matters, civil society and the media, within the framework of an advocacy campaign aimed to shape a public opinion that protects and champions rights and freedoms.

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Introduction

Completing this report on the constitutional and legislative framework with regard to rights and freedoms in Tunisia poses a real challenge at this particular stage as the country experiences a new transitional phase under the state of exception declared by the President of the Republic on July 25, 2021, based on Article 80 of the 2014 Constitution. Despite the many checks stipulated in this article, "measures necessitated by states of exception" have generally failed to observe the material and procedural requirements set forth therein. Contrary to the requirements of the constitutional text, the President dismissed the government and appointed a new government. He also suspended the Assembly of the People's Representatives before dissolving it on March 30, 2022, in preparation for the election of a new one based on a new electoral law that was promulgated by virtue of a presidential decree.

Presidential Order No. 117 issued on September 22, 2021, relating to exceptional measures, was the turning point in departing from the 2014 constitutional system. It suspended the constitution, with the exception of the preamble, Title I on general principles, and Title II on rights and freedoms, in addition to all other constitutional articles that did not conflict with the order, in a clear violation of the supremacy of the constitution and the hierarchy of norms. This order also established a temporary organization of authorities pertaining to states of exception, whereby the President is the sole center of power, amid an absolute absence of any mechanisms to hold him accountable.

The adoption of a new constitution puts to test the democratic transition in Tunisia, for the restrictions imposed by exceptional measures conflict with the components of a democratic constituent process, including public debate, free deliberation, and an inclusive approach towards a new social contract. It should be noted here that the constitutional referendum sparked strong controversy over its democratic character for many reasons. These include, most notably, the general political context and profound divisions between supporters and opponents of the referendum, given that the constituent process took place under a state of exception and based on legal texts that enabled the President of the Republic to exercise discretionary authority and expanded powers. These legal texts also restricted the timeframe for conducting consultations for the preparation of the draft constitution,

which were further held with a narrow group of experts whose role was merely advisory, amid a boycott by the deans of law schools of the consultation process.

This report analyzes and assesses the legal framework regulating rights and freedoms in Tunisia both under ordinary constitutional periods and during the state of exception. The report also highlights the institutional mechanisms available to citizens to seek the protection of their constitutional rights, most notably the plea of unconstitutionality before the Constitutional Court as a means to rid the legal landscape of unconstitutional texts and to defend their rights and freedoms.

Based on the analysis, the report provides recommendations regarding each of the issues raised therein. These recommendations are addressed to key political and civil society actors and members of the legal community, including judges and lawyers, in addition to the media. The main purpose is to shed light on the centrality of the issue of rights and freedoms and the necessity of placing it at the top of the current political authority's list of priorities. Moreover, the recommendations are intended to shape a pro-rights public opinion and reinforce constitutional and legal culture in Tunisia.

The recommendations in the report range from specific interpretations of some of the concepts used in the constitutional text in order to avoid confusion at the conceptual level to general proposals for the amendment of constitutional articles that are problematic for the protection of rights and freedoms. They also include options with regard to the legislative texts that should be issued with a view to implementing the 2022 Constitution, particularly with regard to the regulation of the state of emergency and the establishment of the Constitutional Court.

The report is divided into the following sections:

Section I: The constitutional framework with regard to rights and freedoms

Section II: The guarantee of rights and freedoms during states of exception

Section III: The guarantee of rights and freedoms through constitutional oversight

Section I: The Constitutional Framework in relation to Rights and Freedoms

Even though the 2022 Constitution incorporated most of the rights that had been included under Title II on rights and freedoms of the 2014 Constitution (A), the constitutional references on which these rights are based (B), as well as the institutional design of the three branches of power and the role of counterweights (C) constitute a break with the 2014 Constitution, in a way that affects the coherence of the outlook and vision and affects the core of the system, its institutions and its guarantees. Furthermore, the homogeneity of the body of laws and its conformity with the constitution and ratified human rights treaties have posed a constant challenge with respect to Tunisia's successive constitutions (D).

1. The Constitutionalization of Rights and Freedoms

In the section on rights and freedoms, the 2022 Constitution echoed Title II of the 2014 Constitution, with a number of additions and/or omissions. This will be demonstrated in relation to the principles upon which fundamental rights are founded, the content of those rights, and the means to restrict them.

1.1 The list of constitutional rights and freedoms

- The 2022 Constitution founded the system of rights on the principles of freedom, dignity, equality, and non-discrimination.
- Article 26 enshrines the right to freedom as a general principle. This is deemed an important addition to the 2014 Constitution, because said principle will serve as a reference and pillar for expanding the scope of freedom in situations in which it was not expressly provided for.
- Article 23 refers to the principle of prohibiting discrimination in general without defining it or specifying its forms. It also tackles the principle of equality in its two dimensions. The first is equality before the law or the equal protection of the law and the second is equal rights. The 2022 Constitution further included a mechanism for parity and equal opportunities between the sexes (Article 51).

- Although the 2022 Constitution included most of the civil and political rights recognized by the 2014 Constitution, there were some regressions. For instance, the right to run in legislative elections was limited to Tunisians by birth (Article 58). Moreover, the right to run for President of the Republic became limited to Tunisians by birth who do not hold another nationality (Article 89). These conditions contradict international human rights law, which requires restrictions imposed on the right to participate in political life to be non-discriminatory and based on objective and reasonable standards (Article 25 of the International Covenant on Civil and Political Rights).
- The 2022 Constitution also reproduced the economic, social, cultural and environmental rights previously stipulated in the 2014 Constitution. Moreover, it sought to strengthen the social approach to the state's role. However, this assistance-based social approach differs from the human-rights-based approach. The implementation of these economic, social, cultural and environmental rights also seems problematic in light of the economic crisis, the scarcity of state budget resources, and the absence of effective public policies.
- The multiple references to the law in the constitutional articles related to rights and freedoms gives the legislator discretionary power to determine and limit these rights through regulation.

Recommendations

General recommendation

- Option 1: Interpreting the rights and freedoms mentioned in the Constitution on a non-exhaustive basis. This opens the way for the legislator and judge to regulate the rights and freedoms not stipulated in the Constitution, provided that they are aligned with it
- Option 2: Revising the Constitution and adding a new paragraph or article providing that the rights and freedoms mentioned in the Constitution are not exhaustive, which does not preclude a person from enjoying other rights not mentioned in the Constitution, provided that they do not conflict with it.

