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Drafting Tunisia's Constitution: Tensions between Constituent Power
and Constituted Power in the Transition Process

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Abstract

After a series of votes on each of the 149 articles of the constitution, the Tunisian National Constituent Assembly (ANC) adopted a new constitution on 26 January 2014 which was signed into law by President Mouncef Marzouki the following day. It marked the end of a period of political tension that rocked the country since the summer of 2013, when on 1 June the assembly, dominated by the Islamist Ennahda Movement, presented an Islamo-conservative constitution. This proposal was followed by the assassination of the ANC member and opposition politician Mohamed Brahmi on 26 July and Egypt's military coup on 3 July 2013.

This paper will analyse the tensions surrounding the two and a half year constitution-making process from the two core legal concepts of constituent power and constituted power. Drawing on the theoretical work of Thornhill, I will argue that key to the success of Tunisia in tempering tensions was the role of the judiciary in pre-revolutionary Tunisia as well as the appearance of other extra-judicial actors in the constitution-making process. This was complemented by significant references to international law and rights. During the process of drafting the constitution, the judiciary refrained from attempting to establish its autonomy or supremacy in deciding the correct application of law. Due to this, the elected assembly was charged with the unique task of establishing a legal-rational framework without the constraints imposed by common laws or an autonomous and semi-emancipated judiciary. While it is not possible to assert that this unique situation made the transition to institutionalised liberal-democratic rule possible, this paper will argue that Tunisia's relative stability was at the very least facilitated by the fact that the judiciary remained in the background, denying antagonistic actors access to this institution in order to express their opposition to developing constitutional rule and practice.

Introduction

Comparative Political Scientists and North African specialists have faced a unique situation over the past four years in comparing both upcoming and attempted transitions from authoritarian rule in three countries and the establishment of new constitutions and constitutional orders in four, with completely different outcomes. Ann Lesch compared the transitions in Tunisia, Egypt, and Libya from the perspective of inclusiveness and procedure, after the ousting of the former leaders, arguing that:

Egypt's rush to establish electoral democracy before creating a broadly legitimate constitution and fostering the environment for a range of political parties to compete boomeranged when the elected government monopolized power, marginalized other political forces and hastily promulgated a divisive constitution. The Libyan and Tunisian approach — writing the constitution first, under inclusive interim governments — has considerable merits. And yet, delays in writing their constitutions and acrimony among the coalition partners have caused stress and generated their own problems.¹

In my other work, I have compared the role of extra-judicial actors in political transitions and drafting of new constitutions in Egypt, Morocco, and Tunisia. I argued that the cases of Morocco and Egypt show that extra-judicial actors develop strong positions inside the state and are able to generate a great

amount of trust in their respective constituencies. Transitions that are marked by extensive uncertainties and weak institutions, especially institutions and actors that are based on abstract rule of law and constitutionalism, are particularly vulnerable to political battles that are waged by extra-judicial actors.² In Morocco and Egypt, what is often called the 'deep state' had historically rooted features that could easily throw into illegitimacy their mobilised contestants that attempted to establish themselves as new constituent power.

In this paper, I seek to further analyse the constitutional transition process and argue that the relative success in Tunisia was related to the limited significance of its judiciary. This proposition may be considered counterintuitive with regards to what can be considered a mainstream hypothesis about transitions. After all, according to the standard Weberian view of law as applied to democratic transitions,³ democratising groups attempt to reduce the arbitrary power of authoritarian elites by promoting formal justice and equality before the law, thereby placing the judiciary at the heart of the democratising efforts. Whilst theories of transition have moved away from structuralism to more strongly focus on agency, epitomised by O'Donnell and Schmitter's emphasis on 'uncertain' democracies, the judiciary together with

organisations of lawyers especially in areas of human rights, continued to be seen in the literature in MENA as structures in which agents of democratisation could emerge. As democratisation often emerged in the so-called Third Wave from reforms inside the state, those state institutions themselves were legitimately considered an important subject for research in the emerging democratisation literature on the Arab world and elsewhere.⁴

In focusing on the judiciary's role in the transition in Tunisia, my aim is to analyse the tensions around Tunisia's constitutional moment and identify factors that helped this tension to be eased. I will do so by firstly elaborating on a general problem in legal theory that I call the tension between constituent power and constituted power, and argue that this tension is the more pronounced the more the judiciary has a history of using case law, combined with attempts at establishing its independence vis-à-vis the executive powers. I will then review the constitution-making process in Tunisia, and illustrate how the absence of an involved judiciary gave both the secularists *and* the Islamist Ennahda party room for compromises, believing that abstract constitutional principles could be amended by laws in future law making. In turn, among the challengers to the Ennahda-led interim government and constitution drafters, there were no members of the judiciary that would

have posed an extra-constitutional challenge to the law making authority of the Constituent Assembly. This is emphasised in this paper as a similar situation in neighbouring Egypt resulted in the judiciary's different position towards the elected constituent body.

