THE WILBERFORCE SOCIETY

Proposed Constitutional Framework for the Republic of Tunisia

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About The Wilberforce Society

The Wilberforce Society was founded in 2009 by students at the University of Cambridge. It is the University's student-run think tank, and aims to provide a forum for dialogue between students and leading policymakers.

This core aim is achieved by three key functions: the promotion of public policy debate amongst the wider student body, the publishing of students' policy research to a professional audience, and reaching out to policymakers across the UK to work with students on the formulation of new policy.

For further information on the society, its events and the possibility of commissioning policy research, please visit www.thewilberforcesociety.co.uk or email chairman@wilberforcesociety.co.uk.

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Chapter 1

Preface

This Constitutional Proposal and Report are respectfully submitted to the People of the Republic of Tunisia and to the Office of the General Rapporteur of the National Constituent Assembly of Tunisia. We are therefore honoured to fulfil the commission with which we have been entrusted. We are grateful to high-ranking Tunisian officials as well as everyday Tunisians who have granted us unprecedented access and hospitality. Some officials and civil society activists to whom we are grateful: Selim Ben Abdelassem (Ettakatol Deputy to NCA), Anouar Ben Kaddour (Adjunct Secretary-General, UGTT), Mehdi Mabrouk (Minister of Culture), Samia Melki Fessi (Ettakatol Adviser), Fayçel Nacer (Member of Bureau of Communication, Ennahda), Said Ferjani (Ministry of Justice), Nedra Cherif (The Carter Center), Myriam Ben Ghazi (NCA Correspondent, Tunisia Live), Faouzi Maamouri (WWF North Africa Co-ordinator), and Anne Wolf (Freelance journalist). Other names have been withheld in this Report to honour the request for anonymity.

A Constitutional Working Group consisting of five teams has produced this Report: Tunisian Politics after the Election; Separation of Powers; Judicial Independence and Judicial Review; Individual Rights, Democracy and Fair Elections; and, finally, Anti-Corruption. The names of the editors are presented in the cover page. The process of authoring this Draft has taken into account comparative information concerning a variety of legal structures across the world, particularly in North Africa, as well as the specific constitutional aspirations of Tunisians. These aspirations have been communicated to us through our grassroots investigation in Tunisia, among all walks of life, during 2011–12.

Overarching considerations of importance to Tunisians remain:

1. Political instability,
2. Bribes and other forms of corruption,
3. Unemployment,
4. Transgressions of the responsibilities of citizenship by unlawful encroachment on public rights and resources, and
5. Lack of transparency in government.

Some of these issues are worthy of constitutional enshrinement, and thus permanence, whereas some others are to be entrusted to the flexibility of the democratic process.[1] We have thus articulated in full throughout this succinct Report the reasons for the choices we have made, and the choices we have deliberately avoided. It is no criticism of the logistics of governing, which is an attribute of Tunisian sovereignty, to say that there is room for improvement insofar as the communication apparatus between the National Constituent Assembly and the Tunisian citizenry is concerned. Since the media and communication structure in Tunisia dates back to earlier regimes, greater progress could be made in efficiently communicating to the public the larger and finer points of constitutional discourse.

We submit this Constitutional Draft and this attending Report to the consideration of the People of Tunisia, represented in the personage of M. Habib Kheder, the General Rapporteur of the Constituent Assembly.

Dr. Riddhi Dasgupta

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Mr. George Bangham

Chairman of The Wilberforce Society

[1] Engaging with Article 3, on the law of blasphemy, Article 5, on media regulation, Article 28, on women's rights, and Article 45, on the powers of the President are a balancing act.

Chapter 2

Proposed Constitutional Draft

We the Sovereign People of the Constitutional Republic, heedful of our obligations to this Republic and its People, our commitment to the Fundamental Principles of the Self-Determination Rights of All Persons, Democracy, Fundamental rights, Independence of the Judiciary, and Freedom from Corruption and Our Responsibility to Humankind both positively and negatively, and Our Constant Desire to Persevere and Succeed and to Perfect our Republic, do Ordain and Establish this Constitution.

We thus submit our Case to the scrutiny of a Candid World and Promulgate the following Constitution of the Republic of Tunisia, the content of which is as follows:

Preamble

In the name of God, the Compassionate and Merciful,

We, the representatives of the Tunisian people, meeting as members of the National Constituent Assembly,

Proclaim the will of this people, set free from foreign domination thanks to its powerful cohesion and to its struggle against tyranny, exploitation, and regression;

- to consolidate national unity and to remain faithful to human values which constitute the common heritage of peoples attached to human dignity, justice, and liberty, and working for peace, progress, and free cooperation between nations;
- to remain faithful to the teachings of Islam, to the unity of the Greater Maghreb, to its membership of the Arab family, to cooperation with the African peoples in building a better future, and with all peoples who are struggling for justice and liberty; and
- to install a democracy founded on the sovereignty of the people, characterized by a stable political system, and based on the principle of the separation of powers, including the belief that this Constitution is the supreme law of the land. This Constitution condemns all forms of corruption as such practices undermine the principles of integrity and justice which the People of Tunisia, constituted in the State, all subdivisions and its officialdom, wishes to uphold.

We proclaim that the republican regime constitutes:

- the best guarantee for the respect of rights and duties of all citizens;
- the most effective means for assuring the prosperity of the nation through economic development of the country and the utilisation of its riches for the benefit of the people;
- the most certain way for assuring the protection of the family and guaranteeing to each citizen work, health, and education.

We, the representatives of the Tunisian people, free and sovereign, proclaim, by the Grace of God, the present Constitution.

Chapter I
General Provisions

Article 1: State

1. Tunisia is a free State, independent and sovereign; its religion is Islam, its language is Arabic, and its form is the Republic. The State shall abridge no person's or entity's freedom of religion, speech, opinion, expression, publication, assembly, and association nor discriminate against them on any other grounds, including but not limited to gender, sex, ethnic or national origin, socioeconomic status, and creed. No person or entity will, in any way or for any reason, be required to pronounce a religious oath or affirmation. The preservation of these freedoms must not conflict with the compelling governmental need to maintain equality and order.

2. All acts by States, their organs, their instrumentalities or other actors commissioned, encouraged, assisted or tolerated, when preventing such violations would not have been unreasonable, are to be attributed to the State.

3. In accordance with the Constitution and other laws, the State shall have the obligation to enforce by lawful, necessary and proper means the Constitution. Enforcement of no provision shall be allowed to contradict another. The terms of the Constitution apply to civilian as well as non-civilian contexts.

4. This Constitution shall be the supreme law of Tunisia governing all private and public officialdom. The interpretation of this Constitution shall be in accordance with the evolving, civilised standards of decency attuned to values affirmed by the domestic and international communities.

Article 2: Arab Nation, Treaties

1. The Tunisian Republic constitutes part of the Great Arab Maghreb, towards whose unity it works within the framework of common interests. The Tunisian Republic and its various organs and instrumentalities shall work actively to incorporate all its citizens in the democratic process; shall not adopt codes of conduct that are exclusively or almost exclusively religious but generally approved by the evolving standards of decency; and shall, in all situations, consider principles of international and comparative law.

2. Treaties concluded to this effect and being of such nature as to bring about any modification whatsoever to the present Constitution have to be submitted to a referendum by the President of the Republic after having been adopted by the National Parliament in the forms and conditions established by law.

3. Treaties signed in derogation of the Constitution are invalid but, if possible, the conflicting provisions shall be deemed to be severable.

Article 3: Sovereignty

The sovereignty belongs to the Tunisian people who shall exercise it in conformity with the Constitution. The right of Tunisian citizenship and all attending privileges and obligations belongs to all persons born to a Tunisian father or mother and to all other groups recognized by law, with due process and with equality.

Article 4: Flag

The flag of the Tunisian Republic is red; it has in the middle, under the conditions prescribed by the law, a white circle in which is displayed a five-pointed star surrounded by a red crescent.

Article 5: Personal Integrity, Conscience, Belief

1. The Tunisian Republic guarantees the inviolability of the human person and freedom of conscience, and protects the free exercise of ideas and beliefs.

2. The Tunisian Republic shall guarantee to all persons within its jurisdiction the fundamental rights of food, shelter, clothing and health services.

Article 6: Legitimate Purposes of Restriction

The citizens exercise the plenitude of their rights in the forms and conditions established by the law. The exercise of these rights cannot be limited except by a law enacted for the protection of others, the respect for the public order, the national defence, the development of the economy, and public health. These exceptions shall be interpreted not expansively.

Article 7: Unionization

The right of unionization is guaranteed.

Article 8: Home, Secrecy of Correspondence

The State shall actively secure for persons the right to enjoy intimate and family relationships, free from government or private infringement. In order for the generally inviolable privacy of buildings, persons, papers or effects to be abridged by the State, a compelling, probably genuine and imminent need must exist. There must be due process of law and the securing of a warrant based on probable cause.

Article 9: Free Movement

Every citizen has the right to move freely in the interior of the territory, to leave it, and to establish his domicile within the limits established by the law. Free movement of persons, goods or market activity, within the limits established by the law, cannot be undermined by public or private entities.

Article 10: Expatriation

No citizen can be expatriated or prevented from returning to his country under any circumstances.

Article 11: Presumption of Innocence

1. Every accused person is presumed innocent until his guilt is established in accordance with a procedure offering him guarantees indispensable for his defence. The presumption of innocence shall never expire.

2. In all criminal-related proceedings, the defendant has the free and plenary right of the guiding hand and effective assistance of counsel which may be provided to her if she wishes; to not be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; to a speedy and public trial, by an impartial jury of the region wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to have compulsory and willing process for obtaining all evidence, law and witnesses of her choosing. The defendant shall have the right to be confronted directly and in person with the witnesses against her, unless those witnesses are deceased or otherwise genuinely unavailable to testify. Excessive bail shall not be required, nor excessive fines imposed, nor cruel, unusual or disproportionate punishments, including the death penalty and other needless or wanton penalties, inflicted.

3. In the absence of *force majeure* or the inability to properly convene a tribunal, the writ of habeas corpus or other vehicles for the attainment of freedom shall not be suspended. Detention in official custody, without the commencement of criminal proceedings, for a period longer than 36 hours is forbidden.

Article 12: Slavery and Involuntary Servitude

Torture, human trafficking and involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or shall not exist in Tunisia or anywhere within the reach of the State.

Article 13: Personal Punishment

The sentence is personal and cannot be imposed except by virtue of a law existing prior to the punishable act. Nor may the punishment be aggravated retroactively.

Article 14: Property Rights

The right to all property is guaranteed and may not be infringed upon unless it is for a public purpose, is non-discriminatory basis, and is in accordance with due process of law. Direct or indirect expropriation and other related violations are expeditiously and commensurately compensable, accounting for lost profits as well as intrinsic value.

Article 15: Duty to Defence

The defence of the country and the integrity of its territory is a sacred duty of every citizen. Rights violated by the military should not be presumed to be beyond judicial or other review by appropriate authorities. Conscription shall be in accordance with due process of law and equality. Minors shall not be forced, induced, or actively encouraged to serve in any military, paramilitary or other public or private defence capacity.

Article 16: Taxation

The payment of taxes and the contribution to public expenditures on an equitable basis constitute a duty for every person and entity.

Article 17: Asylum and Refugee Status

Refugees possessing a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or opinion, not to the exclusion of groups primarily characterized otherwise, cannot be extradited.

Article 18: Anti-Corruption and Enhancement of Democracy

1. Each person or entity retains the plenary right to be free from all private and public corruption. The State shall actively encourage persons and entities to petition the State and other private and public actors for a redress of grievances. Such persons and entities, their evidence, and all potential for extortion related to their disclosure must be given complete protection by the State. The State shall, at the behest of a court, constitute an independent panel to investigate any incidences of public and/or private corruption. An independent anti-corruption Ombudsman should be appointed as the first point of referral for citizens; the Ombudsman can choose to investigate cases at his or her discretion. Access should be given to the Ombudsman of information held by government which is related to a current investigation. The State may choose to regulate private corporations if it is notified by the Ombudsman and or the judiciary of corruptive practices taking place.

2. Nothing in this Constitution shall be construed to forbid governments from imposing content-neutral limitations on private campaign contributions or independent political campaign expenditures. Nor shall this Constitution prevent governments from enacting systems of public campaign financing, including those designed to restrict the influence

of private wealth by offsetting campaign spending or independent expenditures with increased public funding.

3. All authorities within Tunisia shall, when compelled by a fair and reasonable request, disclose all relevant and non-confidential information to the petitioner.

Chapter II
Legislative Power

Article 19: National Parliament

1. The people exercise the legislative power through a representative organ called National Parliament. The National Parliament shall be composed of one Chamber of Advisors and one Chamber of Deputies. The National Parliament may, by law, bar persons convicted of serious crimes from holding office in either Chamber.

2. The Chamber of Advisors shall be composed of advisors whose number shall not exceed that of two-thirds of the members of the Chamber of Deputies. The National Parliament shall, by law, determine the procedure for setting the number every six years, on the basis of the number of members of the Chamber of Deputies in office.

3. The members of the Chamber of Advisors are designated as follows: One or two members from each governorate, according to population, are elected at the regional level, from among the elected members of local authorities. One-third of the members shall be elected at the national level from among employers, farmers and workers. Candidates shall be proposed by the concerned professional organisations, from lists comprising at least twice the number of seats allocated for each category. Seats are distributed equally among the concerned sectors.

4. The members of the Chamber of Advisors are elected by fair, free and secret ballot by the elected members of local authorities.

5. The National Parliament shall, by law, define the methods and terms concerning the election of the members of the Chamber of Advisors.

6. The remaining members of the Chamber of Advisors are selected by the President of the Republic from a list of prominent and diverse group of candidates from amongst those nominated by the regional councils, three per council. All regional councils must be represented in this group.

7. The term of office for the members of the Chamber of Advisors shall be six years. Half of its composition is renewed every three years.

8. The Chamber of Deputies is elected for a period of five years in the course of the last thirty days of its mandate. A candidate to the Chamber of Deputies must be Tunisian, and at least twenty-three years of age. The term of office shall be for a renewable five-year period. In case of impossibility of proceeding with the elections during the designated time because of war or imminent peril, the mandate of the Chamber of Deputies is extended by a law until the time it is possible to proceed with the elections.

9. Every bill which shall have passed the Chamber of Deputies and the Chamber of Advisors, shall, before it become a law, be presented to the President of the Republic; If he approve he shall sign it, but if not he shall return it, with his objections to that Chamber in which it shall have originated, and subsequently reconsider it. If after such Reconsideration two-thirds of the Voting Members present shall agree to pass the Bill, it shall be sent, together with the Objections, to the other Chamber, by which it shall likewise be reconsidered, and if approved by two thirds of that Chamber, it shall become law. But in all such cases the votes of both Chambers shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each Chamber respectively. If any bill shall not be returned by the President of the Republic within ten days after it shall have been presented to him, it shall be a law with the same purpose and effect, unless the National Parliament by their adjournment prevent its return, in which case it shall not be law.

Every Order, Resolution, or Vote to which the assent of the Chamber of Deputies and Chamber of Advisors may be necessary (except on a question of adjournment) shall be presented to the President of the Republic; and before it shall take effect, shall be approved by the President of the Republic, or being disapproved by him, shall be passed again by two-thirds of each Chamber's Voting Members present, according to the rules prescribed in the case of a bill.

Article 20: Elections

The members of the National Parliament are elected by universal, free, fair, direct, and secret suffrage, according to the modalities and conditions determined by the Electoral Law.

An elector is every citizen possessing Tunisian nationality for at least five years and having attained at least eighteen years of age.

Article 21: Eligibility

Any voter, born of a Tunisian father or mother, who is at least twenty-five years of age on the day of submission of his candidacy and is a legal inhabitant of his or her Governorate, is eligible for election to the National Parliament.

Article 22: Terms and Re-Election

The National Parliament is elected for a period of five years in the course of the last thirty days of its mandate.

Article 23: Continuing Parliament

In case of impossibility of proceeding with the elections during the designated time, because of war or imminent peril, the mandate of the National Parliament is extended by a law until the time it is possible to proceed with the elections.

Article 24: Seat of the National Parliament

The seat of the National Parliament is established in Tunis or its environment. However, under exceptional circumstances, the National Parliament may hold its sessions in any other place of the territory of the Republic.

Article 25: Indemnity

A deputy cannot be prosecuted, arrested, or tried for opinions expressed, proposals made, or acts carried out in the exercise of his mandate in the National Parliament.

Article 26: Immunity

No deputy can be arrested or prosecuted for the duration of his mandate for a crime or misdemeanour as long as the National Parliament has not lifted the immunity which covers him. However, in the event of *flagrante delicto*, arrest procedure is permitted, in such a case, the National Parliament is to be informed without delay. The detention of a deputy is suspended if the National Parliament so requests.

The State or its actors, acting under the color of law, may not enjoy immunity in equity and injunction. The State may, if it expressly directs by law, enjoy immunity in law and damages; the default state is the non-enjoyment of any immunity.

Article 27: Legislation

1. The National Parliament exercises the legislative power. The presentation of legislation belongs equally to the President of the Republic and to the members of the National Parliament, priority being given to bills presented by the President of the Republic.

2. The National Parliament may authorize the President of the Republic to issue decree-laws within a fixed time limit and for a specific purpose which must be submitted for ratification to the National Parliament upon expiration of that time limit. Organic and ordinary laws are passed by the National Parliament by absolute majority. A draft organic law may not be submitted for deliberation by the National Parliament until after the expiration of a period of fifteen days from its filing.

3. Laws considered to be of an organic character are those specified by Articles 4, 5, 7, 8, 9, 66, 67, 68, 69, 70 and 71.

4. The electoral law has the form of an organic law.

The National Parliament votes on bills concerning financial laws and the regulation of the budget under the conditions stipulated in the organic law of the budget. The budget must be approved at the latest by December 31. If by that date the National Parliament has not made a decision, the provisions of the financial bill may be implemented by decree, in trimestrial renewable instalments.

Article 28: Legislative Sessions

1. The National Parliament meets each year in ordinary session which begins during the month of October and ends during the month of July.
2. However, the first session of every legislature begins during the first fifteen days of November.
3. During the vacation, the National Parliament may meet in extraordinary sessions on the request of the President or the majority of deputies.

Article 29: Permanent Committees

The National Parliament elects from among its Members permanent committees, whose activity is pursued during the vacation of the National Parliament.

Article 30: Decree-Laws During Vacation

During the vacation of the National Parliament, the President of the Republic may, with the consent of the interested permanent committee, issue decree-laws which must be submitted to the ratification by the National Parliament during the next ordinary session.

Article 31: Treaties and Other International Agreements

Treaties do not have the force of law until after their ratification. Treaties duly ratified have an authority superior to laws other than the Constitution, which is supreme.

Article 32: Approval of Treaties

The treaties are approved by law. All debts, contracts, treaties and other obligations entered into, before the adoption of this Constitution, shall be no less valid and enforceable now. The State shall fulfil all such obligations in full measure and shall claim no immunity whatsoever before any domestic or international authority to forego such fulfilment.

Article 33: Areas of Legislative Competence

Matters relating to the following are regulated in the form of laws:

1. the general modalities of the application of the Constitution, other than those relative to organic laws;
2. the creation of and rules governing the State's offices, public establishments, societies, or national enterprises;
3. enhancing the citizenship, the status of persons, and obligations;
4. the procedure before different orders of jurisdiction;
5. the determination of rules, crimes and offences and the penalties which apply to them as well as the law of the seas, air and land;
6. amnesty, pardon and commutation;

7. the basis and rate of taxes for the benefit of the State, except the delegation accorded to the President by the laws of finances and fiscal laws;
8. the regime of the issuance of money and all other economic priorities;
9. loans and financial obligations of the State; and
10. the fundamental guarantees accorded to civilian and military functionaries.

The State shall be empowered to achieve these ends by all means necessary and proper, including the creation of government bureaucracies independent of the Executive.

Article 34: Military Action

The power to declare wars or military actions and to make rules concerning the military shall remain with the National Parliament. The direction of the war shall be conducted by the President of the Republic. The National Parliament may, with the consent of three-fourths of the Voting Members present, declare an end to the salient military action.

In the absence of a declaration of war, in any circumstance in which the military is introduced—

1. into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
2. into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
3. in numbers which substantially enlarge the military equipped for combat already located in a foreign nation;

the President of the Republic shall submit within 48 hours to the Speaker of the National Parliament, in writing, explaining—

1. the circumstances necessitating the introduction of military;
2. the constitutional and legislative authority under which such introduction took place;
3. the estimated scope and duration of the hostilities or involvement; and
4. all other salient information that the Speaker shall require in fulfilment of the National Parliament's constitutional responsibilities and powers.

Whenever the military are introduced into hostilities or into any situation described above, the President shall, so long as the military continues to be engaged in such hostilities or situation, report to the National Parliament periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the National Parliament less often than once every six months, unless the National Parliament amends this time period, absent a waiver from the National Parliament.

The Speaker of the National Parliament may, with the consent of two-thirds majority of the Voting Members present, seek mandatory judicial review of a dispute concerning the application of this Article directly in the Superior Council of Magistrature. The President of the Republic may do the same.

Article 35: Fundamental Principles

The law determines the fundamental principles of:

1. the regime of real and intellectual property rights;
2. public health; and
3. labour and employment conditions and law and social protection.

Article 36: Development Plans

This Constitution authorizes the resources and charges of the State under conditions established by the organic law of the budget.

Chapter III
The Executive

Article 37: Executive Power

The executive power is vested in the President of the Republic assisted by a Government directed by a Prime Minister.[2]

Section I
The President of the Republic

Article 38: Head of State

The President of the Republic is the Head of the State.

Article 39: Presidential Elections

1. The President of the Republic is elected for five years by universal, free, fair, direct, and secret suffrage, within the last thirty days of the term of office and under the conditions specified by the electoral law.
2. In case of an impossibility of proceeding with the elections at the appropriate time, because of war or due to imminent danger, the term of office of the President is extended by law until it becomes possible to proceed with the elections. The President of the Republic may present himself for two consecutive mandates.
3. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

[2] See page 91 for alternative drafts for a Parliamentary or a Presidential system.

Article 40: Eligibility

1. Any Tunisian who does not carry another nationality may present himself as a candidate for the Presidency of the Republic.

2. The candidate must, furthermore, be at least forty years and at most seventy years of age on the day of submitting his candidacy and must enjoy all his civil and political rights.

3. The candidate has to be presented by electors in accordance with the modalities and conditions stipulated by the election law. The declaration of candidacy must be recorded in a special register before a commission composed of the President and the following four members: the Speaker of the National Parliament, the President of Constitutional Council, the First President of the Court of Cessation, and the First President of the Administrative Tribunal. The commission rules on the validity of the candidacies, the challenges received, and proclaims the result of the ballot.

Article 41: Functions

The President of the Republic is the guarantor of national independence, of the integrity of the territory, and of respect for the Constitution and the laws as well as the execution of treaties. He watches over the regular functioning of the constitutional public powers and assures the continuity of the State.

Article 42: Oath

All officials of the State must take the following oath before the National Parliament:

> I swear and affirm that I will safeguard the national independence and the integrity of the territory, to respect the Constitution and the law, and to watch meticulously over the interests of the Nation.

Religious invocations may be, but need not be, inserted only by the corresponding official.

Article 43: Seat of Presidency

The official seat of the Presidency of the Republic is established at Tunis and its surroundings. However, under exceptional circumstances, it can be transferred provisionally to any other location in the territory of the Republic.

Article 44: Role as Commander-in-Chief

The President of the Republic is the Supreme Commander of the military. The President directs wars and military actions, and concludes peace with the approval of the National Parliament.

Article 45: Diplomacy and Foreign Relations

The President of the Republic accredits diplomatic representatives to foreign powers. The diplomatic representatives are accredited to him.

Article 46: Emergency Powers

1. In case of imminent peril menacing the institutions of the Republic, the security and independence of the country and obstructing the regular functioning of the public powers, the President of the Republic may take the exceptional measures necessitated by the circumstances, after consultation with and consent from the Prime Minister and the Speaker of the National Parliament. Such measures, though reviewable deferentially by the Judiciary, are not immune from judicial review.

2. During this period, the President of the Republic may not dissolve the National Parliament and no motion of censure may be presented against the Government.

3. These measures must be continually assessed such that they retain effect only as long as the compelling necessity remains. The President of the Republic addresses a message to the National Parliament on this subject.

Article 47: Referendum

1. The President of the Republic may submit to a referendum any bill relating to the organisation of the public powers or seeking to ratify a treaty which, without being contrary to the Constitution, may affect the functioning of the institutions.

2. When the referendum has resulted in the adoption of the bill, the President of the Republic promulgates it within a maximum period of fifteen days.

Article 48: Authority to Pardon

The President of the Republic exercises the right of amnesty, pardon and commutation.

Article 49: Responsibility to Inform Parliament

The President of the Republic communicates with the National Parliament as regularly and by those methods that the latter may by law direct.

Article 50: Nomination of Government

1. The President of the Republic nominates the Prime Minister, and on his suggestion, the other members of the Government.

2. The President of the Republic presides over the Council of Ministers.

Article 51: Dismissal of Government

The President of the Republic dismisses the Government or one of its members on his own initiative or on the recommendation of the Prime Minister.

Article 52: Promulgation and Veto

1. The President of the Republic promulgates constitutional, organic, or ordinary laws and ensures their publication in the Official Journal of the Tunisian Republic within a maximum period of fifteen days counting from the transmission by the Speaker of the National Parliament.

2. The President of the Republic may, during this period, return the bill to the National Parliament for a second reading. If the bill is adopted by the National Parliament with a majority of two-thirds of its members, the law is promulgated and published within a second period of fifteen days.

Article 53: Execution of Laws and Regulatory Power

The President of the Republic must ensure that the laws are faithfully executed. The President exercises the general regulatory power and may delegate all or part of it to the Prime Minister, with those exceptions that the National Parliament may by law direct.

Article 54: Deliberation of Bills and Countersignature

1. Bills are deliberated on in the Council of Ministers.

2. Decrees of a regulatory character are countersigned by the Prime Minister and the interested member of the Government.

Article 55: Nomination of Officers

The President of the Republic nominates the highest civil and military officers on the recommendation of the Government. Officers serve at the pleasure of the President of the Republic. The President as well as the National Parliament, or any committee thereof, may appoint special and independent counsel to investigate and report publicly the findings of public or private corruption or violation of the laws.

Article 56: Temporary Disability of the President of the Republic

1. In case of temporary disability, the President of the Republic may, by decree, delegate his powers to the Prime Minister with the exclusion of the power of dissolution.

2. During the temporary disability of the President of the Republic, the Government, even if it is the object of a motion of censure, remains in place until the end of this disability.

3. The President of the Republic informs the Speaker of the National Parliament of the provisional delegation of his powers.

Article 57: Vacancy in the Office of the President of the Republic

1. In case the Presidency of the Republic becomes vacant on account of death, resignation, or enduring incapacity, the Speaker of the National Parliament, only with the consent of a majority of the Superior Council of Magistrature, immediately is invested temporarily with the functions of the Republic for a period of at least 45 days and at most 60 days. He takes the constitutional oath before the National Parliament, and during its absence, before the Bureau of the National Parliament.

2. The interim President of the Republic may not be a candidate for the Presidency of the Republic even in the case of resignation. The interim President of the Republic discharges the functions of the President of the Republic, however, without resorting to referendum, dismissing the Government, dissolving the National Parliament, or taking the exceptional measures provided for in Article 46.

3. During this period, a motion of censure against the Government cannot be presented.

4. During the same period, presidential elections are organised to elect a new President of the Republic for a term of five years.

5. The new President of the Republic may dissolve the National Parliament and organise early legislative elections in conformity with the provisions of Article 63 (2).

6. The President of the Republic, interim President of the Republic, Magistrates or any other official may be removed from office only for severe crimes and only after a fair, plenary opportunity to be heard and to defend their conduct. The Chamber of Deputies may initiate such a removal after complete and fair deliberation, by allowing the accused to invoke the services of counsel and by following the same rules as has been laid down in Chapter I of the Constitution. The consent of six-tenths of the Voting Members of the Chamber of Deputies shall be required to impeach an official. The trial shall then proceed in the Chamber of Advisors, in which the same rules shall apply excepting that three-fourths of the entire Chamber of Advisors, voting and non-voting, shall be required to remove said official.

7. In cases concerning the trial of the President of the Republic or the interim President of the Republic, the Chief Justice of Tunisia shall preside; in all other cases, the rules of the National Parliament govern the identity of the presiding arbiter.

Section II
The Government

Article 58: Functions of The Government

The Government puts into effect the general policy of the Nation, in conformity with the orientations and options defined by the President of the Republic.

Article 59: Responsibility

The Government is responsible to the President of the Republic for its conduct.

Article 60: Functions of the Prime Minister

The Prime Minister directs and coordinates the work of the government. He substitutes, as necessary, for the President of the Republic in presiding over the Council of Ministers or any other Council.

Article 61: Government in Parliament

The members of the Government have the right of access to the National Parliament as well as to its committees. Any deputy may address written or oral questions to the Government.

Article 62: Motion of Censure

1. The National Parliament may, by a vote on a motion of censure, oppose the continuation of the responsibilities of the government, if it finds that the government is not following the general policy and the fundamental options provided for in Articles 49 and 58.

2. The motion is not receivable unless it is motivated and signed by at least half of the membership of the National Parliament.

3. The vote may not take place until 48 hours have elapsed after the motion of censure.

4. When a motion of censure is adopted by a majority of two-thirds of the deputies, the President of the Republic accepts the resignation of the government presented by the Prime Minister.

Article 63: Dissolution of Parliament

1. If the National Parliament has adopted a second motion of censure with the consent of the two-thirds of the Voting Members present during the same legislative period, the President of the Republic may either accept the resignation of the government or dissolve the National Parliament.

2. The decree dissolving the National Parliament must include the calling of new elections within a maximum period of thirty days.

Chapter IV
The Judiciary

Article 64: Decisions

Judgments are rendered in the name of the People and in the name of the President of the Republic.

Article 65: Independence of Judiciary

The judiciary is independent; the Magistrates in the exercise of their functions are not subjected to any authority other than the law.

Article 66: Jurisdiction of Magistrates

1. There shall be one Superior Council of the Magistrature which shall be composed of no fewer than seven Members and there shall be inferior courts as the law shall ordain and establish. The Superior Council of the Magistrature shall observe and enforce the guarantees accorded to magistrates in the matter of nomination, advancement, transfer, and discipline. The supreme and final judicial review of all questions of law and fact shall reside in this Council.

2. The procedure of the entertaining of cases in the Judiciary shall be prescribed by law only insofar as it does not modify or alter the fundamental character of the Judiciary as the ultimate arbiter of the rights of persons and entities and the protector of the vulnerable as well as the tribunal empowered to respect the compelling interests of the State.

3. In all cases directly affecting Ambassadors, other senior government officials, and those in which the State is a party, the Superior Council of the Magistrature shall have original Jurisdiction. In all other cases, the Superior Council of the Magistrature shall have appellate jurisdiction, both as to law and fact.

Article 67: Nomination of Magistrates

1. Magistrates shall be nominated by the President upon the recommendation of the Prime Minister. If the National Parliament does not act on the nomination within 180 days, the nomination shall be deemed confirmed.

2. If the National Parliament does act, it must vote on the confirmation or rejection of the nomination within 270 days. Without such a vote, the nomination shall be deemed confirmed.

3. Magistrates shall retain their offices for life, and may be removed from office only for severe crimes and after a fair, plenary opportunity to be heard. The compensation of Magistrates shall not be diminished during their active service.

Chapter V
The High Court

Article 68: High Treason by Government

The High Court ordinarily must decide a case of high treason committed by a member of the Government. The competence and the composition of the High Court as well as the procedure applicable before it are specified by law.

Chapter VI
The Council of State

Article 69: Administrative Tribunal and Court of Accounts

1. The Council of State is composed of the Administrative Tribunal and the Court of Accounts.
2. The composition and the competence of the Council of State as well as the procedure applicable before it are determined by law.

Chapter VII
The Economic and Social Council

Article 70: Consultative Assembly

This Assembly is a consultative assembly on constitutional, economic and social matters. Its composition and its relations with the National Parliament are determined by law. No fewer than two-fifths of its Members shall be current, inactive or retired Members of the Superior Council of Magistrature. If any Member of this Council deems it fit to submit a Treaty or any other form of law to the general electorate for ratification before the salient instrument's effectuation, it may do so until sixty days from the date of effectuation have passed. The Assembly may stipulate that at least a percentage, no greater than eighty-five, need approve the ratification in order for the ratification to be effectuated.

Chapter VIII
The Local Collectivities

Article 71: Local Councils

The municipal and regional Councils shall conduct the local affairs under the conditions determined by law.