Recommendations pertaining to civil and political rights

- Revising Article 28, which includes a specific limitation on rights – the freedom to perform religious rituals unless it harms public security – and contending with the limitations set forth in Article 55 as general limitations applicable to rights
- Revising Articles 58 and 89 of the 2022 Constitution and removing various aspects of discrimination against some Tunisians, in accordance with the requirements of international human rights law

Recommendations on economic, social, cultural and environmental rights

- Interpreting the state's obligations contained in the Constitution in conformity with the interpretation of Article 2-1 of the International Covenant on Economic, Social and Cultural Rights provided by the UN Committee on Economic, Social and Cultural Rights (CESCR), where the state's obligation is based on three elements: progressive realization, obligations of immediate effect and a minimum core obligation (General Comment No. 3 (1990))

1.2 2. The comprehensive article on the conditions and criteria for the regulation of rights and freedoms

- Article 55 of the 2022 Constitution is deemed a comprehensive article relating to the conditions and criteria for the regulation of rights and freedoms. Such inclusion was deemed one of the most important human rights gains that were constitutionalized in 2014 (Article 49). In fact, it captures the advances of new constitutionalism and modern trends in international human rights law. Tunisian doctrine considers the inclusion of this article a "paradigm shift" in relation to the legal framework governing freedoms. The approach under the 1959 Constitution was to limit freedoms by frequently referring to the law and resorting to a general article that did not set actual limits on the legislator's discretionary power. Practice shows that Article 49 was gradually accepted by key legal actors despite some stumbles. The article was applied by the Provisional Instance to Review the Constitutionality of Draft Laws, as well as the administrative and judicial courts.

- A comparison between Article 55 of the 2022 Constitution and Article 49 of the 2014 Constitution highlights their similarities. Both of these articles were placed at the end of Title II on rights and freedoms. The comprehensive structure of the article was also preserved, including consecutive and complementary stages for the determination of the legitimacy of any restriction, beginning by confirming the principle of the reserve of the law and the ensuing exclusive power of the legislator in imposing restrictions on freedoms, to then verifying such restrictions respond to the following criteria:

First: the condition of necessity in a "democratic system". A legislative measure restricting freedom must be necessary to protect the values enumerated in Article 55. However, it is important to note in this respect that safeguards were undermined, since Article 55 omits the phrase "necessary to a civil and democratic State," as well as the term "civil state", which were included in the 2014 Constitution. Also, it will not be easy to interpret this comprehensive article in isolation of Article 5 of the Constitution, which requires the state "to achieve the purposes of pure Islam," including when establishing restrictions on rights and freedoms.

Second: the condition of legitimacy of the goal behind restricting the right or freedom. The constituent authority in both 2014 and in 2022 established a list of public interest objectives to be achieved in introducing restrictions. This list includes the rights of others, the requirements of public order, national defence, and public health. It should be noted that Article 55 omitted the "public morals" requirement.

Third: the condition of proportionality between the restriction and the objective sought. This is in addition to the "threshold" of not affecting the essence of the right, which implies an obligation not to compromise that essence as a result of the restrictions as well as "not inverting" the relationship between the right and the restriction, or between the rule and the exception.

The two articles also refer to the principle according to which no amendment may undermine those rights and freedoms, thus protecting them from political changes and shifts in parliamentary majorities.

Recommendations

- Interpreting the term “democratic system” as referring to the material and substantive meaning of democracy, not the formal and procedural meaning that reduces it to the holding of elections
- Interpreting the relationship between Article 55 and Article 5 of the Constitution
  - Option 1: Considering that Article 55 of the Constitution is the only comprehensive article determining the conditions and criteria for the regulation of rights and freedoms, and that it is further superior to Article 5, given that it cannot be amended.
  - Option 2: Scrapping Article 5, given that opting for the Islamic law objectives-approach would open the way for relying on Islamic jurisprudence and Sharia as a material source or reference for interpreting laws or filling a legislative vacuum. This would turn religion from a mere cultural and social characteristic (Article 1 of the 1959 Constitution and the 2014 Constitution) into a substantively determining factor that largely informs the goal and content of legislative policy.

2. The References Informing Rights and Freedoms

The rights and freedoms framework in Tunisia has remained hostage to attempts to reconcile universality and specificity.

2.1 The reference to universality

- It was observed that the 2022 Constitution has tended to marginalize the universal reference to human rights, be it in its preamble or remaining provisions. Neither does the Constitution include any express reference to international human rights law and international treaties related to human rights.
- The Constitution considers international treaties, which meet a set of conditions, to be an integral part of the national legal system and to have a status superior to that of laws and inferior to that of the Constitution (Article 74). This also applies to human rights treaties.
- However, providing for the requirement of reciprocal treatment in terms of the enforcement of international treaties conflicts with the specificity of

international treaties in the field of human rights, as this principle does not apply to them, for most of their requirements are of a mandatory nature. Also, an important part of their rules falls within the scope of the rules of customary international law.

- This "sovereign" option differs from the trend displayed in many recent constitutional experiments towards openness to international human rights law.
- Judges have failed to implement international conventions in the absence of laws incorporating them into the national legal order. This practice can be explained by two main factors: the marginalization of international law and focus on internal laws during the training stage, and the fact that international conventions are rarely published in the Official Gazette, and publication is limited to the laws ratifying them.

- Revising the Constitution to strengthen the international reference to human rights in its diversity and openness, by stipulating such reference in the preamble and explicitly indicating in the body of the Constitution that the Constitution must be interpreted in light of international treaties
- In the event that the Constitution is not amended, constitutional rights must be interpreted in accordance with international human rights conventions, in a way that strengthens the Tunisian state's commitment to the universal dimension of human rights and makes international human rights law a basic reference for the legislative authority in enacting laws regulating rights and freedoms as well as for ordinary and constitutional judges when interpreting these rights.

2.2 The religious reference

- The new Constitution includes a number of indicators that would confuse the relationship between religion and the legal and political framework and open the door for an interpretation of human rights that might threaten their universal nature. The most important of these indicators is that the 2022 Constitution omitted to provide for the civil nature of the state (Articles 2 and 49 of the 2014 Constitution) and enshrined the objectives of Islam (Article 5). This represents a shift from embracing civil values to the "Islamization"

of the state, which leads to a debate between schools of jurisprudence and conflicting readings of jurisprudential codes between conservatives and modernists, negatively impacting human rights, especially with respect to their regulation. This also contradicts the principle of legal security and the clarity it requires in drafting legal texts, the stability of the legal status of individuals, the non-retroactivity of legal norms, and respect for acquired rights.

Recommendations

- Option 1: Interpreting Article 5 as carrying a symbolic value and not of a normative nature. Accordingly, the term "nation" is interpreted as a cultural description, not as an objective that is determinant for the legislator and judge. "The objectives of Islam" must also be interpreted as general principles and not as binding rules. Therefore, violating those "objectives" cannot constitute the grounds to challenge the constitutionality of laws before the Constitutional Court, as they are not part of the constitutional bloc that constitutes the reference for the work of the court
- Option 2: Scrapping Article 5 (see above)

3. Institutional Determinants

The constitutionalization of freedoms and rights cannot be addressed in isolation of the problems associated with the effectiveness of these rights, considering the constitutional structure as a whole, which is characterized by an imbalance between powers in favor of the President of the Republic. The presidentialist nature of the regime and its tendency towards centralization led to the reduction of the independence of the judiciary and the neutralization of institutional counter-authorities, especially the independent constitutional bodies for the protection of human rights.