Constituent Power and Constituted Power in Transitions from Authoritarian Rule

In the transition from authoritarianism to democracy and in the elaboration of new constitutions, a key question occurs with regards to the validity of pre-legal norms that ensure that the new democratic constitution will be adhered to and not be changed by later governments. Pre-legal norms are a core aspect that give legal systems and the political systems built on legal rules, legitimacy and ultimately stability. Pre-legal are all behavioural norms or legal principles that stabilise constitutionalism, i.e. ensure limited government.⁵ The most basic ones are:

1. The laws of the constitution are interpreted and upheld by independent judges that are accountable to abstract judicial-legal principles and readings

elaborated through century old traditions called the rule of law.

2. Active constitutional courts exercise their authority to control parliamentary institutions, by actively assessing the constitutionality of laws.
3. Constitutional laws are superior to other types of laws and cannot be changed to serve short-term purposes.
4. Constitutional amendments are, in and by themselves, subject to judicial scrutiny, limiting the right of people by once agreed on yet abstract higher principles.
5. The process of judging requires pre-legal rules and methods, such as case law or civil law. Judicial authority is informed by legal standards and not personal preferences.

While liberal political thought is profoundly attracted to liberal norms as a method of legitimating both the political decision process and the judicial application process of laws, this is not always sufficient as authoritarian temptations in nascent as well as established democracies all too clearly illustrate. There remain fundamental flaws due to the judicial authorities' constant search for underlying laws that lawmaker have not explicitly included in the law making process, creating tensions between democratically elected and accountable law makers and the judicial authorities. In order to ease this tension, searches for 'underlying laws' are

generally thought to be necessarily limited by the rules governing judicial deliberation, in order to avoid undermining the democratically legitimated legislative process.⁶ In the words of Keating: 'Courts exercise political power and their authority must be either legitimated or suspected'.⁷

During transitions from authoritarian rule, the role of court's legitimation is uncertain. Such courts will often have a history of having been used as an instrument of the executive to uphold and protect illiberal laws; the role of the court as a liberal, self-restraining, and independent judicial authority is not established. Its ambitions may even be subject to suspicion. Transitions that lead to constitutional moments in which the supremacy of one constitution is claimed by constituent assemblies or other representative bodies, produce other uncertainties about the pre-legal validity of the constitution that courts are meant to protect. The pre-legal validity of the constitution, resting on the theory of constituent power, heavily relies on constitutional drafters representing the nation as a whole and embodying its superior will and values. If constitution drafters are indeed believed to represent such constituent power, then the constitution's authority and validity over other laws, including its own 'eternal' authority through explicit or implicit eternity clauses, will be much stronger and more readily recognised.⁸ Historically, such recognition has evolved in situations when

legal scholars could claim that constitution drafters included self-limitations and limited government in order to protect the people and to guarantee their rights in the long run, even if it limits democratic choices and majority rule in the short run. Furthermore, such legal scholars had strong advocates among judges, who either had a history of inherited self-rule and privilege in feudal Europe, or revolutionary ambitions as in the American colonies, where judges refused to apply the laws that were issued by Westminster.⁹ In turn, the probability of the constitution to establish constitutionalism increases, the more limitations on representative bodies, constitution drafters and the executive are justified with reference to the protection of universal rights.

As an institution, therefore, the judiciary occupies a central yet ambivalent position in transitions from authoritarian rule. As it is no longer an instrument of an authoritarian state, it is capable of assuming independent legal reasoning and individual members may be inclined to assert a political role as a symbol of new political freedoms that the judiciary now enjoys. Furthermore, it may also actively seek to protect rights with reference to case law, statutory law, or other sources of law, and will exercise this authority as it continues to sit on trials as part of the state. It also enjoys a natural audience and publicity for this purpose. Yet, in constituent moments,

some of this conflicts with the authority that constituent power assumes. As such, it is constituent power that is the origin of all exercise of power, including that of the judiciary, yet in the transitional phase, the organisation that lays claim to constituent power, the constituent assembly, also acts as part of the state and involves in vertical power relations with the subjects of the state. While constituted power legitimises itself as constituent power, this legitimation can easily be questioned if it does not act as constituent power, and if it is instead perceived to rule by majority over the people as whole. Still, referring to constituent power is very important in transitions as it gives the political order the legitimacy needed for state authority.