Chapter IX
Amendments of the Constitution

Article 72: Initiatives and Prohibited Amendments

Amendments to this Constitution shall be proposed by the National, and approved by each House by a two-thirds majority, with the reservation that it does not affect the republican character and structure of the State, its respect for human dignity and non-discrimination, and judicial independence and review. A first referendum shall then be held within 180 days. Should a majority of the electorate approve of the amendment, a second referendum shall be held no sooner than three years and no later than five years after the first referendum. Should a majority of the electorate again approve of the amendment, the amendment shall take effect immediately after the certification of the results by the Electoral Commission.

Article 73: Promulgation

The President of the Republic promulgates the law which contains the provision of the Constitution under the form of a constitutional law in conformity with Article 52.

Be it Enacted this Day in the Capital City of the Tunisian Republic.

Chapter 3

The State of Tunisian Life after the Revolution

3.1 Introduction

As the first country to experience the upheaval of the *Arab Spring* of 2011, Tunisia is a leading example for post-revolutionary state-building in the Middle East. This chapter is based on research by The Wilberforce Society in Tunisia in August 2012, examining what has changed in Tunisian life since the start of the revolution in December 2010. Its primary aim is to establish whether Tunisia in 2012 is a state in 'crisis', or merely undergoing the normal experience of a transitional democracy. It then considers how this situation may be stabilised by the new constitution, and concludes that the Constitution should safeguard certain key areas of Tunisian public life, particularly respect for human rights, freedom of information and direct access to legislators for bodies representing civil society. Remaining realistic about what it can achieve, the study finishes by evaluating the contribution made by foreign NGOs to the constitution-drafting, and highlighting the value of the work of foreign students in Tunisia.

3.2 Tunisian Life since the Revolution

3.2.1 Internet & Media

After the fall of President Zine el-Abidine Ben Ali in January 2011, almost overnight, Tunisians gained unrestricted internet access for the first time. Likewise, media censorship laws were rescinded, and a number of new media organisations were established (like *Tunisia Live*, which started during the revolution). The year 2012 has seen the advent of new media outlets such as the popular satirical TV show, *Les Guignols du Maghreb*, whose immense popularity derives largely from the fact that such public ridicule of Tunisian politicians was banned until 2011.The authors note, however, that this new-found freedom is not necessarily matched by superior quality and impartiality of reporting. The implications of inadequate-quality media for the Constitution-drafting process will be considered in more detail in the section on the National Constituent Assembly's media relations (below).

3.2.2 Police and Surveillance Powers

As befits a transitional democracy, the Tunisian police force remains prominent on the streets in Tunis and other major towns, occasionally resorting to force to maintain public order. The old regime had a similarly large police presence in the street so, at first glance, little has changed in the nature of police tactics. Politicians assured the authors that the past human rights abuses in the criminal justice system have been eliminated, but allegations remain of rough treatment at the hands of the police and prisons.

Many ordinary Tunisians to whom the authors spoke believed that the police act more autonomously and more brutally after the revolution. Whereas under Ben Ali they worked under a strict code of conduct, they are now more autonomous and may extract far larger bribes. In the words of one young journalist, 'they've changed their uniforms' but little else.

The most important step for the police's future, according to a high-ranking and knowledgeable person, will be new training and new equipment. In time, these will help bring in a new institutional culture to the police, one which suits Tunisia's new democratic polity.

3.2.3 Freedom of Expression and Civic Responsibility

As might perhaps be expected after a revolution, Tunisian citizens hold differing and occasionally conflicting definitions of their new-found freedoms. An adviser to Ettakatol, Samia Melki Fessi explained to the authors that since there is no tradition of free democratic expression, new-found freedoms have been interpreted too broadly by many Tunisians. This accounts for the more chaotic nature, since the revolution, of many elements of daily life, for example in people's disregard for traffic lights on the road and increased throwing of rubbish on to the streets.

The previous regime should not be viewed unequivocally as more stable, however, although it guaranteed some level of individual civic responsibility, for example via tax-related incentives. Ben Ali's dictatorship arguably promoted an acute individualism amongst its citizens, as a repressive state obliged citizens to fend for themselves, with mutual bonds of community being lost in the struggle for personal survival.

The Culture Minister, M. Mabrouk, expressed optimism that a sense of civic responsibility could be restored to Tunisia but only gradually. Much of society has yet to learn the norms of peaceful political expression, with respect for the force of authority, but this is once again the usual situation of a transitional democracy.

3.2.4 Tunisia's Economy

For the majority of Tunisians, as suggested by their low electoral turnout, the country's economic situation is more important than any political debate about the technicalities of the Constitution. The authors were struck by the disparity between this apathetic reality, and the situation sometimes portrayed in the foreign media, whose disproportionate engagement with

politicians may overlook the fact that the Constitution-drafting is mainly a project of the elite, and portray it as a national obsession.

Said Ferjani of Ennahda emphasised to the authors that economic growth since the revolution has been impressive, given the extremely low starting situation. A rise in growth rate from -2% to 5% is more than most comparable countries in recent months, and little more improvement could be expected. The price rises and unemployment which precipitated the revolution are still however a major problem. A representative of the UGTT highlighted the regional disparity in these statistics, where the national average of 18.1% (in the first third of 2012) unemployment is comprised of 15–17% unemployment in the more affluent North and East of the country, versus 27–28% in the more deprived South and West. These statistics reflect a general economic uncertainty reported by young interviewees of the authors, since Ben Ali's regime, for all its failings, could at least provide a sense of stability. Finally, price rises have persisted beyond the revolution, though a slight improvement has been observed in 2012.

3.3 The Constitution-Drafting Process

3.3.1 Timescale

Very soon after the revolution of January 2011, the national debate in Tunisia focused on the country's lack of separation of powers and freedom of expression. For reasons to be discussed below, many analysts argue that Tunisian political culture attaches a more central importance to the Constitution than many of its North African neighbours. As such, the political establishment worked rapidly in 2011 to initiate the national Constitution-drafting process, beginning with elections to the National Constituent Assembly on October 23rd.

There is no way to predict the success or speed of the constitution-drafting, since every one of the 200-plus articles is subject to debate and disagreement in the Constituent Assembly. Durinng the summer of 2012 it was commonly accepted that the first draft of the Constitution was due for completion by October 23, 2012, one year after the elections to the National Constituent Assembly. This schedule appears very optimistic, however, in light of the doubts expressed by several figures closely involved in the process, including Habib Kheder, the General Rapporteur of the Constitution Drafting Committee, who appeared to estimate on August 13th that the Constitution would not be ready for a vote before February 2013. Others speculate that the process may take even longer. After this second reading due in spring 2013, a vote in the NCA will decide whether to ratify the Constitution Constitution or put it to a national referendum. An Ettakatol Deputy to the NCA, Selim Ben Abdelassem, suggested that even if the process works on schedule, the earliest election (after 2 months of campaigning) would have to take place after Ramadan 2013, thus not before August 2013.

It is important to note, despite the uncertainty over its timescalespecific timeline, that *some* form of Constitution is likely to be passed. As Nedra Cherif of the Carter Center has observed, nearly all mainstream parties prefer an imperfect Constitution to none at all, so will most probably agree to ratify the draft Constitution which emerges in 2013. It should also be remembered, though, that a Constitution is an important means for the civic spirit to be

preserved. It is not an intrinsic end. What it can accomplish is that it can address certain important issues and place them on the national and international radars. The desired, sobering effect to be had is on the civic spirit. If the civic spirit demands a certain transformation, it will find a way. If it does not, no parchment will suffice.

3.3.2 Popular Interest amongst Tunisians

As was evident in the low electoral participation of October 2011 — below 50%, with turnout particularly low amongst the young — Tunisia suffers from a significant popular apathy about the Constitutional process. Perhaps rightly, and in keeping with a widespread 21st-century trend, popular attention has been fixed more on the economy than the details of politics.

Most young people interviewed by the authors viewed the Constitution-drafting process as strongly tainted by the current establishment, with its strong Islamist element. It should be noted, however, that this is not a representative sample, and comprised a mostly privately-educated, francophone elite in suburban Tunis. These young people, who aspire to and are able to emigrate from Tunisia in future, probably will hold unusual views compared to those of the majority. They are both unusually interested in, and unusually critical of, the drafting process. Although some settlement is thought possible in the end, they express doubts as to whether the current process will provide it.

Engagement with the Constitution-drafting process peaks in the debate over the 4 most controversial Draft Articles: Article 3, on the law of blasphemy, Article 5, on media regulation, Article 28, on women's rights, and Article 45, on the powers of the President.

During the authors' research in Tunis the authors witnessed the scale of discontent amongst women's rights groups about Ennahda's proposal for the new Article 28, referring to women as man's 'associate', in large protest marches on Avenue Mohamed V in Tunis. The authors were assured by representatives of Ennahda and Ettakatol that the Arabic wording of this proposed clause implies a totally egalitarian relationship between man and woman. More impartial commentators suggest greater caution, however, in trying to understand all the political motives at work in this debate. The passionate nature of the national discourse on such divisive points in the Constitution does nonetheless demonstrate that its importance goes beyond that suggested by poor election turnout. In reality, fundamental law touches upon everyone's lives in some respect, and the most controversial reforms thus arouse strong opinions in almost everyone.

An important restraint on popular engagement with the Constitution-drafting is the National Constituent Assembly's relatively undeveloped media relations apparatus. This arguably explains most of the lack of popular awareness of the constitution-drafting, and will be covered in greater detail below. The NCA's opacity was exemplified in the release of the first draft of the Constitution; this was first leaked by the MP Mabrouka Mbarek, rather than being officially released by the assembly itself. Politicians assured the authors, however, that the Assembly will organise debates and public meetings in every governorate to ensure the Constitution debate occurs takes place across the country before it is voted on in the Assembly.

The UGTT (Trades Unions Syndicate) currently spearheads much popular engagement with the NCA. According to its long-running tradition (it was founded in 1952), it leads many strikes

and protests, as its network of offices has a uniquely national reach. This tradition predates the revolution, when the UGTT functioned as a voice for all of civil society, since all other such groups were banned (save 4 or 5). In 2012 the UGTT drafted their own constitution, drafted by Union experts, and submitted to Ben Jafar and the executive branch. The Syndicate have experienced some tensions when working with Ennahda, as they do not support UGTT taking a more political role.

3.3.3 Media Communications between the National Constituent Assembly and the Tunisian People

Perhaps the most recurrent theme in the course of the authors' research in Tunis was the lack of communication between the National Constituent Assembly and its citizenry. The problem in the legislature was not, as many portray it, a lack of legislative momentum, but more the fact that whatever progress has been made has not been efficiently communicated to the public. This was evident even in brief visits to NCA drafting sessions, where the authors' difficulty in gaining access mirrored the general scarcity of established procedures surrounding the efficient core of the NCA's work.

Ennahda representatives made it clear that the current media apparatus largely dates from Ben Ali's era, so it is often criticised out of hand by opposition media, newly able to make their opinions known. The press may not, therefore, wish to co-operate with all aspects of the NCA's external relations efforts. If this is not always the case, there is also a problem of training; the vast majority of journalists trained during the RCD regime and may continue many of the same self-censoring practices even once official censorship has been relaxed. The Carter Center identifies the main problem as being that observers are not always allowed into plenary sessions of the Assembly. This lack of communication makes it more difficult to assess how much input is had into the process by civil society groups and NGOs.

The National Constituent Assembly may not, arguably, see a need to overcome the communication 'problem' outlined above. An Ettakatol Deputy interviewed by the authors articulated a seemingly common view within the political establishment, that the democratic mandate conferred by the October elections leaves the NCA free to pursue the drafting process independent of civil society. Further consultation with all potential stakeholders is unnecessary and impractical.

The coalition politics of the National Constituent Assembly may also compound its communication problems. In order to make the 'Troika' coalition work, the three leading parties have been obliged to compromise on many policies, with Ettakatol for example following the principle that co-operation with Ennahda, and therefore some influence on the end product, is better than no influence at all. This pragmatism has, when combined with the Assembly's inadequate media communication of the decisions then made, served to polarise opposition opinion against the 'Troika'.

3.3.4 Role of NGOs and Researchers

The authors asked every interviewee connected to the Constitution-drafting how much attention was being paid to NGOs and researchers, within and outside Tunisia. The prevalent view

is that the drafting must primarily be an internal negotiation, though the NCA have received representations from many governments and NGOs. Over 290 international bodies were invited, of which over 60 have visited the Assembly to present their findings. There is a legitimate case to be made that it would be impossible to take full account of the views of the 1,500-plus domestic activist groups. The Assembly pay due attention to all international dossiers, at least, and many will make constructive contributions to the Deputies' thinking, but the process must eventually come from within the nation.

Deputies interviewed by the authors reported that discussion was often delayed by their peers referring to reports from overseas. At least some attention is paid, therefore, to any high-quality overseas input regardless of its origin, though it is hard to assess its extent. The Carter Center appeared pleased with the attention paid to their input to the drafting process, including their reports on its transparency.

3.3.5 Tunisia's Constitutionalist Traditions

As the first Arab state to acquire a Constitution, in 1861, Tunisia has subsequently been identified with a strong tradition of constitutionalism. Historians like Christopher Alexander emphasise Tunisia's preference for 'stability and reform', with conservative political changes being enacted through the Constitution, rather than through more destructive political upheaval which demolishes then re-establishes the nation's political institutions, as has occurred across much of North Africa[3]. Some scholars, politicians and civil society leaders have observed that Islam's relationship with the political sphere contrasts markedly with the alternative view of the Constitution as an entity separate from religious life, irrespective of the existence in a given state of a formal division between religion and state.

Tunisia's previous Constitution were also closely tied to the Francophone elite, which could at times appear disconnected from society. The 1959 Constitution was promulgated by a Francophone political elite determined to modernise the country using fundamental law.

By contrast, the composition of the National Constituent Assembly in 2012 represents a cross-section of Tunisian society, with a level of political representation that did not exist in the 1950s. The Constitution project is still driven forward by distinct political class, but it is far less a project of the upper-class elite than was its 1959 predecessor. If it is argued, therefore, that the process in 2012 still has little interest for the 'man on the street', it may be noted at least that the Constitution-drafting is far more nationally-inclusive than any equivalent process in Tunisia's past.

[3] Alexander, C., Tunisia: Stability and Reform in the Modern Maghreb (Routledge, 2010).

3.4 The Role of Political Islam

The rise of Salafism in Tunisia was the primary religious concern amongst the educated Tunisians interviewed by the authors. Given Salafists have been banned for so long, many argue it is only natural that they should express themselves out in the open after the revolution. These beliefs are particularly propagated by overseas newspapers and TV news in Arabic; a process aided by post-revolutionary press freedom.

Tunisia's historical relationship with Islam has been of a more 'liberal' nature, in some respects, than that of other North African nations. It was the first Arab country to abolish restraints on women, and Tunisians are proud of this progressive tradition.

European readers should note that Tunisian religiosity is exceptionally high by European standards — this was particularly evident during Ramadan, when the authors visited Tunis. Such traditions do not automatically extend to a desire for Islam's influence in politics, however, with all of the young, suburban, francophone and privately-educated elite to whom we spoke expressing a desire for separation of religion and politics. Most Islamist support comes from a less-educated majority, and this may explain why support for Ennahda appears to have remained steady since the October 2011 elections.

The view of at least one party seems to be that Islam has its own idea of the connection between religion and state — there are only civil states. Islam is not a prefabricated whole, and so it is up to the state to interpret a broad system of principles and values. The party therefore puts forward its own view on how this system should be interpreted.

3.5 Funding of Political Parties

It is not easy to ascertain the source of funding for some parts of Tunisian politics and media. The authors were struck by the seeming disparity in the resources of different political parties, with one party in particular enjoying unparalleled funding which enables them to campaign on a national platform unmatched by any other party. Some Tunisians have drawn attention to the way that this political party has highlighted Algerian input to the political process through media sponsorship, as well as unspecified funding across Tunisian politics from other nations and corporations.

3.6 Conclusion: Is Tunisia in Crisis?

The most dramatic interpretation of Tunisia's polity in 2012 would interpret its apparent legislative quietude or government incompetence as the signs of crisis. The authors conclude that this view is too alarmist, given that all transitional democracies will experience significant instability in their early days. Tunisia retains the potential, however, to degenerate further into 'crisis,' if a new Constitution is not established and if the political establishment loses credibility in failing to restore national finances.

The perception of crisis probably arises because people's expectations in the new regime are very high; not so much for the country, but for themselves. As an Ettakatol spokesman put it, they 'expect a magic wand' to fix social problems, and very quickly complain of crisis when this quick fix proves impossible. It was argued that this viewpoint was propagated by the newly-liberated media, with journalists feeling obliged to be negative towards politics, in order to emphasise the fact that they are now free to criticise it in a way that was impossible under Ben Ali. This process thus propagates the perhaps unfair impression that politicians are slow and incompetent with reform.

Complaints over the slow pace of legislative change also confuse 2012 with the pre-separation of powers days when the government itself cared for the Constitution, and had the authority to enact change very fast. Ennahda representatives alleged that these concerns were exacerbated by the opposition's irresponsible politicisation of the issue of slow legislative reform. The situation is thus better seen as that of a typical transitional democracy; it will simply be a matter of time before confidence is restored in the state's legislative competence. Tunisia has been privy to laws of expression for decades, so it will take time to transition into democracy. The government's main priority in the short-term was the restoration of the economy, a task in which, according to the IMF and World Bank, they have done well.

Tunisia's transitional democracy will be inherently unstable for many years, so it is unfair for opposition media to refuse to compromise in their criticism of the government and assembly. The authors conclude that the National Constituent Assembly's diligence and attention to detail must be respected, and that perceptions of the government's so-called incompetence should not be overdrawn. It is most important that the Constitution-drafting reaches a credible conclusion, and it is only if the National Constituent Assembly fails in this objective that the situation may be judged to be a true crisis.

Chapter 4

Separation of Powers

4.1 Introduction

Tunisia stands at a crucial point in its history. Having assumed its autonomy, the country now has the precious opportunity to secure a future for its people by choosing the structure of its constitutional system prudently. Structuring the system under which Tunisia will be governed for years to come is a vital part of the renaissance of the country as a democratic, rights-protecting Republic. Constitutional protections for human rights matter little if those who are infringing them control the courts or the press; a written commitment to democracy may be worthless if one political faction gains the power to control the electoral process. The Constituent Assembly might, therefore, wish to consider the very structure of the Constitution and the distribution of the powers of government not only as a matter of efficiency but also as a means of protecting the rights for which Tunisians have recently fought.

As Tunisia begins its democratic rebirth, it is important to learn from the mistakes of the past. The former Tunisian Constitution, shaped by a President's desire to increase his own power and check any threat to it, and used by another President to create an appearance of liberalisation while actually preserving his own power, is a prime example of the dangers that must be avoided in the future.

A significant problem was the ability of a single person to control the entire government. Tunisia's pre-Revolutionary system was described as 'Presidential monarchy.'[4] The President controlled the executive functions of government; the President could dismiss ministers to avoid them challenging him for power; the President controlled the bureaucracy and internal security forces (enabling repression of political dissidents); the President could legislate by decree, and to the extent that the Parliament had any function, it was a rubber stamp because it was constitutionally weak and the President had substantial control over its composition.

In light of this, the Tunisian Constituent Assembly might appreciate the delicate balance that each choice entails. Tradeoffs must be made — an excessively divided government would struggle to perform its legitimate functions — but always with the risk of abuse in mind. The structure of government must, therefore, be created to as to minimize the probability of authoritarianism returning while avoiding creating a dysfunctional mess. It is with this principle in mind that we make the following recommendations.

[4] Perkins, Kenneth J. *A History of Modern Tunisia* (Cambridge, Cambridge University Press, 2004). p. 133; Willis, Michael J. *Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab Spring* (London, C. Hurst & Co., 2012). p. 64.

4.2 Models of Choice

The extent to which Tunisia should separate the executive and legislative branches of government is a highly contentious political issue. Some, including Ennahda, have advocated a Parliamentary system; others prefer a semi-Presidential system on the French model. The former would have a relatively low level of separation of powers and the latter would have a higher level of separation.

A Parliamentary system has certain attractions. Because a Parliament can contain a large number of representatives[5], there are more individuals in place to check abuses of executive power and a greater diversity of opinions. In Tunisia, decades of abuse under an ultra-strong Presidential system[6] have, unsurprisingly, led to a suspicion of a Presidency. Parliamentary systems, in one form or another, certainly have their academic supporters too. Among these is Professor Bruce Ackerman, a leading proponent of a 'constrained Parliamentarianism'[7] that would adapt the Westminster model by adding an activist judicial branch and a method of entrenching issues through supermajority referenda.

However, there are Tunisia-specific factors that may make a Parliamentary system problematic. The most important of these is the tendency of Parliamentary systems to result in what has been termed 'elective dictatorship': one party (or coalition of parties) has unfettered control of the legislative and executive branches of government for the period between one election and the next. Ackerman suggests backbench representatives may be able to provide an effective check by threatening to defect and cause the governing faction to lose its majority,[8] but aside from a few examples (including the downfall of Margaret Thatcher, upon which Ackerman relies heavily), this appears to be rare and circumscribed by specific circumstances and other parameters. No general rule can be extrapolated from these examples. Moreover, strong internal party discipline, keeping backbenchers in line through the carrot of more senior roles and the stick of adverse campaigning, defeats this as an effective deterrent to abuse.

Similarly, entities such as the Cabinet in the Westminster system struggle to provide an effective check on the concentration of power: even if the Prime Minister is nominally *primus inter pares* (first among equals), she or he has the power to dismiss other ministers. Because ministers lack security of tenure, the Prime Minister can remove opponents and select those who will agree with her or him. The most significant act of opposition possible is resigning. This may have some effect — in the United Kingdom, prominent resignations (and the fiery speeches that follow) have often had serious political consequences for the government — but this may not necessarily be enough to prevent an abuse of power.

Ackerman suggests Germany as an example that resembles a constrained Parliamentary system through its powerful *Bundesverfassungsgerecht* (Constitutional Court).[9] But in countries

[5] 'Representative' is used as a neutral term for a member of a legislature; it should not necessarily be seen as endorsing the systems of any of the several countries that have a House of Representatives.

[6] As noted above, note 1, numerous writers described the Bourguiba-Ben Ali system as Presidential monarchy: like a more traditional hereditary absolute monarchy, governmental power was either held personally by a single person or distributed according to the wishes of that person.

[7] Ackerman, Bruce. 'The New Separation of Powers.' *Harvard Law Review* 113, no. 3 (January 1, 2000). p. 664 ff.

[8] *Id.*, at 662–663.

[9] *Id.*, at 670.

without such a tradition, the reliability of a new and untested judiciary in checking potential abuses of power or more generally engaging in a 'constitutional conversation' with other branches cannot be taken for granted. Constitutional, or any, conversations require certain endogenous premises. Moreover, the judicial method of solving constitutional problems is intrinsically *re*active — by the time judges have a chance to pass judgment on the propriety of an issue, the harm will probably already have been done.

Although every major party in Tunisia has strongly supported a rights-respecting democratic system, the risk is that, at some point in the future, a party may be elected which does not respect those laudable goals. A Parliamentary system (or something close to it) means that such a party need only be elected once to cause permanent damage; perhaps the most famous historical example of this is the election of the NSDAP in the Weimar Republic, leading to Hitler's ascent and the rapid erosion of many of the rights protected by the Weimar Constitution.

Separated systems have other advantages and disadvantages. From the perspective of preventing any one person gaining excessive control over political power, a properly separated system[10] has the obvious attraction of requiring a faction to gain control of at least two or, in bicameral systems, three institutions in order to gain 'full authority'[11] (*i.e.*, control of the entire government). Where elections are staggered, this requires a long period of ascendancy (during which one would expect other parties or factions to react and move to appeal to more of the electorate). In what Ackerman dubs the 'Madisonian hope'[12], some posit that the existence of multiple institutions ought to lead to reasoning and bargaining between them, producing a better result.

However, critics of separated systems — and Ackerman is a prominent one — point out that this is not necessarily the case. It is unsurprising that a system that divides government and aims to prevent any one institution from gaining unfettered power is somewhat slower to act; indeed, some argue that this is intentional — a feature rather than a flaw necessarily.[13] Ackerman, however, suggests that this slowness harms the stability of government: amid a demand for action, stalemate can lead to a *coup d'état.* He christens this the 'Linzian nightmare'[14] after an academic who observed this instability in Latin American Presidential systems. This risk is a serious one, particularly where there is a popular desire for government to be activist and where the nation lacks a history of political stability.

Ultimately, it is difficult to determine whether a Parliamentary or Separated system is preferable for Tunisia. It is for the Constituent Assembly to determine whether the loss of efficacy involved in a separated system is worth the added protection against one party dominating government and oppressing its opponents. In our view, however, separated systems are more likely to work in countries without a long history of stable democratic government, and a debilitating stalemate is not as likely as Ackerman suggests. Furthermore, for the reasons set out

[10] Tunisia's erstwhile Constitution was not a separated system. Although it partially clothed itself in the appearance of separation, with a President and a nominally separate legislature, even after the legalization of 'opposition' parties (in practice, often sham opposition), the President had such significant power over the composition of the legislature and the power to legislate by decree that there was no real separation of powers.

[11] Ackerman, 2000 p. 648.

[12] Ackerman, 2000 p. 645.

[13] Greve, Michael S. 'Taking the Constitution Seriously.' *The Public Interest* 85 (1985) p. 135 ('The Founders also shaped Congress in such a way that its output would be limited: Multiple factions had to agree on any particular provision.').

[14] Ackerman, 2000 p. 645.

below, a separated system can be designed that avoids or minimizes the flaws that Professor Ackerman and others have observed in Presidential systems.

4.3 The Executive Branch

4.3.1 Unitary or Plural?

In making our observations, we attempt to behave not normatively but descriptively and analytically. The choice, it almost goes without saying, belongs to the people of Tunisia and their chosen representatives.

The most prominent example of a separated system is the United States. Power is concentrated in one person — the President. The heads of the Departments are essentially advisors, with no security of tenure. More junior civil servants do have secure tenure, but in general the notion of major policy being approved personally by the President is deeply embedded in the American political system. This is a unitary system, although the academic consensus is that it is 'weakly' unitary[15] in that the legislature has some power to influence the structure of the Executive.

Such a concentration of power in a single individual might be deemed inappropriate and ill-suited to a country with Tunisia's history of Presidential abuses. A sole, powerful Chief Executive might be tempted to treat the entire apparatus of government as at his or her command, and it would create an untenable situation where the government is largely identified with a single individual. Tunisia has recently emerged from the absolute and unitary executive form of Presidentialism.

A semi-Presidential system is one model of this architecture, although the French model gives the President power to select the Prime Minister[16], suggesting that it is more unitary than it might at first glance appear. A semi-Presidential system could, however, be constructed that is less unitary — for example, one where part of the Cabinet (or Council of Ministers) is nominated by the legislature rather than the President (perhaps with a Presidential veto). The important feature of such a system, allowing it to stand up to an abusive President, would be that the President could conceivably be blocked from carrying out his preferred actions by the legislature's nominees to the Cabinet.

Another model, used by most U.S. states, is direct election to certain offices. For example, in an American state, the Governor, Attorney-General and Secretary of State might be elected separately, and protected from dismissal during their term (subject to impeachment by the legislature for certain behaviour, or occasionally, recall elections by the voters). This prevents any one person having plenary power over the executive branch. However, it is questionable whether it is appropriate at the national level — in specialist positions (such as Minister for Foreign Affairs), a busy electorate may struggle to gain the knowledge to evaluate the candidates properly, possibly resulting in populist but incompetent candidates being elected.

[15] See Lessig, L., & Sunstein, C.R. 'The President And The Administration.' *Columbia Law Review* 94, no. 1 (1994) and the works cited therein.

[16] Titre 2, Article 8.

Yet another model — rare in the West (it was famously used in Pennsylvania from 1777 to 1790, and is still used to some extent in New Hampshire and the Swiss canton of Berne) but occasionally encountered in the Middle East (notably by the Palestine Liberation Organisation) — may be considered for Tunisia. This is the Executive Council system: a number of candidates are elected and govern the executive branch as a collective entity. The Council will then choose which portfolio its members are most suited for, and will delegate power to specialist departments, but will always retain the power to overrule any of those delegated power. A significant advantage of this is that, by electing collectively, the role of personality politics is minimized.

An Executive Council model might eschew both the excessive personality politics of a Presidential model and the 'elective dictatorship' problem associated with the Westminster model. It does, however, have certain drawbacks. Perhaps the most worrying is the capacity of a plural executive with collective governance to lead to sclerotic decision-making, with the government unable to perform even its legitimate functions. In order to avoid this, we suggest that an Executive Council have an odd number of members, to prevent deadlocking, or, if there is an even number, the President of the Council should have a casting vote. Additionally, the Council should be stated to have collective responsibility, like the British Cabinet (i.e., once a decision is made, even members who opposed it should be required to use their best efforts to implement it).

Another potential problem of the Executive Council approach is that it would place the executive power entirely in the hands of elected officials. To be sure, this would most likely enhance the officials' responsiveness to the electorate, a very positive development given Tunisia's undemocratic history. However, it might deprive the senior ranks of the executive of technical expertise. In order to resolve this problem, the Executive Council ought to be able to appoint experts it trusts to advise it and to exercise delegated powers. In the case of mere advisors, this is relatively unproblematic; in the case of individuals exercising delegated powers, certain protections are required. The Executive Council must be able to countermand a decision made by a delegate, and/or remove the delegate from office; because these delegates would be unelected, a legislative confirmation should be required in order to enhance democratic accountability.

4.3.2 The Civil Service and Appointments

Unbiased and universally esteemed individuals exercising delegated powers might

- be subject to nomination by the executive and confirmation by the legislature so as to be sure that they have democratic legitimacy,
- be subject to removal at the demand of the executive, in order that elected officials retain control over the composition of the administration, and
- have their decisions subject to review by the elected officials within the executive branch so as to retain democratic control of the government's actions.

However, these concerns apply much more weakly to the junior members of the civil service. There, to the extent that officials exercise discretion, it tends to be administrative discretion

(for example, whether a person meets the criteria for a licence or welfare payment) rather than policy discretion (for example, deciding how the executive will carry out its functions under a statute). Moreover, there are other strong factors relevant to the junior civil service: given Tunisia's history of using bureaucracy to make life difficult for political opponents, it is important that administrators be free from political pressure.

One way in which this might be done is through combining an apolitical selection method (such as a competitive examination) and security of office. In this way, the composition of the civil service can be largely protected from political manipulation, promoting quality and preventing use of administrative power and patronage to reward political support and disincentivise political opposition. The Arab Maghreb's recent history is an illustration of the dangers of a political infestation of the civil service. In Tunisia, not only were government jobs one way of rewarding supporters ('the spoils'), but also, the abuse of administrative discretion allowed the government to make political support a *conditio sine qua non* of broader success, including licensing for private commercial or other enterprises. In this way, the incentive not to openly oppose, or even the incentive to actively *support,* the *status quo* is so great as to mute opposition. This might help create an illusion that almost everyone supports the regime.

4.3.3 Qualifications for Office and Electoral Integrity

Tunisia has a tragic history of Presidentially-rigged elections. After the PSD's one-party state was ended by Ben Ali, the RCD (the new name for the PSD) remained dominant. This was partially due to widespread fraud, and partially due to the President and his lackeys banning any candidate who offered real opposition.[17] While a number of candidates might have been on the ballot, none of them offered any prospect for changes of policies. These were opposition parties only in name, permitted to exist only so that a façade of liberalisation could exist. Indeed, popular uproar concerning these elections has been regarded as a significant contributor to the Revolution.

Recent history in Egypt also confirms the risks of broad powers to disqualify candidates. It is no exaggeration to say that an election that is not beyond reproach would lead to renewed uprisings and bloodshed. One way to avoid this is to include a comprehensive list of qualifications for candidacy in the constitution, and to ensure that the electoral commission is strictly independent. The latter might be difficult: in a nascent democracy only now developing embedded precedent and traditions of fair election administration, the potential for abuse is significant. The following features might prove to be helpful and constructive:

1. Multi-member: reduces the possibility of any one person controlling elections;
2. Includes widely respected individuals, preferably with a reputation for subordinating their own policy preferences to institutional legitimacy. Such individuals might be:
    - Lawyers or judges, preferably with some experience practicing or studying in a mature democracy[18]

[17] Willis, M.J. Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab Spring (London, C. Hurst & Co., 2012) pp. 131–5.

[18] In any case, it may be sensible to have the Chief Justice (or equivalent) serve *ex officio* as a member of the commission.

- Academics or religious scholars
- Longstanding pro-democracy activists

Provided that, in each case, the individuals are known not to have strong affiliations to a political party.