3.1 At the level of the distribution of powers

The new Constitution adopts a clear trend towards centralizing powers horizontally and vertically and displays a tendency to undermine them.

General recommendations

- Amending Article 3 of the Constitution in order to determine the means of exercise by the people of their sovereignty by expressly providing for these means, including direct means (referendums) and indirect means (the people's election of their representatives). This serves to prevent the approval of formal means such as electronic consultations, whose organization raises many questions, and which could turn into a means of conferring fictive legitimacy on the choices of the political authorities.
- Amending the Constitution to establish a political system based on the separation of powers and the balance between them, while linking power to responsibility
- Amending the Constitution to strengthen the safeguards for the independence of the judiciary in accordance with international standards, whether with regard to the courts and their assumed institutional independence from other authorities (executive and legislative) in determining their internal organization and decision-making, or with regard to judges
- Maintaining the Local Government Code while amending some of its articles to align them with the requirements of the new Constitution at the institutional level, and preserving the same principles and mechanisms that guarantee local bodies the freedom to manage their affairs within the framework of state unity, partnership and solidarity

3.2 Human rights protection bodies

- The 2022 Constitution only foresees the Independent High Authority for Elections (Article 8), while the 2014 Constitution provided for five independent bodies: the Elections Commission, the Media Commission, the Human Rights Commission, the Anti-Corruption and Good Governance Commission, and the Commission for Sustainable Development and the Rights of Future Generations. However, with the exception of the Elections Commission, whose establishment preceded the 2014 Constitution, the establishment of most of the permanent independent constitutional bodies was slow and fraught with obstacles, which led to a delay in their establishment and the continued work of weak provisional instances. This represents one of the major failures in implementing the framework established by the 2014 Constitution.

- The change raises several questions, given the sensitivity of the role of independent bodies in general in ensuring the rule of law upon which any democracy is built. The lack of constitutionalization of the Human Rights Commission in the new Constitution raises special concerns, given that it is one of the most important institutional safeguards for rights and freedoms.

Recommendations

General recommendations

- **Option 1:** Re-constitutionalizing some independent bodies, especially the Human Rights Commission, as a key step towards strengthening the institutional safeguards for rights and freedoms and promoting the constitutionalization of other independent public bodies that were not constitutional previously, such as the Anti-Torture Commission and the Anti-Human Trafficking Commission, with full observance of the Paris Principles.
- **Option 2:** Keeping the four bodies previously included under Title 6 of the 2014 Constitution and regulated by virtue of organic laws and completing the process of enacting the organic law related to the Media Authority. This is in addition to revising some of the provisions of these organic laws to align them with their new status as non-constitutional bodies, while preserving their independence and efficiency, and accelerating the process of their actual establishment.

A special recommendation related to the Human Rights Commission

- Establishing a body with a general mandate in the field of human rights, whether under the Constitution (if amended) or under a legislative text (keeping the Organic Law of 2018 and introducing thereto a limited number of formal amendments within the limits required by the new status of this body). This body should fully comply with the principles relating to the status of national human rights institutions (Paris Principles), enjoying an "A" status according to the classification of the Global Alliance of National Human Rights Institutions.

4. The Conformity of Legislation regulating Rights and Freedoms with the Constitution

- The drafting of a new constitution raises issues related to the establishment of new institutions and the review of previous legislation in order to harmonize the national legal framework and guarantee the supremacy of the constitution. Following the ratification of the Constitution of July 25, 2022, this challenge was generally raised in relation to previous legislation, and especially in relation to legislation subsequent to the declaration of a state of exception in the year 2021, which is discussed later in the second section of this report.

Recommendations

- The Assembly of the People's Representatives, and specifically the Committee on Rights and Freedoms, has placed ridding the national legal framework of legislative texts that violate the Constitution at the top of its legislative priorities. It is thus preparing an audit of the laws in force that affect human rights and freedoms, based on the accumulated recommendations contained in the reports of the Individual Freedoms and Equality Committee and the Truth and Dignity Commission. This is in addition to leveraging the work of the National Committee to harmonize legal texts related to human rights with the provisions of the Constitution and international agreements and developing a plan and work programme that extends for the remainder of the parliamentary term (2023-2027), during which relevant reform measures are prioritized.
- Developing the legislative framework in relation to economic, social and cultural rights and allocating sufficient resources to implement the relevant reforms, especially establishing a social insurance system against unemployment, and expanding the scope of social protection to include various social and professional groups, including the most vulnerable groups, in addition to regulating the right to strike in the organic law on public service and in private systems in a way that balances between the right to strike as an element of the trade union rights and the continuity of the public services
- Developing the legislative framework in relation to environmental rights and allocating sufficient resources to implement the relative reforms, especially in the field of water, environment, and sustainable development

- The Assembly of the People's Representatives must use oversight procedures on government work that are provided for by the Constitution and its internal regulations dated May 2, 2023 to request clarifications from the Ministry of Justice regarding the progress of the work of the technical committee charged with preparing the draft of the new Code of Criminal Procedure and the committee charged with preparing the draft of the new Criminal Code.
- Civil society must launch an advocacy campaign aimed to push members of parliament to re-submit the draft Code of Individual Rights and Liberties to the Assembly of the People's Representatives.
- The government must call for strengthening the work of the National Committee to harmonize legal texts related to human rights with the provisions of the Constitution and international conventions.
- Supporting the capacity of civil society, including human rights associations, coalitions, and lawyers, concerning legislative and regulatory texts that violate the Constitution and training them on strategic litigation techniques

Section II: The Guarantee of Rights and Freedoms during States of Exception

Since 2011, Tunisia has experienced multiple states of exception, the legal system of which varies depending on their nature and the danger to be addressed. These include the state of emergency declared due to a number of security threats and the state of health emergency required to confront the Covid-19 pandemic at the beginning of 2020 and its ensuing multidimensional crisis. They further include the state of exception declared by the President of the Republic on July 25, 2021.

Given the seriousness of the repercussions of states of exception on the balance between powers and on the exercise of rights and freedoms, the constitutions of democratic countries and international human rights law attach great importance to the precise framing of the "legitimacy of exception" so that it is consistent with the requirements of the rule of law, by laying down a set of procedural and material conditions, as well as safeguards related to rights and freedoms.

Therefore, we will first address the multiplicity of legal systems related to exceptional powers, which raises the problem of defining and framing them (A). We will next address formal and procedural conditions, by reviewing options related to declaring, extending, and ending the state of exception (B). The scope of exceptional provisions and the options proposed to protect rights and freedoms against the exercise of exceptional powers (C), the means to protect the pillars of the constitutional system from the tyranny of the executive authority (D), and oversight of exceptional measures (E), will further be analyzed.