An important historical difference between transitions and 18th and 19th century constitutional moments concerns the sources of rights. As Thornhill points out, in the history of constituent power, it has been the appeal to universal rights that was a core source of constituent power. Consequently, it has been the courts that have given those who enacted basic political order the legitimacy and inclusiveness that characterises the modern state. In contrast, in transitional politics, it has been the appeal of rights through international law has been that serves as a primary source of legitimacy for new constituent powers.¹⁰ As I argue in this paper,

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this is potentially because domestic sources and actors remain too ambivalent and too closely related to constituted power to play this role effectively.

Tunisia's Model of Constitutional Review under Ben Ali

There are two main systems of constitutional review and courts. On one hand, there is a diffuse system, and on the other hand a centralised system. With its common law system, the US has probably the best known of all diffuse systems, in that practically all courts can render judgments based on their reading of the US constitution. The US Supreme Court may review all of these decisions before making a binding and authoritative constitutional review itself. The continental European system, in turn, largely concentrates the authority to make constitutional reviews in the hands of a specialised constitutional court. The right to undertake such a constitutional review was granted to such courts restrictively, as to not infringe on the legislative authority of elected bodies. The French *Conseil Constitutionnel*, for example, was explicitly conceived by Charles De Gaulle to prevent a government of judges and his perception of the US Supreme

Court model. It could only examine new laws if authorised by a political authority, and only within limited time frames.¹¹ Such centralisation in civil law courts has in some cases only recently resulted in constitutional courts' assuming the authority to examine the constitutionality of laws, with the German *Bundesverfassungsgericht* in Karlsruhe perhaps developing a leading role. In the European Union, the process of increasingly assuming an overseeing function is regarded as the emancipation of courts from their legislative bodies. It also reflected the growing importance of EU law and with it, the internationalisation of European constitutional principles.

In Tunisia prior to the 2011 revolution, there was a constitutional council, not a court, and only the President could refer questions to the council, while he also controlled the appointment of members of the council. The independence of judges and the courts was not institutionalised, and through appointments and transfers was it possible for the presidency to influence decisions and penalise too independent judges. This was done through the supreme council of the judiciary (CSM - *Conseil Suprême de la Magistrature*). Furthermore, by granting judges access to the lawyer's profession after 10 years of practice, judges could make a very comfortable living, gaining access to lucrative state-contracts.¹² Judges in pre-revolution

Tunisia therefore, had much in common with their Moroccan counterparts, and much less in common with their Egyptian counterparts, the latter having experienced periods of emancipation from the executive (and the controlled legislative) political bodies by, for example, overseeing elections and granting political opponents access to parliamentary election.¹³

Tunisia's Constitutional Moment and the Re-emergence of Constituted Power

When Tunisia's President Zine Eddine Ben Ali was ousted in January 2011, the 1959 Constitution was quickly suspended by executive decree and the election of a national constituent assembly announced to help stabilise the immediate post-revolutionary period. The interim president also dissolved the constitutional council by decree in March 2011. A large number of constitutional lawyers did not support the idea of drafting a new constitution, as the 1959 text was considered satisfactory. The problem did not appear to be the legal text, but rather the absence of its enforcement and its violation by a political and judicial elite that chose to ignore many of its principles. After all, the 1959 Constitution's Chapter One enshrined the universality human rights in its Article 5. As the Constitution also enshrined the freedom of conscience, a right that is more

secular than the simple freedom of religion, some observers believed that a new constitution could easily drop this clause. Therefore, a new constitution could potentially become an instrument for illiberal, religious principles in a period when the new political elite was not yet clearly defined, and potentially strongly influenced by Islamist electoral victories.

In spite of these concerns, the constitutional process served to reinforce the constituted power of the state in a number of ways.

First, shortly after the revolution the Committee for the Realization of the Revolution was working on a constitutional draft with new chapters that reinforced some of the revolution's objectives, notably in areas of personal freedom and freedom of press. This was partially a response to growing uncertainties about the role of, and street protests targeting the old elite's continuing hold over key institutions. A built-up of revolutionary pressure following January 2011 forced the first post-revolutionary government of Mohamed Ghanoushi to step down, leaving its place to Fouad Mebazaa.¹⁴ This prompted Mebazaa to call for the election of a National Constituent Assembly (ANC) and to abrogate the old constitution as early as in March 2011. He thereby managed to contain overwhelming street pressure and gain political control over the revolutionary

transition. This illustrates that the constitutional project served an important pre-legal objective, namely to gain control over a revolutionary movement and to reconstitute the state as constituted power.