For the first election under the new Constitution only, it may be worth allowing independent foreign delegations of experts to administer the election. It is imperative, however, that the process is 'patriated' as soon as possible: the Tunisian people must themselves develop and thus establish ownership over the new Constitution. Therefore, even the temporary period of foreign influence need be deeply cooperative and mutually instructive for the Tunisian people.

4.3.4 Legislative Relations

Presidential decree powers[19] and, after 'opposition' parties were supposedly permitted, control of the composition of the legislature[20] meant that the President was concurrently Chief Executive and Legislator-in-Chief. Presidential decree power — what might in the United Kingdom be called prerogative or delegated legislative power — is usually a limited one. It is inevitable in a modern state that the executive will require some power to create policies to apply broad discretions given to it by legislation. This should, however, be minimal, and should be expressly stated to be subject to judicial review. 'Henry VIII clauses' — legislative provisions permitting amendment by the Executive — pose too much of a risk and should be prohibited. Where the Executive has the power to make rules as to how it will exercise discretion, the legislature should be entitled to veto them. It is questionable whether it should be possible for the legislature to make violation of an executive rule or regulation a criminal offence. A veto power, subject to supermajority override (similar to the U.S., minus the 'pocket veto'), is probably an acceptable Executive legislative power in that it provides a check on the legislature without giving the Executive a direct power to write its own laws.

The Executive's direct power, absent the actual introduction being done by a legislator, to introduce legislation is more questionable. It increases the risk the legislature will return to its pre-Revolutionary role of rubber-stamp. Direct power to introduce proposed legislation would mean that legislators would have less 'ownership' of the proposals. Given that a President should be able to persuade a legislative ally to introduce Bills, it is doubtful whether this power is worth including. Should the Executive have the power to call legislative elections? Because it will be used when convenient to the governing party, such a power increases the risk of what Ackerman calls 'full authority'[21] — where one party comes to control all branches of government.

As Bruce Ackerman notes, in France (which is, of course, Tunisia's former colonial power and a historic influence), such a power exists subject to a National Assembly having a one year minimum and five year maximum term. He further observes that in a separated system, the

[19] Willis, M.J. Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab Spring (London, C. Hurst & Co., 2012) p. 51.
[20] *Id.*, at 131–35.
[21] Ackerman, *supra*, at p. 648.

achievement of full authority allows greater entrenchment of policies than under a Parliamentary system[22]: the former requires the opposition to capture two branches; the latter only one.

Given Tunisia's legacy of problems caused by full authority, we think it would be judicious for the Tunisian people to soul-search and debate constructively whether they would wish for the Executive to generally retain such a power. The risk of occasional impasse caused by an Executive and Legislature refusing to deal with one another is probably a lesser threat to the constitutional order than the risk of one party again capturing both branches on a regular basis, and fixing the timing of legislative elections so as to maximize its chances of preserving its authority.

4.3.5 Emergency Powers

Emergency powers provisions of Constitution are notoriously capable of abuse. Extended so-called 'emergencies' (including *force majeure*) have been abused by dictators to grant themselves additional powers to crush opposition throughout the Maghreb and Mashreq. Similarly, Article 48 of the Weimar Constitution, allowing emergency legislation by decree, was infamously abused, creating a situation in which the executive also exercised substantial legislative power, meaning that few checks stood in the way of massive abuses.

Beyond any derogations or limitations provided for in the section on Rights, the new Tunisian Constitution might avoid strictly defining emergency powers. Such lists may become a roadmap for abuse, and there is Tunisian precedent for using constitutional provisions in ways for which they were not intended. This is not to say that no emergency powers should exist. Rather, it is to say that, on balance, the indeterminacy of these powers should prevent abuse, and an independent and engaged judiciary should be able to strike down any abusive assertions of an emergency. By contrast, if there are written emergency provisions, the judiciary is bound strictly to the text.

4.3.6 Military & Security

The influence of the internal security forces under Ben Ali was notorious. Unfortunately, it is difficult to avoid giving the executive power to command these forces; an independent military or security service would able to form a power-base that might attempt a *coup d'état* or assume political influence (cf. Egypt, although there are promising signs that elected officials are beginning to push back there), so executive command is necessary.

Legislative checks, such as an oversight role and control of the budget, and rights provisions, would mitigate this somewhat, but this appears to be one area where reliance on the good faith of those in command is the only substantial barrier to abuse of power. If the armed forces were to attempt a coup, written guarantees of rights and legal limitations on the military would have little practical impact; it would be a revolutionary change in which the old order would apply only to the extent those exercising influence in the new order wish to retain it. Little can be done beyond counselling those who select senior military personnel to exercise caution in their decisions.

[22] *Id.*, at p. 651.

4.3.7 Accountability

It would be unthinkable for a criminal member of the Executive to remain in office; at the same time, if it were too easy to remove officials, another institution (presumably the legislature) might gain substantial control over the composition of the Executive, threatening the separation of powers. To that end, most constitutional systems provide for some sort of dismissal-for-cause method. The two main options are legislative removal (almost always requiring a supermajority; in the American terminology, impeachment) and popular removal (often, by a simple majority; to use the American terminology, a recall election). Each has advantages and disadvantages.

The Impeachment model tends to vest significant discretion in the legislature as to the grounds for removal (insofar as determining the meaning of misconduct tends to be a task for legislators), but at least tends to require supermajorities. It thus tends to a more stable composition of the executive branch: only actions beyond the pale (or an official utterly without support) will result in dismissal. However, when officials are removed, it is usual to disable them permanently from serving in any government position.

By contrast, the American experience with recall elections appears to demonstrate that a significant proportion of the electorate see removal not as punishment for wrongdoing, but merely an opportunity to engage in combat over the previous election's issues. Such elections are also many times more expensive than impeachment. They do have the advantage, however, of being more directly democratic, both in actuality and as a matter of perception.

A hybrid model, however, might allow for the best elements of each. Having an impeachment system, but allowing an official removed from elective office to run for election again if he or she so wishes would provide stability and ensure that removal is not undertaken lightly. The people could then provide a check on abuses of the power — if an unpopular legislature removes a popular official, the electorate can assert its continued support for the official by returning him or her to office.

In terms of accountability short of removal, the legislature should be empowered to investigate potential abuses. Independent Inspectors-General should be appointed; one way of ensuring independence from the elective branches would be requiring that the Supreme Court appoint them by a supermajority. Because Inspectors-General would be unelected, they should not have the power to dismiss or prosecute individuals; instead, they should be empowered to compel disclosure of documents and testimony (subject to any right against self-incrimination), and to issue reports and recommendations. These could then be used by other parts of the government in exercising their functions: the Executive Council could decide to dismiss a person it had appointed; the legislature could seek their removal; prosecutors could seek to commence a criminal case against them.

Additionally, because the legislature has important powers of oversight — the power over the budget, the power to impeach, and the power to pass legislation affecting the executive branch — it might also be given powers to compel disclosure and testimony, such that the legislature exercises its other powers rationally and in an enlightened form. Finally, transparency enhances accountability and informed electoral choices. To that end, freedom of information (subject to reasonable exceptions, provided by statute) should be required by the Constitution.

4.4 The Legislative Branch

4.4.1 Unicameral or Bicameral?

The question of whether to have one House or two is a difficult one. Unicameralism has the advantage of being faster and more efficient; bicameralism allows for greater reflection and thought, reducing the chances that a temporary majority will make significant changes without due consideration of the consequences. Additionally, a second chamber can be structured to represent different interests, such as the U.S. Senate, which gives equal weight to each state to assuage smaller states' fears that their interests would be ignored in the favour of the interests of larger states.[23]

Tunisia does not have the same level of federalism as the United States — the Governorates are better described as administrative subdivisions as opposed to semi-sovereign regions. Whilst regional identity has some role, even in a relatively small country such as Tunisia (for example, religious conservatism appears stronger outside urban centres), it is not so central as to require a second chamber on its own.

However, there are more general theories that suggest bicameralism may have significant benefits. Traditionally, liberals endorsed bicameralism in part out of a suspicion that rapid change will be more difficult and require greater consensus if there are two chambers rather than one, ensuring greater stability and reducing the chance of oppressive laws being passed. There are examples galore in democratic countries. If *de facto* unicameralism led to questionably democratic behaviour in a country with a long heritage of democracy, this could indicate greater risks if new democracies adopt either *de jure* or *de facto* unicameralism.

Even on policy issues, Riker suggests bicameralism may lead to preferable gradual shifts rather than sudden major changes, again comparing Britain's left- and right-wing economic revolutions in 1945 and 1979 respectively to the United States' less extreme moves[24] Again, the New Deal, Great Society and 'Reagan Revolution' may cast doubt upon Riker's choice of examples, but the notion that effective bicameralism promotes stability and means broader consensus is required before a major change occurs seems a valid one.

Bicameralism does have some negative aspects to its history. In many constitutional systems, the upper chamber was created to preserve the power of the upper classes and thereby to limit the power of the lower chamber to affect the status quo. The prime example of this is the British House of Lords, although as has previously been noted, it has so little power today that it is not really a second chamber in any meaningful sense today. The former Tunisian Constitution, some have argued, improperly set aside seats for certain favoured groups in the upper house.

Negotiating this balance could be tricky and fraught with needless complexity. Unrestrained populism can, of course, be a problem — that is why Constitution contain rights provisions that place certain higher values beyond the scope of political control. But a Constitution which

[23] Indeed, originally, Senators were appointed by State governments rather than being directly elected, presumably based on the theory that they could represent the policy interests of the states rather than having to engage in personality-based election campaigns.

[24] Riker, William H. 'The Justification of Bicameralism.' *International Political Science Review* 13, no. 1 (1992) p. 115.

gives certain classes or castes a veto is cosmetic democracy, one in which democracy only is permitted to exist to the extent that it serves the interests of the faction with the veto. Appointive chambers, such as the House of Lords today and certain Commonwealth upper houses, are barely less problematic. They tend to give the political classes, or a party recently thrown out of office, significant power to constrain their replacements. Such systems should be avoided.

Additionally, bicameralism promotes stability only in the same way that supermajority requirements for sensitive issues (e.g., budgets) do, and that if the popular majority's view is represented accurately, both legislatures should have the same pivotal median point. Perhaps such a system could be adopted in Tunisia, but deciding which issues to require supermajorities for might result in an excessive level of micromanagement that could needlessly prolong the drafting process. Bicameralism may be the simpler option. And it is worth noting that every voting system that could be implemented in practice has imperfections in representation; two chambers with different voting systems might balance one another out, particularly if elections are somewhat staggered.

If there is to be a second chamber, the Governorates might provide a useful division, particularly since they are already in existence. It might be deemed difficult to justify U.S.-style equal numbers of legislators from each Governorate, but the German model of limited variation in numbers might be a plausible system for Tunisia. Perhaps the smallest six Governorates could have a single legislator, the largest six, three or four, and the middle twelve, two.

4.4.2 Electoral System and Political Tenures

The problem of election system design has caused long-term difficulties. Representing a broad range of views whilst avoiding a situation in which too many fringe legislators make governing unworkable presents a challenge. There are some principles that might be followed by the legislature in selecting appropriate electoral systems.

- Voter Control: Many systems confer too much power upon political parties to select candidates. This means that politicians owe more loyalty to the party machine than to the electorate, since the party has the power to almost guarantee election by giving a candidate at the top of the list or in a safe district. Such systems are unlikely to represent voters' true views — they simply force them to choose from a small number of parties. Whether through primary systems, runoff elections, or preferential voting systems, voters should in general have the final say as to who they wish to represent them.
- Proportionality: For a system to represent the people properly, it needs to provide a reasonable approximation of the actual views of the electorate.
- Effectiveness: Even in a relatively small country such as Tunisia, there will be significant divergences of opinion as well as extremism. To avoid an unwieldy legislature in which extreme parties may have an outsized influence when no party has an overall majority, some minimum threshold might be required by law to exist.
- Cost: An excessively expensive system, such as one requiring thousands of complicated machines to count ballots, is not feasible.

The electoral system used for the selection of the Constituent Assembly — a closed-list multi-member district proportional system, with districts based on the Governorates — scores reasonably well on each of these measures except voter control. A closed list places too much power in the hands of political parties to protect candidates the electorate might prefer not to elect. This might be acceptable in a Constituent Assembly where technical expertise is required; it is more problematic in a regular legislature.

While it is difficult to recommend any specific system, a Single Transferable Vote system in multi-member districts (based on the Governorates) might be considered. This is a preferential system, in which voters rank candidates in order of preference. This means that voters can usually choose to rank a party's candidates in a different order to that which the party's leaders would prefer, scoring highly on voter control. It is reasonably proportional, although not perfectly so. Because second, third, and later preferences also matter, it tends to limit the number of fringe candidates who can garner the requisite broad base of support. The

4.4.3 Budgetary Powers

The legislature should have primary control of taxes and spending, as a means of checking potential abusive or unpopular actions by the executive. Budgetary control provides a weapon for the legislature to compel a recalcitrant executive to follow its legal duties.

4.4.4 Delegated and Pre-Empted Legislation

In a modern administrative state, it is generally viewed as inevitable that the laws passed by the legislature cannot cover every eventuality. Consequently, statutes tend to be framed broadly, and the executive then establishes policies or regulations for carrying out the requirements; the judiciary then reviews to ensure that the policies made are compatible with the statute, the Constitution and broader principles of administrative law.

This type of delegation is commonplace and is usually not a problem unless used in an abusive manner (for example, establishing a policy to disguise a real motive of excluding opponents from beneficial public programmes). What might be more problematic is more powerful delegations of legislative power, where the legislature allows the executive to change certain parts of statutes without legislative approval.

Such powerful delegations are worryingly common in, for example, the United Kingdom, where some such powers are stunningly broad, such as enabling the executive to amend almost any primary legislation if it believes that the primary legislation violates European Union law. Such absolutist clauses excessively empower the executive, and might place Tunisia once again at the mercy of those who control the Executive Branch. Again, it is not enough that most leading Tunisian politicians today could probably be trusted not to abuse these powers; a Constitution ought to deal with potential challenges for generations to come.

4.4.5 Immunity

Since the British Bill of Rights and the U.S. Constitution, limited protections for legislators against being prosecuted have existed in many constitutional systems. Because the Executive is generally in control of the police, military, and security services, the theory goes that legislators need express protection against abuses of these powers.

Abuses of powers of arrest are not unheard of. We counsel the Constituent Assembly against *broad* grants of immunity to legislators such that the officialdom does not transgress upon the rights of persons or group with impunity or wilful negligence in a way that becomes a pattern. Legislators, of course, have the solemn responsibility of constructing laws and overseeing the policies of the State. One reason the electorate can be confident that a legislator is doing his or her best is that the legislator has to live under the same laws as everyone else. The incentives are substantially though still imperfectly aligned, because a legislator can be faithful to his sincere notion of the public good, divorced from an ulterior motive, if he or she is subject to the same laws and the equal enforcement of those laws.

However, if the legislator is immune, he or she can no longer experience first-hand the problems of the rest of the population. It is true that doing one's best for one's constituents would still increase one's chances of re-election but this may be many years away, and will not affect legislators who have already announced their plans to retire. Moreover, even if the legislator honestly *wishes* to solve his or her constituents' problems, not having to obey the laws means that the legislator may have difficulty perceiving the legal barriers that overbroad or oppressive criminal laws may have on ordinary people. Some limited immunity might, however, be argued as defensible. The notion known in the United Kingdom as Parliamentary Privilege and in the U.S. as the Speech and Debate Clause holds that a legislator cannot be held liable (civilly or criminally) for speaking or voting in the legislature, in order that legislators act according to their own opinions and not fear of others.

A non-absolute immunity subject to waiver by a super-majority of the legislature is also worthy of some consideration. In limited circumstances addressed by statute, this would keep legislators subject to the ordinary criminal law, but delay trial until the legislator is out of office or the legislature waives the immunity. The idea would be to prevent the executive abusing its power to arrest opposing legislators, without encouraging the corruption or loss of touch with the realities of normal life that full immunity would cause. It is, however, less clear that this would work in actuality, especially if legislators frequently refused to waive immunity for their colleagues (perhaps to protect their own misdeeds)

4.4.6 Amendment

Any constitutional system must provide for its own amendment, so that any problems that were not foreseen can be fixed without the instability of a constitutional crisis or revolution. Because amendments tend to be entrenched, they should not be easy to make. An amendment should reflect a broad and longstanding national consensus. Ackerman proposes two ways

of proving this — supermajority requirements and sometimes repeated votes (either by the legislature or the people).[25]

4.5 Conclusion

Tunisia has a rare opportunity to reconfigure itself as a democratic, rights-protecting State. We will consider our work a success even if all it leads to is further discussion of the risks present in choices about constitutional structure.

The new Tunisian Constitution should not be seen as an instrument of everyday politics, and the drafting process should not be seen as an opportunity to embed policy preferences. The greatest threat to Tunisia's newfound freedom is failure to heed this warning from history. Whatever form the new government takes, its legitimacy will be in question from day one if it was pushed through for partisan reasons. The other parties might treat such a system as illegitimate, and pressure for more constitutional change would result.

There may well be disputes over the form of the new Constitution; some may even take place along party lines. But when those disputes occur, it should be in good faith over the best structure, not over who can give their party a better chance in the new system. For, in large part, it is not the structure of the system which guarantees future liberty — it is a political culture of respect for the Constitution and for the rule of law. The signs are encouraging that senior Tunisian political figures understand this. Rachid Al-Ghannouchi has articulated:

> In the Constitution we should have principles for hundred years to come. We should not include political decisions that might change with time as the problems are solved.

We began this analysis by urging the Constituent Assembly to adopt a pluralist power-architecture, lest one person again possess too much power and yet there might be accountability. We end by urging the Constituent Assembly to cultivate the spirit of the Constitution through grass-roots means.

4.6 Appendix A: Draft Constitutional Provision

4.6.1 Amendments

Amendments to this Constitution shall be proposed by the National Parliament, and approved in each House by a two-thirds majority. A first referendum shall then be held within 180 days. Should a majority of the electorate approve of the amendment, a second referendum shall be held no sooner than three years and no later than five years after the first referendum. Should a majority of the electorate again approve of the amendment, the amendment shall take effect immediately after the certification of the results by the Electoral Commission.

[25] Ackerman, 2000 pp. 666–667; Hibou, Béatrice (2011), *The Force of Obedience: The Political Economy of Repression in Tunisia* (Andrew Brown, translator). Cambridge; Malden, MA: Polity Press (Originally published in French as *La Force de l'obéissance* by Editions La Couverte, Paris in 2006) (ISBN 9780745651804).

4.7 Appendix B: Draft Legislative Provisions for the Legislature to Enact under its Article 33 Powers

4.7.1 The Executive Agencies

1. The power to make policies directed by statute shall remain in particular executive agencies as created, suspended or abolished by law.

2. The Executive Council shall consist of at least five members, elected for terms of four years at large by Single Transferable Vote. Should a vacancy occur during the term, the vacancy shall be filled by a special election within a time period to be provided by statute but no greater than ninety days; provided that, if a vacancy should occur within one hundred and eighty days of regularly scheduled election, the position shall remain vacant until the regularly scheduled election.

3. The Executive Council shall act by a majority of the full number of its members, and the quorum shall be at least three-fifths of the total number of members.

4. The Executive Council shall select one of its members to serve as President of the Council. The Executive Council shall appoint each of its members to specialized portfolios.

5. The Executive Council may, subject to such restrictions as the National Assembly may impose, delegate executive power to certain of its members or individuals appointed under Section 6 of this Article; provided that the Executive Council shall always retain the power to countermand a decision made under a delegated power.

6. Members of the Executive Council may be removed by the joint resolution of each House of the National Assembly, each voting by a two-thirds supermajority, for severe misconduct or incapacity. Members so removed may run for election again in the future, including at the special election to fill the vacancy created by the member's removal.

7. Inspectors-General shall be appointed on a non-partisan basis by the Supreme Court in order to act by a two-thirds supermajority to monitor the Executive and Civil Service for misfeasance in office. The Inspectors-General shall be required to be independent, and shall have the power to require members of the Executive and Civil Service to provide evidence to them and to issue reports and recommendations.

8. Documents and other information held by the Executive and the Civil Service shall be subject to disclosure, subject to such *reasonable* exceptions as shall be prescribed by statute.

4.7.2 The Civil Service

1. The Civil Service shall be responsible for administration.

2. The Civil Service shall be protected from political pressure, and shall be selected based solely on merit in a manner to be prescribed by statute.

3. Members of the Civil Service shall have security of office, and shall only be removable for misconduct, incapacity, or manifest incompetence; provided that the legislature may by statute provide for a mandatory retirement age; and provided that any member of the Civil Service who is dismissed or demoted shall have the right to appeal the decision to an independent and impartial Court or Tribunal in a manner to be prescribed by statute; and also provided that this shall not prevent the legislature from modifying the size of the Civil Service or eliminating particular positions within the Civil Service by statute.

4. Should it be necessary to reduce the size of the Civil Service, the manner for selecting individuals to be retained and to be dismissed shall be based solely on merit in a manner to be prescribed by statute.

5. For the purposes of item 3 of this Article, misconduct shall not include the exercise of a right protected under this Constitution shall never be a ground for dismissal.

4.7.3 Elections

1. A candidate for the Executive Council shall be a citizen of Tunisia who is over the age of 30.

2. A candidate for the National Assembly shall be a citizen of Tunisia who is over the age of 21. He or she shall maintain a residence within the Governorate from which he or she seeks election.

3. Reasonable requirements for signatures and money deposits may be imposed by statute; provided that no such statute shall require more than 1,000 signatures nor a money deposit greater than ten per centum of Gross Domestic Product per capita; and provided that any such statute shall provide for waiver of the money deposit in whole or in part for impecunious candidates.

4. No other restriction shall be placed upon eligibility to run for office.

5. All elections shall be administered by the Electoral Commission of Tunisia, which shall be independent and impartial, and shall have seven Commissioners. The Chief Justice of Tunisia shall serve *ex officio* as Chair of the Commission. The remaining members shall be nominated by a majority of the Supreme Court and confirmed by a two-thirds majority of each House of the National Assembly. Except for the first elections to be held under this Constitution, a Commissioner shall be a Tunisian citizen.

Chapter 5

Judicial Independence & Judicial Review

5.1 Judicial Independence

5.1.1 The Concept

The concept of judicial independence is not susceptible to easy definition. Indeed, different countries, especially those of different legal cultures, adopt varying models which can be said to respect judicial independence. A further complication is that, as noted by Neudorf, the degree of independence demanded may well vary depending on the type of questions the judiciary is called upon to adjudicate.[26] For instance, where a court is tasked with reviewing the validity of legislation enacted by democratically elected bodies, a more politicised appointment process for its judges may be more readily justified.

Due to its French legal heritage, the power to uphold the Constitution (theoretically including the power to strike down of legislation) in Tunisia is allocated to the Constitutional Council. We must recognise the difference between the functions of ordinary courts (all the other courts) and that of the Constitutional Council and will make recommendations specific to these two institutions.

A number of features may be said to constitute the (aspirational) common core of the concept (applicable to both ordinary and Superior Council of the Magistrature judges). The list is not exhaustive but many of these have been identified by the European Commission for Democracy Through Law (Venice Commission) as necessary for maintaining the independence of the judiciary.[27] In terms of appointment, there should be an independent process based on objective criteria. Also, judges are to enjoy fixed tenure of office, be adequately remunerated, and enjoy freedom from both undue external influence and pressure from their judicial superiors. Commonly, the need to maintain judicial independence is provided for at the highest level in the Constitution.The main challenge in ensuring judicial independence in Tunisia lies in the concentration of power in the hands of the President and the Executive.

[26] Neudorf, L. 'Promoting Independent Justice in a Changing World.' *The Human Rights Law Review* 12, no. 1 (2012): 107–121.

[27] European Commission for Democracy Through Law (The Venice Commission). *Report on the Independence of the Judicial System Part I: The Independence of Judges* (Strasbourg, The Venice Commission, March 16, 2010). *Available at* http://www.venice.coe.int/docs/2010/CDL-AD%282010%29004-e.pdf (last accessed September 5, 2012).

5.1.2 Constitutional Council

Constitutional review of bills, treaties, the validity of elections and referenda are conducted by the Constitutional Council, a separate institution established under Chapter IX of the current Constitution. The direct subordination of the Council to the authority of the President is striking: the remuneration of the Council as well as referrals (other than mandatory referrals) to the Council are determined by the President; almost half the members of the Council are appointed by the President; the Council budget forms part of the President's budget; and the Council reports to the President annually.

5.1.3 Higher Judicial Council

5.1.3.1 Composition

The Higher Judicial Council (HJC) is responsible for matters relating to the transfer and discipline of magistrates, and for giving recommendations to the President on the appointment of magistrates. The composition of the HJC is heavily tilted in favour of the executive. The President and Vice-President of the Council are, respectively, the Tunisian President himself and the Minister of Justice. Indeed, 13 out of 19 members are either representatives of or elected by the executive, directly or otherwise. The remaining 6 members are magistrates elected among themselves. However, the election of the 6 magistrates must be by decree of the Minister of Justice, who also receives and decides on challenges to the validity of such elections.

5.1.3.2 Discipline of Magistrates

A particular phenomenon of concern in Tunisia is the problem of disciplinary matters and purportedly 'punitive' transfers of magistrates. The HJC is divided into the Discipline Council and the Appeals Committee. Magistrates can be brought before the Discipline Council for 'any dereliction of a magistrate of the duties of his office, of honour or of dignity,' an open-ended criteria subject to a wide range of possible interpretations. The Minister of Justice has the power to issue warnings to magistrates, refer alleged wrongdoings to the Discipline Council, and temporarily ban a magistrate from holding office subject to a final decision of the Council. It is to be noted that a disciplinary decision cannot be appealed to the Administrative Tribunal.

5.1.3.3 Transfer

Transfers are examined by the HJC annually before the judicial vacation. Nevertheless the Minister of Justice may decide upon a transfer during the course of the year and refer it to the HJC, in order to address a genuine 'need within the organisation,' also a notion with no clearly defined limits. Magistrates can appeal against transfers to the HJC; the decision of the HJC on this matter is final.

5.1.4 Recommendations

This report recommends two main measuress to strengthen judicial independence in Tunisia: (a) the enshrining of the concept of judicial independence at the Constitutional level; and (b) the creation of an independent judicial council, whose status and functions should be clearly laid down by statute for the sake of flexibility. In addition, a separate set of rules are applicable for the selection of Superior Council of the Magistrature judges.

5.1.4.1 Formal Protection at the Constitutional level

In order to provide the best safeguard against the erosion of judicial independence, it is submitted that the concept should be enshrined at the Constitutional level. By guaranteeing it at the highest level, the indispensability of the concept is emphasised and this deters the Executive from freely ignoring it. The next question is how detailed the constitutional provision should be: whether a brief declaration of the respect for the concept (with measures to be supplemented by general law) suffices or whether a comprehensive detailing of measures is necessary, in the Constitution itself. The authors are of the view that the latter may be preferable in view of the experience in other Middle Eastern countries. Finally, we shall examine the Basic Structure Doctrine which will prevent constitutional amendments from being made to alter fundamental aspects of the Constitution.

5.1.4.2 A Formal Declaration

The current Constitution of Tunisia formally endorses the principle of judicial independence, as do the Constitution of most other Middle Eastern and African countries. The vast majority of these countries adopt a 'minimalist' approach by including little more than a declaratory statement that judicial independence is to be respected. For instance, the Constitution of Bahrain states in Article 104(b) that 'the law guarantees the independence of the judiciary' and that other provisions pertaining to judges are to be laid down by the general law. Similarly, the 2011 Constitution of Morocco states in Article 107 that 'the judicial power is independent of the legislative power and of the executive power'; the current Constitution of Tunisia also in Article 65 states that 'judicial authority is independent' and that 'judges are subject only to the authority of the law.'

In terms of the exact wording, it should be emphasised that the power of the judiciary flows directly from the Constitution and that it is independent of the executive and legislative branches. The formulations that 'judges are only subject to the authority of the law' or that 'judicial independence is guaranteed by the law' may create the impression that judges are subservient to the law-making branches. Indeed, during the 1988 Constitutional Crisis in Malaysia as a result of which several Supreme Court judges were removed from office by a displeased Executive, Article 121(1) of the Constitution which read 'the judicial power of the Federation shall be vested in two High Courts' was amended to now read 'there shall be two High Courts…[which] shall have such jurisdiction and powers as may be conferred by or under federal law.' The Malaysian Bar remarked that such amendment has brought about the perception that the Judiciary is subservient to the Executive and has led to significant deterioration in public confidence in the Judiciary.

5.1.4.3 Supplementing Provisions

Beyond such declarations, the aforementioned countries generally leave the details of the important aspects of judicial independence such as the questions of appointment, promotion, remuneration and transfer of judges to the general law. Thus, the Constitution of Tunisia simply states in Article 66 that 'the modalities of [judges'] recruitment are set by law' and that a 'Higher Magistracy Council' shall 'ensure respect of the guarantees granted to judges regarding appointment, promotion, transfer and discipline.' Likewise, without specifying in detail how, Article 113 of the Moroccan Constitution states that the 'Superior Council of the Judicial Power' shall 'see to the application of the guarantees accorded to the magistrates, notably concerning their independence, their appointment, their advancement, their retirement and their discipline.'

A brief statement of judicial independence has the natural advantage of keeping the Constitution succinct and accessible, which is an important object in itself given the need to inform the general public of its content and for them to feel related to it. However, it must be questioned whether it is adequate to leave the details of guarantees of judicial independence to the general law, which by definition can be more easily abrogated. This is particularly important given the experience of many countries adopting the 'minimalist' model.

The inadequacy of a brief declaratory statement can be illustrated by the experience in Morocco. Despite the formal recognition of judicial independence in the 2011 Constitution, the government has been slow to introduce concrete reforms cementing its realisation. Indeed, the Constitution Unit based at University College London notes that in reality the Moroccan Royal Family and the Executive currently have exclusive control of judicial promotions and salaries.[28] As a result, judges will often be influenced by illegitimate factors such as their careers when reaching their decisions. This prompted almost 3000 judges to wear a red armband for a week as a form of protest in May 2012.

Similarly in Tunisia, despite the passing of a decree necessitating the creation of a temporary independent judicial committee in November 2011 (within the framework of the current Constitution), such decree has still not fully taken into effect. The Association of Tunisian Judges argued that there is a lack of will on the part of the executive to tackle the issue of judicial independence and organised the wearing of red armbands in April 2012 to express their discontent. In addition, there has been accusation that the Minister of Justice has attempted to control the judiciary by arbitrarily appointing and transferring judges, a practice which greatly undermines judicial independence.

By contrast, the Constitution of South Africa is one of the most comprehensive instruments of its kind. Not only does it lay down the principle in Article 165(2) that 'the courts are independent and subject only to the Constitution and the law', it also goes on to describe the structure of the judicial system in Article 166. More importantly for present purposes, the Constitution details the criteria and procedure for appointment to judicial office in Article 174. Thus, in Article 174(2), it is stated that the 'racial and gender composition of South Africa'

[28] Perkins, N., 'Judicial Independence Around the World: Nepal *&* Morocco.' *Constitution Unit Blog*, June 13, 2012. *Available at* http://constitution-unit.com/2012/06/13/judicial-independence-around-the-world-nepal-morocco/ (last accessed September 2, 2012).

must be considered when judicial officers are appointed and in Article 174(6) that judges of most courts are to be appointed by the President on the advice of the Judicial Service Commission. Furthermore, Article 176 lays down the rules regarding terms of office of judges and their remuneration; the conditions of their removal from office are prescribed in Article 177 while the composition and functions of the Judicial Service Commission are stipulated in Article178. Such model circumvents the problem of a reluctant Executive or Parliament.

Indeed, South Africa is arguably a prominent success story in Africa in upholding judicial independence. Despite a series of controversial rulings by the Superior Council of the Magistrature regarding the protection of fundamental rights[29], the South African Government has generally respected its decisions. This is so even where the Government was the losing party and that positive actions on its part were required to implement the rulings. However, it may be argued that the political will to uphold judicial independence appears to be particularly strong in South Africa where the Constitution is regarded as the embodiment of the values that the ruling African National Congress party stood and fought for.