1. The Multiplicity of Legal Systems related to Exceptional Powers

Constitutional law in times of crises is characterized by multiple systems of exception. However, the distinction between exceptional states is not always clear. The regulation of these states by the political authorities represents real problems in light of the relativity of the standards adopted to distinguish and clearly define converging concepts.

1.1 State of exception

- Successive constitutions contented themselves with devoting an article related to the state of exception without addressing other exceptional cases. These are, respectively, Article 46 of the Constitution of June 1, 1959, Article 80 of the Constitution of January 27, 2014, and Article 96 of the Constitution of July 25, 2022.
- Article 96 sets a number of material conditions. It requires the existence of an imminent danger, understood as "the existence of something that would, if remediation is not taken, lead to consequences that are impossible, or at least, difficult to remedy." The state of danger must have begun to materialize or become imminent. There must also be an imminent danger threatening the entity of the republic. Article 96 also requires that the imminent danger be a threat to the security of the country, and it extends to all cases in which there is a breach of public security and a threat to the authority of the state, whether from within or from abroad. As for the procedural conditions for declaring a state of exception, they are limited to consulting the Prime Minister and the heads of the two chambers that make up the legislative authority.

This grants broad powers to the President of the Republic amid a lack of any timeframe for these measures or any judicial oversight over the decision to declare a state of exception or to extend it. This is analyzed in detail below.

1.2 State of emergency

The regulation of the state of emergency under Order No. 50 of 1978 raises several constitutional problems:

- The nature of the text, which entails restrictions: In view of the restrictions on rights and freedoms resulting from the state of emergency, Order No. 50 is considered a violation of the requirements of the Constitution, especially Article 55 of the Constitution of July 25, 2022 (and before that, Article 49 of the 2014 Constitution), which requires that restrictions on constitutional rights and freedoms be exclusively introduced by law.
- The ambiguity of the constitutional basis: None of the successive constitutions tackled the state of emergency. The order relating to the state of emergency was based on Article 46 of the Constitution of June 1, 1959, which corresponds to Article 96 of the Constitution of July 25, 2022, and both relate to the state of exception.
- Confusion and ambiguity regarding the legal basis for presidential orders concerning the declaration of a state of emergency, which further deepens the confusion between the state of emergency and the state of exception.
- The generality of the conditions and their lack of precision, especially the conditions for declaring a state of emergency and the concept of danger as specified in Article 1 of Order No. 50.

1.3 State of health emergency

- Despite the issuance of a number of urgent measures to confront the Covid-19 pandemic in Tunisia in 2020-2021, there is no special legal framework for what is known in comparative law as a state of health emergency. Moreover, the exceptional regulations stipulated in Tunisian law (for the state of exception, state of emergency, …) were not necessarily aligned with the circumstances and challenges posed by the Covid-19 pandemic, and they did not generally provide appropriate response mechanisms.

- During the Covid-19 pandemic, the legal texts and intervening parties multiplied, and confusion prevailed between relying on Article 80 of the 2014 Constitution and Order No. 50 relating to the state of emergency, in addition to other legal texts such as Law No. 71 of 1992 of July 27, 1992, relating to contagious diseases and Law No. 39 of 1991 of June 8, 1991, relating to disaster prevention and response and organizing rescue.

Recommendations

The constitutional regulation of various exceptional states

- Option 1: Providing in the constitution for a single state under which exceptional measures are taken, which is the state of exception, and which is deemed the most dangerous in terms of its threat to the entity of the state, as provided for in Article 96. Other exceptional states that are based on organic laws must be defined clearly, distinguishing the state of emergency and the state of health emergency from the state of exception.
- Option 2: Revising the constitution and clearly providing for the various types of exceptional states, while highlighting the differences between the state of exception and the state of emergency (procedural conditions, material conditions, oversight, powers granted to constitutional authorities, scope of measures, restriction of rights...) and referring to an organic law to specify the details.

With regard to the regulation of the state of emergency

- Expediting the enactment of an organic law to regulate the state of emergency that repeals Order No. 50 of 1978, in line with Articles 55 and 75 of the 2022 Constitution that reserve the power to restrict constitutional rights and freedoms to the law, and conferring to the measures taken in this context the necessary safeguards. This is in addition to respecting Article 4 of the International Covenant on Civil and Political Rights and CCPR General Comment No. 29.
- The organic law must regulated various states of emergency, whether related to health, security, climate, or social circumstances, provided that it includes common provisions and special provisions for each of them. This responds to the multiplicity of states of emergency and enables avoiding exaggeration and the dispersion of legislation. In this context, it is possible to draw on and seek to harmonize previous draft laws regulating the state of emergency, draft laws regulating the state of health emergency, and the proposals of the Committee on Individual Liberties and Equality in 2018.

2. The Conditions Applicable to States of Exception

2.1 The constitutional powers authorized to declare these states

Declaring a state of exception is subject to a set of procedural conditions provided for in Article 96 of the 2022 Constitution, in which the President of the Republic plays a pivotal role, as they have broad discretion in assessing the extent of a state of imminent danger threatening the entity of the republic and the country's security and independence, and in taking the decision to declare a state of exception. Article 96 limits itself to stipulating that the Prime Minister, the President of the Assembly of the People's Representatives, and the President of the National Council of Regions and Districts shall be consulted before announcing these measures. However, with respect to the state of emergency, the executive authority, represented by the President of the Republic, has the right to declare a state of emergency in accordance with the requirements of Order No. 50 of 1978.

Recommendations

Regarding the declaration of a state of exception

- Amending the Constitution to stipulate the participation of the executive and legislative authorities in declaring a state of exception, by requiring the approval of the Legislative Council by a qualified majority
- Amending the Constitution to provide for mandatory consultation with the Constitutional Court to ensure the fulfillment of the conditions that allow the declaration of a state of exception. Judicial review of the declaration of a state of exception may be limited to monitoring the procedural aspects of the declaration, with the possibility that this oversight also covers the reasons justifying the declaration of a state of exception.

Declaration of a state of emergency

- The new law regulating the state of emergency must stipulate the obligation of consulting and informing the legislative and judicial authorities (in particular, the Constitutional Court – if not, this jurisdiction must be allocated to the administrative judiciary)

2.2 The temporary nature of states of exception

- According to Article 96 of the 2022 Constitution, the exceptional measures shall cease when their causes cease. This article did not stipulate the initial duration of the measures, nor a specific period for their extension, nor oversight over them, which means that the President of the Republic has absolute authority to decide the duration of the measures. The danger of such provision is that it allows the exception state to continue without clear time limits, which increases the risk of the authority deviating from the objective standards that may have initially justified resorting to exceptional powers. This is considered a departure from what was stipulated in Article 80 of the 2014 Constitution, which enabled the Speaker of the Assembly of the People's Representatives or thirty of its members to ask the Constitutional Court, thirty days after the exceptional measures took effect, and at any time after that, to decide whether or not the state of exception should continue.
- As for the state of emergency, the initial period approved by Order No. 50 of 1978 is estimated at thirty days, with the possibility of its extension without a specified timeframe. This can lead to the perpetuation of the state of emergency and thus the denial of the rule of law, contrary to the temporary nature of these measures.