Second, the time frame, objectives, and the election of the ANC were defined by executive decree, in order to quickly legitimise the new constituted powers. Once the ANC was elected in October 2011, the assembly issued a Constituent Law Organizing Provisional Powers that took the place of a mini-constitution. In 28 Articles, the delays for the elaboration of the constitution were re-defined, the formation of a government included, as well as the distribution of legislative and executive power determined. In the words of the constitutional scholar Salwa Harouni, ‘through the sheer fact of having been elected, the ANC believed that it had the divine right to alter any of the rules laid out before, even if the very same rules were constitutive for its own legitimate claim to rule-making’.¹⁵ While some of this may have been unavoidable given the need for effective government, from a theory of constituent power as outlined above, this process can be seen as *constituted* power emerging and engaging in a vertical power relations of ruling. The formation of the Ennahda (Islamist)-led troika government with its majority of almost 2/3 in the ANC meant that majority *rule* could easily

dominate the new state. Constituent power, therefore, could easily give way to vertical rule by law, such as the law on provisional powers. This was all the more apparent when the critical and divisive character of the elected members of the ANC meant its claim to be acting on behalf of constituent power remained strongly questioned. Party politics and mass media exposure of some of ANC members’ ideologies, gave the council arguably less legitimacy and rendered the various *rights* critical for the legitimacy of the process.

Third, the decision taken by the president of the ANC, Mustapha Ben Jaffar (leader of the Ettakatol party), to start from an “empty page” (*feuille blanche*) in the constitution’s drafting process compounded the autonomy of the constituted power in the ANC. As an allied party, Ettakatol belonged to the Ennahda-led majority in the troika government. In fact, there had been a number of constitutional projects by political parties, labour unions, constitutional lawyers, which had been publicly discussed and that were expected to serve as a basis for the discussion inside the ANC – giving the concept of constituent power in Tunisia a broad, inclusive dimension. Yet, the idea of an empty page turned this inclusiveness upside down, and resulted in shielding the ANC from outside influence. The ANC thereby obtained more authority to start a drafting process that

could legitimately ignore other proposals. Members of the ANC were also shielded from “expert opinions” by not institutionalising a committee of legal experts for the series of drafts that they started to produce, a process that was called the *politics of drafts* (*la politique des brouillons*). As there was only one constitutional lawyer elected to the assembly, Fadl Moussa, who was Dean of the Law and Political Science Department at Tunis University, the quality of the drafts was quite poor. Given the split between an Islamist-dominated ANC and secular forces in many of the organisations that had drafted constitutional projects prior to the election of the ANC, the decision of the “empty page” raised suspicion concerning the motivations of the majority in the ANC: After all, the practical effect was to shield the majority of Islamo-conservatives from secular influences. As will be seen, this effect was not alleviated by the ANC attempts at reaching out when in 2012 it organised limited and short internal auditions and a series of public fora after its first draft was severely criticised for its lack of inclusiveness.¹⁶

Rights

These factors re-established constituted power, yet it triggered a high level of scepticism concerning the ability and willingness of the ANC majority to produce legally sound constitutional drafts, as well as suspicions concerning the Ennahda’s

ambitions to transform Tunisia into a more religious state. Both suspicions invalidated the ANC’s claim to act as constituent power, with concomitant legitimacy questions resurfacing throughout the drafting process. The question of personal rights was a key to such legitimacy concerns, especially as the 1959 constitution made extensive reference to the universality of rights, as well as the freedom of conscience. The possibility seemed real that both core rights could be critically undermined by any references to Islam or Islamic law. It has been through these suspicions and manoeuvres among the governmental coalition and majority in the ANC that the process started to suffer.

In the first draft that was produced by the leading Ennahda party, *shari’a* was elevated to the principle source of law. The draft replaced equality between men and women with complementarity, criminalised violations of the “sacred.” It furthermore introduced the establishment of a supreme Islamic council, which was meant to have equal powers to the constitutional court. It reflected the majority opinion of the Troika and Ennahda, which controlled about two-thirds of the ANC. As such, the first official draft took Ennahda’s main concern of *shari’a* from Article 10 of its draft as a source of law. It may be noteworthy that in Ennahda’s own draft, articles on rights and liberties were included in Chapter Two whereas *shari’a* was mentioned in Chapter

One – indicating a certain hierarchy. Ennahda's draft included impractical provisions. For example, it criminalised all forms of normalisation with sionism (Article 2:27).