5.1.4.4 Basic Structure Doctrine

The Basic Structure Doctrine was developed by the Indian Supreme Court. In interpreting Article 368 of the Indian Constitution, which relates to Parliament's power to amend the Constitution, the court held

> the power to amend does not include the power to alter the basic structure of the Constitution so as to change its identity.[30]

Consequently, the 42nd amendment to Article 368, which ousted judicial review of any constitutional amendment under the Article and declared that the amending power of Parliament was unlimited, was struck down as invalid.[31]

The supervening and supreme power of the doctrine denotes that even democratically elected bodies with the requisite majority in the Legislature can be prevented from amending or tempering with fundamental tenets of the Constitution. Indeed, if invoked, it could arguably have rendered the amendment to Article 121 of the Malaysian Constitution — deleting the provision that the judicial power of the Federation is vested in the judiciary (and replacing with words that power of the courts are only as conferred by federal law) — void. For this very reason, this doctrine remains controversial. Its pedigree is fundamentally anti-democratic and sets a dangerous precedent for a democratic form of government and access to the rule of law. If Tunisia is to have it, then it is better to accommodate it directly and thus take the stigma away. Therefore, Article 72 of the proposed Constitution states: 'Amendments to this Constitution shall be proposed by the National, and approved by each House by a two-thirds majority, with the reservation that it does not affect the republican character and structure of the State, its respect for human dignity and non-discrimination, and judicial independence and review.'

[29] For instance, in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), the South African Superior Council of the Magistrature ruled that the State was obliged to progressively realise the right of access to adequate housing as guaranteed by the Constitution.
[30] Kesavanada Bharati v State of Kerala, AIR 1973 SC 1461.
[31] Minerva Mills v Union of India, AIR 1980 SC 1789.

5.1.5 The Judicial Council

5.1.5.1 Background

The current Tunisian Constitution states

> The judicial authority is independent. In exercising their functions, judges are subject only to the authority of the law. (Article 65)

However, as noted above, it must be strengthened as to its stipulations concerning the appointment, promotion, transfer of judges and other critical matters. In theory, the creation of a Judicial Council or High Council can help promote judicial independence but the way it was regulated in the Tunisia Constitution is unsatisfactory for this goal.

According to Article 67 of the Constitution the High Council of the Judiciary 'shall control the respect for the guarantees accorded to judges and prosecutors in matters of appointment, promotion, transfer and discipline.' However, the apparent strength of this provision is diminished by Article 66, which states that judges and prosecutors are appointed by the President of the Republic and that the High Council can only make recommendations. Moreover, the High Council is headed by the President. The judicial branch is, therefore, highly influenced by the Executive and the nature of the High Council as regulated in the Constitution does not help reduce this.

Taking this as well as other deficiencies in the regulation of the Judicial Council in other states of the region into consideration, this report will suggest some guidelines leading to a more independent High Council and judiciary.

5.1.5.2 Functions

The High Council or Judicial Council should be an 'organ of government', formally part of the judicial branch, without carrying out any judicial activity *per se*. The Judicial Council shall perform the following tasks: selection and appointment of judges; promotion of judges; evaluation of judges; disciplinary and ethical matters; training of judges; control and management of a separate budget; administration and management of courts; personal security of judges; provision of opinions to other state authorities; and responsibility to the public (transparency, accountability and reporting).

5.1.5.3 Composition

An important matter relating to the independence and autonomy of the Judicial Council is its composition and the election of its members. In making our recommendations, we are mindful of the tension between judicial independence and accountability: while a Judicial Council whose members are appointed exclusively by the Executive or Legislature (potentially controlled by the Executive with a majority there) might seriously compromise judicial independence, undesirable corporatism might arise if all of them are elected by peer judges.

Presently only 6 out of 19 members of the Tunisian High Council are chosen by the magistrates among themselves by election (the rest are appointed by the Executive). It is submitted that it is important for the autonomy of the Judicial Council that the majority (or at least half) of its members are elected by the judges or that, at least, the judges elect the potential candidates to be eventually appointed by the Legislature or the Executive; such arrangement should also be clearly indicated in the Constitution.

There are thus two potential models which may be considered. In the first of them, some members of the Judicial Council are elected by judges while the rest are appointed by the Legislature or (more commonly) the Executive.[32] This is the model followed in Lebanon after the reform nº 389 of the 21 December 2001 of the law of 1983. The risk is, as it happens in Lebanon, that the actual number of the Judicial Council members who are appointed by the Executive/Legislature ends up being considerably higher than the number of members elected by judges.[33]

This phenomenon can perhaps be avoided by stipulating clearly in the Constitution the proportion of members to be elected by members of the judiciary. In the second model, the members who are required to be judges are elected by all members of the judiciary and then the Parliament elects the members of the Judicial Council among them. This is the case in Spain, where judges and magistrates designate a maximum of thirty-six candidates, among which the Congress elects six and the Senate another six (non-judge members are elected by the Parliament).

Furthermore, one major concern in relation to the current composition of the Tunisia Council is that it is headed by the President of the Republic and includes the Minister of Justice and other officials from the ministry. The authors of this report believe that the direct participation of the Executive in the functioning of the Judicial Council is liable to undermine the autonomy of the council and should be avoided (even though the Executive may still appoint the remaining lay members of the Judicial Council). To this end, the Constitution should clearly state the composition of the Judicial Council and the process of election and appointment of its members in order to avoid ambiguities.

Finally, the autonomy of the Judicial Council cannot be ensured without enjoying financial autonomy. States of the Middle East region usually perform poorly in this aspect. The model in Palestine, where the Judicial Council evaluates and supervises the budget of the judiciary, would be a good one to adopt.

5.1.5.4 Selection of Judges (apart from Supreme Court judges)

The process of appointment to judicial bodies shall be transparent and accountable. It is preferable for judges to be elected by their peers or by a body independent of the Executive and the Legislature.[34] This is what the *European Charter on the statute for judges* envisages when it

[32] One variation of this model is that found in many Latin-American countries, where Judicial Council´s members are elected or appointed by a wide range of institutions/ organs, including, for instance, the Deans of the Law faculties of the country. The problem with this model is that usually judges themselves have little or no voice in the election of the Judicial Council´s members.

[33] In Lebanon, only two out of the ten judges who compose the Judicial Council are elected. Three of the eight others are appointed by a decree of the Council of Ministers, and the rest are appointed by decree of the Minister of Justice.

[34] International Commission of Jurists (2007), *International Principles on the Independence and Accountability of Judges, Lawyers and prosecutors*, Practitioners Guide, nº 1, Geneva, p 45.

stipulates

> In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

For their part, the *African Guidelines* support the idea of an independent body entrusted with selecting judicial officers, but allow other bodies, including other branches of power, to perform this function as long as they comply with certain criteria[35]:

> The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

Certain checks and balances are important in choosing new judges. There are different systems of selection of judges which meet these requirements. Among them, the model followed in some countries such as France and Spain seem to ensure the highest level of impartiality and objectivity. In both these countries judges are generally required to hold law degrees and, subsequent to their appointment, must pass through certain courses and an internship supervised by the Judicial School (in the Spanish case) or the *Ecole Nationale de la Magistrature* in Bourdeaux (in the French case).

This selection process occurs in two phases (examination and judicial school). In the first phase, the candidate takes an examination which ranks aspirants according to their legal knowledge. Once selected, the aspirant enters formal studies at the judicial schools. Only the candidates with best scores enter the school.[36] In short, the Constitution might state clearly enough that judges are to be appointed based on ability, training and qualifications, with no discrimination on irrelevant grounds.

5.1.5.5 Conditions of Tenure

Security of tenure and an impartial system of promotion and discipline are essential for achieving judicial independence. The Constitution should include some provisions ensuring this. Unless judges enjoy long-term security of tenure, they are susceptible to undue influence from different quarters[37]. The international standards on the independence of the judiciary identify a number of requirements related to this issue that the drafters of the new Tunisian Constitution should consider. For instance, according to the *United Nations Basic Principles*,

> judges, whether appointed or selected, should have guaranteed tenure until a mandatory retirement age or the expiry of their term in office, where such exists.

[35] *Id.*, at 46.

[36] It could be argued that, although the French/Spanish judicial selection model strengthens judicial independence, judges who are just appointed usually lack practical knowledge and experience, and this can negatively affect the quality of the justice in the country.

[37] Autheman, V., and S. Elena. 'Global Best Practices: Judicial Councils. Lessons Learned from Europe and Latin America.' Edited by Keith Henderson. *IFES Rule of Law White Paper Series* 2, no. April (2004). p. 51.

In a similar vein, *Principles and Guidelines to a Fair Trial and Legal Assistance in Africa* provide that:

> judges or members of the judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office'

and also that

> the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.

For their part, the *African Guidelines* state in negative terms that

> judicial officers shall not be appointed under a contract for a fixed term.

With regard to promotion of judges, the *U.N. Basic Principles* state

> promotion of judges, wherever such a system exist, should be based on objective factors, in particular ability, integrity and experience.

If it is the Executive, with the advice and consent of the Legislature, selecting judges for promotion or the Constitution or laws stipulating another model, it is incumbent that this prescription be generally followed.

5.1.5.6 Selection of Supreme Court Judges

Traditionally, there are two main models of appointment of Supreme Court judges. In the first model, it is either the Legislature or the Executive that elect the members of the Supreme Court. This is the case, for instance, in Libya, where the Supreme Court President and the other members of that court are elected by the General People´s Congress. This model should be avoided, since it allows the non-judicial branches of the state to wield undue influence over the top of the judicial branch. This could compromise the independence of the entire judicial system, given the importance and key influence of the Supreme Court´s decisions.

In the second model, it is the Judicial Council which proposes the appointment of certain candidates to another authority. The candidates are usually democratically chosen in an election by the Judicial Council assembly. Given the limited role that the non-judicial branches play in it (which is usually reduced to just a formal appointment), this model does not present the threat for judicial independence that the fist model does.

It is also not uncommon for Supreme Court members to come from different professional backgrounds. This is potentially enriching for the work of the Court. However, Supreme Court judges who do not have any experience as judges at other courts should not outnumber the number of those who do so. In any case, the statutes should state a minimum number of years of experience in the legal profession that successful candidates must have.

5.2 Selection of Superior Council of the Magistrature judges: Special Rules Concerning the Appointment of Superior Council of the Magistrature Judges

In many countries, constitutional review powers are given to a body separate from the Supreme Court. When this is the case, the members of the Superior Council of the Magistrature (hereinafter SCM) are not selected and appointed on the basis of the same requirements and procedure as those applicable to other members of the judiciary.[38] Instead, due to the peculiar nature of this court (in reviwing legislation enacted by democratic bodies), SCM judges are usually appointed by political organs. More specifically, the Head of State and/or the Parliament may have some responsibility in the appointment of judges at the SCM. Nonetheless, it is the Parliament that traditionally plays the greatest role.[39] In some countries the Executive also has some power in the appointment of the judges at the SCM.[40] However, It has been argued elsewhere that this might create an undesired appearance of politicisation.[41]

Despite the obvious involvement of the political organs, as long as the following considerations of experience requirements and guarantees are observed, the election of the Superior Council of the Magistrature judges by political organs (excluding the Executive) should not endanger judicial independence in Tunisia. At the same time, the legitimacy of the Superior Council of the Magistrature in striking down legislation is enhanced through participation in the selection of its members by the Parliament.

SCM judges should be required to be distinguished professionals whose integrity and competence are beyond reproach. Most successful candidates should be required to have significant experience, either as a judge, law professor, corporate executive, a practising lawyer, or in another capacity (or combination of roles) that is involved with sober-minded decision-making and analyses.

Even though the length of terms of office varies greatly from country to country, there is something approaching a broad consensus that members of a SCM should enjoy security of tenure and material independence through their judgeship. In order to achieve this, it is commonly agreed that SCM judges should keep their positions for a considerable number of years (between 9 and 12 years). In any case, the Court might be renewed partially every three/ four years (depending on the length of the tenure) so as to avoid abrupt changes in the positions of the Court and interference with its work. The lifetime tenure model is another possibility. This is a value judgment demanding the Constituent Assembly's own choice.

In relation to the work conditions, the granting of immunity of the SCM judges from civil liability for actions in the course of their functions, on the one hand, and strict rules of conflict of interests on the other, are paramount for ensuring independence of the SCM judges. Thus, SCM judges should not undertake any commercial or political activities. Indeed, the conflict of interest rules are even stricter in some countries, where even just political party membership is absolutely prohibited.

[38] *Id.*, at p. 6.

[39] In Germany, for instance, each chamber appoints half of the judges at the CC. In a similar vein, Spanish Congress and Senate have the responsibility to appoint a third of the SCM judges each. In Italy, by contrast, all the members are appointed in a joined session of all chambers.

[40] In Spain, for instance, the government appoints two of the SCM judges.

[41] Agudo Amora, Miguel J. 'El Modelo Europeo De Justicia Constitucional.' In *La Reforma Del Tribunal Constitucional. Actas Del V Congreso De La Asociación De Constitucionalistas De España*, by Pablo Pérez Tremps. Valencia, 2007.

5.3 Judicial Review

5.3.1 Challenges to Constitutionalism in the New Tunisia

Over the last half century, numerous African and Middle Eastern nations have adopted Constitution. Many of these Constitution, however, have not been fully enforced by the judiciary. If it is to be effective, the new Tunisian Constitution might concern itself with certain obstacles to constitutionalism and the rule of law, which are set out below.

5.3.1.1 The Perceived illegitimacy of Constitutional Review

If constitutional review by the judiciary is viewed as illegitimate by the people, it cannot function, because the people may not condemn any failure by the Government to adhere to the rulings of the judiciary; the people may not condemn any manipulation of the judiciary by the Government; and the judiciary, knowing that a ruling adverse to the government will either not be enforced, or will result in interference with the judicial system, are disinclined to give robust judgments in defence of the Constitution.

In post-colonial Africa, constitutional review suffered such a deficit of legitimacy. The lack of popular support for judicial review was attributable to the perceived infallibility of both the will of the people and the aims of the key leaders of decolonisation, a response to the minority rule and suffering of colonialism.[42] This fallibility was also deemed to be attributable to the possibility of flagrant or furtive corruption by the judges, a possibility that Article 18 addresses and attempts to remedy. The newly adopted Constitution operated to constrain the will of the people and their liberators; accordingly, constitutional review was largely viewed as illegitimate, particularly as the judiciary were not accountable to the people. This contributed to the breakdown of constitutional review.

It is extremely crucial, therefore, that constitutional review in Tunisia is viewed by the public as a legitimate exercise of the judicial function. Chief Justice John Marshall of the United States once remarked that '[t]he people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.'[43] In this respect, the Tunisian authorities must work cooperatively and develop a coherent system with the African Court of Human Rights or other courts that might respectfully attempt to exercise judicial engagement. International human rights tribunals which might be pedagogically instructive also have an interest in engaging the domestic machinery of the State. However, like some of post-colonial Africa, Tunisia has recently emerged from rather an oppressive regime. Popular opinion is thus largely concerned with enacting the will of the people and generally makes an ambivalent assesment of the revolutionary actors who now lead the country. If constitutional review comes into conflict with these widely-held views, it risks being viewed as problematic, at least in the short run. Problematic is not always the same as illegitimate, however. Even decisions with

[42] Kwasi Prempeh, H. 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa.' *Tulane Law Review* 80, no. 4 (2006).

[43] *Cohens v. Virginia*, 19 U.S. 264, 389 (1821) ('But this supreme and irresistible power to make or to unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.').

which the populace disagrees as a *policy* matter might, if the Judiciary is generally respected and trusted, be given the benefit of the doubt as being lawful.

The challenge, therefore, is to ensure that the Tunisian people see constitutional review as of equal legitimacy to both the will of the people and the revolutionary ideals of their leaders. Such legitimacy might be achieved by making the judiciary accountable to a democratically elected Legislature (even after initial appointment). However, since the Legislature might be manipulated, such a strategy is ill-advised. Other means of ensuring the legitimacy of constitutional review must be devised.

Giving the general public easy access to constitutional review may go a long way in abating the prospect of any plausible claims of legitimacy deficit. However, two key challenges arise. Many ordinary Tunisians may not have access to the legal representation required to bring a constitutional review.[44] In addition, North African legal systems typically only afford the right of constitutional review to certain members of the Government and Opposition. Furthermore, constitutional rights are often not enforceable before the ordinary courts. Such a system of constitutional review is not conducive to the involvement of the general public.[45]

5.3.1.2 Individual Rights, Macropolitical Concerns and Deference

Where a nation faces pressing macropolitical concerns, leaders have often been able to argue that civil rights are not a priority, and, therefore, to excuse unconstitutional measures. The judiciaries of these nations may employ concepts of deference to the executive and to acts of sovereignty to justify the Government's otherwise unconstitutional actions.[46] The new Tunisian Government has inherited the threat of radical Islamism, troubling civil disorder and unemployment, but the Constitution must be drafted such that these concerns may not be used to justify unconstitutional action.

5.3.2 Matters of Constitutional Drafting and Interpretation

Several matters of legal detail require attention. Where Western model Constitution, such as the United States constitution, tend to *prohibit* measures impinging on constitutional rights, North African Constitution typically *oblige* the legislature to make provision for the protection of such rights. This discretion, however, is often used to reduce the extent of the protected right.[47] Constitution are often interpreted as living documents, adaptable to the exigencies of the moment. This theory allows the judiciary to depart from the original intended meaning of the Constitution, and could potentially be used to justify unconstitutional measures. In other new constitutional democracies, constitutional review has been impeded by the use of pre-democratic jurisprudence by the judiciary.

[44] See, in general, Study on Access to Justice and Legal Aid in the Mediterranean Partner Countries, prepared under the EuroMed Justice II Frameworks.
[45] Le Roy, Thierry. 'Le Constitutionnalisme: Quelle Réalité Dans Les Pays Du Maghreb?' *Revue Française De Droit Constitutionnel* 79, no. 3 (2009). p. 549.
[46] Brown, Nathan J. 'Judicial Review and the Arab World.' *Journal of Democracy* 9, no. 4 (1998). p. 93.
[47] *Id.*, at p. 94–95.

Some judicial systems have formulated a presumption that pre-democratic legislation is constitutionally compliant.[48] Other judiciaries have adopted a culturally relativist approach to Human Rights.[49] In some nations, the judiciary have left the definition of key concepts, such as a state of emergency, to the executive. The drafters of the new Constitution will need to consider how to avoid these problems; it may be desirable to include guidelines to interpretation in the new Constitution.

5.3.3 Ordinary Judicial Review

Respect for judicial review is premised on legitimacy, specific judicial guidance, access to constitutional review, and judicial review of administrative decisions. This list is by no means exhaustive. It simply enumerates several of the most sought-after ingredients in Tunisia specifically and North Africa generally.

5.3.3.1 Legitimacy

A system of constitutional review must be accepted as legitimate by the Tunisian people. First and foremost, this requires having truly independent judges — the systems to ensure which are discussed elsewhere. Secondly, the Constitution must be drafted in such a concise and clear way that it is *obvious* when it is being followed by the judges; conversely, this ensures that when it is not being followed for political reasons that the judges cannot refer to obfuscatory language as mere pretext.

A system of constitutional review can also only be viewed as truly legitimate if everyone can access it. The French *Conseil Constitutionnel* has recently developed a system where judicial review is available by ordinary lawsuit, which it is submitted as a good model to follow. In contrast to the United States system only the *Conseil Constitutionnel* can actually strike down legislation, with all the subordinate courts acting as gatekeepers to this. This goes someway to ensuring that only very well-qualified judges have significant functions in constitutional safeguarding, which furthers the aim of ensuring legitimacy in the eyes of the people.

5.3.3.2 Sufficiently Specific Guidance

There is a fundamental balance to be sought here, perhaps eternally, between the desire to have the Constitution written clearly and concisely that everyone is fully aware of their rights, and having a Constitution so inflexible that it ties the hands of judges and politicians in interpretation. As an alternative to having an ultra-specific Constitution, certain African Constitution and courts provide for interpretation in line with international human rights instruments.[50] This is perhaps an ingenious way of adding detail without detracting from clarity. The only disadvantage is in the inherently more general nature of international as opposed to national human rights guarantees.

[48] Id., at p. 27.
[49] Id., at p. 79.
[50] Id.

5.3.3.3 Access to Administrative and Constitutional Review

France's *Conseil Constitutionnel* has only allowed direct access to constitutional review very recently, in 2010. Since many North African nations have based their Constitution on the French model of government, very few allow such access. It is submitted that it is a necessary check for safeguarding the constitution, and it allows everyone from the poorest farmer to the President to request that the court remove the effect of a law by asserting their rights.

The reality is, as ever, a little different. There are two kinds of access to consider: legal and practical. The former is comparatively easy to ensure by making the Constitution enshrine it as a right. However, practically speaking, short of making a constitutional right to legal aid where a constitutional challenge is being made, there are few ways to ensure that access is practically available to all. In Tunisia, a country of more limited resources, it could be extremely cumbersome to the public finances. Apart from being a cost-benefit decision about the allocation of resources, it is also about the preservation of rights not as yet another variable to enter into the computation but as an end it itself. Ensuring practical access to justice is a vital check on tyranny, but to enshrine it constitutionally might be to pay too high a price.

Where constitutional review allows a special court to determine the lawfulness of actions of the legislature, so an administrative court ought to determine the lawfulness of actions of the executive. It is vital to ensure that this forms part of the constitution, at least in outline, given its critical status in the system of checks and balances between branches of government that any Constitution seeks to impose.

There is also the scope for allowing jurisprudence from other jurisdictions to be considered in constitutional judgments, much as it is in most common law jurisdictions. An obvious starting point for this, given Tunisia's legal heritage, would be French *Droit Administratif*, with the additional advantage that importing a system of judicial review can keep the Constitution brief and concise whilst ensuring that it is also very specific. There are questions of access to justice here as well, for a discussion of which see above — the issues are broadly the same as with constitutional review, though perhaps exacerbated due to the larger scale.

5.4 Conclusion

Judicial independence is perhaps the most delicate issue in the constitutional calculus.[51] Judges have neither the power of the purse nor the military to enforce their decisions. They have only the rule of law in their arsenal to generate a culture of civic respect for the rule of law and access to justice for all. Systemic disrespect of judicial independence bespeaks the traversing of an undesirable Rubicon in a State's trajectory, for it would signal that people have ceased to do honour to the rule of law.

[51] Dixon, M. *International Law.* Oxford: Oxford University Press, 2005 p. 54. ; Lauterpacht, H. *The Function of Law in the International Community.* Oxford: Oxford University Press, 2011. p. 111.

Chapter 6

Individual Rights, Democracy and Fair Elections

6.1 Individual Rights in Tunisia

This section focuses on individual rights, which are known as 'primary rights' to constitutional lawyers. It considers their place in the Tunisian Constitution and examines how other Constitution address individual rights, before suggesting how the Constitution might be changed in the future. Primary rights demarcate the privileges to which the individual or group is entitled, but they do not specify a remedy if and when the rights are violated or the structural protections that make the system or network of primary rights function. We understand individual rights to be held by people irrespective of their group membership.

The increased focus on the human rights situation in Tunisia in section 6.2 is a logical progression from the previous concept, which focused mainly on how Tunisia's situation fits in with the bigger picture of the North African region. The introduction of section 6.3 to compare the human rights situation in Tunisia with that of other developing countries in North Africa is achieved in order to realise a wider prism.

This analysis is divided into three sections. The first section focuses on an overview of the human rights context in Tunisia, using the major reports by the United Nations Office of the High Commissioner for Human Rights (OHCHR), Human Rights Watch, as well as Amnesty International. The second section focuses more on the comparison between the human rights situation in Tunisia with that of other developing countries in North Africa. Section 3 focuses on the analysis of the specific constitutional history of Tunisia, an in depth look at some of its specific provisions, as well as a region wide comparison of other Constitution and their various comparable provisions.

6.2 Overview of Human Rights in Tunisia

In the 'Human Rights in North Africa' brief, it is stated:

> While the repressive laws under Ben Ali, which stifled the freedom of expression, press and association were liberalized[52], recent incidents[53] have prompted some members of the National Assembly to suggest curbing the freedom of expression in favor of Islam.

But the curbing of the freedom of expression laws in favor of Islam is not the only human rights challenge that faces Tunisia. According to the Human Rights Watch report on Tunisia's laws on civil and political rights[54], there are a number of other laws currently in force (but not enforced) in Tunisia that pose a human rights challenge on a number of levels.

On the first level, Tunisia's Penal Code and Press Code still impose criminal penalties for speech that defames, insults, or offends other persons or state institutions or religions, or is deemed likely to harm the public order or Tunisia's reputation, or is deemed to incite hatred or religious extremism. Furthermore, the Minister of Interior retains discretion to ban the importation of foreign publications and to ban any publication, imported or not, that harms the public order or good morals. (It was suggested in the Human Rights Watch report that the criminal penalties be eliminated and the Minister's discretion curtailed.)

On the second level, the Tunisian Internet Decree, approved by the Ministry of Communications Decree in 1997, is capable of being used to hold service providers responsible for all content posted online, and can be used to require them to disclose to authorities information about internet users. (It was suggested by the report the service providers should not be responsible for all materials posted online and the identities of users should not be made available to the authorities.

On the third level, the main law on public assemblies still gives the authorities considerable discretion to prohibit public gatherings. Furthermore, the law still does not require the authorities to provide specific reasons for prohibiting or restricting a gathering. (The report suggested that the authority's discretion should be limited to a specifically enumerated criteria). On the fourth level, many human rights abuses in Tunisia could still be carried out under the guide of the country's 2003 Law on Terrorism. The definition of the 'terrorist offences' is broad and there are many provisions within the law that negatively affect the rights of those charged with terrorism.

[52] Human Rights Watch. 'Tunisia's Repressive Laws.' *Human Rights Watch.org*, January 1, 2011, *available at* `http://www.hrw.org/reports/2011/11/01/tunisia-s-repressive-laws-0`.

[53] On June 10 2012 violence in Tunisia set off by religious radical reaction to art exhibition they deemed as offensive to Islam.

[54] Human Rights Watch, 'Tunisia's Repressive Laws,' *supra.*

6.3 A Comparative Approach

Libya's post-Revolution human rights context was still plagued with the existence of armed militias that continued to operate independently of the central authorities, cases of ill-treatment of prisoners of war, their torture, and extra-judicial killings, and the introduction of legislation which curtailed the freedom of expression in the name of 'protecting the revolution.'

In Tunisia's post revolution context, there are several differences. Firstly, the problem of armed militias is less pronounced in Tunisia. Secondly, while situations of ill-treatment, torture and extra-judicial killings cannot be absolutely ruled out, at least the interim government as decided to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, joined the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights. This at least shows that the interim government is willing to take on an international obligation to combat ill treatment, torture and extra-judicial killings. Thirdly, with regards to the introduction of legislation that would curtail the freedom of expression to 'protect the revolution', Tunisia has something similar in the form of a planned legislation that would also curtail the freedom of expression in favour of protecting Islam.

Egypt's post revolution human rights context was still plagued with the existence of widespread torture committed by the military during arrests and toward detainees in the year and-a-half since Mubarak's ouster, as well as brutal beatings of protesters. There are several differences that each of these experiences has with Tunisia's post-revolution context. Firstly, Tunisia is not governed by a military council (as was Egypt then before the elections), and furthermore, Tunisia has also ratified the aforementioned international instruments, all of which strongly suggests that any widespread torture committed is unlikely (or even if it does happen, it is unlikely to have been committed by Tunisia's interim government). Secondly, with regards to the brutal beatings of protesters, Tunisia has something similar in the form of the existing security apparatus in Tunisia, which 'continues to rely on its violent methods of the past and has yet to implement crowd control techniques aimed at minimizing the use of force.'

6.4 Engaging with Individual Rights in Tunisia's 1959 Constitution (as amended)

Various fundamental rights and liberties are given protection in the 1959 Tunisian Constitution. Article 5 states that the Tunisian Republic shall protect these rights. Such a statement is to be valued in that it conveys this intention to the international community, and allows the state to be called to account if it failed to do so. However, as the Amnesty International Submission for Consideration by the National Constituent Assembly on the Guarantee of Civil, Political, Economic, Social and Cultural Rights in the New Constitution suggests, there are ambiguities and clauses present within the Constitution that allows for the subversion of an individual's rights in the face of action by the state. Furthermore, the 1959 Constitution proved inadequate in practice to prevent decades of human rights violations.[55]

[55] Amnesty International. *Submission for Consideration by the National Constituent Assembly on the Guarantee of Civil, Political, Economic, Social and Cultural Rights in the New Constitution.* London,

6.4.1 Freedom of Religion and Rights of Minorities

Article 40 stipulates that the President must be a Muslim. Whilst this might be appropriate for Tunisia, the new Constitution must ensure that the rights of religious minorities are protected. Whilst Article 5 outlines the Republic's commitment to the rule of law, pluralism and freedom to practice religious beliefs this last right is qualified in that it applies only when it does not endanger public order. This qualification is a significant one, and it is important that a perceived danger to public order should not result in the loss of freedoms for minority religious groups.

It is interesting to note that in the Algerian Constitution no such exceptions are allowed, it being stated that freedom of creed and opinion are inviolable. Egypt's 2011 Constitutional Declaration too guarantees freedom of creed, and the freedom to practice religious rites. The religious autonomy of minorities is explicitly safeguarded in Libya's Draft Constitutional Charter of 2011 where Article 1 outlines that the state will guarantee non-Muslims the freedom of exercising religious rights and shall guarantee respect for their systems of personal status. Thus other countries in the region have taken steps to ensure that the rights of minorities, particularly religious minorities are protected, and such provisions should also be included in Tunisia's constitution.

Article 8, while professing to protect freedom of expression, states that no political party may take religion, language, race, sex or region as the foundations for its principles, objectives, activity or programs. The reasons behind this article can partly be explained by reference to the country's own political history, in particular the recent violent clashes between Salafi Islamists and the police. The same prohibition can be found in Article 4 of Egypt's Constitutional Declaration which bans political activity on the basis of religion, race or origin. Such an article could prove useful in preventing the sectarian violence which has plagued Egypt since its revolution and enable greater religious cohesion. However, extending the restriction of party representation for regions and religions could pose a real problem for minorities seeking to give a voice to their specific concerns and may prevent religious minorities from attaining adequate representation. A potential compromise could be a relaxation of this restriction when political activity does not endanger public safety and the rights and freedoms of others. Restrictions on the freedom of religion in this form can be found in Article 18 of the ICCPR.

6.4.2 Freedom of Expression

This right was enshrined in Article 8 of the previous Tunisian Constitution, along with freedom of association. This Constitution gave almost unlimited discretion to infringe upon the right to freedom of expression 'according to the terms defined by the law.' The new Constitution, if it elects to uphold any limitations on this right, must at least do so in a precise and explicit manner.

2012, *available at* https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/mde300042012en?CMD=VEROBJ&MLKOB=30621633838, at p. 5.

Beyond this point, Tunisia can benefit not simply from greater clarity of constitutional restrictions but a more emphatic endorsement of the freedom of expression and the benefit derived from the free market of ideas. Egypt's Declaration provides a possible model. Not only does it state that every person has the right to express their opinion, but also that personal and constructive criticisms are guaranteed for the safety of national development.

6.4.3 Right to Privacy

Article 9 of the 1959 Constitution protects the home, correspondence and personal data of every citizen. The Article also offers protection of correspondence and personal data, save in exceptional cases prescribed by law. This must be maintained as it forms not only an integral part of the citizen's private life but is also instrumental in supporting the rights of freedom of expression and association. Correspondence must be interpreted in light of modern methods of communication. With the risk that the exceptional circumstances clause could be abused by the government, this clause should either be removed or qualified in any new Constitution.

Underlying this value is the right to privacy, a wider concept enshrined in the International Covenant on Civil and Political Rights (ICCPR). In neighbouring countries privacy has been wedded to a restrictive notion of marriage and the family. For example Libya's Charter says that the family is the basis of society and is entitled to protection by the state, which also has a duty to protect and encourage marriage.

For its part, Algeria provides a potential model, by attaching privacy to the home, described as an inviolable physical entity without a warrant. This definition is less discriminatorily restrictive as to what constitutes a private life, hence providing sufficient breadth to comply with the relevant international agreements and standards on human rights. It is imperative that the Tunisian state is seen to have this respect for the private life of citizens as opposition activists had previously been accused of going against the country's traditional view of what was acceptable sexual behaviour.

6.4.4 Operation of Criminal Law

Article 12 protected against arbitrary detention and enshrined the presumption of innocence. Article 13 proscribed retrospective punishment and required that those deprived of their liberty were treated with respect, thereby prohibiting torture. A similar requirement is found in the Egyptian Declaration. This assurance is particularly important given the treatment of protesters and revolutionaries during the Arab Spring, and the criticism of Tunisian treatment of prisoners by the European Court of Human Rights (ECtHR) in *Saadi v. Italy* (2009)[56] prior to the revolution. In light of these events an explicit prohibition of torture might be required.

6.4.5 Duties

Article 6 referred to both the rights and obligations of citizens being equal. Articles 15 and 16 detail duties to pay taxes and to defend the state. Such duties are not placed upon citizens

[56] App. No. 37201/06.

in human rights instruments such as the European Convention on Human Rights (ECHR) and the ICCPR or the United States Bill of Rights (Amdts. 1–10) or the Civil War Amendments (Amdts. 13–15). The Algerian Constitution too states that the rights and duties of all citizens, men and women, should be equal. This is indicative of the individualism which influenced the formation of the United States Constitution, and its relative absence in the Arab world. Therefore if such duties are supported by the Tunisian people they should remain a part of the constitutional framework.