Recommendations

The state of exception

- Amending the Constitution to specify its initial duration. This means determining the start and end of the legal effects of this stare inn the decision declaring it. This is in addition to stipulating the possibility of extending the state of exception after the approval of the authorizing body, provided that this is absolutely necessary. Setting this time limit is deemed a guarantee against the misuse of states of exceptions to prevent exceptional powers from shifting from a temporary exceptional regime to a permanent regime
- Amending the Constitution to stipulate that the extension decision be submitted to a judicial body – the constitutional judiciary (or the administrative judiciary in the absence of a Constitutional Court) – that can determine whether the conditions that allow the extension of the state of exception are fulfilled or not

- Amending the Constitution to stipulate that the various provisions on the state of exception fall within an exceptional legal system that is circumstantial in nature and that inevitably ceases when its causes disappear, i.e. when the imminent threat and danger cease to exist, and once the normal operation of state facilities is restored
- Requesting the President of the Republic to announce in an official statement the end of the state of exception that he announced on July 25, 2021, in accordance with the Constitution

The state of emergency

- Ending the continued extension of the state of emergency because it conflicts with its own temporary and exceptional nature. Maintaining the state of emergency for a period exceeding reasonable time limits is deemed a serious danger to the rule of law.
- The new law regulating the various types of state of emergency must stipulate that the duration of these measures shall be of thirty days, subject to extension under a law approved by the Assembly of the People's Representatives after consulting with the Constitutional Court. The government's obligation to notify States parties to the International Covenant on Civil and Political Rights must also be stipulated in accordance with the obligation undertaken under Article 4, paragraph 3, of the covenant.
- It must be provided that measures taken under the emergency law shall be annulled concurrently with the end of the state of emergency.

2.3 Determining the scope of exceptional measures

- Compared to Article 80 of the 2014 Constitution, Article 96 of the 2022 Constitution did not contain the necessary safeguards to ensure the protection of the foundations of the constitutional system and did not draw any lessons from the experience of the declaration of the state of exception on July 25, 2021.
- Article 96 merely stipulated that the President of the Republic cannot dissolve the Assembly of the People's Representatives, and that no motion of censure against the government may be submitted. It did not stipulate that the Assembly of the People's Representatives would be deemed permanently in session for the duration of this period, a procedure that was

stipulated in Article 80 of the 2014 Constitution. Here it is worth noting that the internal regulations of the Assembly of the People's Representatives approved on April 28, 2023 devoted an entire section to exceptional measures, but this raises constitutional problems.

Recommendations

- Option 1: If the Constitution is not amended: The organic law regulating the state of emergency must precisely specify the scope of the measures taken and stipulate fields that cannot be covered by these measures based on the requirements of Article 96 of the 2022 Constitution (the impossibility of dissolving one or both of the legislative councils and the impossibility of submitting a motion for censure against the government).
- Option 2: In the event of amending the Constitution: Article 96 must be amended by adding that the two chambers shall remain in permanent session and also stipulating that the Constitution cannot be amended, in order to protect the constitutional system. The states of exception require temporary measures to confront serious and occasional circumstances and cannot be used as a pretext for establishing permanent constitutional provisions.

3. Protecting Rights and Freedoms during the State of Exception

The state of exception in itself does not constitute a threat to democracy, but rather aims in principle to stabilize and protect it, provided that there is a balance between ensuring constitutional rights and freedoms on the one hand and the requirements of security and defense to protect the state and the national territory from internal and external threats on the other hand.

3.1 Assessment of the constitutional framework regulating the state of exception

Article 55 provides a number of safeguards when restricting rights and freedoms, but it does not explicitly address the status of rights and freedoms under a state of exception or a state of emergency. Article 96 of the 2022 Constitution also fails to address this matter, which opens the door for the discretionary assessment of the political authorities and the judiciary.

Recommendations

- Option 1: If the Constitution is not amended: The absence of an explicit text in the Constitution on how to restrict rights and freedoms during states of exception must not be interpreted to mean that there is a vacuum that enables the President of the Republic to have discretionary authority in this regard. Rather, it must be interpreted to subject the President to the list of non-derogable rights under a state of emergency in accordance with Article 4 of the International Covenant on Civil and Political Rights and CCPR General Comment No. 29, which are binding on the Tunisian state.
- Option 2: In the event of amending the Constitution: a paragraph must be added to Article 55 or Article 96 or a new article must be drafted specifying the non-derogable rights under the state of exception or in all exceptional cases, in accordance with the requirements of international human rights law, especially Article 4 of the International Covenant on Civil and Political Rights.

3.2 Assessment of the order governing the state of emergency

Order No. 50 authorizes the President of the Republic to declare a state of emergency, after consulting the Prime Minister and Speaker of the Assembly of the People's Representatives. It also grants the governors and the Minister of the Interior broad powers. In view of the restrictions on rights and freedoms resulting from the state of emergency, Order No. 50 is considered a violation of the requirements of the Constitution, especially Article 55 of the Constitution of July 25, 2022 (and before that, Article 49 of the 2014 Constitution), which stipulates that restrictions on constitutional rights and freedoms must be exclusively established by an organic law.

Recommendations

- Option 1: If the Constitution is not amended: the new law regulating the state of emergency must include a list of non-derogable rights under the state of emergency in accordance with Article 4 of the International Covenant on Civil and Political Rights and CCPR General Comment No. 29.

- Option 2: If the Constitution is amended and a list of non-derogable rights and freedoms is added, the content of this constitutional list must be included in the new organic law regulating the state of emergency.

In both cases, the organic law must take into account the guidelines and comments of the Human Rights Committee when regulating residence and house arrest, interception of communications and correspondence, and searches of premises...

3.3 Oversight over the constitutionality of legislation issued under states of exception

- The analysis of the constitutionality of a number of decrees and orders issued after the declaration of the state of exception on July 25, 2021, and their assessment in light of Article 55 of the Constitution, highlights the extent of the violations that strike at the heart of a number of rights and freedoms, such as the right to peaceful demonstration, freedom of expression, freedom of movement, and the presumption of innocence, even though these rights are protected under the International Civil and Political Rights, which Tunisia ratified in 1968, specifically Article 4 thereof on states of exception.
- The 2022 Constitution does not provide for parliamentary or judicial oversight over measures taken under the state of exception. The absence of an express text stipulating the possibility of appealing exceptional measures before the judiciary allows for different judicial interpretations between those who consider these measures as falling within the scope of acts of sovereignty that are immune to any challenge and those who deem them subject to judicial review since they are considered administrative decisions. As for decrees, the failure to subject them to oversight means shielding a range of texts that are critical in terms of rights and freedoms from judicial review.