Subsequent drafts gradually began to incorporate many of the secularists' demands, even if they maintained ambiguities of language and wording. Predictably, the key *rights* issues related to *shari'a*, the protection of the sacred, protection through international law, freedom of speech and conscience, were those most disputed. Ennahda's key demand, to form a parliamentary system and not a presidential one, received remarkably less public attention¹⁷ indicating the supremacy of rights over most other questions. On the question of constitutional jurisdiction, a key question concerned how much authority the constitutional court should have, and how judges should be controlled to actually fulfil the objectives of the constitution, especially given the personal involvement of many judges in the Ben Ali regime. Whilst this question may be considered an important long term technical question with important ramifications, in the debate it was also not particularly emphasised.

The third draft of June 2013 illustrated the fact that the institutional question of the role of the judiciary remained uncontroversial. The draft included a supreme court. Its

composition (centralised, supermajority model, mixed model, or model based on a constitutional council) was left for another law to be defined later on (Articles 115-121). Some members of the ANC tried to make it a non-intervening, non-activist constitutional court,¹⁸ with some of its members being political appointment outside of the judiciary. Yet, the issue on which the process threatened to falter was specifically related to constituted power, as some of the ill-defined transitional clauses gave the executive the authority to issue laws before the constitution would become effective. As the political threat was seen, this would have given the executive the power to abrogate or not implement any number of constitutional principles (Article 146).¹⁹

Political Gridlock and the Last Stage of the Transition

The above section argued that Tunisia's constitutional moment included a significant tension between the actual, newly constituted power and constituent power. It further argued that the issue of rights became pivotal, and that tensions over the implementation of many of the rights in the transitional clauses highlighted the tension between principles of majority government and constituted power on one hand and constituent power on the other.

After its presentation in June 2013, political gridlock resulted from the hostility expressed by a minority of members of the ANC to what appeared majority rule and possibly authoritarian temptations. These members of the ANC began to boycott the assembly's sessions and instead protested outside of the assembly's complex. They were supported by wide-spread protests organised by a significant number of civil society associations and tens of thousands of protesters. Furthermore, the July 25 assassination of Mohamed Brahmi, a secular pan-Arab activist and elected member of the ANC, preceded by the 6 February assassination of Chokri Belaid, another leftist politician, further galvanised the opposition to the government and its constitutional project. Lax security measures and violent political rhetoric increasingly marked the political landscape, of which the attack on the US embassy in Tunis in September 2012 was emblematic. The July 2013 military coup in Egypt, and rumours about an impending coup in Tunisia, further marked political anxieties about a constitutional process that was threatening to fail and derail into violence.

Under these circumstances, it is significant that structures outside of constituted power reaffirmed the importance of Tunisia's constitutional moment and formed an extra-judicial institution, the so-called Quartet, to oversee the problematic transitional clauses

and allow for a new government to establish consensus inside the ANC (the so-called consensus committee). The Quartet consisted of the Tunisian Bar Association *l'Ordre des Avocats*, the main trade union *Confédération Générale Des Travailleurs Tunisiens* (CGTT), the Employer's Federation UTICA, as well as Tunisia's Human Rights League (LTDH).²⁰ As part of the reaffirmation of the primacy of constituent power, majority rule inside the ANC was replaced with consensus and equal voice of the diversity of political currents, including many small, secular opposition groups. It was inside this new committee that the final, compromise draft was elaborated, yet confidence in the just procedural continuation included changes inside constituted power. Hence, the Ennahda-led government under Ali Laarayedh stepped down in November 2013 and a caretaker government under Mehdi Jomaa oversaw the voting for and implementation of the last constitutional draft, as well as the election of the new parliament and president.