6.4.6 Rights Not Specifically Enshrined Constitutionally or in Treaties

Article 32 states that treaties have a higher precedence than laws. This can be applied to international human rights agreements to which Tunisia is a party, meaning that these agreements overrule any domestic legislation. Enshrining this principle would be beneficial in that citizens of the Republic would not be reliant only upon their own government to enshrine their rights in domestic law.

The right to life was also absent from the old constitution. As the most fundamental of all human rights, guaranteed by Article 6 of the ICCPR, it should be present in the new draft. Although Article 6(2) of the ICCPR does not prohibit the death penalty 6(6) also states that the Article may not be invoked to prevent its abolition. Amnesty International have proposed that a complete abolition is the only appropriate course for a country which purports to support human rights, a reasoned proposal which is supported by abolition throughout the international community and by agreements

6.4.7 Social and Economic Rights

A lesson apparent from the study of other Constitution and constitutional documents in the region is the presence of social and economic rights. These rights can be instrumental in ensuring that the rights and liberties outlined above can actually be enjoyed by the citizens of the Republic. The right to a fair trial, for example, may be hindered by the prohibitive costs of instructing a lawyer. Poverty was one of the main causes of the 2011 uprising and therefore poverty must no longer prevent any Tunisian citizen from participating in the political sphere. Tunisia has ratified the International Covenant on Social, Economic and Cultural Rights and as such there is a precedent for rights of the following type to be included.

Articles 53 and 54 of the Algerian Constitution detail the rights to education and healthcare, whilst Article 55 includes employment rights. The State is said to be responsible for the organisation of the education system and the prevention of epidemics. The Libyan Charter (Article 8) also includes social and economic rights such as the right to medical care, education and social security which go beyond the guarantees in Algeria. The State must ensure equality of opportunity, and the fair distribution of the national wealth.

Furthermore, Article 22 of the Egypt Declaration guarantees that those unable monetarily to defend themselves in court can resort to the judiciary for means to defend their rights. This expands upon the access to the court and to justice which is viewed as a fundamental aspect of the rule of law by providing practical means by which this can be achieved. With the

prospect of rights comes the prospect of the derogation of those rights. Article 7 of the old Tunisian Constitution listed situations in which the state could derogate from the recognition and enforcement of the rights enjoyed by citizens, including when the rights of others were endangered and for the protection of public order.

In contrast to Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights and Fundamental Freedoms stipulate that there must be an emergency threatening the life of the nation before rights can be derogated from, and indeed the ICCPR stipulates that some may not be derogated from in any situation. The old Tunisian Constitution also included the development of the economy and social progress as reasons which could justify derogation. Whilst this might be more culturally appropriate given the communitarian nature of Tunisian society, these categories can be exploited by oppressive governments, and the benefits are disproportionate to the rights that are lost. A nation which respects individual rights cannot violate them merely in the name of economic or perceived social progress. Therefore the more limited conditions found in the ICCPR may be more appropriate, and the use of these carefully monitored to ensure that they are not exploited by the executive. It has been shown even in the interpretation of Article 15 of the ECHR that the judiciary give a degree of deference to their judgment about whether such an emergency exists.

6.4.8 Rights of Women

Article 3 of the ICCPR stipulates that states party to the covenant must undertake to ensure that men and women have equal rights to enjoy all civil and political rights in that covenant. The Libyan Charter is noteworthy for the fact it goes further and would guarantee for all women opportunities which would allow them to participate entirely and actively in the political, economic and social spheres. Egypt's Declaration also stipulates (Article 38) that there must be a minimum participation of women in both the new assemblies.

The continued threats against women by Salafist groups in Tunisia since the uprising make it imperative that Tunisia sends a message that it would ensure that women are afforded equal rights and that discriminatory practices, such as measures regarding inheritance and child custody, will no longer be tolerated. As such an article prohibiting discrimination and guaranteeing equality between the sexes must be included in the constitution. Such an anti-discrimination clause should also be extended to a non-exhaustive list of religion, race and sexuality.

6.4.9 Amendment and the Protection of Rights

The Tunisian Constitution did not provide the rights enshrined in it with any additional protection from amendment when compared with other elements of the Constitution. The rights could be amended, and hence eroded, by a 2/3 majority of the Chamber of Deputies or by an absolute majority of that Chamber after having been approved by the people by means of a referendum. In contrast the Algerian Constitution (Article 158) states that any constitutional revision cannot infringe upon fundamental liberties and citizens' rights. This gives important

protection to these rights, and correctly sets them out as a uniquely important part of any constitution, but it could equally prove too restrictive if any minor or beneficial changes needed to be made.

The Egyptian Declaration (Article 17) states that any attack on the rights and freedoms of citizens is a crime, and can be followed by a criminal or civil suit. The state guarantees fair compensation in such an event. This further protects and conveys the value of the rights concerned, and yet does prevent the evolution of the Constitution should this be deemed appropriate. Such a provision would also comply with Article 2(3)(a) of the ICCPR which states that the State must ensure an effective remedy when any rights outlined in that document are violated. Individual rights are crucially important but their functioning is possible only if the structural guarantees and remedies are in place. We now address this aspect in the Tunisian constitutional context.

6.5 Democracy and Fair Elections

6.5.1 In Tunisia

Since independence in 1956 the Tunisian polity has consistently striven to portray itself as a prima facie democracy, despite the effective control of a single party led by only two autocratic Presidents. This chapter assesses Tunisia's approach to democracy since independence, and considers the relationship between the country's national faith — Islam — and its national politics, with particular attention to the origins and motives for state 'secularism' since the 1950s. The various constitutional options which may guarantee fair elections are outlined, before summarising the chapter's recommendations in a series of draft Constitutional articles. Finally, it is emphasised that the contents of the Constitution alone will not ensure its legitimacy and effectiveness. Further legislation is proposed, outside Tunisia's fundamental law, to ensure free speech, freedom of expression and freedom of information are upheld.

Tunisia's culture of restricted free speech and unfair elections may only, of course, be altered by pressure for change from within the nation. The work of foreign students such as this report makes no pretence to suggest otherwise. Nonetheless, it is thought valuable to contribute an independent perspective, and to emphasise the researchers' impression that self-censorship remains prevalent in the Tunisian media even since the fall of Ben Ali in the 2011 Revolution.

Now a brief historical overview is necessary. Between its independence in 1956 and the revolution in 2011, Tunisia only had 2 leaders, President Bourguiba (1956 – 1987) and President Ben Ali (1987 – 2011). President Ben Ali succeeded President Bourguiba after he was declared medically unfit to fulfil the duties of the Presidency [57], so Tunisia has never had a change of leadership as a result of an election, despite holding elections regularly since 1956.

Despite the outward appearance of democracy and electoral fairness, Tunisia's polity has consistently been dominated by one party since independence. Developments like multi-candidate

[57] Delaney, Paul. 'Senile Bouguiba Described in Tunis.' (*New York Times*, November 9, 1987), *available at* http://www.nytimes.com/1987/11/09/world/senile-bourguiba-described-in-tunis.html?scp=2&sq=senile%20bourguiba&st=cseSenile.

presidential elections or a limit on the number of times one candidate may hold the office of President appeared to introduce a fairer system, where regular elections were to be held every 5 years. These advances were limited however by the President's freedom to amend the constitution, so that President Ben Ali altered the Constitution to allow himself to serve in office for longer than the 15 years this three-term limit permitted.

Tunisian opposition parties and civil society have also been limited in their ability to criticise the government, with almost no effective political change possible at the ballot box.[58] Security forces reportedly carried out physical abuse, intimidation and general harassment of citizens who voiced public criticism of the government. Likewise the government was able to interfere with the general privacy of citizens, including intercepting post or internet communications.[59] Despite the occasional appearance of journalism on a few sensitive topics, there remained only limited direct criticism of government officials and policies, thereby curtailing the public's ability to form reasoned and informed opinions about the government. This was not helped by the fact that editors and journalists readily practiced self-censorship, in response to the government's continued ability to engage in criminal investigations or arbitrary arrests against public critics. Whilst carrying out research in Tunis in August 2012, the authors encountered many allegations of continued self-censorship amongst journalists, since it is difficult to rapidly change this institutional practice after the revolution. At the heart of the problem is the fact that defamation is a criminal offence in Tunisia, as is the spreading of false information or speech liable to cause harm to public order or public morals.[60]

President Ben Ali's government also allegedly restricted political opponents' freedom of movement by either denying them passports or refusing to allow them to leave the country. [61] Restrictions were also imposed on the type of political party that could be set up, preventing a party's establishment if its fundamental principles were based on religion, language, race, gender or region.[62] As such it has been possible for opposition political parties, which may be viable opponents in a Presidential or Parliamentary election, to be dissolved. Furthermore, there has been a requirement on any person running as Presidential candidate that they obtain the signatures of at least 30 members of the Chamber of Deputies or presidents of Municipal Councils, persons who are only able to endorse one candidate. Since their appointment is either exclusively by or influenced by the current President,[63] it is almost impossible to obtain this level of public support prior to an election, and so democracy and fairness has been restricted by preventing potentially popular candidates from being able to stand.

Since its independence, Tunisia has therefore succeeded in giving the impression of prima facie democracy, by staging elections and maintaining constitutional provisions for fair and democratic process. One need not investigate far, however, to uncover the regime's removal of any viable opposition to its rule, as testified by Ben Ali's exceptionally high electoral support, which never fell below 90 per cent. Such exceptionally high and consistent support suggests

[58] Krieger, J., and Crahan, M.E. (eds.) *The Oxford Companion to Politics of the World.* (2nd ed. Oxford, Oxford University Press, 2001).
[59] Human Rights Watch. 'Tunisia's Repressive Laws, Human Rights Watch.' (*Human Rights Watch.org*, January 1, 2011). *Available at* http://www.hrw.org/reports/2011/11/01/tunisia-s-repressive-laws-0.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

these were not truly fair elections — although some reports suggest that the outcome of at least some of these elections was the genuine view of the people. A free and fair democratic future most importantly requires an end to Tunisia's culture of self-censorship, and the criminal offence of defamation which underlies the problem. In addition the restrictions on potential presidential candidates will need to be relaxed, to ensure the long-term existence of a viable opposition.

6.5.2 The Scope of Democracy

The numerous definitions of the term 'democracy' have proved among the most contentious issues in modern political thought. Its twin notion and necessary precept, the 'rule of the people,' allows us even to reconcile the desire for freedom with the need for political order. If the Arab Spring demonstrates anything, it is that this desire to be free from arbitrary, imposed governance is a broadly applicable concept.

However, there remain significant differences in the interpretation and implication of the concept of democracy. Very few states today do not describe themselves as democratic. The People's Republic of China terms itself a 'people's democracy,'[64] and even has some formalised democratic institutions, such as a national legislative assembly (the National People's Congress), given specific and significant powers in constituting the governance of the nation. Yet, this formalised structure of democratic governance is at odds with a system where political expression, at the ballot box or otherwise, is not recognised by political authority. The situation is supported by an intellectual framework which says that democracy, and the will of the people that defines government, is the collective, 'general will', not the sum of the collected, individual wills. Within this political framework and understanding of what it means to be 'democratic', the People's Republic of China is only democratic to the extent that the 'collective' will of the people, the interests of the people, are the Constitution of government and the Communist Party of China. Political leaders are portrayed as merely agents for the implementation of this will, not the devisors of it.

Significant difficulties arise even in nations where there is a formal, constitutional and mass-participatory process to define the will of the people via elections and referenda. The 1959 Tunisian Constitution clearly sets out a role for democratic institutions with electoral participation, like the National Assembly, yet these elections in practice negated a truly democratic influence.[65] Through censorship the elections could be manipulated to favour one candidate or party over another, while intimidation from state and non-state actors left some fearful of the consequences of expressing themselves at the ballot box, beside the risk of public official corruption by tampering with or losing ballot papers.[66]

A democratic artifice may therefore be used to legitimate political regimes that have been constituted without the true consent of the people they rule. This illustrates the need not only to

[64] Giddens, Professor Lord Anthony. 'Democracy', BBC Reith Lectures (1999)., *available at* http://news.bbc.co.uk/hi/english/static/events/reith_99/week5/week5.htm.

[65] The Republic of Tunisia. *The Constitution of Tunisia*, 1959. http://www.wipo.int/wipolex/en/details.jsp?id=7201.

[66] Fisher, Max. 'Tunisian Election Results Guide: The Fate of a Revolution.' *The Atlantic*, October 28, 2011. http://www.theatlantic.com/international/archive/2011/10/tunisian-election-results-guide-the-fate-of-a-revolution/247384/.

codify democratic values and institutions in Constitution, to make sure they last, but also to codify their meaning, and not leave this to the open interpretation of generations of political actors to come. It also demonstrates the need, in the 21st century, to codify the institutions needed for fair 'practice' of elections and political participation which go beyond broad statements around the right to freedom of speech, which often fail to materialise in reality.

There is therefore reason for optimism over the growth of democracy following the Arab Spring last year, in particular that the values surrounding democracy of government by the 'rule of the people' is more universal than previously assumed. Both a desire for self-rule and political participation, and to be free from external colonial rule, were demonstrated as universal values in much of the Arab world in early 2011. This idealistic thread runs continuously through the modern history of the Republic of Tunisia, and may thus leave us with confidence that democracy and political participation have the potential to thrive in the nation. The task of the Tunisian Constituent Assembly now must be to find ways to frame protect this new, democratic Constitution from political usurpers, to avoid repeating the mistakes of over half a century ago.

6.5.3 Religion and Secularism

6.5.3.1 Secularism in Tunisia?

The Tunisian government's implementation of secularism after independence in 1956 was problematic since it alienated much of the population. President Bourguiba set about, at the beginning of his tenure, to install political and socio-economic infrastructure that was primarily secularist and socialist, and strived to greatly discredit Islam, completely dismantling traditional Tunisian culture and institutional Islam. His new infrastructure therefore distanced itself, and the secularism it introduced, from the population.[67] The largely francophone elites embracing this secularization and hoping to spread it to the country also lacked ties to the larger Tunisian population,[68] many Tunisians feeling like strangers in their own country[69], surrounded by civil laws and institutions that resembled those of the French they had recently driven out of the country.[70] For many of Tunisia's elites, secularism came with public attacks on institutional Islam and the dismantling 'of the whole old cultural order,'[71] further antagonizing the general population against the notion. In recent times, secularism in the Arab world has become as extreme as Islamism or fundamentalism, making it hard for those who are religious but not conservative to reconcile themselves with it.[72]

In fact, the notion of secularism is different in traditional Arab culture. Classical Arabic does not have a word for the separation of state and church.[73] Care must be taken not to overdraw the division of 'Church and state' in Europe, but to separate both in the Islamic tradition would be a 'clerical approach alien to our culture' and a 'deviation of the Islamic world.'[74] Some argue that a non-religious party would thus have 'no future'[75] in Tunisia because it would be

[67] Hamdi, M.E. *The Politicisation of Islam: A Case Study of Tunisia.* (Boulder, Colorado, Westview, 1998). p. 13.
[68] Pargeter, A. 'Localism and Radicalization in North Africa: Local Factors and the Development of Political Islam in Morocco, Tunisia and Libya.' *International Affairs* 85, no. 5 (2009): 1031–1044.
[69] Hamdi, M.E. *The Politicisation of Islam.* p. 17; p. 81.
[70] Pargeter, A 'Localism and Radicalization,' *supra*, at p. 9.
[71] Hamdi, M.E. *The Politicisation of Islam.* p. 17.
[72] *Id.*, at p. 95; Pargeter, A 'Localism and Radicalization,' *supra*, at p. 9.
[73] Hamdi, M.E. *The Politicisation of Islam.* p. 94.
[74] *Id.*, at 90.
[75] *Id.*, at 94.

ideologically removed from the people and culture.

Unfortunately, the history of secularism in Tunisia has also proved to be a mixed one. Those who adopt secularism instil its formal institutions and structures, but without the usually-associated democratization of political life, freedom of the press, accountability and transparency,[76] making it very superficial. Essentially, 'secularism,' especially as practiced by Presidents Bourguiba and Ben Ali, has proven to be more of a political tool for the elite, enabling them to claim the upper hand in the fight against Islamism, than a programme motivated purely by the interests of the nation. It is a 'flawed institution' because it is 'designed to ensure the authoritarian character of the regimes'[77] by limiting democratic functions and ensuring the power rests firmly in the executive branch of the government.[78] It also has helped those in power maintain privileges and shore up interests, through legislation disguised as secularist or socialist reforms that favours one part of the country or another.[79] The rest of the country was left impoverished, underdeveloped, and, perhaps worst of all, thoroughly disillusioned.

The authoritarian regimes of Bourguiba or Ben Ali, and Mubarak further east, have perhaps surprisingly been supported by Western countries for decades, disappointing their populations and heightening what the latter see as western hypocrisy. French governments for example, most recently under Presidents Chirac and Sarkozy, have praised Tunisia for its democratic government, protection and promotion of human rights, and the 'Tunisian miracle' of its economy. In 2009, President Sarkozy telephoned Ben Ali to personally congratulate him on his latest election victory, though many knew very well that the election was unfair, and very few other countries spoke out in support of the Tunisian president.[80] This vote further discredited the institution of free elections, and therefore democracy in Tunisia, and also harmed the credibility of Western governments that proclaimed themselves pro-democracy and human rights, whilst continuing to uphold brutal dictators and provide them with critical support.

6.5.3.2 The Importance of Islam, and of Islamists

Religion has remained a crucial component to the Tunisian identity despite, or perhaps in many parts due to, persistent government attempts at dismantling institutional Islam. At the beginning of his tenure, Bourguiba embarked on a markedly socialist and greatly impoverishing agenda: he promoted socialism as a new conception of national solidarity,[81] and took farmers' land to create a cooperative system revolving around a planned and centrally-oriented economy. Once the regime extended this policy to the whole country, its shortcomings were impossible to hide and it was quickly forced to renounce certain projects and embrace liberalization. Many of Tunisia's young 'found nothing to be attached to, left or right; they were uprooted.'[82] After the failure of socialism followed by a quick veer to the right, and the following failure of Arab nationalism after the six day war with Israel, many Tunisians suffered from 'an ideological and identity crisis'[83] that brought them back to Islam and their faith. These were

[76] *Id.*, at 97.
[77] Cook, Steven A. 'The Right Way to Promote Arab Reform.' *Foreign Affairs*, March 1, 2005., available at www.foreignaffairs.com/articles/60625/steven-a-cook/the-right-way-to-promote-arab-reform?page=show.
[78] Pargeter, A. 'Localism and Radicalization'. p. 9.
[79] *Id.*, at 4–7.
[80] Puchot, Pierre. *Tunisie, Une Révolution Arabe.* (Editions Galaade, 2011).
[81] Hamdi, M.E. *The Politicisation of Islam.* p. 8.
[82] *Id.*, at p. 10.
[83] *Id.*, at p. 10.

educated young from the middle class, those who could afford to think about politics, and they subsequently travelled the country calling others back to the Qur'an, appealing especially to populations from rural areas[84] who were 'marginalized by unaccomplished modernization'[85] and were disillusioned with government promises. The government's volte-face and accruing charges of corruption appeared to them to be 'ideological looseness;' unemployment chipped away at its credibility; and its extreme secularization agenda was based on notions that didn't even have classical Arabic designations and therefore were inaccessible to the majority of the population. Essentially, being Arab and Muslim began to merge as a single identity, one that offered more stability and morality than Tunisia's government.

The Islamist movement in Tunisia fuelled, and eventually was also fed, by this trend towards an Islamic Arab identity. The main Islamic party offered an alternative to what many saw as the moral and intellectual failure of the country's political elite, as well as of its media. At first, Mohamed Ghannouchi and his group started simply calling Tunisians back to their Muslim traditions, history, and pride. But soon this was not enough: social change did not mean political change in Tunisia. The Islamists joined the Muslim Brotherhood and started to engage with more social and political issues. Due to the illegality of any opposition and the accompanying lack of political perspective, the group could become more conservative, and more political, in secret meetings in the country or abroad. What eventually became Ennahda claimed to provide the only true faith and promised an Islamic state that fulfilled the requirements of the Qur'an, as opposed to 'jahiliyya' or pre-Islamic Arab society (one not founded on the basis and values of Islam), which they said Tunisia was. This exclusivist, narrow definition of Islam tied its fortunes to that of the party when the latter successfully controlled the religious narrative, but also served to designate those not aligned with the party as second-class Muslims and citizens, which many in Tunisia rejected. The difference was no longer between French/Western and Muslim, but within Muslim society, between modern and traditional followers.

Essentially, though, the popular Arab, Muslim identity and culture, coupled with the Islamists' attempts to redefine and control the religious narrative, forced the ruling class to use religious language and rationale to legitimize its legislation and decrees, despite its insistence on secularism. For the population, the only legitimacy and language they could understand and recognize was that tied to religion, which permeated culture and consisted of their identity. With regards to the Islamist movements, the government was also attempting to control the narrative — Bourguiba and Ben Ali both understood it would be futile to fight Islam outright, and instead tried to present their interpretations of it as the right ones. Some governments see it as essential to discredit any opposing religious parties because these organisations might present themselves as viable and even *preferred* alternatives, as protective barriers against jahiliyya and external pressures, and would eventually serve to undermine a central political authority.

It appears that the ideal approach for Tunisia might be to incorporate cultural elements into a constitutional framework for democracy, in order to dispel popular distrust and accusations of Westernization, and to make it compatible with the exercise of local, traditional customs, minimizing potential confrontations with religious and cultural authorities and therefore con-

[84] Pargeter, A. 'Localism and Radicalization'. p. 8.
[85] Hamdi, M.E. *The Politicisation of Islam. supra*, at p. 12.

solidating political power within the roles of government. This is arguably the best way to ensure the preservation of both the Constitution and democracy.

Certainly, the powers of government must be limited, and political and religious freedom should be safeguarded in any democracy. The danger is only in those parties that wish to completely overhaul the system and act in themselves as alternatives to state and society. If the Constitution could be crafted in such a way that would provide such groups with the freedom and framework to work within the system, there would be few differences and grievances they could legitimately use to gain enough momentum and support to challenge the system itself — the actual administration can be challenged, as in any democracy.

The main focus of Ennahda, and of most Islamic parties, is the advent of an Islamic state that is based on Shari'a and Shur'a, or the laws of the Qur'an and Muslim self-government, respectively. The comprehensiveness of Islam's teachings entail that religion and faith cover all aspects of life, indicating the possibility of conflict if ever society and politics are explicitly separated, as suggested by secularism. Ennahda also criticizes Tunisia for not being Muslim enough, in a sense, or lacking Islam. For many Islamists, what is not shari'a is jahiliyya, and therefore not enough. This leads to another potential problem with trying to take parts of Islam and incorporate it into democracy, because the demands seem to be for all or nothing. But if the Constitution and civil society provides enough traditional and cultural components for the population to be comfortable in their Muslim identity and faith, then the Islamists lose much popular support — there is a significant portion of Tunisians who are religious but not conservative, and the Islamist agenda does not sit entirely well with them.

Finally, either genuinely or as a political tool to gain more acceptance, Ennahda, the main Islamic party, has professed to accept Western democracy and simply reject state secularism.[86] This includes elections, parliament, and majority rule. The Constitution can support democracy, nominally with their support, and it is left in the hands of the population to elect representatives who are more or less conservative or liberal. The latter can act on their mandate through a Constitution that only supports a democratized political life, free and fair elections, and the protection of human rights, without being able to change the Constitution itself. Therefore, if the population wants a more conservative, religious government at a period of time, they are free to elect one, and it will act within a constitutional framework that is not culturally antithetical to its values. But the population will also be free to elect a more liberal government. A true democracy leaves the choice to the people; the values of the resulting government cannot be predetermined.[87]

6.5.4 Formal Structure of Government

This proposal for a democratic government for Tunisia centres around a parliamentary system with a president, modelled after many Western governments but with several considerations.

Government legitimacy comes from two sources in Arab and Islamic culture(s): the first is through Islam[88] and its shared cultural reference points; the second, from the ability to build

[86] Id., at p. 103.
[87] Id., at p. 126.
[88] Joffé, G. 'Political Dynamics in North Africa.' *International Affairs* 85, no. 5 (2009). p. 933.

and maintain a network or dependency and manage one's rivals.[89] The former has already been discussed; the latter is also tied to Islam, and requires explanation. Being able to establish a network of dependents and partners is part of the way in which a Muslim person acts upon and interacts with the world surrounding them. This in part corresponds to the Islamic ideal of governing one's relations with reason, and implies 'self-mastery and worldly effect.'[90] It also indicates a certain control over objects, because ownership rests on the relation between people as they concern things, and could be extrapolated to critical resources like money at the government level. Finally, it highlights the person's ability to fabricate 'culturally recognizable capabilities and social consequences.'[91] It is critical to understand that legitimacy in this setting comes not only from the ballot box and popular mandate as is understood in the West, but by the demonstrated ability to maintain networks of indebtedness and control allies, and rivals.[92]

From the importance of networks of dependents stems a different perspective on, and understanding of, corruption. In this context, corruption is the failure to share the spoils of one's work within your network as a way of maintaining it and bolstering it against rivals.[93] In response to this, there should be two mechanisms: one, to enable an institutionalized, legal, and rational way to distribute favour once in office, similar in some ways to the cabinet of the President of the United States, fulfilling the traditional demands of the executive function of government. The other is to install special punishment for corruption: the perpetrator would not be legally pursued in order to encourage the disclosure of any mismanagement.

6.5.4.1 Parliamentary, Presidential or Mixed Regime?

The choice of a purely Presidential, Parliamentary or 'Mixed' system in Tunisia is a key political issue currently faced by the interim National Constituent Assembly.[94] Before analysing which system is favourable for democracy to flourish in Tunisia, it is important to recognise that any constitutional framework can only dictate the politics of any single country to a certain degree. In short, other factors will always be involved with the complex political dynamic of a state, such as the size of majorities in the NCA or the very nature of e presidents and/or prime ministers elect.

Under a semi-presidential or, more accurately, a 'mixed' regime, a balance can be found between two key political figures, the prime minister and the president. In ensuring the president does have important but limited prerogatives, there remains a role for the prime minister within the NCA to operate as more than a mere coordinator of the president's will. In theory a 'mixed system' would strike a balance between the president and legislature, which may have a prime minister, but can often be of lesser practical significance. This can result from constitutional limits being unclear, insufficient or inept to address imbalances in power between political bodies such as the president and the prime minister.

[89] Rosen, Lawrence. 'Expecting the Unexpected: Cultural Components of Arab Governance.' *The Annals of the American Academy of Political and Social Science* 603, no. 1 (January 1, 2006). p. 8.
[90] Id., at p. 3.
[91] Id., at p. 8.
[92] Id., at p. 13.
[93] Id., at p. 10.
[94] Tunisia Live. 'Conflict Between President and Prime Minister Rekindles Debate over Tunisia's Next Political System', 7 July 2012), *available at* http://www.tunisia-live.net/2012/07/05/conflict-between-president-and-prime-minister-rekindles-debate-over-tunisias-next-political-system/. Article 60 of Bahrain, Article 38 of Morocco, Article 7 French Constitution have been of significant help as models.

Under a purely Presidential system, there would be no prime minister or the president may appoint a prime minister who merely serve as a coordinator in the NCA. Thus, the prime minister would simply be another member of the president's executive branch, as in the French system (see Article 8, French Constitution). Such a system can promote a strong government in which a clear separation between the president and the legislature is present. That said, it can often be the case that the party of the president and the majority party of the NCA are the same, reducing the inbuilt effectiveness of the NCA serving as a political check and balance against the President's legislative agenda.

In contrast, under a mixed system both the president and prime minister would be active in day to day administrative duties of the state. A prime minister would be appointed by the NCA; and the president would be elected by the people.[95] Under this structure, it would be correct to say that the prime minister is being indirectly elected by the people, as the people's representatives sitting in the NCA are deciding the prime minister. Subtle balances of power can result when their respective functions are outlined in detail. Whilst Chtioui states that there is a guaranteed balance of power with a semi-presidential system, this is entirely based on the drafting of the Constitution and defining of powers, boundaries and limits. Considering the work of Simovic in recent developments of constitutional theory and doctrine, there is no fixed form of a 'mixed system', which can present the State with certain flexibilities in how it wishes to separate and allocate the powers of governance. The essence of the 'mixed' system is that there is a dual executive structure and both the president and prime minister have key roles in the day to day administration of the state.

We must be careful here. The *key* consideration is whether a dual executive system goes too far in providing inbuilt checks and balances against the probability of an elective dictatorship. Furthermore, whether such an inevitably complex and at times contradictory system should be used for a fledgling democracy should be questioned. This is the key question to answer when deciding whether this system adds value over and above that of a strictly presidential or parliamentary system. The disadvantage may result in proposed legislation being in constant in a deadlock, stuck between a power struggle between the two executive branches. Whilst this could be decided by referenda, such a problem being recurrent can lead to an impractical and unworkable democratic system. This reflects the crucial tension between a workable democracy and a strong government, both crucial to a functioning democratic state. The drafting of the relevant constitutional articles will need to take careful consideration of the allocation of powers to the executive and legislature, and the political individuals and groups which fall under this title. The right balance will ensure democracy operates effectively in practice and ensure that a balance remains in practice between key political bodies. And whether the right balance can be achieved by a 'mixed system' can certainly be scrutinised.

Having a purely Parliamentary system, without a President as head of state, is also an option. Such a system would mean the whole function of government, legislature and executive roles are all carried out within the bicameral NCA. A parliamentary system has the advantage of simplicity in that all the administrative functions are carried out by the bicameral NCA. This rules out the need for a symbolic presidential or prime ministerial figure being present.

[95] Simovic, Darko. 'The Definition of Semi-Presidential Regime Reformulated' presented at the VII World Congress of the International Association of Constitutional Law, Athens, Greece, June 2007.

Furthermore, with the NCA being directly elected by a PR system, in build checks would result; namely the likelihood that no one party will turn over a majority from the election and coalitions will result. This will be elaborated upon in the NCA electoral system section below.

A parliamentary system could also have problematic implications, however, for the short-term and long-term political stability of Tunisia. Currently, it is only Ennahda who have proposed a purely parliamentary system. In a state where political parties are still rising and falling, it can be difficult for the national electorate to vote suitably for a stable NCA, and government. Such concerns have rightly been raised by Tunisian politicians. Furthermore, it is only natural for a political party in power to attempt to secure its position. Whilst a presidential system may vest many powers in the hands of one individual, with a semi-presidential system, the NCA can serve as a more effective check against the abuse of political power. However, many criticisms can also be said of a prime minister of the NCA, and it not uncommon to have "presidential" prime ministers. Such situations can arise where the prime minister has a strong majority in the NCA and can easily pass party legislation. This is often due to the strength of party discipline. Such a likelihood of an elective dictatorship would be reduced by the use of the PR system for NCA elections, as explained below. This again reiterates the critical point that a Constitution only provides the framework and functional boundaries of governance. Naturally, such a framework is dynamic and can work in various ways as a tool for those in power. Thus, the importance of agreeing on the right system and then following through with suitable checks and mechanisms of accountability are necessary, regardless of whether a presidential, parliamentary or mixed system is favoured.

6.5.4.2 Presidential Elections

Under a purely presidential system the president serving as head of state with all executive functions and the NCA merely being a legislative check, holding a position which can aid the accountability process. It will be important to ensure the NCA has sufficient powers to effectively hold the president to account and ensure he cannot dictate legislation. In short, the NCA should serve as more than a rubber stamp to presidential proposals.

A direct, popular vote is proposed for Presidential Elections of Tunisia, with a two-round runoff. Under such a system, the initial round of voting will take place on a national level. Should one candidate have more than 50% of all votes, they shall be elected. Should no candidate have a true majority of votes after the first round, a delayed run-off should take place, as used in the French presidential elections. The top two candidates of the first round advance to the second round, typically between two to four weeks after the first round. This will ensure one candidate then secures a majority of the votes.

The delayed run-off voting (DRV) is in widespread use globally and more popular than the instant run-off voting (IRV) system.[96] With DRV there are, whenever necessary, two elections as the second round candidates have time to campaign again in the delay period. This also reduces the probability of tactical voting, an innate problem with IRV system as voters may tactically rank their choices. However, the administrative costs and financial demands of DRV

[96] Smith, W.D. 'Evidence That Instant Runoff (IRV) Leads to 2-party Domination, While (delayed) Top-Two Runoff Leads to Multiparties.' *Score Voting*, 2007.

are higher than that of IRV. IRV is also typically used in two party dominant countries (though it is a hotly debated issue in relevant electoral reform campaigns). [97] If democracy is to be nurtured and two party dominance avoided, DRV is preferable. Another, more practical consideration, is the simplicity behind DRV. Voters will always have a single vote for their single candidate choice. Under IRV, the first round would demand that voters rank their candidates. Ancillary to this, confusion and problems can result from vote counting, whereas with DRV typical voting machines can be used accordingly.