Recommendations

Parliamentary oversight

- Calling on the Assembly of the People's Representatives to provide subsequent oversight over the measures issued by the President of the Republic, whether these are decrees or texts of a regulatory nature, based on the mechanisms provided for in the internal regulations of the Assembly of the People's Representatives
- If the Constitution is amended: The Constitution must specify that the Assembly of the People's Representatives may form an investigation committee that will subsequently scrutinize the measures taken under states of exception. This measure would proactively deter the executive authority and discourage it from committing violations for which it may later be held accountable before the legislative authority.

Cleansing the legal system

- Calling on the Assembly of the People's Representatives, through the General Legislation and Rights and Freedoms Committees, to scrutinize the decrees drawn up under the state of exception and consider them against Article 55 of the Constitution and international human rights law, and ridding the legal order of all texts that violate the Constitution through the annulment, amendment, or approval of the relevant texts.
- Calling on the legislator to intervene to put an end to the legislative chaos that represents a threat to legal security by amending or annulling conflicting texts (for example, Decree 115, Decree 54, and the Telecommunications Code), subject to the principle that acquired rights may not be impaired and giving preference to texts that are the least restrictive of rights and freedoms.

Judicial oversight

- Submitting pleas of unconstitutionality against decrees, whether ratified or not, by pleading the unconstitutionality of ratifying laws before the ordinary courts and subsequently before the Constitutional Court upon its establishment, within the framework of strategic litigation (see Section III on the plea of unconstitutionality).

Section III: The Guarantee of Rights and Freedoms through Constitutional Oversight

Under this section, two options are presented in relation to constitutional oversight, considered as one of the most important institutional safeguards that citizens can invoke to protect the supremacy of the constitution and to defend their constitutional rights and freedoms. It should be noted that constitutional oversight has been a legal and political demand for decades in Tunisia. High hopes are also placed on the *a posteriori* judicial oversight of the constitutionality of laws in order to cleanse the legislative system of unconstitutional articles that marred it during normal constitutional times or under states of exception, especially in light of the delay in legislative reforms related to rights and freedoms and their subjugation to political balances. Drawing lessons from the failure to establish the Constitutional Court under the 2014 Constitution, and the ensuing repercussions on the democratic transition, require accelerating the establishment of this court despite the shortcomings vitiating the 2022 Constitution (A). Likewise, a number of options must be presented that may be useful to the legislator when drafting the new law regulating the Constitutional Court, especially with regard to the plea of unconstitutionality (B).

1. The Obligation to Establish the Constitutional Court

1.1 The establishment of the Constitutional Court

The establishment of the Constitutional Court in Tunisia is currently a major stake given the general political context characterized by a state of exception and the accompanying issuance of unconstitutional legislation amid the absence of any oversight over the constitutionality of laws in the wake of the abolition of the Provisional Instance to Review the Constitutionality of Laws pursuant to Article 21 of Order No. 117 of September 22, 2021.

Recommendations

- Accelerating the implementation of the provisions of the 2022 Constitution by enacting a new law for the establishment of the Constitutional Court or amending Constitutional Court Law No. 50 of 2015 within the limits required by the new text of the Constitution. This new law must establish the Constitutional Court during the first semester of 2024, while allocating a budget for this purpose in the Finance Law for 2024.
- The new organic law must address the various organizational and functional aspects related to the Constitutional Court and must not include any referral to another legislative text to regulate the plea of unconstitutionality, so as not to prolong the process of implementing this mechanism.

1.2 The independence of the Constitutional Court

The 2022 Constitution brought about fundamental changes in the composition of the Constitutional Court compared to the 2014 Constitution. The composition of the Constitutional Court, as specified in Article 125 of the 2022 Constitution, raises several problems, including the following:

- The court consists of nine members, all of whom are judges: The first third of them are the most senior heads of chambers in the Court of Cassation, the second third of them are the most senior heads of the cassation or advisory chambers in the Administrative Court, and the final third of them are the most senior members of the Court of Accounts. This raises many questions about the extent of the judges' mastery of constitutional interpretation techniques, given the specificity of constitutional oversight.
- The provisions of Article 125 of the Constitution appear to be based on the principle of "*nomination by capacity*," but in practice it is the President of the Republic who has the power to make such nomination, given that the President himself is the one who names the heads of departments (Article 120 of the Constitution).
- The Constitution does not specify a specific term for the membership of judges of the Constitutional Court, with the adoption of a seniority criterion for their appointment. This membership expires upon reaching retirement age.

This stirs controversy since membership is granted to the most senior judges in the highest judicial chambers, who will only be a few years away from retirement age, which would affect the stability of the composition of the court and its jurisprudence.

Recommendations

Court membership

- Option 1: Amending the Constitution

  The Constitutional Court law must provide for resorting to specialized assistants in public law assigned by the Constitutional Court, by consulting higher education professors enjoying experience and competence in public law on the matters submitted to them.

- Option 2: Not amending the Constitution

  Adopting a mixed system for the appointment of the members of the Constitutional Court involving multiple authorities to ensure the independence of its decisions. This is an option adopted by most constitutions in democratic systems that opted for the Constitutional Court model.

The appointment of judges

- Amending the Constitution to stipulate that the appointment authority that receives nominations from judicial councils is forced to choose among them based on the concurring opinion technique. In practice, this entails dividing the appointment authority between a nominating authority and an appointing authority. This is an option that embraces the idea of division of power to minimize the dangers of tyranny.

Selection criteria and membership duration

- Option 1: Not amending the Constitution

  The new organic law on the Constitutional Court must lift the ambiguity that marred the constitutional text, by precisely determining the age requirement for candidates to membership in the Court and the retirement age for judges of the Constitutional Court.

- Option 2: Amending the constitution
  - The Constitution must expressly specify the term of its members to guarantee the independence of judges and the independence of the court and the efficiency of its work.
  - The Constitution must expressly specify the age requirement for candidates to membership in the Court and the retirement age for the Constitutional Court judges.

2. The Procedural Design of the Plea of Unconstitutionality

The Constitutional Court is competent to review the constitutionality of laws referred to it by the courts if the plea of unconstitutionality is invoked in legal actions and in accordance with the procedures approved by the law (Article 127 of the 2022 Constitution). This entails a series of observations and recommendations regarding the options that can be adopted by the new organic law on the court.

2.1 The right to raise the plea of unconstitutionality

The 2022 Constitution did not clearly define the parties that have the right to raise the plea of unconstitutionality of laws. Article 127 is a general article. The Constitution also did not stipulate the right of individuals to directly challenge laws through a lawsuit before a constitutional judge, in contrast to the measure enshrined by some comparative constitutional systems to enable individuals to directly challenge laws that affect their rights and freedoms (*Amparo*), such as in Germany, Austria, Slovenia, Armenia, and Hungary.