The Judiciary and Tunisia's Transition

A new role of judiciary appeared during a number of controversial judgements. The condemnation of the Nessma TV producer Nabil Karoui on charges of blasphemy was

one of the key events in this respect. He was condemned for the public broadcast of the French-Iranian movie *Persepolis* and its dubbing in Tunisian dialect. A well-known Tunisian lawyer, Charfeddine Kellil, explained how judges lacked independence and neutrality in this trial in the following words:

Nabil Karoui... was sentenced on the basis of Articles 121 and 121bis of the Penal Code, for infringing on religious beliefs.... Yesterday's statement shows that Nessma TV committed a crime that I consider a new crime. Before the revolution of 14 January 2011, the Tunisian judiciary did not prosecute anyone for artistic and creative work based on these articles. Clearly, before the revolution the magistrates obeyed to state orders. Today, they obey to street pressure.²¹

In contrast to such attempts at redefining the role of the judiciary, there have been little participation of the judiciary as specialists in the ANC or in public statements during much of the constitutional transition. The passive nature is related to its low profile and few, if any attempts to relate to constituent power. This has been in spite of its being part of constituted power and the state by sitting over trials and rendering public judgements such as that of Nessma TV producer Nabil Karoui.

The reason for this relates to the history of Tunisia's legal profession. In the past decade prior to the revolution, it has been lawyers who have frequently formed counter-movements to the state. The Tunisian Bar Association and its presidents have frequently contested the state's authority. The Bar

Association was also instrumental in the January 2011 revolution, when they demonstrated prior, during and after the main events and participated, together with Tunisia's main labour union UGTT in transition organisations such as the Quartet.²²

The historical compromise that they oversaw included amongst others a constitutional consensus committee in which all parties, regardless of their relative weight inside the constituent assembly, were represented and had voting rights. In contrast, the Association of Tunisian Judges (*Association des Magistrats Tunisiens*, AMT) has been a fringe association and lacked public credibility. When the constitutional council was dissolved by presidential order, nobody protested. In fact, the AMT had since 2005 become ineffective: Its president was barred at the time, and judges were subjected to intense controls to ensure that they remain instruments of the executive.²³ Judges lacked so much credibility and authority to act as a single body that upon the revolution, a second association/union of judges was formed, the *Syndicat des Juges*, partially in response to threats of purges against sitting judges. The AMT, in an attempt to gain independence after the revolution, appeared to be pursuing a course against its old controlling members.²⁴

Thus, as a political force, judges had little power and credibility yet they also did not attempt to take part in public discussions about the constitution and the make-up of the

constituent assembly. Whilst a number of politicians were reluctant to give the constitutional court authority to review the constitutionality of laws, this remained a technical, not a political topic. In this respect, it is noteworthy that when a number of politicians challenged the electoral law before the provisional constitutional court, alleging that the new law did not respect the principle of parity, the provisional constitutional court heard the case yet refrained from interfering in a disappointing judgement that simply repeated the electoral law.²⁵ In other words, it was acutely aware of its lack of authority as the protector of rights and therefore constituent power, and therefore remained on the side. The history of Tunisia's judiciary of non-interference in the civil law tradition, and of not emancipating itself from the state by relying, for example, on case law, arguably stabilised the fragile constitutional moment.

The fact that the role of the judiciary was uncontroversial is reflected in general attitudes that the Arab Barometer revealed in September 2012. Whilst the high level of corruption and it having been an instrument of the regime is reflected in a high level of no trust (39), as an institution of the state it was still considered as acting with a fairly high level of professionalism, potentially reflecting their apolitical stance before and during the revolution. The relevant counter example are political parties, that garnered a high level of distrust (56% distrust and only 23% trust) and

that could arguably be mobilised in the high level of protests against the constitutional drafts.²⁶ (See Table 1, p. 16)

International Law and Tunisia's Transition

As mentioned in the first part of this paper, a core aspect of Thornhill's work on constituent power is that as in the past, it is strongly linked to rights which give judges the authority to overcome suspicions that may otherwise be justified for democratic majorities (the tension between constituted and constituent power).²⁷ In contemporary legal systems, he further notes that there is a process of the internationalisation of such rights, such as in the European Union, but also that international law provides a crucial source of rights in situation of transitions.

In at least two respects, references to international law and rights have been significant in Tunisia's constitution writing process. First, from its first draft to its last, the chapter on rights included references to the universality of human rights as enshrined in international law. In fact, this clause even became subjected to debates due to *shari'a*: After all, Islamic law similarly prescribes an externality of rights that has given many constitutions an important source of extra-judicial legitimacy and trust. In the case of Tunisia, this posed a conflict as many

politicians not only wanted to include *shari'a* as a source of legislation, but also to adapt the international human rights regime to local specificities. In the end, though, as Marks reports, external advisors mainly from the European Union convinced a large number of constitution drafters that a constitution was not the place to include limitations, an important point that became particularly relevant when some drafters believed in the importance to limit the freedom of speech with regards to Islam and sacred values.²⁸