A majority system is preferable for deciding a President, especially with a delayed run-off mechanism, as it ensures the elected candidate has a relatively stronger mandate and voter confidence. Considering a plurality system, one candidate could be victorious without a true majority. This can undermine any victors political mandate throughout their term. Majority systems are not, however, without their problems, as seen with the French elections of 2002. This reflects how the system can fall victim to true democracy, in which too many similar parties split the electorates vote, resulting in an opening for other political parties to slip into the second round, as the National Front Party benefiting in France 2002. That said, the value of having a president elected by a true majority has many advantages, especially when presidential powers are codified in the Constitution to select the executive branch. This can then be compliment by a separate and independent legislature which can serve as more than a rubber stamp to presidential proposals.

6.5.4.3 National Constituent Assembly Elections

A closed list proportional representation system is recommended, regardless of whether there is a presidential, mixed or parliamentary system. This system was used in the October 2011 NCA elections and it is proposed that this system should continue to be utilised for future Tunisian NCA elections.

A closed list PR system promotes a representative, rather than majority, based NCA which increases the likelihood of a coalition government. Thus, such a system will ensure the elections are more than just about selecting a constituent assembly, as they will determine the prospects for genuine democracy to operate in Tunisia. Whilst a majoritarian system would produce a strong government, in terms of seats in the NCA, PR will ensure that no one party dominates the legislature. This is essential in provoking discussion and debate within the NCA and no one party imposing its policies. Furthermore, by raising the chances of coalition, larger parties are forced to form coalitions with those smaller, in turn providing a counterbalance against large parties dominating from within the government of the day, in addition to the NCA as a whole. This, in turn, should reduce the risk by which one party can pass more extremist legislation and dictate to the State. Thus, political mandates are less likely to be abused and more thoroughly considered and debated proposals should result.

A PR system will also ensure a voice is given to smaller parties, should the electorate favour this. This cannot go understated when building a new democratic state. Unlike First-Past-The-Post (FPTP), or other majoritarian electoral systems, PR will ensure, even with just 1 or 2

[97] Instant Runoff Voting. 'Instant Runoff Facts Vs. Fiction.' *Instant Runoff Voting*, 2010 http://www.instantrunoffvoting.us/3rdparty.html; Langan, James P. 'Instant Runoff Voting: A Cure That Is Likely Worse Than The Disease.' *William and Mary Law Review* 46, no. 4 (February 2005): 1569–1595; Shentrup, Clay. 'Failed Analysis by League of Women Voters on Instant Runoff Voting — The Center for Election Science', *Available at* http://www.electology.org/san-leandro-inamdar.

seats, that smaller parties will have a voice, however large or small, in the NCA. To complement this, a threshold mechanism should be put in place, from anywhere between 5–10%, enforcing a minimum number of votes necessary to be attained before a party can win a seat. This will ensure that not every single small party will gain a seat, but only those deserving. Such a mechanism should help tackle the potential problem in a fledgling democracy in which a plethora of democratic parties come into existence, taking note of the 80+ parties that were approved to campaign for the Oct 2011 elections.[98] This can highlight an essential different between the parliamentary and presidential systems. With a parliamentary system, such a small party may have the ability to initiate proposals, or have a great influence in politics whereas under a presidential system such a party's role would be undoubtedly limited.

A gender quota was also used in the October 2011 elections, otherwise known as "the zipper system". It is recommended that further implementation continue as such. Whilst it may not be highly effective in the upcoming election, such a mechanism can only stand to promote equality in gender and hopefully be more effective as time passes, especially in the context of women's rights in the Arab world. However, whether this is a system that is actually desired is another question and requires further review. Noting the grumbles with the Iraqi system, to which 25% of seats in Parliament are reserved for women, the gender quota may require further refinement. The relation between women in the NCA and that of the executive committee will also be of importance if the gender quota is to have a real impact on Tunisian politics, rather than being merely superficial.[99]

6.6 Implementation

The establishment of democracy and fair elections in Tunisia requires more than constitutional provisions alone. Any constitutional developments can be manipulated or distorted, if not accompanied by other legislative measures, so as to reduce their effectiveness in achieving fair elections and democracy. This is clear from the above observations of the previous approach to the matter in Tunisia, and the prima facie democracy which existed before 2011. Furthermore, the evidence of other countries after significant political shifts indicates that the implementation measures are absolutely vital for public confidence in the fairness of the new system. This section thus focuses on potential *legislative* measures necessary to implement the constitutional provisions.

6.6.1 Experiences Within and Beyond Tunisia

Tunisia faces specific problems of one-party domination, self-censorship of the press, the criminal offences of defamation and of spreading false information, and a lack of transparency over the financing of campaigns. Whilst these issues are not appropriate as the basis of any constitutional articles, any constitutional development will be unable to have a positive effect in the country if they remain unaddressed.

[98] Al Jazeera. 'Background: Tunisian Elections.' News. *Al Jazeera*, October 27, 2011, *available at* http://www.aljazeera.com/indepth/spotlight/2011/10/20111089246280661.html.

[99] Coleman, Isobel. 'Democracy in Development » Tunisia's Upcoming Elections: Part II.' *Council on Foreign Relations — Democracy in Development*, October 21, 2011, *available at* http://blogs.cfr.org/coleman/2011/10/21/tunisia%E2%80%99s-upcoming-elections-part-ii/.

Since the RCD's fall, one-party domination is clearly a reduced concern in Tunisia. There may even be too many parties now. The legacy of one-party domination could still cause electoral problems, however, as people may be sceptical of the new election process; this happened in Algeria and produced low voter turnouts. The recent approach consequently taken in Algeria — where state media provided approximately equal airtime to both the government and the lead opposition parties — seems sensible whether or not Tunisia foresees problems as likely. It ensures that the government is not in control of the public communications of their opponents, and grants specific air time to criticism of the government, which could also help to combat the Tunisian culture of self censorship discussed above.

As previously discussed, Tunisia has retained a culture of self-censorship even after the 2011 revolution. Once a party is established as dominant under the new constitution, it will be vital that public criticism of their activities or policies is readily disseminated, which will require the removal of the criminal offences of defamation and spreading false information. Only the removal of these offences will assuage the fear of arrest or investigation which hangs over persons who might otherwise be prepared to critically assess the government. These misdemeanours would best be decriminalised and made into civil matters, which are punishable accordingly, but which cannot result in a deprivation of liberty.

Finally, the issue of campaign finances has emerged as a matter which needs attention, after the allegations levelled at Ennahda regarding the source of their campaign money. The rules on campaign finances should reflect the fact that in a fledgling democracy, such as that created by the new Tunisian constitution, anything which can possibly be done to increase faith in the system should be done. As such the campaign financing should be made as transparent as possible so that the voters are able to inspect this information along with anything else which they wish to give weight to when deciding the candidate that they will vote for.

The recent Libyan elections saw reports of polling stations not being opened and concerns about potential ballot stuffing. Reports also emerged of violence and protests, either on Election Day or as the results were announced, in Libya, Algeria and Egypt. Such events and reports will all serve to detract from public confidence in the new democracy and electoral system, which is absolutely vital in its early stages. Whilst it must be accepted that disgruntled voters may always make allegations if the candidate whom they had supported is unsuccessful, there must be sufficient safeguards to be able to show that on a balance of probabilities there has not been anything improper in the electoral process.

A useful measure used in both Algeria and Libya was observers or monitors from domestic and international organisations. In both countries, however, there was still violence and allegations of fraud were still made. Whilst this could suggest that the use of monitors and observers did not help, it seems more likely that the observers were simply employed in insufficient numbers (Algeria had only 500 observers for the entire country). Tunisia could certainly benefit therefore from future use of domestic or international election-monitoring organisations, though significant personnel would be required to guarantee national confidence in the process. The Carter Center carried out work of this kind in the October 2011 elections, and could be aided in the continuation of this work by the government, as well as being used as a model by domestic NGOs carrying out the same work. As a guideline it might be sensible to ensure there are enough observers to be able to visit and check that each polling station is

open. This would at least remove the allegations of unfairness which occurred in Libya due to unopened polling stations.

Another issue which occurred in Libya was the burning of ballots, which specifically occurred in Benghazi, by people protesting. To ensure that this does not happen, the initial response could easily be to provide additional security at polling stations by using the military. However in Tunisia, where there has been a historical perception that there will be repercussions if people criticise the government, any military presence at polling stations could serve to intimidate the electorate and be counterproductive to achieving fair and democratic election results. Instead it may be more productive to assess the basis of the protests and try to address these as using neutral security could be impractical and expensive. This is another matter which the observers may be able to help with as they could ensure that the system is explained to voters and so there would be less confusion or suspicion about the system.

6.6.2 Freedom of Expression

The Republic of Tunisia currently has an opportunity to review not just the form of the democratic institutions laid out in its constitution, but also the conditions which impede the clear formation of democratic expression. It is important to ensure that principles such as 'one person, one vote' exist not just as legal or constitutional statements of intent, but that they are implemented in the day-to-day life of this system of political decision making.

At one level, there is a clear and definite moral case that these rights to political participation and expression deserve special, clear and specific protections in the Constitution of the Republic of Tunisia. Academic thought often classifies democracy as a human right — the right to be able to participate in the formation of the laws we are subject to. A freedom from arbitrary government where we exist in servitude, subject to laws we did not give our consent to. Article 19 of the Universal Declaration of Human Rights goes further than this, stating

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[100]

More practically, freedom of political expression is a key requirement for full political participation, as it is necessary for the exchange of political ideas. Democracies at their best develop a system where individuals interact with each other and critically share views on public and political life. In doing this, voters are not only more informed in their decision-making but also have a better understanding of the system of the laws that govern them, meaning the laws themselves are more legitimate in that they exist with informed consent. This political expression, beyond the ballot box is crucial in understanding how we can establish a good, democratic, society which also brings utilitarian benefits of informed democratic participation to the quality of government and the character of a national political culture.

With reference to the press, while the 1959 Constitution notionally grants freedom of speech which would in turn apply to their coverage of real world events, in reality laws over defamation of character, and laws against speech harming public order and public moral mean this

[100] Article 19, Universal Declaration of Human Rights, 1948.

freedom is rarely enforced in the real world. Journalists have been known to practice self-censorship, so while they may have the right to print or blog on a particular story, they choose not to for fear of reprisal, or the cost of having to deal with the threat and disruption of a government investigation, or an arrest with or without charge. Ultimately this form of press repression is the most pernicious and difficult to deal with, because it is the journalists themselves who censor because of a wider political culture that forces them to do so.

The last few years of President Ben Ali's rule saw some positive developments with regard to freedom of political expression. For example, opposition parties over the past decade have been permitted to develop some, limited criticism of government while the press have been given greater freedom to speak out critically on pertinent issues in political life. While the conditions for democracy may have been deeply flawed, the progress in the past decade does give us some reason for optimism around the development of a democratic political culture in the new Republic of Tunisia.

The new Constitution thus needs to offer not only general protection for speech, but also specific protection for freedom of the press, and media to criticise and scrutinise public life. While there is a difficult balance to strike between the need to protect these freedoms and the need to protect ordinary people from, for example, writings that incite violence — the abuse of laws on the statute book around 'treason' or 'spreading of false information' demonstrates a clear and tangible need for the Constitution to limit government power in relation to limiting freedom of speech. A distinction should be made in this constitution, that laws can only be made against speech where they specifically threaten violence or physical harm. Above all, the right to freedom of political speech, and the right to criticise government, policy and public officials should be protected, and potentially this area of public expression could be protected from laws of defamation and libel.

Twenty-first century Constitutions must also recognise the role of new platforms of communication in understanding what constitutes freedom of speech, and this needs to be done in specific as well as general terms. The internet operates as a platform now for the dissemination of information, a platform for political campaigning as well as a method of personal and private communication with our nearest and dearest. This technological expression deserves special protection, not least because it embeds our personal, social relationships and communications in the modern world.

Given the role of online communications, especially among young people in developing the campaign for a change of government in the Republic of Tunisia in last 2010 and early 2011, it would seem particularly important that this platform of communication is enshrined as protected in a constitution, again only with specific exceptions where online communication is being used to incite violence, or support crime in the real world.[101] The fact that other governments in the Middle East in particular have sought to limit online freedom since the Arab Spring last year demonstrates the importance of the internet as a platform for communication.[102]

[101] Nebehay, Stephanie. 'UN Forum Backs Web Freedom After Arab Spring.' *Reuters*. Geneva, July 5, 2012, *available at* http://www.reuters.com/article/2012/07/05/net-us-rights-internet-idUSBRE8640DE20120705.

[102] 'The Arab Spring's Online Backlash.' *Economist Newsbook*, March 29, 2012, *available at* http://www.economist.com/blogs/newsbook/2012/03/internet-middle-east.

This hints then at a wider problem, that there is a need to balance the freedom of expression with the need for a strong, stable political authority to guarantee some of the peaceful conditions required for meaningful political expression to take place. We need to reframe this question in terms where the need for political stability and political expression are not seen as mutually opposed.

A strong government is required to provide the conditions for political participation and fair elections that all democratic Constitution seek to outline. Equally, the government can only have legitimacy to enforce these rules if it is constituted by the consent of the people. These conditions, democracy and stability have the potential to go hand in hand if delivered in the right way. Above all, the state and the Constitution itself needs to be placed as a neutral arbiter in disputes over freedom of speech, so that no one aspect of political expression is given preferential treatment over another.

These provisions would leave us with many unresolved problems to. Not all the ideas discussed in a democracy are good ones, and the freedom to live under a law governed polity constituted by popular political will can also infringe on the liberty of others, as well as giving a platform for some to intimidate through violence, threats of violence and hate speech. This need for a meaningful, democratic polity to be free from this kind of political intimidation also deserves greater consideration.

6.6.3 Freedom from Intimidation

In political terms, all democracies face the challenge of ensuring political expression is always free and exercised with conscience. Whether they are dependent on family, friends, family, employers or government agencies, citizens may lose their freedom of choice, where their public expression is constrained by societal norms. This process can drown out the very diversity of expression that is necessary for a vibrant and original debate about the future of a state like Tunisia, and may have wider impacts, such as the suppression of particular groups of people. This is why the secrecy of expression at the ballot box is so important. These provisions need to be constitutional, and they are a key part of the framework on the democracy and deserve protections beyond the usual bills and parliamentary process alone.

The Constitution then provides a framework for democratic expression to be structured, and for it to form governance. As a non-partisan document, it is essential that it sets out both the form of democratic institutions and the mechanisms for their protection. Leaving these to statute law and the decision-making process of a legislature is risky, as these will almost certainly be dominated by partisan institutions. While these are essential to structure a legislature into a coherent sense of government and opposition, they clearly have self interest in determining the framework for political expression in which they themselves operate.

For this reason, provisions against political intimidation and protection for political expression should be protected in a constitution, and chief among these in any democracy must be secrecy on the ballot. In historical terms, the introduction of the Secret Ballot Act in the United Kingdom had a transformative effect on the democratic nature of the country's parliament just as,

if not greater than, the extension of the franchise itself. While voters may be given the opportunity to vote, and theoretically vote as they chose if their expression is public and traceable so is the opportunity for intimidation, and manipulation, to skew political expression.

This protection is so crucial firstly because it protects individuals from their own government, which in a democracy is constituted by partisan political expression. Secrecy of the ballot means that even in a regime where public political expression through speech and print is challenged and constrained in a partisan fashion, individuals still have the opportunity to express their private, genuine opinion — without fear of reprisal. Freedom from reprisal is not just about being free from the reprisals of governments. Others in civil society also seek to intimidate and manipulate to coerce people to vote for them. Indeed opposition factions can be just as guilty of this as government, so this is a politically 'neutral' form of protection of the freedom of political expression. It also deals with the problem of political expression being constrained in the private domain. Intimidation within families or by those we may be financially dependent on for work has historically structured flawed expression of the democratic will in countries without secrecy of the ballot. Enshrining it in law is the only way to guarantee the true expression of the men and women of the republic of Tunisia.

Of course, freedom from intimidation must also be set against the very need for political stability and peace which this report has also outlined. Even a democracy does need some provision to set the boundaries of freedom of speech and political expression, at risk of instability. While the Constitution is a natural place to determine the scope of this expression, the question remains as to where these boundaries should be drawn.

Clearly any speech and expression which encourages or incites violence against any group or individual, must be considered illegitimate. Such speech is counter to the fundamental principles of democratic expression. While freedom to speech may mean freedom to challenge and offend, ultimately all that happens is that someone is offended. Their physical integrity remains intact, as does their ability to respond, and criticise back. When this crosses the line into violence, this is when free speech must be constrained.

Beyond this there are other problems to consider with respect to voting and elections. Who votes is one obvious problem and one particularly problematic when we consider the intimidation of voters. Secrecy of the ballot can be easily enshrined and protected in the Constitution and the conduct of an election, but the act of voting itself, not least in a country with a flawed experience of democracy. While the vote in itself is secret, the act of voting is not. A register is required of those who have and haven't voted, to prevent voter fraud and stuffing of ballot boxes. The statement that 'I am participating in the process' is potentially controversial in itself, and cannot be hidden when citizens walk into polling stations, hence some groups may be more susceptible to intimidation that curtails their freedom of balloting. To counter this, this paper recommends a constitutional provision that voting, by law, should be compulsory. This would place it as an act of civic duty while allowing government to be effective in its legitimacy precisely because all people have had to vote and the government is constituted by that powerful mandate.

6.6.4 Procedures and Arbitration

Any credible system of democratic decision-making and participation must, by definition, be competitive and contested. Without genuine choices for an electorate — between candidates for public office and the political platforms of different parties, the scope of policy and political leadership is limited and the views of ordinary people go unrepresented. The 'democratic' system itself cannot be legitimate without genuine, free, fair and open competition, as demonstrated by Tunisia's recent 'elections', most notably the Presidential Election of 1999, where freedom of choice and political expression was superficial at best.

The obvious point to make here then is that the administration and adjudication of elections, referenda and the process of constituting a democratic system of governance must be fair, impartial and free from the political whim of a particular government, whose members have partisan and parochial allegiances. The system of arbitration then must be 'above' politics, or perhaps more accurately above *partisan* and factional politics, and the systems put in place to regulate the political process must also be *seen* to be objective and unbiased, in order that a government is seen to have the legitimacy to govern effectively. For these reasons then, it seems that the process for arbitration must be enshrined in the constitution, and to understand what it should look like must be a key aspect of the work of the Tunisian Constituent Assembly in devising this new document.

So we need to note here that with this sense of 'competition', there is the potential for some problems too. When, for example, does freedom of expression and opposition in political terms become unlawful sedition? Where does enjoying ones right to disagree with the decisions of government, cross the line for the respect for the Rule of Law, and the right of others to live their lives peacefully in a law governed polity? Where do we draw the line between opposition politically, and when do we reach the conclusion that it has affected a revolutionary character that neither benefits peace or the conditions for democracy.

There are other problems too where arbitration and decision making and management will be necessary to structure the democratic system in the Republic of Tunisia. In a country with an electorate of 7 million individuals, potentially with localised elections in the country's 23 governorships, elections will be expensive, and difficult to manage. Records will need to be kept effectively, and the system of administration will need to be effective, rigorous and considered in what are potentially the most difficult decisions to make politically in this new, early Tunisian republic.

6.6.4.1 Localised Administration

In purely pragmatic terms, it might be necessary for the administration of elections to be handled at a local level. This is far from a trivial matter, and in fact deciding the level at which the practical administration of elections takes place is key in understanding the effectiveness of the democratic process. Administration at the local level means that the process is more deeply embedded in the local community, that the process is truly representing the needs of every local area because it's managed in the local area. Ballots can be counted at the polling station and results reported to centralised administration. This is appealing not only because

it will save money in terms of administration, but because it will allow for the ballots to be counted quickly for the process of converting democratic expression at the ballot box to be converted into elected posts far more quickly.

This brings problems too though. Elections in other countries following the *Arab Spring* last year have shown numerous anomalies at the local level. Bribery, corruption and intimidation are all easier to do on a local level, especially when officials are embedded and live in a local community. However, would this be any less desirable than a centralised system to manage elections? Corruption can happen at central level too, and under a system of centralised administration the risks will be far greater, and could more easily change the outcome of elections nationally and the composition of government too.

If managed at a local level, the risks are smaller, the culprits easier to chase and localise and above all the risk that malpractice will change the results of elections outright is greatly reduced. In Egypt's 2012 Presidential Election, while there may have been hundreds of allegations of electoral malpractice from both candidates' campaigns, the election arbiter found that these were simply not significant enough to change the outcome of the election, despite it being one of the most balanced and closely contested ones in the history of the Arab world, with Mohammed Morsi winning by less than 1% of the vote.

The Constitution of the Republic of Tunisia that elections should be counted at a local level, with officials coming from the local area, and that they should swear an oath to be fair and impartial between candidates and loyal to the constitution. However there is also a role for national administration. Selection of local administrations should be handled, impartially, by a centralised appointments body. Similarly, in elections, when the local system of administration fails, there must be accountability to administration at a higher level too. Candidates and voters must have the right of appeal to higher, more senior bodies, to make sure that we aren't just embedding the corruption which held back democratic expression under the last regime, at the local level instead.

6.6.4.2 National Administration and Arbitration

One more obvious role for national administration and arbitration in elections is the need to have a register of voters. A modern, sophisticated state makes this possible in ways never imagined before, with the potential for electronic databases of the electorate making it possible for better records of the population, making electoral fraud more difficult too. The Constitution should mandate a census, every 10 years, which will not only aid policy makers in making appropriate decisions over policy and resources for the nation, but also provide information on boundaries and constituencies for elections, to be set be a centralised, independent and non-partisan national commission. The Constitution should also mandate compulsory electoral registration when and individual reaches franchise age, with central, constitutionally mandated bodies managing these records, and providing them to local officials for the purpose of managing local or national elections.

To prevent local malpractice, the Constitution should specify that while local officials should have a key role in the administration of elections, their role is always ultimately subordinate to

central officials and centralised adjudication. Local polling stations should be open to inspection from clearly designated, centrally appointed officials, and local officials can be removed and their decisions overturned if ruled to do so by a central, independent, quasi-judicial body for the arbitration of elections. Candidates and members of the public can petition this body in writing to hear grievances over local decision making — and the court, constituted of members of the judiciary with no partisan affiliation, should be the final arbiter on these matters.

6.7 Appendix: Draft Constitutional Provision

6.7.1 Article 39: Presidential elections

Note: Article would be non-existent in a purely Parliamentary system

1. The President of the Republic is elected for five years by universal, free, fair, direct, and secret suffrage, within the last thirty days of the term of office and under the conditions specified by the electoral law.
2. The President of the Republic is elected by an absolute majority of votes cast. Should an absolute majority not be obtained on the first ballot, a second ballot shall take place on the twenty-first day thereafter. Only the two candidates who have won the greatest number of votes in the first ballot may stand in it, after taking into account, if applicable, any withdrawals of candidates who have received a higher vote.
3. In case of an impossibility of proceeding with the elections at the appropriate time, because of war or due to imminent danger, the term of office of the President is extended by law until it becomes possible to proceed with the elections. The President of the Republic may present himself for two consecutive mandates.
4. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

6.7.2 Article concerning the Prime Minister

Note: Article would be non-existent in a purely Parliamentary system

1. At its first session the National Constituent Assembly shall choose from among its members a Prime Minister for the same duration as the Assembly's term. Should the position fall vacant at any time, the Assembly shall choose a replacement for the remaining duration of its term.
2. The election of the Prime Minister shall be by an absolute majority of all those Assembly members present.
3. If the first ballot produces no such majority, the election shall be repeated between those two who secured the most votes in the first election.
4. If a third party tied with the second of the two in the first ballot he shall also participate in the second ballot. In this case the election shall be by proportional majority.

Chapter 7

Anti-Corruption

7.1 Corruption in Tunisia

Corruption is defined by Transparency International (TI) as

> the abuse of entrusted power for private gain.

However, corruption need not necessarily involve public officials — for instance, an ordinary citizen may lie in court after having being paid to do so (corruption of the criminal justice system). Similarly, a doctor may refuse to testify against a negligent colleague following a complicated operation (undermining of institutional accountability procedures). These are both cases of private corruption.

Moreover, grand corruption (also known as 'political corruption' or 'high-level corruption') may be distinguished from petty corruption (also known as 'bureaucratic corruption' or 'administrative corruption') in so far as it is perpetrated by political leaders or elected officials (e.g. ministers) who have been vested with public authority and the responsibility to represent the public interest. By contrast, petty corruption is the day-to-day corruption found at the interface between public officials and the broader public. It is mostly found as bribery or abuse of power in daily situations (e.g. to obtain a restaurant permit). A state of unrestrained political corruption where politicians themselves steal state assets is termed a kleptocracy ('rule by thieves'). Examples include the Duvalier (Haiti), Mobutu (Zaire) and Suharto (Indonesia) regimes.

Not all types of corruption are deemed to be unlawful in various jurisdictions. For instance, in many countries the unrestrained giving of political donations and lobbying is permitted. Corrupt behaviour ranges from active involvement, such as violating duties, accepting or transferring bribes, facilitating transactions, to passive involvement, which can include simply ignoring or failing to follow-up on indicators that corruption may be taking place. Although it is impossible to devise a conclusive list of offences which could be considered 'corruption', the following includes its most common forms:

Bribery Payment given personally to a government official in exchange for his use of official powers. Generally a two-party relationship.

Extortion (blackmail) Unlawful obtaining of money, property or services from a person, entity or institution by means of coercion

Cronyism Situation where personal friends / associates are favoured over others

Nepotism Situation where relatives are favoured over others

Patronage (clientelism) Favouring of supporters, for instance in relation to government employment

Graft Unscrupulous use of a politician's authority for personal gain, for instance the exchange of a political donation for political power

Embezzlement Outright theft of entrusted funds; diversion of entrusted assets

Trading in influence (influence peddling) Situation where a person sells his or her influence over a decision process involving a third party

Electoral fraud Interference with the process of an election, for instance through vote buying

Kickback Remuneration (usually a commission) given in return for a referral which resulted in a transaction or a contract; a kickback differs from other types of bribes because there is implied collusion between the parties.

Most of these offences, it should be noted, are economic in character. Non-economic corruption may also be present, for example in the police, judiciary and in academia, with a variety of motivators and causes.

Corruption is also related to human rights, with some human rights violations simultaneously constituting corrupt acts, such as the wrongful and unlawful incarceration of a political dissident. Corruptive behaviour, particularly by criminal justice personnel, exacerbates victim vulnerability and renders it almost impossible for the state's institutions to investigate and prosecute criminal cases with due diligence.

Corruption is also closely linked to transnational organised crime, as it will often facilitate money laundering, cross-border drugs trading and human trafficking. In 2008, the U4 Anti-Corruption Resource Centre in Norway produced interesting findings about links between organised crime and public corruption. Firstly, they found evidence of a negative correlation between the effectiveness of the criminal justice systems and organised crime. It follows that levels of organised crime are lower where the conviction rates are higher, and moreover points towards a deterrent effect of a functioning judicial system. Secondly, political interference in the appointment, dismissal and promotion of civil servants (including judges) is positively correlated with higher levels of organised criminal activity. Independent judges are less vulnerable to corruption and better able to implement repressive action against organised crime, in spite of widespread corruption of the political system.

The relevance of corruption to the well-being of a country should not be underestimated. Among others, it affects development (and consequently the population's wellbeing), fiscal stability, public and private investment decisions (and therefore the growth prospects of the economy), decisions regarding development assistance and the environment.

7.1.1 Developmental Effects

Corruption increases costs for citizens and erodes fundamental democratic values such as equality and the rule of law. Citizens are compelled to pay for something which under normal circumstances they could receive for less or for free, so the effectiveness of public administration is damaged. Once officials are motivated by their own personal interests, they will tend to focus on their personal enrichment (thus pillaging the state's funds), rather than what is best for the nation's citizens, motives which distort the allocation of public expenditure towards more capital-intensive projects.

This erosion of the cornerstones of democracy (equal participation, majority voting etc.) reduces citizens' trust in government as a whole, affecting their willingness to actively participate in society. Social capital and moral standards likewise decline as a result. Engagement in corruptive activity (e.g. by means of a bribe for an official) becomes a 'way to get things done' and subsequently habitual, which in turn erodes the rule of law. Citizens consider it too burdensome to follow proper procedures since they know that they can be circumvented by paying a fee. A long term consequence is a higher risk for conflict and civil unrest, as seen in Tunisia during 2010–11. Chronic insecurity additionally promotes capital flight and a decrease in tourism.

As indicated previously, corruption causes costs to increase for its citizens. Particularly for the poor, it impacts severely upon access to and quality of key public services like water, health, sanitation and education. The poor are disproportionately affected since they are already on a tight budget and specially dependent on basic public services, and any price increase in one area brings cuts in other areas of basic needs. Corruption thus widens inequality within society. Again, this negatively affects their relationship with public officials and the state (as well as police, community leaders and other people in positions of authority) and the reputation of institutions suffers. Given their economic circumstances, they are for instance unable to fall back on private medical treatment. The poor also lack the ability to represent themselves properly, since they lack direct legal recourse and are unable to pay for access to the judicial system. It should be noted that legal access on its own, however, is not always sufficient to bring justice; this is particularly true in corrupt justice systems where winning a court case is a matter of the correct price and knowing the right people in positions of authority.

7.1.2 Fiscal Stability and the Economy

Corruption plays an important role in government income generation (predominantly through taxation of the population), investment and economic growth. Corruption will often result in a reduction of the tax base. Tax evasion offers a competitive advantage for the companies in question, however it creates inefficiencies at the macroeconomic level. Some companies which do not engage in corruption may find themselves at a disadvantage and may ultimately have to exit the market, while other companies, which would have had to exit under the original circumstances, remain. Less competition is also more likely to lead to an increase in prices. A smaller tax base further reduces public spending levels and widens the social divide. Forgone tax and customs revenues due to loopholes in tax collection reduce state funds which, as

indicated previously, will affect the poor disproportionately. In addition, revenue may disappear into the pockets of the governing elite before reaching government coffers. It has also been suggested that corruption also alters the composition of public expenditure. A larger proportion of the state budget is preferentially allocated to highly lucrative sectors such as construction, since there is more opportunity for the public officials to receive high kickbacks and therefore increase their personal wealth. Capital-intensive projects furthermore require less labour, which in turn results in lower levels of employment and higher poverty levels.

Corrupt procurement of lucrative government contracts presents numerous problems of quality and inefficiency, when contracts are not offered to the best bidder. Corrupt governments spend more than is necessary, with chosen bidders often using inferior-quality materials in order to meet the bid. Many such investments ultimately turn into 'white elephants.' In other words, their cost far exceeds their usefulness. Coupled with an absence of transparency and (internal) accountability measures, additional opportunities for theft and advantage-taking emerge. Finally, the effectiveness of institutions suffers and growth is hampered.

Foreign and domestic investment is heavily dependent on the quality of the business environment in a particular country. Where economic actors sense difficulties (such as corruption), they will be reluctant to invest in that particular business environment, since the costs and ability to influence become uncertain. The considerations for foreign investors include — but are not limited to — the following: rule of law; stability of regulatory framework and legal rules relating to businesses (taxation, licensing, etc.); security and integrity of property rights (especially risk of expropriation); political stability; transparency; and bureaucratic red tape. Each of these considerations is adversely affected by increased levels of corruption.

Public rent-seeking activities, for instance through taxation or redistributions from the private sector to government bureaucrats (who in turn affect the fortunes made in the private sector), bring additional difficulties. The private sector has less incentive to invest — for example by improving business practices, increasing R&D activity, employee training or the purchase of additional capital goods — and economic growth is reduced. Innovators (new market entrants) are significantly more vulnerable to public rent-seeking and corruption than established producers. New companies have a high demand for diverse government-supplied goods such as building permits, import quotas, operation licences and machinery. The demand for these goods is highly inelastic, making them a primary target for corruption. New producers are moreover not part of the established lobby and are credit-constrained (subsequent difficulties in finding cash for bribes). Similarly, innovation and associated projects are risky and typically medium to long-term, offering numerous opportunities and incentives for expropriation by rent-seekers (where private or public) in the future. Depending on how the rent-seeking activities are structured (e.g. focus on one industry or foreign firms only), competition may be undermined.