Recommendations

The new organic law on the Constitutional Court must include a text

- That grants the right to raise the plea of unconstitutionality to all parties to the dispute (the plaintiff/defendant) and recognizes it for natural and legal involved in the dispute in the initial lawsuit.
- That enables the court in charge of the lawsuit and the Public Prosecution to automatically raise a plea of unconstitutionality of a text within the framework of a lawsuit brought before them and refer said lawsuit to the Constitutional Court for adjudication. The issue of constitutionality concerns public order, and the Constitution did not explicitly prevent the court from spontaneously raising this issue. Moreover, this option is consistent with Article 55 of the 2022 Constitution, which authorizes all judicial bodies to protect rights and freedoms from any violation.

2.2 The determination of the courts before which the plea of unconstitutionality may be raised

The 2022 Constitution, similarly to the 2014 Constitution, enabled litigants to plead unconstitutionality before the courts. The two Constitutions further entrusted these courts to accept these pleas and refer them to the Constitutional Court. One may consider that the courts concerned with these procedures are those that form part of the judicial judiciary, the administrative judiciary, and the financial judiciary, defined in the Constitution as components of the judiciary. However, the question that remains to be answered is whether it is possible to raise the plea of unconstitutionality before the military judiciary, especially since the 2022 Constitution did not address the military courts at all; it neither determined their jurisdiction nor made any reference thereto, although they represent one of the components of the judiciary in Tunisia and their jurisdiction extends to civilians.

Recommendations

The new organic law on the Constitutional Court must include a text

- That expands the scope of the courts before which the plea of unconstitutionality may be raised, to comprise all courts, including military courts, as well as all public bodies that exercise a judicial function and examine disputes involving rights and freedoms, without being a court in the structural sense of the word, such as the Competition Council and the Access to Information Authority.
- That allows raising the plea of unconstitutionality during all stages of litigation, which would enable the parties to the dispute and the judge to track unconstitutional provisions in force, which further safeguards rights and freedoms.

2.3 The subject-matter of the plea of unconstitutionality and areas of oversight

- The constitutional review in accordance with the provisions of Article 127 of the 2022 Constitution includes the following legal texts:
  - Laws: based on a request from the President of the Republic, thirty members of the Assembly of the People's Representatives, or half the members of the National Council of Regions and Districts
  - Treaties submitted by the President of the Republic before the law approving them is stamped.
  - Laws referred to the Constitutional Court by the courts when their unconstitutionality is invoked and in accordance with the procedures approved by law
  - The internal regulations of the Assembly of the People's Representatives and the internal regulations of the National Council of Districts and Regions, which are submitted to the Constitutional Court by the president of each of these two councils.
  - Procedures for revising the constitution
  - Draft laws for amending the Constitution to determine whether or not they conflict with unamendable provisions as stipulated in the Constitution

- By comparing areas of oversight, we find that oversight by filing a lawsuit is broader than oversight by invoking the plea unconstitutionality, which can only be raised against laws. Although ordinary and organic laws do not stir controversy in this context, the possibility of invoking the plea of unconstitutionality in relation to a group of other legislative texts, specifically referendum laws (Article 97), laws ratifying international treaties, and constitutional decrees and laws seems debatable.

Recommendations

Referendum laws

- Option 1: The new organic law on the Constitutional Court must expressly specify the possibility of claiming the unconstitutionality of referendum laws, especially since Article 97 of the Constitution stipulated that referendum laws must not violate the Constitution but failed to subject them to the prior oversight of the Constitutional Court. Thus, invoking unconstitutionality could prevent referendum laws from being completely immunized against any review of their constitutionality.
- Option 2: In the absence of a clear legal text on the possibility of raising unconstitutionality against this type of law, the mechanism of strategic litigation can be resorted to by invoking the unconstitutionality of a referendum law before the judiciary and calling on the constitutional judge and subsequently the Legislative Council to make a decision in this regard.

Decrees

- Option 1: If decrees, especially those issued under a state of exception, are subject to parliamentary approval, these texts will take the form of law and their unconstitutionality can be argued without any problems. This hypothesis is contingent upon the initiative taken by the legislative authority.
- Option 2: In the event parliament does not ratify the decrees issued under the state of exception, which is the hypothesis closest to reality given the precedents recorded in Tunisia in this regard, the following options would be available:
  - The matter would be entrusted to the administrative judge to examine it within the framework of their legal oversight. There are precedents by the administrative courts in this area.

- It may be possible to resort to the strategic litigation mechanism to highlight the importance of subjecting decrees to the oversight of the constitutional judge. This option assumes urging lawyers and civil society activists to intensify their use of the plea of unconstitutionality to rid the legal order of unconstitutional decrees issued under states of exception.

- Option 3: The new organic law on the Constitutional Court must expand the scope within which the plea of unconstitutionality may be raised before the Constitutional Court to include decrees that have not been ratified and that are exceptionally described as texts of legislative value (based on the material criterion), especially those made within the framework of exceptional states, whether a state of emergency or the state imposed to counter the Covid-19 pandemic, or the state of exception (such as the decrees taken within the framework of Presidential Order No. 117 of September 22, 2021 relating to exceptional measures).

- Option 4: The Constitution must be amended to allow invoking the plea of unconstitutionality of decrees that were not ratified and that were exceptionally adapted as texts of legislative value (based on the material criterion), especially those adopted within the framework of exceptional states and transitional situations.

The subject-matter of the plea of unconstitutionality and areas of oversight

The Constitution did not specify that the subject of the plea of unconstitutionality must be necessarily related to the issue of rights and freedoms, contrary to what is recognized in comparative law. Therefore, should this plea be limited to the lack of conformity of legislative provisions that are intended to be applied in a lawsuit with the rights and freedoms guaranteed in the Constitution, or can this plea be raised even with respect to rights and freedoms that are not explicitly stipulated in the Constitution?

Recommendations

- Expanding the possibility of invoking the plea of unconstitutionality of texts related to rights and freedoms, whether those expressly provided for in the Constitution or international treaties, or even those outside the Constitution but included in legislation.
- Allowing the possibility of invoking the unconstitutionality of the procedures followed in approving the law, especially since sometimes, in light of political consensus, several laws may escape prior oversight. Moreover, separating the procedures from the content in protecting rights and freedoms may be meaningless.

3. The Relevant Procedures

The Constitution limits itself to addressing the broad outline of the procedures for pleading unconstitutionality without regulating relevant procedures in relation to issuing the pleading memorandum, the referral decision, and the screening of the pleas. Filtering the pleas of unconstitutionality is an extremely important procedure, as it is must be designed in a way that achieves a balance between rationalizing challenges for unconstitutionality and ensuring the rights of litigants. The procedural organization of the plea of unconstitutionality raises several challenges that the new organic law on the Constitutional Court is expected to regulate.