Second, in the more recent process of drafting specific laws for the constitutional court as well as the supreme judicial council, the Tunisian parliament asked the European Union for an independent opinion on its draft law on the constitutional court.²⁹ Key controversies included the election of members, their authority, legal or scientific qualifications and reserve lists for civil society activists. It thereby appeared to be responding to a long list of criticism from Human Rights Watch but also from the international commission of jurists, which in November 2015 issued a report on the effectiveness and independence of the Constitutional Court and the High Judicial Council.³⁰ Prior to that, the Tunisian permanent mission to the United Nations had already consulted with the Organization for Security and Cooperation in Europe (OSCE) about the independence of the judiciary, resulting in an OSCE advisory report.³¹ The

role of international rights and discourses is particularly striking in the constitution itself – as a European Commission policy paper observes:

The language used in these parts of the new constitutional settlement is strikingly succinct and akin to the approach found in international human rights conventions or Western constitutions like those of the United States and Germany.³²

Conclusion

The legal discussion on constituent power illustrates that as an actual concept it emanates from constituted powers claims to act on behalf of the people. Yet, they also emanate from legal professions' and here in particular judges as members of the constituted power, pre-legal functions and behaviours and claims to authority based on rights. The latter had, historically, evolved against the constituted power of the state. Whilst courts remained an instrument of the state, tensions between the rights of people and majorities to rule through people's sovereignty and the rule of judges emerged.

The case of Tunisia's constitution making process illustrates that the constituent assembly attempted primarily through its majority to issue different drafts with its vision of individual rights and freedoms, as well as the organisation of constituted power. As constituted power, it did not face abstract legal hurdles that rule of law and an independent judiciary may represent. In fact,

it primarily faced the hurdles by continuing protests, lack of expertise and credibility, as well as an accelerated use of violence across the country. Altogether, these represented a rival, strongly legitimate, and highly resonating reference to alternative constituent power. Therefore, constituent power did not emerge from abstract legal concepts based on the rule of law, nor from trust in the legal professions *per se*. Rather, the involvement of a large, mobilised society and the absence of emancipated courts allowed for a political compromise to emerge with successful references to the people and active involvement of the people. This means on the other hand that the constituent assembly did not feel intimidated by an assumed authority of judges.

This, however, does not mean that the combination of international rights and constituent power was not relevant. To the contrary, the frequent references and continued use of international institutions and laws as higher level law has constrained members of the constituted power (i.e. in the constituent assembly) and made it align with the expression of a wide, and inclusive section of mobilised society.

A last point to make is that the drafting process described in this paper is by no means a guarantee of any particular long-term political path for Tunisia. A Tunisian constitutional lawyer expressed the following

view, which illustrates that the Tunisian constitution is not yet the result of legal certainty or trust expressed through constituent power, but rather of a collective effort of creating a constitutional frame that judges *and* electoral majorities together will require to give more meaning in the future.

The seeds of social and ideological conflicts are still represented in the constitution. The reason why everybody was in agreement was not because there was consensus, but rather because they left enough open space for everybody to read into the constitution whatever they wanted. For example: What does “Etat Civil” really mean, when the state’s obligation is to “protect religion”? There is a fundamental contradiction between Article 1 and Article 6, and it will depend on the political and judicial authorities to clarify. All of this will further the ideological conflicts that are expressed in the constitution. In a word, the constitution is filled (*bourrée*) with apparent consensus that only hides ideological contradictions.³³

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Tables

Table 1: “I will name a group of institutions and I would like you to tell me to what extent you trust each of these institutions” (Question 201)

	I trust it to a large extent	I trust it to a moderate extent	Total Trust	I trust it to a little extent	I don't trust it at all	Total No Trust	I don't know
The judiciary	16%	35%	51%	16%	23%	39%	10%
General Security “Police”	19%	39%	55%	15%	22%	37%	5%
Political Parties	6%	17%	23%	18%	38%	56%	21%
Armed Forces	73%	16%	89%	3%	4%	7%	4%
Civil Society Institutions	7%	24%	31%	14%	26%	40%	29%