Leakage of funds in development projects can occur as early as during the project design phase. Project requirements can be overstated or tailored in such a manner so as to suit one company only. Rigging of the bidding process, with preferential treatment for a particular group, results in underperforming companies getting contracts at inflated prices. Often additional bribes will be paid in order to release the development funds, to avoid (or pass) audits and simplify regulatory matters (e.g. licences, permits). High levels of aid moreover reduce the quality of

institutions, promote poor governance, weaken accountability procedures and cause conflicts over control. A related problem is that aid (without stringent conditions) alleviates pressure to reform where it is most necessary and perpetuates inefficiency. Finally, money is diverted towards more capital-intensive projects as these promise the highest personal gains for corrupt officials.

7.1.3 Corruption, Politics and Elections

In many countries lobbyists, businesses associations and NGOs are able to impact on the political agenda and influence legislation to an extent. However, there is a fine line between a participatory democracy and state capture. The latter describes a phenomenon in which outside interests are able to bend laws and regulations to their benefit through corruptive transactions with officials and politicians. Problems arise where individuals with large business interests and corporations become involved who are able to exert undue influence and have a disproportionately large access to the policy-making process. These difficulties also arise in relation to (presidential) elections where high net-value individuals and corporations often contribute significant amounts resources towards the preferred candidate's campaign.

Corruption may also have long-term effects on the environment. For instance, if it is possible to obtain construction and operation permits for power plants and heavy industry in protected areas, this will result in groundwater and air pollution in fragile environments. Similarly, obtaining declassifications (e.g. Grade I listed building (UK), Denkmalschutz (D), UNESCO World Heritage) has the potential to destroy valuable cultural assets and habitats for animals. Soil erosion and climate change (whether at a local or regional level) are other possible results of deforestation and forest degradation.

We will now consider how private and public corruption has manifested itself since the Republic of Tunisia's independence in 1956, under the rule of Habib Bourguiba (1957 – 1987) and Zine El Abidine Ben Ali (1987 – 2011). According to diplomatic cables originating from the United States embassy in Tunis, four main types of corruption could be identified in the latter years of Ben Ali's rule.[103]

Simple Corruption Basic bribery and extortion is commonly found amongst police and other security forces. It is increasingly widespread given the low salaries of civil servants, but is yet to become endemic in Tunisia.

Bureaucratic Corruption Mostly found among mid-level civil servants, this ranges from bribery to the siphoning of money from government bank accounts for personal benefit. Although investigations typically result in conviction and punishment of offenders, it appears that only mid-level officials are investigated. While these investigations have been welcome, they were problematic under Ben Ali because they did not address the major corruption occurring at the top of government and in the First Family. It appears that the Tunisian people consider bureaucratic corruption to be pervasive and that they can only reach their desired result by paying bribes or engaging in other forms of corruption.

[103] Aftenposten. 'Corruption in Tunisia part III: Political Implications.' (15 January 2011), *available at* http://www.aftenposten.no/spesial/wikileaksdokumenter/05072006-05072006-CORRUPTION-IN-TUNISIA-PART-III-POLITICAL-IMPLICATIONS-5107180.html.

Influential Corruption This type of corruption involves more senior government officials such as ministers and will involve the misuse of official entitlements (whether privileges or funds) for personal benefit. They also use their influence to ensure that their business partners, families and friends have insider information on government activity and contracts, which ensures additional income. Influential corruption is not complained about much, but the Tunisian people would nonetheless like to see it rooted out.

First Family Corruption There are very widespread complaints about Ben Ali and his extended family exploiting the Tunisian economy for their own benefit. All key decisions, especially related to investment and privatization, were made at the highest levels of the government which made it possible for the ruling clans to become aware of, to assert interests in virtually every important sector of the Tunisian economy. The Ben Ali family was perceived to be above the law, thereby exercising their influence unchecked and controlling between 30–40% of the Tunisian economy (i.e. approx $10bn)[104]. Consequently, many Tunisian businessmen considered connections to the First Family to be essential (whether through bribes, partnerships or kickbacks) for ensuring continued business operations within Tunisia. The Ben Ali family and its associates are also often compared to other corrupt leaders around the world. For instance, Dr Lardi Sadiki (Exeter University, United Kingdom) characterized Leila Trabelsi as an incarnation of Imelda Marcos (Philippines) who collects real estate and bank accounts.

7.1.4 Transparency International's Corruption Perception Index

Corruption levels are high, but it is less pervasive in comparison to neighbouring countries such as Libya, Egypt and Algeria. Transparency International's CPI scores countries on how corrupt their public sectors are perceived to be by the population. Tunisia's score have ranged from 5.3 (2001, high) to 3.8 (2011, low) over the last twelve years. The overall trend has been downwards — meaning that the Tunisian public sector has been considered increasingly corrupt over time. Tunisia achieved it lowest scores in the available data immediately before and during the Jasmine Revolution.

7.1.4.1 Habib Bourguiba

During Habib Bourguiba's 30-year presidency, corruption was more or less confined to a few politicians and a small group of officials in more or less senior positions, who granted themselves privileges in exchange for the services rendered and sacrifices made, believing that the Tunisian people acquiesced in their activity.

7.1.4.2 Zine El Abidine Ben Ali

Corruption was prevalent in all areas of life during Ben Ali's 23-year presidency, in particular among the first family and its associates.[105] While Habib Bourguiba had been responsible

[104] The Economist. 'Tunisia: Ali Baba Gone, but What About the 40 Thieves?' *The Economist*, January 20, 2011, *available at* http://www.economist.com/node/17959620.
[105] The Economist. 'Tunisia: Ali Baba Gone, but What About the 40 Thieves?' *The Economist*, January 20, 2011, *available at* http://www.economist.com/node/17959620.

for many reforms relating to female emancipation, public education and family planning as well as campaigns to improve literacy, health care and administrative, financial and economic organisation, the approach under the Ben Ali dictatorship was fundamentally different. Freedoms and rights were restricted, and trade unions, educational facilities and the press were infiltrated and controlled. Moreover, Ben Ali's presidency was characterized by increasingly corrupt elections[106], an absence of the press freedom and an omnipresent and pervasive security force. Finally, the judiciary operated under the orders and auspices of the executive — most significantly where political cases where concerned.

The Ben Ali and Trabelsi clans were an increasingly large group that established themselves in all major business sectors, the media, and the sports world. Their influence grew significantly from 1992 onwards, and in 2011 constituted a well-connected network of approximately half the Tunisian elite. Many of these individuals are reported to have made the most of their lineage and contacts, accumulating extensive commercial holdings and influence in the process (see Annex I for a detailed list). It can safely be assumed that family members also registered new business interests in the names of their children, friends or other contacts in order to restrict knowledge of their activities. Most notably, these interests were geographically divided: Leila Trabelsi's family interests were concentrated in the greater Tunis region, while Ben Ali's side of the family controlled the coastal region around Hamman Sousse.

While President Ben Ali's family were known to have active business interests, Tunisians complained most bitterly about the Trabelsi family's extended reach in society and commercial circles. These complaints were directed chiefly at the most prominent and notorious Trabelsi son, Belhassen, who is believed to have been unscrupulous in his approach and willing to use any corrupt measures to his advantage. The ruling clans have moreover benefitted from their unique position as regards access to key business and political information. For instance, whenever there were cabinet reshuffles and official appointments occurred, these generally went to the family's personal allies. In addition, a lack of transparency in the Tunisian economy has proved an advantage in the exploitation of parallel markets, for instance by illegally importing luxury consumer goods. Finally, the manipulation of the financial and banking sector has been possible by obtaining sweetheart loans from previously respectable banks. These loans were to a large extent non-performing (approximate value: $6bn), and in turn brought a chronic fear of collapse in the banking sector. Efforts to recover the money have also proven to be futile.

Physical repression (e.g. beatings and imprisonment), forced disappearances, torture and murders were rare under the Ben Ali dictatorship. The regime preferred an intrusive system of state corruption, whereby its opponents were typically coerced into parting with a percentage of their money ('commissions') or forced to enter into compulsory partnerships where business ventures were concerned. Although, as indicated previously, the extended Presidential family was able to enter into virtually all businesses and industries, a handful of businessmen managed to protect their companies from interference. The former include Tunisiana, a private mobile phone services company, and a shipping magnate. It is tentatively suggested that these industries are too complex and also involve a significant international element, which has the potential to create diplomatic unease with business partners in other countries.

[106] *Id.*

However, more low-level corruption (particularly bribes and nepotism) was also common. The former US ambassador, Robert F. Godec reported that the 'right price' determined whether customs searches could be avoided, speeding tickets ignored and documents (e.g. passports) could be expedited. Donations to certain funds and charities also appear to have the same effect. Nepotism also played an important role in relation to securing jobs offers and educational scholarships.

In 2009, United States ambassador Robert F. Godec commented that the Ben Ali regime had lost touch with the people of Tunisia. Moreover, he noted that criticism was not tolerated and that even average Tunisians were now aware of the Family's corruptive activities. Finally, In its January 2011 report, Global Financial Integrity estimated that the amount of money lost through corruption and associated criminal activity amounted to approximately $1bn per annum between 2000 and 2008.

7.1.5 Examples of Corruption

7.1.5.1 Case: Farid A.

Farid A. was interested in exporting red corals to Saudi Arabia, however the Tunisian government required him to obtain an export licence before starting up his business. The export licence was (virtually) impossible to obtain unless the interested party turned to Mourad Trabelsi, one of Leila Ben Ali's in-laws. Consequently, Farid A. contacted Mr. Trabelsi in 1997 in order to obtain the requisite documents — apparently a standard move in the Tunisian business sector when Ben Ali was in power. Mr Trabelsi agreed to provide the licence subject to two stringent conditions — he demanded a fee of USD 150,000 up-front in addition to a 20% stake in all earnings obtained from the business. Farid A. then made the payment and waited several weeks, however nothing happened. Approximately three months later, he decided to raise the issue with the President Ben Ali himself and sent letters to him and the Ministry of Justice. Raids followed in the area and Farid A. was subjected to accusations by an Algerian woman (arrested during the raids) that he was a drug dealer. Although the statement was retracted at a later point in time, he no longer trusted the Tunisian judicial system and decided to flee the country. He was subsequently tried in absentia given the maximum prison sentence of 35 years — on no recognised legal basis according to his attorney.

7.1.5.2 Case: The Bouebdellis, Lycée Louis Pasteur and the Carthage International School

The following is an elaborate example of how a number of people were targeted by the Presidential Family, and Leila Trabelsi in particular. However, the school has stood empty since 2008 for several reasons. Firstly, the Bouebdellis refused to allow the school to be demolished in order to give way for the construction of a new mall. Secondly, one of Leila Trabelsi's nieces was not admitted to the school due to poor grades. The Ministry of Education then ordered the school to be closed down as it apparently did have the required legal operating licence — although in fact it did.

It subsequently became apparent that the Ben Ali clan was seeking revenge and was also seeking to promote its own school — the Carthage International School. The CIS is a private school

in Carthage which was created by Leila Trabelsi and Ms Arafat and was opened in September 2007. The land for the school was expropriated from Mr Jalel Ban Arous on the grounds of public interest in 2000. He was forced to sell three acres of his land for ten dinars per square meter (approx €10 / m^2), although the market rate was in the region of 1000 dinars per square meter (approx €500 / m^2). Leila Trabelsi later received this desirable tract of land for free in addition to a 1.8 million dinar (€1 million) gift from the Government of Tunisia. Within a few weeks, the infrastructure in the area had also been improved in order to facilitate access to the school. The United States embassy cables report that Ms. Trabelsi has now sold the school to Belgian investors, however the Belgian Embassy has yet to confirm that the transaction took place.

7.1.5.3 Case: The stolen yacht

In 2006, two of Ben Ali's nephews, Imed and Moaz Trabelsi, reportedly stole the luxury yacht of Bruno Roger, the Chairman of Lazard Paris, a French investment bank. The freshly repainted yacht appeared in the harbour of Sidi Bou Said a few weeks later. Given Mr. Roger's position in French society, this incident had the potential to cause diplomatic irritations between the two countries and the boat was returned without significant delay. In May 2008, judicial proceedings were brought against the two men in Tunisia in an effort to satisfy the French government and international justice, however, the outcome is unknown. Imed Trabelsi was stabbed to death at Tunis airport in January 2011 when attempting to escape abroad. He had been identified as a member of the hated 'First Family' by demonstrating members of the opposition.

7.1.5.4 Case: Foued Cheman

Foued Cheman is the son of a large Tunisian textile manufacturer and multimillionaire, who was forced into exile with his wife and two children in 2004 after offending the Ben Ali-Trabelsi clan. When Ben Ali rose to power, one of his in-laws, Slim Chiboub, wanted to have a stake in the second-hand textile industry which had until then been dominated by Cheman. No efforts were spared to discourage the heir of this old family: One of his associates was accused of corruption and Cheman was repeatedly summoned to meetings, placed in police custody and subjected to sham trials. He then retreated to his villa on the outskirts of Sidi Bou Said, however, it did not take long until Leila Trabelsi became interested in the property. The businessman was then approached by representatives of the palace and asked whether he would be willing to sell the property to a 'friend of the president' — however, he declined to comply and so events took a turn for the worse. The Tunisian tax authorities imposed a record fine of two million euros, forcing Foued Cheman and his family into exile.

7.1.5.5 Case: Mohamed Jegham

Mohamed Jegham is a Tunisian businessman and former interior and defence minister. In 2001, the trusted presidential adviser intimated to Ben Ali that the Trabelsi family was involved in racketeering and corruption and also warned him about the extent of their greed. Leila Trabelsi became aware of these complaints and Jegham subsequently found himself exiled to Italy as Ambassador to Rome. He was subsequently offered the same position in Beijing, but declined, preferring to exercise his right to retirement and instead entering into business.

7.1.5.6 Case: Elf Aquitaine, Karthago Airlines & Bricorama

Elf-Aquitaine The family clans act as intermediaries whenever large government contracts or investments by foreign companies are concerned. The intermediaries receive 'commissions' for their services and it is not uncommon that these exceed ten million dinars. These payments appear to have been the reason why Elf-Aquitaine ended their operations in Tunisia.

Karthago Airlines The ruling family clans have significantly benefitted from the opportunities which have arisen through their unique access to key businesses, industries and economic information. Privatization and liberalization plans to encourage competition launched in the 1990s have indirectly enabled the Ben Ali family to gain control of a number of key industries. Belhassen Trabelsi, Leila's brother., founded Karthago Airlines and the luicrative charters which Tunisair (state-owned) had previously operated, were transferred. According to US diplomatic cables, the airline also was able to borrow planes from Tunisair when necessary. It merged with its competitor Nouvelair Tunisie in 2008.

Bricorama The events surrounding Faouzi Mahbouli and Bricorama Tunisie exemplify the need for businessmen to enter into compulsory partnerships with the Ben Alis and exposed the ruthlessness and flagrancy with which the clan acted. Faouzi Mahbouli, son of two judges and a respected businessman convinced the Bricorama, the French retailer, to give him a franchise in 2006. However, it quickly emerged that it was impossible to commence business operations without the support of an influential person — their participation was equivalent to the state giving its consent. Ignoring the advice of his former business partner, he introduced Imed Trabelsi, Leila Ben Ali's favourite nephew, who was renowned for his tendency to appropriate any lucrative business that he encounters. A master franchise agreement was then made between the two parties and Bricorama Tunisie was formed. The deal stipulated that Imed Trabelsi was to obtain a 33% share (i.e. a majority) and Mahbouli was to receive 5%. Following the endorsement of the deal by Bricorama France in October 2006, the construction of the shops went ahead. However, in July 2007, Imed Trabelsi suddenly orders his partner to surrender his shareholdings with immediate effect in return for €160.000.

These orders are soon followed by intimidation — his home and office were burgled, his family was kept under surveillance and he received numerous anonymous death threats. Aware of the methods used by the first family, he complied and sent his family to the South of France before following them to Montpellier via Genoa. Although he thought he was in safety, pressure increased and shots were fired at his car. Fouazi Mahbouli only received €60.000 through his solicitor, and the remaining amount was never tendered. In consequence, his lawyer filed complaints against Imed Trabelsi for extortion and against Bricorama France for handling stolen goods in July 2010. The outcome was not reported.

7.2 A Comparative Approach

The Middle East and North Africa (MENA) have stubbornly resisted the waves of democratization that swept much of the world in the 20th century. While the number of electoral democracies has nearly doubled since 1972, the number in this region has registered an absolute decline. A study conducted in 2004 showed that only two out of 21 countries in MENA qualify as democracies. While the absence of electoral democracies is not equivalent to corruption *per se*, evidence suggests that corruption may be the cause and guarantor of the robustness of these authoritarian regimes.

7.2.1 Types of Corruption in MENA

Joseph Nye defines corruption as 'the behaviour which deviates from the formal duties of a public role (elective or appointive) because of private regarding (personal, close family, private clique) wealth or status gains; or violates rules against the exercise of certain types of private regarding influence.'[107] There is evidence of corruption in the form of nepotism, arbitrary application of the law, stolen assets, prolific patronage, and collusion between the private and public sectors. The widely cited annual Transparency International Corruption Perception Index (TICPI) in 2005 gave the Middle East as a whole a value of 3.8 and the non-Gulf countries an even lower 2.9 out of a possible 10.

The most evident effect of corruption, nepotism, is shown to be higher in MENA countries compared to global averages. The Transparency International National Integrity System Assessments (2010) has shown that nepotism is so rife that in most of these states it is accepted as a 'fact of life.' The United Nations Office on Drugs and Crime has documented that nepotism has led to the abuse of public office. This has led powerful and influential positions to be granted to individuals with familial and business links to the governing authority rather than appointing these positions through democratic elections or merit. This blurring of boundaries between public and private interest is further evident in the undue influence and benefits granted to certain private individuals or companies who are 'friends of the regime'. Often successful businessmen are placed in prominent political positions as well as political individuals gaining control of a sector of the economy. This phenomenon, known as the 'revolving door' phenomenon was especially prevalent in Egypt prior to the revolution that led to the ousting of the Mubarak regime. As such, nepotism has led to the increased centralization of power in the hands of a select few with strong ties and loyalties to the regime, which in turn has led to the lessened accountability of the government to its people.

Another consequence of corruption, the limited freedom of press and space for civil society, is also prevalent among MENA countries in comparison to other regions. The Press Freedom Index produced by Reporters Without Borders (2010) shows that MENA countries fall in the lowest third of the 178 countries ranked, with Libya and Tunisia (pre-Arab Spring) especially among the 15 lowest. Furthermore, this Index reveals that freedom of the press has deteriorated in recent years. Independent media outlets, including TV channels, newspapers, and

[107] Nye, Joseph S. 'Corruption and Development: A Cost-Benefit Analysis.' *American Political Science Review* 61 (June 1967): 419.

magazines, have been either closed or subject to stringent government control. Anti-regime journalists are frequently harassed, exiled, and imprisoned. The scope for the formation of an effective civil society has also been severely curtailed due to lack of free transmission of information, limited funding, and co-opting of their domain into government control.

7.2.2 Drivers of MENA Corruption

The manifestation and extent of corruption across the MENA states varies according to economic, cultural and socio-political differences. For example, the annual Transparency International Corruption Perception Index (2011) showed marked differences between the Middle Eastern states. Qatar and the United Arab Emirates were ranked as 22nd and 28th respectively on a list of 182 nations, ranked in order of increasing corruption.[108] These differences make it problematic to generalize conclusions on corruption across the entire diverse region. Nonetheless, the MENA region is generally characterized by similar factors, namely chronic insecurity — both internally and from external actors — and institutional factors such as lack of access to information, weak legal frameworks, inadequate enforcement mechanisms, tribal or sectarian cultures, and rentier economies.

Other studies have pointed to the social dynamics of the MENA states as contributory to the culture of corruption. Middle Eastern societies are usually more collectivist than European equivalents, with their people identifying more as members of a certain family, religious sect or tribe than with the country as a whole. Politicians and high-ranking individuals are often more loyally bound to their groups, giving or accepting bribes for the advancement of these groups, often with the intended purpose of weakening the other groups. Consequently, the group with which the autocrat identifies is the most successful in the country. Hence the Sunnis prospered to the detriment of the Shiites and Kurds under Saddam Hussein's regime in Iraq, the Alawite minority dominated the predominantly Sunni population in Syria (prior to the current revolution), and the Al Saud family has an almost free reign over Saudi Arabia, intentionally weakening the Al-Rasheed family and the rest of the country.

Social dynamics and insecurity alone cannot however explain the corruption conundrum of the MENA region. Most African countries have strong tribal groups as well as persistent insecurity, yet many rank well above most Middle Eastern states. Botswana, Mauritius, Rwanda and Namibia, for example, all lie in the top third of the Transparency International Corruption Perception Index (2011).

Many posit rentier economies as the greatest contributory factor to the persistence of corruption in the MENA region. Rentierism is the economic phenomenon whereby a state accrues most of its wealth from capital generated from external sources, called rent. Oil revenues are the most common form of rent, but rent could also include strategic rents in the form of economic aid, loans, transit fees, and/or worker remittances. Although an economic trait, rentierism does have repercussions for the political development of a state.

[108] Transparency International. *Corruption Perceptions Index 2011.* http://cpi.transparency.org/cpi2011/results/.

Hazem Bablawi sets four characteristics that a country must possess in order to quality as a rentier state.[109] First, revenues from rent must compose the bulk of the state's capital wealth. Second, the rent must come from external sources, so that it can sustain the economy without a strong productive domestic sector. Third, only a minority of the population is engaged in the generation of this rent, the majority being involved only in its distribution and utilisation. The last but not unrelated factor is that the government must be the principal recipient of the external rent, changing the state's function from one of extraction of resources, most commonly through taxation, to one of the distribution of capital and resources.

Traditional rentier state theory posits that the generation of wealth from external sources serves to enhance state autonomy because it breaks a linkage between the people and the state. The state does not need to rely on the productivity of its citizens to accrue wealth, and as such is in an advantageous position. It controls the structure of the market as well as the flow of funds, giving the state considerable discretion in its use and allocation of money. Also, distribution relieves the state of the political accountability that accompanies taxation. Instead of 'no taxation without representation', the rentier state says 'no representation without taxation.' The rentier state is not under the same burden as other states to satisfy its people and respond to their grievances, as the state is their main source of income. The implication is that corruption becomes rampant without checks and balances to keep the regime in line, and money distributed in such ways that will consolidate the monopoly that the regime has on all aspects of the economy as well as the 'private' sector.

A correlation is certainly identifiable between the extent to which a state displays this rentier economy phenomenon and the extent of public sector corruption. However, this correlation may not be a strict linear relationship between the percentage of GDP that comes from rent increases, and the country's place in the Transparency International Corruption Perception Index (TICPI). Other factors discussed above, as well the nature of the leader himself, all have an impact on the extent of corruption, though rentierism is one of the single greatest indicators of corruption in the MENA region. Furthermore, the significant economic control permitted by rents allow the regime control of other elements in the country that enable corruption to permeate, such as a weak civil society, lack of freedom of speech and the press, and exploitation of societal divisions. Three distinct cases will be examined — those of Saudi Arabia, Egypt, and Qatar.

7.2.3 Rentier Economy Case Studies

7.2.3.1 Saudi Arabia

Saudi Arabia is the foremost example of a rentier state, satisfying all four of the conditions of Bablawi's definition. Oil revenues represent over 90% of budget revenues and 95% or more of exports. In 1978, annual revenue from oil had reached $48 billion. The country's productive sector is very weak. Wealth is generated from the sale of oil which is paid directly to the regime, thus forming a direct economic basis for the political status quo. No more than 2–3% of Saudi Arabia's labour force is engaged in the production and distribution of the oil wealth,

[109] Bablawi, Hazem. 'The Rentier State in the Arab World.' In *The Arab State*, edited by Giacomo Luciani. London: Routledge, 1990.

which contributes 60–80% of GDP. The government has no need to tax its population, instead functioning as a distributive organ, mixing public goods and private favours, as well as being the major and ultimate employer in the economy.

The abundance of oil wealth in the hands of very few royals enabled the Saudi state to be created in a top-down fashion. This oil wealth funded the recruitment of clients into the state apparatus, exchanging jobs and social security for political quiescence. The royals at the top lacked proper coordination and planning, each forming their own agencies that often performed overlapping functions. Thus, as Stephen Hertog notes, the fiscal autonomy of the regime elite allowed them to expand the state into different directions, resulting in the parallel existence of state agencies of different quality and composition, making the only common denominator in the system the monopoly of the Al Saud family.[110] The regime did not allow any larger independent interest groups to emerge and fragmented society through royal and bureaucratic largesse. As a result, the prince in charge of a certain bureaucracy had complete discretion over its activities, allocating jobs and favours based on personal relations and interests rather than merit and market competition, without any transparency. This allowed corruption to thrive in such a closed system, with loyalties lying to the head of an agency rather than the interest of the state as a whole.

The absolute centralisation of power in the hands of the royal family, while possible in times of great oil wealth, became problematic when oil revenues were decreasing.[111] Consequently, promises and attempts at reform (however inadequate) were seen during the 1980s when declining oil prices depleted reserves and generated severe fiscal crises. Saudi Arabia attempted economic liberalisation and greater transparency in order to attract foreign investment, although these efforts were hampered by the already-existing static top-down bureaucracies discussed above. Similarly, beginning in the late 1990s, Saudi Arabia again faced decreasing oil prices due to the East Asian economic crises and an increase in non-OPEC oil production. The demand for oil slowed and dragged down oil prices by more than one third. Since then, there have been strong anti-corruption and liberalisation efforts. The government has tried to liberalise and strengthen its governing institutions, increasing emphasis on public transparency and in 2007 approving a national strategy to combat corruption. Possibly the greatest step towards improving its effectiveness to foreign investors was its joining the World Trade Organization (WTO) in late 2005.

Nonetheless, there is still a scarcity of information on economic activities, making it difficult to accurately estimate the extent to which corruption has been remedied. There are still a number of reports of incidences of irregular payments and bribes, as well as regulatory processes that are inconsistently applied in practice. Okaz newspaper reported that Saudi courts have handled more than 1,800 cases involving forgeries, bribes, and other corruption cases in the second half of 2010.

Apart from economic corruption, the tight control of the Saudi royal family over the country, facilitated by its enormous oil wealth, has not wavered. Corruption is still rife in the fields of

[110] Hertog, Steffen. *Princes, Brokers, and Bureaucrats: Oil and the State in Saudi Arabia.* Cornell University Press, 2011.

[111] Absolute monarchs are often subject to absolute peril, for the constitutional government that insulates constitutional monarchs is absent.

free speech, human rights and the judiciary. The most recent case of such a case is the distribution of $37 billion by the state to its population in 2011 when they called for reform in the months following the Tunisian and Egyptian revolutions. The money bought the quiescence of the majority of the population, allowing the government to use dubious methods to silence the vocal few who were not appeased by the grant.

This study of the Saudi case demonstrates how corruption is correlated to and enabled by rentierism. It is important to reiterate that rentierism is not the sole determinant of the extent of corruption, but rather an important factor. Saudi Arabia ranks 57th on the Transparency International Corruption Perception Index (2011). Egypt, on the other hand, ranked 112th in 2011. In 2010, however, it was 98th on the CPI. This marked decline in Egypt's position is most probably due to uncertainty regarding the outcomes of the Revolution as well as instability following such a momentous change in government. Because Egypt is in a transition state as of yet with a very tentative conclusion, the following discussion will only address its situation before the 2011 Revolution.

7.2.3.2 Egypt

Egypt is more accurately described as a semi-rentier state, because rent accounts for a smaller percentage of the GDP than other rentier states like Saudi Arabia. 45% of Egypt's GDP is represented by exogenous rent elements in the form of oil revenues, workers' remittances, foreign aid, Suez Canal revenue, and tourist expenditure. Most, though not all, of these revenues accrue directly to the state. In the 1960s, Egypt received the highest Soviet aid to the foreign country. In the 1970s and 80s, it became the second highest recipient of US aid, second only to Israel. Furthermore, workers' remittances became in the 90s the biggest source of foreign exchange in Egypt.

By the late 80s, between 1.7–2.2 million Egyptian workers were abroad. Although this revenue does not accrue directly to the government, it does decrease the unemployment rate as well as providing an extra source of income for many families; both factors contribute directly to the health of the Egyptian economy. Thus, the government has instituted very liberal migration laws, encouraging Egyptian labourers to work abroad, especially in the neighbouring Gulf States. These external revenues have contributed to the Egyptian state exhibiting some of the behaviour of rentier states, namely distributing governmental favours through welfare programs, tax cuts, subsidies, and a corrupt bureaucracy.

Soon before the January 25th Revolution, a survey by the Egyptian Information and Decision Support Centre found that more than 94% of Egyptians believed corruption was a serious problem in their country, and 70% believed corruption had increased from the previous year. Egypt had an appalling record of corrupt land sales, corrupt licensing deals, and embezzlement by prominent members of the regime. Furthermore, torture and political imprisonments and assassinations were almost commonplace. The Revolution was a response to several grievances, one of which was the pervasive corruption of the Mubarak regime. One of the most infamous cases of corruption exposed after the Revolution was the violation of stock market and central bank rules to make unlawful profits through dealing of shares in Al Watany Bank of Egypt by Gamal and Alaa Mubarak along with seven other men.

Although Egypt ranks far below Saudi Arabia in the International Corruption Perception Index and yet exhibits less rentierism, this seeming contradiction may be explained by the nature of government in each state. Saudi Arabia has never permitted the operation of formal political parties, instead relying on bloodlines and royal favours to appoint governmental positions. Egypt, on the other hand, appears to have a system of structured mass participation in politics in the shape of political parties and elections. What this signifies in terms of actual politics is contested, but nevertheless, the Egyptian government is forced to at least maintain the impression of democracy.

This difference in how the each government seeks to legitimize itself is in part due to rentierism. The Saudi royal family, especially during the period in which the formal state apparatus was being formed, sought to build up its 'eudaemonic legitimacy' through its distribution policies, using oil money to build infrastructure, education, provide free medical services, and most importantly create jobs for a large part of the population. This role as a distributor of monies rather than collector allowed it to enforce its own governing structure that did not incorporate the people. The royal family's alliance with the religious Wahhabi clerics is also a continuing source of legitimacy. As a result, the population does not expect to be included in governing themselves. Alternately, the Egyptian government did not have similar sources of legitimacy to rely on. It had to build its own legitimacy, which it did in the form of the appearance of democratic elections and institutions. In reality, however, their activities were heavily controlled and restricted by the government. Because of this, the Egyptian government had to rely on illegal and corrupt dealings in order to achieve what the Saudi government did relatively easily — the exclusion of the public from government and the centralisation of power. This is therefore a possible explanation, incorporating rentierism, for why Egypt ranks well below Saudi Arabia in terms of corruption.

7.2.3.3 Qatar

The final case to be examined is that of Qatar. As mentioned earlier, Qatar is the least corrupt country in the MENA region. It is a rentier state. Oil and gas account for about 85% of export revenues and more than 50% of the GDP. However, although Qatar contravenes the hypothesis presented above, that is due to factors unique to it and should not be studied as a representative case of the MENA region.

Qatar is a relatively new state, only gaining independence in 1971. It has a citizen population of less than 300,000 people. Yet, it is endowed with 25 billion barrels of proven oil reserves and the world's third-largest natural gas reserves; about 15% of the world total. The country itself, with such a small population, is thus unable to utilize these enormous resources. As such, it has had to rely on thousands of foreign workers and investors. Qatar hosts almost 1.5 million foreign workers. In order to draw in foreign investment, the monarchy had to create an environment that outside companies view as attractive. Only because it has permitted extensive foreign investment in its natural gas industry has it been able to become the world's largest exporter of liquefied natural gas.

Yet, although Qatar ranks relatively high on the Corruption Perception Index, even on a global scale, all members of the ruling family and public officials enjoy large degrees of immunity.

Qatar does not provide any form of disclosure laws, and the royal family does have a monopoly on economic activity. Personal relationships and connections, known as 'Wasta', play a major role in procurement and government contracting. Policy and decision-making are not very transparent, and large government projects usually require local intermediaries with connections to high-level politicians. So far, however, the royal family has succeeded in creating a somewhat safe economic environment for investment. That is not because the state runs the economy on a free-market basis, but because it realises the need for keeping foreign investors. Although there have been very few publicized corruption scandals, information on business-related corruption in Qatar is scarce, making an accurate estimation difficult. The United Arab Emirates was similar in that regard prior to the financial crisis. However, in the wake of that crisis, several high-profile cases of corruption have been detected, the government-owned Nakheel being the most prominent.

While corruption in the economic sector has either not been made publicly obvious or is successfully regulated, the political field is strictly controlled by the royal family. The Emir has the exclusive power to appoint and remove the prime minister and cabinet members, who together comprise the Council of Ministers. This Council is the supreme executive authority in the country and also initiates legislation.# The Council therefore consists of members of the Emir's family and those loyal to him personally. As was the case in Saudi Arabia, the people of Qatar accept this non-role in the running of their country due to the monetary benefits they accrue from the government because of the wealth generated by oil and natural gas rents. They are not taxed and therefore do not demand representation.