Recommendations

The pleading memorandum

- The memorandum must be written and reasoned by a lawyer. However, if the plea is raised by the court, the judge may draft the challenge, and this is ought to be done within the framework of the referral decision.

The referral

- The referral shall be made by the judge in the form of a reasoned decision that is not subject to challenge but is subject to formal requirements aimed at facilitating the task of the constitutional judge.

Challenges

- It must be possible to raise challenges based on a new plea in issues whose constitutionality has previously been confirmed. This would ensure expanding the jurisprudence of the court, especially in the field of protecting rights and freedoms. At the same time, the constitutional judge must be allowed to refuse to examine issues whose constitutionality they have previously confirmed, to avoid being overwhelmed by repeated pleas in similar issues.
- In the event that the plea is rejected for not meeting formal requirements, it must be possible to invoke a second plea addressing the unfulfilled formal requirements within the framework of the same case, with the aim of protecting violated rights.

Filtering pleas

- Option 1: The new organic law must allow the Constitutional Court to exercise exclusive control over the process of examining serious challenges through a committee within said court. Judges before whom the issue of unconstitutionality is raised must be automatically bound to refer it to the Constitutional Court.
- Option 2: The ordinary courts before which the plea of unconstitutionality is invoked must be entrusted with the filtering process, and must justify the decision of not referring the plea of unconstitutionality. The organic law on the Constitutional Court must also allow challenging the decision of not referring the plea before the Constitutional Court.
- Option 3: The law must entrust the filtering process to the highest court within the judicial order that includes the court before which the plea of unconstitutionality is made (the chambers of the Court of Cassation and the plenary session before the Administrative Court), or a joint filtering committee, given the status of these bodies and their role in shaping jurisprudence and unifying legal opinions.

4. The Decision of the Constitutional Court in relation to a Plea of Unconstitutionality

Judicial decisions issued in the context of a plea of unconstitutionality are particularly sensitive, as the Constitutional Court's ruling declaring the unconstitutionality of legislative texts that had previously entered into force and had effects on people's legal positions, may undermine the rights and freedoms of individuals, and impair the principle of acquired rights, and the principle of legal security in general.

4.1 The effect of the Constitutional Court's decision of unconstitutionality on the law in question

According to Article 131, paragraph 2, if the Constitutional Court rules that a law is unconstitutional, the said law shall be suspended within the limits of the court's ruling. The intended meaning of the expression "suspension of the law" seems problematic. The meaning of suspension differs from that of abrogation, which means ceasing the implementation of unconstitutional provisions without prejudice to the effects entailed from their application in the past. It also differs from that of the term repeal, which means annulling constitutional provisions with a retroactive effect.

Recommendation

- It must be expressly stipulated that the unconstitutional legislative text is deemed null as of the date of publication of the court's decision or from a later date determined by the court. This specification would better clarify the effects of the decision in relation to the legal text.
- The Constitutional Court must be enabled to determine the conditions, restrictions and deadlines related to reviewing the scope and extent of the effects resulting from declaring a legislative text unconstitutional. The court must also be enabled to verify the constitutionality of other legal requirements related to the legislative text declared unconstitutional.

4.2 The implications of the Constitutional Court's ruling of unconstitutionality on the lawsuit

The court that referred the plea of unconstitutionality will be informed of the Constitutional Court's ruling so that it adjudicates the original lawsuit in light of said ruling. The political authorities, including the President of the Republic, the Prime Minister, and the Speaker of the Assembly of the People's Representatives, are also supposed to be informed of the ruling. Given that the implications of the Constitutional Court's rulings apply to all, these rulings must be published in the Official Gazette and on the Constitutional Court's website.

Recommendations

- The deadlines for the entry into force of the ruling must be unified and the new law must expressly provide that the ruling on the plea of unconstitutionality shall be binding on all individuals and public authorities as of the date of its publication in the Official Gazette.
- The Constitutional Court's law must stipulate that the ruling of unconstitutionality does not have a retroactive effect on acquired rights.
- The article on elections must be accorded varying effects according to the discretionary authority of the constitutional judge, so that the scope of determining the effects is left to the Constitutional Court itself in order to adapt to the specificity of each situation.
- It must be specified that the State shall be held accountable before the administrative judge for the effects resulting from the plea of unconstitutionality of laws, given the harm to persons ensuing from the legal text declared unconstitutional by the Constitutional Court.

General recommendations on the communication policy of the Constitutional Court

- The Constitutional Court law must stipulate that the opinions of individual judges (concurring opinion or dissenting opinion) must not be published in order to preserve the unity of the court, the confidentiality of its deliberations, and the collegial and abstract nature of its rulings.
- The Court must set forth a code of conduct for constitutional judges that enables them to be open to their surroundings, which requires an active communicative role, but within the framework of respecting the requirements of neutrality, independence, integrity, and the duty of discretion.

- Immediately after its establishment, the Court must adopt a clear and professional communication policy overseen by a specialized work team in institutional media, in cooperation with the Court's members.

General recommendations on promoting capacities and expertise-sharing

- Training courses for judges and lawyers must be intensified to allow them to amass experience in this field, accompanied by the development of practical guides for judicial and administrative judges and lawyers on the plea of unconstitutionality.
- An observatory must be established to follow-up on lawsuits related to the plea of unconstitutionality in the field of rights and freedoms. These lawsuits must be published to introduce exemplary judicial positions in this regard. An institutional mechanism can also be established that enables communication and sharing of experiences between law faculties and the judicial, administrative and constitutional courts in this field.

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The Arab Association of Constitutional Law

The Arab Association of Constitutional Law (AACL) is the first regional network of constitutional experts in the Arab region. Established in 2013, AACL's main objective is to contribute to good governance and democratic transition by promoting intra-regional networking and exchange of expertise. It also aims to provide objective, grounded and forward-thinking analysis of the region's constitutional frameworks and to apply its expertise to legal and constitutional reform efforts in the Middle East and North Africa.

AACL brings together leading legal scholars, judges, lawyers, parliamentarians, and civil society activists from various Arab states, specialized in constitutional law, electoral systems, peace-building processes and human rights. AACL members are prominent experts in constitution-building in the region and have participated in the negotiations and drafting of the constitutions in the Arab region and abroad, including in Morocco, Algeria, Tunisia, Libya, Egypt, Iraq and Yemen. The organization has become a reliable source of expertise in constitutional reform efforts.

AACL organizes and participates in a large number of activities, including regional or international conferences and panels with renowned experts, decision-makers, and prominent universities and institutions in the Arab region. Moreover, AACL issues academic publications on constitutional developments in the Arab region, including books, policy papers, studies, research papers and articles.

AACL seeks to strengthen the capacities of researchers in the field of constitutional law in the Arab region through its annual Constitutional Law Academy, established in 2015, or through its working groups that bring together senior researchers and specialists to discuss constitutional developments in countries that are undergoing constitutional transitions and to collaborate on joint research projects.

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