Notes

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- ² James N. Sater. 'Constitutionalism and Transitions in North Africa. Analysing conflicts between legal and extra-legal sources of constitutional rights' in *London School of Economics – Challenges to Citizenship in North Africa and the Middle East Region. Collected Papers*, Volume 2, April 2015, pp. 36-53. <http://eprints.lse.ac.uk/61773/1/Challenges%20to%20citizenship%20in%20the%20Middle%20East%20and%20North%20Africa%20region.pdf>.
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- ⁴ Guillermo O'Donnell and Philippe C. Schmitter. *Transitions from Authoritarian Rule Vol. 4: Tentative Conclusions about Uncertain Democracies*. Baltimore, MD: Johns Hopkins University Press, 1986; Sara Schatz and Javier Jesus Gutierrez-Rexach. *Conceptual Structure and Social Change. The Ideological Architecture of Democratization*. Westport, Connecticut: Greenwood, 2002, pp 16-20; Tamir Moustafa. 'Law versus the State: The Judicialization of Politics in Egypt' in *Law and Social Inquiry* Vol 28 No 4, 2003, pp. 883–930; Nathan Brown. *Rule of Law in the Arab World: Courts in Egypt and the Gulf*. London and New York: Cambridge University Press, 1997, James N. Sater. 'Reforming the Rule of Law in Morocco: Multiple Meanings and Problematic Realities' in *Mediterranean Politics* Vol 13, No 2, 2009; Hussein Ali Agrama. *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt*. Chicago and London: University of Chicago Press, 2012; Sara Schatz: 'A Neo Weberian Approach to Constitutional Courts in the Transition from Authoritarian Rule: The Mexican Case (1994–1997)' in *International Journal of the Sociology of Law* Vol 26, 1998, pp. 217–244.
- ⁵ Gregory C. Keating. 'Fidelity to pre-existing law and the legitimacy of legal decisions' in *Notre Dame Law Review*, Vol 69, No. 1, 1993-4. Pp. 3-9.
- ⁶ Ibid. p. 2.
- ⁷ Ibid. p. 3.
- ⁸ On this question see Yaniv Roznai. *Unconstitutional constitutional amendments: An Analysis of the Nature and Limits of Constitutional Amendment Powers*. London: London School of Economics, Ph.D. thesis, 2014, accessible at http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf.
- ⁹ Chris Thornhill. 'Rights and Constituent Power in the Global Constitution' in *International Journal of Law in Context*, Vol 10 No. 3 2014, pp. 362-3.
- ¹⁰ Ibid. p. 378.
- ¹¹ Noëlle Lenoir. 'Le métier de juge constitutionnel', accessible at <http://archive.wikiwix.com/cache/?url=http%3A%2F%2Fwww.conseil-constitutionnel.fr%2Fdivers%2Ftemoignages%2Flenoir.htm>.
- ¹² Eric Gobe. 'The Tunisian Bar to the test of authoritarianism: professional and political movements in Ben Ali's Tunisia (1990–2007)' in *Journal of North African Studies*, Vol 15, No. 3, September 2010, p. 335.
- ¹³ James N. Sater. 'Constitutionalism and Transitions in North Africa: Analysing Conflicts between Legal and Extra-Legal Sources of Constitutional Right' in *The Middle East Centre: Challenges to Citizenship in the Middle East and North Africa Region* Collected Papers, Vol 2, 2014, pp. 36-54, accessible at <http://eprints.lse.ac.uk/61773/1/Challenges%20to%20citizenship%20in%20the%20Middle%20East%20and%20North%20Africa%20region.pdf>; Tamir Moustafa. 'Law Versus the State. The Judicialization of Politics in Egypt in *Law & Social Inquiry* Vol. 28, No. 4, Autumn 2003, pp. 883-930.
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- ¹⁶ Salsabil Klibi, Association Tunisienne De Droit Constitutionnel, interview with the author, Tunis 2 September 2014.
- ¹⁷ Monica L Marks. 'Convince, Coerce, or Compromise. Ennahda's Approach to Tunisia's Constitution.' Brookings Doha Center Analysis Paper, Number 10, February 2015, accessible at: <https://www.brookings.edu/research/convince-coerce-or-compromise-ennahdas-approach-to-tunisias-constitution/>.
- ¹⁸ Salsabil Klibi, Association Tunisienne De Droit Constitutionnel, interview with the author, Tunis, 2 September 2014.
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- ²⁵ Salwa Harouni, *Association Tunisienne de Droit Constitutionnel*, interview with the author, Tunis, 4 September, 2014.
- ²⁶ Arab Barometer II (in Arabic), accessible at <http://www.arabbarometer.org/country/tunisia>. It is worth mentioning however that faith in the courts dropped to 35 percent in 2016 from 51 percent in 2011, as more recent polls indicate. See Arab Barometer IV (in English), p. 8, accessible at <http://www.arabbarometer.org/country/tunisia>.
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