Corruption evidently remains an endemic problem across most of the MENA region. Its type and extent vary sufficiently within and between countries to make generalisations difficult; it may be mainly economic or political, and its severity differs widely. The persistence of rentier economies may offer a limited explanation for the phenomenon, though numerous other factors contribute, such as societal division, political instability and regimes' sources of legitimacy.

7.2.4 Learning from Other Constitutions

This section examines the Constitution of Morocco, Algeria and South Africa, to establish what anti-corruption measures could be employed in Tunisia. Tunisia has been a trailblazer in achieving the Arab Spring. The first protests took place in Sidi Bouzid in December 2010. Similarly, there are reasons to hope that the new Tunisian Constitution will also be a shining torch, setting out a new path and direction for the country, one which will inspire its neighbours. Good parents learn from their children, and good comparativists do too. It is therefore incumbent on this Report's authors to address how the aforementioned fundamental charters can help Tunisia chart its own course.

Tunisia gained independence in 1956, forming a democratic Republican state with both a president and a prime minister. The 1987 coup installed Zine el-Abidine Ben Ali as President, and having secured that seat, his greed for power led to his re-election to the post and continued wielding and flagrant abuse of power. This tyranny extended to all members of the first family,

including the Trabelsi clan of the President's second wife. The following case-studies are chosen following the research outlined earlier in this chapter. The corruption table shown above allows for the comparison of Tunisia's current position with other neighbouring countries and also with developing and developed countries. According to Transparency International's 2011 index, it is perceived that corruption in Tunisia is getting worse. Tunisia's ranking on the index dropped from 43 in 2005 to 73 in 2011. Looking at those tables enabled us to select countries which will have the most relevance and utility for Tunisia to refer to for both inspiration and warnings.

7.2.4.1 Morocco

Attention will first be paid to Morocco, a neighbour and a country with social conditions to Tunisia. They are both Republic Monarchies and both States are Islamic, they are perceived to be almost as equally corrupt as each other (73/183 corruption perception index 2011 — Tunisia; 80/183 corruption perception index — Morocco). However, according to statistics collected by the World Bank (2011) Morocco has approximately twice as much Gross Domestic Product as Tunisia. At the risk of fallacy, one could venture to suggest that Morocco, simply on those facts, is relatively in a better position to tackle the problem of corruption in their country. . It describes itself as a democratic Monarchy, with the 'Supreme Leader's' influence and power having a wide ranging effect. It was a post-imperialist Constitution and bears the trademarks of a country borne out of a revolution. It promised a democratic and fair society, rejecting all forms of suppression, though paradoxically assigning much discretion to the 'Supreme Leader', leaving it open to abuse and fertile ground for corruption. Perhaps it was natural for an ex-colonised country to be extra cautious against foreign forces but ignorant to the possibility of home-bred tyranny.

Chapter 1 in the Moroccan Constitution gives protection for basic human rights including right to freedom of movement, opinion, equal education, the clarity used is to be appreciated. Meanwhile, Chapter 2 is devoted to the monarch's array of powers, which ranges from appointment of the Prime Minister to appointing magistrates. Powers are not separated because there is overlap between the different functions of the State, which though not an unusual situation, does raise the risk of abuse in newly-established polities. One cannot emphasise enough the importance for a country's judiciary to be independent and impartial in order to retain credibility and inspire confidence amongst the citizens of the country. The fact that Article 33 sets out in unequivocal terms that the 'King' shall appoint magistrates and Article 32 — the King shall preside over 'Supreme Council of Magistracy', shows that the King's power to appoint is not a mere formality, he seems to play an active role in the judicial system.

A Tunisian should set out clear lines of demarcation and have in place checks and balances to ensure that power does not concentrate unnecessarily to certain persons. Power in Tunisia should be allocated carefully and clearly, especially in the Constitution, in order for the fundamental law to be a longstanding book of reference for every citizen wishing to learn about their rights. Another lesson to be learnt from Morocco is that fusion of powers should be kept to a minimum to discourage the temptation of bribery, this is imperative when the credibility of the judicial branch of the government is at stake.

It has been suggested that the Moroccan Constitution leaves some room for corruption in Parliament. Article 39 rewards all members of Parliament with immunity from any prosecutions while in office, except offences against Islam or the King. In any criminal charges, fraud charges or civil charges, no arrest can be made without the House's permission. It is intrinsically symbolic that the only exceptions mentioned in the Constitution indirectly equate God with King; this gives us an idea of the pedestal on which the monarchy is placed by the people, or rather the drafters of the Constitution. Such a wide immunity leaves open room for much discrepancy and unjust behaviour going unpunished. It is important for the new drafters of Tunisia to be more wary of such open ended immunities. Immunity granted, if any, should be kept to the bare minimum, and to be increased at the discretion of the independent judiciary.

7.2.4.2 Algeria

Algeria is the third country forming the Great Maghreb, alongside Tunisia and Morocco. It is an Islamic state with a similar political-religious background to Tunisia. Corruption in Algeria was ranked in 2011 at 123/183, much higher than the other two Maghreb countries. It will therefore be useful to look at how Algeria has set about to tackle, if at all, corruption in its system. Article 21 of the Constitution, enacted on 22nd November 1976, states that functions in public institutions should not be a source of wealth for private interests. This is further reinforced by Article 22, in which any abuse of power is to be repressed by the law, which proves a useful tool for tackling corruption if correctly implemented. However, the corruption levels in Algeria imply otherwise.

Another area where corruption finds fertile ground is recruitment into public offices. Article 51 holds out a general right of 'equal access' to functions and positions in the state, although Articles 77 and 78 empower the President to award medals and honorific titles, as well as appointing important positions such as the Governor of the national Bank and magistrates. Judges are also appointed by the President, added to which the sole authority to recommend members of the Council from both the executive and judicial branches because he chairs the Council. The power of the Council cannot be underestimated, it oversees appointment, promotion, transfer, punishment and removal procedures of all judges and tragically it is not independent from the executive. Some of this power is neutralised by Article 122 which requires Parliament's permission when awarding honorific titles and medals and in transfers of public property to the private sector. Nonetheless, the executive's sole power of appointment to 'sought after' positions, with no external checks, can become a system of 'cash for honours', with private vested interests being promoted at the expense of a country's well being.

Immunity for deputies and members of Council is secured by the Constitution via Articles 109 and 110, at the very least during their time in office. No law suits of civil or penal nature may be instituted against members of the Council, except where the Council explicitly revokes the privilege. Otherwise arrests are only allowed in the case of a flagrant infringement (Article 111).

Constitutional protection is given, in theory, to judges through the Constitution against any form of external pressure which might force them to be anything but impartial and fair (Article 148). This has to be appreciated because Algeria is confronting and trying to deal with the

fact that members of the judiciary are under the danger of being coerced forcefully into co-operating with corrupted parties. Tunisia can learn from Algeria to be firm in the steps taken towards securing an independent and impartial judiciary, corruption does not just affect as popularly perceived, politicians and civil servants, it is a very real threat against the justice system.

7.2.4.3 South Africa

As an African state to have very successfully reconstructed its polity after a revolution, South Africa is potentially very instructive for Tunisia's constitution-drafting. It is now a financially developed country according to GDP indicators, especially in comparison to its neighbouring African countries. The South African Constitution was enacted on 16th Dec 1996, with 17 amendments. Though it is also relatively new, it has engendered more stable and reliable social and political conditions. It was borne out of the Apartheid, in a fight against previously rampant racial discrimination. The Constitution places special emphasis on the need for its countrymen to be 'united in diversity' and unlike the Moroccan Constitution, it lays out in no uncertain terms that the 'Constitution is the supreme law of the Republic' (Section 2). Chapter 2 of the Constitution has been formulated as a 'Bill of Rights', resembling Western Constitution such as that of the USA, making it easily accessible to the citizens. The rights for equality have been stated in much detail, this is arguably to ensure that there is no ambiguity concerning fundamental human rights and the consequences of any breaches.

South Africa also promotes the 'right of access to information' (S32) which acts as a good check on the Legislature and Government. Similar provision would make a useful addition to the new Tunisian Constitution, particularly in adding credibility to the Constitution-drafting and the new polity by allowing exposure of potential corruption. The recent expenses scandal in the United Kingdom provides one example of the considerable effectiveness of Freedom of Information legislation to bring to light any misconduct or corruption within the three branches of the State.

Immunity from civil and criminal proceedings is granted to Cabinet members, Deputy Ministers and members of the National Assembly, and only in select circumstances. The protection on offer is more akin to confidentiality of Assembly and committee meetings (S58, S71, S117, S161). Any further exemption can only be prescribed specifically by national legislation, in stark contrast to the Moroccan Constitution where wider protection is offered for those in public office. The Tunisian drafters should where possible follow this type of close ended privileges, as it leaves open the least amount of room for leverage and corruption.

The South African Constitution's two-term limit (S88) on the President's tenure is also proposed as a useful example for Tunisia to follow . This greatly reduces the chance of the Executive's capture by a single ruler, though it may be circumvented by subsequent constitutional amendment. A clear procedure is also set out for the removal of the President when there is a violation of the Constitution or serious misconduct (S89 *&* S102). Setting out the consequences of corruption in the Constitution achieves two goals; it acts as a personal deterrent to any who fill those powerful positions, and provides a longevity which is hard to achieve through ordinary legislation alone.

Cabinet Ministers are also kept accountable through Section 92 of the South African Constitution, which requires them to provide Parliament with full and regular reports concerning matters under their control. This acts as a check on ministers against outsourcing of public contracts for personal gain. Conversely, Section 101 requires any decision taken by the President to be countersigned by the relevant cabinet minister further broadening accountability.

The South African Constitution anticipates the problem of political party funding faced by many countries, including developed ones, and thus provides important examples for Tunisia to follow. To encourage a multiple party system, it would be advisable for Tunisia to provide some public funding of political parties, otherwise rich individuals will have greater opportunity to fund parties and push through their own vested interests. This risk is heightened after a revolution, when a country's resources are depleted. Section 236 of the SA Constitution provides for such public funding for political parties on a proportionate basis.

If any general principle is to be extracted from the case-studies above, it is that national corruption is best tackled by open and public reform. Corruption is a problem that is at once both political and economic. The lack of transparency and accountability that characterize Tunisia's political system have concomitant effects on the economy, damaging the investment climate and fuelling a culture of corruption. There seems to be reluctance in the MENA countries to even acknowledge the existence of widespread corruption at all levels of government, let alone institute tools to combat it. Tunisia must therefore choose a different path and perhaps try and emulate South Africa's relatively open approach towards it. This will help instil confidence in citizens about the credibility and capability of the governmental branches. It will also ameliorate the human rights situations that arise as a result of different forms of corruption.

7.3 Private Sector Corruption in Tunisia

According to Transparency International, corruption is the abuse of entrusted power for personal gain. Corruption happens not only in transactions between private individuals and public officials, but also in situations involving two or more private parties. Commission payments by suppliers to a company's staff are an example of private sector corruption. Businesses pay bribes for many reasons. Characteristically, they are faced with inefficiencies and seek to expedite what would otherwise be legal services. Once bribery becomes rife, they fear that they cannot win on their merits alone in a system of unfair competition, so businesses become victims of corruption and participants in it.

For the reasons outlined below, banning private enterprise corruption is one viable way of improving the quality of life in Tunisia, both economically and politically. But it must be done delicately such that the balance between incentives and disincentives is not abruptly upset.

7.3.1 First Family Corruption

Before the revolution Tunisians from all strata of society complained President Ben Ali's and his family's exploitation of the Tunisian economy for personal gain. Despite increasingly progressive economic legislation, all key decisions, especially related to investment and privatization, were made at the highest levels of the government — probably by personnel related to the

President. This arrangement permitted President Ben Ali's extended family (siblings, in-laws, and distant relatives) to become aware of, to assert interests in, and to carve out domains in virtually every important sector of the Tunisian economy. Connections to the powerful (if not outright partnership with them) thus became essential for businesses of any significant size to succeed, fuelling widespread disillusionment and a sense of social injustice. Has the Revolution changed this?

In the wider market environment, entrusted power can be abused to collude with competitors or form cartels, hurting markets and consumers. At the societal level corporate power can be abused to evade laws and regulatory oversight or exercise undue influence on regulations and policy-making with implications for foreign direct investment, global supply chain integrity and transnational taxation. As the Centre for International Private Enterprise observes: 'All these corruption risks are interrelated, and at times mutually reinforcing, in at least two important ways. At the motivational level corruption in any of these business spheres fosters a culture of moral ambivalence and reckless opportunism that undermines the overall commitment to integrity and opens the door for other corrupt acts. When high-level executives award themselves extraordinary pay packages, lower-level managers may be tempted to sweeten their own pay package by soliciting bribes from suppliers. When top managers take steps to corner the market by forming illegal cartels, lower-level managers may feel encouraged, or even pressured, to close these important deals with the help of kickbacks — all in the spirit of boosting company profits at any price.'

At the organisational level the strategies and mechanisms used to evade regulatory controls and cover up a specific corrupt activity may also provide the infrastructure for other corrupt acts. For example, slush funds set up to bribe purchasing managers can be retooled to pay off politicians. Likewise, financial structures that leverage secrecy and weak regulation to win business, such as tax avoidance at the borderline of legality can be abused to launder the proceeds of corruption, conceal financial risks or manipulate earnings. All this puts the stability of companies, investments and even markets generally more at risk.

Companies are entrusted by society with a social licence to operate. This requires them to act as responsible corporate citizens and manage what are often enormous economic resources as well as their social, environmental and political impact, with integrity, accountability and according to the letter and spirit of the law.

7.3.2 Combating Public Sector Corruption Depends on the Private Sector

It is submitted that that private sector participation in the fight against corruption will be key to success in Tunisia. Although some companies may benefit in the short term from corrupt deals, corruption causes most companies to suffer in the long term from higher costs, greater insecurity, and an inhospitable business climate. Companies have good reasons to join this fight, and can tackle the supply side of the problem in ways that governments cannot.

Equally important, corruption must be treated as the product of institutional failures, not simply individual moral failings. Building a system of strong, balanced institutions is the best way

to reduce corruption. This means creating a set of reliable incentive structures that reward honesty and transparency and punish bribery and abuse of public office. The private sector can make extremely valuable contributions to reforming political and economic institutions.

Most accounts of the Jasmine Revolution so far cite massive economic injustice and the pervasive and structured corruption as major causes. It is thus a legitimate inference that the fate of Tunisia will depend most on whether this particular societal failing is addressed. If corruption (in both the private and public enterprise) is not addressed, the root problems of disillusionment with the extractive autocracy that animated the Revolution will persist.

7.3.3 Economic Impact of Corruption on Private Enterprises

Both business and society bear the costs of corruption. Firstly, corruption results in resource misallocation. Resources that couldbe put to productive uses are instead devotedto corruption. Firms waste time and resources on rent-seeking — cultivating relationships with officials and spending on bribes. Secondly, foreign and domestic investors are afraid of unpredictable costs. Rampant corruption signals to potential investors that the rule of law, and thus property rights, are very weak in the country, making an investment there a risky proposition. Lower investment means lower growth. Thirdly, corruption reduces competition, efficiency and innovation in the market. Rent seeking means that favoured companies do not compete on market signals alone, while new firms face high barriers to entry. Consumers end up paying in terms of higher prices, lower quality, and limited product offerings.

Corruption also leads to an unaccountable and indifferent administration. Lawmakers in corrupt systems use their powers to help rent-seekers, not the citizenry as a whole. Bureaucrats are not held accountable for their performance and actually have incentives to delay services in order to extract bribes. Corruption is also likely to bring unemployment. By forcing businesses into the informal sector, creating barriers to entry, and increasing the costs of doing business, corruption essentially reduces private sector employment, because firms are less likely to grow. Small businesses are hit especially hard.

Sixth, corruption lowers the income potential of the poor because there are fewer private sector opportunities. It also limits their access to quality public services such as healthcare and education, thereby exacerbating poverty. The business case for countering corruption is clear. A half of international business managers estimate that corruption increases project costs by at least 10 per cent, in some cases more than 25 per cent. In addition to direct financial costs and lost business opportunities, there are substantial damages to brand, staff morale and external business and government relations. Stronger enforcement of anti-bribery rules in some jurisdictions has significantly upped the ante, making long prison sentences and penalties in the tens of millions of U.S. dollars increasingly likely.

7.3.4 Is 'Good Corruption' an Oxymoron?: A Critical Commentary

> To argue that the personal relationships that come to be established between public sector employees and individuals who deal with them reflect a 'corrupt'

society may be correct in a legalistic sense, but it misses the point that these relationships simply reflect different social and moral norms.[112]

A certain body of literature, such as Tanzi's 1995 work quoted above, suggests that the idea of corruption being necessarily bad is an inherently Western one — one which is incompatible with cultural practices in many other cultures. Two important sociocultural lpoints may facilitate the growth of corruption. Firstly, a culture of gift-giving and reciprocity which preserves community harmony through reciprocal relationships that rest on goodwill and altruism, may promote corruption. Secondly, many cultures attach less importance to the notion of separating public (or private) office from individual principle. Bribery and gift-giving are therefore methods of advancement and mutual solidarity which may be far more effective in non-European cultures. An overly legalistic view of corruption may thus fail to account for local nuance, so a more flexible definition may be considered for Tunisia.

7.3.5 Current Reform Measures

Tunisia has significant potential to overcome many previous shortcomings in the drafting of new fundamental Anti-Corruption law. The resignation in early 2012 of the Minister in charge of the Commission against Corruption in the new government was an unfortunate setback, but need not be terminal. As has already been argued, successful freedom of information and anti-corruption legislation will be essential to avoid a repeat of the economic and social grievances which first brought about the Jasmine Revolution from late 2010. Many of the reform proposals, addressed below, can best be characterised as 'structural' to the constitutional and legal design.

Overpowering Executive Branch Events in the past have shamelessly unveiled the corruption rampant within the executive branch; this includes first and foremost the President and his inner circle. Putting to one side the intrinsic illegitimacy and loss of prestige on the world stage, on a purely utilitarian level this can affect the investment and trade possibilities, their credit ratings for loans from financial institutions, and any aid from other countries.

Immunities and Privileges too Liberal Categorical immunity from criminal and civil proceedings while in office reduces the justice system to a kangaroo court whose puppeteer is the President.

No Freedom of Access to Information By preserving classified information, this is possible.

Opaque Political Party Funding This problem is at all not confined to Tunisia (or even to less developed countries), and may be seen in developed as well as developing countries. Private vested interests may be thrust to the forefront of public policy if political party funding spirals out of control, this is often against the best interests of the country in the long run.

[112] Tanzi, Vito, 'Corruption: Arm's Length Relationships and Markets' in *The Economics of Organised Crime*, edited by G. Fiorentini and Sam Peltzman (Cambridge University Press, 1995).

Public Contracting Decision-making concentrated in the hands of few ministers with personal vested interests has adversely affected the country on many different levels. On a functional level, it has deprived the public purse of its rightful amount (rechanneling of funds for private interests), and has resulted in substantial losses from outsourcing of public contracts to 'friends' of the President. Perhaps a new regime whereby any outsourcing or irregular allocation of public contracts are overseen by independent mixed panel — politicians, judges, experts and lay members — might help.

Nepotistic Appointments and 'Spoils' System Sole and largely unchecked (in practice) prerogative of President, once again an area ridden with nepotism in the past, this means that the country is losing out on the contribution of intelligent individuals who may have been better qualified than the 'friends and relatives' of the President.

Private Sector Corruption As addressed before. Independent panels to investigate and penalise private sector corporations — by an Ombudsman and/or whistleblower protection — might help.

Bibliography

Ackerman, B. (2000). The New Separation of Powers. *Harvard Law Review* 113.3, pp. 633–729. ISSN: 0017-811X.
DOI: 10.2307/1342286.
URL: http://www.jstor.org/stable/1342286 (visited on 09/17/2012).

Aftenposten (2011). *Corruption in Tunisia part III: Political Implications*.
URL: http://www.aftenposten.no/spesial/wikileaksdokumenter/05072006-05072006-CORRUPTION-IN-TUNISIA-PART-III-POLITICAL-IMPLICATIONS-5107180.html (visited on 09/19/2012).

Agudo Amora, M. J. & Pérez Tremps, P. (2007). El Modelo Europeo de Justicia Constitucional. In: *La Reforma del Tribunal Constitucional. Actas del V Congreso de la Asociación de Constitucionalistas de España*. Valencia.

Al Jazeera (2011). Background: Tunisian elections. *Al Jazeera News*.
URL: http://www.aljazeera.com/indepth/spotlight/2011/10/20111089246280661.html

Alexander, C. (2010). *Tunisia: Stability and Reform in the Modern Maghreb*. The contemporary Middle East. Abingdon ; New York: Routledge. ISBN: 9780415274210.

Amnesty International (2012). *Submission for Consideration by the National Constituent Assembly on the Guarantee of Civil, Political, Economic, Social and Cultural Rights in the New Constitution*. London.
URL: https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/mde300042012en?CMD=VEROBJ&MLKOB=30621633838

Autheman, V. & Elena, S. (2004). Global Best Practices: Judicial Councils. Lessons learned from Europe and Latin America. *IFES Rule of Law White Paper Series* 2. Ed. by K. Henderson.

Aziz, S. (2012). *To Stop Corruption, Egypt Needs a Freedom of Information Law*.
URL: http://www.huffingtonpost.com/sahar-aziz/to-stop-corruption-egypt-_b_1538999.html (visited on 09/21/2012).

Bablawi, H. (1990). The Rentier State in the Arab World. In: *The Arab State*. Ed. by G. Luciani. London: Routledge.

BBC (2011). Ousted family's business assets. *BBC*.
URL: http://www.bbc.co.uk/news/world-africa-12307548 (visited on 09/19/2012).

Bellin, E. (2004). The Robustness of Authoritarianism in the Middle East: Exceptionalism in Comparative Perspective. *Comparative Politics* 36.2, pp. 139–157. ISSN: 0010-4159.
DOI: 10.2307/4150140.
URL: http://www.jstor.org/stable/4150140 (visited on 09/21/2012).

Business Anti-Corruption Portal (2012a). *Qatar Country Profile*.
URL: http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/qatar/snapshot/ (visited on 09/21/2012).

Business Anti-Corruption Portal (2012b). *Saudi Arabia Country Profile*.
URL: http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/saudi-arabia/snapshot/ (visited on 09/21/2012).

Business Anti-Corruption Portal (2012c). *United Arab Emirates Country Profile*.
URL: http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/united-arab-emirates/snapshot/ (visited on 09/21/2012).

Chaudhry, K. A. (1994). Economic Liberalization and the Lineages of the Rentier State. *Comparative Politics* 27.1, pp. 1–25. ISSN: 0010-4159.
DOI: 10.2307/422215.
URL: http://www.jstor.org/stable/422215 (visited on 09/21/2012).

Chooi, C. (2012). Malaysia — A-G 'receptive' to Article 121 review, says Bar Council. *The Malaysian Insider*.
URL: http://www.themalaysianinsider.com/malaysia/article/a-g-receptive-to-article-121-review-says-bar-council (visited on 09/20/2012).

Coleman, I. (2011). Democracy in Development » Tunisia's Upcoming Elections: Part II. *Council on Foreign Relations — Democracy in Development*.
URL: http://blogs.cfr.org/coleman/2011/10/21/tunisia%E2%80%99s-upcoming-elections-part-ii/ (visited on 09/18/2012).

Cook, S. A. (2005). The Right Way to Promote Arab Reform. *Foreign Affairs*. ISSN: 0015-7120.
URL: http://www.foreignaffairs.com/articles/60625/steven-a-cook/the-right-way-to-promote-arab-reform?page=show (visited on 09/18/2012).

Delaney, P. (1987). Senile Bouguiba Described in Tunis. *New York Times*.
URL: http://www.nytimes.com/1987/11/09/world/senile-bourguiba-described-in-tunis.html?scp=2&sq=senile%20bourguiba&st=cseSenile (visited on 09/18/2012).

Dixon, M. (2005). *International Law*. Oxford: Oxford University Press.

European Commission for Democracy Through Law (The Venice Commission) (2010). *Report on the Independence of the Judicial System Part I: The Independence of Judges*. Strasbourg: The Venice Commission.
URL: http://www.venice.coe.int/docs/2010/CDL-AD%282010%29004-e.pdf

Fisher, M. (2011). Tunisian Election Results Guide: The Fate of a Revolution. *The Atlantic*.
URL: http://www.theatlantic.com/international/archive/2011/10/tunisian-election-results-guide-the-fate-of-a-revolution/247384/ (visited on 09/18/2012).

G. L. (2012). The Arab Spring's Online Backlash. *Economist Newsbook*.
URL: http://www.economist.com/blogs/newsbook/2012/03/internet-middle-east

Gelvin, J. L. (2012). *The Arab Uprisings: What Everyone Needs to Know*. New York: Oxford University Press, USA. ISBN: 019989177X.

Giddens, L. A. (1999). Democracy. *BBC News*.
URL: http://news.bbc.co.uk/hi/english/static/events/reith_99/week5/week5.htm

Government of the Republic of South Africa v Grootboom (2001). 2001 (1) SA 46 (CC).

Greve, M. S. (1985). Taking the Constitution Seriously. *The Public Interest* 85, pp. 127–135.
URL: http://www.nationalaffairs.com/public_interest/detail/taking-the-constitution-seriously

Hamdi, M. E. (1998). *The Politicisation of Islam: A Case Study of Tunisia*. State, Culture, and Society in Arab North Africa. Boulder, Colorado: Westview. ISBN: 0813334586.

Heritage.org (2012). *Qatar Economy: Facts, Data, & Analysis on Economic Freedom*.
URL: http://www.heritage.org/index/country/qatar (visited on 09/21/2012).

Hertog, S. (2011). *Princes, Brokers, and Bureaucrats: Oil and the State in Saudi Arabia*. Cornell University Press.

Hibou, B. (2011). *The Force of Obedience*. Trans. by A. Brown. Originally published in French as La Force de l'obéissance by Editions La Couverte, Paris in 2006. Polity. ISBN: 0745651801.

Human Rights Watch (2011). Tunisia's Repressive Laws. *Human Rights Watch*.
URL: http://www.hrw.org/reports/2011/11/01/tunisia-s-repressive-laws-0 (visited on 06/26/2012).

Human Rights Watch (2012). *Country Summary: China*. Human Rights Watch.
URL: http://www.hrw.org/sites/default/files/related_material/china_2012_0.pdf

Instant Runoff Voting (2010). *Instant Runoff Facts vs. Fiction*.
URL: http://www.instantrunoffvoting.us/3rdparty.html

Joffé, G. (2009). Political Dynamics in North Africa. *International Affairs* 85.5, pp. 931–949.
URL: http://studium.unict.it/dokeos/2011/courses/1001283C0/document/joffe_IA2009.pdf

JURIST: The Legal Education Network (2012). *Jurist World Law: Tunisia*.
URL: http://jurist.law.pitt.edu/world/Tunisia.htm

Kawach, N. (2012). Saudi public sector hit by corruption. *Emirates 24/7*.
URL: http://www.emirates247.com/business/saudi-public-sector-hit-by-corruption-2011-04-17-1.381835 (visited on 09/21/2012).

Kesavanada Bharati v State of Kerala (1973). AIR 1973 SC 1461.

Kingdom of Morocco (2011). *The Constitution of Morocco*. Revised date.

Krieger, J. & Crahan, M. E., eds. (2001). *The Oxford Companion to Politics of the World*. 2nd. Oxford: Oxford University Press. ISBN: 0195117395.

Kwasi Prempeh, H. (2006). Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa. *Tulane Law Review* 80.4.

Langan, J. P. (2005). Instant Runoff Voting: A Cure That Is Likely Worse Than The Disease. *William and Mary Law Review* 46.4, pp. 1569–1595.
URL: http://www.uvm.edu/~dguber/POLS125/articles/langan.htm

Le Roy, T. (2009). Le constitutionnalisme : quelle réalité dans les pays du Maghreb? *Revue Française de Droit Constitutionnel* 79.3.

Lessig, L. & Sunstein, C. R. (1994). The President And The Administration. *Columbia Law Review* 94.1, pp. 1–123.

McKay, V. (1948). France's Future in North Africa. *Middle East Journal* 2.3, pp. 293–305.

Minerva Mills v Union of India (1980). AIR 1980 SC 1789.

National Democratic Institute. *NDI Elections Calendar*.
URL: http://www.ndi.org/electionscalendar

Neudorf, L. (2012). Promoting Independent Justice in a Changing World. *The Human Rights Law Review* 12.1, pp. 107–121.
DOI: doi:10.1093/hrlr/ngr048.

Niblock, T. (2006). *Saudi Arabia: Power, Legitimacy and Survival*. Abingdon: Routledge.

Nye, J. S. (1967). Corruption and Development: A Cost-Benefit Analysis. *American Political Science Review* 61, p. 419.

Okruhlik, G. (1999). Rentier wealth, unruly law, and the rise of opposition: the political economy of oil states. *Comparative Politics* 31.3, pp. 295–315.

Pargeter, A. (2009). Localism and Radicalization in North Africa: Local Factors and the Development of Political Islam in Morocco, Tunisia and Libya. *International Affairs* 85.5, 1031–1044. ISSN: 1468-2346.
DOI: 10.1111/j.1468-2346.2009.00845.x.
URL: http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2009.00845.x/abstract (visited on 09/18/2012).

Perkins, K. J. (2004). *A History of Modern Tunisia*. Cambridge: Cambridge University Press. ISBN: 0521811244.

Perkins, N. (2012). Judicial Independence Around the World: Nepal & Morocco. *Constitution Unit Blog*.
URL: http://constitution-unit.com/2012/06/13/judicial-independence-around-the-world-nepal-morocco/

Puchot, P. (2011). *Tunisie, Une Révolution Arabe*. Editions Galaade. ISBN: 978-2351761410.

Republic of South Africa (1996). *The Constitution of South Africa*.

Riker, W. H. (1992). The Justification of Bicameralism. *International Political Science Review* 13.1, pp. 101–116.

Rosen, L. (2006). Expecting the Unexpected: Cultural Components of Arab Governance. en. *The Annals of the American Academy of Political and Social Science* 603.1, pp. 163–178. ISSN: 0002-7162, 1552-3349.
DOI: 10.1177/0002716205282329.
URL: http://ann.sagepub.com/content/603/1/163 (visited on 09/18/2012).

Roy, D. A. (1991). Egyptian emigrant labour: domestic consequences. *Middle Eastern Studies* 27.4, pp. 551–582.

Saleh, Y. (2012). Mubarak's Sons Back in Court on Graft Charge. *Reuters*.
URL: http://in.reuters.com/article/2012/07/09/egypt-trial-idINL6E8I81P920120709

Shentrup, C. (2010). *Failed Analysis by League of Women Voters on Instant Runoff Voting — The Center for Election Science*.
URL: http://www.electology.org/san-leandro-inamdar (visited on 09/18/2012).

Simovic, D. (2007). *The Definition of Semi-Presidential Regime Reformulated*. Athens, Greece.
URL: http://www.enelsyn.gr/papers/w7/Paper%20by%20Darko%20Simovic.pdf

Smith, W. D. (2007). *Evidence that Instant Runoff (IRV) leads to 2-party domination, while (delayed) Top-Two Runoff leads to multiparties.*
URL: http://scorevoting.net/TTRvIRVstats.html

State of Qatar (2010). *Website of Qatar Embassy in Washington, DC.*
URL: http://www.qatarembassy.net/council.asp

The Economist (2011). Tunisia: Ali Baba gone, but what about the 40 thieves? *The Economist.* ISSN: 0013-0613.
URL: http://www.economist.com/node/17959620 (visited on 09/19/2012).

The People's Republic of Algeria. *The Constitution of Algeria.* 1976.

The Republic of Tunisia (1959). *The Constitution of Tunisia.*
URL: http://www.wipo.int/wipolex/en/details.jsp?id=7201

Transparency International (2011). *Corruption Perceptions Index 2011.* Tech. rep.
URL: http://cpi.transparency.org/cpi2011/results/

Tunisia Live (2012). Conflict Between President and Prime Minister Rekindles Debate over Tunisia's Next Political System. *Tunisia Live.*
URL: http://www.tunisia-live.net/2012/07/05/conflict-between-president-and-prime-minister-rekindles-debate-over-tunisias-next-political-system/ (visited on 09/18/2012).

United Nations (1948). *The Universal Declaration of Human Rights.* This is the United Nations site for The Universal Declaration of Human Rights. Here you will find information and links.
URL: http://www.un.org/en/documents/udhr/index.shtml (visited on 09/18/2012).

Willis, M. J. (2012). *Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab Spring.* London: C. Hurst & Co. ISBN: 9781849042000.